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Sepideh Mousakhani

SEEKING TO EMERGE FROM SLAVERY'S LONG SHADOW: THE INTERPLAY OF TRIBAL SOVEREIGNTY AND FEDERAL OVERSIGHT IN THE CONTEXT OF THE RECENT DISENROLLMENT OF THE CHEROKEE FREEDMEN

Sepideh Mousakhani*

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* Editor-in-Chief, Santa Clara Law Review, Volume 53; J.D. Candidate, Santa Clara University School of Law, 2013; B.A., Political Science and Anthropology, University of California, Berkeley, 2008. I would like to thank Santa Clara Law Professor Margalynne Armstrong for her guidance in writing this paper. Thank you to Senior Research Librarian Ellen Platt for her invaluable research assistance. In addition, I would like to thank the Volume 53 Board of Editors for their helpful edits and contributions. Finally, I would like to thank my family for their continuous love and support throughout all my endeavors. To my mom, Mona Shayesteh, you are my rock and foundation. To my uncle, Ben Shayesteh, thank you for your endless support and sense of humor. To my brother, Ray Mousakhani, you light up my life with your smile and charisma. Last, but certainly not least, to my aunt, Zore Shayesteh, for being my shining example of how to love, live, and learn fully and completely; I aspire to be as kind, genuine, and compassionate as you every day.

INTRODUCTION

Native American tribes occupy a unique position in the legal, social, and economic fabric of American society; they are simultaneously independent sovereigns and dependent domestic nations. Indian nations have the power to structure their governments, courts and laws. This authority, however, is subject to limitations by Congress and oversight by executive agencies. Many historical and contemporary controversies arise from the tension between these principles, particularly in the context of tribal membership. This Comment discusses one such controversy surrounding an August 2011 decision by the Cherokee Nation Supreme Court. The decision upheld a referendum requiring Cherokee Indian ancestry for tribal membership, which consequently stripped 2800 former Cherokee slaves, known as Cherokee Freedmen, of their citizenship status in the Cherokee Nation.

This shift toward blood quanta requirements for tribal membership is a trend among several Native tribes, signaling a reassertion of tribal sovereignty.[1] In most of these cases, as in the Cherokee Nation controversy, the federal government also asserts its authority to oversee tribal affairs. The result is an ongoing struggle to define the appropriate role for the federal government in Indian matters—one that preserves tribes' right to self-determination, while also protecting individual tribal members from violations of their fundamental rights.

In this specific case, the importance of protecting the Cherokee Freedmen from unjust removal based on race alone

1. The blood quantum requirement refers to legislation enacted in the United States to define membership in Native Tribes. *See* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 1–3 & nn. 1, 2, 5, 6 (2006). Blood quantum describes the degree of ancestry for an individual of a particular ethnic or racial group. *Id.* at 1.

outweighs the preservation of tribal sovereignty. Federal involvement is necessary to ensure reinstatement of the Cherokee Freedmen's citizenship status. A paradigmatic shift in the definition of Indian, however, is required to find a balance between sovereignty and dependence. Not until the federal government and, as a result, Indian nations redefine Indian in nonracial terms will these race-based controversies cease.

This Comment begins in Part I.A with a discussion of the fundamental principles of Indian Law, namely tribal sovereignty and the federal government's oversight role. The Comment outlines the foundation for tribal independence, as well as the plenary powers of Congress and the authority of the Executive Branch as it pertains to tribal sovereignty. The Comment continues by discussing civil rights as applied to Indian nations, as well as deferential judicial review of decisions by executive agencies regarding native tribes.

In Part I.B, this Comment addresses both native and federal control of tribal membership. Subsequently, this section discusses the various ways in which the federal government and Native tribes define Indian. Then, in Part I.C, the Comment provides a brief history of the Cherokee Freedmen. Part I.D provides an account of the events culminating in the current Cherokee Freedmen controversy, and Part I.E concludes the Background Section with an overview of current scholarly and popular opinion about the controversy. In Part II, the Comment outlines the legal problem, and in its analysis in Part III, the Comment argues that all the available legal avenues would not adequately remedy the Cherokee Freedmen's plight. Finally, the Comment concludes with a proposal in Part IV that calls for federal intervention, but more importantly, a redefinition of Indian using nonracial factors.

I. BACKGROUND

A. Principles of Indian Law that Inform Federal-Tribal Relations

Federal Indian law derives in many respects from three foundational cases decided by Chief Justice John Marshall:[2]

2. Greg Rubio, *Reclaiming Indian Civil Rights: The Application of*

McIntosh v. Johnson,[3] *Cherokee Nation v. Georgia*,[4] and *Worcester v. Georgia*.[5] The Marshall trilogy establishes two fundamental principles: the independent, sovereign nature of Native tribes and the federal government's responsibility to protect the tribes.[6] Despite the U.S. Supreme Court's holding in *Worcester* that states have no authority over Indian matters, no similar decision shelters Native tribes from federal control.[7] Thus, while Native tribes have the authority to structure their governments, they are limited by Congress's plenary powers over their affairs.[8] The contradictory juxtaposition of these two notions of Native tribes—as dependent and helpless on the one hand and distinct, independent political nations on the other—is at the root of myriad historical and contemporary Native conflicts.[9]

1. Tribal Sovereignty

Due to their inherent tribal sovereignty prior to contact with European nations, Indian tribes are considered "distinct, independent political communities"[10] capable of exercising self-government.[11] The U.S. Constitution, various statutes, treaties, and court decisions recognize these preexisting powers of self-government.[12] Encompassed in tribes' independent status is immunity from suit.[13] This foundational principle protects Indian tribes' right to exercise independent power in their decision making.[14] For example, tribal governments have the authority to structure their court systems, craft and apply civil and criminal codes, and define

International Human Rights Law to Tribal Disenrollment Actions, 11 OR. REV. INT'L L. 1, 12 (2009).

3. Johnson v. McIntosh, 21 U.S. 543 (1823).

4. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

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

6. Rubio, *supra* note 2, at 14.

7. *Id.* at 13.

8. *See* Terrion L. Williamson, *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, 247–48 (2004).

9. *See* Rubio, *supra* note 2, at 12–13.

10. *Worcester*, 31 U.S. at 559.

11. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 205 (Nell Jessup Newton et al. eds., 2005).

12. *Id.*

13. *See* Williamson, *supra* note 8, at 247.

14. *Id.*

tribal membership or citizenship.[15] Subject to tribes' consent to waiver or express waiver from Congress, sovereign immunity serves as grounds for dismissal of any cases parties bring against tribal nations.[16] This forces any potential parties to seek redress in tribal courts.[17]

Immunity from suit is an "integral part" of protecting tribes' independence and survival.[18] If tribes had to pay damages to aggrieved parties, they would deplete community treasuries and potentially impair the tribes' ability to perform their governmental duties.[19] Yet, sovereign immunity has simultaneously detrimental effects for petitioning parties that sue tribal nations—it forces those parties to seek redress in tribal courts alone.[20] Obtaining relief from a court that is invested in protecting the independent sovereignty of its nation, however, is likely to prove difficult for aggrieved parties.[21] Therefore, while tribal sovereign immunity preserves the sanctity of tribal independence, it also has the effect in certain circumstances of leaving injured parties without redress.[22]

2. The Plenary Powers of Congress and the Power of the Executive Branch

Congress exercises broad authority over Indian nations,[23] and it is Congress alone that has the power to limit and restrain Indian tribal power.[24] Congress derives its plenary power from three clauses in the Constitution[25]: the Indian Commerce Clause,[26] the Treaty Clause,[27] and Supremacy

15. *Id.*

16. Lydia Edwards, *Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin to Securing Equal Rights Within Indian Country?*, 8 BERKELEY J. AFR.-AM. L. & POL'Y 122, 136 (2006).

17. *Id.* at 137; Williamson, *supra* note 8 at 252–53.

18. Edwards, *supra* note 16, at 137; *see also* Williamson, *supra* note 8 at 247.

19. Edwards, *supra* note 16, at 138.

20. *See id.*

21. *See* Williamson, *supra* note 8, at 252–53.

22. *See id.*

23. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) ("Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.").

24. Williamson, *supra* note 8, at 257.

25. *Id.*

26. U.S. CONST. art. I, § 8, cl. 3.

Clause.[28] Therefore, tribal sovereignty "'exists only at the sufferance of Congress,'"[29] and any changes to federal-tribal relations are within Congress' domain alone.[30] Though there may be certain limitations on Congress' plenary power over tribal nations, the Supreme Court has upheld every act of Congress pertaining to an Indian tribe.[31]

Consequently, the Court has reaffirmed Congress' authority to regulate nearly every aspect of Native life, including but not limited to: the restructuring of treaty agreements,[32] the regulation of land and water use rights,[33] the applicability of constitutional rights and provisions to Indian nations,[34] and determinations of tribal membership.[35] Therefore, despite tribal nations' inherent sovereignty, Congressional oversight and control denigrates Native nations to a "quasi-sovereign"[36] status.[37]

Further establishing this "quasi-sovereign"[38] status, the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA) also exert a great deal of power over tribal affairs.[39] The DOI asserts that it has "'broad and possibly nonreviewable authority' to disapprove or withhold approval of [any] tribal constitutional amendment regarding membership criteria."[40] Furthermore, tribes organized under

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27. *Id.* at art. II, § 2, cl. 2.

28. *Id.* at art. VI, cl. 2.

29. Christina D. Ferguson, Martinez v. Santa Clara Pueblo*: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 279 (1993) (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

30. Williamson, *supra* note 8, at 257–58.

31. *Id.* at 258.

32. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565–67 (1903).

33. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175–76 (1999); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 802–03 (1976).

34. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988) (rejecting the notion that the First Amendment's Free Exercise Clause applies to U.S. Forest Service's burdening of a Native American religious practice); Morton v. Mancari, 417 U.S. 535, 552–54 (1974) (affirming Congress' authority to exempt hiring of Native Americans by the Bureau of Indian Affairs from equal protection claims); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290–91 (1955) (denying Alaska Indian tribes' right to bring a Fifth Amendment takings challenge).

35. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

36. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

37. *See* Williamson, *supra* note 8, at 258.

38. *Oliphant*, 435 U.S. at 208.

39. SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 197 (1989).

40. Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to*

the Indian Reorganization Act, or the IRA, must send any constitutional amendments to the BIA for approval.[41] As will be discussed in the next section, actions by the DOI and BIA are reviewed with great deference; hence, federal courts rarely overturn these two executive agencies' decisions.[42]

3. Federal Judicial Review of DOI and BIA Determinations

Federal-tribal relations are only subject to judicial review as authorized by Congress.[43] The Administrative Procedure Act of 1970 governs determinations made by the Department of the Interior, including the Bureau of Indian Affairs.[44] When a court reviews an administrative decision, it undertakes a three step inquiry by determining: (1) whether the Secretary of the DOI acted within his authority; (2) "whether 'the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;'" and (3) whether the Secretary's action "followed the necessary procedural requirements."[45] The

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the Question at the Core of Federal Indian Law, 34 U. MICH. J.L. REFORM 275, 307 (2001).

41. Williamson, *supra* note 8, at 258.

42. *See id.*

43. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

44. Seminole Nation of Okla. v. Norton, 223 F. Supp. 2d 122, 130 (D.D.C. 2002). The Administrative Procedure Act provides in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (2006).

45. *Norton*, 223 F. Supp. 2d at 131 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416–17 (1971) (internal quotation marks

court cannot supplant the decision of the agency with its own judgment; as long as the agency articulates a rational connection between the facts found and the choice made, the court will defer to the agency.[46]

Seminole Nation of Oklahoma v. Norton[47] is one case that illustrates federal judicial deference to DOI and BIA actions. In facts somewhat analogous to the Cherokee Nation case that is subject of this Comment, the Seminole Nation held a referendum election including several proposed constitutional amendments designed to exclude the Freedmen from membership in the tribe.[48] The DOI Assistant Secretary stated in a letter that he would not approve the constitutional amendments because they were intended to exclude the Freedmen and they were not sent to the DOI for approval.[49] Despite these warnings, the Seminole Nation subsequently held an election where the voting eligibility requirements complied with the constitutional amendments.[50] After the election, a new Principal Chief was elected.[51] Freedmen cast ballots, but their votes were not counted in the election results.[52]

In a suit by the Nation requesting declaratory and injunctive relief, a district court held that "the DOI has authority, pursuant to Article XIII of the Seminole Constitution, to approve amendments to the Nation's Constitution before they could be adopted."[53] Additionally, the district court held that "'the DOI is independently authorized pursuant to the Act of 1970 to approve or disapprove of amendments affecting the selection of the chief.'"[54] Since the DOI explicitly noted past membership in the Seminole Nation since the 1866 Treaty as the basis for its objection to the amendments, the court upheld the DOI's determination.[55]

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omitted)).

46. *Id.*
47. *Id.* at 122.
48. *Id.* at 125.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 125–26.
53. *Id.* at 126.
54. *Id.*
55. *Id.*

An officer with the BIA subsequently sent the Seminole Nation a letter declaring that it refused to recognize the results of the election and would not restore a government-to-government relationship with the Nation's General Council until the Nation restored Freedmen representatives to the General Council.[56] The Seminole Nation brought further action in federal court, alleging a violation of the Administrative Procedure Act.[57] Exercising a highly deferential standard of review, the court in the second case concluded that the DOI did not act in an arbitrary, capricious, or otherwise illegal manner.[58] The court cited the DOI's authority to ensure that the Nation's representatives are valid representatives of all members of the Nation.[59] Thus, the court rejected the claim that the DOI violated the APA, and affirmed the DOI's right to refuse to recognize the election results and engage in government-to-government relations.[60] Ultimately, this case demonstrates only one of many examples of judicial deference to executive agencies in the realm of Indian affairs.

4. Tribal Sovereignty and Federal Control Over the Years

Throughout the history of federal-tribal relations, each component of the Indian nation dynamic—distinct, independent sovereignty and Congress' plenary power over Indian affairs—enjoyed periods of domination in Indian law.[61] In the early decades of the century, Indian law reflected the nineteenth century policy of allotment and assimilation.[62] Through broad and frequent use of the plenary power, as well as judicial support in cases such as *Ex Parte Crow Dog*,[63] the United States sought to force Indians to substitute their tribal way of life with the cultural and economic norms of mainstream American society.[64]

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56. *Id.*
57. *Id.* at 130.
58. *Id.* at 148.
59. *Id.* at 140.
60. *Id.* at 146–47.
61. Rubio, *supra* note 2, at 14.
62. *Id.*
63. *Ex parte* Kan-gi-shun-ca (Crow-Dog), 109 U.S. 556 (1883).
64. Rubio, *supra* note 2, at 14.

Frustration with these policies, however, helped engender the Indian New Deal in the 1930s.[65] Academic and political leaders like Felix S. Cohen and John Collier, respectively, reestablished the right of tribal sovereignty by helping pass measures such as the Indian Reorganization Act of 1934 (IRA).[66] The IRA, among other provisions, federally subsidized Indian economic activity, restored Indian lands, and reinstated Indian control over education.[67] Most importantly, through tribal registration and incorporation with the Bureau of Indian Affairs, the IRA ensured tribal self-determination and sovereignty.[68] It was not until the Indian New Deal, and specifically, the IRA, that the government implemented the principle of inherent tribal sovereignty long established since the Marshall trilogy.[69]

The Indian New Deal shift in favor of a broad and expansive understanding of tribal sovereignty, however, did not last. In the 1950s, Congress abruptly exercised its plenary power to withdraw all federal involvement and aid to Indian tribes.[70] This termination policy purported to endow Native Americans with "[f]reedom of action . . . as . . . full-fledged citizen[s]."[71] As Utah Senator Arthur Watkins announced, removing federal jurisdiction from the tribes altogether served to "end the status of Indians as wards of the government and grant them all of the rights and prerogatives pertaining to American citizenship."[72] Critics realized, however, that it was the federal protection itself that afforded tribes a means to maintain traditional ways of life.[73] Despite these concerns, termination policies continued with passage of Public Law 280 in 1953[74] and the 1954 statutory

65. *Id.* at 14–15.

66. Indian Reorganization Act, 25 U.S.C. §§ 461–79 (2007); Rubio, *supra* note 2, at 15.

67. Rubio, *supra* note 2, at 15.

68. *Id.*

69. *Id.*

70. *Id.* at 15–16.

71. Arthur V. Watkins, *Termination of Federal Supervision: The Removal of Restriction Over Indian Property and Person*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 47, 49 (1957).

72. *Id.* at 55.

73. Rubio, *supra* note 2, at 16.

74. 83 Cong. ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2000)).

termination of the Menominee Indians of Wisconsin.[75] Discontent with these policies, in addition to concern for the future of tribal culture, lead to a demand for tribal self-determination; this self-determination policy soon replaced the termination era of the 1950s.[76]

The Indian Civil Rights Movement of the 1960s not only reestablished what was destroyed under termination policies, but also further increased recognition of tribal self-governance and sovereignty.[77] This emphasis on tribal self-determination, along with the doctrine of tribal sovereign immunity lives on today.[78] Tribes have greater autonomy in many aspects of Indian governance, and the federal government is increasingly deferential to tribal determinations of membership and citizenship.[79] While this current trend strengthens tribal sovereignty and independence,[80] it also creates the context for citizenship disputes such as those discussed in this Comment.

5. Civil Rights as Applied to Tribal Nations

Reflecting the fundamental principle of tribal sovereignty, the U.S. Constitution, as well as other civil rights legislation, does not apply directly to Indian tribes.[81] "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."[82] Only treaties or acts of Congress can impose federal constitutional laws on tribal governments.[83] While the federal government does not provide protections for individual tribal members against actions by the tribal government, the Indian Civil Rights Act (ICRA) grants tribal members statutory rights nearly

75. Menominee Indian Termination Act of 1954, 83 Cong. ch. 303, 68 Stat. 250 (1954), *repealed by* Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. § 903–903f (1994)).
76. Rubio, *supra* note 2, at 16.
77. *Id.* at 16–17.
78. *See id.* at 18.
79. *Id.* at 17–18.
80. *See id.* at 17.
81. Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971).
82. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).
83. *Groundhog*, 442 F.2d at 678.

comparable to the federal Constitution's Bill of Rights.[84]

Utilizing its plenary powers, Congress enacted ICRA to prevent tribal governments from infringing on the civil rights of their tribal members.[85] As the Senate Subcommittee on the Judiciary notes:

> The Department of Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the Federal and State governments with several notable exceptions, viz., the 15th amendment, certain of the procedural requirements of the 5th, 6th, and 7th amendments, and, in some respects, the equal protection requirement of the 14th amendment.[86]

Should a tribal government violate ICRA, civil plaintiffs cannot seek relief; the only remedy available is a writ of habeas corpus.[87]

In spite of these statutory protections, aggrieved parties cannot bring suit in federal court against tribal governments

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84. The ICRA affords tribal members the following rights:

> No Indian 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 search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized; (3) subject any person for the same offense to be twice put in jeopardy; (4) compel any person in any criminal case to be a witness against himself; (5) take any private property for a public use without just compensation; (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense; (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [or] a fine of $5,000, or both; (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; (9) pass any bill of attainder or ex post facto law; or (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302 (2001) (footnote omitted).

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

86. *Groundhog*, 442 F.2d at 682.

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

for violating ICRA.[88] As previously discussed, tribal governments still enjoy sovereign immunity from suit.[89] The Supreme Court affirmed the Tenth Circuit's ruling in *Santa Clara Pueblo v. Martinez*[90] that neither the legislative history of the ICRA nor the implicit implications of the Act itself suggested a private right of action for individual members against tribal governments.[91]

In *Nero v. Cherokee Nation of Oklahoma*,[92] the court reaffirmed tribal sovereign immunity as a defense in civil rights suits.[93] Alleging violations of his right to vote in tribal elections and to participate in federal benefits programs, a Cherokee Freedmen brought suit in federal court.[94] The court dismissed the claims based on sovereign immunity, concluding that the Cherokee Nation's right to self-govern was purely an internal matter.[95] Similarly, in *Stroud v. Seminole Tribe of Florida*,[96] a Florida district court decided the plaintiff's employment discrimination claim was precluded by sovereign immunity.[97] Again, in *Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation*,[98] a district court reiterated tribal immunity from suit.[99] The court dismissed the nine plaintiffs' civil suit because an "'Indian person is subject to tribal law.'"[100]

In these cases, various federal courts recognized that tribal courts are the proper venue for individual members' civil rights claims, ICRA or otherwise.[101] These suits rarely reach tribal courts, and even when they do, the tribal courts dismiss them, holding that tribal governments are immune

88. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Nero v. Cherokee Nation of Okla., 892 F.2d 1457 (10th Cir. 1989).
89. *See supra* Part I.A.1.
90. *See generally Santa Clara Pueblo*, 436 U.S. 49.
91. *See id.* at 61, 72.
92. *Nero*, 892 F.2d 1457.
93. Edwards, *supra* note 16, at 141.
94. *Id.*
95. *Id.* at 141–42.
96. Stroud v. Seminole Tribe of Fla., 606 F. Supp. 678 (S.D. Fla. 1985).
97. Edwards, *supra* note 16, at 142.
98. Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F. Supp. 85 (D. Mont. 1969). The plaintiffs sought an injunction eliminating use of the tribe's jail, as well as punitive damages. *Id.* at 87.
99. Edwards, *supra* note 16, at 142.
100. *Id.* (quoting *Spotted Eagle*, 301 F. Supp. at 88).
101. *See id.* at 140.

from any federal civil rights guarantees, even the ICRA.[102] Therefore, in many instances, aggrieved members of the tribe are often left without a forum to redress violations of their civil rights.[103]

B. Native and Federal Control Over Tribal Membership

Each tribe has the power to determine membership within its political community.[104] Yet, as stated before,[105] Congress also has the authority to legislate in the area of tribal membership and has done so on multiple occasions.[106] Perhaps most significantly for the purposes of this Comment, the federal government, through treaty, required certain tribes to treat former slaves as tribal members.[107] As previously mentioned, in certain cases, tribal constitutions themselves include provisions that require approval of constitutional amendments by the Department of the Interior.[108] When the DOI finds that tribal membership laws underlying voter eligibility for an election violate the Indian Civil Rights Act or the tribe's own constitution, the DOI often refuses to continue government-to-government relations with a tribe's elected officials.[109]

1. Defining Native and Blood Quantum Requirements

Differing definitions of the word Indian within federal legislation cause many of the problems associated with determining who is defined as an Indian for governmental purposes.[110] As a result of these numerous and often conflicting definitions, some individuals are considered Indian for one purpose, but non-Indian for another.[111] Under most circumstances, legislative definitions of an Indian are based on either tribal status or blood quantum.[112] In certain cases,

102. *Id.*
103. *Id.*
104. COHEN, *supra* note 11, at 212; *see Santa Clara Pueblo* v. Martinez, 436 U.S. 49 (1978).
105. *See supra* Part I.A.
106. COHEN, *supra* note 11, at 213.
107. *See* 2 INDIAN AFFAIRS: LAWS AND TREATIES 944 (Charles J. Kappler ed., 1972).
108. COHEN, *supra* note 11, at 213 & n.80.
109. *Id.* at 213.
110. Williamson, *supra* note 8, 253.
111. *See* Brownell, *supra* note 40, at 277.
112. *Id.* at 278; Williamson, *supra* note 8, at 253.

the legislation lacks any definition at all.[113]

The federal government marked a long history of reliance on race to define Indian when it first enrolled Indian tribes with the passage of the General Allotment Act of 1887 (the Dawes Act).[114] Enrollment under the Dawes Act formalized tribal membership by cataloguing individuals into discrete racial categories, such as "Cherokee by blood," "Minor Cherokees by Blood," "Cherokee Freedmen," or "Minor Cherokee Freedmen."[115] Most current federal and tribal policies similarly emphasize and rely upon race—through blood quantum requirements—to determine tribal membership.[116] To be eligible for tribal membership or certain programs, requirements such as this demand that individuals prove a minimum degree of Indian ancestry.[117] The most common blood quantum degree is one-quarter.[118]

Blood quantum requirements derive from the "one-drop rule," a form of American social classification that deemed any individual with one drop of black blood Black.[119] "'[T]he 'one-drop rule' ensured that there would be more Black laborers for slavery's human machine . . . blood quantum ratio[s] ensured that there would be more available land for White settlement and development.'"[120] Because of intermarriage between tribes, it became increasingly difficult for Indians to meet blood quantum requirements, and as a

113. Brownell, *supra* note 40 at 278; Williamson, *supra* note 8, at 253 .

114. General Allotment Act, ch. 119, 24 Stat. 338 (1887) (codified in part in scattered sections of 25 U.S.C.). Also known as the Dawes Act, the General Allotment Act was an integral part of the United States' broader late nineteenth century policy of assimilation and allotment. *See* WILLIAM C. CANBY JR., AMERICAN INDIAN LAW: IN A NUTSHELL 20–23 (4th ed. 2004). These policies resulted in genocidal slaughter among the Lakota Sioux, and, as previously discussed, were supplanted by Indian New Deal Reforms. *See* Rubio, *supra* note 2 at 6 n.6.

115. S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387, 391 (2007).

116. *See* Brownell, *supra* note 40, at 277; Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1482–83 (1990).

117. *See* Brownell, *supra* note 40, at 280–81; O'Brien, *supra* note 116, at 1489–90.

118. Williamson, *supra* note 8, at 254; *see* Brownell, *supra* note 40, at 280–81.

119. *See* Williamson, *supra* note 8 at 254.

120. *Id.* (quoting Tiya Miles, *Uncle Tom Was an Indian: Tracing the Red in Black Slavery in* CONFOUNDING THE COLOR LINE, 137 (James F. Brooks ed., 2002).

result, just as difficult to make land ownership claims.[121] White policy makers used both methods of determining identity to increase their land ownership and remove as many obstacles to that growth as possible.[122] Consequently, "Indian and Black identities are defined by methods that originated outside of both Indian and Black communities."[123]

Critics identify multiple problems with the federal government and tribal governments' use of blood quantum requirements to determine membership.[124] Some argue that by utilizing the blood quantum method, the federal government only supplies services and benefits to a portion of the population.[125] For instance, the BIA uses blood quantum requirements to determine eligibility for federal benefits.[126] Critics find this problematic, especially considering the BIA's disproportionate reliance on physical characteristics to determine an individual's degree of Indian blood.[127]

Moreover, to some scholars, use of blood quantum requirements by tribal governments serve as a way for tribes to conveniently reduce the number of individuals with whom they must share limited resources.[128] One scholar explained that tribes' decisions to rely on blood quantum requirements reflect the tribal struggle for survival.[129] The scholar contends that they utilize this method to maximize wealth or gain political advantage.[130] Of particular relevance to this Comment, other scholars and individuals are concerned that tribes use blood quantum requirements to exclude Blacks from membership.[131] In sum, both tribal and federal power over tribal membership resulted in a system with racist roots, which has negative implications for marginalized and oppressed individuals in Indian tribes.[132]

121. *Id.*
122. *Id.*
123. *Id.*
124. *See id.* at 254–55.
125. O'Brien, *supra* note 116, at 1490.
126. Brownell, *supra* note 40, at 288–92.
127. *See id.* at 288.
128. *See generally id.* at 309–12.
129. *Id.* at 309.
130. *Id.*
131. Williamson, *supra* note 8, at 255.
132. *See id.* at 253–57.

C. A Brief History of the Cherokee Freedmen

African Americans began integrating into Indian tribal communities in the Antebellum South.[133] Initially, as with other tribes, African Americans entered the Cherokee Nation as slaves or escaped slaves.[134] African American participation and status in the tribal community varied greatly within the Cherokee Nation, as well as throughout all Indian tribes.[135] Despite these differences, most African Americans experienced a similar "political reality."[136] It was not until the close of the Civil War, with the passage of the Civil Rights Act of 1866 and postwar treaties between the tribe and the federal government, that African Americans enjoyed formal status as tribal members.[137] By the terms of the 1866 Reconstruction Treaty with the United States:

> all freedmen . . . liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees.[138]

The Cherokee Nation subsequently amended its constitution to reflect the agreements of the Treaty.[139]

Over the years, Freedmen enjoyed varying levels of acceptance and inclusion in Cherokee tribal community and politics.[140] The 1975 adoption of a tribal constitution appeared to firmly establish the legal status of Freedmen in

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133. Rubio, *supra* note 2, at 5.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. 2 INDIAN AFFAIRS: LAWS AND TREATIES, *supra* note 107, at 944.
139. Ray, *supra* note 115, at 390; *see* CONST. OF THE CHEROKEE NATION, art. III, § 5 (amended 1866) (hereinafter C.N.C.A). The amendment used language similar to that of the Treaty providing that:

> All native-born Cherokees, all Indians, and [W]hites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken, and deemed to be, citizens of the Cherokee Nation.

Id.
140. *See* Edwards, *supra* note 16, at 124–27.

the Cherokee Nation.[141] The constitution defined membership explicitly and exclusively based upon the Dawes Rolls.[142] Despite this seemingly broad citizenship provision, the Tribal Council subsequently enacted more restrictive membership requirements, demanding proof of Cherokee blood.[143] Moreover, since 1983, the Cherokee Nation has not allowed Freedmen to vote in the Nation's elections.[144]

D. The Recent Disenrollment of Cherokee Freedmen

Prior to the most recent 2011 Cherokee Nation Supreme Court decision focused upon in this Comment, an earlier case set in motion a series of events that culminated in the current Cherokee Freedmen controversy.[145] In 2004, Lucy Allen sued the Cherokee Nation Tribal Council, the Tribal Registrar, and the Tribal Registration Committee, alleging that the blood quantum requirement of the Cherokee Nation Constitution was invalid because it was narrower than the 1975 constitutional citizenship provision.[146]

In March of 2006, the Cherokee Supreme Court invalidated the Tribal Council's more restrictive enrollment criteria, and held that Cherokee Freedmen were entitled to citizenship under the 1975 constitution.[147] The court based its decision on two main points.[148] First, the court concluded that the 1975 Constitution did include the Freedmen as tribal members despite the lack of explicit reference to them.[149] The court interpreted the 1975 Constitution to define citizenship based on reference to the Dawes Commission Rolls alone,

141. *See* C.N.C.A, art. III, § 1 (1975). This provision broadly defined membership as follows: "All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls . . . ." *Id.*

142. Ray, *supra* note 115, at 390–91.

143. *See id.* at 392. As defined by the subsequent legislative acts, "[t]ribal membership is derived only through proof of Cherokee blood based on the Final Rolls." C.N.C.A. ch. 2, § 12(A).

144. Edwards, *supra* note 16, at 133.

145. *See* Rubio, *supra* note 2, at 6.

146. *Id.* at 7.

147. Allen v. Cherokee Nation Tribal Council, JAT-04–09 (Cherokee Nation Jud. Appeals Trib. 2006), *available at* http://www.cherokeecourts.org/Portals/73/Documents/Supreme_Court/Opinions/JAT-04-09%2054-Opinion%203-7-06.pdf. The court noted that "there is no express 'by blood' requirement for citizenship in the Constitution." *Id.* at 21.

148. *See id.* at 17–18.

149. *Id.* at 17.

which did not mandate any by blood requirement.[150] Second, the court held that because the 1975 Constitution did not define membership in terms of blood quanta, the Tribal Council lacked the authority to further restrict citizenship requirements.[151] According to the court, only a constitutional amendment voted upon by Cherokee Nation citizens could alter citizenship requirements.[152] One estimate concluded that the court's ruling made up to 45,000 individuals with Cherokee Freedmen ancestry eligible for Cherokee citizenship.[153]

It was soon after this decision that Cherokee political leaders mobilized and galvanized support for a referendum election on that precise issue.[154] Principal Chief Chad Smith expressed concern that the ruling could upset the political composition of the tribe.[155] As a result of his efforts, the Tribal Council approved a petition for a tribal vote on a constitutional amendment that would require proof of Cherokee blood for citizenship.[156] In October of 2006, the Cherokee Supreme Court held that there were enough signatures to hold a special election.[157] On March 3, 2007, the amendment passed by an overwhelming majority (seventy-seven percent).[158]

In August 2011, the Cherokee Nation Supreme Court upheld the referendum, rejecting the notion that the 1866 Treaty granted Freedmen Cherokee citizenship.[159]

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150. *Id.*

151. *See id.*

152. *See id.* at 20. "If the Cherokee people want to change the legal definition of Cherokee citizenship, they must do so expressly." *Id*.

153. Ray, *supra* note 115, at 392.

154. *See id.* at 392–93.

155. *See id.* at 392.

156. *See id.* at 393.

157. Order Determining the Numerical Sufficiency of the Signatures Counted by the Election Commission Concerning the Initiative Petition "Proposing an Amendment to Article IV, Section I of the Cherokee Constitution of 1999" and Article III, Section I of the Cherokee Constitution of 1975, SC-AD-06-06 (Cherokee Nation Sup. Ct. 2006), *available at* http://www.cherokeecourts.org /Portals/73/Documents/Supreme_Court/Opinions/SC-AD-06-06.pdf.

158. Ray, *supra* note 115, at 393–94. Freedmen granted citizenship after the 2006 Cherokee Supreme Court decision were eligible to vote on the proposed constitutional amendment. *Id.*

159. James MacKay, *The Cherokee Nation Must be Free to Expel Black Freedmen*, THE GUARDIAN (Sept. 17, 2011, 7:00 AM), www.guardian.co.uk /commentisfree/2011/sep/17/cherokee-nation-black-freedmen.

Consequently, 2800 Cherokee Freedmen lost citizenship status, which means that they are no longer eligible to receive food aid and medical services.[160] Furthermore, this decision significantly impacted the impending principal chief election.[161] The previous election was too close to determine a winner, so on September 24, 2011, the Nation held a special election to settle the runoff between Chad Smith, the incumbent (who opposed Freedmen tribal membership), and opponent Bill John Baker.[162] The exclusion of Freedmen votes potentially changed the results of the election.[163]

In response, the BIA threatened not to recognize the outcome of the election, which has the potential to lead to a constitutional crisis for the Cherokee Nation.[164] As Assistant Secretary for Indian Affairs Larry Echo Hawk wrote in a letter to acting principal chief Joe Crittenden: "The department's position is, and has been, that the 1866 treaty between the U.S. and the Cherokee nation vested Cherokee freedmen with rights of citizenship in the nation, including the right of suffrage."[165] Furthermore, the U.S. Department of Housing and Urban Development also took action, freezing thirty-three million dollars of funds.[166] This recent decision reignited conversations about the proper role of the federal government in Indian affairs.

E. Tribal Sovereignty or Racial Justice?

Scholarship and opinion on this issue seems to take one of two perspectives: either that tribal sovereignty preserves the right of the Cherokee Nation to expel black Freedmen, or that the disenrollment of Freedmen is an atrocious civil

160. *Id.*

161. *See* Lenzy Krehbiel-Burton, *Cherokee Nation Court Terminates Freedmen Citizenship*, TULSA WORLD (Aug. 23, 2011, 2:28 AM), http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20110823_11_A12_TAHLEQ813989.

162. *See Special Election for Cherokee Nation Chief Begins*, REAL CLEAR POLITICS (Sept. 24, 2011), http://www.realclearpolitics.com/new/ap/politics/2011/Sep/24/special_election_for_cherokee_nation_chief_begins.html

163. MacKay, *supra* note 159.

164. *Id.*

165. *Id.* (quoting Letter from Larry Echo Hawk, Assistant Sec'y of Indian Affairs, to Joe Crittenden, Acting Principal Chief of the Cherokee Nation (Sept. 9, 2011)).

166. *Id.*

rights violation that calls for federal intervention.[167] Those in favor of tribal self-determination argue that as a sovereign nation, the Cherokees should be free to "determine[] its citizenship by a Constitution approved by [its] people."[168] These scholars and individuals emphasize that ancestry and clan define the essence of Cherokee identity.[169] Therefore, they contend, the Cherokee Nation should be allowed to require documented lineal biological descendants from Indians by blood.[170]

Other individuals on this side of the debate support tribal sovereignty because they believe federal involvement will create more problems than it will solve.[171] Viewing federal response to the court decision as another attempt by the United States government to deny the Cherokee's right to self-determination, supporters point to a line of failed past U.S. efforts as a warning of things to come.[172] From the Trail of Tears cleansing to the destructive termination policies of the 1950s, these scholars posit that there is nothing to suggest that current federal intervention will have different results.[173]

Those opposing the Cherokee Nation decision to expel the Freedmen rely on principles of racial justice to justify their cause.[174] They argue that all societies with histories of slavery, including the Cherokee Nation, have an obligation to grant citizenship rights to former slaves and their descendants.[175] Freedmen supporters claim that the Cherokee Nation cannot undo the 1866 Treaty that granted the former slaves citizenship.[176] They assert that tribal

167. *See Tribal Rights vs. Racial Justice*, N.Y. TIMES, Sept. 15, 2011, http://www.nytimes.com/roomfordebate/2011/09/15/tribal-sovereignty-vs-racial-justice.

168. Cara Cowan-Watts, *It's About Ancestry*, N.Y. TIMES, Sept. 16, 2011, http://www.nytimes.com/roomfordebate/2011/09/15/tribal-sovereignty-vs-racial-justice/being-an-indian-its-about-ancestry.

169. *Id.*

170. *See id.*

171. *See* MacKay, *supra* note 159.

172. *See id.*

173. *See id.*

174. *See* Tiya Miles, *Why the Freedmen Fight*, N.Y. TIMES, Sept. 15, 2011, http://www.nytimes.com/roomfordebate/2011/09/15/tribal-sovereignty-vs-racial-justice/wjy-the-freedmen-fight.

175. *Id.*

176. *See id.*

governments cannot encroach upon Freedmen's previously granted individual rights.[177]

Furthermore, opponents of the recent Cherokee Nation court decision assert that Indian tribes will not be able to exercise a strong form of sovereignty until non-Indians in their communities become a part of their membership and governance structure.[178] These scholars suggest that Indian Nations will be subjugated to federal intervention if they refuse to enfranchise Freedmen.[179] They argue that factors such as cultural assimilation should be used to determine tribal citizenship.[180] Ultimately, Freedmen supporters argue that the Cherokee Nation should not breach justice and continue racist membership policies.[181]

II. IDENTIFICATION OF THE LEGAL PROBLEM

The plight of the Cherokee Freedmen poses an interesting and complex legal question: whether the expulsion of the Freedmen is a legitimate exercise of tribal sovereignty, or a reversion to the Jim Crow era that demands intervention by the federal government. As previously discussed, the power to determine tribal membership is central to tribal independence and self-determination.[182] Yet, this Native power is restrained; Congress and executive agencies, namely the DOI and BIA, regulate and oversee Indian affairs, even in the area of tribal membership.[183] Despite the individual protections Congress enacted in ICRA, excluded Cherokee Freedmen are without recourse in tribal courts.[184] Therefore, absent a sudden and unlikely change by the Cherokee Nation itself, any restoration of Freedmen citizenship will require further Congressional action. Considering the turbulent history of federal regulation in the area of citizenship, this

177. *See* Rubio, *supra* note 2, at 10.
178. Matthew L.M. Fletcher, *A Weak Sovereign*, N.Y. TIMES, http://www.nytimes.com/roomfordebate/2011/09/15/tribal-sovereignty-vs-racial-justice/cherokee-nation-underhanded-racial-politics (last updated Jan. 22, 2013).
179. *See id.*
180. *See id.*
181. *See id.*
182. *See supra* Part I.A.1.
183. *See* discussion *supra* Part I.A–B.
184. *See supra* Part I.A.5–B.1.

possibility is alarming to many.[185] Ultimately, in this case, justice for the Cherokee Freedmen is in tension with the fundamental notion of tribal sovereignty.

III. ANALYSIS

Under current law, the Cherokee Freedmen do not have an adequate remedy for their harm. Absent contrary action by the Cherokee Nation itself, their exclusion from tribal membership stands. The Cherokee Nation can invoke immunity from suit as an affirmative defense, which would be grounds for dismissal of any case brought by a Cherokee Freedman.[186] This principle of law preserves Indian tribes' independent decision-making power and ability to perform governmental functions, but in this instance, has the adverse effect of promoting racist policies.

Furthermore, Cherokee Freedmen cannot pursue a suit in tribal court under ICRA.[187] As already stated, these courts have a vested interest in protecting the sovereignty of the Cherokee Nation.[188] Moreover, considering that the Cherokee Nation Supreme Court upheld the constitutional amendment disenrolling the Freedmen, it is highly unlikely that the court would even hear an ICRA claim, and it is just as unlikely that the court would decide in favor of the Freedmen. The court would be reluctant not only to reverse itself, but also to challenge the constitutional amendment approved overwhelmingly by the people. Thus, neither federal nor tribal courts provide a forum for Cherokee Freedmen to seek redress.

In addition, though executive agencies can take certain actions, they cannot provide quick or satisfactory redress for the Cherokee Freedmen. Since the Cherokee Nation is organized under the IRA, it must send any constitutional amendments to the BIA for approval.[189] As in *Seminole Nation v. Norton*, the BIA could refuse to approve the recent amendment to the Cherokee Nation Constitution.[190] Moreover, the BIA, as it did in *Seminole Nation v. Norton*,

185. *See supra* Part I.E.
186. Edwards, *supra* note 16, at 136.
187. *See* Runs After v. United States, 766 F.2d 347, 353 (8th Cir. 1985).
188. *See* Edwards, *supra* note 16, at 140.
189. Williamson, *supra* note 8, at 258.
190. *See supra* Part I.A.3.

could refuse to recognize the results of the election and cease government-to-government relations until Freedmen citizenship is reinstated.[191] It is likely that, as in *Seminole Nation v. Norton*, federal courts would uphold BIA determinations.[192]

With facts similar to those of *Seminole Nation v. Norton*, it is likely that any BIA determinations would survive the three-step inquiry governing the judicial review of administrative decisions.[193] Since the Cherokee Constitution provides that the BIA has the power to approve constitutional amendments, the Secretary would certainly be acting within his authority. In addition, acting to combat racist policies and encourage the Cherokee Nation to reinstate Freedmen citizenship is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[194] Lastly, if the BIA acted as it did in *Seminole Nation v. Norton*, it would be following the necessary procedural requirements.

While these BIA actions would be upheld by federal courts and eventually remedy the Freedmen's plight, it would leave them without food aid and medical services until years of litigation came to an end. Furthermore, these remedies would not address the ongoing trend among tribal nations to redefine membership in terms of blood quanta. Thus, current actions available to executive agencies, though able to ultimately redress some of the Freedmen's injuries, do not address the underlying issues of tribal identity and membership. In conclusion, none of the current legal avenues for Cherokee Freedmen provide a just and adequate remedy for their grievances.

IV. PROPOSAL

Based on the complex nature of the federal-tribal relationship, as well as the turbulent and oppressive history between the Cherokee Nation and Cherokee Freedmen, no single solution will prove sufficient to solve the problem. Most fundamentally, the federal government should

191. *See generally supra* Part I.A.3.
192. *See supra* Part II.
193. *See* discussion *supra* Part I.A.3.
194. 5 U.S.C. § 706(2)(A) (2004).

reexamine the way it defines an Indian. Blood quantum requirements derive from the federal classification methods that date back to the Dawes Rolls, and as long as the federal government continues to define Indian by racial means, the Cherokee Nation will likely follow suit.[195] Because the Cherokee Nation, like other tribes, relies on federal definitions of Indian to qualify for aid and eligibility for programs, the tribe continues to perpetuate these racial categories.

Cherokee Nation political leaders and tribal members further reinforce this lineage distinction by calling others to preserve the tribal political community by excluding the Freedmen. In place of racial definitions, the federal government, as well as tribal nations, should redefine Indian using factors such as cultural and political assimilation.[196] Ultimately, a paradigmatic shift in understandings of tribal identity is essential to solve the recurring problem of tribal membership determinations.

Until that shift occurs, Congress and the DOI should take practical steps to redress the Freedmen's harm. The BIA should act as it did in the Seminole Nation case, refusing to recognize the election results and engage in government-to-government relations until the Freedmen's citizenship status is reinstated. Furthermore, Congress could strengthen the ICRA by adding a cause of action so that injured parties, such as the Freedmen, can seek recourse for civil rights violations in federal court.

Though these solutions may detract to some degree from tribal sovereignty, this further limitation on tribal self-determination serves the greater purpose of ensuring racial justice, a subset of justice itself. The fundamental unfairness here is that the Cherokee Freedmen are being deprived of a right to which they have a legitimate claim solely on account of their race. While preserving the Cherokee Nation's ability to determine membership in its tribe is an important aspect of the tribe's right to self-determination, this autonomy should not extend so far as to promote racist policies and outcomes. As previously mentioned, blood quantum requirements are archaic measures, used historically to

195. *See* discussion *supra* Part I.B.
196. *See* discussion *supra* Part I.E.

create artificial differences and promote racist laws, such as miscegenation statutes.[197] Ultimately, even though extensive federal and congressional oversight would threaten tribal sovereignty, federal involvement is necessary to prevent racial injustice.

CONCLUSION

In sum, the Cherokee Freedmen controversy serves as a microcosm for the greater struggle to strike a balance between tribal sovereignty and federal oversight. Indian control over membership is the very essence of tribal independence. Yet, when that definition relies on outdated blood quanta requirements and excludes individuals solely based on their race, justice calls for federal intervention; tribal sovereignty does not justify racist policies. All the current legal avenues available to the federal government and its executive agencies, however, would not adequately address the Freedmen's grievances or solve the greater problem of fairly defining Native identity. Not only must the federal government get involved, but it must also redefine tribal membership in nonracial terms, which would have the effect of allowing and encouraging Native tribes to do the same. Ultimately, it will not be until this paradigmatic shift occurs that controversies such as that of the Cherokee Freedman can truly be resolved and perhaps even prevented.

197. *See supra* Part I.B.