CHEROKEE FREEDMEN AND THE COLOR OF BELONGING

LOLITA BUCKNER INNISS*

This Article addresses the Cherokee Nation and its historic conflict with the descendants of its former black slaves, designated Cherokee Freedmen. This Article specifically addresses how historic discussions of black, red, and white skin colors, designating the African-ancestored, aboriginal (Native American), and European-ancestored people of the United States, have helped to shape the contours of color-based national belonging among the Cherokee. The Cherokee past practice of black slavery and the past and continuing use of skin color-coded belonging not only undermines the coherence of Cherokee sovereignty, identity, and belonging but also problematizes the notion of an explicitly aboriginal way of life by bridging red and white cultural difference over a point of legal and ethical contention: black inequality.

* Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. Ph.D and LLM with Distinction, Osgoode Hall, York University; J. D., University of California, Los Angeles; A.B., Princeton University. The author thanks members of the Harvard University Law School Institute for Global Law and Policy, members of the Lutie Lytle Workshop, and Dean Kevin R. Johnson of the University of California, Davis for reviewing versions of this article. The author offers special thanks to Associate Dean Carla Pratt of Pennsylvania State University School of Law for her in depth comments on earlier drafts of this article. Finally, but not least, the author thanks the editors of the Columbia Journal of Race and Law and especially Madiba Dennie for her assistance during the editing process.

I. INTRODUCTION

It is a relatively little-known aspect of United States history that the Cherokee and other aboriginal people[1] in the United States sometimes held African-ancestored slaves.[2] This Article addresses Cherokee slave-holding and the tribe's historic conflict with the descendants of its former black[3] slaves, designated Cherokee Freedmen, and examines the ways in which skin color has served as a mechanism for assessing citizenship and acceptance in the Cherokee Nation. It specifically analyzes how historic discussions of black, red, and white[4]

---

[1] This Article interchangeably uses the words "aboriginal," "Native American," "indigenous," or "Indian" to designate members of what are believed to be the earliest groups of peoples in what is now the United States. All of these terms have been the subject of critique, given that there are, as one scholar has written, "a limited assortment of unsatisfactory terms" for labeling these first people. ALEXANDRA HARMON, INDIANS IN THE MAKING: ETHNIC RELATIONS AND INDIAN IDENTITIES AROUND PUGET SOUND 10 (1998). Indeed, acknowledging their apparent priority in the Americas, in Canada some aboriginal persons, those who are neither Inuit nor Métis, are called (or call themselves) "First Nations." *See, e.g.*, PETER KULCHYSKI, LIKE THE SOUND OF A DRUM: ABORIGINAL CULTURAL POLITICS IN DENENDEH AND NUNAVUT 232 (2005). The word "Indian" has been a particular source of controversy. Though it is perhaps one of the earliest terms used to describe these early inhabitants the Americas, a key complaint about the word is that it is a misnomer that came into use due to the navigational error of Christopher Columbus, who believed that he had reached South Asia. Besides being a misnomer, the word Indian has also traditionally been freighted with a number of unpalatable associations, such as "(1) generalizing from one tribe's society and culture to all Indians, (2) conceiving of Indians in terms of their deficiencies according to White ideals rather than in terms of their own various cultures, and (3) using moral evaluation as description of Indians." ROBERT BERKOFER, THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT 25-26 (1979). Though I do not use these terms, it is worth mentioning that some scholars have also used the terms "white Indian" and "black Indian" to distinguish persons who claim Indian ancestry but who also have, respectively, significant amounts of European or African ancestry. *See, e.g.*, Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 61, 68 n.28 (2005) [hereinafter Pratt, *Tribes and Tribulations*].

[2] The Cherokee were not the only tribe to hold African-ancestored slaves. The Choctaw and the Chickasaw, for example, held over 5,000 blacks in slavery by 1860. FRANK CUNNINGHAM, GENERAL STAND WATIE'S CONFEDERATE INDIANS 32 (1959).

[3] This Article uses the words "black" and "African-ancestored" interchangeably to refer to people who themselves originated from or whose ancestors in significant numbers originated from the continent of Africa. Just what to call such persons has been the subject of some debate. It has been suggested that the transition from "Negro" and "colored" to "black" and "African-American" was as a result of the efforts by persons of African ancestry in the 1960's to achieve a sense of racial pride. *See, e.g.*, F. JAMES DAVIS, WHO IS BLACK? 145-46 (1991). As some scholars have noted, even the label "African-American" is subject to further subdivision, given that it may be misleading to apply it to persons who are not the descendants of Africans enslaved in the United States. *See, e.g.*, Jerome E. Morris, *Ethnicity*, in 1 ENCYCLOPEDIA OF AFRICAN AMERICAN EDUCATION 252, 253 (Kofi Lomotey ed., 2010) (explaining that "the term *African American* implies that an individual shares common social, political, historical and cultural experiences with other descendants of enslaved Africans in the United States, whereas the term *Black* is a more inclusive term that may include people from varied experiences (Caribbean countries or the African continent).") (emphasis in original); Allison Blakely, *The Emergence of Afro-Europe: A Preliminary Sketch*, in BLACK EUROPE AND THE AFRICAN DIASPORA 3, 11 (Darlene Clark Hine et al. eds., 2009) (noting the ambiguity of the word black in transcultural and transnational contexts and observing that "Black subjects from the Caribbean and Africa have had to be accommodated for mutual benefit, just as the descendants of enslaved Africans in the United States have had to be."); MARILYN YAQUINTO, REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES 470 (2007) (noting descendants of Africans enslaved in the United States as a distinct group).

[4] I use the word "white" to designate European-ancestored persons in the United States, as many other scholars have. *See, e.g.*, PAUL SPICKARD, ALMOST ALL ALIENS: IMMIGRATION, RACE, AND COLONIALISM IN AMERICAN HISTORY AND IDENTITY 80 (2010) (describing European migrants to the United States as forming the "second great panethnicity: the white race."); Nicholas Faraclas & Marta Viada Bellido de Luna, *Marginalized Peoples, Racialized Slavery and the Emergence of the Atlantic Creoles*, in AGENCY IN THE EMERGENCE OF CREOLE LANGUAGES: THE ROLE OF WOMEN, RENEGADES, AND PEOPLE OF AFRICAN AND INDIGENOUS DESCENT IN THE EMERGENCE OF THE COLONIAL ERA CREOLES 36-37 (Nicholas Faraclas ed., 2012) (describing the creation of a "new Calvinist, capitalist and racialized form of colonization," which relied on strict separation of European-ancestored peoples, who were white, from all others). The category white is perhaps less stringently drawn in the contemporary United States as a result of racial mixing among Whites and certain

skin colors have helped to shape the historical contours of color-based national belonging among the Cherokee.[5] This account seeks to expose the ambivalence and contingency of ideas of nationhood, sovereignty, and race. This dynamic is grounded in the existence of black skin color discrimination that emerged with the spread of black slavery among the Cherokee and has culminated in the contemporary political exclusion of Cherokee Freedmen. Widespread and longstanding white and red skin preference helped to shape formal legal notions of Cherokee status, privilege, and sovereignty.

Many scholars have addressed black subordination and slavery among the Cherokee[6] and other Native

racial minority groups (chiefly Asians and Latinos) and the broader embrace of these hybrid identities as white identities. *See* GEORGE A. YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE 3-5; 14-15 (2003) (arguing that though African Americans remain separated, some other racial minorities in the United States, especially Asians and Latinos, may attain majority or white status).

[5] I use the crude designator of "Red" to denote the unique racial and color-based identity of Native Americans. The term has been subject of critique, but I use it only to distinguish between the black and white skin color designations prevalent throughout the rest of this Article. Addressing the issue of color in the context of Cherokee social and political status is complex because color often does not align with race. Significantly, White does not always signify that a person is exclusively or primarily of European ancestry or culture, nor does Red always indicate Indian. E-mail from Carla D. Pratt, Nancy J. LeMont Faculty Scholar and Professor of Law, Penn State Dickinson School of Law (May 7, 2014, 3:37 P.M. ES]) (on file with author). Whiteness among the Cherokee has developed as a result of specific geographical, social and cultural contexts. It has been noted, for example, that many members of the Cherokee Nation in Tahlequah, Oklahoma—the capital of the Cherokee Nation—present as phenotypically white. *Id.* These observations are in line with the work of some demographers of the Cherokee nation in the Twentieth Century. For example, in the 1980 federal census, only half of those who reported Cherokee as a principal ancestry indicated American Indian as their *only* ancestry. RUSSELL THORNTON, THE CHEROKEES: A POPULATION HISTORY 193 (1990). Of those who indicated a second ancestry, twenty percent reported European ancestry. *Id.* Very few reported Black or Hispanic second ancestries. *Id.* Perhaps most interestingly, over a quarter of the Cherokee population identified a European ancestry as their first ancestry. *Id.* at 196.

[6] It is useful here to note that much of the discussion in this Article addresses what is contemporarily known as the Cherokee Nation. The Cherokee Nation is one of three federally-recognized Cherokee governments, the others being the Eastern Band of Cherokee Indians (composed of descendants of Cherokees who did not remove to Indian Territory in the 1830s) and the United Keetoowah Band of Cherokee Indians (situated in northeastern Oklahoma and Arkansas and consisting of Cherokee cultural traditionalists). S. Alan Ray, *A Race Or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387, 399, n. 50 (2007) [hereinafter Ray, *A Race Or a Nation?*] (citing RUSSELL THORNTON, THE CHEROKEES: A POPULATION HISTORY 138-43 (1990)). The Cherokee Nations refers specifically to the group that was created by "the Five Civilized Tribes Act of 1906 and a key 1976 federal court decision to establish legal continuity with the tribe that walked the Trail of Tears in 1838-39." *Id.* at 400.
The historic division between the three tribes is largely attributed to political differences over removal. For a general discussion of the historic separation of the tribes, *see* SAMUEL C. STAMBAUGH, AMOS KENDALL ET AL., A FAITHFUL HISTORY OF THE CHEROKEE TRIBES OF INDIANS FROM THE PERIOD OF OUR FIRST INTERCOURSE WITH THEM, DOWN TO THE PRESENT (1846). As one observer writes, "[i]nitially the Cherokee leadership was both publicly and privately united against the acceptance of land cessions and removal as the only option for the Cherokee." Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B.U. PUB. INT. L.J. 91, 99 (2005). There has been some research indicating that the Keetoowah branch of Cherokee, though apparently existing in several forms and factions for many decades before and after the United States Civil War, were formally established and activated in 1858 in order to effectuate abolitionist sentiments among the Cherokee and to aid the Union. PATRICK NEAL MINGES, SLAVERY IN THE CHEROKEE NATION: THE KEETOOWAH SOCIETY AND DEFINING OF A PEOPLE, 1855-1867 233 n.28 (2003) [hereinafter MINGES, THE KEETOOWAH SOCIETY].

American tribes.[7] These commentators have long noted the struggle for black tribal inclusion. Some recent writings have addressed in detail the disenrollment of Cherokee Freedmen.[8] There are also writings that address the enslavement of African-ancestored people by Native Americans, such as the black slavery that the Five "Civilized" Tribes practiced.[9] In contradistinction with much of the existing work on this issue, my Article offers another perspective: it addresses the role of skin color bias in the production of Cherokee citizenship.[10]

This Article begins with a discussion of some of the difficulties of framing Native American sovereignty. Next, it traces the rise of color-based belonging and its relationship to black slavery and the search for Cherokee political legitimacy. Finally, it addresses some of the post-emancipation challenges of Cherokee Freedmen, and concludes by suggesting that the Cherokee battle for sovereignty has become a site for the reification of longstanding ideologies about the differences between black, red, and white peoples.

II. THE NATIVE AMERICAN SOVEREIGNTY CONUNDRUM

Sovereignty is often contingent and contested. It is rife with practical, theoretical, and methodological challenges, and frequently enshrines what may be outmoded or oppressive norms and ideas.[11]

---

[7] *See, e.g.*, JACK FORBES, AFRICANS AND NATIVE AMERICANS: THE LANGUAGE OF RACE AND THE EVOLUTION OF RED-BLACK PEOPLES (1993); GARY NASH, RED, WHITE, AND BLACK: THE PEOPLES OF EARLY NORTH AMERICA (4th ed. 2000); CONFOUNDING THE COLOR LINE: THE INDIAN-BLACK EXPERIENCE IN NORTH AMERICA (James F. Brooks ed., 2002); TIYA MILES, TIES THAT BIND: THE STORY OF AN AFRO-CHEROKEE FAMILY IN SLAVERY AND FREEDOM (2005) [hereinafter Miles, Ties That Bind]; CLAUDIO SAUNT, BLACK, WHITE, AND INDIAN: RACE AND THE UNMAKING OF AN AMERICAN FAMILY (2006); CIRCE STURM, BLOOD POLITICS: RACE, CULTURE AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA (2002); DANIEL LITTLEFIELD, THE CHEROKEE FREEDMEN: FROM EMANCIPATION TO AMERICAN CITIZENSHIP (1978); FAY A. YARBROUGH, RACE AND THE CHEROKEE NATION: SOVEREIGNTY IN THE NINETEENTH CENTURY (2007).

[8] *See, e.g.*, Stacy L. Leeds & Erin S. Shirl, *Whose Sovereignty? Tribal Citizenship, Federal Indian Law, and Globalization*, 46 ARIZ. ST. L.J. 89 (2014) [hereinafter Leeds & Shirl, *Whose Sovereignty?*]; Joseph William Singer, *Tribal Sovereignty and Human Rights*, 2013 MICH. ST. L. REV. 307; Jessica Jones, *Cherokee By Blood and the Freedmen Debate: The Conflict of Minority Group Rights in a Liberal State*, 22 NAT'L BLACK L.J. 1 (2009); Greg Rubio, *Reclaiming Indian Civil Rights: The Application of International Human Rights Law to Tribal Disenrollment Actions*, 11 OR. REV. INT'L L. 1 (2009); Ray, *A Race Or a Nation?*, *supra* note 6; Carla D. Pratt, *Contemporary Racial Realities: Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241 (2005) [hereinafter Pratt, *Contemporary Racial Realities*]; Lydia Edwards, Comment, *Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin To Securing Equal Rights Within Indian Country?*, 8 BERKELEY J. AFR.-AM. L. & POL'Y 122 (2006), Terrion L. Williamson, Diversity, Impartiality, and Representation on the Bench Symposium, Note, *The Plight Of "Nappy-Headed" Indians: The Role of Tribal Sovereignty in the Systematic Discrimination Against Black Freedmen by the Federal Government and Native American Tribes*, 10 MICH. J. RACE & L. 233 (2004).

[9] Historians have traditionally used the phrase "Five Civilized Tribes" to refer collectively to the Cherokee, Chickasaw, Choctaw, Creek, and Seminole tribes. These groups were said to have more sophisticated cultures and customs that were more akin to Western norms than practices of other aboriginal groups. *See, e.g.*, DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY, AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 13 (1997). The Cherokee embraced early Unites States efforts to domesticate the Indian tribes, including adopting an agrarian lifestyle and developing a system of education, a government of separated powers, and a constitution modeled on that of the United States. For a discussion of Cherokee constitutionalism, *see infra* Part III. Cherokee Constitutional Norms, Color, and Citizenship. This article adopts the phrase term "Five Civilized Tribes" in keeping with the usage of other writers on the topic. *See, e.g.*, Pratt, *Tribes and Tribulations*, *supra* note 1, at 75.

[10] This approach calls to mind some of the work of several scholars from a variety of disciplines who have queried the nature of Whiteness as a social category. *See, e.g.*, Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994). One scholar has argued, for example, that by giving poor white workers privilege due to their skin color, the plantation bourgeoisie created the "White race" as an institution. THEODORE W. ALLEN. THE INVENTION OF THE WHITE RACE: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO-AMERICA 246-250 (1997).

[11] For example, one scholar has noted that "[e]xisiting international ideas and ideals [such as sovereignty] were crafted within specific and narrow social, economic, historical and cultural spaces." Berta Esperanza Hernandez-Truyol, *Globalized Citizenship: Sovereignty, Security And Soul*, 50 VILL. L. REV. 1009, 1014 (2005).

This is especially true in the context of United States aboriginal people. Native American sovereignty is a concept "that has a history of contest, shifting meanings, and culturally-specific rhetorics."[12] This is largely because Native American tribes have a unique legal status in the United States.[13]

On the one hand, Native Americans are distinct nations whose existence pre-dates the United States Constitution.[14] On the other hand, Native American tribes are also subject to many United States political and legal norms.[15] The United States Supreme Court has largely relied on the Indian Commerce Clause, which grants Congress the authority "to regulate Commerce … with the Indian Tribes," as the source of United States the federal government's exclusive power against States and plenary power over tribes.[16] "The Indian Commerce Clause makes 'Indian relations … the exclusive province of federal law.'"[17] However, as some recent scholarship suggests, United States federal government's sweeping power over Native Americans may also derive from a broader set of norms, both within and outside of the United States Constitution.[18] One response to the difficulties of framing sovereignty has been to view sovereignty as a social, cultural, and intellectual development rather than as chiefly a geo-political and legal construct.[19] Sovereignty in general is frequently seen as highly contested, essentialist, and perhaps more symbolic than literal.[20] Native American sovereignty has sometimes meant borrowings from and compromises with the United States government, and thus self-governance and self-determination differ significantly in the context of a dominant United States government.[21] Indeed, some observers have gone so far as to argue that, in the

---

[12] Scott Richard Lyons, *Rhetorical Sovereignty: What Do American Indians Want from Writing?*, 51 J. CONF. COMPOSITION & COMM. 447, 458 (2000).

[13] The foundations of Native American sovereignty in the United States are largely premised on three important cases, all of which establish Native American tribes as subordinate sovereigns. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (asserting that the doctrine of discovery gives the "discovering" European State the sole right to acquire tribal territory through "purchase or conquest"); *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (articulating the notion that while tribes are "states," distinct, self-governing political entities, they are not wholly autonomous); Worcester v. Georgia, 31 U.S. 515 n.2 (1832) (deeming the United States a tribal "protector" in an unequal alliance, yet noting the tribes retain all internal attributes of sovereignty).

[14] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978); Worcester, 31 U.S. at 559. For a general discussion of Native American sovereignty, *see generally* William Wood, *It Wasn't An Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587 (2013).

[15] Most scholarly discussions of Native American sovereignty and law focus on the relationship between Native American tribes and the federal government. This is premised on the typical assumption that Native American regulatory regimes in United States were exclusively and ultimately within the federal government's domain. While much of the Native American sovereignty and autonomy debate has been framed in the context of United States federal law, some recent scholarship has shown how states and territories also extended their legislative and judicial authority over Native Americans during the early history of the United States. *See, e.g.*, DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880 19-50 (2007).

[16] U.S. CONST. art. I, § 8.

[17] Seminole Tribe v. Florida, 517 U.S. 44, 60 (1996) (quoting Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985)). Some recent jurisprudence has questioned, however, whether congressional plenary power and inherent tribal power may coexist. *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1015 (2015) (citing United States v. Lara, 541 U.S. 193, 214-15, 224-25 (2004) (Thomas, J., concurring)).

[18] Ablavsky, *supra* note 17, at 1088.

[19] For example, scholar Robert Allen Warrior coined the term "intellectual sovereignty" to describe the efforts of indigenous scholars to counter external, non-indigenous voices and to make norms of sovereignty cognizant of tradition. ROBERT ALLEN WARRIOR, TRIBAL SECRETS: RECOVERING AMERICAN INDIAN INTELLECTUAL TRADITIONS 87-98 (1995).

[20] JANE BARTLESON, SOVEREIGNTY AS SYMBOLIC FORM 1 (2014). This insistence on the mutability of sovereignty has stretched sovereignty beyond its established connotations and legitimized new political practices. *Id.* Bartleson asserts that sovereignty has become "an object and instrument of government of government rather than its precondition, and that the strategies harnessed for this purpose were often legitimized with reference to the mutability and contingency of sovereignty." *Id.*

[21] I have previously discussed this unique form of sovereignty using the term *sui generis* aboriginal rights, arguing that such rights arise from alternative sources of law that reflect the unique historical presence of Aboriginal peoples in

absence of Native American consent via treaty, "there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes."[22]

Sovereignty remains, as one commentator has observed, "[p]erhaps the most basic principle of all Indian law."[23] Regardless of its source, sovereignty typically includes certain core characteristics such as indivisibility, territoriality, domestic hierarchy, political autonomy, and the right to be undisturbed by external political actors.[24] Despite contestations in meaning, power has always been at the heart of sovereignty.[25] Sovereignty is "the power to govern, the power to determine the shape of a society."[26] However, while territoriality and the external recognition of state power are often seen as central to sovereignty, the sovereign's exercise of power over populations via tools such as racial categorization usually goes unnoticed.[27] Race is said to be a principle tool in the exercise of sovereign power.[28] In summary, skin color[29] has historically been deeply intertwined with shaping the content of sovereignty.[30]

III. CHEROKEE COLOR-BASED BELONGING, SLAVERY, AND POLITICAL LEGITIMACY

Similar to discussions of sovereignty, traditional historical accounts of relationships between black, red, and white peoples have also proven especially contested and complex, particularly in the context of considering the Cherokee enslavement African-ancestored people. Very often such accounts ignore the cross-cultural, trans-national nature of interactions between the three groups, and may altogether leave out the role of Blacks in relationships between red and white peoples. It has been observed that a scholar's viewpoint on the development of relations between the aboriginal peoples of the Americas and non-aboriginal people impacts how the scholar interprets primary legal and historical materials.[31] Thus, it is perhaps unsurprising that many legal historical accounts center on the relations between red and white people as shaped by United States federal

---

North America, representing a bridge between Aboriginal and European legal customs. *See* Lolita Buckner Inniss, *Toward A Sui Generis View of Black Rights in Canada? Overcoming the Difference-Denial Model of Countering Anti-Black Racism*, 9 BERKELEY J. AFR.-AM. L. & POL'Y 32, 50 (2007) [hereinafter Inniss, *Toward a Sui Generis View*] (citing John Borrows & Leonard I. Rotman, *The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?* 36 ALBERTA. L. REV. 9 (1997)).

[22] Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 116 (2002).

[23] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 231 (1982). For further discussions of Native American sovereignty, *see generally* Heidi Kiiwetinepinesiik Stark, *Nenabozho's Smart Berries: Rethinking Tribal Sovereignty and Accountability*, 2013 MICH. ST. L. REV. 339 (2013); Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions In Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL'Y 357 (2006); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004); Rebecca Tsosie, *Reclaiming Native Stories: An Article on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002.)

[24] *See* TANJA E. ALBERTS, CONSTRUCTING SOVEREIGNTY BETWEEN POLITICS AND LAW 20 (2012).

[25] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 108 (2007) ("[S]overeignty is a set of powers and competences which can be enjoyed by all states regardless of their particular cultural identities.").

[26] Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and The Federal Trust*, 68 MD. L. REV. 290, 318 (2009).

[27] Achille Mbembe, *Sovereignty as a Form of Expenditure*, in SOVEREIGN BODIES: CITIZENS, MIGRANTS, AND STATES IN THE POSTCOLONIAL WORLD 148, 165-166 (Thomas Blom Hansen & Finn Stepputat eds., 2009).

[28] Stark racial distinctions or absolutes are said to have played a key role in articulating and promoting modern sovereign power. *See* FALGUNI A. SHETH, TOWARD A POLITICAL PHILOSOPHY OF RACE 30 (2009)

[29] Although skin color is not always tantamount to race, *see supra* note 5, skin color has long served a proxy for biological race and thus one practical basis for racial discrimination. *See* PATRICK MANNING, THE AFRICAN DIASPORA: A HISTORY THROUGH CULTURE 144 (2009).

[30] ANGHIE, *supra* note 25, at 102-104.

[31] Robert N. Clinton, *The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation*, 28 ARIZ. L. REV. 29, 30 (1986).

law; such accounts do not often address interactions between Blacks, Indians, and Whites, ignoring how Native American laws and norms have informed those interactions.[32]

Studying the interrelation between black, red, and white racial identities raises numerous difficulties. Color bias is only part of the story of African-ancestored presence among the Cherokee. The Cherokee practice of black slavery is perhaps best thought of in isolation, since slavery under any circumstance presents broad legal, moral, ethical, social, political and economic concerns. Color bias is nonetheless a significant part of the broader story of interracial interactions among the Cherokee. This is especially true in a context where Indians are first subordinated by a dominant white group, then attain some degree of wealth, power, social standing, and in turn subordinate black people.

The Cherokee were once among the wealthiest of the North American aboriginal groups and sometimes owned large plantations.[33] Like many white plantation owners in the early nineteenth century, many Cherokee relied upon black slave labor to cultivate their lands.[34] When the Cherokee were expelled from the southeast United States by the federal government, some of them took their slaves with them on the long, brutal march known as the Trail of Tears. By the 1820s, slavery had become far more common among the Cherokee and was, according to one observer, "a cornerstone of Cherokee progressive society."[35]

Slavery among the Cherokee, however, did not begin with the enslavement of Black people. Even before the Cherokee had widespread contact with Europeans, the Cherokee exercised their own indigenous form of human bondage.[36] Some scholars have observed pre-contact slavery among the Cherokee bore so little resemblance to Western practices that the use of the word "slave" to describe people held by the Cherokee was inaccurate.[37]

Though captives were generally taken via intertribal warfare, the capture of slaves was typically not the reason for waging such wars. According to scholars, the early Cherokee placed no premium on the capture of enemies, and slaves were the product of wars waged chiefly for vengeance or to establish primacy in an area.[38] As aboriginal slave captives gained economic value as a result of European demand for laborers, some tribes, including the Cherokee, turned to market-based slavery. The growth of the practice of commodity-based slavery coincided with the decline in aboriginal slavery. By 1776, most Cherokee traded almost exclusively in African-ancestored slaved rather than in aboriginal people.[39] There are records of Cherokee trading in and holding Black slaves that date back to the eighteenth century.[40] The Cherokee, like some other indigenous American groups, were often explicitly cast as black slave traders and slave hunters by Whites. This was seen,

---

[32] Frequently such histories served as a tool for rationalizing and legitimizing United States appropriation of aboriginal lands and displacement of aboriginal peoples. *Id. at 30*.

[33] *See, e.g.*, TIYA MILES, THE HOUSE ON DIAMOND HILL: A CHEROKEE PLANTATION STORY (2010) [hereinafter MILES, THE HOUSE ON DIAMOND HILL]. Miles has suggested, however, that despite certain privileges, mixed-race White-Cherokee people were nonetheless separated by racial caste and often by social norms from wealthy White southerners. *Id.* at 21-22, 210; *accord* ALEXANDRA HARMON, RICH INDIANS: NATIVE PEOPLE AND THE PROBLEM OF WEALTH IN AMERICAN HISTORY: NATIVE PEOPLE AND THE PROBLEM OF WEALTH 98-102 (2010).

[34] THEDA PERDUE, CHEROKEE WOMEN: GENDER AND CULTURE CHANGE, 1700-1835 126 (1998). Perdue asserts that the growth of Black agricultural labor was not a result of planning, but more a result of opportunity or happenstance. *Id.* Perdue also asserts that the growth of black slavery caused a disruption in the traditional roles of both Cherokee men and women. Men were hesitant to undertake farming as a livelihood because of its association with black slave labor. Similarly, Cherokee women, who often had direct responsibilities in the fields for crops such as corn, sometimes found their traditional roles compromised by the presence of black men in the fields. *Id.*

[35] MILES, THE HOUSE ON DIAMOND HILL, *supra* note 33, at 167.

[36] THEDA PERDUE, SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY, 1540-1866, 4 (1979).

[37] *Id.*

[38] *Id.*

[39] STURM, *supra* note 7, at 49 (citing PERDUE, SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY, *supra* note 37, at 34).

[40] MILES, TIES THAT BIND, *supra* note 7, at 31.

for instance, in the 1730 Treaty of Dover, between King George II and a delegation of Cherokee.[41] Around the time of this treaty, "Slave Catcher" became a common title for some Cherokees.[42] Black slavery spread further as the Cherokee adopted agrarian lifestyles.[43]

While some accounts suggest that the majority of Cherokee never owned slaves, black slavery became a key source of wealth and status in the Cherokee Nation beginning in the early 1800s.[44] Since the people who set the pattern for acculturation among the Cherokee were often White, the agricultural and social patterns of the United States south became the model for many Cherokee.[45] This included the use of slave labor in the farming of cash crops.[46] Many Cherokee aspired to own slaves, and slaves became a source of inheritable wealth and a means of farming larger land holdings.[47] Although some Cherokee may have been more ambivalent about Black slavery, the Cherokee practice of was no less oppressive and far more complex than was seen among Whites in the antebellum South.[48]

As the eighteenth century waned and Cherokee had greater interaction with White slaveholders, their slaveholding practices came to more closely resemble those of Whites. Nonetheless, some accounts soften criticism of Cherokee slaveholding by casting it as a rarely practiced and highly nuanced institution. One scholar has suggested that the "assistance rendered by the Negro laborers" to the Cherokee "must have been greatly appreciated," making a master-slave relationship sound like friendly cooperation between neighbors.[49] Others have suggested that while Blacks were enslaved by some Cherokee, there was a bottom-up process whereby Cherokee owners were enlightened by their black slaves and taught the finer points of Western farming or animal husbandry.[50] Still other observers suggest that the institution of slavery among the Cherokee was less cruel and that slaves suffered less than they might have under white slave owners.[51]

There is, however, relatively little evidence to support claims of the gentleness of black enslavement among the Cherokee. Cherokee and their slaves were often at odds, and slave escapes were common.[52] Although some scholars have sought to diminish the harshness of slavery among the Cherokee, the fact is that black slaves were subjected to a wide range of treatment ranging from torture and death all the way to adoption in the tribe and fictive kinship.[53] Moreover, despite occasionally experiencing good treatment, black slaves among the Cherokee were, for the most part, marked as persons of lower status. While social difference among the Cherokee may not always have centered on skin color discourse, eventually black skin became and remains a potent source of outsider status.

---

[41] *Id.* (citing RUDI HALLIBURTON, RED OVER BLACK: BLACK SLAVERY AMONG THE CHEROKEE INDIANS 8-9 (1977)).
[42] *Id. See also* PERDUE, SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY, *supra* note 37, at 4.
[43] HENRY THOMPSON MALONE, CHEROKEES OF THE OLD SOUTH, 141 (1956).
[44] WILLIAM GERALD MCLOUGHLIN, CHEROKEE RENASCENCE IN THE NEW REPUBLIC 70-71 (1992).
[45] *Id.*
[46] *Id.*
[47] *Id.* at 71.
[48] MALONE, *supra* note 44, at 141.
[49] *Id.* at 21.
[50] *See* William G. McLoughlin, *Red Indians, Black Slavery, and White Racism: America's Slaveholding Indians*, 34 AM. Q. 367 (1974) [hereinafter McLoughlin, *Red Indians, Black Slavery*]. McLoughlin quotes Cherokee Indian Agent George M. Butler, who stated in 1859: "I believe if every family of the wild roving tribes were to own a negro man and woman who would teach them to cultivate the soil . . . it would tend more to civilize them than any other plan that could be adopted." *Id.* at 375 n.11.
[51] *Id.*
[52] In 1842 one of the largest slave escapes recorded among the Cherokee occurred. The slave revolt started on November 15, 1842, when a group of 20 black slaves owned by the Cherokee escaped and tried to reach Mexico, where slavery had been abolished in 1836. Though the escape ultimately failed, it spurred a number of other such slave escapes among the Cherokee. *See* Daniel F. Littlefield & Lonnie E. Underhill, *Slave Revolt in the Cherokee Nation, 1842*, 3 AM. INDIAN Q. 121, 126-127 (1977).
[53] McLoughlin, *Red Indians, Black Slavery*, *supra* note 51, at 375 n.11.

A. Skin Color Discourse as the Source of Belonging

The function of discourse is often highly dependent upon context. Hence, understanding a term requires an analysis of the history of the particular use of a term as well as an understanding of its current contextual and temporal meanings and its interaction with both public and private meanings.[54] There is sometimes a tension between the terms of a community's vocabulary and the narrative frame in which such terms are to be understood.[55] This is all the more true in the case of words that have unique ideological commitments or meanings such as "black," "red," or "white" in the context of skin color belonging.[56] Although black slavery among the Cherokee grew continually over the course of the early nineteenth century, skin color as a discursive mechanism for framing belonging appeared relatively late in the development of Cherokee political life.[57]

As was true with many early human societies, the Cherokee did not perceive human differences in terms of physical appearance; rather, distinctions were more often based on family ties or on characteristics such as strength or intelligence. While there were references to "the red man" and "the black man" in certain Cherokee cultural practices, Cherokee references to themselves as "red" may have had more to do with cultural myths of their own origins and not to European perceptions of aboriginals as red people.[58] The Cherokee apparently used "red" self-referentially in a number of early contexts, but these contexts varied, and there were no fixed meanings.[59]

Moreover, even given certain references to color, these references were apparently not meant to convey a sense of sovereignty or national belonging. Cherokee did not early on in their history conceive of themselves as a political nation state, nor indeed as a specifically geo-political nation state, though territorial claims were crucial to their claims of sovereignty and nationhood. Early Cherokee political self-concept varied from Eurocentric norms, and to some observers, what was most striking about pre-eighteenth century Cherokee governance was the apparent absence of centralized governing systems.[60] Most government was organized at the municipal level, and several "Mother towns" held authority over other towns or settlements. In earliest times, the Mother towns served as headquarters for matrilineal clans, and intermarriage among clans was forbidden.[61] Within Cherokee towns there were multiple governing groups who assumed authority under certain circumstances.[62] However, a sea change in Cherokee political organization and sovereign self-concept came with greater exposure to and intermarriage with Whites. Whiteness gained a positive discursive valence, and became a source of social, economic, and, perhaps most importantly, political power and legitimacy for many Cherokee.

B. Whiteness and Cherokee Political Legitimacy

Many changes were wrought as the Cherokee struggled to gain mainstream legitimacy for their claims of nationhood. Much of this change has been tied to the growth of intermarriage between Cherokee and Europeans dating back to early colonial times.[63] The Cherokee leadership class grew to include members of a

---

[54] Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 ST. JOHN'S J.L. COMM. 649, 667 (2010).
[55] *Id.*
[56] *Id.* at 649, 665-668.
[57] Early Cherokee likely had no concept of color as an index of racial difference. STURM, *supra* note 7, at 45.
[58] *Id.* at 46.
[59] *Id.* (citing Nancy Shoemaker, *How Indians Got to Be Red*, 102 AM. HIST. REV. 625, 641 (1997).
[60] MALONE, *supra* note 44, at 24.
[61] *Id.* at 25
[62] *Id.* at 25-26
[63] RACHEL CAROLINE EATON, JOHN ROSS AND THE CHEROKEE INDIANS 19 (1914).

close coterie of families who were of mixed white and red ancestry.[64] Although they still claimed Cherokee membership via matrilineal ancestry, leaders were increasingly of majority white lineage. By the 1830s, persons of mixed ancestry such as John Ridge,[65] James Vann,[66] Elias Boudinot,[67] and John Ross[68] were prominent in all aspects of Cherokee politics. The Ross family was especially prominent.

John Ross (1790-1866) was the patriarch of the Cherokee Rosses. Ross served as principal chief of the Cherokee from 1826 to 1866, and was one of the longest serving and most important Cherokee political leaders of the nineteenth century.[69] Ross was the son of Daniel Ross, a white Scottish trader, and Mary "Mollie" McDonald Ross, a member of the Cherokee Nation who was of mixed white and Cherokee heritage.[70] The Rosses often mingled with the elite of United States society, and some of the Rosses also attended the College

[64] Some mixed race red-white Cherokee family names, besides Ross and McDonald, were Adair, Dougherty, Vann, Gunter, Ward, and Rogers. *Id.* These names remain common among contemporary Cherokee. Some persons historically taking leadership roles or claiming Cherokee Nation membership pointed to no aboriginal ancestry at all. For example, John B. Neeley, a member of the Cherokee nation born in Tennessee in 1846, asserted, "My people were all white, however, my grandmother was raised by the Cherokee Indians." Interview with John Neely for the Indian Pioneer History Project, (Feb. 13, 1937), *available online at* http://www.okgenweb.org/pioneer/ohs/neeleyjohnb.html. Even in more recent times, some persons claiming Cherokee ties have also asserted that they were primarily or even uniquely of European ancestry. *See* THORNTON, *supra* note 5, at 196.

[65] John Ridge was born in 1802 to a Cherokee father, Major Ridge, and a White mother, Sarah Bird Northrup. Ridge joined with his father Major Ridge, Elias Boudinot (a nephew of Major Ridge) and some other Cherokee in the Treaty Party, which supported the removal of Cherokee to western territories. The elder Ridges and Boudinot were all signatories to the Treaty of New Echota of 1835, by which they ceded Cherokee lands east of the Mississippi in exchange for lands in Indian Territory. The majority of the Cherokee, along with then Principal Chief John Ross, opposed the land cession, but the United States Senate ratified the treaty. In 1839, after removal to Indian Territory, political opponents killed the elder Ridges, Boudinot, and other Treaty Party members for their roles in the land cession. JAMES W. PARINS, JOHN ROLLIN RIDGE: HIS LIFE AND WORKS 19-30 (2004).

[66] James Vann, born around 1768 to a Cherokee mother and a Scottish father, was believed at one point in the early 1800s to be the richest man in the Cherokee Nation, and possibly in the entire eastern U.S. at the time. MILES, TIES THAT BIND, *supra* note 7, at 41. Vann built Diamond Hill mansion, a two-story house constructed of brick in 1804, with access to the road, near present-day Chatsworth, Georgia. *See* MILES, THE HOUSE ON DIAMOND HILL, *supra* note 33.

[67] Elias Cornelius Boudinot was born in 1802 to a Cherokee father and a mixed Cherokee and White mother. Boudinot was born Gallegina Uwati. While in his early teens Uwati met Elias Boudinot, the white United States politician and statesman, and was so impressed that he asked to adopt Boudinot's name. Boudinot the Cherokee was perhaps best known as was an editor of the Cherokee Phoenix, the Cherokee Nation's first newspaper, which was published in the Cherokee language and English. JAMES W. PARINS, ELIAS CORNELIUS BOUDINOT: A LIFE ON THE CHEROKEE BORDER 4 (2006).

[68] For a discussion of John Ross and some other members of the Ross family, *see infra* notes 69-73.

[69] GARY E. MOULTON, JOHN ROSS, CHEROKEE CHIEF 1-2 (1978).

[70] John Ross was only one eighth Cherokee, and, according to one biographer, spoke Cherokee haltingly and could not write the language. *Id at 2.* Ross' Cherokee ancestry apparently derived from one full-blooded Cherokee great-grandmother, Ghigooie of the Bird Clan, who married a Scot, William Shorey. *Id.*; *see also* GEORGE ROSIE, CURIOUS SCOTLAND: TALES FROM A HIDDEN HISTORY 111 (2004).

of New Jersey (now Princeton University).[71] John Ross and others set about to reorganize Cherokee government along Western, "civilized" norms.[72] This included the creation of roads, schools, Western-style laws, and the broadening of black slavery.[73] John Ross himself was said to have owned more than one hundred slaves.[74]

While Whites did not sanction all marriages between Whites and Cherokees,[75] much intermixing was noted with approval by some white observers. As one historian wrote of intermarriage between Cherokees and Whites: "the Cherokees married more freely with the whites than did the other tribes, and with exceptional results."[76] One scholar has even used the phrase "sexual assimilation" to describe this process of white-Cherokee intermarriage and ultimate race mixing.[77] Cherokee use of the word "red" in a racial sense became more fixed, as the tribe adopted Euro-American notions of color as indicative of racial difference and racial hierarchy.[78] The red Cherokee became a race in contrast to white Europeans and black African-ancestored people. Whiteness came to be seen as a premium trait, and this was seen in the proliferation of white-Cherokee unions, and in the growth of an elite mixed-race upper class.

Some commentaries have argued that Cherokee also formed black-red social alliances with their

---

[71] Although Princeton, unlike several other colleges, did not have an explicit mission to educate Native Americans, some aboriginal people attended Princeton in the nineteenth century, including several Cherokee Rosses: John McDonald Ross, class of 1841; William Potter Ross, class of 1842 and later principal chief of the Cherokee nation; Robert Daniel Ross, class of 1843; Silas D. Ross, class of 1849; and George W. Ross, class of 1850. There were also two members of the Vann family who attended in the 1850's, Cooey Vann and Clem L. (or Clement) Vann. *See Princeton University Undergraduate Alumni Index, 1748 - 1920*, Princeton University Seeley G. Mudd Manuscript Library, http://www.princeton.edu/~mudd/databases/alumni.html (search each name and class year) (last viewed March 14, 2015). *See also* Marcia Graham Synnott, The Half Opened Door 176 (1979) (discussing the limited presence of Native Americans and non-Protestant Whites at Princeton in the Nineteenth Century and the overall "academic nativism" that thrived in elite American colleges during the this period). In contrast, students of known African ancestry were not regularly admitted to Princeton until some one hundred years later in the 1940s. *Id.*
Tragically and perhaps ironically, many members of the families of these Cherokee students completed a move to western United States territory during 1830's when some of the younger Rosses were away in the Northeast at school. These families took their slaves with them. Before some of the Rosses returned home there occurred one of the largest revolts among the Cherokee, the 1842 Slave Revolt in the Cherokee Nation. *See infra* note 52.

[72] EATON, *supra* note 63, at 6 (describing how Ross "began at an early age not only to be interested in the development of the Cherokees into the greatest nation of civilized Indians, but to have a vital part in that development").

[73] *Id.* Though John Ross personally owned slaves, he moved away from publicly supporting the practice of slavery towards the end of his life as it became evident that the Confederacy stood little change in the Civil War. Ross' desire for Cherokee distance from supporting slavery and the Confederacy became the source of a major rift among the Cherokee and lead to Ross' exile. Perdue, Slavery and the Evolution of Cherokee Society, *supra* note 37, at 129-130. Apparently unable to convince other Cherokee leaders to remain neutral and fearing a political coup by pro-slavery, pro-Confederacy Cherokee, Ross entered into a treaty to support the Confederacy. *See* Duane H. King, *Cherokee in the West: History Since 1776*, in 14 Handbook of North Am. Indians 363-364 (RAYMOND FOGELSON & WILLIAM STURTEVANT eds., 2004).

[74] RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 80 (1982).

[75] *See generally* THERESA STROUTH GAUL, ED., THE MARRIAGE OF HARRIETT GOLD AND ELIAS BOUDINOT IN LETTERS, 1823-1839 (2005) (chronicling the engagement and marriage of Cherokee Elias Boudinot and white woman Harriet Gold, and the opposition of Gold's family to the match). Gaul notes that while she was able to trace the Gold family's position on the marriage via letters, she was unable to recover letters from Boudinot describing his position on the marriage. *Id.* at 3.

[76] EDWIN STARR, EARLY HISTORY OF THE CHEROKEES: EMBRACING ABORIGINAL CUSTOMS, RELIGION, LAWS, FOLKLORE, AND CIVILIZATION 96 (1917).

[77] Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation* 2007 Wisc. L. Rev 409, 441-447 (2007). Pratt uses the phrase "sexual assimilation" to describe the sexual relationships (including marital relations) between whites and Native Americans that resulted in whiter, more socially assimilable offspring. *Id.*

[78] *Id. See also* WILLIAM T. HAGAN, FULL BLOOD, MIXED BLOOD, GENERIC, AND ERSATZ: THE PROBLEM OF INDIAN IDENTITY, IN MIXED RACE AMERICA AND THE LAW 137-52 (Kevin R. Johnson ed. 2003).

African-ancestored slaves, and, in doing so, resisted some of the most oppressive legal and social norms wielded by Whites against black slaves.[79] It has been suggested that the Cherokee and their black slaves experienced an ever-converging marginality during the antebellum years, and that they formed implicit, if not explicit, social, economic, and even political alliances. This rapprochement, according to some, led to the creation of a liminal space in which there was a dislocation of established practices of color discrimination. In this space there was an almost democratic camaraderie, with African-ancestored slaves and their Cherokee masters sharing the same precarious social position, thus allowing for political solidarity and cultural exchange.[80]

In this regard, some scholars point to the formation of mixed-race red, black, and white peoples, termed "tri-racial isolates," as evidence of a fluid, amalgamated relationship between the three groups. However, as other scholars have observed, the history of racially ambiguous people who were not exclusively one color only suggests that intermediate and hybrid racial statuses were precarious.[81] In the words of one observer: "The hallmark of racial oppression is the reduction of all members of the oppressed group to one undifferentiated social status, beneath that of any member of the oppressor group."[82] In keeping with this, any racial intermixing that did occur among the Cherokee more often gave rise to the subordination of the next lower group, and heightened pressure on all individuals to perform whiteness in order to maintain community standing.[83]

By the mid-nineteenth century, the red and white races became closely aligned and intermingled within the Cherokee Nation. Perhaps of greater portent, however, Blacks remained apart, and the Indian members of the Cherokee Nation stood in stark contrast to black, non-member slaves. The cultural, social, economic, and racial hybridization of red and white people, as well as the simultaneous rejection and estrangement of black people and people of mixed red and black identity served as the crux of the popular formation of Cherokee national identity. Blacks, already famously inassimilable in mainstream white Western culture, ultimately faced a similar fate in the Cherokee Nation.[84] Skin color hierarchies were ultimately incorporated not only in Cherokee social norms but also in legal and political institutions.

C. Cherokee Constitutional Norms, Color, and Citizenship

In an effort to gain and sustain political and social legitimacy, the Cherokee adopted many "Western" concepts of justice, freedom, and the rule of law within a set of constitutional norms. In this regard, it has

---

[79] Bethany R. Berger, *"Power over this Unfortunate Race": Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 2024 (2004) ("Despite these apparently race-based distinctions, political alliances and attitudes do not appear to have turned on racial grounds in the same way they did for white Americans. . . . [R]epressive slave laws were apparently not enforced because of widespread resistance to their principles, and some black children attended school alongside Cherokee children.").

[80] Ariella Gross, *"Of Portuguese Origin": Litigating Identity and Citizenship among the "Little Races" in Nineteenth-Century America*, 25 LAW & HIST. REV. 467, 473 (2007).

[81] *Id.* at 474 ("The persistence of these racially ambiguous communities challenges the notion of the U.S. as a binary racial system, but it also undermines the naive belief that the mixing of races will eliminate racial hierarchy or injustice. Indeed, the histories of these in-between peoples suggest that intermediate and hybrid statuses were precarious, bred the tendency to subordinate the next lower group, and increased the pressure on all individuals to perform Whiteness in order to maintain one's place in a community.").

[82] ALLEN, *supra* note 10, at 177. Subordination by one non-white group of others has been seen in many other contexts, such as in the subordination of Indians and Blacks by Mexican elites in pre-statehood New Mexico. *See, e.g.*, Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, in COLORED MEN AND HOMBRES AQUÍ: HERNÁNDEZ V. TEXAS AND THE EMERGENCE OF MEXICAN AMERICAN LAWYERING 1, 25 (Michael A. Olivas ed. 2006).

[83] Gross, *supra* note 81, at 473. Gross observes that the only tri-racial group to continually insist on their black heritage, the Narragansett, suffered loss of tribal status and near-extinction as an Indian nation. The Narragansett ultimately won a land claim settlement from the state of Rhode Island in 1978 and Federal recognition as a tribe in 1983. *Id.*

[84] For a discussion of the notion that Black people are akin to permanent immigrants in the United States because of their inability to be fully assimilated, *see* Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 88-90 (1999).

frequently been suggested that the 1827 Cherokee Constitution was modeled in large part of the United States Constitution.[85] Though acculturation was one goal of establishing a written constitution, the 1827 Cherokee Constitution was also part of an effort to forestall dispossession by asserting a nationhood and sovereignty similar to that of the United States.[86] By the turn of the nineteenth century, the Cherokee, along with other aboriginal groups living in Georgia, were facing a concerted effort to remove them from their lands within the state.[87]

The 1827 Cherokee Constitution contained twenty-four Articles. It was similar to the United States' Constitution in that it provided for three branches of national government: legislative, executive and judicial.[88] The 1827 Cherokee Constitution, however, in keeping with concerns about land retention, began with an articulation of the Cherokee Nation's then-extant physical boundaries in Article I.[89] Another substantial distinction between the 1827 Cherokee Constitution and the United States Constitution was that the Cherokee Constitution explicitly denied political rights to Blacks or African-ancestored people.[90] Any descendant of a black person was, for example, ineligible to hold any "office of honor, profit, or trust" in the Cherokee government.[91] Within this same document, children of non-black women and Cherokee men were granted tribal membership.[92] Because of the Cherokee matrilineal clan system, there was no corresponding need for legislation granting the descendants of Cherokee women and white men citizenship in the tribe; such persons

---

[85] The first Cherokee Constitution was drafted on July 4, 1827. MCLOUGHLIN, CHEROKEE RENASCENCE IN THE NEW REPUBLIC, *supra* note 44, at 396. ("The draft of the constitution was obviously designed as the capstone of Cherokee nationalism and of the Cherokee renascence — a Cherokee version of the American Constitution to meet Cherokee needs."). *See also* AMY H. STURGIS, THE TRAIL OF TEARS AND INDIAN REMOVAL 70-71 (2007).

[86] DANIEL HEATH JUSTICE, OUR FIRE SURVIVES THE STORM: A CHEROKEE LITERARY HISTORY 75 (2006). For much of its early history, Cherokee territory spread throughout the Southeastern central United States, encompassing parts of what is now North Carolina, South Carolina, Georgia, Alabama, Virginia, Kentucky and Tennessee. Douglas C. Wilms, *Cherokee Land Use in Georgia Before Removal*, in CHEROKEE REMOVAL: BEFORE AND AFTER 1, 20 (William L. Anderson ed., 1992). However, as a result of land session treaties during the eighteenth century, by beginning of the nineteenth century, Cherokee land was reduced to a far smaller area. *Id.*

[87] THE EMPIRE STATE OF THE SOUTH: GEORGIA HISTORY DOCUMENTS AND ARTICLES 72 (Christopher C. Meyers ed., 2008).

[88] 1827 CONSTITUTION OF THE CHEROKEE NATION, art. II, available online at http://www.tn.gov/tsla/founding_docs/33638_Transcript.pdf. However, although the 1827 Cherokee Constitution, like the United States Constitution, articulated a separation of powers provision that gave autonomy to the three branches, a significant difference was that the legislative branch of the Cherokee government elected the heads of the executive branch. 1827 CONSTITUTION OF THE CHEROKEE NATION, art. III, §§ 23, 25.

[89] 1827 CONSTITUTION OF THE CHEROKEE NATION, art. I ("The boundaries of this nation embracing the lands solemnly guaranteed and reserved forever to the Cherokee Nation by the treaties concluded with the United States is as follows, and which shall forever hereafter remain unalterably the same . . . .").

[90] For a historical analysis of Cherokee miscegenation law, see Fay Yarbrough, *Legislating Women's Sexuality: Cherokee Marriage Laws in the Nineteenth Century*, 38 J. SOC. HIST. 385 (2004). For a more general analysis of tribal miscegenation laws and Indian-Black race mixing, *see* ERIK MARCH ZISSU, BLOOD MATTERS: FIVE CIVILIZED TRIBES AND THE SEARCH OF UNITY IN THE 20TH CENTURY 46-50 (2014); PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 21-23; 63 (2009); THOMAS N. INGERSOLL, TO INTERMIX WITH OUR WHITE BROTHERS: INDIAN MIXED BLOODS IN THE UNITED STATES FROM THE EARLIEST TIMES TO THE INDIAN REMOVALS 241-242 (2005).

[91] 1827 CONSTITUTION OF THE CHEROKEE NATION, art. III, § 3 provided that

> no person shall be eligible to a seat in the general Council but a free Cherokee male citizen who shall have attained to the age of twenty five years the descendants of Cherokee men by all free women (except the african race) whose parents may be or may have been living together as man and wife according to the customs & laws of this nation & shall be entitled to all the rights and privileges of this Nation, as well as the posterity of Cherokee woman by all freemen, no person who is of a negro or mulato parentage either by the father or mother side, shall be eligible to hold any office of profit or honor or trust under this Government.

[92] *Id.*

were already identified as Cherokee.[93] Ironically, the creation of the 1827 Constitution heightened white resistance to Cherokee nationhood.[94]

The 1827 Constitution is viewed as the Cherokee Nation's founding formal document. However, the removal of the Cherokee to Indian Territory caused substantial political breaches between those who advocated for voluntary departure and those who were forcibly removed.[95] As a result, a new Constitution was forged in 1839 to address some of the deep-seated political enmity between different Cherokee factions.[96] The 1839 Constitution retained the prohibitions on Blacks and African-ancestored persons holding office,[97] but it seemed to allow such persons to vote.[98] In contrast to the Cherokee Constitution, the United States Constitution, though proslavery in much of its outlook, never once mentions slaves, slavery, or Africans.[99] While the Cherokee Constitution of 1827 was a milestone in the formalization of the existence of the nation, it also formalized and enshrined black political inferiority.

It is difficult to avoid viewing the creation of anti-black legal norms as an event of immense cultural, political, and social significance. The 1827 Constitution represented the codification of Cherokee political and social life, and this reorganization occurred without any explicit external, imperial intervention.[100] In the 1827 Cherokee Constitution, it was ambiguous whether the exclusion of African-ancestored people from membership in the political community was aspirational or an actual representation of Cherokee social and political life. In either case, the first drafting of a Cherokee Constitution can be interpreted as part of a mimetic, assimilative, and authoritative process that privileged one race over another. This process is, as one scholar has described it, a process of mimicry that is emblematic of colonialism, one that is constructed around a complex strategy of reform, regulation and discipline that instills mainstream norms all while appropriating the Other.[101]

By drafting laws that limited the rights of Blacks, the Cherokee implemented the same flawed practices that came to so bedevil of the American republic. While Native American tribes may, in some respects, "use tribal sovereignty to preserve their differentness—even when tribal laws are seemingly inapposite to American

---

[93] STURM, *supra* note 7, at 31 (citing SARAH HILL, WEANING NEW WORLDS: SOUTHEASTERN CHEROKEE WOMEN AND THEIR BASKETRY 27 (1997)). Other writers addressing more broadly the norms of women's roles in other Native American groups have observed that, historically in many North American Indian tribes, women enjoyed equal rights with men. Some tribes were, early in their histories, entirely woman-centered. *See* ROBERT H. LOWIE, INDIANS OF THE PLAINS 96-97 (1954) (discussing the Crow, Hidatsa, Mandan, and Pawnee tribes). Other matrilineal tribes included the Iroquois, Siouan, Mohegan, Delaware, Powhatan, Creek, Choctaw, Chickasaw, Seminole, Caddoan linguistic family, Pawnee, Hidatsa, Mandan, Oto, Missouri, Crow, Navajo, Hopi, Laguna, Acoma, and Zuni tribes. JOHN U. TERRELL & DONNA M. TERRELL, INDIAN WOMEN OF THE WESTERN MORNING: THEIR LIFE IN EARLY AMERICA 28-29 (1974). *See also* Clara Sue Kidwell, *Women's Leadership in the Development of American Indian Studies*, in 1 GENDER AND WOMEN'S LEADERSHIP: A REFERENCE HANDBOOK, 610 (Karen O'Connor ed., 2010).

[94] JILL NORGREN, THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE FIGHT FOR SOVEREIGNTY 43 (2004). Many Georgians feared that the new constitution signaled the sort of assimilation and acculturation that might make it possible the Cherokee to defend against the state of Georgia's efforts to seize Cherokee lands. *Id.*; *see also* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 65-67 (1976).

[95] CELIA E. NAYLOR, AFRICAN CHEROKEES IN INDIAN TERRITORY: FROM CHATTEL TO CITIZENS 245 n.3 (2008).

[96] 1839 CONSTITUTION OF THE CHEROKEE NATION, *available online at* http://www.cherokeeobserver.org/Issues/1839constitution.html.

[97] 1839 CONSTITUTION OF THE CHEROKEE NATION, art. III, § 5.

[98] 1839 CONSTITUTION OF THE CHEROKEE NATION, art. II, § 7.

[99] *See* GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 2-13 (2010) (ARGUING THAT CONSTITUTIONAL provisions protecting slavery were beyond political compromises and were instead integral to the principles of the new nation).

[100] MICHAEL IGNATIEFF, BLOOD AND BELONGING 12 (1995) (discussing the collapse of the Soviet Empire and the Communist regime as examples of great national re-orderings and the absence of an external, explicitly political actor to spur the change).

[101] HOMI K. BHABHA, THE LOCATION OF CULTURE 86 (1994).

civil rights norms," this puts aboriginal people at odds with contemporary norms of good governance.[102] Efforts at formal sovereign and civic definitions, as evidenced by the 1827 and the 1839 Constitutions, emerged simultaneously with a substantial diminution in Cherokee sovereign territory. This dual process of gain and loss depicted an all too common experience of learning "how to recognize the impossibility of belonging to a place yet claim one's presence in it; of how to strive and yearn for emplacement yet live in a world in which rights and ideals were constantly thwarted."[103] Cherokee efforts to address their losses through political alignment with pro-slavery and Confederate forces in the decades after their removal only yielded greater losses. The Cherokee, having for the most part allied themselves with a vanquished enemy, were punished by United States government seizure of some of their lands and the abrogation of some treaties.[104] Land was not the only thing lost; as was true in the Confederacy and in other slaveholding parts of the country, slavery was declared at an end among the Cherokee.

IV. CHEROKEE FREEDMEN EMANCIPATION AND ITS AFTERMATH

Slavery among the Cherokee ended at approximately the same time that slavery ended in the rest of the United States.[105] Though slavery ended, the contentious relationship between some Cherokee slave masters and their slaves survived emancipation and became an article of post-war life among the Cherokee. This hostility persists largely because the descendants of Cherokee slaves have frequently been excluded as members of the tribe, and have fought their exclusion over the course of the last two hundred years. In 1863 the Cherokee voted to end slavery. An 1866 Cherokee Nation treaty resulted in recognizing the citizenship of former black slaves held by blooded members of the Cherokee Nation.[106] It was estimated that the Cherokee Nation officially recognized over 20,000 persons of African ancestry, known as the Cherokee Freedmen, after the 1866 treaty. After the enactment of the Treaty, Freedmen were allowed to vote and serve on juries in the Nation. [107] However, the letter of the law was not always followed, and many Freedmen had difficulty in exercising their newly granted rights. Persons of African ancestry were frequently denied membership in the Cherokee Nation, despite the fact that some could trace ancestry to the Dawes Roll, a list of Cherokee by blood, intermarriage, adoption, or former slave status drawn up by federal officials at the end of the nineteenth century.[108]

The Dawes Commission, the principal author of the list, and tribal members "used the tribal custom of matrilineal families to justify excluding the overwhelming majority of freed slaves with Indian blood from the blood rolls."[109] A key reason for the roll was to allocate tribal property.[110] In some cases allegations have

---

[102] Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1051-1052 (2007).
[103] SIMON GIKANDI, SLAVERY AND THE CULTURE OF TASTE 235 (2011).
[104] WILLIAM T. HAGAN, TAKING INDIAN LANDS: THE CHEROKEE (JEROME) COMMISSION, 1889–1893 7-10 (2012).
[105] WILLIAM G. MCLOUGHLIN, AFTER THE TRAIL OF TEARS: THE CHEROKEES' STRUGGLE FOR SOVEREIGNTY, 1839-1880 208 (1994). The Cherokee passed an act emancipating all slaves in the Nation as of June 25, 1863. *Id.*
[106] Treaty with the Cherokee, U.S.-Cherokee, July 19, 1866, art. 4, 14 Stat. 799.
[107] KATJIA MAY, AFRICAN AMERICANS AND NATIVE AMERICANS IN THE CREEK AND CHEROKEE NATIONS, 1830S TO 1920S: COLLUSION AND COLLUSION 71 (1996).
[108] Though governmental attempts to define "Indianness" were seen even in colonial times, the first formal attempts to do so began in the late Nineteenth Century with the 1887 Dawes Severalty Act, also known as the General Allotment Act. 24 Stat. 388 (1887). A key goal of the act was to distribute reservation lands. The Dawes Act established the first general government program for the division of reservation land into individual allotments. The Dawes Act continues to play a major role in aboriginal tribal membership. "Currently, only those persons who can demonstrate an ancestral connection to the Native Americans listed on the 'Blood roll' can claim full tribal membership and all of the rights and privileges that flow from such membership." Pratt, *Tribes and Tribulations*, supra note 1, at 72 (citing Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts* 1 J. GENDER RACE & JUST. 325, 330 (1998)).
[109] Pratt, *Contemporary Racial Realities*, *supra* note 8, at 1250.
[110] STURM, *supra* note 7, at 80-81; LITTLEFIELD, *supra* note 7, at 239; MILES, THE HOUSE ON DIAMOND HILL, *supra* note 33, at 194-195.

been made that some ostensibly white persons were added to the rolls that had either miniscule or no aboriginal blood at all.[111] However, some scholars have suggested that not all Cherokee Freedmen suffered in their relations with their former Cherokee masters. For example, one scholar concluded, using data from the 1880 Cherokee Nation census, that the racial gap in land ownership was smaller in the Cherokee Nation than existed among southern black farmers outside of the Cherokee Nation.[112]

However, it is still largely the case that historic conceptions of race among the Cherokee remain at the foundation of contemporary notions of race.[113] In the decades since emancipation, Cherokee Freedmen have employed litigation in their fight to end exclusion and to gain full membership in the Cherokee Nation. One such suit was successful; a March 2006 ruling by the Cherokee Nation Supreme Court held that the 1866 Treaty assured descendants of Freedmen tribal citizenship. However, this decision of the Cherokee Nation Supreme Court and the subsequent enrollment of African-ancestored persons led to a March 2007 referendum vote in which the Cherokee Nation, one of the largest of the federally recognized aboriginal tribes in the United States, voted to withdraw membership for persons descended from Cherokee Freedmen. The Freedmen sued and received reinstatement in the Cherokee District Court. That decision was appealed, however, and recently, the Cherokee Supreme Court upheld the results of the referendum ousting the Freedmen.[114]

The recent actions to expel Cherokee Freedmen have caused dismay in some parts of the African American and the North American aboriginal communities, as the actions seem to suggest that the practice of race and color based discrimination against Blacks in the United States is not limited to those of European ancestry. The actions have also acted as a rather rude awakening to a number of African Americans who had celebrated their Cherokee ancestry for generations with little knowledge of the fact (or ignoring the fact) that such ancestry may have originated when their ancestors were slaves of the Cherokee. While the right to self-determination is an acknowledged attribute of a sovereign people, it comes at the cost of expelling many persons who have longstanding cultural and often genetic ties to the tribe.[115]

Supporters of the Cherokee right to expel Freedmen have used a number of intriguing if not entirely apt analogies to justify the act. One suggestion is that if Cherokee were forced to admit to national membership anyone who wished to join, it might lead to "negative" reactions by non-aboriginal people who would be disturbed at the growth in aboriginal sovereign power versus state governments.[116] While the growth of the Cherokee Nation and an associated growth in their political power might trouble some, this sort of "what will the neighbors say?" rationale for foreclosing the possibility of action has rarely held sway in the shaping of modern legal and political norms. Legal sovereignty frequently must give way to political sovereignty, the groundswell of influence that begins from the bottom up and often includes even persons that legal sovereigns may wish to exclude. Increasingly, sovereignty claims for aboriginal peoples have not only national but global consequences.[117] Contemporary scholars often frame sovereignty as a notion that is disaggregated from

---

[111] Pratt, *Contemporary Racial Realities*, *supra note* 8, at 1253 (citing KENT CARTER, THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893-1914 51, 73-74 (1999)).

[112] *See* Melinda C. Miller, Essays on Race and the Persistence of Economic Inequality 1–3 (2008) (unpublished Ph.D. dissertation, University of Michigan) (on file with author). Moreover, there is some evidence that black farmers in the Cherokee Nation on average owned farms that were closer in size to those of non-black farmers and had higher absolute levels of wealth and income than southern black farmers. *Id.* at 3.

[113] YARBROUGH, RACE AND THE CHEROKEE NATION, supra note 7, at 128 (2007) ("Nineteenth-century conceptions of race, identity, and gender are not dead and forgotten in the twenty-first century . . . Cherokee Freedmen remain unable to access political rights and economic benefits . . . .").

[114] On August 22, 2011, the Supreme Court of the Cherokee Nation issued its decision in the matter of the Cherokee Nation Registrar v. Nash, SC-2011-02. In reversing an earlier decision of the Cherokee District Court as well as a temporary injunction that maintained the membership of the Freedmen, the Supreme Court stripped about 2,800 African-American descendants of Cherokee-owned slaves of citizenship.

[115] YARBROUGH, RACE AND THE CHEROKEE NATION, *supra* note 113.

[116] Singer, *Tribal Sovereignty and Human Rights*, *supra* note 8, at 308.

[117] As one scholar has noted:

traditional, fixed geographical borders and territories and is instead rooted in basic democratic arrangements between and among people.[118] Moreover, as one scholar has observed, cultural and even political survival for many Native American tribes may depend upon eliminating race as a criterion for tribal membership.[119] This is all the more true where culture and custom rather than quantum of blood may make such persons more "Indian" than others.[120] The assertions that decisions on Native American belonging are political but not racial fail in the light of contemporary human rights views of civic membership.[121]

Another suggestion has likened the Cherokee rejection of Freedmen who had previously been deemed members to a case wherein biological parents change their minds about adoption.[122] This analogy, too, fails to support disenrollment of the Freedmen. First, while there are a number of cases wherein adoptive parents change their minds about adoption and depend on courts to undo the parental relationship, courts are typically reluctant to sever family ties.[123] Perhaps for this reason, adoptions are rescinded after finalization at a relatively low rate.[124] Next, the applicable legal standard that courts use when an adoptive parent seeks to rescind an adoption is the "best interests of the child" standard.[125] This immediately distinguishes Cherokee desire to "rescind" adopted Cherokee Freedmen from the case of an adoptive parent who wishes to rescind an adoption.

> Tribes now and in the next century will have to think strategically about where they want their place to be relative to other economic and political players, and they will have to be mindful that all decisions made in the exercise of sovereignty will impact how others will affirm or reject those claims to sovereignty. . . . But tribes must also look to the very narrative they are telling themselves, and the perception that narrative creates for those who are watching. That narrative has been one of difference. For approximately 175 years, the United States has thought of Indians as a purely domestic matter, and tribal citizens and tribal governments, for the most part, bought into this narrative: American Indian tribes and tribal governments are so unique, so different from indigenous peoples in other countries, so different than other sovereigns around the globe, that they exist alone on a conceptual space as a tribal government within the United States. Part of this is a survival narrative, both cultural and political, but it can also be counterproductive when advancing a case for sovereign recognition."

Leeds & Shirl, *Whose Sovereignty? Tribal Citizenship, Federal Indian Law, and Globalization*, supra note 8, at 94.

[118] *See* Hernandez-Tryol, *Globalized Citizenship*, *supra* note 11, at 1028.

[119] L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 710, 711 (2001).

[120] There are frequently differences in the social and cultural expression of "race" within designated racial groups, and these differences may be mapped intraracially along a spectrum of PERCEIVED RACIAL "TYPES" AND NOT SIMPLY BASED ON THEIR RACIAL GROUP MEMBERSHIP. DEVON W. CARBADO, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1131 (2013) (discussing the use of intraracial diversity markers in affirmative action in higher education admissions). Carbado notes: "Motivating the theory of racial types is the notion that all of us - at least implicitly - racially judge others not only on whether we perceive them to be members of a cognizable group but also on how closely we perceive them to be associated with that group." *Id.* at 1135 (citing Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003)). What is perhaps more controversial is the notion that there may be preferred models within any particular racial group and these models may be abused to foster one particular "ideal" racial representative to the exclusion of all others. *See, e.g.*, Lolita K. Buckner Inniss, *Bicentennial Man - The New Millennium Assimilationism and the Foreigner Among Us*, 54 RUTGERS L. REV. 1101, 1115-16 (2002).

[121] In Morton v. Mancari, the United States Supreme Court held that an employment preference for Indians in the Federal Bureau of Indian Affairs to be "political rather than racial in nature, finding that the category "Indian" was premised upon an individual's membership in a federally recognized Indian tribe, not on their ancestry. 417 U.S. 535, 553 n.24 (1974). *Mancari* is frequently cited for the proposition that "Indian" is a political and not racial category. For a fuller discussion of the impact of *Mancari*, *see generally* Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011).

[122] *Id.*

[123] *See, e.g.*, In re Adoption of T.B., 622 N.E.2d 921, 924 (Ind. 1993) ("Public policy disfavors a revocation of an adoption because an adoption is intended to bring a parent and child together in a permanent relationship . . . .").

[124] Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 160-161 (2013).

[125] *See, e.g.*, TEX. FAM. CODE ANN. § 161.005(a) (Vernon 2007) ("A parent may file a suit for termination of the petitioner's parent-child relationship. The court may order termination if termination is in the best interest of the child."); In re McDuffee, 352 S.W.2d 23, 28 (Mo. 1961).

The best interest of the child standard is, by its terms, child-focused. If this standard prevailed in the analogized case of Cherokee Freedmen and their Cherokee "parents," then the interests of the Freedmen would take precedence.

Yet another analogy defending the Cherokee exclusion of Freedmen compares Blacks freed by white Southerners to those freed by the Cherokee, noting that when Blacks were generally emancipated, "they were not adopted by their former slave owners--even when those owners were their biological fathers."[126] This is similar to the rescinded adoption analogy, with the distinction that if the "parent" slaveholder had never agreed to enter into the parental relationship, they could not later be compelled to do so. However, this also fails as an analogy to the Cherokee-Freedmen dispute. It is true that society has increasingly committed itself to greater autonomy in shaping family relationships and to understanding "family" as more of a social than biological construction.[127] Society has at the same time, however, become more knowledgeable about and concerned with the genetic correlates of familial relationships.[128] Blood relationships remain crucial to our current understanding of family. This is all the more true in the era of easily accessible genetic testing. Science can now bear technological witness to what used to be a matter of speculation or of convenient legal fiction.[129] If the mixed-race offspring of white slaveholders were not acknowledged as kin by their enslaving parents, it is because neither law nor society recognized such claims and science was inadequate to prove the biological ties. The past choice to ignore black-white kinship and earlier scientific insufficiency cannot be the basis for ignoring the black-red kinship claims of contemporary Cherokee Freedmen with genetic ties to the Cherokee. To continue to ignore ties of custom and blood creates not only injustice, but also deep psychic harm to those ignored.[130]

Finally, arguments creating analogies between Cherokee sovereign power to shape belonging and family structural choices fail chiefly because of the way in which such analogies render an external, collective, and public issue such as membership in a national entity into an internal, personal, and ultimately private familial dispute. Even if the question of tribal membership were an uncomplicated matter of public versus private, such a binary distinction is not neutral because it does not apply equally to everyone (as it sometimes claims to do).[131] This commonly accepted dichotomy, once uncovered, is often at the foundation of certain inequalities and may have an exclusionary effect. This is true even in the contemporary context where "private" has come to have meanings including the individual, civil society, and market relations and where "public" often refers to the collective or the state.[132] Increasingly, even many indigenous groups are adopting a human rights model of sovereignty, one that "transcend[s] the state-centric model that often excludes other groups meriting legal and political attention on the world stage."[133]

---

[126] Singer, *Tribal Sovereignty and Human Rights*, *supra* note 8, at 308.
[127] BARBARA KATZ-ROTHMAN, RECREATING MOTHERHOOD 82 (2000). According to Katz-Rothman, "parenting is a social relationship, not a genetic connection." *Id.*
[128] Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 348 (2008).
[129] There are often statutory and common law presumptions operating in regarding the paternity of a child where the parents are married to each other during conception. There is not, however, a single national standard, and the United States Supreme Court has upheld the states' right to establish differing standards of paternity. Trimble v. Gordon, 430 U.S. 762 (1977).
[130] *See* Pratt, *Tribes and Tribulations*, *supra* note 1, at 72 (2005) ("The injury felt by those persons of dual heritage is in part psychological. It is similar to the injury that a child born out-of-wedlock feels when not recognized by his father.").
[131] The public-private divide apparently grows from the rise of nation-states and concerns with the rights of the individual versus the state. The notion of a public-private distinction is closely tied to natural rights theories that privilege certain realms of human activity. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); *see also* Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY (Jeff Weintraub & Krishan Kumar eds., 1997). For a discussion of the public-private distinction in the context of black rights, *see* Robert Westley, *Bridging the Public/Private Law Divide in African-American Reparations Discourse*, 55 RUTGERS L. REV. 301 (2003).
[132] Weintraub, *supra* note 135, at iv.
[133] Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 177 (2014).

V. CONCLUSION: THE END OF AN ERA BUT NOT THE END OF COLOR BASED CLAIMS TO BELONGING

It is important to note that some historic Cherokee laws and norms, while in many respects imitating white American constitutional and legal norms, still maintained and valorized the sense of being uniquely Cherokee. In this sense, Cherokee legal norms, even those promoting red and white superiority, did not always reproduce typical white racial hierarchies. Cherokee laws are infused with a unique national character capable of producing and reproducing tribal cultural identity. However, it cannot be denied that under the 1827 and 1839 Cherokee Constitutions, only red and white persons were capable of contributing to this national character and ethos. Black inequality among the Cherokee, and especially the acknowledgement and codification of racial inequality in the Cherokee constitutions, exposed the essential instability of the categorization of the Other in American law and society.

Despite a large body of scholarship on the topic of relations between black, red, and white peoples, it is difficult to write about the racial groups here without possibly engendering the irritation of readers of all backgrounds who would rather forget, diminish, or deny the existence and continued relevance of black slavery among the Cherokee. In some ways, denial of the past is understandable, whether due to the guilt of descendants of enslavers or to the embarrassment of descendants of the enslaved who would rather embrace the myth of a free and proud hybrid black-Indian past.[134] Such responses may also be attributable to the desire by Cherokee nationalists to avoid "distractions" from the other contemporary problems facing the Cherokee Nation and other aboriginal people. This "desire to disremember"[135] is a distressing aspect of a shared black and red past that is often emblematic of larger projects in silencing or obscuring painful issues of history and identity.[136]

Through the power inscribed in the nation-building process and the constitutional process, the contemporary Cherokee battle for sovereignty has become a potent site for the reification of longstanding myths and ideologies about the distinctions between black, red and white peoples. As had been true in the slaveholding white South, slaveholding among the Cherokee was intertwined with notions of national character and sovereignty.[137] In the context of the Cherokee Freedmen, assertions about Cherokee sovereignty betray a phenomenon of power that is in significant respects premised on a skin color-based construction of Cherokee belonging.

---

[134] Some members of my mother's family are examples of African-ancestored people who lay claim to an ambiguous Cherokee past. Generations ago many of my mother's maternal ancestors lived in parts of Arkansas and Oklahoma among Cherokee and other aboriginal people. Their surname, Ragsdale, is one that is common among both Cherokee Freedmen and Cherokee by blood, potentially hinting not only at past enslavement and but also at Cherokee consanguinity. *See* BARBARA KRAUTHAMER, BLACK SLAVES, INDIAN MASTERS: SLAVERY, EMANCIPATION, AND CITIZENSHIP IN THE NATIVE AMERICAN SOUTH 72 (2013) (discussing the presence among the Choctaw and Chickasaw of Blacks and mixed Indian and black persons with the same last names as well-placed Choctaws and Chickasaw). Answers have eluded my family partly because of the general difficulty of doing African-ancestored United States genealogy. One substantial barrier is that African-ancestored people were not widely enumerated by name until the 1870 decennial census; thus, those researching black ancestry commonly refer to 1870 as the genealogical "wall." *See, e.g.*, DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 230 (2011) ("[B]lacks in the United States who have tried to reconstruct their family trees with conventional genealogical tools almost always meet a brick wall erected by the slave trade. With the right genealogical tools, most African Americans can trace at least one side of their family to the 1870 federal census taken after the Civil War, the first to list blacks as citizens rather than property"). But answers may have also eluded us because of a will to forget in those of us who knew the truth, thereby avoiding or evading the very real possibility that our ancestors were either the unacknowledged biological offspring of Cherokee and/or were slaves of the Cherokee.

[135] MILES, TIES THAT BIND, *supra* note 7, at xiv.

[136] *Id.* at xiv-xv.

[137] *Id.* at 5.