INDIANNESS AS PROPERTY

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ABSTRACT

This Article expands upon the seminal work by Cheryl Harris entitled Whiteness as Property *by exploring the intersection of race and property through Indianness. Indianness has been constructed as a form of property conferring rights and privileges to its holders which this Article examines through the inertial relationship between race and legal status. Tracing the historical evolution of Indianness from the slavery era to the modern era demonstrates the complex relationship between tribal sovereignty, citizenship and Indian identity. This legal history contextualizes contemporary disputes over who can enjoy tribal citizenship and be Indian. This Article advocates for a reevaluation of Indianness that it is not grounded in notions of race and property, but rather sovereignty, history and culture, asserting that broadening the conception of Indianness will strengthen tribal sovereignty.*

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INTRODUCTION

Three decades ago, UCLA Law Professor Cheryl Harris published an article in the *Harvard Law Review* entitled *Whiteness as Property*.[1] She posited that racial identity and property are deeply interconnected concepts with whiteness evolving from a form of racial identity into a form of status property that conveyed a bundle of rights on those individuals who embodied whiteness.[2] She asserted that "American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated."[3] Some three decades later, Professor Harris's work continues to inform how we think about race and identity in the law.[4]

This Article builds on Professor Harris's work by exploring the interplay between race and property in the context of whites, blacks and Native Americans[5] in early America through today. In a previous article, I examined

[1] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

[2] *Id.* at 1709.

[3] *Id.* at 1713-14 (footnote omitted).

[4] *See id.*

[5] This Article uses the terms "Native American," "Indigenous," and "Indian" interchangeably to refer to the original inhabitants of the lands that are now governed by the United States. The term "Native American" is used to remind the reader that this group of Americans were the first people to govern the land that we now know as the United States of America. The term "Indian" is the label that Christopher Columbus assigned to the Indigenous people he encountered in the "New World" based on his mistaken belief that he had arrived in the "Indies" which we now refer to as South Asia. Despite the misnomer, the term "Indian" has been adopted by law and Indigenous peoples to refer to the Indigenous people who inhabited North America, prior to European settler colonialism, and their descendants. *Cf.* Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 U. DET. MERCY L. REV 745, 747, 760-64 (1999) (discussing Columbus' conquests and subjugations of native peoples in the Americas). Historian Dr. Alaina Roberts defines "settler colonialism" as "the exploitation of a region or country's resources and labor, plus the forcible resettlement of Indigenous peoples and their replacement by settlers who then move onto their lands and rewrite history in an effort to erase the longevity of their presence, and often their very existence." ALAINA E. ROBERTS, I'VE BEEN HERE ALL THE WHILE: BLACK FREEDOM ON NATIVE LAND 2 (2021) (conducting an in-depth historical examination of both white and African American settlement in Indian Territory following the Reconstruction Era). For an in-depth history of the project of settler colonialism in the United States, see ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 32-44 (2022). In this Article, the terms "African American" and "black" are used interchangeably. I understand that not all black people are African American, and not all African American people approve of being called black. Moreover, not all African American people in the United States today are descendants of African Americans who were enslaved. Nonetheless, the group of African Americans discussed in this paper are all descendants of enslaved people of African ancestry held in bondage by Native Americans. Recognizing that such descendants are commonly referred to as "black," I have elected for purposes of this article, to use the term "black"

how the tribal pursuit of whiteness historically was necessary to the preservation of Indianness[6] as an identity. Because maintaining Indianness as a racial identity was essential to the preservation of Indianness as a political identity, tribes[7] were forced to adhere to the racially established norms of the federal government in order to protect and maintain tribal sovereignty.[8] This Article builds on that work to explore the relationships between the concept of race and property in Indian country and how these relationships have constructed Indianness as a form of property akin to whiteness—and contingent upon attitudes of antiblackness—that were perfected during the slavery era and persist into the present.[9]

This Article focuses its analysis on the former slaveholding tribes and presents its arguments in four parts. Part I of the Article examines the legal history of black, red and white people during the slavery era in Indian

interchangeably with the term "African American" to refer to the collective group of people who are descendants of African enslaved people held in captivity in the geographical boundary of what is now the United States. I use the term "Negro" to refer to African Americans only when the historical text referenced uses this term.

[6] This Article borrows the term "Indianness" from the work of prior scholars to refer to the contested notion of being Indian. *See, e.g.*, Anjana Mebane-Cruz, *Incarceration by Category: Racial Designations and the Black Borders of Indianness*, 38 POL. & LEGAL ANTHROPOLOGY REV. 226 (2015) (describing the complexity of Indianness as it relates to multiracial and "mixed" race people with indigenous roots). Indianness has been defined by federal law, by tribes, and by individuals. *See* Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 959-60 n.2 (2011); *see also* Mebane-Cruz, *supra*.

[7] In this Article, I use the terms "tribe," "First Nation" and "nation" interchangeably to refer to the first nations that governed the geographic area that is now the United States. Although the word "tribe" was arguably used by whites to subordinate Indigenous people to whites and characterize Indigenous people as primitive and uncivilized, I reject any such connotation in my use of the word "tribe." For a thoughtful discussion of the word "tribe," see EDWARD R. KANTOWICZ, 2 COMING APART, COMING TOGETHER: THE WORLD IN THE 20TH CENTURY 229-30 (2000).

[8] Carla D. Pratt, Loving *Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation*, 2007 WIS. L. REV 409, 426. Tribal sovereignty existed prior to European contact with the First Nations of the Americas and was merely "diminished, but not terminated," by European conquest. *See* Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 4 (Harv. Univ. John F. Kennedy Sch. of Gov't, Fac. Rsch. Working Papers Series, No. RWP04-016, 2004), http://ssrn.com/abstract=529084.

[9] Jeremiah Chin, *Red Law, White Supremacy: Cherokee Freedmen, Tribal Sovereignty, and the Colonial Feedback Loop*, 47 J. MARSHALL L. REV. 1227, 1228 n.1 (2014) (stating how the 2007 Cherokee Amendment which ousted black freedmen from the tribe "solidified the Jeffersonian fantasy of Indian assimilation by adopting one of the key features of White Supremacy in U.S. Laws: anti-Blackness and Black exclusion").

Territory,[10] which would later become the state of Oklahoma. Known as the removal and reservation era, the federal government displaced Indigenous communities by relocating them to other land initially "reserved"[11] by the federal government for their benefit. This Part of the paper explores how Indianness emerged as a form of identity free of blackness which afforded its owner both status and entitlement property that guaranteed freedom from slavery and other human rights.[12]

Part II examines Indianness as status and entitlement property during the Reconstruction Era and the early 1900s, which is known as the allotment and assimilation era of federal Indian policy.[13] This Section explores how the federal government's efforts to deal with the "Indian problem,"[14] which was also

[10] "The 'term "Indian Territory" had been used in connection with several of the 1830's proposals to establish an organized territory governed by a tribal confederation. Although no territorial Indian government was ever established, the name "Indian Territory" gradually came into common use as the collective term for the lands of the Five Civilized Tribes and others settled among them.'" *See* Taiawagi Helton, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L.J. 979, 979-80 n.1 (1998) (quoting FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 770-75 (Rennard Strickland et al. eds., 1982) (offering a history of the Indian Territory); *see also* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61, 62 (1994).

[11] The policy of removing Indigenous people from their ancestral homelands to smaller areas of land that were reserved exclusively for their occupancy was not created by a single federal law. Instead, the policy evolved over time through a series of treaties, federal statutes, and federal court decisions. However, the Indian Appropriation Act of 1871 contributed to the establishment and expansion of the reservation system within the United States. *See* DUNBAR-ORTIZ, *supra* note 5, at 10-11, 142. The reservation system allowed the federal government to relocate tribes from lands desired by white settlers to specific land that was deemed less desirable. *See id.* While removal of Indigenous people happened through treaty negotiations during the Treaty-making era, many Indigenous people were forcibly removed from their homelands and relocated to reservations. *See id.* (noting that over fifty tribes were forcibly relocated to Oklahoma onto designated land). Such was the experience of the "Five Civilized Tribes" who were forcibly removed from the southeastern region of the United States to an area west of the Mississippi river now known as Oklahoma. *See id.* at 134-35. This forced removal is known as the "Trail of Tears." *See id.* at 110-14. Although the Seminole, Cherokee, Creek, Chickasaw and Choctaw tribes were called the "Five Civilized Tribes" during the slavery era and through the allotment era, this author rejects the notion that these tribes were at any time "uncivilized." *See id.* at 134.

[12] It is important to note that the Seminole Nation resisted the dominant society's anti-black attitudes and laws. *See* 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, 102-103 n.290 (2005).

[13] ANGELIQUE TOWNSEND EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 12-17 (2013).

[14] For a video on the "Indian Problem," see National Museum of the American Indian, *The "Indian Problem,"* SMITHSONIAN (Mar. 3, 2015, 7:34 PM), https://www.si.edu/object/indian-problem:yt_if-BOZgWZPE [https://perma.cc/Y45R-4YKN].

referred to as the "Indian Question,"[15] fueled the concept of Indianness as property. It explains how allotment of Indian lands was part of a larger federal government project aimed at terminating tribes and making Indian people disappear into the dominant white society.[16] Many federal and state policy makers viewed the disappearance of Indian people,[17] which many anthropologists now call "cultural genocide,"[18] to be a gift to Indigenous people because they thought that Indian marriage with whites would ultimately convey the status property benefits, and perceived genetic benefits, of white "blood."[19] During the early twentieth century, "whiteness was a form of status property,"[20] resulting in the perception that integration of whiteness into tribes elevated Indigenous people in the eyes of the dominant white society.[21]

Part III explores Indianness as status property and entitlement property during the Jim Crow and Civil Rights Eras when federal Indian policy shifted from seeking to terminate Indian tribes to supporting tribal sovereignty and self-determination.[22] During the Civil Rights Era, Indianness continued to be a form of status property that elevated its owner above people who were deemed "black" or "Negro."[23] Indianness was also a form of entitlement property that

[15] *See generally* FRANCIS A. WALKER, THE INDIAN QUESTION (1874).

[16] *See infra* Part II.

[17] *See generally* ANGIE DEBO, THE ROAD TO DISAPPEARANCE: A HISTORY OF THE CREEK INDIANS (1941).

[18] Gary Clayton Anderson, Native America and the Question of Genocide *by Alex Alvarez*, 31 HOLOCAUST & GENOCIDE STUD. 133, 133-34 (2017) (reviewing ALEX ALVAREZ, NATIVE AMERICA AND THE QUESTION OF GENOCIDE (2016)) (describing that reservations and the federal Courts of Indian Offenses, which were Article II courts created by the federal Executive branch, were used as instruments of cultural genocide). *See also* DUNBAR-ORTIZ, *supra* note 5, at 9-10 (arguing that settler colonialism is inherently genocidal).

[19] The Curtis Act was the federal law that forced the allotment of tribal lands held by the former slaveholding tribes. The allotment of land to individual Indians encouraged whites to marry Indians by creating a property interest. Whites who married an Indian would be entitled to be listed as a citizen of the tribe and receive a land allotment. *See* The Curtis Act of 1898, Pub. L. No. 55-517, 30 Stat. 495. Whites continued to marry Indians after all lands were allotted to get access to the valuable land allotted to the Indian spouse. *See* Pratt, *supra* note 8, at 429, 451 n.246 ("[W[hites offered the bribe, in part, to defuse the tribes' oppositional agenda—to maintain an indigenous culture based on tribal customs that included communal ownership in their autochthonous region.").

[20] Harris, *supra* note 1, at 1734.

[21] Indeed, the five tribes of Oklahoma that were most open to social relations with whites and assimilation to the cultural norms of the dominant society earned the title of the "Five Civilized Tribes" from the dominant society which viewed these tribes as superior to the western plains tribes that whites viewed as "uncivilized" and "savage." *See* Pratt, *supra* note 8, at 414 n. 20.

[22] *See infra* Part III.

[23] *See* LAWS OF THE CREEK NATION 20-21 (Antonio J. Waring ed.) (1960); *see also* Pratt, *supra* note 8, at 439.

entitled its holder to be free from the racialized constraints imposed on black people, also known as "colored"[24] people during the era of segregation. During this era, former slaveholding tribes engaged in exclusionary actions restricting tribal citizenship toward the descendants of blacks or "Freedmen,"[25] who by treaty were tribal citizens, in order to retain their own status property.

Part IV explores Indianness as property in the modern era. It examines contemporary notions of Indian identity that position it beyond race for some purposes, yet firmly grounds it in notions of race for other purposes. As a legacy of slavery and Jim Crow segregation, the concept of a property interest in Indianness is present in contemporary discourse surrounding the exclusion of black freedmen descendants from tribal citizenship. Many concerns raised in discussions about adding people to tribal citizenship rolls are concerns about property. Will adding black freedmen descendants reduce existing citizens' property interest in tribal citizenship? Stated differently, will the tribe have sufficient resources to provide for the needs of its citizens if it increases its population by accepting the black freedmen as citizens? The freedman question also presents a status property issue that is not discussed or examined openly. Will the freedmen's blackness taint the tribe's "Indianness" such that the tribe will be regarded by the dominant white society as including a group of "fake Indians"? If the tribe accepts thousands of black people as citizens of the tribe, will the dignity of the tribe suffer from the debilitating stereotypes of blackness[26] that continue to plague our society? Given our nation's past treatment of tribes that have integrated people of African ancestry as citizens, and society's continuing anti-black racism, these are legitimate fears that animate tribal responses to the "Freedman Question."

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[24] *See Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (referring to black people as the "colored race[]"); Kee Malesky, *The Journey from 'Colored' to 'Minorities' to 'People of Color*,*'* NPR (Mar. 30, 2014, 9:25 PM), https://www.npr.org/sections/codeswitch/2014/03/30/295931070/the-journey-from-colored-to-minorities-to-people-of-color [https://perma.cc/6RLN-MVAD].

[25] The descendants of former slaves once held in bondage by Indian tribes are called "freedman descendants" or "freedmen" for short. I use the term "freedmen" and "freedmen descendants" interchangeably to refer to the descendants of people of African ancestry who were enslaved by the five slaveholding tribes in the geographic region that is now the state of Oklahoma. Occasionally, I will refer to freedmen as formerly enslaved persons and freedmen descendants as the descendants of formerly enslaved persons who were born free. Although I recognize the gendered nature of the term, it has been adopted by freedmen descendants as a gender-neutral term that refers to all freedmen descendants across the gender spectrum. For a primer on the freedmen, see B. 'Toastie' Oaster, *7 Questions About Freedmen Answered*, High Country News (Oct. 11, 2021), https://www.hcn.org/articles/indigenous-affairs-communities-7-questions-about-freedmen-answered/ [https://perma.cc/3CY8-4WX6].

[26] For a summary of the stereotypes assigned to blackness in the United States, see *Popular and Pervasive Stereotypes of African Americans*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/explore/stories/popular-and-pervasive-stereotypes-african-americans [https://perma.cc/BCV9-YL83] (last visited Feb. 6, 2025).

The status and entitlement property interests in Indian identity continue to plague tribes today and is the often the unspoken concern surrounding the freedmen's struggle for the reinstatement of their tribal citizenship in the former slaveholding tribes. The final Part of the Article considers the persistence of Indianness as property and posits that refocusing Indian identity as a political identity free of the social construct of race will help liberate tribes from the property paradigm of Indianness and strengthen tribal sovereignty.

I. INDIANNESS AS PROPERTY DURING THE SLAVERY ERA

A. *Indianness as Entitlement Property Guaranteeing Freedom*

During the slavery era, Indianness—just as whiteness—fit "the broad historical concept of property described by classical theorists" such as James Madison, who viewed property as "embrac[ing] every thing to which a man may attach a value and have a right."[27] Since the founding era, law has considered not only tangible items as property, but also "all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties."[28] The slavery era of American history perhaps best illustrates freedom as a form of property guaranteed by law to all non-black people.[29]

People of African ancestry first arrived in Indian Territory, presently the eastern part of the state of Oklahoma, during the slavery era.[30] Black people were slave property pursuant to tribal law.[31] Black enslaved people accompanied Native American people on the Trail of Tears forced migration,[32] and served as watchmen, nursemaids, cooks, and personal servants to the Indians making the journey west.[33] The tribes forced to migrate west on the Trail of Tears were called the "Five Civilized Tribes"[34] by whites because they had assimilated to

[27] Harris, *supra* note 1, at 1725-26.

[28] *Id.* at 1726 (quoting Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128-29 (1990)).

[29] It should be acknowledged that some black people enjoyed the property of freedom during the slavery era, whether through manumission, purchasing their freedom or having been born free, but law failed to guarantee freedom for free black people who were subject to kidnapping and being sold into slavery by whites. *See generally* SOLOMON NORTHUP, TWELVE YEARS A SLAVE: NARRATIVE OF SOLOMON NORTHUP, A CITIZEN OF NEW YORK… (1859).

[30] *See* ROBERTS, *supra* note 5, at 12-13 (2021).

[31] See id. at 13 ("The laws policing Black people's behavior that appeared in all of the tribes' legislative codes that they were willing to make [Black enslavement] a part of their societies.")

[32] *Id.* at 12-14.

[33] Pratt, *supra* note 12, at 80.

[34] KENT CARTER, THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893-1914, AT 1 (1999).

European ways of living by speaking English, dressing in European attire, becoming Christians, and adopting agrarian lifestyles, including using black slave labor on their farms.[35] Earning white society's title of being "civilized"[36]

[35] *Id.* ("These tribes were collectively known almost universally as the Five Civilized Tribes because many of them had adopted so many elements of white culture that reformers often pointed to them as models for what assimilation could accomplish.").

[36] Some white settlers thought that Christianity would bring "civility" to "Indian savages." Sager, *supra* note 5, at 753 (describing Western efforts to break down Indigenous practices to "civilize" them and move them from "savage" and "barbarous" practices). The desire to be viewed by whites as civilized pushed Indigenous people and other people of color to engage in respectability politics wherein they sought to perform their identities in ways that demonstrated civility. ALEX ZAMALIN, AGAINST CIVILITY: THE HIDDEN RACISM IN OUR OBSESSION WITH CIVILITY 15-16 (2021). One author has recently chronicled in detail the racism embedded in demands for civility. *See id.* When I asked ChatGPT to tell me about the history of the word "civility," this is the reply that I received in relevant part: "the expectation of civility was often weaponized against marginalized groups, particularly people of color, who were deemed 'uncivilized' or 'barbaric' if they did not conform to the social norms dictated by white society. This not only served to justify discrimination and violence against these groups but also perpetuated the myth of white superiority. So, while the word 'civility' itself may not be inherently racist, its historical usage and ideologies it has been associated with reflect deeply ingrained racist beliefs and power dynamics. It's important to critically examine how concepts like civility have been used to uphold systems of oppression and strive for a more inclusive and equitable understanding of social norms and behaviors." Response to: "Tell me about the history of the word 'civility,'" CHATGPT, (Feb. 19, 2024), https://chat.openai.com/ (enter query into "Message ChatGPT" box). When I asked the AI system called "Silatus" for its assessment of the term "civility," it stated "the concept of civility has often been weaponized against marginalized groups such as people of color.

Recent historical and scholarly discourse suggests that civility has been used to silence dissent, exclude minoritized people from public discussions, and maintain white, male, middle-class norms. Civility has been leveraged as a tool for maintaining order over justice, frequently casting dissenting voices as uncivil or disruptive. This tendency can work to stifle the voices and undermine the struggles of those pushing against systemic privilege and oppression." Response to: "How do you assess the term 'civility,'" SILATUS AI, https://www.silatus.com (enter query into the search bar) (citing Nora Berenstain, *'Civility' and the Civilizing Project*, 49 PHIL. PAPERS 305, 309 (2020); Alex M. Richardson, Oppression, Civility, and the Politics of Resistance 47 (2021) (Ph.D. dissertation, University of Tennessee) (on file with the Tennessee Research and Creative Exchange); Shakira Thiranagama, Tobias Kelly & Carlos Forment, *Introduction: Whose Civility?*, 18 ANTHROPOLOGICAL THEORY 153, 156 (2018); Joshua Reeves, *Rhetoric, Violence, and the Subject of Civility*, 19 COMM. & CRITICAL/CULTURAL STUD. 91, 93 (2022)). For a law paper exploring the origins of "civility" and its connection to being "civilized," both of which are rooted in racism, see Rory Bahadur, *Civility as Morally Justified Oppression*, TEX. J. C.L. & C.R. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4695609.

was a form of status property that elevated the Five Tribes over other tribes out west that Anglo-Americans often referred to as "savages."[37]

The Five Tribes earned the respect of whites by working to have their people assimilate into the dominant culture of white America.[38] In addition to adopting Christianity, speaking English and adopting an agrarian lifestyle,[39] assimilation also required that tribal people adopt the anti-black attitudes and practices of the dominant white society.[40] Tribal Indigenous people absorbed the dominant society's view that Indians were capable of being uplifted from their state of savagery through Christian education and intermarriage with white people, which would ultimately transform them into white people with all the status and entitlements of whiteness.[41] First Americans also learned the Christian narrative that black people are the descendants of Ham who were cursed by God with the mark of blackness.[42] Indigenous people learned that black people are inherently immoral, hypersexual beings, and that blackness tainted "the blood," making a mixed-race person with African ancestry "Negro" despite the presence of Native American ancestry.[43] Consequently, Indigenous people adopted the dominant society's view that black people carried a taint rendering them incapable and unworthy of being elevated to the status of white people.[44]

In light of the pre-existing racial narratives that Indigenous people encountered on their quest for survival, tribal leaders likely understood that

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[37] *See, e.g.,* Andrew Jackson, Second Annual Message (Dec. 6, 1830), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 500, 521. Jackson states:

> What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms, embellished with all the improvements which art can devise or industry execute, occupied by more than 12,000,000 happy people, and filled with all the blessings of liberty, civilization, and religion?

[38] *See* Chin, *supra* note 9, at 1239 (explaining recognition of Indigenous tribes as white during Oklahoma statehood process because they had been civilized).

[39] ANGIE DEBO, AND STILL THE WATERS RUN: BETRAYAL OF THE FIVE CIVILIZED TRIBES 126-27 (1940).

[40] *Id.*

[41] *Id.* at 105-06 (explaining the "bleaching effect" of Native Americans intermarrying with white people, thus creating a hierarchy where "mixed-blood" Native Americans were elevated, "full bloods" were marginalized, and notions of white supremacy were entrenched into the Tribe); *see* David J. Silverman, *To Become a Chosen People: The Missionary Work and Missionary Spirit of the Brothertown and Stockbridge Indians, 1775-1835*, *in* NATIVE AMERICANS, CHRISTIANITY, AND THE RESHAPING OF THE AMERICAN RELIGIOUS LANDSCAPE 250, 254 (Joel W. Martin & Mark A. Nicholas eds., 2010) (illustrating adoption of Christianity by Indigenous tribes to overcome misfortune and ultimately prosper like White Americans).

[42] IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 21 (2016).

[43] *See id.* at 32 (elaborating on how God condemned Ham for being hypersexual on Noah's Ark and cursed his descendants to be "so blacke and loathesome," and adding that curse theorists believed black people to be inferior and incapable of assimilation).

[44] *See id.*

adopting anti-blackness as a norm in tribal culture and tribal law was necessary to protect Indian identity from "degradation."[45] They likely understood that permitting Indian people to marry or cohabitate with black people would cause the tribe to lose future generations of Indigenous people to the preexisting state and federal laws of racial hierarchy that would assign the status of "Negro" to any Indian children with African ancestry.[46] If tribal people did not adopt and enforce the state and federal rules of anti-blackness and instead allowed people with both Indian and African ancestry to be tribal citizens, state and federal law would consider those people Negro, not Indian.[47] Because race was the primary determinant of Indian identity for the federal government, it would refuse to recognize a tribe as a sovereign First Nation if it perceived that the tribe had been degraded to the point of becoming a group of "Negroes," rather than a sovereign Indigenous nation of people who were racially Indigenous.[48] Hence, adopting anti-blackness as a cultural and legal norm was the price that tribal Indigenous people had to pay to maintain their tribe's status as a federally recognized tribe.[49] Because federal recognition was a necessary precondition to maintaining tribal sovereignty, and sovereignty was only extended to tribes that met the federal government's racial expectations, blackness was a true threat to tribal sovereignty.[50] Responsible tribal leadership thus required that tribes adopt anti-black laws and customs to protect Indian identity from degradation.[51]

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[45] *See* DUNBAR-ORTIZ, *supra* note 5, at 37-39. Dunbar-Ortiz highlights how the concept of cleanliness of blood was introduced to Indigenous people through Christianity, which desired to separate old Christians who had no mixture of Jewish or Moorish blood. Whereas the Irish and people of color were deemed by the English to be descended from apes, the English were deemed to be descended from Adam and Eve, who were created by God in his own image. *Id.*

[46] *See* Acts of the Choctaw Nation, November 6, 1885 (Sept. 18, 1896); *see also* Cherokee Const. Art. III., § 5 (1839).

[47] *See e.g.*, *Alberty v. United States*, 162 U.S. 499, 501 (1896) ("As his mother was a [black enslaved person], under the rule ,"Partus sequitur ventrem," he must be treated as a [black person] by birth, and not as a Choctaw Indian.").

[48] *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, 253-54 (2004).

[49] Pratt, *supra* note 8, at 417-21 (explaining how tribes chose to "align themselves with the privileged side of [the] binary system of race" when they assimilated into Southern agrarian norms, relied on black enslaved people for this work, and yielded to state racial classification laws to avoid having their members labeled as "colored").

[50] *See* Matthew L.M. Fletcher, *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 WASH. U. J.L. & POL'Y 273, 279 (2005) ("[T]he leeway granted to tribes in the self-determination era has limitations—the major limitation being that where non-Indian interests are affected, tribal self-government must give way.").

[51] *See* Williamson, *supra* note 48, at 243-45.

As part of the removal process, the federal government entered a treaty with the Five Tribes that provided a reservation[52] of lands for each tribe.[53] Removal treaties promised tribes that once they settled into Indian Territory west of the Mississippi river, they would hold the lands of Indian Territory for "as long as the waters run,"[54] meaning they would own the land in perpetuity. Each of the Five Tribes reestablished their government and people in Indian Territory, working to demonstrate to whites in the federal government that their tribes were "civilized" and deserving of the same status and legal entitlements as whites.[55]

By the eighteenth century, "[r]ace and property were thus conflated by establishing a form of property contingent on race," where "only Blacks were subjugated as slaves and treated as property."[56] By the eighteenth century, only people of African ancestry were permitted to be enslaved by law.[57] White racial identity was therefore a form of entitlement property that entitled its owner to be free.[58] Stated another way, "[w]hiteness was the . . . property of free human beings."[59] Whiteness therefore was extremely valuable during the slavery era because it was the property that conveyed the right to be free from physical bondage and the right to be free in all other aspects important for human well-being.[60]

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[52] The Indian reservation system has been described as one of the "first and largest systems of incarceration" in the United States. Mebane-Cruz, *supra* note 6, at 228-29.

[53] *See* DEBO, *supra* note 39, at 5 ("All these removal treaties contained the most solemn guarantees that the Indians' titles to these new lands should be perpetual and that no territorial or state government should ever be erected over them without their consent.").

[54] *See e.g.*, Treaty of Dancing Rabbit Creek, Choctaw Nation-U.S., Sept. 27, 1830, 7 Stat. 333; John Bartlett Meserve, *The Plea of Crazy Snake (Chitto Harjo)*, 11 CHRONS. OKLA. 899, 902 (1933) ("This was the first agreement that we had with the white man. He said as long as the sun rises it shall last; as long as the waters run it shall last; as long as the grass grows it shall last. That was what it was to be and we agreed upon those terms.").

[55] SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 80 (1989) (explaining how federal government afforded citizenship to certain Tribes after they proved they had assimilated to "the habits of civilized life").

[56] Harris, *supra* note 1, at 1716.

[57] U.S. CONST. art. 1, §§ 2, 9; U.S. CONST. art. 4, § 2; Gregory Ablavsky, *Making Indians "White": The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy*, 159 U. PA. L. REV. 1457, 1460-61 (2011) (describing movement in 1800s courts to establish Native Americans as free, and functionally established Native Americans as "white" in the white-black racial binary).

[58] *See* Harris, *supra* note 1, 1726 (indicating that whiteness was property, when property was defined as all of a person's legal rights).

[59] *Id.* at 1721.

[60] *Id.* at 1726 (noting founding era property did not just include ownership over external objects, but also "human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties" (quoting Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128-29 (1990)).

But whiteness was not the only racial identity that conveyed the right to be free. By the nineteenth century, Indianness was also a status or a form of property that entitled its owner to be free from bondage.[61] Treaties with European nations recognized the sovereign rights of Indigenous peoples and established boundaries within which they could continue to govern themselves after European conquest.[62] The status of Native Americans as sovereign nations under treaties with European nations played a vital role in protecting Indigenous Americans from enslavement. From the European perspective, Native Americans were seen in relation to the land they occupied.[63] From the American federal government perspective, Native people were merely occupants of valuable land who needed to be removed so the land could be put to its highest and best economic use.[64] Consequently, Native Americans found themselves as the target of federal removal from their ancestral lands, either by force or through treaty negotiations offering the tribes some insignificant consideration in exchange for ceding large swaths of their land to the United States.[65]

The slavery laws in early American colonies played a significant role in preventing Native Americans from being enslaved, thereby elevating their status over people of African ancestry.[66] Several American colonies passed laws limiting enslavement of Native Americans.[67] Some colonial setters believed it was their duty to convert Native Americans to Christianity rather than enslave

[61] As one example, the Cherokee Nation ordered a white man to relinquish a Cherokee woman and her children that he was enslaving. The Cherokee Nation declared that she was "free born as any White women [sic]" and although she was purchased as an enslaved person, there "must [be] a recourse to the Man [he] bought her of." Henry T. Malone, *Cherokee-White Relations on the Southern Frontier in the Early Nineteenth Century*, 34 N.C. HIST. REV. 1, 11 (1957).

[62] Articles of Peace Between Charles II and Several Indian Kings and Queens, at 5, May 29, 1677.

[63] *See id.*

[64] *See* Johnson v. McIntosh, 21 U.S. 543, 562-63 (1823) (holding that Native Americans were dispossessed of their legal title to their ancestral lands upon European discovery of the land, merely holding a right to occupy the land).

[65] Pratt, *supra* note 8, at 415 n.25 (describing removal as the "forcible extraction of the Native American population from their indigenous lands," often achieved through treaties where tribes had no choice but to negotiate with the federal government (citing GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 1-5 (1972)).

[66] Margaret Ellen Newell, *Indian Slavery in Colonial New England*, *in* INDIAN SLAVERY IN COLONIAL AMERICA 33, 49 (Alan Gallay ed., 2009) (indicating colonial governments limited enslavement of Native Americans, especially after acquiring land from wars and treaties and turning Native inhabitants into citizens).

[67] *Id.* at 47-48 (noting that Massachusetts, Connecticut, and Rhode Island put limits on enslavement practices to avoid rebellions in captive populations, including banning imports of newly-enslaved people and passing laws preventing the keeping of adult Indian servants).

them.[68] Other colonists raised diplomatic concerns to justify banning the enslavement of Native Americans. They recognized that it was in their best interest to maintain good relations with Native tribes, and enslaving Native Americans risked souring relationships with Indigenous peoples and endangering colonial settlements.[69] A final rationale offered for prohibiting Indian enslavement was that Indigenous people knew the terrain and had potential support networks among other tribes, which would make escapes of enslaved Native people more frequent.[70]

Once the colonies became states, several slaveholding states adopted laws that prohibited the enslavement of Native Americans.[71] Some tribes were also successful in securing their citizens' personal liberty by entering treaties with the federal government.[72] Those treaties often contained provisions guaranteeing the protection of tribal members from kidnapping and enslavement, which was a financially lucrative industry in the southern regions of the United States.[73]

During the colonial period, in 1661, Virginia adopted a law prohibiting the enslavement of Native Americans, thus putting them on equal footing with white English persons who could only be indentured servants.[74] This law was

[68] *See* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 21 (2d ed. 2012) (describing how Englishmen viewed black people as "heathens" and how this "heathenism" represented the "necessity of bringing non-Christians into the fold" of Christianity).

[69] Newell, *supra* note 66, at 50 ("[P]ressure from New York and from imperial authorities who feared alienating potential Indian allies, as well as the northern Indians' ability to take English hostages in retaliation, all protected the northern Indians from the scale of enslavement that had afflicted the Indians of southern New England.").

[70] Alan Gallay, *Introduction: Indian Slavery in Historical Context*, *in* INDIAN SLAVERY IN COLONIAL AMERICA 1, 19, 22 (Alan Gallay ed., 2009).

[71] *See, e.g.*, Ablavsky, *supra* note 57, at 1500-01 (noting that Massachusetts and several other states abolished slavery in the early years after the Revolution).

[72] Treaty with the Ottawa of Blanchard's Fork and Rouche de Boeuf, Ottawa Nation-U.S., June 24, 1862, 12 Stats. 1237 (granting Ottawas with American citizenship in exchange for their tribal entity dissolution).

[73] C.S. Everett, *"They Shalbe Slaves for their Lives": Indian Slavery in Colonial Virginia*, *in* INDIAN SLAVERY IN COLONIAL AMERICA 67, 70 (Alan Gallay ed., 2009). Although there were colonial, state, and federal laws in place that were aimed at protecting Native Americans from slavery, some Native Americans were still enslaved during a period when the law permitted their enslavement. *See* Newell, *supra* note 66, at 44. Others were wrongfully enslaved by slave catchers who claimed that the native person had African ancestry. The slave catcher business was a lucrative one, so any person of color was subject to being kidnapped and sold into slavery to make money. For more on the kidnapping of people to be sold into slavery, see Daniel J. Sharfstein, *When the Slave-Catcher Came to Town*, NAT'L ENDOWMENT FOR THE HUMANS. (Sept./Oct. 2011), https://www.neh.gov/humanities/2011/septemberoctober/feature/when-the-slave-catcher-came-town [perma.cc/E2TA-ZSAH].

[74] Angela Onwuachi-Willig, *Multiracialism and the Social Construction of Race: The Story of* Hudgins v. Wrights, *in* RACE LAW STORIES 147, 149 (Rachel F. Moran & Devon

judicially enforced in the 1772 case of *Robin v. Hardaway*,[75] wherein an enslaved person named Robin and several other enslaved plaintiffs brought a claim asserting they were wrongfully enslaved because they were the maternal descendants of a Native American woman.[76] The high court of Virginia agreed and the enslaved plaintiffs were set free.[77] Indianness as a property interest entitling its holder to be free carried over into Virginia statehood and was the basis for three women's legal claim that they were being enslaved unlawfully.[78]

In 1806, in *Hudgins v. Wrights*,[79] the high court of Virginia again considered the issue of whether the maternal descendants of a Native American woman could be enslaved.[80] The plaintiffs in *Hudgins*—Jacky, Maria, and Epsabar Wright, a mother, daughter, and granddaughter—were three enslaved women who claimed that their enslavement was unlawful because they were descended from an Indian woman, not a woman of African ancestry.[81] Mixed-race people were a common occurrence in slaveholding states and territories because white and Indian men used black women's bodies to satisfy their sexual desires, thereby creating mixed-race offspring.[82] To deal with the mixed-race population and protect slaveowners' property interest in mixed-raced people born to an enslaved individual, Virginia, like most slaveholding states, adopted laws providing that mixed-race children inherited the legal status of their mothers.[83] This matrilineal status rule operated to keep the mixed-race offspring of white men and Indian men with African-descended slave women as property. The plaintiffs' claim in *Hudgins* rested upon this status rule.[84] In other words, the Wrights made a legal claim to the property of Indianness, a legal status that

Wayne Carbado eds., 2008) (citing Act CXXXVIII: Concerning Indians, Laws of Virginia, 14th Charles II, 143 (Mar. 1661) ("*And be it further enacted* that what Englishman trader, or other shall bring in any Indians as servants and shall assigne them over to any other, shall not sell them for slaves nor for any longer time than English of the like ages serve by act of assembly.")).

[75] 1 Jeff. 109 (Va. Gen. Ct. Apr. 1772).

[76] *Id.* at 109; Ablavsky, *supra* note 57, at 1458-59.

[77] Judgment in the Case of *Robin, et al v. Hardaway* (May 2, 1772), *available at* https://encyclopediavirginia.org/judgment-in-the-case-of-robin-et-al-v-hardaway/ [https://perma.cc/57D3-N7GQ].

[78] 11 Va. (1 Hen. & M.) 134 (1806).

[79] *Id.* at 134.

[80] *Id.* at 137-39.

[81] *Id.*

[82] *See* Pratt, *supra* note 8, at 433, 440 (describing how sexual stereotypes of black women were abused to satisfy male sexual desires and culminated in historical documentation of mixed-race persons).

[83] *Hudgins*, 11 Va. (1 Hen. & M.) at 135-36 (noting eighteenth-century Virginia act that restricted enslavement of maternal descendants of free Indian women).

[84] *Id.* at 134. The Wrights claimed that they were descended from a Native American woman named Butterwood Nan. At trial, witnesses testified that Butterwood Nan was known to be an Indian woman. *Id.*

would render them ineligible to be enslaved. Due to their Indian appearance, which portrayed no hint of African ancestry, the three women enjoyed the presumption that they were free.[85] The burden to prove they were lawfully enslaved fell upon Mr. Hudgins, who sought to maintain them in slavery.[86] Ultimately, the court concluded that Mr. Hudgins failed to meet his burden of proof and ordered the women to be freed.[87]

Citizens of the Five Tribes also gained greater proximity to whiteness through tribal laws that permitted tribal citizens to marry whites. Once a tribal citizen married a white person, that white person was adopted into the tribe as a citizen of the tribe with the benefits of citizenship.[88] Indian marriage to whites was also seen by state and federal government officials as another method of "civilizing" the Indian—and ultimately, "disappearing" the Indian, because the expectation was that after two generations, the offspring would be white in phenotype and culture with no evidence of Indianness.[89]

Indianness carried with it a form of status property that was capable of being elevated to the status of whiteness, but only if Indianness remained free of the taint of blackness.[90] State law often conferred the benefits of whiteness to Indian people by classifying people with European and Indigenous ancestry as racially

[85] *Id.* at 134, 137-40 (declaring presumption of freedom for plaintiffs whose "characteristic features" like complexion, hair, and eyes "were proven to have been the same with those of whites").

[86] *Id.* at 135 ("If, in *fact*, the [Wrights] are descended from Indians, it is incumbent on [Hudgins] to prove that they are slaves; the [Wrights] are not bound to prove the contrary.").

[87] *Id.* at 137 (holding plaintiffs free given "[u]nequivocal proof" that they descended from an Indian woman, which the court determined through witness testimony and plaintiffs' physical characteristics). For other cases of individuals trying to prove their Indian identity to escape slavery, see Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 133-37, 139-41 (1998).

[88] DAWES COMM'N, REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES (1894), S. MISC. DOC. NO. 53-24, at 10 (1894) [hereinafter DAWES COMM'N REPORT] ("[The Five Tribes] have also provided by law for the intermarriage of white persons with their citizens and adopted them into their tribes. . . . [L]arge numbers of white people have become adopted citizens, participating in the benefits of citizenship.").

[89] *Cf. id.* ("The day of isolation has passed. . . . The [tribal] governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites . . . .").

[90] Pratt, *supra* note 8, at 439-40 ("Indian marriage to blacks threatened the existing definitions and distributions of property. Black miscegenation was therefore an act against property." (footnote omitted)).

white.[91] State law also respected the status and entitlement property interests in Indianness by prohibiting the enslavement of Native Americans.[92]

The five slaveholding tribes in Indian Territory shared a common experience in that they underwent significant cultural transformation in response to European contact. Their assimilation into the dominant white society was seen by many as an indicator of their civilized status. The Five Tribes' adoption of the English language, Christianity, European attire, and Anglocentric education made them less "foreign" and less "savage" than the tribes of the western plains.[93] Many tribal leaders took pride in their assimilation achievements, viewing them as evidence of their tribe's resilience and adaptability. For example, the Cherokee's development of a written syllabary by Sequoyah, their creation of a newspaper, and their establishment of a constitutional government demonstrated their capacity for "civilized" self-governance.[94] These accomplishments were evidence of assimilation into the dominant white society and accorded the tribe additional property rights, including the tribe's right to self-determination and their rightful place as a sovereign nation within the United States.[95] These accomplishments were also used to distinguish the Cherokee from the plains Indians and from blacks, who were viewed as holding an inferior place in the human hierarchy.[96] By being viewed as "civilized" Indians, the Five Tribes enjoyed a form of status property that elevated them and their respective citizens over the plains Indians and black people.

[91] DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880, at 84-85 (2007) ("Among English colonial laws, the Georgia and South Carolina statutes exempting 'free Indians in amity with this government' from the general presumption that 'every negro, Indian, mulatto and mustizo, [sic] is a slave . . . .'").

[92] *See generally* Kevin M. Maillard, The T'aint of Taint: Memory and the Denial of Mixed Race in the U.S. (2004) (Ph.D. dissertation, University of Michigan) (ProQuest).

[93] *See* Ablavsky, *supra* note 57, at 1474 n.8, 1511-12.

[94] DEBO, *supra* note 39, at 3-4, 8-9 (discussing how Cherokees experienced "especially rapid" progress resulting from Sequoyah's inventions, which enabled whole tribe to become literate and establish national newspaper).

[95] For a paper exploring the origins of "civility" and its connection to being "civilized," which is rooted in racism, see Bahadur, *supra* note 36, at 20-21.

[96] *See* Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241, 1252 n.65 (2005) (noting one editorial writer in 1906 who opined that "[t]he average Indian, especially of that class which controls political matters of his nation, considers himself as far above the negro socially as does the white man" (citing T. Baker Tritos, *Editorial on Indian Slave Holders*, HOLDENVILLE TIMES, Aug. 17, 1906)).

B. *Indianness Guaranteed the Right to Slave Property*

Native American participation in the enterprise of black chattel slavery is well documented in history.[97] As documented in the Pioneer Papers,[98] the institution of black slavery in Native American society was modeled after the institution of slavery created by white America in the states.[99] The most affluent Native Americans tended to be "mixed-blood" Indians, meaning that their ancestry was comprised of both Native and European ancestry.[100] The mixed-blooded aristocracy of the tribes favored tribal institutionalization of African slavery by law.[101] This elite group, much like their white family members of exclusively European ancestry, owned people as slaves and operated plantations and other businesses to generate wealth.[102] In adopting an agrarian way of life that

[97] *See* DEBO, *supra* note 39, at 3-4 (highlighting how some Indian leaders began to operate plantations worked by black enslaved people in nineteenth century). For a contemporaneous documentation of Native American slave ownership in Indian Territory, see THE WPA OKLAHOMA SLAVE NARRATIVES 274-77 (T. Lindsay Baker & Julie P. Baker eds., 1996) (compiling and reprinting interviews conducted by the Work Progress Administration of former enslaved people in Oklahoma, many of whom recount they were owned by Native Americans).

[98] When Oklahoma was a young state, the Works Progress Administration sponsored, jointly along with the University of Oklahoma and the Oklahoma Historical Society, a project to record the recollections of people who had lived during the Pioneer days when Oklahoma was Indian Territory. Government workers throughout the state of Oklahoma interviewed thousands of Oklahomans with personal knowledge of pioneer life and experiences and recorded those interviews in what is commonly referred to as the Pioneer Papers. *See Indian-Pioneer Papers*, UNIV. OKLA., https://repository.ou.edu/islandora/object/oku%3Aindianpp? [https://perma.cc/NGK4-6N5U] (last visited Feb. 6, 2025).

[99] *See* Interview with Caroline Pannell, UNIV. OKLA., https://repository.ou.edu/islandora/object/oku%3A10319? [https://perma.cc/M42S-ND6G] (last visited Feb. 6, 2025). Some historians note that the institution of slavery imposed by Native Americans was not as harsh as the institution imposed by whites. Hilary N. Weaver, *A Boiling Pot of Animosity or an Alliance of Kindred Spirits? Exploring Connections Between Native Americans and African Americans*, 35 J. SOCIO. & SOC. WELFARE 115, 119 (2008) (noting testimony of formerly enslaved persons and outside observers who indicated that slavery among the Choctaw and Chickasaw tribes was not as harsh as state slave codes and mentioning similarity of living conditions between enslaved persons and their masters). This author rejects the claim that there was a kind and gentle form of human slavery. While there were relative degrees of violence among enslavers, that reality does not warrant the implication that Native American enslavement of people of African ancestry was in any way kind, gentle, or humane. In fact, the institutional imposition of slavery through law was in large part modeled after the southern states. *Id.* at 119.

[100] Malone, *supra* note 61, at 4, 6-7 (discussing how mixed-blood Cherokees like James Vann, Charles Hicks, and John Ross wielded influence in-part because of their relative wealth, economic knowledge, and political freedom).

[101] *See id.* at 10-11.

[102] *See generally* Pratt, *supra* note 12, at 77 (describing how elite mixed-blooded Indians most often owned slaves as slavery became institutionalized by tribal law and culture).

included African slave labor, aristocratic Native Americans were able to align their tribes with the values of aristocratic whites, especially those in the South.[103] This alignment with powerful whites assured the tribes of racial and economic domination over blacks in a time and space when property rights were racially contingent.[104] Black racial identity marked those who were property or subject to being converted to property through enslavement, whereas Indian and white racial identities marked those who enjoyed the entitlements of bodily liberty and the freedom to pursue and own property, including other people.[105]

The protection of private property—including enslaved people—was guaranteed by tribal law, which sought to protect not only Indian slaveholders' property interests, but those of white slaveholders as well. For example, the Choctaw nation enacted a law that brought the tribe in line with the interests of white slaveholders by providing a property-based incentive for tribal citizens to become deputies in the hunt for runaway slaves. The law provided:

> [I]t shall be the duty of any one in this Nation to take up a negro whom he may suspect as a runaway: *Provided*, *however*, That any person or persons who may apprehend a negro as a runaway, he shall give the owner, where he is known, information by the earliest opportunity. And if such negro be caught any distance less than twenty-five miles from home, the person so apprehending shall be entitled to five dollars; and if caught over that distance he shall receive ten dollars from the owner of said runaway negro.[106]

By extending protection to the property interests of white slaveholders in the neighboring southern states, tribes signaled to the politically powerful white landed class that tribal sovereignty was something whites should not fear or oppose, but rather embrace, because it looked out for elite white property interests. Tribal leaders also likely expected reciprocity in the protection of tribal slaveholders' property interests in runaway slaves who escaped Indian Territory only to be captured in one of the southern slaveholding states.

Although tribal law protected white slaveholding property interests, it did not aim to protect white interests that sought to undermine the institution of slavery. For example, the Laws of the Chickasaw Nation provided that:

> [A]ll white persons known to be abolitionists, or may hereafter advocate the cause of abolitionism in this Nation, shall be deemed unfriendly and

[103] Malone, *supra* note 61, at 4, 9-10.

[104] BARBARA KRAUTHAMER, BLACK SLAVES, INDIAN MASTERS: SLAVERY, EMANCIPATION, AND CITIZENSHIP IN THE NATIVE AMERICAN SOUTH 2 (2013) (acknowledging that Indians, like white southerners, "bought, sold, owned, and exploited black people's labor and reproduction for economic and social gain" and "embraced a racial ideology that affirmed black people's inherent difference and inferiority and thus justified their enslavement").

[105] *See* Harris, *supra* note 1, at 1718.

[106] *An Act Providing for the Apprehension and Disposal of Negroes Suspected to be Runaways* (1840), *in* CONSTITUTION AND LAWS OF THE CHOCTAW NATION 35 (1847).

> dangerous to the interests of the Chickasaw people, and shall be forthwith removed from the limits of this Nation by the United States Agent or Governor of this Nation.[107]

By aligning tribal law with the economic interests of slaveholding whites, the Chickasaw Nation garnered the respect of slaveholding whites and further solidified their status property interest in Indianness.[108]

C. *Conversion of People to Property Helped Secure Indianness as Property*

Scholars who have written about race and the American justice system during the colonial era have documented the "duality" of the slave who was generally property under the law but was assigned personhood for purposes of criminal law and could be held criminally responsible for his actions.[109] Personhood for blacks was also given limited recognition in contexts other than the criminal law, when such recognition converged with whites' interests.[110] For example, at the Constitutional Convention, southern slaveholding states wanted the personhood of enslaved people of African ancestry recognized for purposes of counting the states' populations to determine their number of representatives in the U.S. House of Representatives.[111] Representatives from non-slaveholding states objected to counting enslaved persons in the population of the southern states because slaveholding states treated enslaved people as "property" and did not afford them the right to vote or participate in the political process in any way.[112]

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[107] *An Act in Relation to Abolitionism* (1857), *in* CONSTITUTION, LAWS, AND TREATIES OF THE CHICKASAWS 80 (1860).

[108] It is important to note that whites and Native Americans were not the only groups seeking to elevate their own identity over that of others. It is a phenomenon of human existence that transcends race and place. *See* JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION 31 (2001) ("[A]ll human societies tend to be structured as systems of *group-based social hierarchies*."); *see also* ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 17 (2023) ("America has an unseen skeleton, a caste system that is as central to its operation as are the studs and joists that we cannot see in the physical buildings we call home.").

[109] A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 971-74 (1992) (discussing "duality" of slaves as "a double standard of chattel and person" meant to maximize profits of enslavers while keeping enslaved people as powerless as possible).

[110] *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-24 (1980) (contending "sudden shift" in 1954 toward desegregation stemmed in-part from shift's value to whites, which included "economic and political advances at home and abroad").

[111] ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, SLAVE NATION: HOW SLAVERY UNITED THE COLONIES & SPARKED THE AMERICAN REVOLUTION 173 (2005).

[112] *See id.* (observing that three-fifths compromise passed only after northern state representatives at Constitutional Convention questioned black peoples' congressional representation given restricted rights).

To settle this dispute, a compromise was reached wherein the U.S. Constitution counted three-fifths of black enslaved persons in the population of states for purposes of determining the number of representatives each state was entitled to have in the House of Representatives.[113]

Despite viewing black people as property and therefore ineligible for tribal citizenship during the slavery era, tribes, like their neighboring slaveholding states, were willing to recognize the humanity of blacks to assign criminal responsibility for wrongdoing.[114] Accordingly, tribal law criminalized the disfavored conduct of enslaved people and punished those who were found guilty of criminal behavior.[115]

In several instances throughout the tribes' criminal code, blackness, rather than behavior exclusively, became the subject of criminal regulation.[116] The fact that black people were viewed by slaveholding Indian tribes as inferior, and therefore not worthy of equal protection under the law, is evidenced in the tribes' criminal law which often treated blacks more harshly than Indians or failed to acknowledge and protect the basic humanity of black people.[117]

The slaveholding tribes' desire in solidifying their status property interest led them to adopt slave codes that were modeled after the slave codes of the slaveholding states.[118] In doing so, race and crime in Indian Territory became entwined in a way that made blackness an aggravating component of a crime,

[113] Harris, *supra* note 1, at 1718-19 (citing U.S. CONST. art. I, § 2, cl. 3).

[114] Generally, to be held criminally responsible for one's conduct, one must be capable of cognition which includes knowledge, reasoning, and control. Animals' absence of cognition rejects animal responsibility, and it follows that they are not held criminally responsible for their conduct. Cognition entails the capacity to understand the surrounding facts, to realize the breach of norms involved, and to conform one's behavior to expected standards. These are initial prerequisites of moral agency, assumed to be present in all humans except for young children and people deemed "insane." *See generally* Maya Mei-Tal, *The Criminal Responsibility of Psychopathic Offenders*, 36 ISR. L. REV. 103 (2004). While black enslaved people were sometimes compared to animals for other purposes, they were deemed to have the cognition sufficient for criminal responsibility. *See* Higginbotham & Jacobs, *supra* note 109, at 971 ("This double standard of chattel and person lay at the heart of the criminal laws that governed slaves in antebellum America . . . .").

[115] Wyatt F. Jeltz, *The Relations of Negroes and Choctaw and Chickasaw Indians*, 33 J. NEGRO HIST. 24, 31 (1948) (detailing tribal restrictions on slave conduct implemented to keep enslaved people in "position of peaceful servitude" like laws prohibiting reading, writing, and singing without owner's consent).

[116] *Id.* at 31-32 (listing Choctaw laws that targeted black enslaved people and disqualified them from holding government office and limited their ability to marry).

[117] *Id.* at 26 ("Most of the instances of cruelty to Negroes by Indians can be traced to the Chickasaws. In 1816, they killed several slaves for minor offenses by whipping or burning them.").

[118] R. Halliburton, Jr., *Origins of Black Slavery Among the Cherokees*, 52 Okla. Chron. 483, 494-95 (1974).

and Indianness a mitigating component.[119] For example, blacks were punished more harshly than their Indian counterparts for the same crime.[120] For the crime of rape, the Cherokee Nation's criminal law provided that the man found guilty of rape "shall be punished with one hundred lashes on the bare back."[121] But for a black man committing the offense of rape "against any free female, *not of negro blood*, he shall suffer death by hanging."[122] Therefore an Indian (or white) man convicted of the same crime as a black man enjoyed a form of entitlement property that saved them from the penalty of death.[123]

During the slavery era, it was a crime for a Cherokee Indian to marry "any slave or person of color not entitled to the rights of citizenship under the laws" of the Cherokee Nation.[124] Importantly, those with the power to make law in the Cherokee Nation used the language "person of color" in regulating marriage of Cherokee citizens because they did not see themselves as "persons of color." For the Cherokee, "[w]hiteness gained a positive discursive valence," and "came to be seen as a premium trait."[125] In fact, the Cherokee viewed themselves as living "the white path of righteousness."[126] Any free person (meaning white or Cherokee person) who violated this anti-miscegenation statute was punished by a beating which "shall not exceed fifty stripes for every such offence."[127] But

[119] *See e.g.*, *An Act for the Punishment of Criminal Offences* (1839), *in* CONSTITUTION AND LAWS OF THE CHEROKEE NATION 17 (1840) (highlighting that black people received harsher punishment than natives for committing the same crime.

[120] *See id.*

[121] *Id*. § 3, at 17.

[122] *Id.* (emphasis added).

[123] *See id.* It is important to note that black women's bodies were not protected from rape by this tribal law, at least not if the perpetrator of the crime was a black man. It is doubtful that black women's bodies were protected against rape by a white or Indian man since ownership over her body would likely give the Indian or white slave owner absolute dominion and control over her body. *See, e.g.*, State v. Mann, 13 N.C. (1 Dev. Eq.) 263, 266 (1829) (stating that an enslaved person's "obedience is the consequence only of uncontrolled authority over the body" and to achieve that absolute control, "power of the master must be absolute, to render the submission of the slave perfect"). As for white or Indian men who were not the slave woman's owner, there is serious doubt about whether they would have been prosecuted under this statute for the rape of a black woman or whether that act would be viewed as merely a crime against the slave owner's property. *See* Fay Yarbrough, *Legislating Women's Sexuality: Cherokee Marriage Laws in the Nineteenth Century*, 38 J. SOC. HIST. 385, 393 (2004).

[124] *An Act to Prevent Amalgamation with Colored Persons* (1839), *in* CONSTITUTION AND LAWS OF THE CHEROKEE NATION 18, 18-19 (1840).

[125] Lolita Buckner Inniss, *Cherokee Freedmen and the Color of Belonging*, 5 COLUM. J. RACE & L. 100, 108, 110 (2015).

[126] Donald L. Fixico, *The Crazy Snake Movement and the Four Mothers Society*, 4 CHRONS. OKLA. 388, 391 (2023). This aspiration to whiteness is a universal reality of colonialism around the globe.

[127] *An Act to Prevent Amalgamation with Colored Persons*, *supra* note 124, at 18.

any black male who was convicted of violating the anti-miscegenation law was mandated by the law to receive a punishment twice as harsh—"one hundred lashes."[128]

The Choctaw Nation had a similar law criminalizing interracial sex and marriage. Any person cohabitating with or fornicating with a "negro slave" was "liable to pay a fine not less than ten dollars nor exceeding twenty-five dollars, and shall be separated. . . . [F]or the second offence of a similar nature the party shall receive not exceeding thirty-nine lashes nor less than five on the bare back, as the court may determine, and be separated."[129] The Choctaw law did not merely prohibit marriage of an Indian to a black person, it also prohibited cohabitation, which included fornication.[130] This was an important departure from the law in the slaveholding states which did not criminalize whites for fornicating with black people. History has documented countless incidents of white men taking sexual liberty with black enslaved women's bodies.[131] Tribes understood that they were not similarly situated to slaveholding states. No state was subject to losing its sovereignty due to having mixed-raced offspring of whites and blacks living in the state. But tribes were subject to losing their sovereignty if federal or state government agents determined that their citizens were really a group of "Negroes" and not Indian.[132] This further demonstrates how, as Jeremiah Chin has espoused, "Tribal Sovereignty is preserved only if it reflects colonial, White supremacist structures of power."[133] Hence, "the sovereign right to exclude necessarily encompasses the discriminatory exclusion of Freedmen."[134] Generally, "federal courts affirm tribal sovereignty only when it maintains colonial, White Supremacist structures of power and privilege."[135]

Criminalization of interracial fornication was necessary to prevent having Choctaw offspring with both Indigenous and African ancestry which would threaten the tribe's sovereignty. Allowing African ancestry to enter the tribe's genetic pool would threaten the tribe's sovereignty because federal and state governments' view of African ancestry was that it "taints" and makes the person

[128] *Id.*

[129] *An Act Prohibiting Any Choctaw Citizen from Cohabiting with a Slave* § 1 (1837), *in* CONSTITUTION AND LAWS OF THE CHOCTAW NATION 27 (1847).

[130] *Id.* at 27.

[131] The most notorious example of this was Thomas Jefferson, who kept Sally Hemings as his sex slave and had several children with her. *See generally* ANNETTE GORDON REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1998).

[132] *See* Samuel R. Cook, *The Monacan Indian Nation: Asserting Tribal Sovereignty in the Absence of Federal Recognition*, 17 WICAZO SA REV. 91, 98 (2002) (explaining how Virginia's Racial Integrity Law of 1924 empowered the Virginia Secretary of Vital Statistics with the power to "classify all Virginia Indians as 'Negroes'" due to the state legislators' understanding that Indians in Virginia "had intermarried with blacks for generations").

[133] Chin, *supra* note 9, at 1257.

[134] *Id.*

[135] *Id.* at 1258.

African in descent.[136] Consequently, individual Indians who procreated with a person of African descent would have their offspring deemed "a colored person" or "half-breed" rather than Indian by both the federal government and the states.[137] This application of the one drop rule to Indian people with any known African ancestry would have had devastating consequences on a tribe because they would lose members of the next generation to the federal government's racist conception of who could be Indian.[138] More importantly, blackness was a threat to tribal sovereignty because the federal government had demonstrated its willingness to declare an entire tribe nonexistent due to Indian procreation with people of African ancestry.[139]

Professors Gerald Torres and Kathryn Milun have argued that despite existing as a sovereign nation for over 300 years, the Mashpee Nation's "adherence to its traditional, non-racialized membership rules" resulted in the tribe accepting both black and white people as citizens of the tribe.[140] Their acceptance of blacks as citizens led to interracial marriage and Indian offspring with African ancestry. That African ancestry negated their status property as Indians and initially kept the Mashpee from gaining tribal recognition because they were viewed as racially black, not racially Indian.[141] When the federal government hired an anthropologist to determine whether the Lumbee people were Indian or "Negro," the anthropologist "relied heavily on phenotype in making his assessment."[142] Those individuals with curly hair and darker skin were deemed "Negroid" instead of Indian.[143] Hence, the federal government declared the tribe nonexistent and terminated the tribe's legal interests in having its trust relationship with the federal government continued.[144] The federal government

[136] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1069-70 (2012).

[137] *Cf.* Desi Rodriguez-Lonebear, *The Blood Line: Racialized Boundary Making and Citizenship Among Native Nations*, 7 SOCIO. RACE & ETHNICITY 527, 528-30 (2021).

[138] *See id.* at 528 (noting the federal government's "Indigenous erasure through [the] blood rule of exclusion").

[139] *See id.*

[140] *See* Pratt, *supra* note 8, at 449 (citing Gerald Torres & Kathryn Milun, *Translating "Yonnondio" by Precedent and Evidence: The Mashpee Indian Case*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 177, 181 (Kimberlé Crenshaw et al., 1995)).

[141] *See id.*

[142] *Id.* at 447 (citing Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 MICH. J.L. REFORM 275, 288 (2001)).

[143] *Id.* ("[I]f the [anthropologist's] pencil slipped through the [individual's] hair, he denoted them racially Indian, but if the pencil caught in the hair he deemed the person 'Negroid.'" (citing Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 MICH. J.L. REFORM 275, 288 (2001)).

[144] Pratt, *supra* note 8, at 448 ("Racial transformation of the tribe from Indian to Negro would have meant the loss of federal recognition, which entailed losing sovereignty . . . ." (footnote omitted)).

thus legitimated how Indianness was a form of status and entitlement property that could be destroyed by blackness.[145]

In the Chickasaw Nation, any non-black person caught cohabitating with a black person was subject to criminal sanction of a fine "of not less than twenty-five nor exceeding fifty dollars," and if unable to pay the fine, was subject to being jailed for a term ranging from ten days to three months.[146]

In the Creek Nation, during the slavery era, the personhood of black people was only recognized in the criminal law if the person accused of committing the crime was black. If the victim of the crime was black, tribal law treated the black victim's existence as that of property.[147] For example, in the Creek Nation, if a black person killed an Indian, the black person would be punished by death, but if an Indian killed a black person, the Indian would be required to pay the owner of the black person the market value of the deceased slave.[148] If the Indian who killed the black person was unable to compensate the owner, the Indian would be punished with death.[149] This law reflected the value choice by the white elite slaveholding class of Indians who elevated the protection of their property interest in black bodies over the sanctity of red Indian life.

Indian Territory was geographically positioned adjacent to the slaveholding states of Texas, Arkansas and Missouri, which were committed to maintaining slavery.[150] As tensions mounted between the northern and southern states over the continuation of slavery, Southerners in favor of seceding from the union lobbied the Five Tribes to join with them in forming their own nation, the Confederacy.[151] Secessionists argued to the tribes that white northerners would ignore tribal treaty rights and take their land in Indian Territory.[152] Moreover, the officials in Washington, D.C. who controlled trade with the tribes in Indian Territory were from Texas and Arkansas.[153] Consequently, the tribes recognized

[145] *See id.*

[146] *An Act in Relation to Cohabiting with Negroes* (1858), *in* CONSTITUTION, LAWS AND TREATIES OF THE CHICKASAWS 96, 96 (1860).

[147] *See Laws of the Creek Nation (Creek People, 1817-1824)*, *in* DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT: 1500S TO 1933, at 134 (2009).

[148] *Id.* ("If a negro Kill an Indian the negro shall be suffer death. And if an Indian Kill a negro he shall pay the owner the value.").

[149] *Id.* ("If [the] person [is] not able to pay the value [he] shall suffer death.") (alteration in original).

[150] *See Native American Spaces: Cartographic Resources at the Library of Congress*, LIBR. OF CONG., https://guides.loc.gov/native-american-spaces/cartographic-resources/reservations-allotments [https://perma.cc/3MB2-3VMG] (last visited Feb. 6, 2025).

[151] ANNIE HELOISE ABEL, THE AMERICAN INDIAN AS SLAVEHOLDER AND SECESSIONIST 58-59, 75-76 (1915) (noting William H. Seward had given a speech in Chicago in 1860 wherein he stated that Indian Territory south of Kansas must be vacated by the Indians, and that quote was used by the Confederate States to convince tribes that their best interests resided in joining the Confederacy).

[152] *Id.* at 59.

[153] *Id.*

that their ability to trade and survive economically could be curtailed if they upset the officials who had the power to grant licenses to traders in Indian Territory.[154]

When the Civil War erupted with Confederate forces firing upon Fort Sumter, South Carolina, in April of 1861, the tribes attempted to stay neutral, despite pressures from southern secessionists to join their cause.[155] While the Cherokee were adamant about neutrality, the Chickasaw and Choctaw tribes were "anxious to join the Southern Confederacy."[156] The Creek, Choctaw, Chickasaw and Seminole had all signed treaties with the Confederacy.[157]

However, the Cherokee were divided.[158] The pro-slavery Knights of the Golden Circle were "mixed blood" Cherokee slaveholders who favored assimilation into white society and wanted the Cherokee Nation to join the Confederacy.[159] The traditionalists in the tribe, known as the Keetoowah Nighthawk Society and were largely "full blood" Cherokee, sought to preserve the traditional Cherokee way of life.[160] These traditionalists wanted the Cherokee Nation to maintain neutrality and "opposed the 'whitening' of Cherokee culture and the political influence of mixed-race white Cherokees."[161] Ultimately, Cherokee Chief John Ross yielded to internal pressure from the wealthy elites within his tribe who were mostly the pro-slavery Knights of the Golden Circle and negotiated a treaty with the Confederacy in October of 1861.[162] This resulted in the Cherokee fighting with the Confederacy in the Civil War and finding themselves the defeated enemy of the U.S. government.

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[154] *Id.* at 59-60 ("The granting of licenses to traders rested with the superintendent and everything goes to show that, in the fifties and sixties, applications for license were scrutinized very closely by the southern superintendents with a view to letting *no* objectionable person . . . get into the territory." (emphasis added)).

[155] *Id.* at 149-55 (showing that Cherokee's lack of desire to engage in dispute was evident through Chief John Ross' Proclamation of Neutrality, which urged Cherokees to honor their treaty obligations and maintain peace with all people).

[156] *Id.* at 155 (quoting Letter from Benjamin McCulloch, Brigadier Gen., to L.P. Walker, Sec'y of War (May 28, 1861)).

[157] *Id.* at 158.

[158] *Id.* at 156 n.257 (explaining attempts made by Confederacy to negotiate with Cherokees).

[159] *See* TIYA MILES, TIES THAT BIND: THE STORY OF AN AFRO-CHEROKEE FAMILY IN SLAVERY AND FREEDOM 40, 252-53 (2d ed. 2015) (2005).

[160] *See* Fixico, *supra* note 126, at 396-97 (explaining how Keetoowah or Kituwah is considered by Cherokees to be their original name, and Keetoowah Band broke away from the Cherokee Nation in 1939 to form a separate federally recognized tribe called the United Keetoowah Band of Cherokee Indians of Oklahoma, also known by their abbreviated name of the United Keetoowah Band, or UKB); *see also About Us*, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, https://www.ukb-nsn.gov/about-us [https://perma.cc/V7R5-X953] (last visited Feb. 6, 2025).

[161] MILES, *supra* note 159, at 253.

[162] ABEL, *supra* note 151, at 153-57.

II. INDIANNESS AS PROPERTY DURING THE RECONSTRUCTION AND POST-RECONSTRUCTION ERAS

A. *Indianness as Property Contingent on Taking Tribal Property*

Following the Civil War, Indianness continued to have relative value compared to whiteness and blackness. The federal government required each of the former slaveholding states to adopt the Reconstruction Amendments[163] as a condition to returning to the Union.[164] The Reconstruction Amendments to the Constitution focused on constraining state power. Because tribes are not states under our Constitution, and the Reconstruction Amendments made no reference to Indian tribes, the Amendments had no effect on the slaveholding tribes. The federal government recognized that the tribes were "domestic dependent nations" within the United States that had to be dealt with as sovereigns.[165]

Because the Reconstruction Amendments did not apply to the tribes, the federal government offered each slaveholding tribe the opportunity to enter into a treaty with the federal government confirming peaceful relations between the tribe and the federal government and offering the tribe federal protection in the post-Civil War Era.[166] The federal government had several mandatory stipulations in the Reconstruction Treaties, which paralleled the provisions of the Reconstruction Amendments made applicable to the States. Specifically, the tribes had to agree to end slavery in Indian Territory immediately, except as a punishment for crime.[167] This stipulation mirrored both the mandate and the

[163] The Reconstruction Amendments to the U.S. Constitution include the Thirteenth, Fourteenth, and Fifteenth Amendments. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 276 (1988).

[164] *See* Baker v. Carr, 369 U.S. 186, 311 (1962) (Frankfurter, J., dissenting) (discussing the fact that Congress conditioned the Southern States' return to the Union upon their ratification of the Fourteenth Amendment).

[165] Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 1, 17 (1831).

[166] Treaty with the Choctaws and Chickasaws, Choctaw & Chickasaw Nations-U.S., art. I, Apr. 28, 1866, 14 Stat. 769, 769 ("Permanent peace and friendship are hereby established . . . ."); Treaty with the Seminole Indians, Seminole Nation-U.S., art. I, Mar. 21, 1866, 14 Stat. 755, 756 ("In return for these pledges of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes."); Treaty with the Creek Indians, Creek Nation-U.S., art. I, June 14, 1866, 14 Stat. 785, 786 ("[T]he United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes."); Treaty with the Cherokee Indians, Cherokee Nation-U.S., art. XXVI, July 19, 1866, 14 Stat. 799, 806 (providing the United States will offer protection to the Cherokee Nation in exchange for peaceful relations).

[167] *See e.g.*, Treaty with the Choctaws and Chickasaws, art. II, *supra* note 166, at 769; Treaty with the Seminole Indians, art. II, *supra* note 166, at 756; Treaty with the Creek Indians, art. II, *supra* note 166, at 786; Treaty with the Cherokee Indians, art. IX, *supra* note 166, at 801.

exception of the Thirteenth Amendment to the U.S. Constitution.[168] In addition, the federal government required that the former slaveholding tribe had to extend tribal citizenship to those individuals who were formerly enslaved under tribal law,[169] just as the Fourteenth Amendment extended state citizenship to the freed slaves of the former slaveholding states.

The Fourteenth Amendment not only granted citizenship to the formerly enslaved people of the states, it also contained an Equal Protection Clause and Privileges and Immunities Clause guaranteeing that the formerly enslaved people of former slaveholding states would enjoy citizenship rights under the law that were equal to the citizenship rights enjoyed by white Americans.[170] Accordingly, in the post-Civil War negotiation between the tribes and the federal government, the federal government sought to secure the same protections of the Fourteenth Amendment for the freed slaves in Indian Territory. To do so, the federal government required each former slaveholding tribe to include in its treaty with the federal government terms that were the analogue to the provisions of the Reconstruction Amendments.[171] In order to restore peaceful relations with and secure the protection of the federal government, each former slaveholding tribe signed a post-war treaty with the federal government.[172] Each of the respective treaties of 1866 mandated not only that the tribes end slavery, consistent with the mandate of the Thirteenth Amendment, but also that they accept their freed slaves as citizens of their respective tribe, consistent with the citizenship clause of the Fourteenth Amendment.[173]

For example, the delegation of "loyal Creeks" who negotiated with the federal government were willing to enter a post-Civil War treaty that ceded some of their lands to the United States.[174] They were also willing "to provide for the abolishing of slavery and settlement of the blacks who were among [the tribe] at the breaking out of the rebellion, as slaves or otherwise, as citizens [of the tribe]

[168] U.S. CONST. amend. XIII, § 1 (abolishing slavery and involuntary servitude, "except as a punishment for crime").

[169] Treaty with the Creek Indians, art. II, *supra* note 166, at 786.

[170] U.S. CONST. amend. XIV § 1.

[171] Treaty with the Choctaws and Chickasaws, art. III, *supra* note 166, at 769; Treaty with the Seminole Indians, art. II, *supra* note 166, at 756; Treaty with the Creek Indians, art. II, *supra* note 166, at 786; Treaty with the Cherokee Indians, art. IX, *supra* note 166, at 801.

[172] *See* ABEL, *supra* note 151, at 265-66.

[173] *See* McGirt v. Oklahoma, 591 U.S. 894, 897-98 (2020) (upholding the Muscogee Creek Nation's sovereign rights to govern their citizens on tribal lands reserved to the tribe under their 1866 Treaty with the federal government). Consequently, the U.S. Supreme Court has by implication held that the Treaty of 1866 with the Muscogee Creek Nation has not been abrogated and therefore still has the full force and effect of being the Supreme Law of the Land pursuant to the Supremacy Clause of the U.S. Constitution. U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

[174] Gail Balman, *The Creek Treaty of 1866*, 4 CHRONS. OKLA. 184, 184 (1970) (explaining how "loyal Creek delegates" resolved the main issues in the Creek Treaty).

entitled to all the rights and privileges that [other tribe members] are."[175] The resulting language of Article II of the 1866 Treaty with the Muscogee Creek Nation[176] ("Muscogee Creek Nation Treaty") provides:

> The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted in accordance with laws applicable to all members of said tribe, shall ever exist in said nation; and *inasmuch as there are among the Creeks many person of African descent,* who have no interest in the soil, *it is stipulated that hereafter these persons lawfully residing in said Creek country under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants* and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens [thereof,] *shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons*, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe.[177]

As the aforementioned language closely parallels the U.S. Constitution's Reconstruction Amendments, it is reasonable to conclude that the intent of the federal government in entering post-Civil War treaties with each of the slaveholding tribes was to accomplish five fundamental purposes that mirrored their goals in the States, which were to:

- grant freedom to the people of African ancestry who had been enslaved pursuant to tribal law;
- grant tribal citizenship to the people of African ancestry who had been enslaved pursuant to tribal law and extend citizenship rights to their descendants;
- ensure that the tribe would afford equal protection of the law to the people of African ancestry who had been enslaved and their descendants;
- ensure that the people of African ancestry who had been enslaved pursuant to tribal law, and their descendants, would enjoy all rights and privileges of citizenship that native tribal members by blood enjoyed (a provision akin to the Privileges and Immunities clause in the

[175] *Id.* at 192 (quoting Letter from Sands, Chief of the Loyal Creeks, to Federal Peace Commissioners (Sept. 15, 1865), *in* ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR 1865, at 341, 341 (1865)).

[176] The Creek Nation was negotiating two treaties with the federal government after the war. The second treaty was aimed at restoring tribal annuities and land. *Id.* at 190-91.

[177] Treaty with the Creek Indians, art. II, *supra* note 166, at 786 (emphasis added).

Fourteenth Amendment that would have applied to freed black people in the former slaveholding states); and

- ensure that *free* people of African ancestry residing in the Creek Nation and their descendants were granted tribal citizenship (just as free black people residing in the states were granted citizenship in their respective State by the Fourteenth Amendment's Birthright Citizenship clause).[178]

But even the millions of acres of land that had been surrendered by the Five Tribes pursuant to the Treaties of 1866 would prove insufficient for the federal government. Ultimately, the federal government sought to break up the remaining tribal land and allot it to individual citizens of the tribe so that it too would become alienable and could be sold to white settlers. To effectuate this goal, in 1887 Congress passed the General Allotment Act ("the Dawes Act"), which authorized the U.S. President to survey and allot any Indian reservation to its native residents, except for certain Oklahoma tribes.[179] Subsequently, the 1889 Oklahoma Land Run brought thousands of white settlers to Oklahoma and resulted in the creation of Oklahoma Territory in 1890.[180] Congress responded by creating the Commission to the Five "Civilized" Tribes, also known as the "Dawes Commission." the Dawes Act and promote the assimilation of Indian tribes into the dominant white society in 1893.[181] The Dawes Commission was charged with creating a roll of each tribe so that the federal government could allot each individual tribal citizen a plot of land from the tribal land that was previously held in common ownership by the tribe.[182]

Several tribes, including the five former slaveholding tribes in Indian Territory, were exempted from the allotment requirement in the Dawes Act.[183] Traditionalists in each of the Five Tribes opposed allotment because they understood that it would decimate tribal lands and tribal sovereignty.[184] The Five

[178] *See* Treaty with the Creek Indians, art. II, *supra* note 166, at 786.

[179] Dawes Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 334, 339, 341-42, 348-49, 354, 381) (discussing the process of allotments and those tribes for whom the law does not apply).

[180] Donald E. Green, *The Oklahoma Land Run of 1889: A Centennial Re-Interpretation*, 67 CHRONS. OKLA. 116, 117 (1989) (describing how "as many as 40,000 to 50,000 people charged across the boundaries of the Unassigned Lands at high noon on April 22" during the Oklahoma Land Run); Dianna Everett, *The Encyclopedia of Oklahoma History and Culture: Organic Act (1890)*, OKLA. HIST. SOC'Y (Jan. 15, 2010), https://www.okhistory.org/publications/enc/entry?entry=OR004 [https://perma.cc/AG86-BGYY].

[181] CARTER, *supra* note 34, at 2-3.

[182] *See* Dawes Act § 1, at 388.

[183] Dawes Act § 8, at 391.

[184] *See* Tom Holm, *Indian Lobbyists: Cherokee Opposition to the Allotment of Tribal Lands*, 5 AM. INDIAN Q. 115, 115-16 (1979) (discussing how Cherokee delegates to Congress

Tribes' reprieve from allotment was short-lived. In 1898, Senator Charles Curtis of Kansas, who was himself part Kansa Indian, succeeded in getting a law passed by Congress that mandated all of Indian Territory submit to the allotment process.[185] The law became known as the Curtis Act and was the largest assault on tribal sovereignty that the Five Tribes had experienced. The law abolished tribal courts and subjected all persons in Indian Territory to federal jurisdiction.[186] It was the final step in the plan to erase Indian existence in preparation for Oklahoma statehood. With the significant increase in white settlers initiated by the Oklahoma Land Run, Congress enacted the Organic Act of 1906, providing for Oklahoma Territory and Indian Territory to merge and become the state of Oklahoma.[187]

As stated previously, in executing the post-Civil War treaties with the former slaveholding tribes, the federal government used the disloyalty of those tribes that had fought with the Confederacy as a justification to take millions of acres of tribal lands from the former slaveholding tribes.[188] The Choctaw and Chickasaw Nations were geographically adjacent to each other and had close relations, so they jointly negotiated a post-Civil War treaty with the federal government.[189] The Treaty mandated that the tribes adopt laws to:

> give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations . . . and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected . . . after the Choctaws and Chickasaws and Kansas Indians have made their selections . . . .[190]

Embedded in the text of the Treaty is a recognition of Indianness as entitlement property. The Treaty required the tribe to include formerly enslaved

advocated against allotment legislation "designed to put an end to what little was left of tribal sovereignty" by presenting it as "outright exploitation").

[185] H.R. 8581, 55th Cong. (1898); *see also* 31 CONG. REC. 2154 (1898) (noting Rep. Curtis's introduction of H.R. 8581 to the House of Representatives on Feb. 24, 1898, and referral of the same to the Committee on Indian Affairs). H.R. 8581 was ultimately adopted into law on June 28, 1898. *See* Curtis Act, ch. 517, 30 Stat. 495 (1898).

[186] Curtis Act § 28, at 504,05.

[187] H. R. 12707, 59th Cong., 34 Stat. 267 (1906); 40 CONG. REC. 3314 (1906); *see* Fixico, *supra* note 126, at 397.

[188] ANNIE HELOISE ABEL, THE AMERICAN INDIAN UNDER RECONSTRUCTION 187-90, 301-63 (1925) (detailing the peace council proceedings held at Fort Smith in 1865 and the subsequent treaties adopted in 1866).

[189] *See id.* at 327-37, n.598.

[190] Treaty with the Choctaws and Chickasaws, art. III, *supra* note 166, at 769-70 (detailing the cession of land to the federal government and the stipulations in place to provide for formerly enslaved people and their descendants).

persons as tribal citizens who were entitled to all the rights of citizenship, including a land allotment.[191] However, people who were deemed racially Indian were entitled to be the first in line to select their plot of land. Black tribal citizens who were politically Indian, but racially non-Indian, were to select their land allotment from land left over after persons who were racially Indian had chosen land.[192] Thus, racial Indianness created a priority in land selection. Racial Indianness was again a form of property that entitled its holder to choose a plot of land before tribal citizens who were racially black. This property interest in racialized Indian identity resulted in the freedmen being deeded land deemed to be the least desirable, usually because it was not suited to farming.[193]

B. *Indianness as Status Property and Entitlement Property During Allotment*

My paternal great-grandmother Mary Folsom,[194] was one of the enslaved persons of the Choctaw Nation. She had been held in bondage by a Choctaw citizen named Dr. Henry Folsom, who was rumored to have one-quarter Indian ancestry and three-quarters European ancestry.[195]

My father, Carl Wenzil White, described his grandmother Mary's appearance as the stereotypical Indian. He recalled her to be a petite woman with tan skin and long, straight, silky black hair that she sat on when she sat down. Her phenotypical appearance shared orally by my father is corroborated by a twentieth century U.S. Census worker who collected information on households for the 1900 Census. The worker recorded her race as "I" for "Indian," while recording her husband and children as "B" for "Black."[196] Despite her Indian appearance, we know that Grandma Mary had African ancestry because, by the time of the Civil War, slavery was an almost exclusively black institution.[197] By

[191] *Id.*

[192] *Id.*

[193] *See, e.g.*, DAWES COMM'N REPORT, *supra* note 88, at 12 (reporting that the Choctaw freedmen lacked title to the land they occupied and could be compelled by tribal members to leave land that freedmen improved).

[194] The name Folsom is spelled in various ways in the records. Sometimes it is spelled Folsom, Fulsome, or Folsome.

[195] *See* Interview by Hazel Greene with Jordan D. Folsom (Feb. 17, 1938), *in* 31 INDIAN-PIONEER PAPERS 62, 67-69, https://repository.ou.edu/islandora/object/oku%3A13161? [https://perma.cc/9NYS-D6F6] (discussing the history of the Folsom family, the town of Doaksville, and the experience of enslaved people). Henry Folsom's Choctaw Indian ancestry has not been confirmed by this researcher. It is important to note that some white people of exclusively European ancestry were able to secure enrollment as "blood" Indians through marriage, fraud, or bribery. *See generally* CARTER, *supra* note 34. Consequently, not every person listed on a tribal "blood roll" has Indian ancestry.

[196] Census Card on file with author.

[197] *See* Debra Thompson, *Racial Idea and Gendered Intimacies: The Regulation of Interracial Relationships in North America*, 18 SOC. & LEGAL STUD. 353, 361 (2009).

the 1800s, only people of asserted or proven African ancestry were eligible to be enslaved as a matter of law.[198]

Records from the U.S. Dawes Commission reveal that Mary was born to Rhoda Folsom, who was also a slave owned by Henry Folsom, in Doaksville, Indian Territory, which is now a part of the state of Oklahoma. Doaksville was the largest town in Indian Territory in 1850[199] and was the commercial center of the Choctaw Nation.[200] Henry Folsom was a citizen of the Choctaw Nation, had mostly white European ancestry, and was educated as a physician and surgeon.[201] He owned a large plantation in Doaksville across the road from the Doaksville Cemetery.[202] His enslaved people grew cotton and spun it into fabric.[203]

According to my family's oral history, Rhoda was a mixed-race slave who was impregnated either by her slave master Henry Folsom, or some other phenotypically white man who had occasion to be present on the Folsom plantation. Great-grandma Mary was the product of that interracial sexual encounter. This narrative would explain why great-grandma Mary had the phenotype attributed to an Indian woman that caused my father and federal census workers to see her as a woman of Choctaw Indian ancestry rather than a woman of African ancestry.[204] Nonetheless, because she had been an enslaved person, her race by law had to be "Negro," and her Indian appearance did not negate that.

As a formerly enslaved person who became a citizen of the Choctaw Nation, great-grandmother Mary was entitled to a land allotment. As stated previously, she was awarded citizenship in the Choctaw Nation pursuant to the Treaty of 1866 that the Choctaw and Chickasaw tribes had entered into with the federal

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[198] *See* Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592, 597 (2007).

[199] *Fort Towson Historic Site: Doaksville*, OKLA. HIST. SOC'Y, https://www.okhistory.org/sites/ftdoaksville [https://perma.cc/Z7GV-U6JN] (last visited Feb. 6, 2025).

[200] *Id.* Doaksville is the town where the last Confederate General surrendered. General Stand Watie surrendered his Indian troops to Unions forces on June 23, 1865. After the Civil War, Doaksville declined and no longer exists as a town other than on the National Register of Historic Places (NR 75001561). *See* Jon D. May, *The Encyclopedia of Oklahoma History and Culture: Doaksville,* OKLA. HIST. SOC'Y (Jan. 15, 2010) https://www.okhistory.org/publications/enc/entry.php?entry=DO002 [https://perma.cc/QR55-HTUQ] (explaining the history and current state of Doaksville). Its location is now Fort Towson, in Choctaw County, Oklahoma. *See Fort Towson Historic Site*, OKLA. HIST. SOC'Y, https://www.okhistory.org/sites/forttowson [https://perma.cc/L9WU-ARN9] (last visited Oct. 6, 2024).

[201] *See* Interview by Hazel Greene with Jordan D. Folsom, *supra* note 195, at 66-67.

[202] *See id.*

[203] *See id.*.

[204] Census records on file with author.

government.[205] The Treaty also provided for formerly enslaved people to have the means to support themselves while awaiting the allotment process by providing that "while the said freedmen, now in the Choctaw and Chickasaw [N]ations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and [their] families."[206] In reliance on this right of cultivation provision, great-grandma Mary began farming a parcel of tribal land in Indian Territory just a few miles north of Denison, Texas. In or around 1872, she married a black man named Matthew White from Denison, Texas. In the years that followed, they begat six children who attended school across the Red River in Denison, Texas. This is because as black children, they were not permitted to attend the schools for Indian and white children, and the Choctaw Nation had not created a school for black children near their home.[207] Moreover, the couple opened a post office box and maintained a home in Denison, Texas.

Of the five former slaveholding tribes, "[t]he Choctaw and [the] Chickasaws harbored the greatest animosity toward their former slaves" and "dealt most severely with their freedmen."[208] The Choctaw and Chickasaw did not permit the return of formerly enslaved people who left tribal territory during the Civil War.[209] The tribes also petitioned Congress to have the federal government remove the black freedmen from tribal territory and relocate them to lands that the federal government acquired through the Treaty of 1866.[210] The federal government did not remove the Choctaw and Chickasaw freedmen, so many

[205] Treaty with the Choctaws and Chickasaws, art. III, *supra* note 166, at 769-70.

[206] *Id.* art. VI., at 770.

[207] DAWES COMM'N REPORT, *supra* note 88, at 17 ("No provision was made by the United States or by the Choctaw Nation for the education of their children . . . and could not procure and provide necessary educational facilitates."). A federal government worker documented that the freedmen "whose rights, protection, and education were guaranteed by treaty, are left in ignorance, without civil or political rights, and with no hope of improvement." *Id.* at 31. After receiving an appropriation of funds from Congress pursuant to the Indian Appropriation Act of May 17, 1882, the Choctaw Nation did eventually create inadequate inferior schools for black children. *Id.* at 20, 29 ("In the Indian appropriation act of May 17, 1882 . . . the sum of ten thousand dollars is hereby appropriated . . . for the purpose of educating freedmen [among the Choctaws]."). The report includes a "Statement of the Choctaw Freedmen Setting Forth Their Wrongs, Grievances, Claims, and Wants" (Aug. 1894). *Id.* at 13. One demand was for adequate education and stated: "The Choctaw freedmen desire, claim, and urge that sufficient and suitable provisions and facilities be secured to them at the earliest possible moment for the proper education of their children." *Id.* at 22. The desperation of the freedmen of the Chickasaw and Choctaw is evident in their willingness to "furnish school buildings if by any means teachers and books can be obtained for them." *Id.* at 31.

[208] Donald A. Grinde, Jr. & Quintard Taylor, *Red vs Black: Conflict and Accommodation in the Post Civil War Indian Territory, 1865-1907*, 8 AM. INDIAN Q. 211, 211-12, 216 (1984).

[209] *Id.* at 213.

[210] *Id.*

stayed in tribal territory with no tribal legal status.[211] Those freedmen and their descendants who were residing in the tribe's territory at the time the 1866 Treaty was executed or who returned to tribal territory within a year of the treaty's execution were entitled to an allotment of land.[212] On August 13, 1897, Mary filed an application requesting that she and her children be listed on the Dawes Roll as citizens of the Choctaw Nation ("Choctaw freedman")[213] so that they would be eligible for a land allotment from the Choctaw reservation lands. However, her application was denied because the federal enrollment official considered her to be a citizen of Denison, Texas instead of a citizen of the Choctaw Nation.[214]

As noted previously, the Dawes Commission had been tasked with creating a list or "roll" of all citizens of each of the former slaveholding tribes for the purpose of determining who was entitled to an allotment of land.[215] After land was allotted to each tribal citizen, "surplus land" would be awarded to white settlers.[216] The Choctaw and Chickasaw ultimately lost over three million acres of "unallotted land" deemed by the federal government to be "surplus" land subject to dissemination to white settlers.[217]

The land allotment process crystalized the relative nature of property associated with racial identity. Each tribal citizen was entitled to an allotment of land, but status and entitlement property interests were maintained during the allotment era to maintain the preexisting racial hierarchy. Choctaw citizens who were racially white or Indian enjoyed entitlement property associated with their racial identity such that they were entitled to receive a 320-acre allotment of land.[218] However, Choctaw citizens who were formerly enslaved persons and their living descendants, all of whom had African ancestry, and had their race socially and legally constructed as "Negro," did not enjoy the same entitlement. They were entitled to an allotment of only forty acres of land.[219]

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[211] *Id.*

[212] *See* Treaty with the Choctaws and Chickasaws, art. III, *supra* note 166, at 770.

[213] Application on file with author and available in Record Group 75 of Federal Archives.

[214] This region would become part of Oklahoma once the Indian Territory and Oklahoma Territory were combined and joined the union as a state in 1907. *See* Grinde & Taylor, *supra* note 208, at 217, 222.

[215] *See supra* notes 179-87187 and accompanying text.

[216] CARTER, *supra* note 34, at 187-88 (describing the "great deal of interest nationwide in buying what many people referred to as surplus Indian land," where "public auctions were held for small amounts of Seminole, Creek, and Cherokee lands").

[217] DEBO, *supra* note 39, at 260.

[218] *Select Provisions of the 1866 Reconstruction Treaties Between the United States and Oklahoma Tribes: Hearing Before the Comm. on Indian Affs.*, 117th Cong. 39 (2022) [hereinafter *Hearing*] (prepared statement of Marilyn Vann, President, Descendants of Freedmen of the Five Tribes Ass'n).

[219] *Id.* at 44.

Because any land left over after the allotment process would be opened up as "surplus lands" for white settlers to take, the federal government, which sought to maintain the existing hierarchy of race and property, had an interest in denying as many freedmen claims to allotments as possible.[220] Hence, it is not surprising that the Dawes Commission informed Mary's lawyer that she would have to travel the 150 miles to appear in person in Muskogee, Indian Territory, and give testimony regarding her residency in order to be considered for enrollment on the Choctaw Nation freedmen citizenship rolls.[221] In pursuit of her property interest in a land allotment, which was contingent upon her demonstrating that she had not abandoned her residency in the Choctaw Nation, Mary appeared in person before the Dawes Commission[222] on February 21, 1905.[223] After being duly sworn, Mary testified that she was born in Doaksville, in the Choctaw Nation, Indian Territory. She further testified that her mother was a slave and that they belonged to a man named Henry Folsom. She said when she was about five years old her aunt came and got her and took her to another farm in the Choctaw Nation. She was not sure if it was also in Doaksville or if it was in another town. She testified that after the "War of the Rebellion"[224] she left the Choctaw Nation for the first time and that starting at the age of about twenty-three years old, she had lived in Denison, Texas with her husband and children so that their children, all of whom were visibly African-American, could attend

[220] *See* CARTER, *supra* note 34, at 187-88.

[221] Muskogee was in northeastern Indian Territory about fifty miles southeast of Tulsa, Oklahoma. Wallace F. Waits, Jr., *The Encyclopedia of Oklahoma History and Culture: Muskogee*, OKLA. HIST. SOC'Y (Jan. 15, 2010), https://www.okhistory.org/publications/enc/entry.php?entry=MU018 [https://perma.cc/B9Z7-AFXM]. Traveling the 150 miles by horse or wagon from Colbert to Muskogee would have been difficult, requiring a full day of travel (around ten hours with stops, assuming no inclement weather in February which would have made the travel even more arduous). This travel would have imposed an undue burden on the freedmen that some undoubtedly would not have been able to overcome causing them to forfeit their claim to a tribal land allotment.

[222] *Dawes Enrollment Jacket for Choctaw, Choctaw Freedmen, Card #151*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/44437932 [https://perma.cc/CZ9G-LVS8] (last visited Feb. 6, 2025).

[223] *Id.*

[224] Great-grandmother Mary, as a former enslaved person, chose not to refer to the war as the Civil War or the "war of Northern aggression" as many southerners did. *See* Transcript of Testimony (on file with author). I have no doubt that her choice of words here were intentional and intended to remind federal officials that the Choctaw Nation and the southern states had engaged in rebellion against the United States government. *See id.* Revisionist historians "tended to portray Southern whites . . . as victims reacting to Northern attacks." JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 7 (2007). For them, the Civil War was a "war of Northern aggression." *Id.*

school.[225] She testified that she had maintained a farm that she worked with a crop and livestock in the Choctaw Nation, Indian Territory, and that she stayed in her house on the farm when she was not in Denison, Texas. Mary made it abundantly clear in her testimony that despite the fact that she married a Texan and enrolled her children in school in Texas, she always considered her home to be in the Choctaw Nation, Indian Territory, and that her continuous cultivation of land in the Choctaw Nation was evidence that she had not abandoned her domicile and citizenship in the Choctaw Nation.[226] Mary successfully proved, through her testimony, that she was entitled to an allotment of land as a Choctaw freedwoman. Consequently, on June 28, 1905, the Dawes Commission rendered its decision granting the application for the enrollment of herself and her children on the Choctaw Freedman Roll.[227]

The Freedmen Roll was a segregated citizenship roll created by the Commission to delineate which tribal citizens were the black descendants of enslaved persons held in the Choctaw Nation under Choctaw slave codes.[228] In other words, black Choctaw citizens were placed on the segregated "Freedmen Citizenship Roll" as opposed to the "Blood Roll,"[229] which purported to list

[225] Mary married a black man named Matthew White, which meant that her husband and children were visibly "Negro." Her black children were not allowed to attend the school for Indian children in the Choctaw Nation. *See* Grinde & Taylor, *supra* note 208, at 216. The Choctaw Nation "denied schooling to its freedmen until 1887." *Id.* The Choctaw established one boarding school for children of the Freedmen called Tuskalusa Colored Academy, which was not close to where great-grandma Mary lived. *See id.* Hence, her only option to educate her children was to enroll them in public school in her husband's hometown of Denison, Texas, where there was a day school for "colored" children. Interestingly, the Cherokee Nation offered the most educational opportunities for freedmen children with a total of eight freedmen schools by 1890, including a high school. *See* Linda Reese, *The Encyclopedia of Oklahoma History and Culture: Freedmen*, OKLA. HIST. SOC'Y (July 29, 2024), https://www.okhistory.org/publications/enc/entry.php?entry=FR016 [https://perma.cc/LQ9C-FLHT] (describing that while the Chickasaw "refused to support any education for Freedmen," the Cherokee "offered the best educational opportunities").

[226] *Dawes Enrollment Jacket for Choctaw, Choctaw Freedmen, Card #151*, *supra* note 222 (describing the names, births, residences and education of Mary's children).

[227] Their enrollment is recorded on Choctaw Freedmen Enrollment Card #151, which lists the names Mary White, Annie Mitchell, Frank White (Annie Mitchell's spouse), Jim White, Napoleon White (my paternal grandfather), Naomi White and Wayman Adolphus White. *Id.* Mary's adult children were required to give their own testimony before the Commission to establish their eligibility for an allotment. *See id.*

[228] CARTER, *supra* note 34, at 69 ("The Curtis Act required that the Dawes Commission make separate rolls of Choctaw citizens, Chickasaw citizens, Choctaw freedmen, and the Mississippi Choctaws.").

[229] The philosophy of "blood" created a hierarchy of human beings with whites being at the top of the hierarchy and being assigned all the positive attributes of human existence, and blacks being at the bottom of the hierarchy and being assigned all of the negative attributes of humans. For an example of such philosophy, see Michael James & Adam Burgos, *Race*,

tribal citizens who were racially Choctaw Indian "by blood."[230] The Freedmen Rolls are a clear badge of slavery that the federal government used to document who had been an enslaved person of each tribe.[231] The federal government created this former slave roll for the express purpose of maintaining the relative property of racial hierarchy. By treating freedmen and their descendants less favorably than individuals who were deemed racially Indian and had never been enslaved, the tribes and the federal government maintained the relative value of Indianness as superior to blackness.[232]

C. *Indianness as Post-Allotment Property for Freedmen*

Citizenship in the Choctaw Nation entitled great-grandmother Mary to receive an allotment of land from the Choctaw reservation pursuant to the Treaty

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STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/entries/race/ [https://perma.cc/55UK-2GM3] (last updated Feb. 2, 2025). James and Burgos state:

> The concept of race has historically signified the division of humanity into a small number of groups based upon five criteria: (1) Races reflect some type of biological foundation, be it Aristotelian essences or modern genes; (2) This biological foundation generates discrete racial groupings, such that all and only all members of one race share a set of biological characteristics that are not shared by members of other races; (3) This biological foundation is inherited [through the blood] from generation to generation, allowing observers to identify an individual's race through her ancestry or genealogy; (4) Genealogical investigation should identify each race's geographic origin, typically in Africa, Europe, Asia, or North and South America; and (5) This inherited racial biological foundation manifests itself primarily in physical phenotypes, such as skin color, eye shape, hair texture, and bone structure, and perhaps also behavioral phenotypes, such as intelligence or delinquency.

[230] I say "purported" here because there was fraud in the Commission. CARTER, *supra* note 34, at 74 ("The roll became a source of controversy, and the commissioners later asked the secretary of interior to disregard it because it was inaccurate and incomplete."). Some whites saw "passing" as Indian as a way to get their hands on real property at no cost, so they bribed Dawes Commission officials to have their name added to the blood roll so that they could be allotted a plot of land. *Id.* (describing how several lawyers were recruiting applicants in hopes of getting portions of land they may be allotted and how "[m]any of the people listed had absolutely no proof that they or an ancestor had complied with article 14 of the treaty of Dancing Rabbit Creek").

[231] *See* Nicholas Serafin, *Redefining the Badges of Slavery*, 56 U. RICH. L. REV. 1291, 1330-31 (2022) ("Section 2 is not limited to preventing the reimposition chattel slavery or its de facto equivalent. Section 2 grants Congress the authority to target stigmatizing laws and social customs, for these practices impose a badge of slavery."). In the Civil Rights Cases, the U.S. Supreme Court held that Section 2 of the Thirteenth Amendment grants Congress the power to enact laws to eliminate the "badges of slavery." *See id.*

[232] For a paper arguing that the Thirteenth Amendment does apply to tribes, see 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, 124-54 (2006).

of 1866. Great-grandmother Mary and her living children would each receive a forty-acre allotment of land from the Choctaw reservation. However, by the time that she was allowed to select land, the premium farmland near the Texas border was gone, so she selected land just across the Red River in an area that was called "the bottom" because it was known to flood.[233] Her son, my paternal grandfather, Napoleon White, also received an allotment of land in the bottom where he planted fruit trees that could withstand flooding and ran an orchard business.

Great-grandmother Mary's struggle to have her citizenship rights in the Choctaw Nation recognized by the Indigenous sovereign that held her in bondage, illustrates how Indianness was a form of legal citizenship that created an interest in real property for tribal citizens who registered with the federal government's Dawes Commission,[234] in a process called enrollment. Black people who were formerly enslaved by tribes, were Choctaw, Creek, Chickasaw, Cherokee or Seminole citizens pursuant to the respective treaties of 1866. That tribal citizenship was a form of political Indianness that carried with it a right to tangible real property. Consequently, political Indianness was a form of entitlement property that individuals sought to claim in order to access real property.

Mary's Indianness as a Choctaw citizen gave her a form of entitlement property. She was a formerly enslaved person who was entitled to an allotment of land, unlike the majority of formerly enslaved people in the Southern states, who received no form of compensation from their state. Moreover, because tribal citizenship was associated with being Indian, citizenship in the tribes conveyed a status property on people who had been enslaved by tribes, thereby elevating them over the black people who had been enslaved in the states. Some tribal freedmen looked down upon the black people freed from slavery in the states and called them "watchina,"[235] meaning white man's Negro, or "state Negroes"[236] to distinguish and subordinate them to tribal freedmen. The tribal freedmen "saw 'state Negroes' as more accommodating and submissive to the

[233] This information was shared with me via oral history from my father Carl Wenzil White. This author could locate no record documenting the land assigned to Mary through the allotment process. Family oral history states that the land assigned to Mary would ultimately be taken by the U.S. government via eminent domain and flooded to create Lake Texoma.

[234] The Dawes Commission took its name from its chairman, Henry L. Dawes, a lawyer and former Republican Senator from Massachusetts who spoke out against slavery and was considered by some as "the Indian's truest friend." CARTER, *supra* note 34, at 3. As others have written, the Dawes Rolls were a colonial mechanism aimed at breaking up tribal ownership of land so that tribal lands would become alienable to whites. *Id.* at 16 ("[I]t became obvious that the Dawes Commission intended to exercise its power to determine citizenship . . . .").

[235] Grinde & Taylor, *supra* note 208, at 218.

[236] Reese, *supra* note 225.

racial hierarchy."[237] Freedmen were also suspicious of "state Negroes" because white land and oil speculators would hire black men to marry tribal freedwomen to gain access to the freedwoman's land allotment.[238] Through their tribal citizenship, tribal freedmen had status property of Indianness and entitlement property via a deed to real property. Land allotments provided tribal freedmen with means of self-support. The ability to work for themselves and farm their land, rather than work for the white man, gave them dignity.[239] With their citizenship status as Indian tribal people, coupled with their status as landowners, the black freedmen perceived themselves as having a higher social, political, and economic status than "state Negroes."[240]

D. *Indianness as Property: The Right to Exclude Blacks*

At the core of American common law property rights is the right to exclude others.[241] Despite entering the treaties of 1866, each of the tribes, to varying degrees, resisted the integration of their formerly enslaved people into the tribe as citizens. Moreover, even those freed blacks who were recognized as citizens were relegated to second-class status, without all the rights of full tribal citizenship.[242] Following the execution of the Treaty of 1866, a debate arose about how to decide which freed slaves were entitled to citizenship in the Cherokee Nation and which were not. Since many people fled Indian Territory during the Civil War, the treaty required that the Cherokee Nation adopt as citizens all freed slaves who returned to the Cherokee Nation within six months of the execution of the treaty.[243] Consequently, some leaders in the Cherokee Nation sought to use this clause of the treaty to limit the number of freed blacks that they would have as citizens of their tribe.[244] These leaders also argued that black people were morally unfit for citizenship,[245] perhaps suggesting that they were more subject to being bribed to vote for a certain candidate than their Indian cohorts. However, some politicians in the Cherokee Nation, who thought they

[237] Grinde & Taylor, *supra* note 208, at 218.

[238] *Id.* at 221.

[239] *See id.* at 215 (noting success of Creek Nation freedmen who received land in fertile river bottoms of Oklahoma).

[240] *See* Kristy Feldhousen-Giles, To Prove Who You Are: Freedmen Identities in Oklahoma 28 (2008) (Ph.D. dissertation, University of Oklahoma) (SHAREOK).

[241] *See* Joseph William Singer, *The Right to Have Property*, 10 TEX. A&M L. REV. 713, 723 (2023).

[242] *See, e.g.*, Pratt, *supra* note 12, at 92.

[243] Treaty with the Cherokee Indians, art. IX, *supra* note 166, at 801.

[244] *See* Grinde & Taylor, *supra* note 208, at 212 (explaining that the Cherokee legislature called on federal authorities to eject formerly enslaved Cherokee who returned after six-month period).

[245] *See, e.g.*, Chin, *supra* note 9, at 1237.

could strengthen their political power by leveraging the black vote, were in favor of granting citizenship to people who had been enslaved by the tribe.[246]

After the execution of the 1866 Treaty, many formerly enslaved persons and their descendants sought citizenship in their respective Indian nations, but they were routinely denied.[247] Sometimes, the tribal government simply refused to accept a black person's application for citizenship. Other times, the tribal government constructed a rationale for why the black person was not entitled to tribal citizenship and denied the application.

The desire to exclude the freedmen from tribal citizenship and restrict the extension of tribal citizenship to as few blacks as possible is evident in the Cherokee tribe's newspaper, the *Cherokee Advocate*, which was not only a vehicle for news, but also akin to a legal reporter and debate forum for matters confronting the tribe.

One instance of debate is captured in an article reporting the findings of a federal worker named "Inspector Watkins." Inspector Watkins had investigated claims by Cherokee freedmen that they were wrongly denied citizenship in the Cherokee Nation. Watkins concluded in his report that the Cherokee Council and courts were in fact denying citizenship to black freedmen who were entitled to such citizenship under the treaty of 1866.[248] A portion of Watkins' report is quoted in the Cherokee newspaper:

> I found a very large proportion of cases referred to me clearly entitled to the rights of citizenship under the treaty of 1866. In most of these cases, application had been made to the courts and Council, but no action had been taken by the courts or Council, so far as I could learn, beyond a bill declaring a large number of persons *intruders*—among whom are found numbers of this class and ordering them out of the Cherokee country. "By article 9th of the Cherokee treaty of 1866 the rights of the freedmen are defined as follows: 'They further agree that all freedmen who have been liberated by voluntary act of their former owners, or by law, as well as all free colored persons, who were in the country at the commencement of the rebellion, and who are now resident therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees.'" "Yet there are numbers of freedmen who are entitled to citizenship, and a share in the Cherokee funds under this provision, whose rights have been ignored by the Cherokee authorities and have been placed upon the intruders list." "There are also another class of freedmen who went north into Kansas, and other States during the rebellion; some of them becoming soldiers in the Union army, who did not return to the Cherokee country, within the time limited by the treaty of 1866—for the reteson [sic] as they allege that they did not know of the provision referred to, but who

[246] *See* Grinde & Taylor, *supra* note 208, at 212, 215.

[247] Inniss, *supra* note 125, at 114.

[248] *See Citizenship. Something In Reference to the Question Not Generally Known*, CHEROKEE ADVOC., June 30, 1882, at 2.

> returned as soon as they became aware of their rights, who are *equitably* entitled to the rights of citizenship." "Some legislation is necessary to secure to this class such . . . as they are equitably [indiscernible]. I think they should be [indiscernible] citizenship upon presenting satisfactory proof of former residence, and that they returned [to the Cherokee Nation geographical boundaries] as soon as practicable after the provisions of the treaty of 1866 became known to them—within a limited time—say five years from the promulgation of the treaty."[249]

A non-black Cherokee citizen submitted a response to Inspector Watkins' findings to the *Cherokee Advocate*, expressing his dissatisfaction with the federal government's findings and recommendations. He also expressed his fear that the federal government would force the black freedmen into the Cherokee Nation. The article's author writes:

> [Inspector Watkins'] recommendations, in reference to the colored "too-laters" that they should be awarded citizenship in the Cherokee Nation, is perhaps, the beginning of the intention of the [federal] Government that they shall be. The matter he reports are undoubtedly of *ex-parte* representations, and, perhaps, in conformity with the complaints made by [the freedmen] in the same way to the Indian Office. Our laws, in their negative and affirmative provisions, defining the duties of adopted citizens by marriage, and the conditions of forfeiture of citizenship, seem not to have had any influence upon his investigation of this class of claimants. Be his report as erroneous as it may the same effect has been produced as if facts alone had been represented, and as a consequence, the screws have been put to us and will be tightened until we yell "enough."[250]

Inspector Watkins' report spawned a response from the federal government, which demanded that the Cherokees form a joint commission comprised of both federal agents and Cherokee citizens to determine the citizenship status of the freedmen.[251] In December of 1886, the Cherokee Council enacted a law creating the Joint Commission on Citizenship and charged the Commission with determining the citizenship of the freedmen pursuant to the 1866 Treaty.[252] The Commission was given de novo jurisdiction, meaning that it could determine the status of any freedman who applied, even if that person had previously been denied Cherokee citizenship by a Cherokee court or administrative process.[253] The Cherokee law further provided that freedmen who were successful in proving their entitlement to citizenship before the Commission would be awarded a decree recognizing the establishment of their claim to citizenship in

[249] *Id.*

[250] *Id.*

[251] *An Act to Create a Joint Commission to Determine Claims to Citizenship of Freedmen Under the 9th Article of the Treaty of 1866*, CHEROKEE ADVOC., Jan. 19, 1887, at 1.

[252] *Id.*

[253] *Id.*

the Cherokee Nation.[254] Freedmen who were unsuccessful in proving their claim to citizenship were deemed "intruders" under the law and were subject to removal from the Cherokee Nation.[255]

A decree of citizenship, however, did not make a black freedman racially Indian or equal to a racially Indian citizen. Racial Indianness was a form of status property that elevated its holder over persons who were politically Indian, but racially black. Black freedmen who successfully proved their entitlement to citizenship confronted fierce racism from those who were racially Indian. The *Cherokee Advocate* published an article by a black citizen, but the editor included a disclaimer, stating that the editorial was "contributed by one of our colored citizens. In some statements our readers will think he exaggerates. How did he become a citizen at all, with 'all the rights of native Cherokees?'"[256]

The black Cherokee contributor of the opinion editorial references the vehement anti-black racism faced by black people in the Cherokee Nation:

> The Negro now more than any body else is made a subject for all kinds of criticism and misanthropic forebodings. By some he is turned over on all sides and looked at through a "glass darkey."[257] He is considered to be hardly a human being. Every virtnons [sic] element in him is blurred . . . the most heartless efforts are made to have him fixed in public opinion as a bad dog. . . . Let any one prove himself a firm friend of the negro and he will fine [sic] himself spurned, scorned ostracized. Sometimes I perceive that this prejudice settles down into murderous hatred. . . . Who are the [Cherokee] Nation's true friends? They are the negroes who were made citizens by the treaty of 1866. Who are the best law abiding citizens of this Nation? They are the colored ones.[258]

Even after the creation of the joint commission to determine freedmen claims to Cherokee citizenship, the Cherokees desired to restrict citizenship to as few black freedmen as possible. Anti-black sentiment is evident from an article

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[254] *Id.*

[255] *Id.*

[256] L.T. Ross, *The Negro*, CHEROKEE ADVOC., Mar. 12, 1886, at 1.

[257] I suspect that the black Cherokee author used the word "darkly" to invoke the often-used Biblical phrase to "see through a glass, darkly," meaning to have an obscure or imperfect vision of reality. 1 *Corinthians* 13:12. I also suspect that the editor of the Cherokee newspaper changed the word "darkly" to "darkey," which was a pejorative word that whites and non-black Indians used to refer to black people in Indian Territory and later Oklahoma. In fact, the term "darkey" was so commonly and publicly used to refer to black people that my father recalled being called a "darkey" to his face by white men when he was a child. My dad had no formal education beyond the fifth grade, but he was determined to reclaim the word "darkey" so that no white person could use it to inflict emotional harm or spirit injury on me. Hence, daddy reclaimed the term and called me his "lil darkey." To this day, I have emotions of warmth and fond memories of his unconditional love, when I read or hear the word "darkey." Thanks daddy.

[258] Ross, *supra* note 256, at 1.

appearing the *Cherokee Advocate* from 1890. That article argues erroneously that there are only about a dozen or so blacks who qualify for citizenship in the Cherokee Nation under the treaty of 1866 and that all other black people once held in bondage pursuant to Cherokee law are properly excluded from tribal citizenship.[259] The author of the article also resorts to arguing that black citizenship in the tribe has a corrupting effect on the governance of the tribe, asserting that black citizens sell their votes.[260] The article states:

> What negroes have any rights in the Cherokee Nation? The treaty [of 1866] divides them [into three] classes. 1st. Those liberated by their owners, 2nd., those liberated by law—the Cherokee Nation having by law in February 1863 abolished slavery—this is the law referred to—and 3rd. Free colored persons, Does anyone know which one, and how many were "liberated by law"? In 1863, the negroes now claiming rights, had fled to Kansas, a free state or had been carried South out of the Cherokee Nation by their owners; neither class was subject to the operation or jurisdiction of the laws of the Cherokee Nation, unless you give the law extra territorial effect . . . The negroes liberated by law, would not number a Baker's Dozen, if the treaty was strictly enforced.
>
> The Cherokees have uniformly for the last twenty-four years held that the six months limitation applied to all three classes of negroes, the government of the United States acquiesce in this construction for twenty years, now the Department of the Interior applies this limitation only to the "free negro." The National Council in accordance with power granted by the constitution placed a construction upon the 9th article, and we have the fight to make, or surrender. I am in favor of not only making the fight but I am in favor of eliminating the negro from our politics. If his friends tell the truth about him, and both parties agree in this, you must first buy him to convince his judgment, and you must buy him to keep his vote. He has become, through this corrupting influence a foul and disgraceful blot upon our politics and grows fouler and filthier every re-occurring election. The black hosses [sic] dispose of their votes at such much a head. I know there are worthy individual exceptions to this classification, but the exceptions are growing each election fewer. Is there any reason why the thousand intelligent Cherokees, whitemen, delawares and shawnees of Cooweescoowee District should allow the rotten bosses of Gooseneck to control that district? The greed for office through the negro vote has disgraced our politics too long, and will ruin the country if we do not call a halt. . . . I am done with . . . the party that is willing to rob the Indian, to enrich the negro, for his vote.[261]

[259] J.A. Scales, *Letter to Hon. Jesse Cochran*, CHEROKEE ADVOC., Mar. 12, 1890, at 2.

[260] *Id.* at 2. This author has found no evidence documenting that freedman accepted money in exchange for voting for a particular candidate.

[261] *Id.*

III. INDIANNESS AS STATUS PROPERTY IN THE SEGREGATION AND CIVIL RIGHTS ERAS

A. *The Jim Crow Segregation Era*

State segregation laws conferred status property upon Indian people by subordinating blacks not only to whites, but also to Indians. In Oklahoma, the original state constitution adopted a binary framework of race that afforded whiteness to racially Indian people and imposed the rule of hypodescent on people of African ancestry, so that no person with any African ancestry could be racially Indian as a matter of law. The constitution provided: "Wherever in this constitution and laws of this State, the word or words, 'colored' or 'colored race,' 'negro' or 'negro race,' are used, the same shall be construed to mean or apply to all persons of African descent. The term 'white race' shall include all other persons."[262] The first law adopted by the Oklahoma state legislature was a law imposing racial segregation.[263] Due to the Oklahoma constitutional provision that defined Indians as "white," Indians were afforded the status property of whites, thereby saving them from the plethora of indignities imposed upon black citizens by Jim Crow laws.[264]

Oklahoma's interest in affording the status of whiteness to Indians was not rooted merely in mutual respect. It was motivated by the fact that tribal citizens held valuable land and resources, such as oil. By affording Indians the status of whiteness, Oklahoma was continuing the historical practice of sanctioning whites to marry Indians and produce descendants who could be legally recognized as white. This would mean that land and other property once controlled by tribes could be more easily acquired and controlled by the politically and socially dominant white population in the state. Oklahoma leaders likely also hoped that by recognizing Indians as white, state laws would effectively diminish the recognition of distinct tribal communities, which would lead to the termination of tribal sovereignty and the rights associated with it.[265]

The five slaveholding tribes found themselves caught in the middle of the black/white binary[266] that accorded all constitutional rights to whites and none

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[262] OKLA. CONST. art. XXIII, § 11 (repealed 1978).

[263] *See* Larry O'Dell, *The Encyclopedia of Oklahoma History and Culture*: *Senate Bill One.*, OKLA. HIST. SOC'Y (July 2, 2018), https://www.okhistory.org/publications/enc/entry?entry=SE017 [https://perma.cc/RZ9H-AGTE] ("Approved on December 18, 1907, Senate Bill One, also known as the coach law and to most as the state's first Jim Crow law, easily sailed through Oklahoma's first legislature.").

[264] *See id.*

[265] Oklahoma leaders continue to try to diminish tribal sovereignty to this day. *See, e.g.*, Adolfo Flores, *Oklahoma Governor Sows Dispute with Tribes and Fellow Republicans*, WALL ST. J., Aug. 7, 2023, at A3 (reporting on Governor Kevin Stitt's efforts to minimize tribal jurisdiction despite recent U.S. Supreme Court rulings).

[266] For an understanding of the black/white binary, see Juan F. Perea, *The Black/White*

to blacks. The tribes recognized that Indianness was a form of property that they would need to protect from the degradation that would result from social proximity to blackness. Consequently, the tribes adopted anti-miscegenation laws that precluded Indian marriage to blacks but permitted Indian interracial marriage to whites.[267] The tribes were likely aware that whiteness carried a certain bundle of rights and privileges that could benefit the Indian tribal member in an interracial marriage and that those rights could ultimately benefit the entire tribe as it progressed toward whiteness. Moreover, the Five Tribes likely understood that they needed to protect the tribes from blackness to maintain tribal sovereignty. Federal Indian agents who visited tribes that had intermarried with black people considered the offspring of black and Indian marriages to be "Negroes," not Indians.[268] Even the Supreme Court of Oklahoma adopted the rule of hypodescent by declaring that "[o]ne drop of slave blood taints the stream, and makes it African in its descent."[269] The tribes surely understood the rule of hypodescent meant that allowing Indian marriage to black people would erase their status as Indian people and potentially subject their people to the racialized horrors committed against black people.[270]

But permitting Indian interracial marriage to whites created a property interest in Indian women's bodies. White men, some of whom were fugitives from states, entered Indian Territory to marry Indian women.[271] Because society

Binary Paradigm of Race: The "Normal Science" of American Racial Thought, 85 CALIF. L. REV. 1213, 1219-39 (1997). *See also* Bruce G. Johnson, *Indigenous Doom: Colonial Mimicry in Faulkner's Indian Tales*, 18 FAULKNER J. 101, 125 (2002).

[267] Pratt, *supra* note 8, at 430-40 (describing the tribal miscegenation laws of the Choctaw, Cherokee, Chickasaw, and Creek Nations).

[268] *See id.* at 453-55 (noting federal agent reviewed records to identify non-white surnames and directed county clerks to classify them as "Negro").

[269] Miller v. Allen, 229 P. 152, 154 (Okla. 1924) (citing Alberty v. U.S., 162 U.S. 499 (1896)) (stating that Congress "understood and treated freedmen as persons not of Indian blood"). In *Alberty*, the U.S. Supreme Court used the race-based concept of Indian identity to hold that a black man was not Indian despite the fact that he was a citizen of the Cherokee Nation pursuant to the Treaty of 1866, which afforded formerly enslaved people and their descendants citizenship in the Cherokee Nation. *Alberty*, 162 U.S. at 501. The Court further held that the deceased victim in the homicide case, who was the child of a Choctaw Indian man and a black woman, was not Indian. *Id.* The Court used the slavery-based rule of *partus sequitur ventrem* to hold that the victim of the homicide took the race of his mother, not his father, and therefore, the law should treat him as a "colored [black] citizen of the United States," not as an Indian for purposes of jurisdiction. *Id.*

[270] Pratt, *supra* note 8, at 446-47.

[271] Malone, *supra* note 61, at 3-4. The problem of white men marrying Indian women to access their property was not limited to the five slaveholding tribes, nor was it limited in time to the slavery era. David Grann chronicles the horror of white men marrying and later murdering Osage Indian women to access their land and the oil under it in his *New York Times* bestselling book, KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI (2017).

conveyed to men the power of choosing who to invite into the marriage contract, and men generally held the ownership of property for married women, the marriage of Indian women to white men meant that tribal resources would be siphoned off to white men.[272] To protect tribal women and the tribe, the tribes passed laws aimed at protecting the property interests of Indian women.[273] The tribes also took actions to protect the tribe from the taint of blackness.

At the time that Oklahoma Territory and Indian Territory were being considered for statehood in 1906, the Muscogee Creek Nation was struggling for its survival. Chitto Harjo, who had served in the Creek House of Kings, the equivalent of the Senate in the Creek bicameral legislature, emerged as a traditional leader within the Creek Nation.[274] "Allotment and white encroachment had impoverished traditional Creek."[275] Yet these traditional Creek Indians stood in alliance with black Creeks.[276] Today, that alliance with black Creeks has been abandoned by the executive and legislative leaders of the Creek Nation. Despite the tribal trial court's determination that the black Creek freedmen descendants are entitled to tribal citizenship, the executive leadership of the tribe seeks to overturn that decision and maintain the exclusion of black Creeks.[277]

IV. INDIANNESS AS PROPERTY IN THE MODERN ERA

Indianness in the modern era is grounded in the past. Despite great-grandmother Mary's success in litigating her claim to citizenship in the Choctaw Nation for purposes of land allotment, her descendants were not able to enroll as citizens or participate in the government. This is because the Choctaw Nation amended its tribal constitution to be in direct conflict with the Treaty of 1866 that afforded great-grandma Mary and her descendants' citizenship.

Article II of the Constitution of the Choctaw Nation of Oklahoma provides that "[t]he Choctaw Nation of Oklahoma shall consist of all Choctaw Indians *by blood* whose names appear on the final rolls of the Choctaw Nation approved pursuant to Section 2 of the Act of April 26, 1906 (34 Stat. 136) and their lineal

[272] *See* Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 937 (1971) ("Upon marriage, [a woman] lost virtually all legal status as an individual human being and was regarded by the law almost entirely in terms of her relationship with her husband.").

[273] *See* Yarbrough, *supra* note 123, at 386-89.

[274] Sidney L. Harring, *Crazy Snake and the Creek Struggle for Sovereignty: The Native American Legal Culture and American Law*, 34 AM. J. LEGAL HIST. 365, 377 (1990).

[275] *Id.*

[276] *Id.*

[277] Chris Cameron, *Judge Rules Freedmen Are Eligible to Join Tribe*, N.Y. TIMES, Sept. 30, 2023, at A14 (reporting on district court ruling in favor of citizenship claim of freedmen descendants and attorney general's plan to appeal).

descendants."[278] By continuing to limit Choctaw citizenship to only those placed on the Dawes "Blood Roll," the Choctaw Nation clings to the racist ideology of the Dawes Commission. The Commission's philosophy of race was influenced by the preexisting socio-philosophical narratives surrounding race. Those narratives were rooted in the theory of classical racialism. Classical racialism was "an essentialist theory of race that . . . [conceived of] 'races' as distinct types [of people] . . . manifesting specific, genetically-linked character traits."[279] "Classical racialism naturalized social differences: non-whites were inferior to whites as a result of their genes. 'It's in the blood,' the argument ran."[280] Consequently, to maintain the purity of "Indian blood," the Commission followed the rule of hypodescent in creating the citizenship rolls for the Choctaw

[278] CHOCTAW CONST. art. II, § 1 (emphasis added).

[279] Ronald S. Sullivan Jr., *Classical Racialism, Justice Story, and Margaret Morgan's Journey from Freedom to Slavery: The Story of* Prigg v. Pennsylvania, *in* RACE LAW STORIES 59, 61 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (citing PAUL C. TAYLOR, RACE: A PHILOSOPHICAL INTRODUCTION 43-47 (2004)).

[280] *Id.* at 61. Francis Galton was a pioneer in eugenics, and his work laid the foundation for later theories that linked heredity and race with intelligence and social class. His book entitled HEREDITARY GENIUS was published in 1869 and had a lasting impact on the ideology surrounding race well into the twentieth century. *See generally* FRANCIS GALTON, HEREDITARY GENIUS (1869). In 1916, author Madison Grant published *The Passing of the Great Race*, which was influential in the American eugenics movement. *See generally* MADISON GRANT, THE PASSING OF THE GREAT RACE OR THE RACIAL BASIS OF EUROPEAN HISTORY (1916). Grant argued that the "Nordic race" was superior to other races but was being diluted by the influx of inferior races. His work informed federal government policy and law. With an awareness of this race science, the former slaveholding tribes strongly opposed the freedmen and their descendants having citizenship in the tribes. CARTER, *supra* note 34, at 71 (discussing societal practices implemented to disenfranchise the freedmen and persons with African ancestry). In an effort to protect racially Indian tribal citizens from the "taint" associated with the black freedmen, the Choctaw Nation adopted a law in 1883 providing that "intermarriage with 'freedmen of African descent' [would] not confer rights of citizenship, and the Chickasaws had similar laws to discourage intermarriage." *Id.* Consequently, if the Dawes Commission "followed 'tribal laws, customs, and usages' as required in the Curtis Act, then it would have to consider any children of a mixed marriage freedmen rather than citizens by blood." *Id.* This application of the rule of hypodescent to the enrollment process is exactly what the Dawes Commission did. With the preexisting race science of the time, the tribes and the Commission felt the need to protect tribes from having their Indian citizenry "diluted" or "degraded" by people of African ancestry who were perceived by the dominant white society as racially inferior to people who were racially Indian. *See* Sullivan, *supra* note 279, at 59-61. It is important to note that racially white ancestry was believed to elevate Indian people in intelligence, civility, morality, and appearance. The idea of elevating one racial group through genetic mixing with another racial group has long been discredited by science. *See generally* STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981); KENDI, *supra* note 42.

Nation.[281] Through the work of the Commission, the tribes fell "prey to the prevalent racial ideologies of nineteenth-century Euroamericans, who held that race was an inherent biological factor."[282] By using the Dawes "Blood Roll" to determine citizenship, the Choctaw Nation is adopting the essentialist understanding of race from the early twentieth century to determine who is eligible for citizenship in the Choctaw Nation of Oklahoma. Essentialism is the idea that everyone in a particular racial group has a single experience:

> that can be described independently from other aspects of the person—that there is an "essence" to that experience. An essentialist outlook assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space and different historical, social, political, and personal contexts.[283]

By adopting this racially essentialist means for determining eligibility for tribal citizenship, the Choctaw Nation is adopting the long-disproven belief that the socially constructed categories of race are instead biological, and that biological ancestry is therefore the determinant of Indian identity.[284]

When I visited a Choctaw Nation office in Durant, Oklahoma, in the early 2000s to request a paper citizenship application, a blonde-haired woman with blue eyes and white skin[285] refused to give me the paper application. Instead, she

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[281] *See* cases cited *supra* note 269 and accompanying text. This list of citizens of the Choctaw Nation was created by the federal government in order to allot tribal reservation land to each individual citizen so that it would become alienable and so that "surplus" land remaining after all Choctaw citizens were allotted land could be made available to white settlers with no relationship to the tribe. *Cf. Hearing*, *supra* note 218, 34-35.

[282] CIRCE STURM, BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA 70 (2002).

[283] *See* Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995).

[284] Adopting a racially essentialist view of identity has been found to cause people to perceive racial outgroup members as less worthy of empathy and assistance. It also correlates with greater discrimination and prejudice against subordinated racial outgroups. Jennifer Tsai, *How Should Educators and Publishers Eliminate Racial Essentialism?*, 24 AMA J. ETHICS 201, 202 (2022).

[285] I do not know if this woman was a Choctaw citizen, but it would not surprise me to learn that she is because citizens of the Five Tribes experienced extensive intermarriage with whites. Indian identity has long been contested in the U.S. *See, e.g.*, M. Alexander Pearl, *How to Be an Authentic Indian*, 5 CALIF. L. REV. 392, 393 (2014); M. Alexander Pearl, *Paint Chip Indians*, 9 UNBOUND: HARV. J. LEGAL LEFT 62, 69 (2015) (providing a satirical critique of common mainstream media representations of Indian image); S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89, 92-94 (2006). To me, Indianness is a state of being, not merely skin, eye, and hair color. A person with white skin, blonde hair and blue eyes can be as Indian as a person with reddish skin, black hair and brown eyes. *See* M. Alexander Pearl, *Redskins: The Property Right to Racism*, 38 CARDOZO L. REV. 231, 267 (2016) (expressing concern with the media's use of racial stereotypes when

promptly told me that my father's ancestors were on the freedmen roll, which to her meant that they were not Choctaw citizens. She told me in no uncertain terms that my ancestors on the freedmen roll were "just slaves."[286] Contrary to her assertion, the federal government once recognized the freedmen as citizens of the Choctaw Nation pursuant to the Treaty of 1866.[287]

portraying Indian identity). Pearl argues that media images that invoke racist stereotypes of Indianness impose harm to his blonde haired, white skinned Chickasaw children. As Professor Pearl points out, "[t]here is no property right to a non-stereotyped existence as an Indian in America." *Id.* Likewise, a person with black skin and an Afro can be Indian. I share the phenotype of the woman who greeted me at the Choctaw enrollment office because the irony of a woman whose race is socially constructed as white having the power to serve as the guardian of the tribal gate was not lost on me. In the 1600s and 1700s, many First Nations of Canada and the northeastern United States shared my view that being Indian is a state of being. These tribes adopted racially white Europeans into their tribes and considered them as native citizens of the tribe. *See* James Axtell, *The White Indians of Colonial America*, 32 WM. & MARY Q. 55, 80 (1975) (showcasing racially white Europeans admitted into highest Indian councils).

Nonetheless, it is also important to acknowledge that some Indian people whose body phenotype aligns with the stereotypical view of Indianness suffer racial discrimination due to their appearance as the stereotypical Indian. It is also important to acknowledge that some Indians whose physical appearance reveals their Indian ancestry to the public upon mere observation view some white people as having infiltrated their tribe, appropriated Indian identity, and converted it to their own use in order to extract property rights associated with Indianness. For example, a young Cherokee Indian man's post on Reddit struck me as reflecting this concern. He posted a selfie with his black hair, brown eyes, and his reddish-brown skin. In the photo, he stands at the back of a long line of what appears to be racially white people waiting to be served by the Cherokee Nation Tag Agency. His note on Reddit states: "All the white folks at the Cherokee Nation Tag Agency . . . i know I know . . you got a little Indian in you . . . ." REDDIT, https://www.reddit.com/r/NativeAmerican/comments/fdf334/all_the_white_folks_at_the_cherokee_nation_tag/ [https://perma.cc/Y4YB-T5RN] (last visited Feb. 6, 2025). Some tribes have bifurcated citizenship in the tribe to guard against having the tribal government controlled by tribal citizens who are phenotypically racially white. *See, e.g.*, MUSCOGEE CREEK CONST. art. III, § 4 (limiting "[f]ull citizenship" in the Muscogee Creek Nation to "those persons and their lineal descendants whose blood quantum is one-quarter (1/4) or more Muscogee (Creek) Indian" and restricting the right to hold office to individuals with full citizenship, meaning those with at least one-quarter Creek Indian ancestry). This is done out of concern that those individuals are more socially and culturally disconnected from traditional tribal culture. *Id.*

[286] I have been told by many freedmen descendants that they too were refused a citizenship application from their tribe prior to the early 2000s when legal advocacy on behalf of the freedmen was resumed.

[287] *See* Paul Spruhan, "*Indians, in a Jurisdictional Sense": Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 AM. INDIAN L.J. 79, 84 (2012) (discussing Supreme Court case which found lower court erred by instructing the jury in a criminal trial that a Choctaw freedman man was not a Choctaw Indian, but rather a Negro) (citing Lucas v. United States, 163 U.S. 612, 614 (1896)).

As a constitutional law professor, I found it shocking that my family's former slave status was being used to justify their exclusion from the tribe. Because the U.S. Supreme Court has held that the Thirteenth Amendment prohibits discrimination based on former slave status,[288] it would seem only logical that Article II of the Treaty would also prohibit the former slaveholding tribes from using former slave status (the Freedmen Rolls) as a basis for denying an application for tribal citizenship.

In recent years, there has been significant litigation in tribal and federal courts over the issue of whether people whose race is socially constructed as African American can be members or "citizens" of the federally recognized Indian tribes that enslaved their ancestors.[289] In an effort to justify the continuing extant exclusion of freedmen descendants from the tribe, the Choctaw, Chickasaw, and Muscogee Creek Nations argue that only people who have documented proof of Indian ancestry or "blood" may be citizens of a federally recognized Indian tribe,[290] embracing the essentialist theory of race while ignoring the 1866 treaties.[291] The freedmen have advanced the argument that they are citizens of their respective Indian tribes because they were awarded citizenship in their respective tribe pursuant to the 1866 Treaties just as the Fourteenth Amendment awarded state citizenship to the freed slaves and their descendants. Presently, only the Cherokee Nation has extended the right of tribal citizenship to the freedmen and their lineal descendants with all of the rights and privileges of native "by blood" tribal citizens.[292] While the Seminole Nation has permitted freedmen descendants to enroll as citizens in two identified bands of the tribe, with restricted rights, the Choctaw, Chickasaw, and Creek Nations have declined requests to enroll the descendants of their former slaves as citizens of their tribal nations.[293] These tribes continue to refuse to honor the 1866 post-Civil War treaties with the federal government wherein the tribes agreed to integrate their freed slaves and their descendants into their respective sovereign political community as citizens with all rights of native tribal citizens.

The freedmen are viewed by the tribes and the dominant society as racially ineligible for tribal citizenship because their race is socially constructed as

[288] *See* Slaughter-House Cases, 83 U.S. 36, 38 (1872).

[289] *See, e.g.*, Grayson v. Citizenship Bd. Muscogee (Creek) Nation of Oklahoma, No. CV-2020-34 (D. Muscogee (Creek) Nation Sept. 27, 2023) (reversing Citizenship Board decisions denying lineal descendants of individuals listed on the Creek Freedmen Roll, membership in the Muscogee (Creek) Nation).

[290] *Hearing*, *supra* note 218, at 44-46, 128; Dwanna L. Robertson, *A Necessary Evil: Framing an American Indian Legal Identity*, 37 AM. INDIAN CULTURE & RSCH. J. 115, 120 (2013).

[291] *See* Sullivan, *supra* note 279, at 43-47.

[292] *Hearing*, *supra* note 218, at 35-39.

[293] *Hearing*, *supra* note 218, at 16-30.

African American[294] or black, and therefore not racially Indian. This racialized view of tribal identity ignores the fact that the freedmen have not only a historical connection to the tribe, but also a sovereign connection, since the tribes exercised tribal sovereignty over their slave ancestors. It also ignores that the freedmen and their descendants were considered citizens of the tribes for purposes of the allotment of tribal lands even though they were not considered racially Indian. It is important to acknowledge that some freedmen do have Indian ancestry but cannot prove it because their Indian ancestry was not legitimated through birth and marriage records but was injected into their family ancestry through interracial sex with black women during slavery. Any Indian ancestry or "blood" was ignored and ultimately erased by tribal and federal law's application of the rule of hypodescent[295] when creating the Freedmen and Blood Rolls of tribal citizens.

When tribal citizenship laws are viewed through the lens of *whiteness as property*, the contemporary effort to exclude from tribal citizenship the majority of individuals with African ancestry who seek citizenship, may be understood as tribal law's submission to the dominant white society's expectations. Throughout our history, white society has expected "real Indians" to be void of African ancestry.[296] "Through this entangled relationship between race and property, historical forms of domination have evolved to reproduce subordination in the present."[297] Whiteness in America has evolved "from color to race to status to property as a progression historically rooted in white supremacy."[298] Like whiteness, Indianness shares the attributes of property in several ways. Indianness and property both share the right to exclude.[299] Tribes, in exercising their sovereignty, have the power to exclude individuals from their tribe and decide who is entitled to enroll and enjoy the benefits of Indianness. Indianness like "[w]hiteness fits the broad historical concept of property described by classical theorists," who conceived property as including not only external objects but also "all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and

[294] Because of the "taint" of blackness discussed earlier, even freedmen descendants who have some Native American ancestry have had their race socially constructed as African American or black.

[295] The rule of hypodescent is also known as the "one drop rule." For an interesting contemporary exploration of the One Drop Rule in the United States, see generally YABA BLAY, ONE DROP: SHIFTING THE LENS ON RACE (2021).

[296] *See* Pratt, *supra* note 8, at 411. I have written in the past that the dominant white society's expectation of tribes is that they would emulate American whiteness, in not only language, religion, attire, education, and law, but also in the dominate white society's aversion to blackness. *Id.*

[297] Harris, *supra* note 1, at 1714.

[298] *Id.*

[299] *Id.*

equal opportunities to use personal faculties."[300] Historically, the benefits of Indianness included the right to be free of slavery and bondage, the right to own and control real and tangible property, the right to marry whites, and other individual rights, such as freedom of speech and the right to bear arms.[301] Indianness in the modern era invokes rights and property interests, such as the right to hunt and fish on traditional hunting grounds, the right to federally funded healthcare, the right to use Indian education programs, access to tribal housing programs and other tribal social service programs, and the right to convey Indianness to the next generation.[302]

It is morally right for a nation that has oppressed its Indigenous peoples to want to create some forms of reparation for those people. Moreover, it is the sovereign duty of tribal governments to provide for the general welfare of their citizens. But in creating programs to help Indigenous people, the federal government and tribes have inadvertently transformed Indian identity into a form of entitlement property that individuals seek to claim to improve their financial well-being. This view of Indianness as a form of property to be claimed dates back to the slavery era and is at the heart of many disputes about who can claim Indian identity.

A. *Implications for Contemporary Disputes Surrounding Tribal Citizenship*

In the extant era of racial justice, Indianness, like whiteness as property, "has taken on more subtle forms, but retains its core characteristic—the legal legitimation of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of white privilege and domination."[303] Indianness, in the context of the former slaveholding tribes, continues to serve as a form of property that conveys benefits to the holder. Indianness, in some respects, entitles one to citizenship in a federally recognized Indian tribe, and tribal citizenship affords benefits that vary from tribe to tribe. Indianness still has the potential to operate separately from whiteness in that it is a form of property that is still subordinate to whiteness on the group level.[304] Indianness also continues to suffer a subordinated status on the individual level, particularly for those Indigenous individuals whose phenotypes are clearly non-

[300] *Id.* at 1725-26.

[301] *See supra* Part I.

[302] *See Programs and Services*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFS., https://www.bia.gov/programs-services [https://perma.cc/MJW2-2V7N] (last visited Feb. 6, 2025).

[303] Harris, *supra* note 1, at 1715.

[304] *See generally* Mary G. Findling et al., *Discrimination in the United States: Experiences of Native Americans*, 54 HEALTH SERVS. RSCH. 1431, 1431 (2019) (reporting results of survey finding that "Native Americans had higher odds than whites of reporting discrimination across several domains, including health care and interactions with the police/courts").

white, thereby preventing those individuals from navigating daily life as white people.[305]

Whites are historically and presently the likeliest racial group to be married.[306] According to the research of industrial psychologists, being white makes one more likely to be interviewed for a job and to be promoted in employment.[307] Being white makes an individual more likely to have been born into wealth and more likely to accumulate wealth during their lifetime.[308] White women and their babies enjoy better outcomes concerning childbirth,[309] and whites enjoy better outcomes regarding common diseases such as breast and prostate cancer.[310] Whites enjoy a right to be free from government imposed bodily injury to a greater degree than blacks do.[311] Consequently, whiteness continues to have value in our society.

To illustrate the point, imagine that you are a white person, and you participate in a genetic experiment to find the genes that create the phenotypes that coincide with the social construct of race, such as the hair texture genes and the skin color genes. You partner with the National Institutes of Health ("NIH")[312] and

[305] *See* Hilary N. Weaver, *What Color Is Red? Exploring the Implications of Phenotype for Native Americans*, *in* THE MELANIN MILLENIUM: SKIN COLOR AS 21ST CENTURY INTERNATIONAL DISCOURSE 287, 291-95 (Ronald E. Hall ed., 2013).

[306] RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 7-8 (2011).

[307] Lincoln Quillian & John J. Lee, *Trends in Racial and Ethnic Discrimination in Hiring in Six Western Countries*, 120 PROC. NAT'L ACAD. SCIS., Jan. 31, 2023, at 1; Derek R. Avery, *Why the Playing Field Remains Uneven: Impediments to Promotions in Organizations*, *in* 3 APA HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY: MAINTAINING, EXPANDING, AND CONTRACTING THE ORGANIZATION 577, 579-81 (Sheldon Zedeck ed., 2011).

[308] DOROTHY BROWN, THE WHITENESS OF WEALTH 12-18 (2021) (presenting a historical account of why, on median, white Americans are ten times wealthier than black Americans).

[309] *See, e.g.*, Tyan Parker Dominguez, Christine Dunkel-Schetter, Laura M. Glynn, Calvin Hobel & Curt A. Sandman, *Racial Differences in Birth Outcomes: The Role of General, Pregnancy, and Racism Stress*, 27 HEALTH PSYCH. 194, 198 (2008) (finding that African American women's perceived racism-related stressors correlated with their infants' birth weights and such a correlation was not present for non-Hispanic white women and their infants).

[310] *See, e.g.*, Valentina A. Zavala et al., *Cancer Health Disparities in Racial/Ethnic Minorities in the United States*, 124 BRIT. J. CANCER 315, 317-18 (2021) (noting that racial minorities, including "American Indians and Alaska Natives," suffer higher mortality rates than whites).

[311] *See generally* E.M.F. Strömmer, Wendy Leith, Maurice P. Zeegers & Michael D. Freeman, *Injuries Due to Law Enforcement Use of Force in the United States, 2006-2015: Trends in Severity and by Race*, J. RACIAL & ETHNIC HEALTH DISPARITIES, Aug. 8, 2023, at 1 (finding that, between 2006 and 2015, black people were three to five times likelier to be admitted to the emergency room in relation to law enforcement use of force).

[312] *See generally Division of Genetics and Molecular, Cellular, and Developmental Biology*, NAT'L INST. GEN. MED. SCIS. (Nov. 20, 2024, 1:29 PM),

voluntarily undergo gene therapy using CRISPR (pronounced "crisper") genome editing technology.[313] The gene editing turns your skin so dark that it appears black, and it changes your hair color to black with a kinky texture so that it stands up in an Afro rather than falling down on your shoulders. However, the scientists who were running the experiment inform you that they were not able to return your phenotype to white. Consequently, you have to live the rest of your life as a dark-skinned black person. The legal question is this: assuming you did not sign a waiver of rights, would you have a legal cause of action against the government scientists for having to live the remainder of your life as a black person? If so, what would the legal claim be, and how much would you want in damages to have to live the rest of your life as a black person? White law students presented with this hypothetical over the years overwhelmingly acknowledged that they would be harmed by losing their white status and that they would want damages to compensate them for having to live the remainder of their life as a dark-skinned black person.[314] This hypothetical highlights the contemporary nature of whiteness as property because the taking of that property requires just compensation.

Likewise, tribes that have prided themselves on having "white Indians" as citizens do not want to lose their status as white tribes because the loss of that status, while difficult to articulate, would come with the loss of something that our society still values. By being a racially white and racially Indian tribe, the tribe maintains the status property of its citizens. Racially white or racially Indian tribal citizens are more likely to be acceptable partners for marriage,[315] business, and economic development[316] with racially white Americans who are non-Indian. Acknowledging African American freedmen as citizens of the tribe arguably continues to be a threat to tribal identity. Aligning the tribe with the property of whiteness historically has signaled being civilized, sophisticated, and eligible for assimilation and equality with whites. Although tribes are afraid to acknowledge it openly for fear of being called racist, the freedmen as a group may be viewed as a threat to the social, political, and economic standing of the

https://www.nigms.nih.gov/research-areas/areas-of-research/genetics-and-molecular-cellular-and-developmental-biology [https://perma.cc/UB8Z-SUZN]. Although NIH does significant genetic research, the hypothetical in this paper is not a research project at NIH.

[313] For an understanding of CRISPR, see *Questions and Answers About CRISPR*, BROAD INST., https://www.broadinstitute.org/what-broad/areas-focus/project-spotlight/questions-and-answers-about-crispr [https://perma.cc/8UR8-MNJN] (last visited Feb. 7, 2025).

[314] In class, we examine the research finding that dark-skinned black people suffer from racial discrimination at a higher rate than light-skinned black people.

[315] *See generally* BANKS, *supra* note 306 (analyzing marriage trends by combining empirical data from government and businesses with anecdotal evidence from a diverse range of black women).

[316] *See* BROWN, *supra* note 308, at 12-18; *see, e.g.*, Christine Barwick, *Patterns of Discrimination Against Blacks and Hispanics in the US Mortgage Market*, 25 J. HOUS. & BUILT ENV'T 117, 118-23 (2010) (describing how discriminatory lending practices in primary and secondary markets have depressed nonwhite homeownership rates).

tribe because blackness still carries a taint in our society, and no tribe wants to suffer the debilitating detriments of blackness.

CONCLUSION

In a nation that has sought the termination and extinction of Indigenous people, the most powerful exercise of tribal sovereignty is not the power to exclude people from tribal citizenship but rather the power to include. As long as tribal sovereignty is treated as a property right to exclude those who fail to conform to settler colonialism's nineteenth- and early twentieth-century notions of Indian identity as racial identity, tribal sovereignty will fall short of its potential to transform tribal communities into diverse, thriving political bodies that collectively work to strengthen tribal sovereignty. When tribes take a propertied view of tribal citizenship, they exercise hypervigilance around the right to exclude. But a political view of tribal citizenship is grounded in the notion that tribes are sovereign nations comprised of racially diverse citizens, not a race of people.[317] Tribes and tribal sovereignty are actually strengthened when tribes exercise their power to include people as citizens of the tribe.[318] The more citizens a tribe has, the more voters it has to advance its tribal interests in various political arenas. The more citizens a tribe has, the easier it is to cultivate tribal citizens as lawyers and leaders for the tribe.[319] Rather than assuming that

[317] *See* S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387, 392-95 (2007) (discussing Cherokee freedman Marilyn Vann: "Vann observes that '[t]he federal government does not have government to government relationships with "races" but with nations'").

[318] Some tribes have sought to limit tribal citizenship in the modern era of tribal gaming because the tribe has a policy of paying per capita payments to enrolled citizens of the tribe. For tribes that pay per capita payments, the fewer tribal citizens, the greater the per capita payment is to each citizen. Consequently, some tribes have sought to disenroll particular bands or groups from the tribe to reduce the number of tribal citizens who receive per capita payments. *See* Anna Malinovskaya, Understanding the Native American Tribal 'Disenrollment Epidemic': An IV Approach (May 1, 2021) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3949116 [https://perma.cc/H7B3-BEWQ] (demonstrating through machine learning simulations that a tribe's involvement in casinos and their attendant "multi-million dollar revenues" dramatically increases the likelihood of a disenrollment epidemic). Tribal per capita payments to tribal citizens are arguably a dangerous practice that undermines tribal sovereignty by reducing the number of tribal citizens through disenrollment and taking money away from tribal government and diverting it to the pockets of individual tribal citizens who may not use the money to advance the tribe and its citizens. Per capita paymentsalso undermine tribal sovereignty by impacting the voting behavior of tribal citizens who have become dependent on per capita payments. For more on per capita payments, see Adam Crepelle, *The Tribal Per Capita Payment Conundrum: Governance, Culture, and Incentives*, 56 GONZ. L. REV. 483, 484-86 (2021).

[319] Cherokee freedman descendant Marilyn Vann, who sued the Cherokee Nation to have her citizenship rights recognized, is now a leader in the Cherokee Nation working to protect

the black freedmen will take resources from the tribe, tribal leaders should think about what the freedmen can contribute to the tribe and the future of tribal sovereignty.[320]

Tribal sovereignty means very little if tribes diminish their own population and thereby lack enough citizens prepared to administer tribal courts and lead tribal government into the future.[321] Some tribes have to contract with non-tribal people to fulfill critical government roles that are essential to the exercise of tribal sovereignty.[322] Tribes hire non-citizens of the tribe who have no shared citizenship interest in protecting and preserving tribal sovereignty. Most of the tribes that rely on non-citizens to help run tribal governments have no choice because the federal government has used constrained, racist definitions of Indian identity to limit the number of people who can be citizens of the tribe. One of the biggest threats to tribal sovereignty is placing non-tribal people in positions of power within the tribe. Non-tribal people are likelier to import non-tribal law and values into tribal governance, thereby shifting the tribe further away from its cultural foundation. The federal government has extinguished tribal immigration power, thereby terminating the tribes' historical practice of adopting non-tribal people and integrating them into the tribe.[323] Consequently, the only way for tribes to grow their population beyond natural procreation is to reclaim those lost to the tribes through the racist practices of the federal government.[324]

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the environment of the Cherokee people. B. 'Toastie' Oaster, *Marilyn Vann Becomes the First Person of Freedmen Status in Cherokee Nation Government*, HIGH COUNTRY NEWS (Sept. 28, 2021), https://www.hcn.org/articles/indigenous-affairs-interview-marilyn-vann-becomes-the-first-freedmen-in-cherokee-nation-government/ [https://perma.cc/ZWM2-AA5U] (last visited Feb. 7, 2025) (interviewing Vann about her fight for civil rights and her efforts since joining Cherokee government).

[320] LeeAnn M. Littlejohn, *A Tribal Court Blueprint for the Choctaw Freedmen: Effect of* Cherokee Nation v. Nash, 48 AM. INDIAN L. REV. (forthcoming 2025).

[321] It's a simple statistical reality that the more citizens a sovereign has, the greater the potential for some of its citizens to achieve greatness that inures to the benefit of the sovereign.

[322] This author had the privilege of serving as a Supreme Court Justice on the Standing Rock Sioux Tribal Supreme Court. The opportunity arose because there was no tribal citizen who could fill this important role.

[323] *See* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 263-69 (2011) (discussing the exclusivity of federal power over immigration).

[324] Many "full-blood" Indians were disenrolled from the Five Tribes and lost as citizens during the allotment era. This is because they refused to participate in the Dawes Commission's enrollment process because they were opposed to the allotment of communally owned tribal lands to individuals. *See* Fixico, *supra* note 126, at 395-96. Consequently, these traditionalists were not enrolled by the Dawes Commission. Their descendants cannot trace their lineal ancestries to a person on the Dawes Blood Rolls and, therefore, are not eligible for tribal citizenship. The sad irony is that these people were the keepers of tribal culture, spoke

The former slaveholding tribes of Oklahoma each have a treaty that grants them the power to expand their sovereignty by extending tribal citizenship to the freedmen descendants.[325] For too long, tribes have been pushed by law to protect tribal sovereignty and Indianness by separating them from blackness. Yet, clinging to the status property of Indianness by subordinating blackness to Indianness through the exclusion of the black freedmen descendants is not advancing tribal sovereignty. Tribal anti-blackness is a form of compensatory subordination aimed at maintaining the status property of Indianness.[326]

Today, "American Indian tribal membership has replaced blood quantum and race as the key component of federal and tribal government activity in federal Indian law."[327] The Cherokee Nation of Oklahoma is no less Cherokee Indian and no less sovereign now that they have incorporated black Cherokee freedmen as citizens of the tribe. The former slaveholding tribes that have not yet reinstated freedmen tribal citizenship have internalized the values of the dominant historical narratives regarding who is Indian. They cling to the Dawes Rolls' conception of Indian identity, grounded in the racist racial hierarchy used by the Dawes Commission when it created the Rolls. The Dawes Commission operated in a place and time when Indianness was a form of status and entitlement property that elevated its holder over non-Indian people of color. The Dawes Rolls subordinated black people to people who were deemed racially Indian pursuant to early twentieth-century rules of race and racial identity. For the tribes to move beyond racism, they must relinquish their strict adherence to the Dawes Commission Rolls for determining tribal citizenship. Exercising tribal sovereignty to include the black freedmen as tribal citizens would be a step toward rejecting the racism of the Dawes Commission. It would also delegitimize the property interest in racial Indianness and its derivative doctrine

the language, maintained the religious practices and clan traditions, and most of them had more "Indian blood" than the people whose names were placed on the Dawes Blood Rolls. With the advent of genetic genealogy, the tribes could reclaim these lost citizens who are both racially and culturally Indian but not politically Indian because they lost their tribal citizenship through the federal government's allotment process.

[325] *See OK Tribes Reconstruction Treaty*, U.S. DEP'T OF THE INTERIOR (July 27, 2022), https://www.doi.gov/ocl/ok-tribes-reconstruction-treaty [https://perma.cc/N8EY-VHSJ] (last visited Feb. 7, 2025) (detailing the existence of and differences between the Five Tribes' treaties regarding treatment of freedmen).

[326] *See* Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 900 (2006) (describing theory of compensatory subordination is where people who are subordinated may seek to compensate themselves for their own oppression by redeploying subordination in a way that subordinates others).

[327] Fletcher, *supra* note 50, at 302. Indian law encompasses several bodies of law, including tribal law, federal Indian law, and some limited state law. *See* Harring, *supra* note 274, at 365 n.1 (describing the legal traditions and their accompanying bodies of law that are subsumed by the term "Indian law").

that holds that tribal governments are only competent to govern people who are racially Indian.[328]

[328] The Cherokee Nation of Oklahoma has already taken steps to challenge the federal government's racist conception of tribal sovereignty by seeking equal rights under the Major Crimes Act for their freedmen descendants who are citizens of the tribe. The Major Crimes Act has been interpreted by federal courts to require tribal citizens to have "Indian blood," thereby discriminating against Cherokee citizens of Freedmen descent who may be tried in state court rather than tribal court. *See* Chad Hunter, *Cherokee Nation Commits to Freedmen Initiatives*, CHEROKEE PHOENIX (Feb. 21, 2024), https://www.cherokeephoenix.org/news/cherokee-nation-commits-to-freedmen-initiatives/article_820727de-cf38-11ee-8ef3-27801f5e8d4e.html?utm_medium=social&utm_source=email&utm_campaign=user-share [https://perma.cc/MT4L-MS33] (last visited Feb. 6, 2025).