

**Protecting Black Tribal Members: Is the Thirteenth Amendment the linchpin to securing equal rights within Indian Country?**

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## Introduction

In 1865, the United States just finished one of its most bloody wars<sup>1</sup> and the country was beginning to adopt Constitutional Amendments and enforcement legislation which would grant black Americans long denied political and civil rights. While many Americans are familiar with the southern “Rebel” states signing onto the Thirteenth,<sup>2</sup> Fourteenth<sup>3</sup> and Fifteenth<sup>4</sup> Amendments as a condition to their rejoining the Union, many people do not know that one year later the Cherokee, Seminole, Choctaw, Chickasaw, and Creek Nations were signing treaties<sup>5</sup> granting their ex-slaves civil rights and membership to last for generations in order to reestablish government to government relations with the United States.

## Background

These newly freed black men and women referred to as Freedmen<sup>6</sup> have coexisted with

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<sup>1</sup> Civil War began in 1861 and ended 1865.

<sup>2</sup> U.S. CONST. amend. XIII.

<sup>3</sup> U.S. CONST. amend. XIV.

<sup>4</sup> U.S. CONST. amend. XV.

<sup>5</sup> See Treaty with the Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 1, 14 Stat. 755; Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 2, 14 Stat. 799; Treaty with the Creeks, June 14, 1866, U.S.-Creek Nat., art. 1, 14 Stat. 785; Treaty with the Choctaw and Chickasaw, Apr. 28, 1866, U.S.-Choctaw Nat. and Chickasaw Nat., art. 1, 14 Stat. 769.

<sup>6</sup>See Davis v. United States, 199 F. Supp. 2d 1164, 1168 ( W.D.Okla. 2002)(explaining that after their emancipation former slaves and Blacks that were not enslaved, were called Freedmen).

their respective tribes for generations.<sup>7</sup> In many cases, they intermarried and fought wars together against encroaching white settlement.<sup>8</sup> Many escaped slaves from white plantations were protected by the tribes and the tribes often used the ex-slaves as translators when dealing with white Americans, and the Spanish.<sup>9</sup> However, the tribes also adopted their own form of

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In this paper the author will refer to Blacks in the tribes before the Civil War as “Africans” because they were not citizens of the United States. The author will also refer to the Freedmen by the tribes they belong to, for example Cherokee Freedmen, or Black Cherokee.

<sup>7</sup>See *Davis v. United States*, 199 F. Supp. 2d 1164, 1167 (W.D. Okla. 2002) (explaining the extensive history between Africans and the Seminole Tribe); see also DANIEL F. LITTLEFIELD JR., *AFRICANS AND SEMINOLES: FROM REMOVAL TO EMANCIPATION* 4-6 (1977) (noting runaway slaves and several Indian Nations began settlements in Florida in the 1700’s); WILLIAM LOREN KATZ, *BLACK INDIANS: A HIDDEN HERITAGE* 50 (1986)(describing early relationships between Africans and Indian Nations); Natsu Taylor Saito, *Articles &Essays: 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) (citing) Kenneth W. Porter, *The Black Seminoles: History of a Freedom-Seeking People* (Alcione M. Amos & Thomas P. Senter ed. & rev.) (1996) [hereinafter Saito](explaining that early Seminoles consisted of Africans and Native Americans).

<sup>8</sup> See LITTLEFIELD, *supra* note 7, at 4-6, 7.

<sup>9</sup> See *Davis*, 199 F. Supp. 2d at 1167-68(noting Black Seminoles assimilated and fought with Seminole Tribe). See also *Seminole Nation v. United States*, 78 Ct. Cl. 455, 458 (1933) (stating the African population among the Seminole Tribe was very large and intermarriage was common, also noting that Africans were very important and recognized allies of the Tribe); KATZ, *supra* note 7, at 60 (noting during the Seminole wars both Indians and African fought

African slavery.<sup>10</sup> The system of slavery varied among the tribes.<sup>11</sup> While some tribes mirrored the white plantation owners, others had a system more like feudalism.<sup>12</sup> African members were so engrained in tribal culture and identity that when the United States began to systematically remove southeastern tribes to eastern Oklahoma,<sup>13</sup> many of the African members, enslaved or free, went with them.<sup>14</sup>

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together to resist the US advances); LITTLEFIELD, *supra* note 7, at 7 (describing the Patriot War of 1812 as the first significant alliance between Seminoles and Africans).

<sup>10</sup> *See id.* at 5.

<sup>11</sup> *See id.* (comparing Seminole and Creeks system of slavery noting that the Creek system mirrored the system of white slave owners). *Id.* at 5-6, 8 (describing Seminole system as more lax, 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.* *See also* DANIEL F. LITTLEFIELD JR., THE CHEROKEE FREEDMEN: FROM EMANCIPATION TO AMERICAN CITIZENSHIP 8-9 (1978)[ hereinafter CHEROKEE FREEDMEN](concluding that slavery among the Cherokees was much like that of white Southerners).

<sup>12</sup> *See* LITTLEFIELD, *supra* note 7, at 8 (explaining that many slaves owned by Seminoles owned property but had to pay tribute to their masters).

<sup>13</sup> *See Davis*, 199 F. Supp. 2d at 1168 (describing Seminoles participation in the “Trail of Tears,” the forced migration of Southeastern tribes from the eastern coast 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).

Despite the long history of coexistence between Africans and the tribes, Africans did not become official members of the tribes until after the Civil War.<sup>15</sup> During the Civil War, the Five Civilized Tribes<sup>16</sup> (Choctaw, Cherokee, Seminole, Creek, and Chickasaw) fought for the Confederacy.<sup>17</sup> After the war, the United States made the tribes sign treaties assuring their allegiance.<sup>18</sup> Along with promising peace, the tribes abolished all forms of slavery and

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<sup>14</sup> See *Davis*, 199 F. Supp. 2d at 1168 (noting that Africans were forcibly removed with the tribes from Florida to Oklahoma between 1838 and 1842); See also LITTLEFIELD, *supra* note 7, at 4 (noting that between 1838 and 1843 nearly five hundred Africans moved with the Seminole Tribe from Florida to Oklahoma).

<sup>15</sup> See *Davis*, 199 F. Supp. 2d at 1168 (asserting that formal recognition of Freedmen's membership in the Seminole Nation occurred through a Treaty signed in 1866).

<sup>16</sup> The author could not find the origins of the term "Five Civilized Tribes."

<sup>17</sup> See *Seminole Nation*, 78 Ct. Cl. at 459 (acknowledging Five Civilized tribes treaty with the Confederacy); LITTLEFIELD, *supra* note 7, at 182. See generally, H. EXEC. DOC. NO. 38-1, pt.3 at 345. (1861) (quoting Henry M. Rector, then governor of Arkansas, to John Ross, Chief of the Cherokees, "You people, in their institutions, productions, latitude, and natural sympathies are allied to the...slaveholding State... Our people and yours are allies in war, and friends in peace.").

<sup>18</sup> See Treaty with the Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 1, 14 Stat. 755; Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 2, 14 Stat. 799; Treaty with the Creeks, June 14, 1866, U.S.-Creek Nat., art. 1, 14 Stat. 785; Treaty with the Choctaw and Chickasaw, Apr. 28, 1866, U.S.-Choctaw Nat. and Chickasaw Nat., art. 1, 14 Stat. 769.

involuntary servitude unless for the punishment of a crime.<sup>19</sup> They were also required to make their former slaves official members of their tribes, and afford them the same rights as their non-African members.<sup>20</sup>

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<sup>19</sup> See Treaty with Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 2, 14 Stat. 755; Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14 Stat. 799; Treaty with the Creeks, June 14, 1866, U.S.-Creek Nat., art. 2, 14 Stat. 785; Treaty with Choctaw and Chickasaw, Apr. 28, 1866, U.S.-Choctaw Nat. and Chickasaw Nat., art. 2, 14 St. 769.

<sup>20</sup> See Treaty with Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 2, 14 Stat. 755

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 the 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. *Id.*

see also Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14 Stat. 799 (“They further agree that all freedmen who have been liberated... as well as all free colored persons who were in the country... 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, June 14, 1866, U.S.-Creek Nat., art. 2, 14 Stat. 785

[I]nasmuch as there are among the Creeks many persons of African descent...it is stipulated that hereafter these persons lawfully residing in 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 an enjoy all the rights and

While a majority of the tribes that held slaves<sup>21</sup> acquiesced with the treaties' stipulations, the Freedmen's rights varied. While some tribes allowed full political participation, others

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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. *Id.*

Treaty with the Choctaw and Chickasaw, Apr. 28, 1866, U.S.-Choctaw Nat. and Chickasaw Nat., art. 2, 14 Stat. 769.

[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, residents... 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 claim by or belonging to said nations respectively. *Id.*

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

<sup>21</sup> The Author is not exactly sure how many tribes owned slaves; however, some case law has alluded to the fact that tribes outside of the Five Civilized Tribes had a system of slavery. *See Jackson v. United States*, 34 Ct. Cl. 441, 445 (1899) (holding that the at the time of the Thirteenth Amendment was passed government officials were negotiating treaties with several tribes including, the Dwamish, Skallams, and Makahs, to abolish slavery).

continually pushed to have their ex-slaves removed.<sup>22</sup> The Chickasaw and Choctaw nations fought the adoption of their Freedmen for many years.<sup>23</sup>

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<sup>22</sup> See *Chickasaw Freedmen v. Choctaw Nation and the Chickasaw Nation*, 193 U.S. 115 (1904)(explaining the many request from the Choctaw Nation to have the United States remove their Freedmen); See also LITTLEFIELD, *supra* note 7, at 203 (comparing the rights of Freedmen in the tribes). While the ex-slaves had no rights under 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 which limited access to full rights to only those ex-slaves which returned to the reservation within six months. *Id.* The Creeks allowed the ex-slaves to full rights, but eventually political strife unsettled the Nation for years, the Seminoles were the only Tribe where ex-slaves had full rights of citizens. *Id.* at 191. Racism within the Chickasaws, Choctaws, and Cherokee tribes was more invidious when compared with the Creeks and even more so when compared to the Seminoles. *Id.* See *CHEROKEE FREEDMEN supra* note 11, at 63 (citing S. REP. NO. 45-744 at 591 (1883), (acknowledging that the Freedmen voted in Cherokee elections); *Id.* at 51 (describing Freedmen prosperity within the Cherokee Nation noting Freedmen owned barbershops, blacksmith shops, general stores and restaurants).

<sup>23</sup> See *Chickasaw Freedmen*, 193 U.S. 115 at 124 (concluding that the Chickasaw Freedmen were never adopted into the nation or acquired any rights dependent on such adoption); *Id.* (finding that the Indian nations would rather refuse rights for the freedmen than take \$300,000 for the succession of their land); See also LITTLEFIELD, *supra* note 7, at 203 (noting that the Seminoles Creeks and Cherokees adopted their ex-slaves immediately while the Choctaws resisted until 1885 and the Chickasaws refused).

Currently, two of those tribes are caught in an ongoing struggle between their “full blood” members and their members of African descent.<sup>24</sup> The Seminole and Cherokee tribes have taken several measures to remove their Freedmen from the tribes thus denying them access to federally funded programs,<sup>25</sup> monies, and the right to vote in tribal elections.<sup>26</sup>

The Freedmen filed suit to contest this discrimination, but courts have continually dismissed the suits because of tribal sovereignty.<sup>27</sup> In some cases, the Freedmen sued the federal government for allowing the tribes to disenfranchise them.<sup>28</sup> However, the courts dismissed the suits because tribes are indispensable parties<sup>29</sup> that cannot be joined because they are sovereign entities.<sup>30</sup>

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<sup>24</sup> See *infra*, Parts II.A, II.B.

<sup>25</sup> The term “federally funded program” defines but is not limited to programs federal monies for education, elderly services, and daycare programs.

<sup>26</sup> See *infra*, Part II.

<sup>27</sup> See *generally* *Davis*, 199 F. Supp. 2d 1164; see also *Nero v. Cherokee Nation*, 892 F. 2d 1457 (10th Cir. 1989).

<sup>28</sup> See *generally* *Davis*, 199 F. Supp. 2d 1164.

<sup>29</sup> See FED. R. CIV. P. RULE 19(b)(explaining that once a party is deemed indispensable the action should be dismissed); See also *Rishell v. Jane Phillips Episcopal Memorial Medial Center*, 94 F.3d 1401, 1411 (“An indispensable party is one who has such and interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without affecting his interest...”).

<sup>30</sup> See *Davis*, 199 F. Supp. 2d at 1178.

This Comment discusses whether the Thirteenth Amendment’s bar against the “badges and incidents of slavery”<sup>31</sup> abrogates tribal sovereignty so that the Freedmen can sue a tribe in federal court. Part I tribal sovereignty and the important role it serves as a protection against encroaching state laws.<sup>32</sup> Part II discusses two cases studies highlighting the current disenfranchisement of the Freedmen and the current legal battles involving the United State government and the Cherokee and Seminole Nations.<sup>33</sup> Part III briefly discusses the courts opposition to applying civil rights legislation within the tribes to protect tribal members due to tribal sovereignty.<sup>34</sup> Due to the difficulty of suing the government to protect the Freedmen and the courts opposition to allowing suits with civil rights legislation Part IV will recommend that the Thirteenth Amendment as a possible means to abrogate tribal sovereignty to protect the Freedmen..<sup>35</sup> After briefly analyzing the how courts have limited and expanded the scope of the Thirteenth Amendment’s bar against the “badges and incidents of slavery” with regard to sovereign entities including Native American tribes, Part IV will <sup>36</sup> demonstrate how the Freedmen can use the Thirteenth Amendment as a limited waiver of tribal sovereignty because the current disenfranchisement constitutes a “badge or incident of slavery.”<sup>37</sup> Part IV will also

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<sup>31</sup> *See infra*, note 212 (noting the phrase “badges of slavery/servitude” came about during Congressional debates over the Thirteenth Amendment).

<sup>32</sup> *See infra*, Part I, and accompanying text.

<sup>33</sup> *See infra*, Part II.A-B, and accompanying text.

<sup>34</sup> *See infra*, Part III, and accompanying text.

<sup>35</sup> *See infra*, Part IV, and accompanying text.

<sup>36</sup> *See infra*, Part IV, and accompanying text.

<sup>37</sup> *See infra*, Part V, and accompanying text.

argue that the expansion of the Thirteenth Amendment’s ban against the “badges and incidents of slavery” to reach the tribes, will not dilute tribal sovereignty because courts can distinguish the Freedmen’s claim from prior case law, thus narrowly tailoring an exception to allow for their claim.<sup>38</sup>

## II. Tribal Sovereignty

### A. Sovereign Immunity Generally

The concept of sovereign immunity has firm roots in Anglo American common law.<sup>39</sup> However, it was not until 1821 that the Supreme Court applied the concept to the United States government.<sup>40</sup> Sovereign immunity is grounds for dismissal and has been used over the years to defend sovereign entities from suit.<sup>41</sup> As a sovereign entity, the United States is immune from suit unless it grants consent to be sued.<sup>42</sup> Congress may waive the immunity of the federal

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<sup>38</sup> See *infra*, Part V, and accompanying text.

<sup>39</sup> Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 5-6, n.15 (1963) (tracing sovereign immunity to Thirteenth century England, noting the king “was not subject to the enforcement of the law or the judicial process).

<sup>40</sup> *Cohens v. Virginia*, 19 U.S. (6. Wheat.) 264, 412 (1821) (holding that “the universally received opinion... that no suit can be commenced or prosecuted against the United States).

<sup>41</sup> See *generally* *Maricopa County v. Valley Nat. bank of Phoenix*, 18 U.S. 357(1943)(finding that no suit against property in which the U.S. has an interest can be maintained); *Feres v. United states* 340 U.S. 135 (1950)(finding that the U.S. cannot be sued for injuries received by service members incident to service); *Seminole v. Florida*, 517 U.S. 44 (1996) (finding that states are protected by the Eleventh Amendment from suit).

<sup>42</sup> See *Cohens*, 19 U.S. at 412.

government, but the waiver must be given expressly and explicitly.<sup>43</sup> States, like the federal government, enjoy the privilege of sovereign immunity.<sup>44</sup> Unlike federal sovereign immunity, state sovereign immunity can be found in the U.S. Constitution under the Eleventh Amendment.<sup>45</sup> State sovereign immunity is absolute and unqualified unless it is waived by Congress or by the State.<sup>46</sup> Congress must waive a State's sovereign immunity with a clear expression to do so.<sup>47</sup>

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<sup>43</sup> See *United States v. Idaho*, 508 U.S. 1, 6 (finding that statutory waiver was not unequivocally expressed); *Henderson v. United States*, 517 U.S. 654,670 (1996)(finding congressional waiver).

<sup>44</sup> See *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, (1991); *Seminole, v. Florida*, 517 U.S. at 54.

<sup>45</sup> See U.S. CONST. amend. XI. (“The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.”); see also *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding the Eleventh Amendment does not only stand for what it says but also that the States entered the federal system with their sovereignty intact); *Blatchford*, 501 U.S. 775, 781 (holding that Eleventh Amendment protected States from suit from an Indian Tribe).

<sup>46</sup> See *Seminole*, 517 U.S. at 55; *Blatchford*, 501 U.S. at 786.

<sup>47</sup> See *Seminole*, 517 U.S. at 55 (also finding that statutory waiver must be clear and within the authority of Congress to do so); *Blatchford*, 501 U.S. 786 (finding Congress must make intent to abrogate unmistakably clear); *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989)(waiver must be unmistakably clear); see also *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989)(holding that a state is not a “person” amenable to suit under 42 U.S.C § 1983).

## B. Tribal Sovereign Immunity

Courts have recognized tribal sovereignty for many years. In *Worcester v. Georgia*, Chief Justice John Marshall, held that, Indian Nations “have always been considered as distinct independent political communities, retaining their original natural rights, as the undisputed possessors of the soil.”<sup>48</sup> Chief Justice Marshall confirmed the Cherokee tribe’s sovereignty by finding that all regulation and intercourse with the tribe was exclusively for the federal government.<sup>49</sup> Thus, Chief Justice Marshall, protected from tribes from state encroachment because as sovereign nations their regulation and intercourse like other sovereign nations is strictly within the jurisdiction of the federal government.<sup>50</sup> However, the tribe’s status as a sovereign entity does not automatically allow it to sue other sovereign entities such as the States.<sup>51</sup>

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<sup>48</sup> *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

<sup>49</sup> *Id.* at 558-59.

<sup>50</sup> *Id.* at 561. (“The Cherokee Nation...is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force... The whole intercourse...[with] ...this nation is vested in the government of the United States.”); *see also* *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)(finding state tax didn’t apply to the tribe.)

<sup>51</sup> *See* *Blackford v. Native Village*, 501 U.S. 775, 781 (1991) (finding that the Tribe’s sovereignty did not defeat the Eleventh Amendment protection of Alaska).

As sovereign entities tribes possess many of the same inherent powers as States, and the federal government,<sup>52</sup> including immunity from suit.<sup>53</sup> Tribal immunity has prevented many people and entities from suing a tribe, by denying the petitioning party jurisdiction in a federal court.<sup>54</sup> This leaves the petitioning party with no other recourse besides litigating in tribal court.<sup>55</sup> Only Congress or the tribe itself can waive tribal sovereign immunity.<sup>56</sup> However, Congress'

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<sup>52</sup> See *Roff v. Burney*, 168 U.S. 218 (1897)(finding that Indian tribes have “the power to make their own substantive law in internal matters.”); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (holding that tribes have the abilities to make their own laws and be ruled by them.)

<sup>53</sup> See *Turner v. United States*, 248 U.S. 354, 358 (1919) (finding Indian tribes are not liable to suit because they are sovereign entities).

<sup>54</sup> See, e.g., *Davis* 199 F. Supp. at 1179; *Nero v. Cherokee Nation of Okla.*, 892 F. 2d 1457 (10th Cir. 1989); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Florida Paraplegic Ass’n.*, 166 F.3d 1126 (11th Cir. 1999); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, (11th Cir. 2001).

<sup>55</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (finding that internal matters concerning the Tribe are to be litigated in tribal court); *but see Davis*, 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.”).

<sup>56</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58; *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* 523 U.S. 751, 754 (1988)( an “Indian Tribe is subject to suit only where Congress has authorized the suit or the Tribe has waived its immunity”).

abrogation of a Tribe's sovereignty must be unmistakably clear.<sup>57</sup> A waiver of sovereign immunity can not be implied.<sup>58</sup> Thus, specific tribal rights will not be deemed to have been abrogated or limited absent a "clear and plain" congressional intent.<sup>59</sup> Congress can demonstrate a "clear and plain" intent by express declaration in the statute, the legislative history, or the "surrounding circumstances."<sup>60</sup> Sovereign immunity is an integral part of protecting the tribes from suit.<sup>61</sup> However, tribal sovereign immunity is not a defense to suit from the United States.<sup>62</sup> If a tribe is subject to damages, the tribe's ability to carry out governmental duties could be impaired, because of great economic losses.<sup>63</sup> This could result in devastating effects on a tribal community, as noted by a tribal court judge:

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

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<sup>57</sup> See *Santa Clara*, 436 U.S. at 58; *EEOC v. Fond du Lac Heavy Equip.*, 986 F. 2d 246, 249 (8th Cir. 1993); *Florida Paralegic Ass'n.*, 166 F.3d 1126, 1130 (11th Cir. 1999).

<sup>58</sup> See *Santa Clara*, 436 U.S. at 58.

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

<sup>60</sup> See *United States v. Dion*, 476 U.S. 734, 739 (1986).

<sup>61</sup> 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).

<sup>62</sup> See *U.S. v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987).

<sup>63</sup> See *id.* (citing Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 *AM. INDIAN L. REV.* 153, 170-71 (1984)).

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.<sup>64</sup>

Tribal sovereign immunity is one of the few protections left to the tribes that ensures tribes will remain distinct nations and prevent further dilution of culture and way of life due to encroaching state and federal law. However, it can be abused by tribe when used to insulate tribes from suit while tribal leaders discriminate against their members.

### III. Current Disenfranchisement

Currently, both the Seminole Nation of Oklahoma and the Cherokee Nation of Oklahoma are disenfranchising their black members. In both cases, the Freedmen are being denied access to federally funded programs, monies, and voting rights on account of race. The Seminole Nation of Oklahoma is also denying their Freedmen access to funds that were awarded to the tribe for land taken in the 1800's.<sup>65</sup> At the root of today's disenfranchisement is the Dawes Commission's

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<sup>64</sup> See *Moses v. Joseph*, 2 Tribal C. Rep. A-51, A-54 (Sauk-Suiattle Tribal Ct. 1980).

<sup>65</sup> See *Davis v. United States*, 199 F. Supp. 2d 1164, 1169; William, Glaberson, *Who Is A Seminole And Who Gets To Decide?* N.Y. Times Jan. 29, 2001 at A1; See also, Ben Fenwick, *Racial Strife Splits American Indian Tribe* at <http://www.citizensalliance.org/The%20Hicks%20Fix/Full%20Sovereignty.htm> (July 3, 2002)(last visited Oct. 16, 2004); Brian Scaper, *Seminole To Refile Lawsuit: Black Seminoles Say They Are Being Discriminated Against By Their Tribe*, The Oklahoma Daily at [http://www.oudaily.com/vnews/display.v/ART/2004/07/14/40f4805e559f9?in\\_archive=1](http://www.oudaily.com/vnews/display.v/ART/2004/07/14/40f4805e559f9?in_archive=1) (July 14, 2004) (last visited Oct. 16, 2004).

assignment of tribal membership in the early 1900's.<sup>66</sup> The Dawes Commission was set up by Congress to determine and record the membership of several Indian tribes.<sup>67</sup> The Commission categorized the tribes' membership on two rolls, one for full blooded Indians the "Blood Roll," and the other for former slaves, the "Freedmen Roll."<sup>68</sup> The Dawes Commission did not bother to quantify the percentage of Native American blood in the Freedmen.<sup>69</sup> Many historians believe that a majority Freedmen were of mixed heritage.<sup>70</sup> The Commission essentially applied a "one

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<sup>66</sup> See Act of June, 28, 1898, Pub. L. No. 55-504, § 21, 30 Stat. 495(1898), (declaring that tribal enrollment as completed by the Dawes Commission and approved by the Secretary of the Interior, has the effect of designating people and their descendants as tribal members).

<sup>67</sup> See Curtis Act, Pub. L. 55-517 30 Stat. 503, (June 28, 1898)

Commission shall 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. *Id.*

*See also* Seminole Nation v. United States, 78 Ct. Cl. 455, 466-467 (explaining Dawes Commission established in 1893 and in 1896 was granted powers from Congress to determine citizens of the tribe).

<sup>68</sup> See *Davis*, 199 F. Supp. 2d at 1168; Press Release, Legal Defense Fund for Cherokee Freedmen Established (August 2003) [hereinafter LDF Press Release] at <http://www.african-nativeamerican.com/fund.htm>.

<sup>69</sup> See *Davis*, 199 F. Supp. 2d at 1168.

<sup>70</sup> *Id.*

drop”<sup>71</sup> rule to the Freedmen, thereby concluding that any drop of black blood would override any Indian ancestry. Ironically, people who had three quarters white blood got full blood status in the Seminole and Cherokee Nations.<sup>72</sup> This was arguably to preserve the purity of white blood. Also Native Americans of other tribes, adopted into the Cherokee Nation were enrolled in the “Blood Rolls.”<sup>73</sup> Today, the Dawes Rolls are considered the ultimate authority for determination of membership in both the Seminole and Cherokee Tribe.<sup>74</sup>

A. Seminole Tribe

In 1823, the Seminole Tribe ceded its land in Florida to the United States.<sup>75</sup> The tribe did not receive compensation for this land until 1976.<sup>76</sup> The tribe received 56 million dollars,

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<sup>71</sup> See Lawrence Wright, *One Drop of Blood*, THE NEW YORKER, July 25, 1994, 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.")

<sup>72</sup> See *Davis*, 199 F. Supp. 2d at 1168; See also LDF Press Release *supra* note 68.

<sup>73</sup> See *Id.*

<sup>74</sup> See *Davis*, 199 F. Supp. 2d at 1169, LDF Press Release *supra* note 68.

<sup>75</sup> See *Davis*, 199 F. Supp. 2d at 1169 (citing *Seminole Nation of Fla. and Seminole Nation of Okla. v. United States*, 387 Ind. Cl. Comm. (Dockets 73 and 151) (1976)(finding the Seminole Tribe should be compensated \$16 million dollars (\$56 million with interest) for lands ceded in 1823).

<sup>76</sup> *Id.*

commonly referred to as the “Judgment Fund.”<sup>77</sup> In 1990, Congress passed a distribution act<sup>78</sup> which set forth the use and distribution criteria of the Judgment Fund.<sup>79</sup> Nowhere in the act did Congress express or imply any intent that the Freedmen be excluded from the funds.<sup>80</sup> The Freedmen’s economic need is very much like that of their full blood counterparts.<sup>81</sup> Despite this, both the Bureau of Indian Affairs (“B.I.A.”) and the Seminole Tribe sought to exclude the

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<sup>77</sup> See *Davis*, 199 F. Supp. 2d at 1169.

<sup>78</sup> Indian Claims Distribution of Funds to Seminole Indians, 104 Stat. 143 (1990).

<sup>79</sup> See *Davis*, 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) ; see also 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 fund several community projects for the elderly and children).

<sup>80</sup> See *Davis*, 199 F. Supp. 2d at 1170. *Id.* at 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 the language did use included the Black Seminoles.)

<sup>81</sup> See John Keilman, *Bloodlines Drawn Over Money; With Millions In Federal Compensation Funds At Stake; Oklahoma’s Seminole Indian Descendants Find Themselves In A Fight Over Tribal Roots*, CHI. TRIB. Apr. 4, 2002 at p. 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.”).

Freedmen from the Judgment Fund.<sup>82</sup> The B.I.A. was aware that the Freedmen were citizens of the Tribe<sup>83</sup> and that Congress was unlikely to approve of a plan that would exclude the Freedmen.<sup>84</sup>

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.<sup>85</sup> They reasoned that because the Freedmen were not officially citizens

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<sup>82</sup> *See Id.*, 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).

<sup>83</sup> *See Davis*, 199 F. Supp. 2d at 1169 (noting that the Seminole Nation of Oklahoma Constitution provided that membership consists of “all Seminole citizens whose names appear on the final rolls of the Seminole Nation of Oklahoma). This would actually include the Freedmen because they were recorded on their own roll of membership for the Tribe.; *see also supra* notes 38-40 (describing the Commission’s way of recording the Freedmen on the rolls).

<sup>84</sup> *See Davis*, 199 F. Supp. 2d at 1169 (citing memorandum from Rosella C. Garbow, B.I.A. Tribal Operations Officer,(May 4, 1990)) (“we 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.”).

<sup>85</sup> *See Davis*, 199 F. Supp. 2d at 1170 (referring to June 28, 1990 telephone conversation between Chief Jerry Haney and Ross Swimmer, witnessed by Rosella Garbow, B.I.A. Tribal Operations Officer).

of the tribe in 1823, they could not benefit from the transfer of the land.<sup>86</sup> As property in 1823,<sup>87</sup> the Freedmen arguably could not partake in the communal ownership of the land.<sup>88</sup> Therefore, they concluded, that the Freedmen should not participate in the communal compensation for it.<sup>89</sup> Ultimately, the Tribe voted to exclude the Freedmen by passing the “Seminole Nation Usage

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<sup>86</sup> See *Id.* See also Treaty with Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 2, 14 Stat. 755; *but see* Saito *supra* note 7 at 1144 ( explaining that from the beginning the Seminole tribe has had Africans living among them).

<sup>87</sup> See Saito *supra* note 7 at 1144-55 (summarizing the conflict over African slaves between Seminole tribe and white settlers in 1823.) By the time the treaty was signed whites 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. *Id.* However there was much confusion over who was actually and escape slave because “Seminole society had blacks at every status-born free, or the descendants of fugitives, or perhaps fugitives themselves, ...interpreters, advisers of importance, others were warriors and hunters or field hands. Intermarriage further complicated black status.” See *generally*, *Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1856) (maintaining property status of African Americans because they were neither citizens of the United States and Constitution therefore did not apply them ) *overruled by* U.S. CONST. amend. XII, U.S. CONST. amend. XIV.

<sup>88</sup> See *Davis*, 199 F. Supp. 2d at 1172. *But see* MELAKU *supra* note 80, at 549 (arguing Black Seminoles helped in the development and cultivation of the land and therefore are entitled to compensation along with the Tribe.

<sup>89</sup> *Davis*, 199 F. Supp. 2d at 1172.

Plan.”<sup>90</sup> This plan required that a person must be descended from a member of the Seminole Nation as it existed in 1823, to receive any of the Judgment Fund.<sup>91</sup> This excluded Freedmen, who did not become official members of the Seminole Nation until 1866.<sup>92</sup> Congress approved the Seminole Nation Usage Plan on March 30, 1991.<sup>93</sup>

On January 16, 1996, Sylvia Davis, a Freedmen, sought to gain access to the Judgment Fund.<sup>94</sup> Instead of filing suit against the Tribe, Ms. Davis sought judgment against the B.I.A.<sup>95</sup> Ms. Davis did not join the tribe because the Tribe is a sovereign entity.<sup>96</sup> The court granted the government’s motion to dismiss for failure to join an indispensable party.<sup>97</sup> The Tenth Circuit reversed and remanded, charging the District Court with deciding whether the Tribe was a necessary party or indispensable.<sup>98</sup> If the tribe was merely necessary then the claims could proceed, however if they were indispensable the claims would be dismissed.<sup>99</sup> In 2002, the court

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<sup>90</sup> *Id.* at 1170.

<sup>91</sup> *Id.* at 1172

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1173

<sup>94</sup> *See Davis v. United States*, 192 F. 3d 951 (10th Cir. 1999).

<sup>95</sup> *Id.*

<sup>96</sup> *See Davis*, 199 F. Supp. 2d at 1173 (citing the holding of prior 1999 decision that the Nation could not be joined because of sovereign immunity).

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

<sup>98</sup> *See* 192 F.3d at 961.

<sup>99</sup> FED. R. CIV. P. 19(b)“Determination by Court Whenever Joinder Not Feasible. If a person as described in ...cannot be made a party, the court shall determine whether in equity and good

concluded once again that the tribe was an indispensable party.<sup>100</sup> The court noted that remedy to the Freedmen was impossible without involving the Seminole Nation because it would involve their integral management of the Judgment Fund.<sup>101</sup> The court did not rule on whether the Tribe's specific actions of denying the Freedmen access to the Judgment Fund violated the Treaty of 1866 or rights of the Freedmen generally.

Consequently, after the 1996 suit was filed, the Seminole Nation sought to exclude all Freedmen from their Nation by amending the Tribe's Constitution.<sup>102</sup> On July 1, 2000, the Tribe passed a referendum to change the membership criteria.<sup>103</sup> Previously, tribal membership required descent from an enrollee on the Dawes Rolls.<sup>104</sup> The new resolution requires one eighth Seminole blood.<sup>105</sup> In August 2000, the Tribe officially removed the Freedmen by amending

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conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.”

<sup>100</sup> *Davis*, 199 F. Supp. 2d at 1177.

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

<sup>102</sup> *See* *Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122, 124 (W.D. Okla. 2002).

<sup>103</sup> *See id.* *See also* *Seminole Voters Approve Changes*, Indianz.com

<http://64.62.196.98/News/printme.asp?ID=law /772000-6> [hereinafter *Seminole Voters*](citing several Constitutional changes including the 1/8th blood quantum which would prove to disenfranchise the Freedmen) (posted July 7, 2000)(last viewed Oct. 16, 2004).

<sup>104</sup> *See* JOHNSTON, *supra* note 13.

<sup>105</sup> *See* *Seminole Nation v. Norton*, No. 00-2384, slip. op. at 4-5, (D.D.C Sept. 27, 2001)(explaining the Sixth Amendment to the Seminole Constitution was “to require one eighth quantum of Seminole Indian blood to be a member of the Seminole Nation” and the seventh

their Constitution pursuant to the new resolution.<sup>106</sup> However, pursuant to the Tribe's original Constitution, the Department of Interior ("D.O.I."), via the B.I.A had to approve all changes to their Constitution.<sup>107</sup> To remove the B.I.A. oversight, the Tribe further amended the Constitution to exclude the provision concerning the federal government.<sup>108</sup> The Tribe never presented to the change to the B.I.A. for approval.<sup>109</sup>

The B.I.A. refused to approve the amended Constitution because it would exclude the Freedman.<sup>110</sup> The Nation filed suit in 2000 challenging the federal government's authority to approve its Constitution.<sup>111</sup> Concurrently, the Tribe held an election in compliance with the new Constitutional amendments.<sup>112</sup> At this election, the tribe disenfranchised the Freedmen because it

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amendment, was to change the term "Seminole citizen" "Seminole Indian citizen by blood.").

*See also Seminole Voters supra* note 103(noting the change to 1/8<sup>th</sup> blood quantum).

<sup>106</sup> *See* FENWICK, *supra* note 65 (noting the Constitutional amendments officially removed the Freedmen from the Seminole Tribe).

<sup>107</sup> *See* Seminole Nation of Okla. v. Norton, 206 F.R.D. 1, 3 (D.D.C. 2001)(citing Article XIII of original Seminole Constitution).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *See* Seminole Nation of Okla. v. Norton, 223 F. Supp. 2d 123, 124 (D.D.C. 2002)

(summarizing a September 29, 2000 letter from Kevin Grover, Assistant Secretary of Department of Interior [hereinafter D.O.I.] to Chief Haney, noting that he would not approve the amendments because they exclude the Freedmen).

<sup>111</sup> *See id.* at 125.

<sup>112</sup> *Id.*

no longer considered them members.<sup>113</sup> Although the Freedmen cast ballots, their votes were not counted.<sup>114</sup> A new Chief was elected.<sup>115</sup> However, the B.I.A. refused to accept the results of the election.<sup>116</sup> The Seminole Nation tried in two suits to repeal the government's actions.<sup>117</sup> First, the Nation tried to deny the federal government's authority to approve amendments to their Constitution.<sup>118</sup> The court disagreed with the Tribe and found that the D.O.I. had authority pursuant to the original Seminole Constitution.<sup>119</sup> After the B.I.A. refused to recognize the Tribe's election results, the Tribe filed suit again.<sup>120</sup> The Tribe claimed 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.<sup>121</sup> Along with refusing to recognize the new leadership, the B.I.A. has frozen the distribution of the Judgment Fund to the

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<sup>113</sup> *Id.* at 126.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (noting that Ken Chambers was elected under the new Constitutional provisions which defeated incumbent Chief Haney).

<sup>116</sup> *See id.* at 126, (noting the B.I.A.'s position to continually recognize Chief Haney as the Principal Chief of the Seminole Tribe despite recent tribal election results making Ken Chambers Principal Chief).

<sup>117</sup> *See* 206 F.R.D. 1; 223 F. Supp. 2d 122.

<sup>118</sup> *See* 206 F.R.D. at 5.

<sup>119</sup> *See* 223 F. Supp. 2d at 126 (citing 206 F.R.D. at 19).

<sup>120</sup> *See* 223 F. Supp. 2d 122.

<sup>121</sup> *See* 223 F. Supp. 2d at 129.

Tribe.<sup>122</sup> The court concluded that the continued refusal to recognize the Tribe's government was not "arbitrary, capricious, or [outside] the accordancy of the law."<sup>123</sup> The court reasoned that unlike prior case law,<sup>124</sup> there was an "element of oppressive action on the part of the Seminole Tribe against its own minority members."<sup>125</sup> Also, that "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."<sup>126</sup> Therefore, this is a situation where the federal government has sought to protect minority members of the Tribe.<sup>127</sup> Finally, the court noted that the Tribe's discriminatory acts

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<sup>122</sup> See KEILMAN, *supra* note 81, (noting that agencies have frozen the Judgment Fund and other payments; \$30 million dollars of the judgment fund is still undistributed); see also FENWICK, *supra* note 65 (noting the Judgment fund has been frozen).

<sup>123</sup> See 223 F. Supp. 2d at 138.

<sup>124</sup> See 223 F. Supp. 2d 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. United States Dep't of the Interior, 811 F.2d 549, 553 (10th Cir. 1987)).

<sup>125</sup> See 223 F. Supp. 2d at 137.

<sup>126</sup> See *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)).

<sup>127</sup> See 223 F. Supp. 2d at 138 ("This 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 *Seminole Nation v. Norton*, 206 F.R.D. 1, 7 (D.D.C 2001) (refusing to

“were in total disregard of the rights afforded to those members by the Treaty of 1866 and the Nation’s Constitution.”<sup>128</sup>

Currently, the B.I.A. refuses to recognize the new government of the Seminole Nation.<sup>129</sup> It is important to note that the court did not restore the Freedmen any rights by allowing the federal government’s refusal to recognize the Tribe’s new leadership. The court merely assured that the federal government was the final check on a Tribe’s actions to amend its Constitution.<sup>130</sup> The courts also concluded that this power to check the tribes is a protection for the Freedmen.<sup>131</sup> However, as demonstrated in the next case study, the government does not have to choose to protect the Freedmen, and has allowed a Tribe to take away their voting rights and access to federal funds and programs.

#### B. Cherokee Nation

Recently, the Cherokee Nation of Oklahoma prevented Black Cherokees from voting in the May 24, 2003 election.<sup>132</sup> The tribe excluded the Cherokee Freedmen from membership, voting, and access to federally funded programs, by redefining tribal membership as being

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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).

<sup>128</sup> See 223 F. Supp. 2d at 138.

<sup>129</sup> See *id.* See also, Keilman *supra* note 81.

<sup>130</sup> See 223 F. Supp. 2d at 140.

<sup>131</sup> See 206 F.R.D. at 7.

<sup>132</sup> See *Cherokee Freedmen caught in high-level dispute*, Indianz.com at <http://www.indianz.com/News/archives/000930.asp> [hereinafter *Cherokee Dispute*] (Aug. 20, 2003)(last visited Sept. 29, 2004).

traceable to blood instead of an ancestor on the Dawes Rolls.<sup>133</sup> This definition of membership also prevents the Freedmen from accessing federal funds.<sup>134</sup> The Cherokee Nation of Oklahoma also amended their Constitution to prevent the B.I.A.'s oversight in their election procedures.<sup>135</sup> The Cherokee Nation of Oklahoma maintains that their actions are completely legal and distinguishable from those of the Seminole Nation because the Cherokees did not seek to amend their Constitution to directly oust their Freedmen.<sup>136</sup> At present, the federal government agrees with the Cherokee tribe's position.

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<sup>133</sup> See LDF Press Release, *supra* note 68 (describing new blood quantum for proof of membership); See also, *Cherokee Freedmen Protest Election*, The African-Native American History & Genealogy Webpage at <http://www.african-nativeamerican.com/election.htm> (July 31, 2003).

<sup>134</sup> See Letter from Jon Velie, Velie and Velie Attorney's at Law, Norman Okla., to Aurene Smith, Acting Asst. Sect. of Indian Affairs, Washington D.C. (June 10, 2003) (on file with Vann v. Norton, No. 03-1711, (filed Aug. 11, 2003 D.D.C)).

<sup>135</sup> See *Cherokee Freedmen Protest Election*, The African-Native American History & Genealogy Webpage at <http://www.african-nativeamerican.com/election.htm> (July 31, 2003).

<sup>136</sup> See 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, US Dept. Int., 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, 03-1711, filed Aug. 11, 2003 D.D.C)); *but see* Letter from Hastings Shade, Deputy

Like the Seminole Tribe case, the B.I.A. had a fiduciary responsibility to watch over the Cherokee Constitution.<sup>137</sup> The 1976 Cherokee Constitution had a provision similar to the one in the Seminole Constitution, which said, “[N]o amendment or new Constitution shall become effective without the approval of the President of the United States or his authorized representative.”<sup>138</sup> Unlike the Seminole situation, the Cherokee Tribe excluded that provision, by amending its Constitution in the May 24, 2003 election, in which the Freedmen were not allowed to vote.<sup>139</sup> Initially, the B.I.A. denied the results of the election as it had in the Seminole situation.<sup>140</sup> But unlike the Seminole case, the B.I.A. reversed its position, allowed the amendment, and certified the election results.<sup>141</sup>

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Chief Cherokee Nation and Stephanie Wickliffe-Shepard, Tribal Council Cherokee Nation, to Aurene Martin, Interim Assistant Sect. D.O.I, Washington D.C. (supporting the Freedmen’s position that the election excluded the Cherokee Freedmen because election procedures included the words “by blood”). (Aug. 5, 2003)(on file with Vann v. Norton, 03-1711, filed Aug. 11, 2003 D.D.C)).

<sup>137</sup> See Principal Chiefs Act, Pub. L. No. 91-495 (1970)(mandating that all procedures to elect the principal chiefs of the Cherokee, Choctaw, Creek and Seminole as well as the governor of the Chickasaw Tribe of Oklahoma shall be subject to approval by the Secretary of the Interior).

<sup>138</sup> See CHEROKEE NATION CONST. art. XV, § 10 (removed by May 24, 2003 election).

<sup>139</sup> *Cherokee Dispute supra* note132.

<sup>140</sup> Letter from Jeanette Hanna, Acting Secretary of Indian Affairs, to Chadwick Smith, Principal Chief of Cherokee Nation to Chadwick (July 11, 2003) (on file with Vann v. Norton, 03-1711, filed Aug. 11, 2003 D.D.C)) (finding Cherokee situation too much like the Seminole and asserting non approval of proposed amendments).

The Cherokee Nation signed a treaty in 1866 and much like the Seminole Treaty of 1866 it contained equal protection provisions for their Freedmen.<sup>142</sup> 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 treatment in communal property distribution based on the Treaty of 1866.<sup>143</sup> Plaintiffs in a recent lawsuit against the tribe allege that the Cherokee Freedmen had the right to vote as recently as the 1970's.<sup>144</sup> However, the B.I.A. continues to

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<sup>141</sup> See Letter to Chadwick Smith, Principal Chief Cherokee Nation, (Aug. 6, 2003)(on file with Vann v. Norton No. 03-1711 filed Aug. 11, 2003). See also *Cherokee Dispute*, *supra* note, 132.

<sup>142</sup> Compare Treaty with Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 2, 14 Stat. 755 with Treaty with Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14 Stat. 799.

<sup>143</sup> See *Moses v. Whitmire, Trustee for the Cherokee Freedmen v. Cherokee Nation and United States*, 30 Ct. Cl. 138 (1895) (holding Freedmen entitled to equal per capita payments of funds as well as equal citizens of the Cherokee tribes); See also *Daniel Red Bird v. United States*, 203 U.S. 76, (affirming citizenship and proprietary rights of the Freedmen); *Seminole Nation v. United States*, 78 Ct. Cl. 455,458-461 (denouncing the Seminole tribes argument that the Treaty on extended to political rights and not property interests); *Cherokee Freedmen Act*, Pub. L. No. 50-1211, 25 Stat. 608 (1888) (responding to Cherokee Tribal Council legislation which excluded Freedmen, Shawnees, Delawares, and intermarried whites from sharing tribal assets, by requiring the Tribe to share its assets).

<sup>144</sup> See Pls.['] Compl. at ¶ 34, *Vann v. Norton*, No. 03-1711 (D.D.C. filed Aug. 11, 2003)(noting that the 1976 Constitution allowed for Freedmen to vote). See also Linda W. Reese, *Cherokee Freedwomen in Indian Territory 1863-1890*, *The Western Historical Quarterly* at <http://www.historycooperative.org/journals/whq/>

contradict its previous position with the Seminole Nation of Oklahoma, and disregard the court's holding in the 2002 Seminole case which found the government has a duty to protect the tribe's minority members.

On August 11, 2003, the Cherokee Freedmen filed suit against Gale Norton current Secretary of the Interior.<sup>145</sup> They are seeking declaratory and injunctive relief against the B.I.A. for allowing an amendment to the Cherokee Nation Constitution and recognizing the Tribe's election, despite the Freedmen's inability to vote.<sup>146</sup> On March 18, 2004, the Department of Interior answered the complaint with five defenses one of which concerned the possibility of dismissal due to the tribe's status as an indispensable party.<sup>147</sup> The government has yet to file a motion to dismiss. On January 14, 2005, the Cherokee Nation of Oklahoma sought to intervene in the case in order to file a motion to dismiss.<sup>148</sup> The Cherokee Nation has argued that their intervention does not waive their sovereignty and therefore it is not subject to suit.<sup>149</sup>

### III. Civil Rights Enforcement in Native American Tribes

As demonstrated with the inconsistent actions of the B.I.A the question of whether the US government will protect the Freedmen is arbitrary. This leaves the Freedmen with really one

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33.3/reese.html (noting that the Tribe amended its Constitution to comply with treaty agreement by granting voting rights.) (last visited Dec. 17, 2004) CHEROKEE FREEDMEN, *supra* note 11, at 63(noting that Cherokees voted in the 19<sup>th</sup> Century).

<sup>145</sup> See Pls.['] Compl. at ¶ 1-3, Vann v. Norton, No. 03-1711 (D.D.C. filed Aug. 11, 2003).

<sup>146</sup> See *id.* at ¶ 55-59.

<sup>147</sup> See Answer at ¶ 10, Vann v. Norton, No. 03-1711 (D.D.C. filed Mar. 18, 2004).

<sup>148</sup> See Mot. to Intervene, Vann v. Norton, No. 03-1711 (D.D.C. filed Jan. 14, 2005).

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

option, to sue the tribe directly. Many people have tried unsuccessfully to sue a tribe for civil rights violations of their members. Most civil rights legislation does not apply to tribes and often times when they do courts have not interpreted the legislation to allow for suit in the federal court system. The United States Constitution does not apply directly to Native American tribes the way it applies to the states and federal government.<sup>150</sup> “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.”<sup>151</sup> Therefore, the Constitution applies to the tribes only to the extent it expressly binds them or is made binding on them by treaty or Act of Congress.<sup>152</sup>

A. Indian Civil Rights Act

In 1968, in order to compensate for the lack of constitutional protection for individual tribal members, Congress enacted the Indian Civil Rights Act (“ICRA”).<sup>153</sup> The ICRA provides tribal members many statutory rights comparable to the Bill of Rights of the U.S. Constitution.<sup>154</sup>

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<sup>150</sup> See *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971).

<sup>151</sup> See *Santa Clara*, 436 U.S. at 56.

<sup>152</sup> See *Groundhog*, 442 F.2d at 678.

<sup>153</sup> 25 U.S.C. §1302 (2004).

<sup>154</sup> 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

The ICRA's purpose is to prohibit tribal governments from violating the civil rights of individual tribal members.<sup>155</sup> There are, however, some notable exceptions with regard to the Fifth, Sixth, Seventh, Fifteenth, and in some respects the Equal Protection Clause of the Fourteenth

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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." *Id.*

<sup>155</sup> See *Thompson v. New York*, 487 F. Supp. 212, 228 (N.D.N.Y. 1979).

Amendment, all of which do not apply to the tribes.<sup>156</sup> The only remedy available for violation of the ICRA is a writ of habeas corpus.<sup>157</sup>

Despite the ICRA application to tribes, courts have held that the tribes are not subject to suit in federal court for violation of a tribal member's civil rights.<sup>158</sup> The pivotal case regarding the ICRA and a tribe's immunity to suit is *Santa Clara Pueblo v. Martinez*.<sup>159</sup> In *Santa Clara*, a female member of the Santa Clara Pueblo Tribe sued the Tribe for declaratory and injunctive relief under the ICRA's equal protection provision.<sup>160</sup> The plaintiff was a full-blooded member of the tribe, however, her daughter was only half.<sup>161</sup> The tribe had a policy of allowing sons and daughters of male members who married outside of the tribe to become members, while the sons and daughters of female members who married outside the tribe could not.<sup>162</sup> Because her daughter could not become a member of the tribe, she was not able to vote in tribal elections, hold secular office, remain on the reservation in the event of her mother's death, or inherit her

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<sup>156</sup> See *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971). (“Congress intended that the provisions of the Fifteenth Amendment...Fifth, Sixth, and Seventh Amendments, and in some respects the equal protection requirement of the Fourteenth Amendment should not be embraced in the Indian Bill of Rights.”)

<sup>157</sup> See 25 U.S.C. § 1303 (2004).

<sup>158</sup> See *Santa Clara v. Martinez*, 436 U.S. 49 (1978) ; *Nero v. Cherokee Nation*, 892 F.2d 1457 (10th Cir. 1989).

<sup>159</sup> 436 U.S. 49.

<sup>160</sup> See *Santa Clara*, 436 U.S. at 51.

<sup>161</sup> *Id.* at 52.

<sup>162</sup> *Id.* at 53.

mother's home or interests in communal land.<sup>163</sup> The court concluded that the legislative history of the ICRA did not lend itself to provide for a private right of action in federal court.<sup>164</sup>

Therefore the ICRA did not waive tribal immunity to suit.<sup>165</sup> The court found that the ICRA did not implicitly authorize actions for declaratory or injunctive relief because the only form of relief provided in the statute was a writ of habeas corpus.<sup>166</sup> Also, Congress did not make its intention clear to permit the “additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent.”<sup>167</sup> The court concluded that tribal courts were the proper forums to vindicate rights under the ICRA.<sup>168</sup>

#### B. Federal Civil Rights Enforcement Legislation

Congress has exclusive and plenary power to enact legislation with respect to Indian tribes.<sup>169</sup> Many courts have interpreted this congressional power to mean that statutes of general jurisdiction apply to Native American tribes.<sup>170</sup> This interpretation is called the Tuscarora rule.<sup>171</sup>

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<sup>163</sup> *Id.* at 52.

<sup>164</sup> *Id.* at 61.

<sup>165</sup> *Id.* at 72.

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

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

<sup>168</sup> *Id.* at 65. *But see* Davis v. United States, 199 F. Supp. 2d 1164, 1169 (noting the futility of bringing discrimination suit against the tribe in its own court).

<sup>169</sup> *See id.*

<sup>170</sup> *See* Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) (“It is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.”).

The application of this rule to the Freedmen's claim will be discussed later.<sup>172</sup> Relevant to the analysis of the Freedmen's case are several cases involving federal civil rights legislation where courts have restricted the application of the laws because of tribal sovereignty.<sup>173</sup> The laws include: 42 U.S.C. §1981 (2005)(“ §1981”);<sup>174</sup> 42 U.S.C. § 1982 (2005)<sup>175</sup>; 42 U.S.C §1983

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<sup>171</sup> *See id.* Over the years courts have come up with three exceptions to the Tuscarora rule: (1), whether the law touches exclusive rights of self governance; *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56; (2) whether the law would abrogate rights guaranteed by treaties, *See* Smart v. State Farm Ins. Co. 868 F. 2d 929, 932 (7th Cir. 1989); (3) whether there is proof either legislative history or some other means that Congress did not intend the law to apply to Indians on their reservations, *See* U.S. v. Farris, 624 F. 2d 890, 893-94 (9th Cir. 1980).

<sup>172</sup> *See* Part V. D.1 *infra*.

<sup>173</sup> *See* Inyo County v. Paiute Shoshone Indians of the Bishop Community of the Bishop Colony, 538 U.S. 701, 709 (2003)(finding that 42 U.S.C §1983 does not apply to tribes); Delauney v. Collins, 97 Fed. Appx. 229 (10th Cir. 2004) (allowing §1981 §1982 suit against individual tribal members) Nero v. Cherokee Nation of Oklahoma, 892 F. 2d 1457, 1463(10th Cir. 1989) (concluding that 42 U.S.C 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); Stroud v. Seminole Tribe of Florida, 606 F. Supp. 678 (S.D. Fla. 1985); Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F. Supp. 85 (D.Mont. 1969).

<sup>174</sup> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be

(2005)(“§1983”),<sup>176</sup> and Title VI of the Civil Rights Amendment (also known as 42 U.S.C. §2000d),<sup>177</sup> Other civil rights legislation restricted by courts<sup>178</sup> include: the Americans with

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subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

<sup>175</sup> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

<sup>176</sup> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

<sup>177</sup> Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin.

<sup>178</sup> See *Florida Parapalegic Ass'n Inc., v. Miccosukee Tribe* 166 F.3d 1126, 1133 (11th Cir. 1999)(finding the Americans with Disabilities Act applies to the tribes but does not waive the

Disabilities Act (“ADA”),<sup>179</sup> the Age Discrimination in Employment Act (“ADEA”),<sup>180</sup> and the Rehabilitation Act of 1973.<sup>181</sup>

In *Nero v. Cherokee Nation of Oklahoma*, the courts reaffirmed tribal sovereignty as a defense against civil rights suits.<sup>182</sup> Mr. Nero, a Freedman, brought suit against the Cherokee Nation for denial of his right to vote in tribal elections and participate in federal benefits programs.<sup>183</sup> Mr. Nero argued that he stated a claim for relief under 42 U.S.C §1981, §2000d and the Treaty of 1866.<sup>184</sup> The court dismissed the claim under the treaty finding that the treaty

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Tribe’s immunity from suit); *Sanderlin v. Seminole Tribe of Fla.*, 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, 29 U.S.C. § 701); *EEOC v. Fond du Lac Heavy Equip.*, 986 F.2d 246, 251 (8th Cir. 1993)(holding that ADEA does not apply to tribes)<sup>179</sup> 42 U.S.C. §12182(a)(2004). (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” )

<sup>180</sup> 29 U.S.C §621(b)(2004). (“It is therefore the purpose of this Act... to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment.”)

<sup>181</sup> 29 U.S.C. §701 (2004)(prohibiting employment discrimination on the basis of disability) .

<sup>182</sup> *See Nero v. Cherokee Nation*, 892 F. 2d 1457, 1459 (10th Cir. 1989).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1458.

did not convey a right to suit but merely a substantive constraint on the tribe.<sup>185</sup> The court analyzed the 42 U.S.C §1981 and §2000d using the Tuscarora rule.<sup>186</sup> When applying the exceptions to the Tuscarora rule, the court found that application of §1981 and §2000d would “affect the tribe’s right to self-governance in a purely internal matter.”<sup>187</sup> 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 would thus constitute an unacceptable interference with a tribe’s ability to maintain itself as a culturally and politically distinct entity.”<sup>188</sup>

In *Wardle v. Ute Indian Tribe*, the Tenth Circuit dismissed a non-Indians suit against the tribe for race discrimination in employment practices under 42 U.S.C. §1981 and §1983.<sup>189</sup> In citing *Wardle*, *Stroud v. Seminole Tribe of Florida*, a case involving a non-Indian dismissed from her job as teacher, the court explained that the doctrine of sovereign immunity precludes the plaintiffs claim under §1981.<sup>190</sup> The court reasoned that Congress did not expressly or impliedly extend §1981 to the employment practices of Indian tribes particularly those that involve preferential treatment for Indians over non Indians.<sup>191</sup>

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<sup>185</sup> *Id.* at 1461.

<sup>186</sup> *Id.* at 1462.

<sup>187</sup> *Id.* at 1463.

<sup>188</sup> *Id.*

<sup>189</sup> *See* 623 F.2d. 670 (10th Cir. 1980)

<sup>190</sup> *See* 606 F. Supp. 678, 679-80 (S.D.Fla. 1985).

<sup>191</sup> *Id.*

A court further upheld tribal sovereignty against a discrimination suit from tribal members against their tribe in *Spotted Eagle v. Blackfeet Tribe of the Black Feet Indian Reservation*.<sup>192</sup> The plaintiffs included nine members of the tribe seeking punitive damages and an injunction from the tribe for use of its jail under 42 U.S.C. §1981.<sup>193</sup> The court found that the law in its original form as the Civil Rights Act of 1870 was a “post civil war measure concerned with the rights of the recently liberated Negroes” that excluded the Indians.<sup>194</sup> Thus the only law “governing the daily affairs of many of the western Indians was the tribal law.”<sup>195</sup> Therefore §1981 can not govern inter-tribal relationships.<sup>196</sup> Also because an “Indian is subject to tribal law and the white person is not, Indians and whites are not treated equally as required by §1981 and cannot be unless tribal powers are extinguished.”<sup>197</sup>

However in *Delauney v. Collins*, the Tenth Circuit upheld a ruling in favor of a §1981 and §1982 suit brought by a non Indian and his wife, a tribal member, against individual tribal members.<sup>198</sup> The plaintiffs claimed that individual tribal members resentful of their interracial marriage (the husband was Caucasian) intentionally blocked their water supply because of the

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<sup>192</sup> See 301 F. Supp. 85, 88 (D.Mont. 1969)

<sup>193</sup> *Id.* at 87.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 88.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> See 97 Fed. Appx. 229 (10th Cir. 2004)

husband's race.<sup>199</sup> This case differs significantly from the prior case just discussed because it involved individual members and not the tribe as an entity. Finally, in *Inyo County, California v. Paiute-Shoshone Indians*, although the issue was not before the Supreme Court Justice Ginsburg noted the court she believed that tribes could not be subjected to suit under §1983.<sup>200</sup>

Attempts to enforce civil rights within a tribe have been met with great opposition by the courts. As mentioned earlier attempts to sue the U.S. government to protect tribal minority members is very arbitrary. Courts are particularly reluctant to enforce general laws with regards to "internal matters" such as membership. This is naturally a concern for tribes and courts alike that people might be able to sue their way in tribal membership and thus benefits. In order to file suit against the tribes, the Freedmen must show Congress intended to abrogate tribal sovereignty with regards to their membership and their particular civil rights. The following sections will analyze the Thirteenth Amendment and its enforcement legislation as possible examples of Congressional intent to abrogate tribal sovereignty.

IV. Recommendation: The Freedmen Should use the Thirteenth Amendment To Abrogate Tribal Sovereignty Because The Current Disenfranchisement Constitutes A "Badge And Incident Of Slavery."

The Thirteenth Amendment's applicability to Sovereign Entities

A. The Thirteenth Amendment's Ban On Involuntary Servitude Reaches Native American Tribes.

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<sup>199</sup> See *id* at 231.

<sup>200</sup> See *Inyo County v. Paiute Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701, 709.

Unlike any other Constitutional provision, the Thirteenth Amendment is understood to apply to both private and public entities.<sup>201</sup> The Thirteenth Amendment consists of two parts; first a ban on slavery, and second, a clause that allows for Congressional enforcement of the ban on slavery.<sup>202</sup> Courts have interpreted the first part to be self-actuating.<sup>203</sup>

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<sup>201</sup> See U.S. CONST. amend. XIII; *see also* Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, n.10 (1989) (finding that the Thirteenth Amendment enforcement legislation applies to state official's so long as for prospective injunctive relief.); 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 human races within the jurisdiction of this government."). *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."); *See also* Jones v. Mayer Co., 392 U.S. 409 at 422-36 (1968) (finding that the Thirteenth Amendment reaches private as well as public forms of discrimination.)

<sup>202</sup> See U.S. CONST. amend. XIII "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have the power to enforce this article by appropriate legislation."

<sup>203</sup> See Civil Rights Cases, 109 U.S. 3, 20 (1893).

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

The Thirteenth Amendment can be a tool to enforce civil rights.<sup>204</sup> However, because of the Equal Protection clause of the Fourteenth Amendment<sup>205</sup> and the voting protections of the

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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. *Id.*

*See also* *Alma Society v. Mellon*, 601 F.2d 1225, 1238 (2nd Cir. 1979)(finding that Thirteenth Amendment ban on “badges and incidents of slavery” must be realized through enforcement legislation.).

<sup>204</sup> *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). Senator Trumbill’s bill as he pointed out would ‘destroy all the discriminations’ embodied in the Black Codes” *Id. See , e.g., KARES, supra* note 202, at 377 (“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 sometime the “badges of servitude.”). The Black Codes passed by southern states after the Thirteenth were what Congress considered as “badges of servitude”. *Id.* These Codes prevented blacks from owning property or suing in courts. *Id.* at 412, n.19 (explaining the phrase “badges of slavery/servitude, came into being during Congressional debates on the ratification of the Thirteenth Amendment).

Fifteenth Amendment,<sup>206</sup> it is rarely used. Also, courts sought to limit this particular use of the Thirteenth Amendment soon after its ratification.<sup>207</sup>

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<sup>205</sup> See U.S. CONST. amend. XIV § 1. “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>206</sup> See U.S. CONST. amend. XV § 1. “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”

<sup>207</sup> See KARES, *supra* note 201, at 377-78(citing Civil Rights Cases, 109 U.S. 3 (1893)).

The 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 “compulsory service of the slave for the benefit of the master, restraint of his movements...[and] disability to hold property.” *Id.*

“[C]ourts have reduced the self executing power of the Amendment’s first section through limiting constructions.” *see id.* at 375. See also Geri J. Yonover, 58 CHI.-KENT. L. REV. 873 (1982) “[T]he Supreme Court decisions in the Civil Rights Cases,...progressively contracted the reach of congressional power under the amendment.”).

The Amendment's unique nature allows it to apply to tribes where other parts of the Constitution do not.<sup>208</sup> Courts have found the Amendment can reach Native Americans on reservations to ban involuntary servitude.<sup>209</sup> In *In re Sah Quah*, an Alaskan Native sought to gain his emancipation from his master under the Thirteenth Amendment.<sup>210</sup> The slave's master, also an Alaskan Native, claimed sovereign immunity as a defense.<sup>211</sup> He argued that his community's rules and customs, which included the selling and holding of slaves, were independent of any other law, authority, or jurisdiction.<sup>212</sup> Therefore, the civil authorities had no jurisdiction over his tribe.<sup>213</sup> The court concluded that the tribe was subject to the Thirteenth Amendment and as such, the plaintiff should be granted his freedom.<sup>214</sup> The court noted the

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<sup>208</sup> *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (concluding that the Fifth Amendment does not apply to Indian tribes.)

<sup>209</sup> *See* 31 F. 327, 331(D. Ala. 1886)(finding that the Thirteenth Amendment applied to Alaskan Native tribes); *see also* *Seminole Nation v. United States*, 78 Ct. Cl. 455, 460 (referring to the Emancipation Proclamation "The treaty did not make the Indian slave freedmen. That was accomplished three years before the treaty was signed."); *Davis v. United States*, 199 F. Supp. 1164, 1168 (W.D. Okla. 2002) ("Following the Civil War the Black Seminoles were emancipated by the Thirteenth Amendment of the United States Constitution")

<sup>210</sup> *In re Sah Quah*, 31 F. at 327.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 327-328.

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

<sup>214</sup> *Id.* at 331.

unique nature of the Amendment as “brief but broad in scope” with “language [that] is sweeping and far reaching.”<sup>215</sup>

Other cases that pertain directly to the Freedmen have acknowledged the applicability of the Thirteenth Amendment to Native American tribes.<sup>216</sup> Although the Thirteenth Amendment applies to Native American tribes, the question still remains as to whether the current disenfranchisement of the Freedmen descendants falls within the scope of its protection.

B. “The Badges And Incidents Of Slavery”

The Thirteen Amendment’s protection extends beyond involuntary servitude to discrimination.<sup>217</sup> Congress demonstrated its intent to ban the likenesses of slavery commonly referred to as the “badges and incidents of slavery” through the Civil Rights Act of 1866, which was the first enforcement legislation of the Thirteenth Amendment.<sup>218</sup> Traditionally, courts have

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<sup>215</sup> *Id.* at 330.

<sup>216</sup> *See* United States v. Choctaw Nation, 193 U.S. 115 at 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, at 797 (1914); Seminole Nation v. United States, 90 Ct. Cl. 151, 152 (1940) (explaining that United States desire to abolish slavery within the tribes).

<sup>217</sup> *See* KARES *supra* note 201, at 412, n.19 (quoting Senator Trumbell, “any statute...which deprives any citizen of civil rights ...is in fact a badge of servitude which by the Constitution is prohibited”) Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

<sup>218</sup> Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1982 (1976)).

defined the “badges and incidents of slavery.”<sup>219</sup> However, since the 1960’s, courts have allowed Congress to define them.<sup>220</sup>

In *Jones v. Mayer*, the plaintiffs alleged that a private company’s refusal to sell them a home because of their race constituted a §1982<sup>221</sup> violation.<sup>222</sup> The defendants countered that the statute did not apply because there was no state action.<sup>223</sup> The court held that §1982 applied to both private and public acts<sup>224</sup> and that §1982 was an extension of the Civil Rights Act of 1866,

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<sup>219</sup> See Civil Rights Cases, 109 U.S. 3, 24 (1893).

<sup>220</sup> See *Jones v. Mayer*, 392 U.S. 409, 440 (1968) (allowing deference to Congress in determining the incidents of slavery); *Id.* (“Surely Congress has the power under the Thirteenth Amendment to determine what are the ‘badges and the incidents of slavery’ and the authority to translate that determination into effective legislation.”); *Id.* at 443-44 (concluding that the ends and means of 42 U.S.C §1982 are legitimate exercises of Congressional power). *Id.* (agreeing with Representative Wilson of Iowa reasoning for urging the Congress to adopt the Civil Rights Act of 1866, Pub. L. 39-31, 14 Stat. 27 (1866)) (“The end is legitimate...because it is defined by the Constitution itself. The end is the maintenance of freedom... A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery....This settles the appropriateness of this measure, and that settles its Constitutionality.”).

<sup>221</sup> See *supra* note 175.

<sup>222</sup> *Id.* at 412. See also *District of Columbia v. Carter* 409 U.S. 418 (1973)

<sup>223</sup> *Jones*, 392 U.S. at 412. .

<sup>224</sup> *Id.* at 413. See also *Sullivan v. Little Hunting Park, Inc.* 396 U.S. 229 (1969) (finding “narrow construction of ... §1982 ... would be quit inconsistent with broad and sweeping nature of protection meant to be afforded by ... Civil Rights Act of 1866, from which §1982 was derived”).

which was intended to enforce the Thirteenth Amendment.<sup>225</sup> The court found that the Thirteenth Amendment authorized Congress to determine the “badges and incidents of slavery” and “translate that determination into effective legislation.”<sup>226</sup> Therefore, the denial of property based on race was one of the “badges and incidents of slavery.”<sup>227</sup>

However, cognizant of the potential for abuse, courts have limited the scope of the Thirteenth Amendment’s ban on the “badges and incidents of slavery.”<sup>228</sup> First, the courts have

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<sup>225</sup> *Jones*, 392 U.S. at 422. *Sullivan*, 396 U.S. at 237.

<sup>226</sup> *Jones*, 392 U.S. at 441. *See also id.* (holding that the enforcement clause of the Thirteenth Amendment “clothed ‘Congress with power to pass all laws necessary and proper for abolishing all ‘badges and incidents of slavery’ in the United States’”).

<sup>227</sup> *See id.* at 440.

<sup>228</sup> *See Palmer v. Thompson*, 403 U.S. 217, 226-27 (1970) (rejecting the plaintiff’s claim that the Thirteenth Amendment’s ban on the “badges and incidents of slavery” allows for suit concerning racial segregation in public schools without enforcement legislation).

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. *Id.*

*See also e.g., Alma Society v. Mellon*, 601 F. 2d 1225, 1238 (2nd Cir. 1979) *cert. denied*, 444 U.S. 995 (1979)(rejecting petitioner’s claim that New York’s adoption law requiring adoption records remain sealed constituted a “badge or incident” of slavery).

found that the Thirteenth Amendment on its face does not bar or create causes of action against the “badges and incidents of slavery.”<sup>229</sup> Second, courts have found that any claim based solely on the Thirteenth Amendment could only ban conditions of servitude.<sup>230</sup> Courts have also upheld a sovereign entity’s immunity to the ancillary enforcement legislation (i.e. 42 U.S.C.

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<sup>229</sup> See *Palmer v. Thompson*, 403 U.S. 217, 226-27; see also *Alma Society v. Mellon*, 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 201, at 380 (noting that federal legislation may create a cause of action against conduct Congress perceives to be a badges of slavery); *Id.* at 412, n.37 (showing 42 U.S.C. § 1981, § 1982 as examples of federal legislation which create a cause of action against badges and incidents of slavery). See *id.* (including 42 U.S.C § 1983) within the realm of legislation that a person may sue to assert a right to be free from involuntary servitude.

<sup>230</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 542 (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.* However, this leaves the Freedmen with no recourse because the Fourteenth Amendment is a protection against State action. See U.S. CONST. amend XIV. See *Alma*, 601 F. 2d at 1237. (“The Court had directly invoked the Amendment only to strike down state laws imposing the condition of peonage.”); see also *Harrigan v. Sebastian’s on 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.”).

§1981, §1982 and §1983).<sup>231</sup> For example, States can use sovereign immunity based in the Eleventh Amendment to protect them from suit for damages.<sup>232</sup> However, courts have allowed suits against a State’s official for prospective injunctions.<sup>233</sup>

Although the Thirteenth Amendment applies to Native American tribes, two issues remain: (1) whether the current disenfranchisement constitutes a “badge or incident of slavery;” and (2) whether the ancillary legislation used to enforce the Thirteenth Amendment’s ban on the “badges and incidents of slavery” abrogates tribal sovereign immunity.

C. The Current Disenfranchisement Constitutes A “Badge And Incident Of Slavery.”

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<sup>231</sup> *See, e.g., See Inyo County v. Paiute Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701, 709 (2003)(finding that 42 U.S.C §1983 does not apply to tribes); *Nero v. Cherokee Nation of Oklahoma*, 892 F. 2d 1457, 1463(10th Cir. 1989) (concluding that 42 U.S.C 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); *Stroud v. Seminole Tribe of Florida*, 606 F. Supp. 678 (S.D. Fla. 1985); *Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation*, 301 F. Supp. 85 (D.Mont. 1969).

<sup>232</sup> *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991)(finding that Indian tribes could not sue State of Alaska because of 11th Amendment protection).

<sup>233</sup> *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71, n.10 (1988); *Delauney v. Collins* 97 Fed. Appx. 229 (10th Cir. 2004) (allowing §1981 §1982 suit against individual tribal members)

The denial of membership and the incident disenfranchisement of the Freedmen constitutes a “badge and incident” of slavery for several reasons. First, the actions deny the Freedmen property, based on race.<sup>234</sup> As noted before, members within the Seminole and Cherokee tribe with white blood were given full “Blood Status” and consequently 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.<sup>235</sup> The Seminole Freedmen and the Cherokee Freedmen have also been denied the right to vote.<sup>236</sup> Second, particularly with the Seminole case, the denial of Freedmen membership is based on a prior condition of slavery.<sup>237</sup> The tribe claims that they are denying property because the Black Seminoles were not citizens of the tribe in 1823.<sup>238</sup> However, if they were not members of the tribe or of the United

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<sup>234</sup> 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); *see also* Jones v. Mayer, 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.’”).

<sup>235</sup> See Part II.A *supra*. *see also* Part II.B *supra*.

<sup>236</sup> See Part II.A *supra*.

<sup>237</sup> See 14 Stat. 27 (granting the right to equally share in property interests as white citizens irrespective of prior condition of slavery or servitude); *see also* Part II. A (explaining that the Seminole Tribe denied the Freedmen descendant’s right to the Judgment Fund because they were slaves in 1823 and couldn’t partake in property ownership).

<sup>238</sup> See Davis v. United States, 199 F. Supp. 2d 1164, 1170 (W.D. Okla. 2002).

States,<sup>239</sup> then the Freedmen were property.<sup>240</sup> 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 such a use of a person's ancestor's condition of servitude to deny a person property is the very sort of "badge or incident of slavery" Congress sought to eliminate by passing the Thirteenth Amendment and its enforcement legislation.<sup>241</sup> Third, the current disenfranchisement is denying the Freedmen the right to vote in tribal elections.<sup>242</sup> This denies the Freedmen from equal protection under tribal law.<sup>243</sup>

Although a court may concede that the Thirteenth Amendment applies to Native American tribes, and the current disenfranchisement constitutes a "badge or incident of slavery," the court may be reluctant to abrogate tribal sovereignty. As noted above, case law has already found in many instances that the ancillary legislation needed to enforce the ban on the "badges

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<sup>239</sup> See *Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1856).

<sup>240</sup> See LITTLEFIELD, *supra* note 7, at 5 (noting that the Seminoles traded livestock for their African slaves); See also Natsu Taylor Saito, *Articles & Essays: From Slavery and Seminoles to Aids in South Africa: An Essay on Race and Property in International Law*, 45 Vill. L. Rev. 1135, 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 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. *Id.*

<sup>241</sup> See *Jones v. Mayer*, 392 U.S. 409 at 441; Kares *supra* note 201 at 412 n. 9.

<sup>242</sup> See *Cherokee Dispute* *supra* note 132; See also 223 F. Supp. 2d 122 (2002).

<sup>243</sup> See Civil Rights Act of 1866, 14 Stat. 27.

and incidences of slavery” does not apply to sovereign entities.<sup>244</sup> Also, courts traditionally have been reluctant to abrogate tribal sovereignty particularly with regards to membership.<sup>245</sup>

D. Can The Ancillary Enforcement Legislation Abrogate Tribal Sovereignty?

With regards to the Freedmen, courts should find the ancillary legislation abrogates tribal sovereignty for three reasons: (1) Congress has already abrogated tribal sovereignty with regards to the Freedmen’s civil rights and membership; (2) courts can create a narrow exception to allow the Freedmen’s claim, but not open the tribe up to more litigation because the Freedmen’s case is distinguishable from prior case law; and (3) if courts acknowledge the Thirteenth Amendment reaches tribes then so should Congressional enforcement action including legislation and treaties.

1. Congress Intended To Abrogate The Tribes’ Sovereignty With Regards To The Freedmen’s Membership.

Courts may still refuse to find an abrogation of the Seminole or Cherokee tribe’s sovereignty because of the enforcement statutes’ silence concerning their application to Native American tribes. In *Nero*, the Tenth Circuit Court found that because membership was an internal matter for tribes, the court would not apply the Thirteenth Amendment’s enforcement legislation.<sup>246</sup> But that court’s analysis was incomplete. It did not consider legislation being

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<sup>244</sup> See *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003); *Nero v. Cherokee Nation*, 892 F. 2d 1457 (10th Cir. 1989).

<sup>245</sup> See *Nero v. Cherokee Nation*, 892 F. 2d 1457, 1463 (10th Cir. 1989) (applying the Tuscarora rule and concluding that 42 U.S.C. §1981 and §2000d cannot apply to Indian tribes because they would “affect the Tribe’s right to self-governance in a purely internal matter”).

<sup>246</sup> See *Nero v. Cherokee Nation of Oklahoma*, 892 F. 2d 1457, 1463.

passed at the time the tribes signed the 1866 treaties,<sup>247</sup> nor did it consider Congressional plenary power with regards to tribal membership.<sup>248</sup> According to the Tuscarora rule, general laws apply to Native American tribes.<sup>249</sup> Analysis of the Freedmen’s case using the exceptions to the Tuscarora rule,<sup>250</sup> (as the court did in *Nero*) demonstrates a congressional intent for the Thirteenth Amendment’s enforcement legislation to abrogate tribal sovereignty with regards to the Freedmen’s membership and equal protection.

The Tuscarora rule is an understanding that general statutes apply to Native American tribes.<sup>251</sup> However, to conserve tribal sovereignty courts have applied three exceptions, any of which will satisfy to defeat the application of the statute to a tribe.<sup>252</sup> The exceptions to the

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<sup>247</sup> See *United States v. Dion*, 476 U.S. 734, 739-40 (1986)(finding that a clear intent to abrogate tribal sovereignty can be found from “clear and reliable” evidence in the legislative history of the statute); see also *EEOC v. Fond du Lac Heavy Equip.*, 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 a ‘clear and plain’ intent to apply the statute to Indian tribes”).

<sup>248</sup> See *Groundhog v. Keeler*, 442 F. 2d 674, 680 (10th Cir. 1971) (“[I]t is well settled that Congress has plenary control over Indian tribal relations and property, ...it was...held that such ... power ... included the power to regulate and determine tribal membership... [and] define and describe those persons who should be treated and regarded as members of and Indian Tribe.”).

<sup>249</sup> See *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

<sup>250</sup> See *id.* at 116 (1960).

<sup>251</sup> *Id.*

<sup>252</sup> See *Nero*, 892 F. 2d at 1462.

Tuscarora rule weighs: a) if the application of the law would abrogate rights found in a treaty; b) proof of legislative history that Congress intended that the law not apply to the Native Americans on reservations; and c) the law touches the exclusive right of self-government in purely internal matters.<sup>253</sup>

First, concerning the treaty rights, the Freedmen can show that application of the enforcement legislation actually helps to assure their rights and the tribe's promise under the Seminole and Cherokee treaties of 1866.<sup>254</sup> The Tenth Circuit in analyzing the treaty protection language found that Cherokee Treaty language did not constitute an "unequivocal expression" of waiver by the Cherokee Nation of its sovereign immunity.<sup>255</sup> Such language merely placed "substantive constraints" on the tribe.<sup>256</sup> The Tenth Circuit's brief analysis of the Cherokee Treaty of 1866 not only ignored the rights conveyed to the Freedmen but also ignored legislative proof (the second prong of the Tuscarora rule) of Congress intentions to protect the Freedmen with the treaty and abrogate the tribe's sovereignty by allowing suit in federal court. Article VII of the Treaty<sup>257</sup> grants original federal jurisdiction over all causes concerning the Treaty of 1866, the Tenth Circuit ignored this analysis. The general provision to ban involuntary servitude and a

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<sup>253</sup> *Id.*

<sup>254</sup> *Compare* Treaty with Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 2, 14 Stat. 755 *and* Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14 Stat. 799. *with* 42 U.S.C. §1981 (providing for equal treatment with regards to contracts) *and* § 1982(providing for equal treatment with regards to property rights *and* §1983 (assuring equal treatment under the law).

<sup>255</sup> See *Nero v. Cherokee Nation of Okla.*, 892 F. 2d 1457, 1461.

<sup>256</sup> *Id.*

<sup>257</sup> See *Treat with the Cherokee*, July 19, 1866, U.S.-Cherokee Nat. art. 7, 14 Stat. 799.

provision that assures equal protection for the Freedmen<sup>258</sup> along with the Article VII provision on federal court jurisdiction demonstrates more than a “substantive constraint” on the tribe.

In order for a statute to apply to abrogate tribal sovereignty there must be some affirmative evidence of congressional intent in the language of the statute, the legislative history, or the “surrounding circumstances,” to apply a statute to Native American tribes.<sup>259</sup> In *Jones v. Mayer*, the Court found that 42 U.S.C §1982 was the modern manifestation of the Civil Rights Act of 1866.<sup>260</sup> The Civil Rights Act of 1866<sup>261</sup> was passed within one month of the Seminole

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<sup>258</sup> See Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14 Stat. 799; Treaty with Seminole, Mar. 21, 1866, U.S-Seminole Nat., art. 2, 14 Stat.755.

<sup>259</sup> See *supra* note 247.

<sup>260</sup> See *Jones v. Mayer*, 392 U.S. 409, 412 (1968); See also KARES, *supra* note 202, at 412,n.37 (noting that 42 U.S.C. §1981, §1982, and §1983 are example of legislation of banning the “badges and incidents of slavery”.)

<sup>261</sup> In its original text the Act did not apply to Native American tribes. See CAROL TEBBEN, *Symposium: Native Americans And The Constitution: An American Trifederalism Based Upon The Constitutional Status of Tribal Nations*, 5 U. Pa. J. Const. L. 318 (explaining that when the Act was written the United States was still making treaties with tribes as sovereign independent nations). See Act of Mar. 3, 1871, Pub. L. No. 41-120, 16 Stat. 544 (1871) (officially ending Congress making of new treaties with tribes). Native Americans were not citizens of the United States at that time. See *Elk v. Wilkins*, 112 U.S. 94, 103 (1884). It was not until 1924, fifty-six years after the ratification of the Fourteenth Amendment, U.S. CONST. amend. XIV, that all Native Americans were granted citizenship by birth in the United States. See Citizenship to Indians Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified in the Nationality Act, 8

Treaty of 1866 and two months of the Cherokee Treaty of 1866.<sup>262</sup> One could argue that the treaty is an example of enforcement legislation meant to apply to Native Americans on reservations because the Civil Rights Act of 1866 excluded Native American's on reservations.<sup>263</sup> Although this may seem like Congress did not intend for the Act to apply to tribes, it actually makes the argument stronger that Congress tried to incorporate the Act in the Treaties by both making slavery illegal within the tribes and granting the Freedmen equal rights and membership for generations.<sup>264</sup> Also at the time of its passage Congress primary exercise of authority over Indian tribes was through treaties.<sup>265</sup> It was not until 1871 that Congress ceased using treaties with Indian tribes.<sup>266</sup> The treaties as enforcement legislation or an incorporation of

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U.S.C.S. § 1401(b) (2004) (“The following shall be nationals and citizens of the United States at birth: a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal Tribe....”).

<sup>262</sup> See Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14 Stat. 799; Treaty with Seminole, Mar. 21, 1866, U.S-Seminole Nat., art. 2, 14 Stat. 755; Civil Rights Act of 1866.

<sup>263</sup> See TEBBEN, *supra* note 261.

<sup>264</sup> Compare Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 with Treaty with Seminole, Mar. 21, 1866, U.S-Seminole Nat., art. 2, 14 Stat. 755 and Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14 Stat. 799.

<sup>265</sup> See TEBBEN, *supra* note 261.

<sup>266</sup> See Act of Mar. 3, 1871, Pub. L. No. 41-120, 16 Stat. 544 (1871).

the Civil Rights Act of 1866, were part Congressional scheme to rid the country of involuntary servitude and the “badges and incidents of slavery.”<sup>267</sup>

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.<sup>268</sup> Congress has passed subsequent legislation on

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<sup>267</sup> See *Jackson v. United States and Comanche Indians*, 34 Ct. Cl. 441, 445 (1899) (“At the time of this amendment [Thirteenth] to the Constitution commissioners were negotiating a treaty with ...Indians...in the furtherance of the national policy of abolishing slavery.”); see *KARES*, *supra* note 202, at 412, n.20 (noting that Congress was countering the discrimination the freed men and women were facing when it passed the enforcement legislation).

<sup>268</sup> See *Jones v. Mayer*, 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). Some courts have found 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, 446 (finding that a Freedmen was not citizen of the United States in 1867 because the Fourteenth Amendment was still under consideration at the time of signing of the treaty with the Choctaw and Chickasaw Nation in 1866). This would then prevent the Freedmen from benefiting from the protection of the Civil Rights Act of 1866 which applies to U.S. citizens See Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (1866). However, that argument would void the Civil Rights Act 1866 in its entirety, because no African Americans were citizens of the United States until 1868. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1856). This understanding is inconsistent with Congressional intent for the Act. The legislative history of the Act shows that Congress intended to get rid of the “badges and incidents” of slavery in the United States irrespective of the actors. See *Jones v. Mayer*, 392 U.S. 409, 440 (1968).

behalf of the Freedmen to assure their equal protection when the tribes tried to take it away.<sup>269</sup> These factors firmly indicate that Congress intended the Thirteenth Amendment's enforcement legislation to apply to Native American tribes with regard to the Freedmen and their descendant's equal treatment within the tribes.

Finally, in *Nero*, the Tenth Circuit found that application of the civil rights legislation would touch one of the exclusive rights of self-governance: deciding membership.<sup>270</sup> However, the Supreme Court has found that "included in Congress' 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."<sup>271</sup> Arguably, this is the power Congress exercised in 1866 when it officially made the Freedmen members of the tribes through the Seminole Treaty of 1866 and the Cherokee Treaty of 1866.<sup>272</sup> Indeed, the Dawes Rolls, which have defined tribal membership for generations, were a product of a Commission set up by Congress.<sup>273</sup> This Commission, charged with determining membership of the tribes had permission to exclude and include potential tribal members.<sup>274</sup>

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<sup>269</sup> See *Cherokee Freedmen*, Pub. L. No. 50-1211, 25 Stat. 608 (1888)(overruling Cherokee Nation's action to exclude the Freedmen and other adopted members from property interests).

<sup>270</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

<sup>271</sup> See *Groudhog v. Keeler*, 442 F. 2d 674, 680 (10th Cir. 1971) (citing *Stephens v. Cherokee Nation*, 174 U.S. 445, 488 (1899)).

<sup>272</sup> See *Stephens*, 174 U.S. at 488.

<sup>273</sup> See *id.* (finding that Congress' creation of the Dawes Commission was an legitimate exercise of its power to define membership).

<sup>274</sup> See *id.*

Therefore, a complete analysis of the Tuscarora rule shows that the Thirteenth Amendment's ancillary legislation does apply to tribes when enforcing equal treatment of the Freedmen. The rights in a treaty would be enforced. Analysis of the legislative intent shows Congress intended to apply the Civil Rights Act of 1866 to tribes as part of their national scheme to be rid of slavery and its vestiges. Finally, the Freedmen's membership and treatment within the tribe is not purely internal matter. Congress made the Freedmen members through a legitimate exercise of its oversight over membership within the tribe. Thus, Congress already limited tribal sovereignty with regards to the Freedmen.

2. The Freedmen's Situation Is Distinguishable from Prior Case Law and application of the Thirteenth Amendment's Civil Rights Enforcement Legislation Will Irreparably Harm Tribal Sovereignty.

The Freedmen's case is *sui generis*.<sup>275</sup> Their history as well as their racial background has distinguished them from case law (excluding *Nero* analyzed above) that has denied federal jurisdiction to other plaintiffs.<sup>276</sup> Unlike prior litigants discussed above the Freedmen have their civil rights and in the Cherokee case a right to sue in federal court, confirmed in treaties signed with the U.S. government. The language of the treaties indicates that the Thirteenth Amendment was meant to apply to the tribes as both a ban on involuntary servitude and the "badges and incidents of slavery."<sup>277</sup> The Freedmen are descendants of a class of newly freed men and

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<sup>275</sup> See generally Treaty with Cherokee, July 19, 1866, U.S.-Cherokee Nat., 14 Stat. 799; see also Treaty with Seminole, Mar. 21, 1866, U.S.-Seminole Nat., 14 State. 755.

<sup>276</sup> See Part I *supra*.

<sup>277</sup> See Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14 Stat. 799 ; Treaty with Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 2, 14 Stat. 755. In both cases the Treaties explained that the tribes would no longer have slavery and would treat the Freedmen as equal

women who Congress intended to protect. Their descendants were freed with the Thirteenth Amendment and protected by its enforcement legislation. The fact that they are members of tribes did not lessen Congress intent to protect them.<sup>278</sup> The Freedmen, with regards to their tribes attempts to deny them property and voting rights have a raised level of protection that other litigants including full blooded tribal members do not.

The treaties that both tribes signed made clear that they were to free their slaves and treat them as equals.<sup>279</sup> Congress was trying to assure that the “badges and incidents” of slavery would be terminated, because the equality was to exist for in perpetuity.<sup>280</sup> Therefore, a court should

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members. *See also* *Seminole Nation v. United States*, 90 Ct. Cl. 151, 153 (1940)(asserting that the Tribe knew “that the rights 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.*, 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 sell of land.)

<sup>278</sup> *See* Cherokee Freedmen Act, Pub. L. No. 50-1211, 25 Stat. 608 (1888) (responding to Cherokee Tribal Council legislation which excluded Freedmen, Shawnees, Delawares, and intermarried whites from sharing tribal assets, by requiring the Tribe to share its assets).

<sup>279</sup> *See* Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14 Stat. 799; Treaty with Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 2, 14 Stat. 755. Note that the language is virtually identical in the treaties and one could assume that the same reasoning when applied to Seminole Nation also applies to the Cherokee Nation. *See Seminole Nation*, 90 Ct. Cl. at 153.

<sup>280</sup> *See* Treaty with Cherokee, July 19, 1866, U.S.-Cherokee Nat., art. 9, 14 Stat. 799; Treaty with Seminole, Mar. 21, 1866, U.S.-Seminole Nat., art. 2, 14 Stat. 755. (requiring equal rights and treatment to the Freedmen and their descendants).

allow the Freedmen's suit because they are a special class of litigants Congress intended to free and protect for generations through signed treaties with the tribes.<sup>281</sup> This distinguishes the Freedmen from plaintiffs in cases where a court denied application the Thirteenth Amendment enforcement legislation.<sup>282</sup> Unlike the Freedmen, they do not have equal protection reinforced in treaties which were agreed upon by the tribes.

Allowing suit in the Seminole case (Cherokee tribe already has a provision allowing suit in their Treaty) will not create irreparable harm to tribal sovereignty in the rest of Indian Country. Nor will it open the Seminole or Cherokee tribe to more suits by non Freedmen. In allowing the Freedmen's suit the courts will be opening a very narrow window. Tribal sovereignty will remain against all other Constitutional Amendments.<sup>283</sup> The Thirteenth

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<sup>281</sup> See *Seminole Nation*, 90 Ct. Cl. at 152 (showing that the Commissioners who represented the United States "declared among other things that the United States desired slavery to be abolished and measures to be taken to incorporate the slaves into the tribes, with their rights guaranteed.").

<sup>282</sup> See generally *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003) *but see generally* *Nero v. Cherokee Nation*, 892 F. 2d 1457, 1459 (10th Cir. 1989) (denying Freedmen's suit under 42 U.S.C. § 1981 and §2000d). The Court denied the suit based on the Tusarora rule and did not analyze whether the Thirteenth Amendment's reach to the tribes as well as the plaintiff, a Freedmen's unique situation allowed suit under § 1981 and § 2000d. *Id.* See also *Wardle v. Ute Indian Tribe*, 623 F.2d 670 (10th Cir. 1980); *Stroud v. Seminole Tribe of Florida*, 606 F. Supp. 678 (S.D. Fla. 1985); *Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation*, 301 F. Supp. 85 (D.Mont. 1969).

<sup>283</sup> *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971).

Amendment will only apply directly where there is involuntary servitude.<sup>284</sup> When there are cases of the “badges and incidents of slavery” the litigant must show that Congress intended the enforcement legislation to protect them as a class.<sup>285</sup> There are few litigants that can meet such requirements in the super majority of Indian tribes in the United States.

With regards to the Seminole and Cherokee tribes few litigants will be able to meet such requirements to enforce the Thirteenth Amendment’s enforcement legislation. Many people are descended from slaves but a very small percentage was granted protection or membership in treaties.<sup>286</sup> Therefore the Freedmen are the only litigants that could use such an avenue to abrogate tribal sovereignty. Courts can also limit the Freedmen descendants redress from the tribe by allowing only prospective injunctive relief from tribal officials or individual members preventing membership rights.<sup>287</sup> Such a relief would greatly benefit the Freedmen. Upon

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<sup>284</sup> See *supra* note 229.

<sup>285</sup> See *generally* United States v. Dion, 476 U.S. 734, 739 (1986).

<sup>286</sup> Arguably most African Americans are descended from slavery but opening the tribes up to suit from the Freedmen descendants will not open the tribe to suit from any African American with a percentage of Native American blood because the requirement that Congress needs to extend protection to them.

<sup>287</sup> See *Delauney v. Collins* 97 Fed. Appx. 229 (10th Cir. 2004) (allowing §1981 §1982 suit against individual tribal members); *Will v. Michigan Dep’t of Police*, 491 U.S. 58, 71,n.10 (1989) (allowing suit against state officials). Arguably this avenue is moot because both tribes have amended their constitutions to exclude Freedmen. Therefore moving the redress beyond individual members but to the tribe itself.

gaining their membership back many rights could be restored including the right to vote which could be used to regain property rights.

### Conclusion

Freedmen have been a part of Native American tribes for generations before the treaties of 1866.<sup>288</sup> The treaties made their membership official<sup>289</sup> and the language shows they were to remain an equal part of the tribes for generations.<sup>290</sup> Despite this promise made to the United States and to the Freedmen, the Cherokee and Seminole tribes have systematically tried to deny the Freedmen equal treatment.<sup>291</sup> For many Freedmen, this is a fight over money.<sup>292</sup> For many full-blooded Native Americans, this is a fight over self-identification and preserving sovereignty over issues of membership.<sup>293</sup> This comment was not meant to attack or critique the use of sovereignty as a protection for Indian tribes. The author acknowledges the to the integral important role of sovereignty. The focus of this comment was to how to bring suit in to federal court strictly for the Freedmen of the Seminole and Cherokee tribes.

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<sup>288</sup> See Part I *supra*. See generally LITTLEFIELD, *supra* note 7.

<sup>289</sup> See *Davis v. United States*, 199 F. Supp. 2d 1164, 1168 (W.D. Okla. 2002).

<sup>290</sup> See *Seminole Nation of Okla. v Norton*, 223 F. Supp. 122, 134 (D.D.C. 2002).

<sup>291</sup> See Part II *supra*.

<sup>292</sup> See KEILMAN, *supra* note 81 (quoting Crockett a Freedman descendant “If it wasn’t for the money, everybody would be in harmony. When the money came, people started to change.”).

<sup>293</sup> *Id.* (quoting Lewis Johnson, a member of the Seminole Tribe council, “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.”).

The current disenfranchisement of the Freedmen is an abuse of the sovereignty. Denying people rights based on their ancestors' prior condition of servitude or property status is a "badge or incident of slavery."<sup>294</sup> Congress intended to eradicate such discrimination not only in the treaties but also in the enforcement legislation passed within months of the treaties.<sup>295</sup> Courts have found that the Thirteenth Amendment reaches Native American tribes.<sup>296</sup> 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.

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<sup>294</sup> See *Jones v. Mayer*, 392 U.S. 409, 441 (1968)(holding that "the badges and incidents of slavery" included restraints upon fundamental rights of property)

<sup>295</sup> See Part V D.1. *supra*.

<sup>296</sup> See *In re Sah Quah* 31 F. 327 (D. Ala. 1886).