REDWASHING HISTORY

Tribal Anachronisms in the Seminole Nation Cases

Kevin Noble Maillard

In Oklahoma, the Seminole Freedmen and their descendants have struggled for equal recognition and membership rights as Afro-Indian members for over a century. Freedmen have been marginalized, disenfranchised, expelled and somewhat restored to and from membership in the Seminole Nation, generating cries of unbridled racism on behalf of “black” members and cries of political sovereignty by “Indian” members. These demands for inclusion raise important questions about interracial memory and selective remembrance.

Both Freedmen and Seminoles view their intertwined history differently, and these understandings emerge in a heated contemporary conflict. This clash stems from the Nation’s effort to “redwash” history, that is, to paint a tribal past rooted in indigenous autonomy—one imagined to be completely unblemished by nontribal influences. “There is no Black Seminole,” exhorted past Chief Kenneth Chambers.¹ A majority of tribal members concurred with Chambers in the belief that people of African descent had no place in the Seminole Nation. In addition, recent changes in tribal law severed an historic tie between blacks and Indians that had existed since the seventeenth century. In fervent objection to these changes in membership policy, affected bicultural

members filed a lawsuit in federal court, in an appeal to have their tribal status restored. Roosevelt Davis, “a man as dark as any of African descent” exemplifies the indefatigable resolve of the Freedmen who balk at such efforts to redefine their identity. “My folks is Indian,” he declares, “I’m Seminole.”

The yes/no dialectic of tribal membership is now familiar: on one side sits a group of racially mixed people who have been denied inclusion in a group which they had previously and historically been members. Narrative accounts and subjective beliefs comprise their evidence of membership in addition to treaties and court cases that declare tribal parity between Black and Blood Seminoles. On the opposing side, tribal members and government agents argue that personal stories and historical interpretation fail to qualify the Freedmen as Indians for tribal and federal purposes. This latter group has erected a standard for proving Indian identity that they argue cannot be met by mere desire and belief. Ironically, they require “hard evidence” as proof of membership.

Yet, disagreement abounds over what defines “hard evidence.” Federal court cases and treaties declare Freedmen as equal members within the Seminole Nation. At the same time, other federal documents portray Freedmen as lacking “Indian blood.” This absence of blood precluded them from participating in tribal programs, and invoked an atmosphere of differential treatment. Despite compelling claims on both sides for exclusion and inclusion, the Nation relied upon sovereignty to define membership as it chooses, without accountability. In response to this assertion of Indian political freedom, the federal government refused to acknowledge the Nation’s existence during the policy of exclusion, which included curtailing federal funding and

2 Id.
3 Id
5 Letter from Patricia Buckley, Coordinator of the Seminole Nation Judgment Fund Program, to Sylvia Davis (Jan. 12, 1995) (claiming that Donnell Davis did not have Seminole blood to participate in the Clothing Assistance Program).
6 William Glaberson, Who is a Seminole, and Who Gets to Decide?, N.Y. TIMES, Jan. 29, 2001, at A1. (A legal brief written by government attorneys reads: “Presuming the plaintiffs have no Seminole Indian blood, they cannot legitimately claim harm from exclusion of funds to which they are not entitled”).
tribal programs. As of October 26, 2003, the Nation restored the Freedmen as members in order to regain the federal funding and governmental recognition.

The status of people of African descent in indigenous nations generates important questions about what it means to be Indian. A fair understanding of the Freedmen controversy necessitates an explanation of the historical sites of contention that affect the Freedmen’s inclusion in the Nation. This essay critically examines the plasticity of memory—how both parties remember and forget the past in order to justify the present. It directly addresses the radically disparate interpretations of government documents by “Indians” and “blacks,” and how these readings of federal texts are constitutive of Seminole membership. The rigid adhesion to “Indian blood” by tribal governments marks a curious manifestation of sovereignty and self-determination. This dogged claim to autonomy and authenticity exemplifies a misapplied and dangerous discrimination hiding behind the mask of political ideology.

MEMORY IN THE COURTS

Case #1: U.S. v. Davis
In 1996, Donnell Davis, a twelve year old registered member of the Seminole Nation of Oklahoma, applied to his tribe for a $150 school clothing allowance. As a federally recognized Indian tribe, the Seminole Nation provides financial assistance to its members for education, clothing, health care, food, and other family expenses from a federal land claims settlement. Enrolled members may apply to the tribe for such assistance, and the fund distributes aid regardless of one’s financial

7 For a period, the BIA ceased federal monies to the tribe, and federal courts ordered their accounts frozen. This included a threat to close the Nation’s Head Start program. Momentarily, the tribe remains at a standstill, and its government stands reluctant to accept Freedmen as equal members. Yet, as of September 2003, the BIA, circumventing the Seminole Nation, announced its recognition of enrolled Freedmen. See Carol Cole, Haney Recognized as Seminole Chief, SHAWNEE NEWS-STAR (Okla.), Dec. 6, 2002; Government Recognizes Seminole Freedmen, SHAWNEE NEWS-STAR (Okla.), October 26, 2003.

8 See Government Recognizes Seminole Freedmen, supra note 7.

background—membership stands as one of the necessary requirements. The Tribe rejected Davis's application because he failed to provide a copy of a Certificate of Degree of Indian Blood ("CDIB"). Davis and his mother, Sylvia, brought a discrimination suit in federal court against the Bureau of Indian Affairs ("BIA"). The plaintiffs sought declaratory and injunctive relief on two grounds: that federal officials wrongfully allowed the Seminole Nation to exclude them from participation in its assistance programs, and that the BIA improperly refused to issue CDIBs to members of the Freedmen bands.

At trial, Judge Vicki Miles-LaGrange dismissed the case on grounds that the Seminole Nation was an indispensable party and not named as a defendant. This left the plaintiffs in a legal bind—they could not sue the tribe because of the doctrine of sovereign immunity, yet the court ruled that the Nation was an indispensable party. The Davies appealed in 1999, and the Tenth Circuit remanded the case back to the district court to "determine whether, in equity and good conscience, Plaintiffs' Judgment Fund Award claim can proceed in the absence of the Tribe." On remand, the district court dismissed the Plaintiff's case once again, which led to a final appeal in 2003, with the 10th Circuit affirming the lower court's decision. After two appeals and two remands, the Freedmen lost their fight to gain equality within the Seminole Nation.

The Davis' legal problem stems from federal documentation that prioritizes their black ancestry over their tribal identification. As members of the Dosar-Barkus band of the Seminole Nation, they were not eligible for CDIB cards, thus precluding their full membership. Tribal membership rolls define these registered members as black Freedmen: part of the Seminole Nation, but without Indian blood—a necessary standard for full tribal membership.

13 Davis v. United States, 192 F.3d 951, 961 (10th Cir. 1999).
15 See Daniel E. Dawes, Unveiling the Mask of Interracial Injustice: How the Seminole Nation Implicitly Endorses Dred Scott and Plessy, 50 How.L.-J. 319, 320 (2007) (eligibility to receive tribal benefits fits rests upon whether a person has descended from a member of the Seminole Nation as it existed in Florida in the 1800's).
The plaintiffs object to this racial delineation which taints the Freedmen’s legacy in the tribe. Sylvia Davis argues, “My ancestors came to Indian Territory on the Trail of Tears with these people. This is something that I’m not going to be denied.” In the collective memory of Seminole Freedmen, the past prevails as a definitive element in their contemporary identity. This retreat to history reveals an avoidance of discussion about a modern day-to-day connection with tribal affairs or strong identification with Blood Seminoles, who view Freedmen’s attenuated connection to the Nation as persuasive evidence for their exclusion.

Aside from the Freedmen and Seminoles by Blood, money is the third major component of the dispute. To support the contested assistance programs, the Nation draws upon the Judgment Fund, a $56 million dollar settlement awarded to the Seminoles as payment for aboriginal lands ceded in Florida in 1823. Most Seminole Freedmen did not have CDIB cards and were thus excluded, because the BIA required proof of Indian blood to participate in the federal programs. Blood Seminoles capitalized upon this restriction as justification for excluding the Freedmen. In addition to the principal from the Judgment Fund, the Nation has lobbied Congress for additional settlements for mineral rights from oil and gas leases that were taken by the federal government in 1908. The tribe has valued these leases at $95 million, almost twice the amount of the Judgment Fund. Simple mathematics shows that fewer members means larger payouts.

17 See supra note 15.
18 See Carla Pratt, Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estel Usti, 11 Wash. & Lee Race & Ethnic Anc. L.J. 61, 104 (2005) (Carla Pratt has characterized the exclusion as “not only dignitary or psychological, [but] also economic and educational”).
20 See John Rockwell Snowden, Wayne Tyndall, David Smith, American Indian Sovereignty and Naturalization: It’s a Race Thing, 80 Neb. L. Rev. 171 (2001) (Full-blood council member Dwayne Miller believes that Freedmen should receive compensation, but from an alternative, non-tribal source. In an interview, he conceded, “I don’t think they should take it out of our money.” Gladerson, supra note 6 (emphasis added). Other scholars have argued that increased economic potentials of tribes, such as government settlements and Indian gaming, have created an atmosphere of greed. This monetary interest leads tribes to disenroll people to increase benefits for remaining members).
B. Case #2: Seminole Nation v. Norton

While U.S. v. Davis generated interest from Freedmen who wanted to reassert their right as tribal members, Seminole Nation v. Norton generated a greater deal of political and racial strife that literally threatened the unity of the Seminole Nation. Norton concerned the political prerogative of a sovereign Indian nation to determine membership as it chooses. In July 2000, “Blood” tribal members passed a general-vote resolution to dissolve the Freedmen bands, along with a constitutional amendment to restrict membership to those Seminoles who could prove 1/8 degree of Indian blood.21 One year later, in July 2001, the Nation held an election for Chief, and voting officials did not allow Freedmen to participate.22 Before the onset of a possible multimillion dollar settlement, Freedmen status and blood dilution did not obscure one’s right to vote as a member of the Seminole Nation. With the subject of the vote excluded from the electoral pool, a majority of Blood Seminoles succeeded in excluding the Freedmen from membership.23 The Nation also held an election for Principal and Assistant Chief, with Ken Chambers and Mary Ann Emamthle defeating Jerry Haney and James Factor in a run-off.24 Freedmen did vote in this election, but their votes were not counted.25

With a majority vote supporting the blood minimum, band dissolution, and Chiefs selection, Seminoles of African descent became pariahs within the Nation.26 The common link between Africans and Seminoles came to an abrupt halt. Freedmen were no longer considered a part of the Seminole Nation, and tribal privileges which had previously existed disappeared quickly. Freedmen could not vote in elections, hold tribal office or participate in health, educational, and food benefits.27 The new government aimed to streamline the tribe into a group of “real” Seminoles, based on a platform of indigenous sovereignty that boasted

22 Id.
23 Metz, supra note 1 at A7.
25 Id.
27 Id.
self-determination and governmental autonomy. Chambers spokesperson Jackie Warledo asked, "The issue is, does our tribal government have the right to govern itself and amend its constitution? The issue still remains one of sovereignty."28 Her statement invites the question: at what point does sovereignty become a political veil for irreproachable autocracy and questionable ethics?

Accusations of racial injustice and threats of social opprobrium failed to deter the ambition of the new administration, as the protective cloak of sovereignty stood as their argumentative vehicle for discrimination. As a result, the Bureau of Indian Affairs, in a bold move, refused to recognize these elections or the new government without the electoral participation of the Freedmen.29 The Seminole Nation filed suit in federal court, challenging the BIA’s action.30 In response, the court upheld both the Bureau’s dismissal of the tribe’s leadership and their repudiation of the constitutional amendment.

Shared History, Severed Ties

"Historically we have exhaustive historical and anthropological research proving that African Seminoles not only owned land, but were also essential chiefs, military and diplomatic leaders, and gave up their lives defending the Seminole Nation for almost two hundred years...I believe you will find there can be no doubt that Estelusti (Freedmen) held an equal interest in the Florida lands they were forced to exchange for their "Trail of Tears" to Indian Territory." —MEMORANDUM OF THE DOSAR-BARKUS BAND, Feb. 23, 199531

28 Ben Fenwick, Racial Strife Splits American Indian Tribe (July 3, 2002). http://www.citizensalliance.org/The%20Hicks%20Fix/Full%20Sovereignty.htm
29 See Letter from Assistant Secretary of Indian Affairs to Hon. Jerry Haney, Seminole Nation of Oklahoma (Nov. 29, 2002) (on file with author) (The Department of the Interior, refusing to give credence to the restrictive platforms and policies of the Chambers administration, publicly recognized Jerry Haney, chief for twelve years prior to the election dispute, as Principal Chief). See Michael Dodson, Tribe’s Old Leadership Won’t Back Down, SHAWNEE NEWS-STAR, (Okla.), May 9, 2002 (Still, neither contender conceded defeat, with Chambers recognized by the people and Haney recognized by the government. The conflict escalated to a tense standoff in May 2002, with Chambers refusing to vacate tribal offices after an express order by the tribal court. Judge Phil Lujan froze all tribal assets, giving control to Haney).
31 On file with Author.
The cases above discuss the roots of the Seminole Nation of Oklahoma, a racially mixed Indian tribe distinguished by its historic connection to freed blacks and escaped slaves. Historically, escaped slaves and freed blacks found refuge and freedom among Indian tribes in Florida, and the Seminoles adopted these emigrants into their ranks. Freedmen adopted the customs, language, and manners of the Seminoles, and developed extensive agricultural skills, which led the Seminoles to dependency on the blacks, as argued by Joseph Opala:

They were the chief agriculturalists of the Seminole Tribe, but they were required to turn over only a token share of the harvest as a tribute to their Indian masters ... They owned their homes, carried guns, and dressed in the same fashion as the Seminoles. Several observers noted that the blacks were better off materially than the Indians.

The freedmen lived in harmony with the Seminoles in Florida, and accompanied them during the 1838 removal to Indian Territory (now Oklahoma), after the Tribe’s defeat by the United States. This close community of red and black led to extensive intermixing, which created a hybrid group of Seminoles of African and Native descent. The extent of racial blurring led colonial whites to express disdain at the inability to classify the Seminoles as simply black or Indian. United States Senator Joshua Giddings described the black Indians as “mostly half breeds, and are rapidly becoming amalgamated with the Indian race.”

Contemporary Freedmen’s arguments for inclusion rely heavily on the memory of their distant ancestors’ indispensability to the Tribe. In recounting this past, Freedmen demonstrate the historic existence of

32 Natsu Taylor Saito, From Slavery and Seminoles To Aids in South Africa: An Essay on Race and Property in International Law, 45 Vill. L. Rev. 1135, 1144 (2000) (Describing that, “some of the members of the Seminole Nation who were of African descent had never been enslaved, some had escaped from slavery, and other were the descendants of fugitive slaves.”). Daniel F. Littlefield, Jr., Africans and Seminoles 5 (1997); Kenneth Porter, The Black Seminoles 4-6 (1996).


34 Aaron Brown, supra note 9 at 122; ANGIE DEBO, AND STILL THE WATERS RUN (1988); GRANT FOREMAN, THE FIVE CIVILIZED TRIBES 255-257 (1934).


36 ISA HAMM BRYANT, WE FLORIDA (Palm Beach Post, 1996). http://www.overground.info/cataloghistory.htm
interracial cooperation to counter the Nation’s racially based restrictions. Accounts of military allegiance recur as standard arguments. Prior to Indian Removal, which occurred after 1838 and before 1866, blacks and Indians fought together against American forces that sought possession of Native ancestral lands in south Florida.37 Seminoles of African descent played a strong role in helping their comrades resist the encroachment of the government, to such an extent that Thomas Sidney Jesup, an American military commander attested, “This you can be assured is a Negro, not an Indian war.”38 In 1836, General Jesup also wrote that, “Throughout my operations I found the negroes the most active and determined warriors; and during the conference with the Indian chiefs I ascertained that they exercised an almost controlling influence over them.”39 Dosar Barkus band chief Rosetta Noble Finney champions this history: “After we fought, bled and died right here to help them with their freedom, they want to delete us. We’re warriors, we’re fighters, we’re not going to give up.”40 A similar narrative account of military memory emboldens Sylvia Davis, who claims that her fifth great-grandparents died in the Second Seminole War, and that another great grandparent walked on the Trail of Tears.41

Rejected by their tribal cousins as non-Indians, many Freedmen remain dedicated to the steadfast belief that the conjoined past of the Seminoles entitles them to equal membership with blood Indians. Because their ancestors lived with, intermarried with, and fought with the Seminoles, they consider themselves “real Indians.” One Freedman describes the history in the same rhetoric as naturalization: “We were Indian. It’s like a white man who grows up in Mexico. He speaks their language, eats their food and thinks the way they do. He’s Mexican; we’re Indian.”42 Recognition of the shared history would validate the

38 Porter, supra note 32 at 67.
39 Opala, supra note 33 at 10.
40 Kevin Hemstock, Black Seminoles Detail Struggles Of Their Nation, JUPITER COURIER (Fla.), December 3, 1997, at A1.
41 Davis states, “Not a day doesn’t go by that I don’t think about my ancestors. Sometimes I place myself back in history and think about the hard times they had to suffer through. A lot of them died at an early age. A lot of them died on the Trail of Tears.” Fighting To Be Heard Black Seminoles Sue For A Place In History, THE SUNDAY OKLAHOMAN, November 7, 1999, at City Edition.
42 Scott Thybony, Against All Odds, SMITHSONIAN, August 1991 at 90.
Freedmen’s subjective conception of themselves as legitimate members of the Seminole Nation.

Categorical denial by Blood Seminoles of this shared heritage invokes a notable dilemma: Black and Blood Seminole inherit legacies from their ancestors, but only the latter inherit a tribal legacy. An alternative argument may be made that full membership is unnecessary to verify the Freedmen’s origins. Tribal ratification of this ancestry would not change what Black Seminoles think about themselves. This may be true, but Freedmen persist in seeking external validation and equal treatment. “We consider ourselves a part of the Seminole Nation. We want no more than what they get. We want to be included as members of the tribe,” says Lawrence Cudjoe, a Freedman and former tribal council member.43 Like other Freedmen, he asserts a personal belief that he deserves membership in the tribe because his parents, grandparents, and great-grandparents viewed themselves as Seminoles. Cudjoe’s argument for inclusion finds root in ancestral allegiances to the Nation. In this appeal to the past, he, like other Freedmen, eclipses the doctrine of hypodescent to assert a tribal connection. Another Freedman, Polly Gentry, of Seminole County, Oklahoma, does not allow her African American appearance to steer away from her subjective conception of identity. When interviewed by the New York Times in January of 2001, she described herself as “an Indian. A black Indian.”44

Freedmen’s accessions to the past sharply contrast with Blood Seminoles’ conception of a rightful claim to membership. Despite historical links between blacks and Indians, Blood Seminoles insist on streamlining the tribe to “real Indians.” Former Chief Jerry Haney justified the opposition by arguing that current Freedmen have drifted away from cultural identification as Indians.45 Blood Indians, comfortably situated within the irreproachable ranks of secure membership, question the authenticity of a faction that rests upon a historical and past, rather than a cultural and current, claim to membership. In the effort to streamline the Nation, a majority of Blood Indians have divested themselves of the burden of history to forge a new, singular identity divorced from the influences of Freedmen. In this rupture with the

44 Glaberson, supra note 6 at A1.
45 Id.
past, the Seminole Nation redwashes history by turning a blind eye to a substantial portion of its Afro-Indian population.

The Nation’s policy of exclusion in part conforms to other patterns of interracial denial, yet still differs from previous examples because of the issue of Indian sovereignty. While amnesia towards mixed race may take the form of Chesnutt’s familial avoidance, Mrs. Hubbell’s testamentary interests, or the Jeffersons’ categorical exclusion, the Seminoles, under the umbrella of sovereign immunity, may safely invoke racially restrictive policies. Even though the Nation’s policy openly promotes race-based exclusion, the Nation, as a sovereign entity, nevertheless may determine membership as it chooses. Courts refrain from questioning tribes’ political policies, particularly regarding membership issues where race and gender would otherwise receive a form of heightened scrutiny. As Justice Marshall opined in *Santa Clara Pueblo v. Martinez*, a tribe should “maintain itself as a culturally and politically distinct entity,” a necessity which he saw as incompatible with judicial review.46 Thus, courts shy away from alarming examples of discrimination in the interest of sensitivity to the autonomy of Indian nations.

Examples of isolated soundbites from “Blood” Seminoles generate additional sympathy for the Black Seminole’s plight while revealing racially charged sentiments from the other side. Chambers supporter Yogi Harjo curtly revealed, “We’re not black—we’re Indians...We’re trying to keep the black people out.”47 A local official in Seminole Indian Country chided Sylvia Davis with outspoken hostility, telling her that the Freemen needed to “go back to Africa.”48 Davis, a former Freedman representative on the tribal council, attests that at meetings, other members were “calling them animal names, cows, stomping feet, roaring at ‘em, telling them to get out.”49 At a curiously titled “Walk for Unity” march organized by Chambers supporters, participants sported T-shirts emblazoned with the slogan, “Seminole by Blood.”50 These

---

47 http://www.veleandvele.com/showArticle.asp?articleid=14
48 Brent Staples, *The Seminole Tribe, Running From History*, N.Y.
examples speak clearly of the racial tension that characterizes this historically Afro-Indian tribe.

This sympathy has its limits, however. Although I stand partial to the merits of Freedmen claims to interracial heritage, I question the singular reliance on the past as a method of establishing a contemporary identity. As a method of legitimating a claim to membership, Freedmen and their representatives recall unified glory days of the past as irreproachable arguments for inclusion. The oral and legal history that they employ undoubtedly prove the existence of an intertwined history, yet these demonstrations fail to trump the Nation’s reliance on federal determinations of blood as definitive proof of tribal membership. This bureaucratic hurdle stands as a somewhat necessary evil, yet in this case, the established standard is tautologically exclusionary. Because Freedmen records remain silent on the subject of ancestry, their contemporaries cannot calculate a degree of ancestry that would make them eligible for membership.

The Blood Seminoles’ motivation for denial runs less on suppressing miscegenistic shame than capitalizing upon opportunities for economic gain. This alternative approach considers the subjective eye of memory as the basis for an authoritative belief in one’s Seminole identity. This way, we may witness the formulation of one history, but with two attendant interpretations of its facts. These opposing versions harbor respectively forgotten and suppressed facts that do not comport with a unified picture of the past. By expunging the unfavorable and venerating the flattering, narrators conflate fact and fiction to present a contrasting version of the past—an engaging model on which to base the present.

_One Treaty, Two Versions_

In 1866, the federal government entered into a treaty with the Seminole Nation. The clause in Article 2 of the 1866 Treaty stands as the Freedmen’s crucial argument for legal and political inclusion:

[I]nasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants...shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all person of whatever
race or color, who may be adopted as citizens or members of said tribe.\textsuperscript{51}

The treaty flows from an inability to separate black from red and also from the government’s acknowledgement of a multiracial tribal population. The federal establishment of interracial citizenship marks the basis for the Black Seminoles’ claim to equal membership in the Nation. From this juridical framework, Freedmen circulate an oral history of equality that “as long as grass grows and water flows ... if the Indian gets a dollar, the Freedman gets a dollar.”\textsuperscript{52} According to these oral, legal and historical narratives, Freedmen and Blood Seminoles shared a common history as conjoined citizens of an Indian nation.

For Freedmen, 1866 marks the legal culmination of their long history with the Seminoles. It also solidifies the alliance of escaped slaves and free blacks with the accepting Natives. Thus 1866 does not represent a beginning for the Freedmen, but memorializes a past that until then had not been formalized. From this variegated background, Freedmen have passed down an oral history securely established in legal and historical documentation. This notion of equality and partnership establishes a collective consciousness of Freedmen entitlement to inclusion. Seeing themselves as kin of the Seminoles, modern-day Freedmen pledge to retain and celebrate this cultural inheritance.

Blood Seminoles maintain that Freedmen overstate the extent of their historical integration into the tribe. Under this interpretation, the 1866 Treaty represents a federal imposition of equal citizenship. The Seminoles recall the past from a paradigm of slavery, precluding consideration of the relationship as one of equality. This interpretation imagines the Nation’s past as an agricultural state characterized by black enslavement. Similar to the Indian-black relations of the other “Five Civilized Tribes,” the Seminoles view themselves as southern slaveowners: distinct, separate, and over the Freedmen.\textsuperscript{53}

\textsuperscript{51} Treaty With the Seminole Indians, March 21, 1866, 14 Stat. 755 (hereinafter “Treaty”).

\textsuperscript{52} Josephine Johnston, \textit{Resisting a Genetic Identity: The Black Seminoles and Genetic Tests of Ancestry}, J. L. ME& ETHICS, 31, 2, 264 (Summer 2003), quoting Rebecca Bate-

\textsuperscript{53} The Five Tribes are: Seminole, Creek, Cherokee, Choctaw, and Chickasaw. Primary based in Oklahoma, these Indian nations each have Freedmen branches in their
This interpretation insists on the fundamental difference between Black and Blood Seminoles. Former Chief Haney maintains, "they were always looked at as non-Indian. They were always a separate people."\textsuperscript{54} Freedmen's slave status, they argue, precluded them from ownership of Seminole lands in Florida. Citing the same Treaty that energizes the Freedmen's cause for inclusion, Blood Seminoles insist that Freedmen had "no interest or property in the soil."\textsuperscript{55} Because Freedmen did not have citizenship or property before the treaty, they cannot receive contemporary money judgments, which concern compensation for the removal from Florida in 1838.

Freedmen perceive their interest in the soil less literally. Their conception of the past downplays their historical status within the Nation as slaves of the Seminoles. While Freedmen do not deny this fact, they distinguish this form of servitude as "nominal slavery." Lena Shaw, a Freedmen band chief, insists that, "In order to keep the American people from taking the people of African descent from them, they decided to say, 'We're your slaves.'"\textsuperscript{56} Joseph Opala succinctly explains: "Technically, a Seminole black was owned or controlled by an Indian master who could either free him or bequeath him to a relative at his death. Seminole blacks or 'Indian Negroes,' as the Americans called them at that time, were, however, free in almost every other way."\textsuperscript{57} Opala explains further that the Afro-Indians served the tribe as "warriors, war leaders, interpreters, negotiators and spies."\textsuperscript{58} Contemporary Freedmen gather this information proudly, insisting that they were not "true" slaves, but "Brothers in Arms" who played a significant historical role in tribal culture and warfare. As argued by Freedmen attorneys and supported by historical treaties\textsuperscript{59}, Black Seminoles were a part of the Seminole Nation at the time of removal from Florida, and these

\textsuperscript{54} Metz, supra note 1.
\textsuperscript{55} Treaty, supra note 51 at Article 2.
\textsuperscript{56} Mary Pierpont, Jim Crow Legacy Still Disrupts Oklahoma Seminoles, INDIAN COUNTRY TODAY, Mar. 5, 2002.
\textsuperscript{57} Opala, supra note 33 at 4-5.
\textsuperscript{58} Opala, supra note 33 at 8.
\textsuperscript{59} Treaty, supra note 51 at Article 2.
“Indian” citizens too experienced the appropriation of lands on the part of the federal government.

The citizenship clause of the Treaty does not influence the Nation’s arguments for exclusion. Language exists that argues for the inclusion of the black Seminoles, but the scope of this inclusion remains unsettled. Does “enjoy all rights” extend to tribal benefits based upon events before 1866? Blood Seminoles, as arbiters of their own membership, emphatically say no. However, it seems counterintuitive that the Freedmen’s evidence of legal precedent from the 1866 Treaty fails to convince courts that their claims to inclusion are valid. The treaty provides an external declaration of equality within the tribe that attests to a variegated group whose members may enjoy the benefits and protections of tribal membership. Yet, the plain language of the citizenship clause fails to influence the Seminole’s interpretation of their tribal history. As law may establish a posterity of knowledge that declares some facts as true and others as false, the language of the treaty stands as a problematic site for the interpretation of past events and their intentions. According to language in the 1866 Treaty, it appears that the Freedmen were unequivocally intended to be absorbed into the body politic. At the same time, however, the membership standards of the Seminole Nation incite racial distinctions that stultify the egalitarian rhetoric of the 1866 treaty.

If the Seminole Nation is to foment a contemporary tribal identity that balks its African ties, is it feasible for courts to accept this revised version of history as legitimate? It appears counterintuitive to assert claims of indigenous ancestry as necessary elements of reparations while selectively ignoring the qualifying circumstances. In this partial remembrance of the past, the Nation runs the risk of declaring the 1866 Treaty as coerced, misrepresented and therefore illegitimate. Their belief that the treaty was not meant to genuinely extend full tribal citizenship to Freedmen jeopardizes the legal authority of all treaties between Indian nations and the federal government. To reject clear and convincing legal language that records a binding promise between governments can only endanger the historical foundation of federal recognition of the Seminole Nation. The treaty marks a basis for the government’s payment for lands ceded in Florida, which provides the monetary foundation of the Judgment Fund. Its legitimacy is only as good as the Seminole’s loyalty and faith to abide by it. Selective atten-
tion to treaty language not only defies the treaty's purpose, but also compartmentalizes its effectiveness.

**Dawes Commission, Freedmen Omission**

In the late 19th century, agents of the United States government, liberal intellectuals, and Christian missionaries convened annually at Lake Mohonk in upstate New York to propose speeches and papers addressing solutions to the "Indian problem." Overwhelmingly, the majority of participants (collectively known as "Friends of the Indian") believed that the practice of communal living on Indian reservations entrenched indigenous people in pitifully savage ways of living. They perceived this problem as stemming from the absence of the stabilizing providence of property ownership. Their perceived solution, then was the allotment of land in severalty, known as the General Allotment Act. Each adult citizen of the various Indian nations would receive plots of land—a physical testament to the Indians’ "entry wedge" into the mainstream of American culture. Senator Henry Dawes, the primary author of the Act, said at the Fifth Lake Mohonk Conference,

> We had better be employed taking, one by one, all these Indians, and making citizens of them, and planting them on their 160 acres of land, telling them how to go forth among the white men of this country and learn the ways of the white man, and stand up and take their part in the great work of the governing of the Union.⁶⁰

Reformers hoped that property would eradicate the savage ways of Indians and replace them with tenets of civilization. Moreover, property conveyed Lockean values of use and Jeffersonian principles of entitlement through the political and theoretical enchantment of the tilling of land. Through ownership, the reformers sought to replace Indian cultural traditions with American cultural values, in addition to opening up ceded land for white settlement. The reformer Carl Schurz argued, "They will have advances in immense step in the direction of the 'white man's' way."⁶¹

---


⁶¹ *Id.*
The policy of instituting ownership strangely figures as the basis for membership in the Seminole Nation. From the reformer’s intentions to supplant Native pathologies with American pragmatism emerges a contemporary paradox that challenges the authority of tribal sovereignty. The Dawes Commission imposed “the ways of the white man” to eradicate Native culture, but this scheme underscored the notion of membership in a particular tribe. Thus, in order to receive the spoils of assimilation, federal officials had to answer the question “Who is Indian?” Today, their determination of membership stands as the irreproachable basis for tribal sovereignty. From the Seminole Nation’s perspective, the proposals from Lake Mohonk do not taint the integrity of tribal history. Exposing this foundation facilitates an analysis of the persistent and divisive anathema of Indian blood.

Formalizing the concept of “Indian blood” underscored bureaucratic and political peculiarities of racial intermixture. Federal bureaucrats, in the task of determining membership, separated the tribe into two groups, Seminoles by Blood, and Seminole Freedmen. Generally, applicants of mixed Afro-Indian ancestry became Freedmen, while fullbloods and mixed-blood white Indians claimed membership as Seminoles by Blood. In certain cases, bureaucratic officials placed Black Indians on the Blood rolls, but only after meeting certain requirements. Paradoxically, white European ancestry did not categorically threaten membership as a Blood Seminole. Thus, the Dawes Rolls, as they became known, could declare a person who was 1/4 Indian and 3/4 white as “Indian,” while a person 3/4 Indian and 1/4 black received “Freedman” status. Consequently, those declared Freedmen at the time of the Dawes Rolls, even with incontrovertible proof of Seminole blood, were stripped of a juridical nod to their dual heritage as their record as Freedmen lists no evidence of Indian blood. Under this system, racial identity was not determined by each individual, but rather withstood review by a government agent. At the time of allotment, Seminoles numbered approximately 3,000, one-third being Freedmen. This membership roll, drawn over 100 years ago, remains the authoritative source for determining Seminole ancestry.

Although the institutionalization of Indian blood aimed to create order from chaos, this basis of identification gave birth to problematic ambiguities. At present, the membership rolls preclude contemporary

62 Pratt, supra note 37 at 1250.
Freedmen from obtaining CDIB cards as a result of the failure of the Dawes Commission to recognize the “Indian blood” of their predecessors. This weight of the past on the present forces inheritance of the cultural constraints of previous generations in order to affirm the impossibility of the obvious. While an individual Freedman may claim Seminole ancestry, the authoritative source for determining membership declares otherwise. Even though Freedmen may rally to declare “we know who we are,” their foes point to the rolls to protest, “we know who you are not.” This purgatory of identity, where subjective beliefs clash with purportedly objective proof, reduces one’s conception of personhood to an historic aberration.

The lasting influence of the Dawes Rolls does not appear to dissipate, yet these seemingly overwhelming forces belie a fragile foundation that finds little basis in irreproachable fact. To assume the authority of 19th century racial categorizations without a critical eye to their historic influences presents a case of fatuous objectivism. Accepting without question the racial constructions of Indianness as represented by the Dawes Commission necessarily privileges those who benefit fully from its provisions, while subordinating those who do not. Expectably, those Seminoles whose full access to the tribe is protected and secured by membership rolls pose few questions about the derivation of their inclusion. Those on the margins, however, find themselves at the mercy of antiquated standards that persist in exercising total authority over contemporary manifestations of identity.

**A Bad Case for Sovereignty**

The historic delineation of black and red standardizes racial segregation within the Seminole Nation, and to a larger extent, racial supremacy. At the same time, it propels the past into the present by serving as a point of mutual contention. Blood Seminoles wish to uphold the separation of the rolls because they testify to the initial intention of the government to disenfranchise those of African descent. In their view, the rolls clarify the misintentions of the Freedmen in their struggle for inclusion. Conversely, Freedmen point to the racial bias they view as inherent in the rolls, and argue for dissolution of the restrictive standards that preclude access to their birthright.

The Nation argues that the determination of membership marks a fundamental right of tribal sovereignty. This assertion of autonomy
reveals in the fact of exerting power within a political sphere unadulterated by non-Indian influences. Regarding racial exclusion in the tribe, tribal spokesperson Jackie Warledo states, “It should be our decision to make.” This image and ideal of sovereignty raises the controversy to a fevered pitch—as accusations of racism and discrimination increase, Blood Members turn to this bedrock concept as political refuge. In resisting the encroachment of traditional American jurisprudence, the Seminoles ask outsiders to respect their assertion of self-determination. Their survival and authority, they argue, depends heavily on the ability to maintain a distinct tribal identity at whatever cost. This premium on autonomy receives support from scholars who sharply describe federal intrusion as a “smothering paternalism that could ruin traditional Indian modes of social, political and religious life.”

But the question remains of separating oneself from the chain of earlier generations. Tribal leadership cannot persuasively spin the Dawes Rolls as internal articulations of Seminole nationhood. This method of maintaining a past of tribal independence reveals a crucial element of recollection. In order for Seminoles to assess the truth of their history, they must regulate the numerous details of their past. Forgetting and remembering exist as essential functions in the management of memory. As Richard Terdiman argues, “loss is what makes our memory of the past possible at all.”

The Nation downplays the impact of the Dawes Rolls on membership and sovereignty. Reformers aggressively advocated their support of assimilation through property. Carl Schurz, a self-professed “Friend of the Indian,” predicted that “[w]hen the Indians are individual owners of property, and as individuals enjoy the protection of the laws, their tribal cohesion will necessarily relax, and gradually disappear.” Surely, the goal of solving the “Indian problem” actually weakened the authority of cohesive Indian nations. The historical distinction of the Dawes Act is its paradoxical benevolence of claiming to aid Natives by eroding their societies. Without question, tribal members know its original

66 Carl Schurz, Present Aspects of the Indian Problem (July 1881), in PRUCHA, supra note 60.
intentions, and with fewer questions, tribal officials derive authority from it. Thus, the federal plan of eventual dissolution strangely reigns as the primary rubric for inclusion on the membership rolls.

The hyperbolic reaction to what the Seminoles see as encroachment on sovereignty matches the level of irony that makes their self-determination appear completely non-indigenous. The current tribal rubric for membership is fundamentally based on the draftings of the Dawes Commission. Even though the tribe retains the prerogative to determine membership as it chooses, it accepts the external and inorganic racial articulations of the all white Commission. This internalization of extra-tribal standards marks a peculiar flaw in the Seminoles’ logic. The imposed and arbitrary concept of blood quantum as a current variable in the all important area of membership haunts the idea of an unfettered and sovereign development of nation. The impossibility of avoiding and circumventing the past may be conceded, but this indefatigable specter of government incursion sets up a conundrum of memory.

The journey of the Dawes Act from a destructive policy conceived by whites to an irreproachable doctrine fortified by Indians is nothing short of a remarkable transformation. The Seminoles have overturned the negative aspects of the Dawes Act into an unavoidable tenet of indigenous authenticity. Indian blood remarkably retains its Victorian legitimacy; defined by whites and essentialized by Natives, it persists unchecked. Tribal spokesperson Jackie Warledo declares, “If you are not Seminole by blood, you are not a tribal member. If we can’t pass that inheritance to our future, we will cease to be Seminole tribal members.”67 This dogged loyalty to the Dawes Rolls confounds a traditional understanding of self-determination and self-identification. In appropriating the external articulation of membership as a prerogative of sovereignty and a symbol of independence, the Seminoles fail to escape the state power they claim to be sovereign from. Notably, the Nation’s redwash of the Dawes Rolls concedes nothing to the influence of “Friends of the Indian.” Even though the tribe retains the prerogative to determine membership as it chooses, a 21st century Indian tribe accepts the external and inorganic racial articulations of dead white Victorians in upstate New York.