Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin To Securing Equal Rights Within Indian Country?

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INTRODUCTION[1]

Today a contentious division between descendants of former slaves and formerly slaveholding tribes has resulted in the loss of voting rights, access to federally funded programs,[2] and identity[3] for those descendents. Yet their tribal membership has survived, until recent attempts by the Cherokee and Seminole Tribes to disenfranchise and even disenroll their black members have

* JD 2006, American University Washington College of Law. This paper is dedicated to my mother and sister, my incredibly supportive friends, and without a doubt to a great friend and mentor, Professor Lawrence Baca, without whom the idea and energy to tackle such a comprehensive and controversial topic would have been impossible. If you have any questions or would like to contact me regarding the content of the paper please email me at liddee@hotmail.com.

1. This paper was originally written for the Fall 2004 class of Indian Law 641 at American University Washington College of Law under the direction of Adjunct Professor Lawrence R. Baca; that prior unpublished version is available at the University Library. I would like to note that this Comment's main theme concerning the Thirteenth Amendment's abrogation of tribal sovereign immunity is being used in current litigation against the Cherokee Tribe. *See* Pls.' Opp'n Mot. Dismiss, Vann v. Norton, No. 03-1711 (D.D.C. filed Aug. 11, 2003).

2. The term "federally funded program" defines, but is not limited to, federal monies for programs for the elderly, education, and daycare. *See* Terrion L. Williamson, Note, *The Plight of "Nappy-Headed" Indians: The Role of Tribal Sovereignty in the Systematic Discrimination Against Black Freedmen by the Federal Government and Native American Tribes*, 10 MICH. J. RACE & L. 233, 239 (2004) (discussing the denial of federal funds disbursed to Tribes to Freedmen members).

3. Although this Comment does not deal directly with the loss of identity, I feel it is important to note some of the intangible losses the Freedmen have faced due to being denied membership. As stated by a Seminole Freedman, "They think we're after money . . . I'm after something to leave as a legacy. This will be a correct account of history." John Keilman, *Bloodlines Drawn Over Money*, CHI. TRIB. Apr. 4, 2002, at 1. *See also* Lydia Edwards, *Spotlight on John Velie: Man On a Thirteen Year Mission*, 1 MOD. AM. 22, 23 (Fall 2005), www.wcl.american.edu/modernamerican/ ("'The $125.00 clothing fund denied to Ms. Davis' son was not the point of the thirteen year fight. It was identity.'") (quoting attorney Velie).

threatened that as well. This paper proposes that such action is a violation of the Thirteenth Amendment and that the formerly slaveholding tribes[4] are subject to suit in federal court to enforce the treaty and membership rights—including the right to vote in tribal elections—of the descendants of these former slaves.[5] Freedmen[6] belonging to these two tribes have filed suit against the tribes and even against the federal government for allowing the tribes to disenfranchise them.[7] So far, federal courts have consistently dismissed the suits against the tribes on the basis of tribal sovereign immunity.[8] Likewise, they have dismissed the suits against the United States because tribes are indispensable parties to the suit[9] that cannot be joined because they are sovereign entities.[10]

This paper is about the Freedmen's history and their current legal battle for equal rights.[11] Part I discusses two cases that highlight the current disenfranchisement of the Freedmen and the current legal battles involving the U.S. government and the Cherokee and Seminole Nations. Part II discusses tribal sovereign immunity and the important role it serves as a protection against encroaching state laws and analyzes the courts' general opposition to applying civil rights legislation within the tribes on the basis of tribal sovereignty. Part III summarizes the current legal challenges facing civil rights cases against Native American tribes. Part IV recommends the Thirteenth Amendment as a possible means to abrogate tribal sovereign immunity to

4. I would like to offset any offense I may create with use of the terms "tribes," "Indian," or "Native American." In cases referring to specific tribes I will use the tribes' names. In many of the cases and legislation the term Indian is used and I may use that term based on the language in those documents.

5. *See infra* Part IV.

6. In this paper, I will refer to Blacks in the tribes before the Civil War as "Africans" because they were not then citizens of the United States. I will also refer to the Freedmen by the tribes to which they belong, for example Cherokee Freedmen or Black Cherokee. *See* Davis v. United States, 199 F. Supp. 2d 1164, 1168 (W.D. Okla. 2002) [hereinafter *Davis II*] (explaining that after their emancipation former slaves and Blacks who were not enslaved were called Freedmen).

7. *See, e.g., id.*; Vann v. Norton, No. 03-1711 (D.D.C. filed Aug. 11, 2003).

8. *E.g.*, Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989); *Davis II*, 199 F. Supp. 2d 1164.

9. FED. R. CIV. P. 19(b) (explaining that once a party is deemed indispensable the action should be dismissed). *See also* Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr., 94 F.3d 1407, 1411 (10th Cir. 1996) ("Determining whether an absent party is indispensable requires a two-part analysis. . . . The court must first determine under Rule 19(a) whether the party is necessary to the suit and must therefore be joined if joinder is feasible. If the absent party is necessary but cannot be joined, the court must then determine under Rule 19(b) whether the party is indispensable. If so, the suit must be dismissed.").

10. *See Davis II*, 199 F. Supp. 2d at 1173, 1177.

11. Please note that there also exists a debate and litigation between the Creek Nation and its Freedmen. *See* Victoria Williams, *OU Lecturer Defends Citizenship of Creek Freedmen*, OUdaily.com, Sept. 14, 2005, http://www.oudaily.com/vnews/display.v/ART/2005/09/14/4328ede60a275?in_archive=1. This Comment concentrates on the litigation and facts concerning the Cherokee Freedmen and the Seminole Freedmen.

protect the Freedmen due to the inability of Freedmen to protect themselves by suing the U.S. government. After briefly analyzing the courts' fluctuating interpretations of the scope of the Thirteenth Amendment's ban on slavery and the attendant bar against the "badges and incidents"[12] of slavery with regard to sovereign entities, Part IV explains why tribal sovereign immunity cannot be raised to bar a suit alleging violations of the Thirteenth Amendment. This Part argues that the expansion of the Thirteenth Amendment's ban against the badges and incidents of slavery to reach the tribes will not destroy tribal sovereign immunity because courts can distinguish the Freedmen's claims from prior case law, thus carving a narrow exception to sovereign immunity. It concludes with a strategy for crafting such a claim.

Before proceeding, however, a brief survey of the history of the Freedmen is in order. In the wake of the enactment of the Civil Rights Act of 1866,[13] passed to rid the country of all the vestiges of slavery and grant black Americans long denied civil rights, the Cherokee, Seminole, Choctaw, Chickasaw, and Creek Nations signed treaties that granted their ex-slaves civil rights and full tribal membership, which was to last for generations, in order to reestablish inter-governmental relations with the United States.[14] Before they gained "official" membership in the tribes as a result of the postbellum treaties, black men and women, or Freedmen, had coexisted with their respective tribes for generations.[15] In many cases, they had intermarried and fought together in wars against encroaching white settlement.[16] The tribes protected slaves who had escaped from white plantations and often used them as translators when dealing with white Americans and the Spanish.[17] African members were so

12. The Supreme Court first interpreted the Thirteenth Amendment to prohibit not only slavery but also its "badges and incidents" in the *Civil Rights Cases*, 109 U.S. 3, 28 (1883).

13. The Civil Rights Act of 1866 was the first in a series of laws that collectively constitute the Civil Rights Act, most recently amended in 1991 and now codified at 42 U.S.C. § 1981 *et seq.* (2005). *See also* U.S. CONST. amends. XIII, XIV, XV.

14. *See, e.g.*, Treaty with the Seminole, Mar. 21, 1866, art. 1, 14 Stat. 755; Treaty with the Cherokee, July 19, 1866, art. 1, 14 Stat. 799; Treaty with the Creeks, June 14, 1866, art. 1, 14 Stat. 785; Treaty with the Choctaw and Chickasaw, Apr. 28, 1866, art. 1, 14 Stat. 769.

15. *See* WILLIAM LOREN KATZ, BLACK INDIANS: A HIDDEN HERITAGE 50 (1986) (describing early relationships between Africans and Indian Nations); DANIEL F. LITTLEFIELD, JR., AFRICANS AND SEMINOLES: FROM REMOVAL TO EMANCIPATION 4-6 (1977) [hereinafter LITTLEFIELD 1977] (noting runaway slaves and several Indian Nations began settlements in Florida in the 1700s); Natsu Taylor Saito, *From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law*, 45 VILL. L. REV. 1135, 1144 (2000) (explaining that early Seminoles consisted of Africans and Native Americans) (citing KENNETH W. PORTER, THE BLACK SEMINOLES: HISTORY OF A FREEDOM-SEEKING PEOPLE (Alcione M. Amos & Thomas P. Senter eds., 1996)).

16. *See* LITTLEFIELD 1977, *supra* note 15, at 4-6, 7.

17. *See Davis II*, 199 F. Supp. 2d at 1167-68 (noting that Black Seminoles assimilated and fought with the Seminole Tribe); Seminole Nation v. United States, 78 Ct. Cl., 455 (1933) (noting that the African population among the Seminole Tribe was very large, that intermarriage was common, and that Africans were very important and recognized allies of the Tribe); KATZ, *supra* note 15, at 60 (noting that during the Seminole wars both Indians and Africans fought together to

ingrained in tribal culture and identity that when the United States began systematically to remove southeastern tribes to eastern Oklahoma, many of the African members were forced to go with them.[18]

Yet the relationship between tribes and Freedman was not always an improvement over the Freedmen's former circumstances with white slave owners. Some tribes adopted their own forms of African slavery.[19] The forms varied among the tribes: while some mirrored the plantation model, others resembled feudalism.[20] During the Civil War, the Five Civilized Tribes—Choctaw, Cherokee, Seminole, Creek, and Chickasaw[21]—fought for the Confederacy.[22] Despite the long coexistence of Africans and the tribes, the former did not become official members of the tribes until after the Civil War,[23] when the United States made the tribes sign treaties assuring allegiance to the Union and abolishing all forms of slavery and involuntary servitude unless for the punishment of a crime.[24] The treaties also required that the tribes grant

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resist U.S. advances); LITTLEFIELD 1977, *supra* note 15, at 7 (describing the Patriot War of 1812 as the first significant alliance between Seminoles and Africans).

18. *See Davis II*, 199 F. Supp. 2d at 1168 (describing Seminoles' participation in the "Trail of Tears" and the forced migration of southeastern tribes from the eastern coast to Oklahoma, and noting that Africans were forcibly removed with the tribes from Florida to Oklahoma between 1838 and 1842); LITTLEFIELD 1977, *supra* note 15, at 4 (noting that between 1838 and 1843 nearly five hundred Africans moved with the Seminole Tribe from Florida to Oklahoma). *See generally* Josephine Johnston, *Resisting Genetic Identity: The Black Seminoles and Genetic Tests of Ancestry*, 31 J.L. MED. & ETHICS 262 (2003) (explaining that the black Indians were too difficult to separate from the tribe and eventually went with them to Oklahoma).

19. *See* LITTLEFIELD 1977, *supra* note 15, at 5; Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation For the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 61, 75-96 (2005) (discussing slavery within the Five Civilized Tribes).

20. *See* LITTLEFIELD 1977, *supra* note 15, at 5-6 (comparing Seminole and Creek systems of slavery; noting that the Creek system mirrored that of white slave owners; and describing Seminole system as laxer, because slaves could own property and build their own homes). The Seminole slaves were more incorporated into Seminole life and culture: they dressed as Seminoles, spoke the language of the Tribe, and were often used as translators for the Tribe when dealing with white people. *Id.* Moreover, many slaves owned by Seminoles even owned property, though they had to pay tribute to their masters. *Id.* at 8. *See also* DANIEL F. LITTLEFIELD, JR., THE CHEROKEE FREEDMEN: FROM EMANCIPATION TO AMERICAN CITIZENSHIP 8-9 (1978) [hereinafter LITTLEFIELD 1978] (concluding that slavery among the Cherokees was much like that of white Southerners).

21. The author could not locate the origins of the term "Five Civilized Tribes."

22. *See* Seminole Nation v. United States, 78 Ct. Cl. at 459 (acknowledging the Five Civilized Tribes' treaty with the Confederacy); LITTLEFIELD 1977, *supra* note 15, at 182. *See generally* H. EXEC. DOC. NO. 38-1, pt.3, at 345 (1861) (quoting the statement of Henry M. Rector, then governor of Arkansas, to John Ross, Chief of the Cherokees) ("'Your people, in their institutions, productions, latitude, and natural sympathies are allied to the . . . slaveholding States. Our people and yours are allies in war, and friends in peace.'"), *quoted in* LITTLEFIELD 1977, at 180; *but see* Pratt, *supra* note 19, at 89 (explaining that the Creek Nation was split in its support and that the Creek Nation yielded to demands of the U.S. government to adopt the freed slaves).

23. *See Davis II*, 199 F. Supp. 2d at 1168 (asserting that formal recognition of Freedmen's membership in the Seminole Nation occurred through the signing of the 1866 treaty).

24. *See, e.g.*, Treaty with the Seminole, *supra note* 14, art. 2; Treaty with the Cherokee,

their former slaves official membership and the same rights as the other members.[25] While a majority of the slaveholding tribes[26] acquiesced in the treaties' stipulations, the Freedmen's rights varied from tribe to tribe. While some tribes allowed full political participation, others continually pushed to have their ex-slaves removed from their tribal territory and from their tribal rolls.[27] The Chickasaw and Choctaw Nations, for example, fought the adoption

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supra note 14, art. 9; Treaty with the Choctaw and Chickasaw, *supra* note 14, art. 2; Treaty with the Creeks, *supra* note 14, art. 2.

25. *See* Treaty with the Seminole, *supra* note 14, art. 2:

> And inasmuch as there are among the Seminoles many persons of African descent and blood . . . it is stipulated that hereafter these persons and their descendants, and such others of the same race shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said Tribe.

See also Treaty with the Cherokee, *supra* note 14, art. 9 ("They further agree that all freedmen who have been liberated . . . as well as all free colored persons who were in the country . . . and are now residents therein, or who may return in six months, and their descendants, shall have all the rights of native Cherokees . . . ."); Treaty with the Creeks, *supra* note 14, art. 2:

> [I]nasmuch as there are among the Creeks many persons of African descent . . . it is stipulated that hereafter these persons lawfully residing in said Creek country . . . and their descendants and such others of the same race as may be permitted . . . to settle within . . . the Creek Nation as citizens shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said Tribe.

And see Treaty with the Choctaw and Chickasaw, *supra* note 14, art. 3:

> [T]hree hundred thousand dollars, will be held . . . [until the] legislatures of the Choctaw and Chickasaw Nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nation at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively . . . .

See also Davis II, 199 F. Supp. 2d at 1168 (confirming that ancestors of the Africans were to have all the rights of native citizens).

26. It is unclear how many tribes owned slaves; however, some case law has alluded to the fact that tribes outside of the Five Civilized Tribes also had systems of slavery. *See* Jackson v. United States, 34 Ct. Cl. 441, 445 (1899) (noting that at the time the Thirteenth Amendment was passed government officials were negotiating treaties with several tribes—including the Dwamish, Skallams, and Makahs—to abolish slavery).

27. *See* Chickasaw Freedmen v. Choctaw Nation, 193 U.S. 115 (1904) (referring to the many requests from the Choctaw Nation to have the United States remove their Freedmen); LITTLEFIELD 1977, *supra* note 15, at 203 (comparing the rights of Freedmen in the tribes). While the ex-slaves had no rights under the treaty with the Chickasaw Tribe, they fared slightly better with the Choctaw Tribe. The Cherokee Tribe was able to exclude many ex-slaves due to a stipulation in their treaty that limited access to full rights to only those ex-slaves who returned to the reservation within six months of the treaty's signing. *Id.* The Creeks allowed the ex-slaves full rights, but political strife unsettled the Nation for years. The Seminoles were the only tribe whose ex-slaves had full rights of citizens. *Id.* at 191. Racism within the Chickasaw, Choctaw, and Cherokee tribes was more invidious when compared with the Creeks and even more so when

of their Freedmen for many years.[28]

I.
CURRENT DISENFRANCHISEMENT OF BLACK TRIBAL MEMBERS

Currently, both the Seminole Nation of Oklahoma and the Cherokee Nation of Oklahoma are disenfranchising their black members. Both tribes have denied their Freedmen access to federally funded programs, monies, and voting rights on account of their race. The Seminole Nation of Oklahoma is also denying their Freedmen access to funds the tribe received as compensation for land taken in the 1800s.[29]

At the root of the current disenfranchisement is the Dawes Commission's assignment of tribal membership in the early 1900s.[30] Congress established the Dawes Commission to determine and record the membership of several Indian tribes. The Commission categorized the tribes' membership on two rolls: the "Blood Roll" for full-blooded Indians and the "Freedmen Roll" for former slaves.[31] Though many historians believe that a majority of the Freedmen were of mixed heritage, the Dawes Commission did not bother to quantify the

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compared to the Seminoles. *Id.* *See also* LITTLEFIELD 1978, *supra* note 20, at 63 n.36 (acknowledging that the Freedmen voted in Cherokee elections) (citing S. REP. NO. 45-744 at 591 (1883)); *id.* at 51 (describing Freedmen's prosperity within the Cherokee Nation and noting Freedmen owned "barbershops, blacksmith shops, general stores, and restaurants.").

28. *See Chickasaw Freedmen*, 193 U.S. at 124 (concluding that the Chickasaw Freedmen were never adopted into the Nation nor acquired any rights dependent on such adoption and finding that the Indian nations would rather refuse rights for the Freedmen than take $300,000 for the succession of their land); LITTLEFIELD 1977, *supra* note 15, at 203 (noting that the Seminoles, Creeks, and Cherokees adopted their ex-slaves immediately, whereas the Choctaws resisted until 1885 and the Chickasaws refused).

29. *See Davis II*, 199 F. Supp. 2d at 1169; *see also* Ben Fenwick, *Racial Strife Splits American Indian Tribe*, Citizens Equal Rights Alliance, July 3, 2002, http://www.citizensalliance.org (follow "Search CERA" hyperlink; then enter "Fenwick"); William Glaberson, *Who Is A Seminole And Who Gets To Decide?*, N.Y. TIMES, Jan. 29, 2001, at A1; Brian Scaper, *Seminole To Refile Lawsuit: Black Seminoles Say They Are Being Discriminated Against By Their Tribe*, OKLA. DAILY, July 14, 2004, http://www.oudaily.com/vnews/display.v/ART/2004/07/14/40f4805e555f9?in_archive=1.

30. Act of June 27, 1898, Pub. L. No. 55-504, § 21, 30 Stat. 495 (1898) (declaring that tribal enrollment as contemplated by the Dawes Commission and as approved by the Secretary of the Interior has the effect of designating people and their descendants as tribal members). The Act authorized the Commission to "make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each said tribes . . . . The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose name are found thereon with their descendants . . . shall alone constitute the several tribes which they represent." Curtis Act, Pub. L. No. 55-517, 30 Stat. 503 (June 28, 1898); *see also* Seminole Nation v. United States, 78 Ct. Cl. 455, 466-67 (1933) (explaining that Congress established the Dawes Commission in 1893 and in 1896 granted it the power to determine citizens of the tribe).

31. *Davis II*, 199 F. Supp. 2d at 1168; Press Release, Legal Defense Fund for Cherokee Freedmen Established (Aug. 2003) [hereinafter Press Release], *at* http://www.african-nativeamerican.com/fund.htm. *And see* Joyce A. McCray Pearson, *Red and Black—A Divided Seminole Nation:* Davis v. U.S., 14 KAN. J.L. & PUB. POL'Y 607, 621 (2005).

percentage of Seminole or Cherokee blood in the Freedmen.[32] Instead the Commission essentially applied a "one drop" rule to the Freedmen, concluding that any drop of black blood would override any Indian ancestry.[33] Ironically, people with three-quarters white blood got full-blood status in the Seminole and Cherokee Nations.[34] The Commission also enrolled members of other tribes, adopted into the Cherokee Nation, in the "Blood Rolls."[35] Notwithstanding recent actions by the Cherokee and Seminole tribes, the Dawes Rolls are considered the ultimate authority for determination of membership in both the Seminole and Cherokee Tribes.[36]

A. Seminole Nation of Oklahoma

In 1823, the Seminole Tribe ceded its land in Florida to the United States but did not receive compensation until 1976.[37] In 1990, Congress passed a distribution act[38] that set forth the use and distribution criteria of the Judgment Fund.[39] The Seminole Nation General Council then established programs to be

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32. *Davis II*, 199 F. Supp. 2d at 1168.

33. *See* Williamson, *supra* note 2, at 245-46 ("The one-drop rule, or the rule of 'hypodescent,' defines any person with even 'one drop' of Black blood as Black. The one-drop rule allowed slaveholders to claim ownership of any person with Black ancestry regardless of any White ancestry. . . . While the one-drop rule has been used as an inclusory device to define Blacks, Native Americans use a much more exclusionary standard in defining tribal membership); *see also* Lawrence Wright, *One Drop of Blood*, NEW YORKER, July 25, 1994, at 46, 48 (defining the one-drop rule as an "American institution known informally as 'the one-drop rule,' which defines as black a person with as little as a single drop of 'black blood.' This notion derives from a long-discredited belief that each race had its own blood type, which was correlated with physical appearance and social behavior.").

34. *Davis II*, 199 F. Supp. 2d at 1168; *and see* Williamson, *supra* note 2, at 246 (explaining that "mixed bloods" with White ancestry were considered superior to those of Black ancestry. "Even today, there exists a group of persons known as 'Intermarried Whites' within the Cherokee Nation that do not have any Indian blood but are considered tribal citizens. Thus to a certain extent, Whiteness has been revered in Indian nations just as it has been in dominant society."); Press Release, *supra* note 31.

35. *Davis II*, 199 F. Supp. 2d at 1168; Williamson, *supra* note 2, at 243 ("Blacks were generally thought of as property, and the assumption was that all people of African descent had been slaves before 1866.").

36. *Davis II*, 199 F. Supp. 2d at 1169; Press Release, *supra* note 31.

37. *Davis II*, 199 F. Supp. 2d at 1169 (holding that the Seminole Tribe should be compensated $56 million, including interest for lands ceded in 1823) (citing Seminole Nation v. United States, 387 Ind. Cl. Comm. (Dockets 73 and 151) (1976)). The $56 million award is commonly referred to as the Judgment Fund.

38. Indian Claims: Distribution of Funds to Seminole Indians, Pub. L. 101-277, 104 Stat. 143 (1990).

39. *Davis II*, 199 F. Supp. 2d at 1170-71 (noting that eighty percent of the funds were to be set aside to fund common tribal needs, such as elderly assistance, higher education, and household education assistance); Martha Melaku, Note, *Seeking Acceptance: Are the Black Seminoles Native Americans?* Sylvia Davis v. The United States of America, 27 AM. INDIAN L. REV. 539, 548 (2002) (noting the funds were to be distributed to finance several community projects for the elderly and children).

financed by the Judgment Fund.[40] Nowhere in the act did Congress express any explicit or implicit intent to exclude Freedmen from the Fund.[41] The Freedmen's economic need is very much like that of their full-blood counterparts,[42] yet both the Bureau of Indian Affairs (B.I.A.) and the Seminole Tribe sought to exclude the Freedmen from the Judgment Fund,[43] despite the B.I.A.'s knowledge that the Freedmen were citizens of the Tribe[44] and that Congress was unlikely to approve of a plan that excluded them.[45]

On June 28, 1990, Chief Jerry Haney of the Seminole Tribe and Ross Swimmer, former Constitutional Chief of the Cherokee Nation, discussed ways in which to exclude the Freedmen from the Judgment Fund.[46] They reasoned that because the ancestors of the present day Freedmen were not officially citizens of the tribe in 1823 when the tribes ceded the land, they had no claim to any monetary benefit from that transfer, including the Judgment Fund and Judgment Fund programs.[47] Considered as tribal property in 1823,[48] the

40. Davis v. United States, 192 F.3d 951, 955 (10th Cir. 1999) [hereinafter *Davis I*] (explaining the factual history of the Judgment Fund and citing the School Clothing Fund as a program from which the Seminole sought to exclude the Freedmen).

41. *Davis II*, 199 F. Supp. 2d at 1170, 1172-73 (noting that Tim Vollman, Regional Solicitor, Southwest Region, expressed several doubts that Congress intended to exclude the Freedmen because Congress did not explicitly say so and because the statutory language included the Black Seminoles).

42. *See* Keilman, *supra* note 3, at 1 ("There is little doubt that many black Seminoles, like their blood neighbors, are in dire need. One short stretch of dirt road . . . is an outpost of trailers known as 'the hood' by some black Seminoles. The poverty is deadening.").

43. *Davis II*, 199 F. Supp. 2d at 1169 (noting that the B.I.A. issued a research report advising Congress not to include the Black Seminoles in the Judgment Fund disbursement); Keilman, *supra* note 3, at 1.

44. *Davis II*, 199 F. Supp. 2d at 1169 (noting that the Constitution of the Seminole Nation of Oklahoma provides that membership consists of "all Seminole citizens whose names appear on the final rolls of the Seminole Nation of Oklahoma."). This would include the Freedmen because they are recorded on their own roll of membership for the Tribe. *See also supra* notes 30-36 and accompanying text (describing the Commission's way of recording the Freedmen on the rolls).

45. *See* Pls.' Mem. Opp'n Mot. Dismiss Indispensable Party, Exhibit B, Mem. Rosella C. Garbow, B.I.A. Tribal Operations Officer, at 1-2 ("[W]e sincerely believe that should a plan be submitted to Congress that excludes the Seminole Freedmen, who are currently members of the Tribe, a joint resolution will be enacted by Congress disapproving such a plan."), *quoted in Davis II*, 199 F. Supp. 2d at 1169.

46. *Davis II*, 199 F. Supp. 2d at 1170 (referring to a June 28, 1990, telephone conversation between Chief Jerry Haney and Ross Swimmer, witnessed by Rosella Garbow, B.I.A. Tribal Operations Officer).

47. *Id. Compare* Treaty with the Seminole, *supra* note 14, art. 2, *with* Saito, *supra* note 15, at 1144 (explaining that from the beginning the Seminole Tribe has had Africans living among them).

48. *See* Saito, *supra* note 15, at 1144-55 (summarizing the conflict over African slaves between the Seminole Tribe and white settlers in 1823). By the time the 1823 Treaty of Moultrie Creek was signed, white planters were demanding that the Seminoles be "active and vigilant in preventing . . . the passing through of . . . any absconding slaves . . . ." *Id.* at 1153. This requirement assured that certain people would be treated as property. However, there was much confusion over who was actually an escaped slave because "Seminole society had blacks at every status-born free, or the descendants of fugitives, or perhaps fugitives themselves, . . . interpreters,

Freedmen arguably could not have partaken in communal ownership of the land at that time, so Haney and Swimmer reasoned that they had no claim to the benefit of communal compensation that vested with the 1823 transfer.[49] Following Haney and Swimmer's reasoning, and to avoid sharing the Judgment Fund with the Freedmen, the Seminole Tribe voted to exclude the Freedmen by passing the "Seminole Nation Usage Plan," which required that a person be descended from a member of the Seminole Nation as it existed in 1823 to receive any of the Judgment Fund.[50] This excluded Freedmen, who did not become official members of the Seminole Nation until 1866.[51] Despite the B.I.A.'s concern that Congress would not approve an attempt to exclude the Freedmen, Congress approved the Seminole Nation Usage Plan on March 30, 1991.[52]

In 1996, Sylvia Davis, a Freedman, on behalf of her son, brought suit in federal district court to gain access to the Judgment Fund. Because sovereign immunity was held to protect the Tribe from suit, Ms. Davis subsequently sought judgment against the B.I.A.[53] The court granted the government's motion to dismiss for failure to join the Tribe as an indispensable party.[54] The Tenth Circuit reversed and remanded, charging the district court with deciding whether the Tribe was a necessary or indispensable party.[55] In 2002, the district court concluded once again that the Tribe was an indispensable party, noting that the Freedmen were seeking a remedy that required involving the Seminole Nation as the managing authority of the Judgment Fund.[56] The district court did not rule on whether the Tribe's specific actions denying the Freedmen access to the Judgment Fund violated the civil rights protections contained in the Treaty of 1866.

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advisers of importance, others were warriors and hunters or field hands. Intermarriage further complicated black status." *Id.* at 1154. *See generally* Scott v. Sandford, 60 U.S. 393, 450 (1856) (maintaining that African Americans were not citizens because they were property and that the Constitution therefore did not apply them), *overruled by* U.S. CONST. amends. XIII, XIV.

49. *Davis II*, 199 F. Supp. 2d at 1172. *But see* Melaku, *supra* note 39, at 549 (arguing Black Seminoles helped in the development and cultivation of the land and that their descendents therefore are entitled to compensation along with the Tribe).

50. *Davis II*, 199 F. Supp. 2d at 1170, 1172.

51. *Id.*

52. *Id.* at 1171. It is unclear why, despite the B.I.A.'s concerns, Congress would approve the Seminole Usage Plan. It could have something to do with the plan not expressly excluding the Freedmen by only including people who were *members* of the tribe in 1823. Congress may have believed that the Freedmen were *members* of the tribe in 1823.

53. *Id.* (holding that the Nation could not be joined because of sovereign immunity) (citing *Davis I*, 192 F.3d 951).

54. *Id.*

55. *Davis I*, 192 F.3d at 961. If the tribe was merely necessary then the claims could proceed; if they were indispensable, however, the claims would be dismissed. FED. R. CIV. P. 19(b) ("If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable . . . .").

56. *Davis II*, 199 F. Supp. 2d at 1177.

Consequently, after the 1996 suit was filed, the Seminole sought to exclude all Freedmen from their Nation by amending their Constitution to require one-eighth Seminole blood for membership.[57] On July 1, 2000, the Tribe passed a referendum to change the constitutional membership criteria.[58] Until that point, tribal membership had required descent from an enrollee on the Dawes Rolls without specification as to any requisite degree of relationship.[59] In August of 2000, the Tribe officially removed the Freedmen—at least those with less than one-eighth Seminole blood— pursuant to the new amendment.[60]

Under the Tribe's original Constitution, however, the Department of the Interior (D.O.I.), via the B.I.A, must approve all constitutional amendments.[61] In violation of this mandate, the Tribe further amended the Constitution to exclude the provision requiring federal government validation and never presented the change to the B.I.A. for approval.[62]

Refusing to honor this second constitutional amendment eliminating federal review, the B.I.A. also refused to approve the "one-eighth" amendment because it would exclude Freedman from tribal membership.[63] The Nation filed suit against the D.O.I. in 2000 challenging the federal government's authority to approve its Constitution.[64]

Concurrently, the Tribe held an election in compliance with the new constitutional amendments, in which it elected a new chief and disenfranchised the Freedmen.[65] Although the Freedmen cast ballots, their votes were not counted.[66] After the B.I.A. refused to accept the results of the election,[67] the

57. Seminole Nation v. Norton, 223 F. Supp. 2d 122, 124 (W.D. Okla. 2002) [hereinafter *Norton II*]; Seminole Nation v. Norton, No. 00-2384, slip. op. at 4-5 (D.D.C. Sept. 27, 2001) (explaining that the Sixth Amendment to the Seminole Constitution "require[s] one eighth quantum of Seminole Indian blood to be a member of the Seminole Nation" and that the Seventh Amendment changed the term "Seminole citizen" to "Seminole Indian citizen by blood"). *See also Seminole Voters Approve Changes*, Indianz.com, July 7, 2000, http://indianz.com/News/show.asp?ID=law/772000-6 [hereinafter *Seminole Voters*] (citing several constitutional changes including the one-eighth quantum which would prove to disenfranchise the Freedmen and noting the change to one-eighth blood quantum).

58. *Norton II*, 223 F. Supp. 2d at 124; *Seminole Voters*, *supra* note 57.

59. *See* Johnston, *supra* note 18, at 262.

60. *See* Fenwick, *supra* note 29 (noting that the constitutional amendments officially removed the Freedmen from the Seminole Tribe).

61. Seminole Nation v. Norton, 206 F.R.D. 1, 3 (D.D.C. 2001) [hereinafter *Norton I*] (citing article XIII of the original Seminole Constitution).

62. *Id.*

63. *Norton II*, 223 F. Supp. 2d at 125 (summarizing a Sept. 29, 2000, letter from Kevin Grover, Assistant Secretary of the D.O.I., to Chief Haney, noting that he would not approve the amendments because they excluded the Freedmen).

64. *Id.*

65. *Id.* (noting that Ken Chambers was elected under the new constitutional provisions that defeated incumbent Chief Haney).

66. *Id.* at 125-26.

67. *Id.* at 126 (noting the B.I.A.'s position continuing to recognize Chief Haney as the

Seminole Nation sought, in two suits, to override the government's decision.[68] First, the Nation tried to deny the federal government's authority to approve amendments to their Constitution.[69] The district court disagreed with the Tribe and found that the D.O.I. had authority pursuant to the original Seminole Constitution.[70] After the B.I.A. refused to recognize the Tribe's election results and froze distribution of the Judgment Fund,[71] the Tribe filed suit again, claiming that the continued refusal to recognize the new tribal government was inappropriate because the Tribe had taken initiatives to recognize full participation of the Freedmen in the General Council.[72] The court concluded that the continued refusal to recognize the Tribe's government was not an "arbitrary, capricious, or... otherwise [unlawful]" agency action.[73] The court reasoned that unlike a line of prior cases in which agency action exceeded the scope of its authority vis-à-vis Native American tribes,[74] this suit presented an "element of oppressive action on the part of the Seminole Tribe against its own minority members."[75] And because "the Secretary of the Interior is charged not only with the duty to protect the rights of the Tribe, but also the rights of individual members,"[76] the federal government had authority to protect minority members of the Tribe.[77] Finally, the court noted that the Tribe's discriminatory acts "were in total disregard of the rights afforded to those members by the Treaty of 1866 and the Tribe's Constitution."[78]

It is important to note that the court did not restore to the Freedmen any substantive rights by upholding the federal government's refusal to recognize the Tribe's new leadership but instead merely affirmed the federal

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Principal Chief of the Seminole Tribe despite the recent tribal election of Ken Chambers to that position).

68. *Norton II*, 223 F. Supp. 2d; *Norton I*, 206 F.R.D. 1.

69. *Norton I*, 206 F.R.D. at 5.

70. *Norton II*, 223 F. Supp. 2d at 126 (citation omitted).

71. *See* Keilman, *supra* note 3 (noting that agencies have frozen the Judgment Fund and other payments and that $30 million is still undistributed); Fenwick, *supra* note 29 (noting the Judgment Fund has been frozen).

72. *Norton II*, 223 F. Supp. 2d at 122, 129.

73. *Id.* at 131 (quoting 5 U.S.C. § 706(2)(A)).

74. *Id.* at 131-32 (citing Ransom v. Babitt, 69 F. Supp. 2d 141, 149 (D.D.C. 1999); Harjo v. Kleppe, 420 F. Supp. 1110, 1143 (D.D.C. 1976); Wheeler v. U.S. Dep't of Interior, 811 F.2d 549, 553 (10th Cir. 1987)).

75. *Norton II*, 223 F. Supp. 2d at 137.

76. *Id*; *see also id.* at 140 ("The D.O.I. has the authority and responsibility to ensure that the Nation's representatives, with whom it must conduct government-to-government relations, are valid representatives of the Nation as a whole.") (citing Seminole Nation v. United States, 316 U.S. 286, 296 (1942)).

77. *Id.* at 138 ("[T]his is a situation where the D.O.I. has sought to protect minority members of the tribe from the discriminatory actions of the overwhelming majority of the tribe."); *see also Norton I*, 206 F.R.D. at 7 (refusing to allow Freedmen to intervene because the D.O.I.'s arguments against approving the amendments essentially protected the Freedmen's right to citizenship in the Seminole Nation).

78. *Norton II*, 223 F. Supp. 2d at 138.

government's ultimate authority to invalidate amendments to the Tribe's constitution.[79] Although the court also concluded that this superseding federal power protects the Freedmen,[80] as demonstrated in the next Part, the government is not required to exercise its power to protect the Freedmen and has in other situations allowed a tribe to take away Freedmen's voting rights and access to federal funds and programs.

B. Cherokee Nation of Oklahoma

Since 1983, the Cherokee Nation has refused to let its Freedmen vote in the Nation's elections.[81] In addition to disenfranchising the Freedman, the Tribe also excluded them from membership, thereby denying them access to federal funds and federally funded programs, by redefining tribal membership in terms of Indian blood quantum rather than by virtue of ancestry tracing back to either the "Full Blood" Dawes Roll or the "Freedmen" Dawes Roll.[82] Initially, the Freedmen filed suit to prevent the discrimination, but the Tenth Circuit dismissed that action.[83] The issue lay dormant until 1999, when the tribe prepared a new constitution for B.I.A. approval.[84] The B.I.A., under Kevin Gover, rejected the proposed constitution because the Freedmen were disenfranchised.[85] The tribe waited for an administration change and in 2002 subsequently asked the B.I.A. to allow a referendum by Cherokee voters on a constitutional amendment to remove government oversight of the Tribe's constitution. The B.I.A. refused at first but then later allowed the referendum.[86] Thus, on May 24, 2003, the Cherokee Nation of Oklahoma prevented black Cherokees from voting yet again.[87]

The Cherokee Nation of Oklahoma maintains that its actions are completely legal—and distinguishable from those of the Seminole Nation—

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79. *Id.* at 140.

80. *Norton I*, 206 F.R.D. at 7.

81. *See* Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989) (dismissing the Freedmen's suit against the tribe for preventing him from voting against the tribe); *see also* Brendan I. Koerner, *Blood Feud*, WIRED MAGAZINE, Sept. 2005, *at* http://www.wired.com/wired/archive/13.09/ (explaining how the tribe linked voting rights to actual proof of Indian blood).

82. *See* Press Release, *supra* note 31 (describing the new blood quantum for proof of membership); *Cherokee Freedmen Protest Cherokee Election*, July 31, 2003, http://www.african-nativeamerican.com/election.htm; Letter from Jon Velie, Velie and Velie Attorneys at Law, Norman Okla., to Aurene Smith, Acting Assistant Secretary of Indian Affairs, Washington, D.C. (June 10, 2003) (on file with Vann v. Norton, No. 03-1711) (D.D.C. filed Aug. 11, 2003).

83. *See Nero*, 892 F.2d 1457.

84. *See* Marilyn Vann, *Cherokee Freedmen Story*, Aug. 2, 2005, http://www.freedmen5tribes.com/Cherokee.htm.

85. *Id.*

86. *Id.*

87. *See Cherokee Freedmen Caught in High-Level Dispute*, Indianz.com, http://www.indianz.com/News/archives/000930.asp, Aug. 20, 2003 [hereinafter *Cherokee Dispute*].

because the Cherokees did not seek to amend their Constitution directly to oust their Freedmen.[88] As of February 2006, the federal government agreed with the Cherokee Tribe's position.

As with the Seminole Tribe, the B.I.A. had a fiduciary responsibility to watch over the Cherokee Constitution, a duty written into the Constitution itself.[89] And like the Seminole, the Cherokee Nation of Oklahoma amended its Constitution to prevent the B.I.A.'s supervision of its election procedures through the May 2003 election, in which the Freedmen were not allowed to vote.[90] Initially, the B.I.A. denied the results of the election, as it had in the Seminole situation, but then reversed its position, allowing the amendment and certifying the election results.[91]

The B.I.A. lacks a legal basis for differentiating between the Seminole and Cherokee amendments. As plaintiffs in a recent lawsuit against the Cherokee Nation allege, the Cherokee Freedmen had the right to vote as recently as the 1980s.[92] Both the Seminole and Cherokee Nations signed treaties in 1866 that

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88. *See* CHEROKEE NATION CONST. art. IV, § 1 (1999) (requiring citizenship to be linked to descendants on the Dawes Rolls). Unlike the Seminole Constitution, this language has not been changed to require a blood quantum for membership. Letter from Lloyd Benton Miller, Sonosky, Chambers, Sachse, Enderson & Perry LLP, Washington, D.C., to Scott Keep, Esq., Office of the Associate Solicitor for Indian Affairs, U.S. Department of the Interior, Washington, D.C. (explaining that the amendments "propose no change whatsoever to citizenship or voting rights . . . . Again in contrast to the situation presented in *Seminole Nation* the proposed Cherokee Nation Constitutional Amendments to be considered . . . do not purport to disenfranchise any citizen in any manner whatsoever.") (July 18, 2003) (on file with Vann v. Norton, No. 03-1711) (D.D.C. filed Aug. 11, 2003); *but see* Letter from Hastings Shade, Deputy Chief Cherokee Nation and Stephanie Wickliffe-Shepard, Tribal Council Cherokee Nation, to Aurene Martin, Interim Assistant Secretary of the Department of the Interior, Washington, D.C. (Aug. 5, 2003) (on file with Vann v. Norton, No. 03-1711) (D.D.C. filed Aug. 11, 2003) (supporting the Freedmen's position that the election excluded the Cherokee Freedmen because election procedures included the words "by blood").

89. Principal Chiefs Act, Pub. L. No. 91-495, 84 Stat. 1091 (1970) (mandating that all procedures to elect the principal chiefs of the Cherokee, Choctaw, Creek, and Seminole Tribes, as well as the governor of the Chickasaw Tribe of Oklahoma, shall be subject to approval by the Secretary of the Interior) (on file with author). The 1976 Cherokee Constitution contained a provision similar to the one in the Seminole Constitution: "[N]o amendment or new Constitution shall become effective without the approval of the President of the United States or his authorized representative." CHEROKEE NATION CONST. art. XV, § 10 (1976) (removed by May 24, 2003 election) (on file with author).

90. *Cherokee Dispute*, *supra* note 87; *Cherokee Freedmen Protest Election*, The African-Native American History & Genealogy Webpage, July 31, 2003, *at* http://www.african-nativeamerican.com/election.htm.

91. Letter from Jeanette Hanna, Acting Secretary of Indian Affairs, to Chadwick Smith, Principal Chief of Cherokee Nation (July 11, 2003) (on file with Vann v. Norton, No. 03-1711) (D.D.C. filed Aug. 11, 2003) (finding the Cherokee situation too much like the Seminole case and asserting non-approval of proposed amendments). *See* Letter to Chadwick Smith, Principal Chief Cherokee Nation, (Aug. 6, 2003) (on file with Vann v. Norton No. 03-1711) (D.D.C. filed Aug. 11, 2003). It is unclear why the B.I.A. made such an about face in its stance towards the Cherokee Nation of Oklahoma.

92. *See* Koerner *supra* note 81; *see generally* Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989); Pls.' Compl., ¶ 34, Vann v. Norton, No. 03-1711 (D.D.C. filed Aug. 11, 2003)

contained equal protection provisions for their Freedmen.[93] Subsequent case law has reinforced both the Seminole and Cherokee Freedmen's right to full citizenship, including political and civil rights, as well as equal rights to communal property distribution arising out of the terms of the 1866 treaties.[94] The B.I.A., however, continues to maintain inconsistent positions vis-à-vis the Seminole and Cherokee amendments.

On August 11, 2003, the Cherokee Freedmen filed suit against the Secretary of the Interior, seeking declaratory and injunctive relief against the B.I.A.'s decision to recognize the Tribe's May 24, 2003, election and the constitutional amendment.[95] The D.O.I. answered the complaint with five affirmative defenses, including an argument for dismissal based on the Tribe's status as an indispensable party, yet curiously it did not in fact file a motion to dismiss.[96] On January 14, 2005, the Cherokee Nation of Oklahoma sought to intervene in the case in order to file a motion to dismiss on the basis of its sovereign immunity.[97] The district court granted the motion for limited intervention on September 8, 2005.[98] The same day the Tribe filed a motion to dismiss.[99] In its motion the Tribe claimed it was an indispensable party and failure to join them in the suit warranted dismissal of the action.[100] The Freedmen filed a motion opposing dismissal on September 22, 2005, asserting that the Tribe had waived its sovereign immunity by intervening in the case; that the United States and the Cherokee Nation itself have limited the sovereign power of the tribe with regards to the Freedmen; and that the Tribe cannot

(noting that the 1976 Constitution allowed for Freedmen to vote); LITTLEFIELD 1978, *supra* note 20, at 63 (noting that Cherokees voted in the nineteenth century); Linda W. Reese, *Cherokee Freedwomen in Indian Territory, 1863-1890*, 33 WEST. HIST. Q. 273 (2002), *available at* http://www.historycooperative/org/journals/whq/33.3/reese.html (noting that the Tribe amended its Constitution to comply with treaty agreement by granting voting rights).

93. *Compare* Treaty with the Seminole, *supra* note 14, art. 2, *with* Treaty with the Cherokee, July 19, 1866, *supra* note 14, art. 9.

94. Cherokee Freedmen Act, Pub. L. No. 50-1211, 25 Stat. 608 (1888) (responding to Cherokee Tribal Council legislation that excluded Freedmen, Shawnees, Delawares, and intermarried whites from sharing tribal assets by requiring the Cherokee Tribe to share its assets); Red Bird v. United States, 203 U.S. 76 (1906) (affirming citizenship and proprietary rights of the Freedmen); Seminole Nation v. United States, 78 Ct. Cl. 455, 458-61 (1933) (denouncing the Seminole Tribe's argument that the Treaty only extended to political rights and not property interests); Moses v. Whitmire v. Cherokee Nation, 30 Ct. Cl. 138 (1895) (holding that Freedmen were entitled to equal per capita payments of funds as well as equal citizenship in the Cherokee tribes).

95. Pls.' Compl., ¶¶ 55-59, Vann v. Norton, No. 03-1711 (D.D.C. filed Aug. 11, 2003).

96. Answer, ¶ 10, Vann v. Norton, No. 03-1711 (D.D.C. filed Mar. 18, 2004).

97. *See* Mot. Intervene, Vann v. Norton, No. 03-1711 (D.D.C. filed Jan. 14, 2005). In filing the motion to intervene, the Tribe maintains that it has not waived its sovereign immunity.

98. *See* Order Granting Mot. Cherokee Nation for Limited Intervention, Vann v. Norton, No. 03-1711 (D.D.C. filed Sept. 8, 2005).

99. *See* Mot. Dismiss, Vann v. Norton, No. 03-1711 (D.D.C. filed Sept. 8, 2005).

100. *See* Mem. Supp. Mot. Dismiss, at 4-15, Vann v. Norton, No. 03-1711 (D.D.C. filed Sept. 8, 2005).

escape liability for denying the Freedmen the right to vote.[101] As of February 2006, the Cherokee Freedmen, the U.S. government, and the Cherokee Nation of Oklahoma were still litigating the case. As one can infer from the Seminole and Cherokee Freedmen cases, the doctrine of tribal sovereign immunity frequently imposes procedural hurdles that prevent courts from reaching the merits of Freedmen's claims.

II.
TRIBAL SOVEREIGN IMMUNITY

The concept of sovereign immunity has firm roots in Anglo-American common law.[102] However, it was not until 1821 that the Supreme Court applied the concept to the U.S. government.[103] Sovereign immunity is an affirmative defense and grounds for dismissal.[104] As a sovereign entity, the United States is immune from suit unless Congress expressly waives sovereign immunity.[105] Individual states are immune from suit in federal court and state court unless they consent to waive immunity.[106] However, sovereignty does not preclude suits against government officials for prospective relief when acting unconstitutionally.[107]

Courts have similarly recognized Indian tribes as sovereign entities for many years. In 1832, the Court, in *Worcester v. Georgia*, held that the laws of Georgia had no force and effect within the Cherokee Nation's territory within Georgia because the tribal nations "have been considered as distinct political communities, retaining their original natural rights, as the undisputed possessors of the soil."[108] Writing for the Court, Chief Justice John Marshall reasoned that the Constitution assigned exclusive authority to regulate Indian affairs to the federal government. Thus, tribes were protected from state encroachment, because only the federal government had authority to regulate

101. *See* Mot. Opp'n Mot. Dismiss, at 4-16, Vann v. Norton, No. 031711 (D.D.C. filed Sept. 22, 2005). The motion makes several claims addressed in this Comment concerning the denial of the right to vote as a "badge and incident" of slavery. *See, e.g., id.* at 15-16.

102. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 5-8 (1963) (tracing sovereign immunity to thirteenth century England).

103. Cohens v. Virginia, 19 U.S. (6. Wheat.) 264, 411 (1821) (embracing "the universally received opinion . . . that no suit can be commenced or prosecuted against the United States").

104. *See generally* Seminole Tribe v. Florida, 517 U.S. 44 (1996) (finding that states are protected by the Eleventh Amendment from suit); Feres v. United States, 340 U.S. 135 (1950) (finding that the United States cannot be sued for injuries received by service members incident to service); Maricopa County v. Valley Nat'l Bank of Phoenix, 318 U.S. 357 (1943) (holding that no suit against property in which the United States has an interest can be maintained absent a statutory waiver).

105. Henderson v. United States, 517 U.S. 654, 670 (1996) (finding congressional waiver); United States v. Idaho, 508 U.S. 1, 6 (1993) (finding that statutory waiver was not unequivocally expressed); *Cohens*, 19 U.S. at 412.

106. Alden v. Maine, 527 U.S. 706 (1999); *Seminole Tribe*, 517 U.S. 44 (1996).

107. *See Ex parte Young*, 208 U.S. 123, 154 (1908).

108. Worcester v. Georgia, 31 U.S. 515, 559 (1832).

the tribes, which were themselves sovereign entities.[109] The Court first declared that Indian tribes, as sovereigns, possessed common law immunity from suit in *United States v. United States Fidelity & Guarantee Co.*[110] The lower courts have ruled, however, that tribes are not immune to suit by the United States, as a superior sovereign.[111]

Tribal immunity has led to the dismissal of many suits against tribes,[112] forcing the petitioning party to seek relief in tribal court.[113] Only Congress or a tribe itself can waive tribal sovereign immunity.[114] However, like state officials, tribal officials are not protected by sovereign immunity from suit.[115] Congress must unmistakably and explicitly abrogate a tribe's sovereign immunity; implied waiver is insufficient.[116] Only a "clear and plain" statement of congressional intent will abrogate tribal sovereign immunity.[117] Courts look for the requisite "clear and plain" congressional intent to abrogate in express language in the statute, the legislative history, or the "surrounding circumstances."[118]

Sovereign immunity is an integral part of protecting the tribes from suit.[119]

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109. *Id.* at 561. *See also* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) (finding state tax law did not apply to the Tribe).

110. 309 U.S. 506, 512 (1940).

111. *See* United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 382 (8th Cir. 1987).

112. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Sanderlin v. Seminole Tribe, 243 F.3d 1282 (11th Cir. 2001); Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe, 166 F.3d 1126 (11th Cir. 1999); Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989); *Davis II*, 199 F. Supp. at 1179.

113. *Santa Clara Pueblo*, 436 U.S. at 71 (finding that internal matters concerning the Tribe are to be litigated in tribal court); *contra Davis II*, 199 F. Supp. 2d at 1179 ("Although the Black Seminoles may seek to have their . . . claim heard on the merits through the Tribe's legislative or judicial bodies, the Court recognizes the reality of these options. The Court *finds it will be futile for the Black Seminoles to seek adjudication in these tribal forums.*") (emphasis added).

114. *Santa Clara Pueblo*, 436 U.S. at 58; Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1988) ("[A]n Indian Tribe is subject to suit only where Congress has authorized the suit or the Tribe has waived its immunity.").

115. *See, e.g.*, *Ex parte Young*, 209 U.S. 123 (1908) (holding that officials are not protected from suit by sovereign immunity for prospective relief). *See also Santa Clara Pueblo*, 436 U.S. at 59 (citing Puyallup Tribe v. Wash. Dep't. of Game, 433 U.S. 165, 171-172 (1977)); *but see* Anderson v. Las Vegas Tribe of Pauite Indians, 520 U.S. 1169 (1997) (finding that even if tribal officials acted outside their authority and discriminated against tribe members, they would not be subject to suit for unconstitutional acts).

116. *Santa Clara Pueblo*, 436 U.S. at 58; *Florida Paraplegic Ass'n*, 166 F.3d at 1130; EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 249 (8th Cir. 1993).

117. *Santa Clara Pueblo*, 436 U.S. at 58.

118. United States v. Dion, 476 U.S. 734, 739 (1986).

119. *See* Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 687 (1994); *see also* Pratt, *supra* note 19, at 116 ("The doctrine of tribal sovereignty seeks to preserve the historical inherent sovereignty of Native American tribes. By allowing Native American tribes to maintain control over their internal affairs and precluding states from interfering with tribal governance, the doctrine of tribal sovereignty promotes Indian self-governance, including tribal self sufficiency and economic development.").

Paying damages could lead to economic loss that might impair a tribe's ability to carry out governmental duties.[120] One tribal judge has noted the potentially devastating effects a damages verdict could impose on a tribal community:

> Critically important community interests are being protected by this immunity: Suits against the tribe seeking damages attack the community treasury. This money belongs to all the people of the... nation. It must be guarded against the attacks of individuals so that it can be used for the good of all in the tribal community. Secondly, any suit against the tribe forces the tribe to expend community monies in legal fees. The possible amounts that can be expended on this effort would be great if suits of this nature are not limited. Finally, the entire community stands to suffer irreparable harm if their leaders foreseeing possible liabilities at every action, are unable to fulfill the responsibility of their offices.[121]

Tribal sovereign immunity is one of the few remaining protections that ensures tribes will remain distinct nations and prevents further dilution of tribal authority by encroaching state law. However, tribes can abuse sovereign immunity in seeking to insulate themselves from anti-discrimination suits by their members.

III.
CIVIL RIGHTS ENFORCEMENT IN NATIVE AMERICAN TRIBES

The B.I.A.'s inconsistent actions vis-à-vis the Seminole and Cherokee Tribes' efforts to disenroll their Freedmen from membership demonstrate that the U.S. government has not consistently protected the Freedmen. This failure has forced the Freedmen to seek relief through direct suit in tribal courts. Such suits will be unsuccessful, because many tribal courts will most likely hold that the civil rights legislation does not apply to their tribe.[122] Additionally, the U.S. Constitution does not apply directly to Native American tribes the way it applies to the states and the federal government.[123] "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[124] Therefore, the Constitution applies to the tribes only to the extent that it expressly binds them or is made binding

120. *See* Limas, *supra* note 119, at 687 n.37 (citing Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153, 170-71 (1984)).

121. Moses v. Joseph, 2 Tribal C. Rep. A-51, A-54 (Sauk-Suiattle Tribal Ct. 1980) (copy on file with author).

122. *See Davis II*, 199 F. Supp. 2d at 1180 ("Although the Black Seminoles may seek to have their Judgment Fund Award claim heard on the merits through the Tribe's legislative or judicial bodies, the Court recognizes the reality of these options. The Court finds it will be futile for the Black Seminoles to seek adjudication in these tribal forums."). *See also infra note* 138 and accompanying text (giving examples of tribal courts' denying jurisdiction to the federal statutes).

123. Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971).

124. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

on them by treaties or acts of Congress.[125]

A. Indian Civil Rights Act

The U.S. Constitution does not protect individual tribe members from the actions of the tribal government, but the 1968 Indian Civil Rights Act (ICRA) grants tribe members statutory rights against their tribes that are comparable to the federal constitutional Bill of Rights.[126] Congress enacted the ICRA to prohibit tribal governments from violating the civil rights of their individual members.[127] As explained by the Senate Subcommittee on the Judiciary:

> The Department of the Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the Federal and State governments with several notable exceptions, viz., the Fifteenth amendment, certain of the procedural requirements of the Fifth, Sixth, and Seventh amendments, and, in some respects, the equal protection requirement of the Fourteenth amendment.[128]

The only remedy available for violation of the ICRA is a writ of habeas corpus, which provides no relief for civil plaintiffs.[129]

Despite this grant of statutory protection, federal courts have repeatedly held that tribes are not subject to suit in federal court by an individual tribal

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125. *Groundhog*, 442 F.2d at 678.

126. 25 U.S.C. § 1302 (2004) provides the following protections:

> No Tribe in exercising powers of self-government shall—(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances; (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized; (3) subject any person for the same offense to be twice put in jeopardy; (4) compel any person in any criminal case to be a witness against himself; (5) take any private property for a public use without just compensation; (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense; (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [or] a fine of $ 5,000, or both; (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; (9) pass any bill of attainder or ex post facto law; or (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

127. *See* Thompson v. New York, 487 F. Supp. 212, 229 (N.D.N.Y. 1979).

128. Summary of the Senate Subcommittee on the Judiciary Report on Dep't of Interior Substitute Bill Introduced in the 90th Congress, *quoted in* Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971) (citation omitted).

129. Runs After v. United States, 766 F.2d 347, 353 (8th Cir. 1985).

member alleging a violation of the ICRA.[130] Consider the landmark case *Santa Clara Pueblo v. Martinez*, in which a full-blooded female member of the Santa Clara Pueblo Tribe sued the Tribe for declaratory and injunctive relief under the ICRA's equal protection provision.[131] The plaintiff, whose daughter was not a full-blooded member, challenged the Tribe's policy of allowing sons and daughters of male members who married outside of the Tribe to become members while disallowing membership to sons and daughters of female members who married outside the Tribe.[132] This exclusion prohibited the plaintiff's daughter from voting in tribal elections, holding secular office in tribal government, remaining on the reservation in the event of her mother's death, or inheriting her mother's home or property interests in communal land of the Tribe.[133]

Instead of ruling on the merits, the Supreme Court affirmed the Tenth Circuit's ruling that the legislative history of the ICRA did not indicate congressional intent to permit the "additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent."[134] Nor did the ICRA implicitly authorize actions for declaratory or injunctive relief, because the only form of relief provided in the statute was a writ of habeas corpus.[135] The court concluded that tribal courts were the proper fora to vindicate rights under the ICRA.[136] In reality, few ICRA claims ever reach tribal courts.[137] Those cases that have are often dismissed by tribal courts based on a holding that the Tribe is immune from any federal civil rights guarantees, including the ICRA.[138] Thus, in many instances a tribal member could find herself without any forum in which to vindicate the rights created by the ICRA.

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130. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989).

131. *Santa Clara Pueblo*, 436 U.S. at 51.

132. *Id.* at 52-53.

133. *Id.*

134. *Id.* at 61, 72.

135. *Id.* at 72.

136. *Id.* at 65. *But see Davis II*, 199 F. Supp. 2d at 1169 (noting the futility of bringing a discrimination suit against a tribe in its own court).

137. *See* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 491 (1998) (claiming that ICRA claims were raised in fewer than five percent of the reported cases).

138. *See* Kinslow v. Bus. Comm. of the Citizen Band Potawatomi Indian Tribe, 1 Okla. Tribal Ct. Rptr. 174, 183 (1988) (questioning whether the ICRA even applies to the Tribe), *cited in* Christian M. Freitag, *Putting* Martinez *to the Test: Tribal Court Disposition of Due Process*, 72 IND. L.J. 831, 858 n.177 (1997). *But see* Jennifer S. Byram, *Civil Rights on Reservations: The Indian Civil Rights Act and Tribal Sovereignty*, 25 OKLA. CITY U. L. REV. 491, 497 (2000) (noting that the Cheyenne River Sioux Tribal Court and the Intertribal Court of Appeals of Nevada have held that the ICRA provides a remedy for civil rights violations).

B. Federal Civil Rights Enforcement Legislation

Congress has exclusive and plenary power to enact legislation with respect to Indian tribes.[139] However, many of the civil rights statutes passed by Congress have been found not to extend to Indian tribes.[140] Relevant to the analysis of the Freedmen's case are several cases involving federal civil rights legislation in which courts have restricted the application of the laws on the basis of tribal sovereign immunity,[141] including challenges under 42 U.S.C. §§ 1981-1983 (2005) and Title VI of the Civil Rights Act.[142] Federal courts have also refused to allow suits against tribes under civil rights statutes such as the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Rehabilitation Act of 1973.[143]

Nero v. Cherokee Nation reaffirmed tribal sovereign immunity as a defense against civil rights suits.[144] Mr. Nero, a Freedman, brought suit against the Cherokee Nation of Oklahoma under § 1981, Title VI, and the Treaty of 1866, alleging violations of his rights to vote in tribal elections and to participate in federal benefits programs.[145] The Tenth Circuit dismissed the

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139. *See Santa Clara Pueblo*, 436 U.S. at 58 ("Congress has plenary power to limit, modify, or eliminate the powers of local self government which tribes otherwise possess") (citing Talton v. Mayes, 163 U.S. 376, 384); Groundhog v. Keeler, 442 F.2d 674, 680 (10th Cir. 1971) (citing Stephens v. Cherokee Nation, 174 U.S. 445, 488 (1899)). *See* Smart v. State Farm Ins. Co., 868 F.2d 929, 932 (7th Cir. 1989) ("Their sovereignty is not absolute, for Congress has plenary power to limit, modify or even eliminate the powers of self-governance which Tribes may have traditionally possessed.") (citing, *inter alia*, *Santa Clara Pueblo*, 436 U.S. at 56; FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 282 (1982 ed.)). Unlike the States, Indian Tribes possess limited sovereignty, "subject to complete defeasance" by Congress. Rice v. Rehner, 463 U.S. 713, 719 (1983).

140. *But see infra* notes 188-192 and accompanying text (applying statutes of general jurisdiction to the Indian tribes under the *Tusacora* Rule exception).

141. Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701, 709 (2003) (finding that § 1983 does not abrogate tribal sovereignty); Delaunay v. Collins, 97 F. App'x 229 (10th Cir. 2004) (allowing suit against individual tribal members under § 1981 and § 1982); Nero v. Cherokee Nation, 892 F.2d 1457, 1463 (10th Cir. 1989) (concluding that § 1981 does not abrogate Indian sovereignty); Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980) (holding that sovereignty prevented application of Title VII prohibitions on discrimination in employment), *overruled by* 42 U.S.C. § 2000e (applying Title VII to Indian tribes); Stroud v. Seminole Tribe, 606 F. Supp. 678 (S.D. Fla. 1985) (holding that sovereign immunity precluded a plaintiff's § 1981 suit against the tribe); *but see* Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F. Supp. 85 (D. Mont. 1969) (finding that Indian tribal member's suit against the tribe under ICRA was a valid suit and denying the Tribe's motion to dismiss).

142. 42 U.S.C. § 2000d (2006).

143. *See* Sanderlin v. Seminole Tribe, 243 F.3d 1282, 1287 (11th Cir. 2001) (finding the Tribe did not waive its sovereign immunity from suit by accepting federal funds in order to comply with the Rehabilitation Act of 1973, 29 U.S.C. § 701); Fla. Paraplegic Ass'n v. Miccosukee Tribe, 166 F.3d 1126, 1133 (11th Cir. 1999) (holding that Title III of the ADA applies to Native American tribes but does not waive tribal sovereign immunity from suit); EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 251 (8th Cir. 1993) (holding that the ADEA does not apply to tribes).

144. *Nero*, 892 F.2d 1457; *but see* Treaty with the Cherokee, *supra* note 14, art. 8.

145. *Nero*, 892 F.2d at 1458.

Treaty of 1866 claim, holding that the treaty did not convey a right to sue but merely a substantive constraint on the Tribe.[146] The court then dismissed the § 1981 and Title VI claims on sovereign immunity grounds, citing "the Tribe's right to self-governance in a purely internal matter."[147] The court went on to note that allowing a plaintiff to allege race discrimination with regards to the way a tribe decided membership would "in effect eviscerate the tribe's sovereign power to define itself, and thus would constitute an unacceptable interference 'with a tribe's ability to maintain itself as a culturally and politically distinct entity.'"[148]

In *Stroud v. Seminole Tribe*, a Florida district court held that tribal sovereign immunity precluded the plaintiff's employment discrimination claim under § 1981.[149] The court reasoned that Congress did not expressly or impliedly extend § 1981 to the employment practices of Indian tribes, particularly those that involved preferential treatment for Indians over non-Indians.[150] A Montana district court ruled similarly in *Spotted Eagle v. Blackfeet Tribe of the Blackfeet Indian Reservation*, dismissing the nine plaintiffs' civil suit under § 1981 because in its original form as the Civil Rights Act of 1870, that statute had only "concerned... the rights of the recently liberated Negroes."[151] Because in 1870 the "only law governing the daily affairs of many of the western Indians was the tribal law.... Section 1981 cannot govern inter-tribal relationships."[152] Moreover, the court reasoned that because an "Indian person is subject to tribal law and the white person is not, Indians and whites are not treated equally as required by Section 1981 and cannot be unless tribal powers are extinguished."[153]

In summary, federal courts have met attempts to enforce civil rights laws against sovereign tribes with great opposition. And as discussed in Part II, early attempts to sue the U.S. government to protect tribal minority members proved fruitless. Federal courts have been particularly reluctant to enforce general laws that would regulate "internal matters" such as tribal membership. Tribal sovereign immunity has protected the interest of tribes in precluding non-members from "suing their way in" to gain tribal membership and thus access to tribal benefits. In order to seek a remedy against disenfranchisement and removal, then, the Freedmen must convince a court that Congress intended

146. *Id.* at 1461.

147. *Id.* at 1462-63.

148. *Id.* at 1463 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978)).

149. 606 F. Supp. 678, 679-80 (S.D. Fla. 1985) (citing Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980)).

150. *Id.*

151. 301 F. Supp. 85, 88 (D. Mont. 1969). The plaintiffs sought punitive damages and an injunction against use of the tribe's jail.

152. *Id.*

153. *Id. But see* Delaunay v. Collins, 97 F. App'x 229 (10th Cir. 2004) (upholding a ruling in favor of a suit against a tribe under § 1981 and § 1982).

to abrogate tribal sovereign immunity in cases alleging wrongful exclusion from tribal membership and violations of core civil rights like franchise. The following Part analyzes the Thirteenth Amendment and its enforcement power through legislation such as the 1866 treaties as demonstrating congressional intent to abrogate tribal sovereign immunity with regard to the rights of the Freedmen of formerly slave-holding tribes.

IV.
USING THE THIRTEENTH AMENDMENT TO ACHIEVE EQUAL RIGHTS FOR FREEDMEN

A. Abrogation of Tribal Sovereign Immunity

The Thirteenth Amendment bans slavery and involuntary servitude and vests Congress with the "power to enforce this article by appropriate legislation."[154] The framers' intent for the Amendment was much broader and more radical than its actual language. Unlike any other constitutional provision, the Thirteenth Amendment is understood to apply to both private and public entities.[155] Courts interpret the first section to be self-actuating.[156] Therefore, any claim based solely on the Thirteenth Amendment can only challenge conditions of servitude.[157] While suits invoking the Fourteenth or

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154. U.S. CONST. amend. XIII, §§ 1, 2.

155. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422-36 (1968) (holding that the Thirteenth Amendment reaches private as well as public forms of discrimination); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1872) (describing the Thirteenth Amendment as a "grand yet simple declaration of the *personal freedom of all the human race within the jurisdiction of this government*") (emphasis added). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-13, at 333 (2d ed. 1988); Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 375 (1995) ("Read literally, the Thirteenth Amendment touches any private action that results in personal slavery or involuntary servitude.").

156. *See* Civil Rights Cases, 109 U.S. 3, 20 (1883):

> This amendment, as well as the fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable *to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom.* Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States (emphasis added).

See also Alma Soc'y v. Mellon, 601 F.2d 1225, 1238 (2nd Cir. 1979) (finding that the Thirteenth Amendment's ban on badges and incidents of slavery must be realized through enforcement legislation).

157. *See* Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting) (arguing that the Thirteenth Amendment was "inadequate to the protection of the rights of those who had been in slavery"). Justice Harlan noted that the Fourteenth Amendment was meant to pick up where the Thirteenth Amendment left off. *Id.* This approach offers no benefit to the Freedmen, however, because the Fourteenth Amendment only protects against State action. *See Alma Soc'y*, 601 F.2d

Fifteenth Amendments—both of which explicitly require state action—cannot reach the actions of an Indian tribe, the Thirteenth Amendment can be a tool to overcome civil rights violations that rise to the level of a badge or incident of slavery by formerly slaveholding tribes against their members who are descendants of those slaves, because the Amendment's prohibitions are applicable everywhere within the jurisdiction of the United States.[158]

The Thirteen Amendment's protection extends beyond involuntary servitude to actual discrimination.[159] In an early interpretation of the scope of the new amendment, the Supreme Court concluded that the second enforcement section, combined with the Civil Rights Act of 1866, gave Congress the power to redress the "badges and incidents of slavery"[160] as well as the power to enforce the explicit ban against slavery and involuntary servitude.[161] But in so holding, the Supreme Court, in order to narrow the potentially broad reach of

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at 1237 ("The Court has directly invoked the [Thirteenth] Amendment only to strike down state laws imposing the condition of peonage."); Harrigan v. Sebastian's on the Waterfront, Inc., 629 F. Supp. 102, 103 n.1 (D.V.I. 1985) ("The Court observes that claims based upon the Thirteenth Amendment . . . as opposed to statutes enacted under its enabling clause must allege some form of compulsory, enforced labor without option.").

158. *See supra* note 155 and accompanying text. *See also infra* notes 166 and 171 and accompanying text (discussing federal courts' application of the Thirteenth Amendment to tribes within the United States).

159. *See Jones*, 392 U.S. at 431-32 (explaining the history of the Civil Rights Act of 1866, Pub. L. 39-31, 14 Stat. 27). *See also* Kares, *supra* note 155, at 376 ("Congress enforces the Thirteenth Amendment when it prohibits conduct or laws that subject individuals to the same type of degradation that slavery imposed. These conditions are called 'the badges of slavery' or sometimes 'badges of servitude.'"). The Black Codes passed by southern states after the Thirteenth Amendment were what Congress considered as "badges of servitude." *Id.* These Codes prevented blacks form owning property or suing in courts. *Id.* at 376 n.19 (explaining that the phrase "badges of slavery/servitude, came into being during congressional debates on the ratification of the Thirteenth Amendment"); *cf. id.* at 377-78 (noting that courts sought to limit this particular use of the Thirteenth Amendment soon after its ratification):

> [T]he Civil Rights Cases struck down federal legislation purporting to create a claim for money damages on behalf of anyone denied equal access to "accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement." The Supreme Court stated that actionable conduct under the Amendment included only "the inseparable incidents of the institution" of slavery such as "[c]ompulsory service of the slave for the benefit of the master, restraint of his movements . . . [and] disability to hold property." (citations omitted, brackets and ellipses in original).

See also id. at 375 ("Courts have reduced the self-executing power of the Amendment's first section through limiting constructions."); Geri J. Yonover, Note, *Dead-End Street: Discrimination, the Thirteenth Amendment, and Section 1982*, 58 CHI.-KENT L. REV. 873, 874 (1982) ("[T]he Supreme Court decisions in the Civil Rights Cases . . . progressively contracted the reach of congressional power under the amendment.").

160. *See Civil Rights Cases*, 109 U.S. at 28.

161. *Id.* at 20 (1883) (discussing congressional authority under U.S. CONST. amend XIII and the Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (1866) (now codified at 42 U.S.C. § 1982 (1976))). *See also Jones.*, 392 U.S. at 431-32 (explaining the history of the Civil Rights Act of 1866). Senator Trumbull's bill, as the senator pointed out, would "'destroy all the discriminations' embodied in the Black Codes." *Id.* at 432 (citation omitted).

the Amendment's protections, initially claimed for itself the sole power to define what constituted the badges and incidents of slavery.[162] Almost one hundred years later, in *Jones v. Alfred H. Mayer Co.*, the Court accepted Congress's own "power under the Thirteenth Amendment... to determine what are the badges and the incidents of slavery,"[163] but it soon thereafter reined in this grant of deference. In *Palmer v. Thompson*, the Court reiterated that de facto segregation in public schools does not fall within the realm of conduct prohibited by the Thirteenth Amendment, once again limiting the scope of what public and private action falls within the badges and incidents of slavery.[164] Therefore, in order to bring a discrimination suit under the Thirteenth Amendment, a litigant must do so under congressionally established, ancillary enforcement legislation.[165]

Despite these restrictions, courts have held that the Thirteenth Amendment prohibits involuntary servitude on Native American reservations.[166] In a late nineteenth century case, an Alaskan Native sought emancipation under the Thirteenth Amendment.[167] The slave's master, also an Alaskan Native, claimed that the new civil rights laws, including the Thirteenth Amendment, did not reach him or his tribe because his community's rules and customs, which included the selling and holding of slaves, were independent of any other law, authority, or jurisdiction.[168] The district court disagreed, concluding that the Thirteenth Amendment's ban on slavery extended to tribes,

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162. *Civil Rights Cases*, 109 U.S. at 24; Yonover, *supra* note 159, at 874.

163. *Jones*, 392 U.S. at 440; *id.* at 443-44 (concluding that the ends and means of § 1982 are legitimate exercises of congressional power). *See also* District of Columbia v. Carter, 409 U.S. 418, 422 (1973) ("[I]t cannot be doubted that the power vested in Congress to enforce [the Thirteenth] Amendment includes the power to enact laws of nationwide application. . . . [including enacting a statute that] was intended to outlaw racial discrimination in the sale or rental of property in the District of Columbia as well as elsewhere in the United States.").

164. 403 U.S. 217, 226-27 (1970) ("To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history. Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a lawmaking power far beyond the imagination of the amendment's authors.").

165. *Palmer*, 403 U.S. at 226-27; *Alma Soc'y*, 601 F.2d at 1237 ("The Court has never held that the Amendment itself, unaided by legislation . . . reaches the 'badges and incidents' of slavery as well as the actual conditions of slavery and involuntary servitude."). *See also* Kares, *supra* note 155, at 380 (noting that federal legislation may create a cause of action against conduct Congress perceives to be a badge of slavery); *id.* at 412 n.37 (arguing that § 1981 and § 1982 are examples of federal legislation that create a cause of action against badges and incidents of slavery and including § 1983 within the realm of legislation authorizing a plaintiff to assert a right to be free from involuntary servitude).

166. *Davis II*, 199 F. Supp. at 1168 ("Following the Civil War the Black Seminoles were emancipated by the Thirteenth Amendment of the United States Constitution."); Seminole Nation v. United States, 78 Ct. Cl. 455, 460 (1933) ("The treaty did not make the Indian slave freedmen. That was accomplished three years before the treaty was signed."); *In re* Sah Quah, 31 F. 327, 331 (D. Alaska 1886) (holding that the Thirteenth Amendment applied to Alaskan Native tribes).

167. *In re Sah Quah*, 31 F. 327.

168. *Id.* at 327-28.

and ordered the plaintiff's freedom.[169] The court noted the unique nature of the Amendment as "brief but broad in scope" with "language [that] is sweeping and far reaching."[170] A line of cases reaffirms *In re Sah Quah*'s core holding that the Thirteenth Amendment applies to Native American tribes, at least insofar as it bans involuntary servitude.[171] But although these cases establish that the Thirteenth Amendment applies to Native American tribes, two questions remain unsettled: (1) whether the current disenfranchisement actions constitute a badge and incident of slavery; and (2) whether the ancillary enforcement legislation abrogates tribal sovereign immunity. I would answer both questions in the affirmative, as developed in the following sections.

B. Disenfranchisement as a Badge and Incident of Slavery

Courts should find that disenfranchisement of and denial of membership to the Freedmen constitutes a badge and incident of slavery for several reasons. First, the actions deny the Freedmen property on the basis of their race.[172] As noted before, because Seminole and Cherokee tribal members with white blood received full-blood status, their descendants have not been denied access to any property, including the Judgment Fund in the Seminole case and federally funded programs in the Cherokee case.[173] Freedmen in both tribes have not enjoyed the same rights. The Seminole Freedmen and the Cherokee Freedmen have also been denied the right to vote.[174] Although voting is not a right under the Thirteenth Amendment, it is a civil right that cannot be denied on account of race. Because denial of civil rights that are enjoyed by other citizens on account of race is a badge and incident of slavery, it follows that denial of the right to vote in this case is also a badge and incident of slavery.[175]

The Seminole Tribe's rationale for denying the Freedmen's property rights reveals the potentials of a litigation strategy grounded in the Thirteenth

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169. *Id.* at 331.

170. *Id.* at 330.

171. United States v. Choctaw Nation, 193 U.S. 115, 123 (1904) ("It is urged that the negroes became free by the . . . Thirteenth Amendment to the Constitution of the United States, and acquired thereby all the rights of freemen. That may be granted . . . ."). *See generally* Allen v. Trimmer, 144 P. 795, 797 (Okla. 1914); Seminole Nation v. United States, 90 Ct. Cl. 151, 152 (1940) (explaining that the United States desired to abolish slavery within the tribes).

172. *See* Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (1866) (banning denial of the rights to property as enjoyed by white persons); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968) (noting that "the badges and incidents of slavery—its 'burdens and disabilities'—included restraints upon those fundamental rights which are the essences of civil freedom . . . namely the right to inherit, purchase, lease, sell, and convey property") (citation omitted).

173. *See supra* Parts I.A., I.B.

174. *See supra* Parts I.A., I.B.

175. "Any statute which is not equal to all, and which deprives any citizen of *civil rights*, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited." CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Senator Trumbull), *quoted in* Slaughterhouse Cases, 83 U.S. 36, 92 (1873) (Field, J., dissenting) (emphasis added).

Amendment.[176] The Tribe claims that it is denying the Freedmen property because black Seminoles were not citizens of the Tribe in 1823.[177] However, if they were not members of the Tribe or of the United States,[178] then the Freedmen were property.[179] Therefore, the Tribe is actually using the Freedmen's prior condition of slavery—and not their lack of tribal citizenship—to deny them a share in the Judgment Fund. Clearly using the slave status of one's ancestors to deny that person property is the very sort of badge or incident of slavery that Congress sought to eliminate by passing the Thirteenth Amendment and its enforcement legislation.[180]

Although a court might concede that the Thirteenth Amendment applies to Native American tribes and that the current disenfranchisement constitutes a badge or incident of slavery, the actual abrogation of tribal sovereign immunity might still give the court pause. As noted above, in many instances courts will not apply the ancillary legislation needed to enforce the Thirteenth Amendment to Indian tribes.[181] This would render useless the application of the Thirteenth Amendment to tribes as a guarantee of anti-discrimination. However, some courts have allowed civil rights suits seeking prospective injunctions against tribe officials.[182] Therefore, because courts traditionally have been reluctant to

176. *See* Civil Rights Act of 1866, *supra* note 172 (granting the right to equally share in property interests as white citizens irrespective of prior condition of slavery or servitude); *see also* Part I.A. (explaining that the Seminole Tribe denied the Freedmen descendants' right to the Judgment Fund because their ancestors, as slaves, had been unable to partake in property ownership in 1823).

177. *Davis II*, 199 F. Supp. 2d at 1170.

178. Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1856).

179. *See Davis II*, 199 F. Supp. 2d at 1171-72 (explaining that the refusal to allow the Seminole Freedmen to partake in the Judgment fund is based on the premise that before the Seminole Treaty of 1866 the Freedmen were deemed property). The Seminole Nation as "it existed in 1823" excluded Freedmen, although they were one of the U.S. government's primary reasons to taking the land in the first place. There was a large economic incentive to force the Freedmen into slavery for white plantation owners. *Id. See also* Pearson, *supra* note 31, at 612 (discussing U.S. slave holders finding the "uppity" Black Seminoles a problem); *id.* at 615-16 (discussing the Seminole Wars as an attempt to preserve slavery: "Georgia slave holders feared that Black Seminole camps could end their current slave system. To alleviate this threat [they] . . . planned to annex Florida.").

180. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1963); Kares, *supra* note 155, at 412 n.9.

181. *See, e.g.*, Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701, 709 (2003) (finding that § 1983 does not apply to tribes); Nero v. Cherokee Nation, 892 F.2d 1457, 1463 (10th Cir. 1989) (concluding that § 1981 and Title VI of the 1964 Civil Rights Act do not abrogate Indian sovereignty); Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980) (holding that sovereignty prevented application of Title VII prohibitions on discrimination in employment), *overruled by* 42 U.S.C. § 2000e (2000) (applying Title VII to Indian tribes). *See also* Stroud v. Seminole Tribe, 606 F. Supp. 678 (S.D. Fla. 1985) (holding that sovereign immunity precluded a plaintiff's § 1981 suit against the tribe).

182. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) ("[A]s an officer of the Pueblo, [the tribal official] is not protected by the tribe's immunity from suit"); Delaunay v. Collins, 97 F. App'x 229 (10th Cir. 2004) (allowing suit under § 1981 and § 1982 against individual tribal members). *But see* Pratt, *supra* note 19, at 123 (noting that such an avenue would

abrogate tribal sovereign immunity—particularly with regards to membership—it will be difficult, though I believe not impossible, to convince a court to recognize a Thirteenth Amendment abrogation of the tribes' immunity.

C. *The Thirteenth Amendment's Ancillary Enforcement Legislation*

If courts acknowledge that the Thirteenth Amendment reaches tribes, then so too does the ancillary enforcement legislation, which includes the treaties. Courts should hold, then, that the ancillary legislation abrogates tribal sovereign immunity in the context of the Freedmen's suits for full membership rights, for two reasons: (1) Congress already interfered with their right to control their membership by negotiating treaty requirements that the tribes make their former slaves members; and (2) courts can create a narrow exception to allow the Freedmen's claims without opening the tribes up to non-related damages suits because of the uniqueness of the Freedmen's case.

1. Congress Already Abrogated the Tribes' Sovereign Immunity with Regards to the Freedmen's Membership

Courts may still refuse to find an abrogation of the Seminole and Cherokee Tribes' sovereignty immunity because of the enforcement statutes' silence concerning their application to tribes. In *Nero*, for example, the Tenth Circuit held that because membership was an internal matter for tribes, the congressional enforcement legislation did not reach tribal action.[183]

But the court's analysis was incomplete, because it did not consider legislation passed at the time the tribes signed the 1866 treaties,[184] nor did it consider congressional plenary power with regards to tribal membership.[185] According to a legal principle known as the *Tuscarora* Rule, laws of general application are binding on tribes.[186] In attempts to protect tribal sovereignty,

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be fruitless if "tribal officials who deny membership in accordance with tribal law and U.S. federal law are not acting outside their scope of authority"). The result would be to preclude suit; *See, e.g.*, Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997).

183. *See Nero*, 892 F.2d at 1463 .

184. United States v. Dion, 476 U.S. 734, 739 (1986) (finding that a clear intent to abrogate tribal sovereign immunity can be found from "clear and reliable evidence in the legislative history of the statute."); EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 250 (8th Cir. 1993) (concluding that "some affirmative evidence of congressional intent, either in the language of the statute or its legislative history, is required to find the requisite 'clear and plain' intent to apply the statute to Indian tribes") (citation omitted).

185. Groundhog v. Keeler, 442 F.2d 674, 680 (10th Cir. 1971) (finding it "well settled that Congress has plenary control over Indian tribal relations and property . . . . [and] that such plenary power . . . included the power to regulate and determine tribal membership, and in so doing to define and describe those persons who should be treated and regarded as members of an Indian Tribe.").

186. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960); *see also* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115-16 (9th Cir. 1985) (adopting the proposition that Indian tribes are not just subject to those laws of the United States expressly made

the lower federal courts have created three exceptions to the *Tuscarora* Rule, any one of which defeat the application of a specific federal statute to an Indian tribe. Courts will not apply the federal law if doing so would: (1) abrogate rights found in a treaty; (2) contravene congressional intent to exempt tribes, as inferred from legislative history; or (3) interfere with tribes' right of self-government in purely internal matters.[187]

But analysis of the Freedmen's case using the exceptions to the *Tuscarora* Rule, contrary to the *Nero* court's analysis, actually demonstrates that the statute in question does apply to the tribes and that Congress intended for the Thirteenth Amendment's enforcement legislation to abrogate tribal sovereign immunity with regards to the Freedmen's membership and equal protection. First, concerning the treaty rights, the Freedmen can show that application of the enforcement legislation actually helps to assure their rights and to ensure the promises contained in the Seminole and Cherokee Treaties of 1866.[188] In *Nero*, the Tenth Circuit, in analyzing the treaty protection language, did not find an "unequivocal expression of waiver" by the Cherokee Nation of its tribal sovereign immunity.[189] Such language merely placed "substantive constraints" on the Tribe.[190] The Tenth Circuit's brief analysis of the Cherokee Treaty of 1866 not only ignored the rights conveyed to the Freedmen but also ignored proof of legislative intent—the second prong of the *Tuscarora* Rule—that the treaty was meant to protect the Freedmen and to abrogate the Tribe's sovereign immunity. Article VII of the Treaty, for example, grants original federal jurisdiction over all causes of action concerning the Treaty of 1866, but the Tenth Circuit ignored this provision.[191] The general provision banning involuntary servitude and a provision that assures equal protection for the Freedmen,[192] along with the grant of federal court jurisdiction, demonstrate more than a "substantive constraint" on the Tribe.

In order for a statute to abrogate tribal sovereign immunity, a court must discern some affirmative evidence of congressional intent in the language of the statute, the legislative history, or the "surrounding circumstances."[193] In *Jones v. Alfred H. Mayer Co.*, the Court found that § 1982 was the modern manifestation of the Civil Rights Act of 1866. Given that the Civil Rights Act of 1866 was passed within one month of the Seminole Treaty of 1866 and

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applicable to them).

187. *Tuscarora Indian Nation*, 362 U.S. at 116.

188. *Compare* Treaty with the Seminole, *supra* note 14, art. 2, *and* Treaty with the Cherokee, *supra* note 14, art. 9, *with* § 1981 (providing for equal treatment with regards to contracts), § 1982 (providing for equal treatment with regards to property rights, *and* § 1983 (assuring equal treatment under the law).

189. *See* Nero v. Cherokee Nation, 892 F.2d 1457, 1460 (1989).

190. *Id.* at 1461.

191. Treaty with the Cherokee, *supra* note 14, art. 7. The court may have ignored this analysis because it was not raised by the Freedmen at that time.

192. *Id.*, art. 9; Treaty with the Seminole, *supra* note 14, art. 2.

193. *See supra* note 118 and accompanying text.

within two months of the Cherokee Treaty of 1866, one could argue that the treaties, like the 1866 Civil Rights Act, were part of the enforcement documents themselves, passed to extend the Civil Rights Act protections to reservations. In this manner, through the treaty process Congress both solidified the Thirteenth Amendment's ban on slavery on the reservations and granted the Freedmen equal rights and permanent membership by incorporating the protective provisions of the Civil Rights Act into the 1866 treaties. Given that until the last quarter of the nineteenth century Congress relied on treaties as its primary tool to conduct relations with Indian tribes,[194] it was therefore through treaties that Congress sought to rid Indian country of involuntary servitude and the badges and incidents of slavery.[195] The purpose of the Civil Rights Act of 1866 was to assure equal treatment for the newly freed men and women in the United States.[196] Congress has passed subsequent legislation on behalf of the Freedmen to assure their equal protection when tribes have tried to take it away.[197] These factors demonstrate a congressional intent to protect the Freedmen and their descendants' right to equal treatment by the tribes

194. See Carol Tebben, *An American Trifederalism Based Upon The Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 340 (2003) (explaining that when the Civil Rights Act of 1866 "was written, the United States was still making treaties with tribal nations as independent sovereigns."). It was not until 1871 that Congress ceased governing Indian tribes through treaties. *See* Act of Mar. 3, 1871, Pub. L. No. 41-120, 16 Stat. 544 (1871).

195. *See* Jackson v. United States, 34 Ct. Cl. 441, 445 (1899) ("At the time of this [Thirteenth] amendment to the Constitution commissioners were negotiating a treaty with . . . Indians . . . in furtherance of the national policy of abolishing slavery."); Kares, *supra* note 155, at 412 n.20 (noting that Congress was countering the discrimination the Freedmen were facing when it passed the enforcement legislation).

196. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (finding that the Thirteenth Amendment's enforcement legislation was to eliminate all forms racial discrimination with regards to property acquisition). One court has held that the Freedmen were not citizens of the United States until the Fourteenth Amendment's ratification in 1868. *See Jackson*, 34 Ct. Cl. at 445-46 (finding that a Freedman was not a citizen of the United States in 1867 because the Fourteenth Amendment was still under consideration at the time of the signing of the treaty with the Choctaw and Chickasaw Nation in 1866). *Jackson* addressed the Indian Deprivation Act, which allowed U.S. citizens to bring suit against a tribe for loss or damage of property. *Id.* at 442 (discussing the Act of Mar. 3, 1891, 26 Stat. L., p. 851). The court ruled that the Freedman could not bring suit under the act because he was not a U.S. citizen at the time. *Id.* at 445. This actually then bolsters the argument that the Freedmen can bring suit under their treaties, which I argue constitute Thirteenth Amendment enforcement legislation, tailored to apply to Indian tribes. *See id.* at 442-44 (finding that the Freedman was a citizen of the Choctaw Nation by virtue of the 1866 Treaty). This ruling would only prevent the Freedmen from benefiting from the protection of the Civil Rights Act of 1866, which applies to U.S. citizens. It would not remove them from the protection of the 1866 treaties, as enforcement legislation. I also note that ironically, no African Americans were citizens in 1866. This one court's analysis, therefore, would void the Civil Rights Act of 1866 in its entirety and would preclude protection under that statute for all African Americans, because none became citizens of the United States until 1868. This understanding would be inconsistent with congressional intent: the legislative history of the Act shows that Congress intended to eliminate the badges and incidents of slavery, irrespective of the actors. *See Jones*, 392 U.S. at 440.

197. Cherokee Freedmen, Pub. L. No. 50-1211, 25 Stat. 608 (1888) (overruling the Cherokee Nation's exclusion of Freedmen and other adopted members from property interests).

through the 1866 treaties as enforcement legislation under the Thirteenth Amendment's ban on the badges and incidents of slavery.

Finally, notwithstanding the Tenth Circuit's holding in *Nero* that applying federal civil rights legislation would interfere with the tribes' exclusive right to decide membership, the Supreme Court has determined that "included in Congress's plenary power over the tribes is the power to regulate and determine tribal membership, and in so doing to define and describe those persons who should be treated and regarded as members of an Indian Tribe."[198] Arguably, this is the same power Congress exercised in 1866 when it officially made the Freedmen members of the tribes through the Seminole and Cherokee Treaties.[199] Indeed, the Dawes Rolls, which have defined tribal membership for generations, were a product of a Commission set up by Congress.[200] This Commission, charged with determining membership of the tribes, had permission to exclude and include potential tribal members.[201]

Finally, courts should recognize that although tribal membership is normally a purely internal matter, federal intervention is inherent in the formerly slaveholding tribes' relationship with their Freedmen. Their membership was dictated by treaties through which Congress required them to make the former slaves full members. Thus, allowing suit to enforce the Thirteenth Amendment or its ancillary legislation does not intrude on tribal sovereignty in these limited circumstances: the intrusion occurred in 1866. A present day action in federal court would merely fulfill the will of Congress in ratifying those treaties. Contrary to the *Nero* court's conclusion, applying the *Tuscarora* Rule and its exceptions would allow the Thirteenth Amendment's ancillary legislation to be applied to the formerly slaveholding tribes when Freedmen are attempting to enforce the equal rights provisions of the 1866 treaties.

2. The Freedmen's Situation is Distinguishable from Prior Case Law and Application of the Thirteenth Amendment's Civil Rights Enforcement Legislation Will Not Irreparably Harm Tribal Sovereign Immunity

The Freedmen's case is *sui generis*. Their history as well as their racial background has distinguished their situation from prior cases that denied federal jurisdiction to other plaintiffs who have tried to sue tribes in federal

198. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary power to limit, modify, or eliminate the powers of local self government which the tribes otherwise possess") (citing Talton v. Mayes, 163 U.S. 376, 384 (1896)); Groundhog v. Keeler, 442 F.2d 674, 680 (10th Cir. 1971) (citing Stephens v. Cherokee Nation, 174 U.S. 445, 488 (1899)).

199. *Stephens*, 174 U.S. at 488.

200. *Id.* (finding that Congress's creation of the Dawes Commission was a legitimate exercise of its power to define membership).

201. *Id.*

court. Unlike prior litigants discussed above, treaties between the tribes and the U.S. government confirm the existence of the Freedmen's civil rights and federal court jurisdiction over suits against their tribes. The language of the treaties indicates that the Thirteenth Amendment was meant to apply to the tribes as a ban on both involuntary servitude and the badges and incidents of slavery.[202] The Freedmen are descendants of a distinct class of newly freed men and women whom Congress intended to protect because their residence with tribes made them "'subject to the jurisdiction' of the United States [and] subject to the jurisdiction of a semi-independent nation."[203] The ancestors of today's Freedmen were freed with the Thirteenth Amendment and protected by its enforcement legislation, particularly against the tribes' current efforts to deny them property and voting rights. The fact that their predecessors were members of tribes did not lessen congressional intent to protect them,[204] but merely demonstrates why Congress protected them initially through treaties.

In allowing the Freedmen's suit the courts will be opening a very narrow window guided by the language of the treaties. The Cherokee Treaty contained a provision allowing for suit in federal court.[205] The Seminole Treaty, while it contains a jurisdiction clause, does assure protection for Freedmen living among the Seminole Tribe.[206] Because the Freedmen are a unique class of litigants who have treaty protection, allowing their suit cannot open the Seminole and Cherokee Tribes to more suits by non-Freedmen, thus leaving tribal sovereign immunity intact.[207] The Thirteenth Amendment will only apply directly where there is a history of some involuntary servitude.[208] When there are cases of the badges and incidents of slavery, the litigant must show

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202. *See* Treaty with the Cherokee, *supra* note 14, art. 9; Treaty with the Seminole, *supra* note 14, art. 2. Both treaties establish that the Tribes would no longer have slavery and would treat the Freedmen as equal members. *See also* Seminole Nation v. United States, 90 Ct. Cl. 151, 153 (1940) (asserting that the Tribe "understood and knew that the rights which they were granting to their former slaves by this treaty were equal rights in all tribal property as well as civil and other rights."). *See, e.g.*, Act of Oct. 19, 1888, Pub. L. No. 50-1211, 25 Stat. 608 (1888) (legislating that the Freedmen were equal members of the Cherokee Tribe and would equally partake in monies owed to the Tribe for any sale of land).

203. *See* Jackson v. United States, 34 Ct. Cl. 441, 444 (1899) (citation omitted).

204. Act of Oct. 19, 1888, *supra* note 202 (invalidating exclusionary legislation by the Cherokee Tribal Council and requiring the Tribe to share its assets with Freedmen, Shawnees, Delawares, and intermarried whites).

205. Treaty with the Cherokee, *supra* note 14, art. 7.

206. *See* Treaty with the Seminole, *supra* note 14, art. 2 ("And inasmuch as there are among the Seminoles many persons of African descent and blood . . . these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens . . . .").

207. Without an abrogation by Congress or the Tribe, these litigants could not abrogate tribal sovereign immunity. *See* Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971). Ironically, by linking membership and voting rights to blood quantum the tribes could be opening up their membership to African Americans who may meet the blood quantum but do not know, respect, or cherish the tribe's culture and history as the Freedmen do.

208. See *supra* notes 155-57 and accompanying text.

that Congress intended the enforcement legislation to protect her as the member of a class.[209] There are few litigants who can meet such requirements in the majority of Indian tribes in the United States, because although many people are descended from slaves, very few were granted protection or membership in Indian tribes through treaties.[210] Therefore, the Freedmen are the only litigants who could use such an avenue to abrogate tribal sovereign immunity. Federal courts could also limit the Freedmen descendants' ability to seek redress from the tribes by allowing only suits for prospective injunctive relief enjoining tribal officials or individual members from interfering with or denying Freedmen's membership rights. Such a remedy would greatly benefit the Freedmen. Upon regaining their membership, Freedman would again enjoy core rights, including franchise and property rights.

CONCLUSION

Freedmen have been a part of Native American tribes for generations, since before the treaties of 1866. The treaties made their membership official,[211] and the treaty language shows they were to remain an equal part of the tribes into perpetuity.[212] Despite their promise made to the United States and to the Freedmen, the Cherokee and Seminole Tribes have systematically tried to deny the Freedmen equal treatment. [213] For many Freedmen, this is a fight over money.[214] For many full-blooded Native Americans, it is a fight over self-identification and sovereignty, including the sovereignty to determine tribal membership.[215] In this Comment I do not intend to attack or critique the application of sovereign immunity generally to protect Indian tribes. I acknowledge the important role of this doctrine for ensuring self-determination, welfare, and safety of the tribes.[216] The focus of this Comment has been an

209. *See generally* United States v. Dion, 476 U.S. 734, 739 (1986).

210. Arguably, most African Americans are descended from slavery but opening the tribes up to suit from the Freedmen's descendants will not open the tribe to suit from any African American with a percentage of Native American blood. The rights established in the treaty again highlight a narrow class of litigants: the Freedmen of 1866 and their descendants who are living under the laws and jurisdiction of the Cherokee and Seminole Nations. Thus it would seem ironic that the Seminole Nation of Oklahoma, and the Cherokee Nation of Oklahoma would look at blood quantum, when doing so would allow African Americans throughout the United States to become members instead of only the small class of Freedmen.

211. *Davis II*, 199 F. Supp. 2d at 1168.

212. *Norton II*, 223 F. Supp. at 134.

213. *See supra* Part I.

214. *See* Keilman, *supra* note 3 ("'If it wasn't for the money, everybody would be in harmony. . . . When the money came, people started to change.'") (quoting Crockett, a Freedman descendant).

215. *Id.* ("'If someone is not an Indian by blood, you can't make them that way. There is no way you can change what history has been, but the Tribe does have an inherent right to determine who are its members.'") (quoting Lewis Johnson, a member of the Seminole Tribe council).

216. *See* Moses v. Joseph, 2 Tribal C. Rep. A-51, A-54 (Sauk-Suiattle Tribal Ct. 1980); Talib Ellison, *Surviving Racism and Sexual Assault: American Indian Women Left Unprotected*, 1

argument that only the Freedmen should be able to bring suit in federal court against the formerly slaveholding tribes for instituting badges and incidents of slavery in order to deprive them of equal rights.

The current disenfranchisement of the Freedmen is an abuse of tribal sovereignty. Denying people rights based on their ancestors' prior condition of servitude or status as property perpetuates the badges and incidents of slavery.[217] Congress intended to eradicate such discrimination, not only through the treaties but also through the enforcement legislation passed within months of those treaties. Courts have found that the Thirteenth Amendment reaches Native American tribes.[218] Therefore, the enforcement legislation should also reach them. Such an application will not leave the tribes vulnerable to law suits from outsiders trying to sue their way into the tribe, but will assure equal treatment for the Freedmen.

MOD. AM. 21 (Fall 2005), *at* www.wcl.american.edu/modernamerican (describing how the federal and state governments have so severely encroached on tribal governments' ability to enforce the laws that many American Indian women are left vulnerable to sexual assault) (last visited Feb. 24, 2006).

217. *Jones*, 392 U.S. at 441 (holding that "the badges and incidents of slavery" included restraints upon fundamental rights of property).

218. *E.g.*, *In re Sah Quah* 31 F. 327.

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