IN THE SUPREME COURT OF THE CHEROKEE NATION

Cherokee Nation Registrar **Appellant,**	)	
and	)	**Case No. SC-2011-02**
Raymond Nash, et al., **Appellees.**	)	

On Appeal from the District Court of Cherokee Nation
The Honorable John Cripps, District Judge
District Court Consolidated Case Nos CV-07-40, CV-07-41, CV-07-42, CV-07-43, CV-07-44, CV-07-45, CV-07-46, CV-07-47, CV-07-48, CV-07-49, CV-07-50, CV-07-53, CV-07-56, CV-07-65, CV-07-66, CV-07-72, CV-07-78, CV-07-85, CV-07-86, CV-07-99, CV-07-100, CV-07-112, and CV-07-116

APPELLEES' ANSWER BRIEF

Ralph F Keen II, CNB #94
KEEN LAW OFFICE, P.C.
205 West Division
Stilwell, OK 74960
(918) 696-3355
(918) 696-3576 Fax

Attorney for Appellee Class

Dated: June 3, 2011.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Treaties

Statutes

Rules

Cases

Secondary Authorities

STATEMENT OF THE CASE

Following the close of the Civil War and the abolition of slavery, as a precondition to rejoining the union and re-establishing its government-to-government relationship with the United States, Cherokee Nation entered into a treaty on July 19, 1866. Article IX of the treaty addressed the status of the freed slaves (Freedmen) within the Cherokee Nation and provided that Freedmen and their descendants *"shall have the rights of native Cherokees."* In November of that same year, the Cherokee People adopted amendments to their 1839 Constitution which granted the Freedmen and their descendant's full citizenship status within the Cherokee Nation. In 1895 the United States Court of Claims, under special congressional jurisdiction, ruled that the Freedmen and their descendants were entitled to equal rights and immunities as full-blood Cherokee citizens and were entitled to participate in the distribution of Cherokee funds and property. As a result, Cherokee Freedmen received land allotments and were joined by Congress in per capita payments of tribal settlement funds distributed over the next sixty years.

In 1976 Cherokee Freedmen participated in the referendum vote on a new constitution which re-established a tripartite government in Cherokee Nation. However, in 1992 the Tribal Council adopted a law requiring proof of ancestry to an original enrollee of the "By-Blood" rolls of the Dawes Commission as a precondition to tribal citizenship. On March 7, 2006, the Judicial Appeals Tribunal found this statute to be unconstitutional in Allen v. Cherokee Nation Tribal Council, et al, J.A.T. 04-09, and once again required enrollment of Cherokee Freedmen as citizens. Thereafter, an effort was launched to override the Allen decision by constitutional amendment, which resulted in the amendment at issue being approved by special election on March 3, 2007 (the "Amendment"). As applied by Nation, the Amendment changed Cherokee citizenship criteria by disenfranchising only descendants of the Cherokee Freedmen Dawes Rolls.

Within 30 days of its passage, the Tribal Registrar sent out over 2800 letters to enrolled Cherokee Freedmen, informing them of their disenrollment and their appeal rights under tribal statute. Of these 2800 citizens, approximately 386 filed timely appeals of the Registrar's decision. On June 27, 2008, the District Court certified these appellants as class representatives under F.R.P.C. 23(B)(1);(2) and defined the class as *"all original enrollees, or descendants of original enrollees listed on the Dawes Commission Rolls, designated as Final Roll of Freedmen and Final Roll of Cherokee Freedmen - Minor Children."* In due course, both parties agreed that

no material facts were in dispute and each brought cross motions for summary judgment. Following oral arguments before the Honorable John T. Cripps, and submission of extensive proposed findings of fact and conclusions of law, the District Court subsequently handed down its ruling on January 14, 2011, finding that the Amendment of March 3, 2007, *"by virtue of the provisions of the Treaty of 1866 and subsequent actions taken in furtherance thereof, are hereby determined to be void as a matter of law."* Cherokee Nation now appeals this decision.

STANDARD OF REVIEW AND STATEMENT OF ISSUES PRESENTED

In reviewing summary judgment where no questions of fact exist, the court is predominantly reviewing legal principles. The proper standard of review in such cases is *de novo* review.[1] The paramount issue in this appeal is whether the District Court was correct in finding that the 2007 Amendment is void as a matter of law by virtue of the Treaty of 1866. Your Freedmen Class asserts that the District Court committed no error, was correct in its findings in all respects, and asks this honorable Court to affirm the District Court's outcome.

In his opinion Judge Cripps based his ruling primarily on the supremacy of federal law and did not address the other two arguments advanced by the Freedmen Class in its motion for summary judgment. Under *de novo* review an appellate court is not limited to the reasoning of the trial court in reviewing an order granting summary judgment, but may substitute its own analysis and affirm if any proper ground exists to support the ruling.[2] Thus, we feel it only appropriate to re-assert these two arguments on appeal as additional and/or independent basis for affirming the outcome of the trial court. Accordingly, your Freedmen Class submits the following two additional issues for consideration on appeal: (a) whether the 2007 Amendment, by virtue of the Treaty of 1866, violates the U.S. 13th Amendment's absolute ban on slavery and badges and incidents of slavery; and, (b) whether the Amendment violates the equal protection clause of the Cherokee Nation constitution and/or the Indian Civil Rights Act as invidious race-based discrimination.

---

[1] Cherokee Nation v. O'Leary, SC-2006-13&14 (C.N. S.Ct. 2006).
[2] Zahorsky v. Community Nat'l Bank, 883 P.2d 198, 201 (OK. APP 1994).

ARGUMENTS AND AUTHORITIES

I. THE TRIAL COURT CORRECTLY FOUND THE AMENDMENT IS VOID AS A MATTER OF LAW BY VIRTUE OF FEDERAL SUPREMACY.

a. Cherokee Nation Is A Sovereign Nation, But Is Also Subject To The Supremacy of Federal Law.

There is no question that Cherokee Nation is a sovereign nation. Organized as a distinct political community under its inherent sovereign authority, Cherokee Nation has either retained, or regained, many attributes of its original inherent sovereignty.[3] Cherokee Nation is a sovereign nation, but similar to the fifty states and other Indian nations, Cherokee Nation is also subjugated to the supremacy of the federal government and the rule of law. The power of the federal government over Indian tribes is well settled in American jurisprudence, stemming primarily from the Indian commerce clause[4] and the treaty clause[5] of the U.S. Constitution. Based on these two sources, Congress' power over Indian affairs is described as "plenary,"[6] extending to the very political existence of a tribe as recognized by the federal government.[7] Cherokee Nation has always been at the forefront of the development of federal Indian law, and was indeed the subject of three early Supreme Court decisions known as the Cherokee Trilogy that became the cornerstone of modern Indian law.[8] Chief Justice John Marshall described Cherokee Nation as a *"domestic dependant nation"*[9] within the United States, with a distinct community, territory and boundaries in which the laws of the state of Georgia could have no force or effect.[10]

However, since the revolutionary war and the emergence of the U.S. government as the dominant sovereign, the sovereignty of Cherokee Nation has never been recognized as being on

---

[3] Only 40 years ago the government of the Cherokee Nation consisted only of a single individual appointed by the President of the United States. The re-emergence of the Nation under its modern constitutional government is a tremendous achievement in self-governance by the Cherokee People.

[4] Congress is authorized to *"regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."* U.S. Const. Art. I Sec. 8, cl. 3.

[5] U.S. Const. Art II Sec. 2, cl. 2.

[6] Delaware Tribal Business Comm. v. Weeks. 430, U.S. 73, 83-84 (1977); United States v. Alcea Band of Tillamooks, 329 U.S. 40,57 (1946).

[7] This is not to suggest that a tribe's existence depends on the federal government, but rather recognition of a tribe to share in a government-to-government relationship with the United States. Federal recognition can be granted, modified, or terminated at will by the United States.

[8] The Cherokee Trilogy consists of: Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[9] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17.

[10] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561.

equal footing as, or superior to that of the United States. The U.S. Supreme Court so found in the 1855 case of Mackey v. Coxe, which articulated Nation's status as follows:

> This organization [Cherokee Nation] is not only under the sanction of the general government, but it guarantees their independence, **subject to the restriction that their laws shall be consistent with the constitution of the United States, and the acts of congress which regulate trade and intercourse with the Indians.** . . . They are not only within our jurisdiction, but the faith of the nation is pledged for their protection.[11]

Indeed, throughout Cherokee/American history, the supremacy of the federal law has been freely acknowledged, but never more concise than in Article I of the 1976 Cherokee Constitution, which states:

> The Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is conflict with any Federal law.[12]

The 2003 Cherokee Constitution also acknowledges federal supremacy in Article I. [Federal Relationship]: *"The Cherokee Nation reaffirms its sovereignty and mutually beneficial relationship with the United States of America,"* and again in Article XIII, where every Cherokee officer must pledge an oath to protect and defend the Constitutions of both the Cherokee Nation, and the United States of America.[13] Throughout the course of American history, there has never been any question that Cherokee law, like the laws of other Indian governments, the states, and other federal protectorates, must co-exist within the framework of the United States Constitution, and any Cherokee law violating the principles of federal supremacy can only be considered null and void as a matter of law.

b. Treaties With The United States Are Afforded The Same Weight As The U.S. Constitution And Federal Legislation, And Are Accordingly The Supreme Law Of The Land.

As long as the Cherokee Nation is necessarily subjugated to federal law, then Cherokee jurisprudence must also necessarily acknowledge the plain language of Article VI, Section 2, of the United States Constitution, which states:

---

[11] Mackey v. Coxe, 59 U.S. (18 How.) 100, 103(1855) [*emphasis added*].
[12] Cherokee Const. of 1976, Art. I. Federal Regulations.
[13] Cherokee Const. of 2003, Art. XIII. Oath, Sec. 1 [*emphasis added*].

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; **and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;** and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The inclusion of *"all treaties made"* in the supremacy clause was in fact one of the primary philosophical linchpins Chief Justice Marshall relied upon in the recognition of Cherokee sovereignty by the Worcester Court in 1832:

> The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.[14]

Moreover, by virtue of the supremacy clause, treaties with the United States supersede any conflicting state laws, and carry the same force and preemptive effect as federal statutes.[15] Historically, this principle was expressly incorporated into Cherokee law vis-à-vis the Cherokee Constitution of 1839, which provided: *"All acknowledged treaties shall be the supreme laws of the land, and the National Council shall have the sole power of deciding on the construction of all treaty stipulations."*[16] This was the fundamental law in Cherokee Nation when the Treaty of 1866 was ratified, and continues to carry contemporary relevance in the modern construction and application of the treaty provisions and language.

c. The Treaty Of 1866 Provides That Cherokee Freedmen, And Their Descendants, Shall Have All The Rights Of Native Cherokees.

The Treaty of 1866 came into existence as a result of the post-civil war reconciliation effort, and provided a means for Cherokee Nation to re-establish its government-to-government relations with the United States, following its ill-providential alliances with the Confederate

---

[14] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (finding the supremacy of treaty law to be one of the defining reasons Indian tribes enjoy sovereign existence apart from the authority of the states).

[15] Antoine v. Washington, 420 U.S. 194, 204 (1975) (holding post treaty era agreements, ratified by congress were supreme and binding on the states, even though the states were not a party to the agreement); *see also* Felix S. Cohen's Handbook of Federal Indian Law 270, 271(1982).

[16] Cherokee Const. of 1839, Art. III, Sec. 20.

States of America and long history of slavery.[17] The Treaty addressed a number of issues and provisos for readmitting Cherokee Nation back into the federal union, including amnesty for all war crimes committed by its citizens,[18] establishment of federal courts in the Indian territory,[19] the settlement of *"civilized friendly Indians"* within the Cherokee Nation,[20] and case-in-point to this dispute, the adoption of all freed slaves and free colored persons into the Cherokee Nation as tribal citizens. Article IX of the Treaty directly dealt with the tribal status of the Freedmen, and provides:

> The Cherokee nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. 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 are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees**: Provided, That owners of slaves so emancipated in the Cherokee nation shall never receive any compensation or pay for the slaves so emancipated.[21]

The rights vested by this Treaty language is plain and unambiguous. It requires no special construction. Cherokee Freedmen, and their descendants, were to receive all the rights of native Cherokees. *"All rights"* can only be read to mean all rights, including but not limited to, the right of citizenship, and the unabridged right of suffrage.

d. <u>The Treaty Of 1866 Diminished Cherokee Nation's Sovereignty In The Area Of Membership With Respect To Cherokee Freedmen.</u>

Cherokee Nation is a sovereign nation, yet the Rule of Law and responsible sovereign leadership requires us to acknowledge that our sovereignty is not without limits. While it is well-

---

[17] Cherokee Nation was one of the few slave-holding Indian tribes. By 1860 Cherokees owned approximately 2,511 slaves. Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914,* 106 Ancestory.com Incorporated (1999).

[18] Appendix "A," Art. II. All appendixes to this brief are found in the record as exhibits to the Cherokee Freedmen's Brief in Support of Motion for Partial Summary Judgment, filed on December 1, 2008 and are provided with this brief purely for the Court's convenience.

[19] Appendix "A," Art. VII.

[20] Appendix "A," Art. XV.

[21] Appendix "A," Article IX [*emphasis added*].

settled that Indian tribes have the power to determine their own "membership"[22] criteria, that power is also subject to federal supremacy and potential diminishment at the hands of the United States.[23] In the case of Cherokee sovereignty, we must concede that we have yielded up our ability to fully determine criteria of our membership by making it subject to the terms and conditions of the Treaty of 1866.[24] This premise finds support in one of the foremost leading authorities in Indian law, *Cohen's Handbook of Federal Indian Law,* which cites to the post-civil war treaties entered by the Five Tribes as a federal limitation on tribal sovereignty to determine membership.

> *Power to Determine Membership*
>
> Each tribe, as a distinct political community, has the power to determine its own tribal membership. A tribe may determine who are to be considered members by written law, custom, intertribal agreement, **or treaty with the United States**.
>
> Congress, of course, may legislate in the area of tribal membership, and has done so in a number of situations. In a few cases, Congress has specified the scheme of tribal membership. It has also specified what constitutes tribal membership in a particular tribe for the purpose of descent and distribution. **In addition, by treaties made in the wake of the Civil War, the federal government has required certain tribes that had adopted forms of slaveholding to treat former slaves as tribal members.**[25]

An objective reading of the 1866 Treaty reveals it specifically addressed tribal membership within the Cherokee Nation by requiring Cherokee Nation to incorporate Cherokee Freedmen into the tribe and secure to them *"all rights as native Cherokees."* As argued above, once treaties with the United States are ratified by Congress, they carry the full force and effect of federal legislation and become co-equal with constitutional law as the supreme law of the land. This principle was deemed self-evident by the 1896 Whitmire Court of Claims (discussed

---

[22] *See e.g.,* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906). For the purposes of this brief the terms "Membership" and "Citizenship" are used interchangeably, which has support in Cherokee law (*compare* - Cherokee Constitutions of 1976 and 2003).

[23] *See e.g.* United States v. Wheeler, 435 U.S. 313, 332 (1978) (finding tribes still possess those aspects of sovereignty not withdrawn by treaty or statute).

[24] This is not to suggest that Cherokee Nation has lost all ability to determine membership. To the contrary, Nation enjoys retained sovereignty to determine membership criteria, limited only by its treaty covenants made with the United States of America.

[25] Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, 212-113 (2005 ed.)[*internal citations omitted, emphasis added*] (*citing* the Treaty with the Seminole Nation, 1866, Art. 2, 14 Stat. 756 and Seminole Nation v. Norton, 223 F. Supp. 2d 122 (D.D.C. 2002).

at length in Section II) under its special congressional jurisdiction when it observed: *"it needs no argument to show that Cherokee Nation cannot violate its treaty provisions."*[26] Whitmire drew this conclusion one hundred and sixteen years ago, which to some might allow room for additional analysis given the stark shifts in federal Indian policy since that time. However, the more recent decision of the Court of Appeals for the District of Columbia Circuit in Vann v. Kempthorne defeats such notions, **and is dispositive** as to the diminishing effects of the 1866 Treaty on Cherokee Nation's sovereignty in the area of tribal membership. Vann involves a pending federal claim brought by descendants of Freedmen against the Bureau of Indian Affairs, the Cherokee Nation, and individual Cherokee officials for denial of citizenship rights guaranteed by the 1866 treaty and other federal law.[27] While Cherokee Nation was not an original party to this action, it sought to intervene for the purpose of asserting a motion to dismiss for failure to join a necessary party and sovereign immunity under Federal Rule of Civil Procedure Rule 19. The trial court allowed the intervention, but ultimately denied Cherokee Nation's claims of sovereign immunity finding that the Thirteenth Amendment, together with the Treaty of 1866, was sufficient to evidence a congressional waiver of Cherokee Nation's sovereign immunity.[28] Nation appealed.

In a decision issued on July 29, 2008, the D.C. Circuit Court of Appeals reversed the District Court's finding on sovereign immunity, but affirmed the Freedmen's standing to pursue claims against individual tribal officers for willful violation of their rights protected by the Thirteenth Amendment and the Treaty of 1866.[29] Cherokee Nation raised multiple arguments defending its authority to determine membership, and invoking the protection of sovereign immunity. One such argument asserted that *Ex parte Young* actions could not be pursued against the tribe in the area of tribal membership because it *"implicates special sovereignty interests."* In no uncertain terms the Vann Court wholly rejected this argument, finding the Treaty of 1866 had diminished the tribe's sovereignty, and left it powerless to discriminate against the Freedmen. The Court held:

> The Cherokee Nation contends that its special interests in controlling internal governance and defining tribal membership

---

[26] Whitmire v. Nation, 31 Ct. Cl. 140, 1896.
[27] The Vann case seeks redress of the disenfranchisement of the Freedmen in a federal forum based on the same common nucleus of operative facts underlying this class appeal.
[28] Vann v. Kempthorne, 467 F. Supp. 2d 56 (D.D.C. 2006), attached hereto as Appendix "B."
[29] Vann v. Kempthorne, 534 F.3d 741, 750 (D.C. Cir. 2008), attached hereto as Appendix "C."

> call for a similar result. We reject this argument. **The Cherokee Nation has no interest in protecting a sovereignty concern that has been taken away by the United States.** As the district court went to great lengths to explain, *Vann*, 267 F. Supp. 2d at 66-70, **the Thirteenth Amendment and the 1866 Treaty whittled away the tribe's sovereignty with regard to slavery and left it powerless to discriminate against the Freedmen on the basis of their status as former slaves. The tribe does not just lack a "special sovereignty interest" in discriminatory elections -- it lacks *any* sovereign interest in such behavior.**[30]

As a result, what was viewed as axiomatic by the Court of Claims in Whitmire 115 years ago has now been reaffirmed by the D.C. Circuit Court of Appeals in 2008 by finding the Treaty of 1866 was a clear diminishment of Cherokee sovereignty in the area of tribal membership. The Vann precedent is seminal to this controversy and its importance cannot be overstated. Under principles of federal supremacy discussed herein, and with the highest degree of respect to the Cherokee judiciary, your Freedmen Class asserts that the Vann precedent is mandatory authority relating to the Thirteenth Amendment, the Treaty of 1866, and the rights of Cherokee Freedmen. If the Cherokee judiciary acknowledges the supremacy of federal law, then responsible jurisprudence dictates that the trial court's finding that the Cherokee Amendment is void as a matter of law should be affirmed. Good jurisprudence also suggests that potential ramifications of usurping federal supremacy should be considered as well. Recent events in the Seminole Nation warn that overreaching assertions of sovereignty made in contravention of treaty covenants can lead to extreme responses by the United States. The Seminoles attempted to disenfranchise their freedmen citizens by amending its Constitution in 2002 in violation of the terms of its post-civil war treaty with the United States.[31] In response, the B.I.A. refused to recognize the validity of its elected officials, and suspended federal funding until *"legal"* elections (which included the freedmen) were conducted. The federal court for the D.C. District subsequently upheld the Secretary's harsh reactions.[32] In the Cherokee Freedmen plight, it is a matter of public record that sympathetic members of Congress have introduced extreme legislation to sever all government relations with the Cherokee Nation. On its face, this legislation would terminate all federal funding to the Cherokee Nation and suspend its right to

---

[30] Appendix "C" at 755-756.
[31] *See* Treaty with the Seminole Nation, 1866 Art. II, 14 Stat. 756.
[32] Seminole Nation v. Norton, 223 F. Supp 2d 122 (D.D.C. 2002).

conduct gaming operations.[33] While political battles must play out in political forums, it is reasonable to presume that the final resolution reached by the Cherokee judiciary in this appeal will not go unnoticed by federal policy makers, and perhaps even viewed as a litmus test for civil rights within in the Cherokee Nation.

e. The Cherokee Amendment Denies Rights And Privileges Guaranteed By The Treaty Of 1866, And Is Therefore Void As A Matter of Law.

On March 3, 2007 the Cherokee voters approved the following constitutional amendment, which is at the core of this dispute and appeal.

> Notwithstanding any provisions of the Cherokee Nation Constitution approved on October 2, 1975, and the Cherokee Nation Constitution ratified by the people on July 26, 2003, upon passage of this Amendment, citizens of the Cherokee Nation shall be only those originally enrolled on, or descendants of those enrolled on, the Final Rolls of the Cherokee Nation, commonly referred to as the Dawes Rolls, for those listed as Cherokees by blood, Delaware Cherokees pursuant to Article II of the Delaware Agreement dated the 8th day of May, 1867, and the Shawnee Cherokees pursuant to Article III of the Shawnee Agreement dated the 9th day of June, 1869.[34]

The plain language of the Amendment would appear to allow citizenship for enrollees and descendants of only two of the Dawes Rolls: 1) the Cherokee by Blood (which includes the Shawnee Cherokee); and 2), the Delaware Cherokee.[35] By deliberate omission, the Amendment denies citizenship for the remaining categories of Dawes enrollees, including the Cherokee Freedmen, Cherokee Freedmen–Minor Children, the Cherokee by Intermarriage,[36]and arguably the Cherokee by Blood–Minor Children.[37] While learned minds may debate the proper construction of the Amendment, it is undisputed that it has already brought about a mass disenrollment of the Cherokee Freedmen as a class, who were denied tribal services and rights as

---

[33] *See* H.R. 2824 (June 21, 2007), attached hereto as Appendix "D."

[34] *See* Joint Stipulations of the Parties, stipulation no. 6, attached hereto as Appendix "E."

[35] The Dawes Commission did not create a separate roll for the adopted Shawnee, but rather incorporated them into the Cherokee by Blood Roll.

[36] The Cherokee Peoples' ability to exclude the Cherokee by Intermarriage (a/k/a Intermarried Whites) is not in dispute, as their citizenship rights were solely a function of tribal law, and was never included in any treaty. provision with the United States. Daniel Red Bird v. U.S., a/k/a Cherokee Intermarriage Cases, 203 U.S. 76 (1906); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[37] The Amendment is strangely silent as to this entire category of Dawes enrollees. This topic is more fully covered in the equal protection section of this brief.

Cherokee citizens.[38] This denial of rights includes the right of citizenship and the right of suffrage, and in fact all other rights enjoyed by "native Cherokees," in direct contravention of the guarantees of the Treaty of 1866. Hence, the trial court's finding that the Amendment is void as a matter of law under the Treaty of 1866 should be affirmed.

II. THE FIVE TRIBES ACT NEITHER ABROGATED THE 1866 TREATY, NOR REPEALED THE CURTIS ACT'S DEFINITION OF TRIBAL CITIZENS.

Nation's primary theory to avoid the supremacy of federal law is to assert that the original Article IX treaty language of 1866 (and presumably the 1898 Curtis Act definition of tribal members) was repealed by implication by the Five Tribes Act of 1906. The gravamen of its argument is that Congress silently altered the treaty covenants, which unquestionably extended *"all rights of native Cherokees"* to Freedmen enrollees *"and their descendants"* in perpetuity, and through the slightest change in phraseology, limited those rights to only original enrollees, thereby divesting all descendants of original Freedmen enrollees. While this argument is creative, there is little in either legal or legislative history to support it.

It is well settled that repeal by implication is not favored by the courts, insomuch that a presumption exists against it, particularly in the area of Indian treaty rights. In a landmark case for the Five Tribes involving the Creek Nation, the D.C. District Court reviewed this presumption, and the level of proof required to overcome it:

> Such an intent cannot be presumed without a clear indication in the legislative history. . . . There must be some clear indication that Congress intended to alter an existing legal situation. Secondly, implied repeal is not a favored tenet of construction, and the court must try to give effect to earlier legislation which has not been expressly repealed. [Citations Omitted]. **Moreover, this general presumption against implied repeal applies with special force where the established legal rights of Indians under federal legislation or treaties is involved.**[39]

A systematic examination of the legal history of Article IX supports that Congress has never abrogated or repealed its original scope or purpose, but has only acted to clarify its original residency qualifiers, and to reaffirm its continuing validity.

---

[38] *See* Appendix "E," stipulation nos. 7-11.

[39] Harjo v. Kleppe, 420 F.Supp 1110, 1140 (D.C. Dist. 1976)[*Citations omitted, emphasis added*].

a. Article IX Was Interpreted by the Court of Claims under Special Jurisdiction of Congress, and Re-affirmed in the Curtis Act, Which Extended Citizenship Rights to All Original Enrollees, and Their Descendants Thereafter Born to Them.

The language in Article IX, while being very deliberate as to the scope of rights being conferred, was less clear on who would be entitled to claim those rights. Again, Article IX provides:

> 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 are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees.

Following the ratification of the Treaty, questions begin to arise about whether the residency requirement applied to freedmen, free colored persons, or both. Also, debate ensued on the exact date of the *"commencement of the rebellion"* and what date triggered the six-month return period. To address these, as well as other mounting disputes of enrollment and allotment, Congress conferred special jurisdiction to the Court of Claims to hear and resolve all claims of Cherokee Freedmen "*who are settled and located in the Cherokee Nation under the provisions and stipulations of the article nine of the aforesaid treaty of eighteen hundred and sixty-six . . ..*"[40] In 1896 the Court of Claims handed down its interpretation of Article IX in Whitmire v. Nation. The Court found:

> The court is of the opinion that the clauses in that article in these words, '*And are now residents therein, or who may return within six months, and their descendants*,' were intended, for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and consequently that they refer to both the freedmen and the free colored persons previously named in the article. That is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree. The Court is also of the opinion that this period of six months extends from the date of the *promulgation of the treaty*, August 11, 1866, and consequently did not expire until February 11, 1867.[41]

---

[40] Act of October 1, 1890 ch 182, 26 Stat. 636.
[41] Whitmire v. Nation, 31 Ct. Cl. 140, 1896.

Thus, the Court of Claims found that to be eligible for enrollment (and hence allotment) both Freedmen and free colored persons had to have been actual residents, or returned to Cherokee Nation to establish residency no later than February 11, 1867. The Whitmire Court made no reference to rights beyond enrollment, which stands to reason, as the issue was determining who was entitled to enrollment and sharing of tribal assets during allotment. The Court would indeed have had no cause to consider anything more than enrollment rights in 1896, as it was clearly understood that the Five Civilized Tribes would come to final dissolution and termination at Oklahoma statehood.

Two years later in 1898, following the official policy of allotment and assimilation created by the General Allotment Act, Congress passed the Curtis Act, which forced allotment on the Five Civilized Tribes. In Section 21 of the Act, Congress specifically incorporated by reference the Whitmire Court of Claims Decree, and directed the Dawes Commission to: "*[M]ake a roll of Cherokee Freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen-hundred and ninety-six.*"[42] In Section 21 of the Act, Congress clearly defined the scope, purpose and finality of the rolls to be created by the Dawes Commission:

> The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, **with their descendants, thereafter born to them**, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.[43]

This language established the federal standard for enrollment and allotment, and remains the core legal scheme for determining Cherokee citizenship to this very day. There can be no question that this congressional mandate reaffirmed the terms of the 1866 Treaty to include Freedmen Cherokee, and their descendants thereafter born to them. Nation can point to no subsequent congressional act that *expressly* repeals this language, because it simply does not exist. Consequently, Nation places its hopes in language found in the 1906 Five Tribes Act, which it asserts to be an implied repeal of both the above Curtis Act language, as well as a silent abrogation of a major term of the 1866 Treaty. As demonstrated below, Nation's argument is both attenuated in logic, and unsupported by fact or law.

---

[42] Act of June 28, 1898, 30 Stat. 495 § 21.
[43] *Id,* [*emphasis added*].

b. The Five Tribes Act Codified the Whitmire Ruling, but Neither Abrogated the Treaty Rights of Descendants, Nor Repealed the Curtis Act's Definition of Tribal Citizens.

Due to continuing disputes over Dawes Commission enrollment policies and practices, and the looming deadline of Oklahoma statehood, Congress passed the Act of April 26, 1906, commonly called the "Five Tribes Act," which attempted to address many remaining issues of enrollment and allotment, including finalizing the enrollment of Cherokee Freedmen. Section 3 of the Act took the judicial findings of the Whitmire Court and adopted them into federal law. Section 3 provides:

> The roll of the Cherokee Freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven . . .."[44]

A simple comparison of this language to the Whitmire Decree confirms that it adopted the Court's interpretation of Article IX to make the residency requirement applicable to all Article IX applicants for enrollment on the Dawes Rolls, including Freedmen, free colored persons, or the descendants of either. Contrary to Nation's assertions, this section only clarified the residency prerequisites for enrollment in accord with Whitmire, but did nothing to modify or repeal the definition of tribal citizens established by Section 21 of the Curtis Act. The next section will discuss how, ironically, the language was actually inserted at the request of Nation for the purpose of thwarting the Commission's practice of approving constructive residency, and was never intended to diminish the rights of Freedmen descendants.

c. The Modified Language Was Included at Nations' Request to Prevent the Dawes Commission from Enrolling Freedmen Based on Constructive Residency, and Not to Disenfranchise Descendants of Freedmen Enrollees.

Five years after the passage of the Five Tribes Act, in yet another chapter of the continuing enrollment disputes before the Court of Claims brought by trustee Whitmire, the Court examined the language in Section 3 relied on by Nation, and revealed its original purpose and legislative intent:

[44] Act of April 26, 1906, 34 Stat. 137 §3.

> The language of the court's decree of February 3, 1896, had been such as to raise the question whether freedmen, as well as free colored persons, were subject to limitation of residence or return, and it also left in doubt whether the six months expired January 19, 1867, or February 11, 1867. These doubts had been resolved by the language of the decree of February 18, 1896, and the language of this section in the act of April 26, 1906, is almost precisely the same with that of the decree. **In his argument of this case counsel for the Cherokee Nation stated that he had drawn this section and procured it to be included in the act, and that his reason for this was that the Dawes Commission was placing, or was about to place, on the roll of freedmen certain persons who were not actual residents of, or who did not actually return to, the nation within the time prescribed by the treaty, because for various reasons they were considered by the Dawes Commission to have been constructive residents or to have constructively returned.**[45]

Nation's attorney in this 1911 Whitmire case was none other than W.W. Hastings, who was also Nation's legal counsel in the original 1896 Whitmire case. Hastings proposed the specific language in the 1906 Act on behalf of Nation because the Dawes Commission apparently intended to approve a number of Article IX applications on evidence of constructive rather than actual residency, to the disdain of Cherokee Nation. Thus, Congress' true intent in adding the modified language was to appease Nation in its concerns over liberal enrollment practices of the Dawes Commission, but had no apparent intent of disturbing a major provision of the Treaty that it had consistently enforced since 1866. Indeed, Nation can point to nothing surrounding the passage of the Five Tribes Act in 1906 to show a legislative intent as drastic as cutting off the rights of all Freedmen descendants, who were expressly included in Article IX, affirmed by the 1896 Whitmire Decree, and re-affirmed by Congress in the Curtis Act.

d. Nation's Arguments on the Garfield Case are Subterfuge, as it Actually Confirmed the Continuing Validity of Article IX in Complete Harmony with the Curtis Act Definition of Tribal Citizens.

Nation's arguments on Garfield v United States ex rel. Lowe, 34 App D.C. 70 WL 21538 (App. D.C.)(1909) in support of its *pro tanto* repealer theory are misleading to the point of

[45] Whitmire v. Nation, 46 Ct. Cl. 227 (1911)[*emphasis added*], *rev'd on other grounds* Cherokee Nation v. Whitmire, 223 U.S. 108, 117 (1912) (*finding* Congress had accepted the 1896 Decree as the correct interpretation of Article IX of the Treaty as to the rights of Freedmen).

subterfuge. Garfield was a post-enrollment case brought after the final closing of the rolls by descendants of one Mary Robbins [a/k/a Mary Rogers], a slave of a Cherokee citizen at the beginning of the civil war, but who left and later returned to establish a residence in the Nation. The issue before the court was whether Mary Robbins satisfied the residency requirements for enrollment.[46] The Court found no abuse of discretion by the Secretary and affirmed the disenrollment, finding:

> The right of relators to enrollment as citizens of the Cherokee Nation was dependant on the interpretation by the Secretary of article 9 of the Cherokee treaty of August 11th 1866 . . ..
>
> The relators were enrolled upon the understanding that their ancestor, Mary Rogers, returned to the Cherokee Nation within six months from August 11th, 1866. The rehearing resulted in the finding that she did not return within that time, and, therefore, that relators were not entitled to enrollment.[47]

Thus, the Court found and affirmed that claimants' ancestor, Mary Rogers, did not return in time to the Cherokee Nation to establish a bona fide residence, and therefore her descendants were not entitled to citizenship vis-a-vis her original enrollment. This fact is key, as the Court did not rule against the claimants because they were Freedmen descendents, as Nation's arguments wrongly imply, but rather because their original enrollee ancestor did not satisfy the residency requirements of Article IX, as modified in Section 3 of the Five Tribes Act. The Court discussed Section 3 and stated:

> If any doubt theretofore existed as to the proper construction to be given article 9 of said treaty of August 11th, 1866, that doubt was dissipated by the language of sec. 3 of the above act of April 26th, 1906, for that language constitutes a legislative interpretation of, and supersedes *pro tanto*, the prior treaty.[48]

The Court reviewed the history of Article IX and rightly concluded that the 1906 Act superseded the original vague treaty language on residency requirements, and replaced it with the Whitmire interpretation once and for all.

---

[46] Originally the Commission had found she had, and granted enrollment before passage of the 1906 Act, but the Secretary later reversed the enrollment and removed her name, and thus disqualified her (and thus her descendants) from citizenship.

[47] *Id.* at *3.

[48] *Id.* at *4.

Garfield was a post-enrollment dispute brought by descendants of an original enrollee whose name had been disenrolled by the Secretary after the rolls had been finalized. It involved no issues or assertions of Congress repealing prior law, cutting off the rights of descendants, or abrogating a major treaty covenant that Congress, the Supreme Court, and the Court of Claims had spent forty-five years re-affirming and enforcing. Nation's arguments rely on selective omission and inference to misstate the true factual context of the case in a bold effort to persuade the Court through subterfuge.

e. Over 100 Years of Judicial, Executive and Legislative Interpretation and Treatment Confirm the Continuing Validity of the Rights Guaranteed by Article IX of the 1866 Treaty as Extending to Freemen and Their Descendants.

Over the last 106 years no federal authority has ever found or even suggested any abrogation of Article IX, or any repeal of the definition of tribal citizens set forth in Section 21 of the Curtis Act. To the contrary, federal authorities have repeatedly re-affirmed the continuing validity of rights granted in Article IX.

In 1906, only four months after the passage of the Five Tribes Act, the United States Supreme Court relied upon the 1866 Treaty as vesting property rights in the Cherokee Delaware, Shawnee and Cherokee Freedmen, but not the intermarried whites, and reaffirmed the rights of descendants. The Court stated: *"The treaty of 1866, between the United States and the Cherokee Nation, provided as to the former slaves, that they should be free and they, and their descendants shall have all the rights of native Cherokees."*[49]

In 1909, as argued above, the D.C. District Court of Appeals in Garfield reaffirmed Article IX, as modified only by Section 3 of the Five Tribes Act of 1906. In 1911, as argued above, the Whitmire Court of Claims explained the legislative intent of the modified language was to require actual residency, and reject any type of constructive residency. The 1911 Whitmire case was appealed to the U.S. Supreme Court, who reversed it on other grounds, but in so doing found Congress had accepted the 1896 Decree as the correct interpretation of Article IX of the Treaty as to the rights of Freedmen.[50]

---

[49] Red Bird v. U.S., 203 U.S. 76 (1906).
[50] Cherokee Nation v. Whitmire, 223 U.S. 108, 117 (1912).

In 1962 Cherokee Freedmen (and their descendents) were included in per capita payments from the sale of tribal lands at the instruction of Congress.[51] In 1967, the Court of Claims again ruled that Freedmen were entitled to receive payments from the Cherokee Nation judgment fund as descendants of citizens listed on the Dawes Commission Rolls.[52] In 1971 the Court of Claims again reaffirmed the rights of Cherokee Freedmen *"and their descendants"* as created by Article IX of the 1866 Treaty.[53]

More recently, in 2006, our own Cherokee high court, had this to say about the continuing validity of the 1966 Treaty in the Allen case: *"If the 1866 Treaty is enforceable for the ultimate inclusion of the Shawnee and Delaware it must be enforceable as to the Freedmen."*[54] Finally, in 2008, as argued in section I, the D.C. Circuit Court of Appeals found that the 1866 Treaty *"whittled away the tribe's sovereignty with regard to slavery and left it powerless to discriminate against the Freedmen on the basis of their status as former slaves."*[55]

Repeatedly, throughout history since its ratification, federal courts and Congress have consistently upheld the rights of Freedmen under the Treaty of 1866. Nation has no evidence to support that Congress intended to limit citizenship to only original enrollees in 1906 and cut off all future generations. Such a premise flies in the face of over 145 years of federal policy and precedent, logically runs afoul of the original treaty purpose of providing a permanent home for the Freedmen, and asks this Court to interpret a federal statute contrary to law, treaty, and the findings of Vann relating to the 13th Amendment of the U.S. Constitution.

III. THE ALLEN DECISION'S NONESSENTIAL EXPRESSIONS ARE ADVISORY DICTA, AND NOT ENTITLED TO *STARE DECISIS*.

a. The Allen Case Is Distinguishable Both in Law and Fact, and Therefore Not Binding on the Court in this Cause.

In Proposition 3 of its brief, Nation asserts the recent case of Allen v. Cherokee Nation, JAT 04-09, is controlling under *stare decisis*.[56] With all due respect to Justice Leeds and the Allen court, while we agree with its ultimate outcome, we must respectfully disagree that it is

---

[51] Act of October 9, 1962, Pub. L. No. 87-775.
[52] Cherokee Nation v. U.S., 180 Ct. Cl. 181 (1967)
[53] Cherokee Freedmen's Asson. v. U.S., 195 Ct. Cl. 39 1971, WL 17825.
[54] Allen v. Cherokee Nation, J.A.T.-04-09 pg. 18, (2006), attached hereto as Appendix "F."
[55] *Supra* Note 30.
[56] Meaning: "stand by things decided" and that like facts will receive like treatment in Court. The doctrine also dictates that courts should adopt the reasoning of earlier judicial decisions if the same point arises again. 21 C.J.S. Torts § 193.

entitled to *stare decisis* in this cause. For *stare decisis* to attach, a case must be substantially similar in both law and fact. Analysis and pronouncement made in a case can only be taken within the context of the law and facts being analyzed. Our U.S. Supreme Court recognized the principle early in our Nation's history in the landmark case of Marbury v. Madison, where the Court stated: *"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit . . .. "*[57]

The Allen case is factually distinguishable in several important ways. First, and foremost, Allen involved the constitutionality of a tribal statute, and not the validity of a constitutional amendment. Second, Allen involved non-citizens who were denied citizenship, rather than tribal citizen whom the Nation is attempting to disenfranchise. Further, the legal issues in Allen are dissimilar. Allen was a constitutional construction case under the 1975 Constitution, whereas the present case will be decided under the 2003 Constitution against the backdrop of federal treaty law, federal constitutional law and federal supremacy. The sole issue in Allen was the constitutionality of a tribal statute, whereas this case challenges the validity of a constitutional amendment. The significance of this cannot be understated. This case will likely be decided on legal precedents that the Allen court either had no reason to analyze or did not exist. Case in point: Allen was decided in March of 2006, prior to either of the federal precedents in Vann argued throughout this brief. The Allen court did not need to look any further than a judicial construction of the 1975 Cherokee Constitution to support its ruling. In contrast, the present case will require the Cherokee judiciary, perhaps for the first time in its modern legal history, to examine the effects of federal treaty law in Cherokee jurisprudence in contrast to the Peoples' power to amend their organic document. Finally, this case directly involves issues of federal supremacy, the Thirteenth amendment, the 1866 Treaty being a congressional tool of enforcement under the Thirteenth amendment, and equal protection arguments both under the Equal Protection Clause of the 2003 Cherokee Constitution, and the Indian Civil Rights Act. None of these civil rights issues were raised in the Allen case.

---

[57] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

b. The Language from Allen Relied by Nation Can Only Be Considered Dicta, and Therefore Not Entitled to *Stare Decisis*.

Nation would have this landmark case summarily decided based on a few statements appearing in the Allen opinion generalizing about the Cherokee citizenry having the ultimate authority to define tribal citizenship. Such nonessential expressions of opinion are not entitled to *stare decisis* under American jurisprudence.

> An opinion is not necessarily limited to issues essential to the decision but may also include expressions of opinion which are not necessary to support the decision reached by the court; such nonessential expressions are known as "dicta." Mere dicta are not binding under the doctrine of *stare decisis*.[58]

As stated above, the sole issue in the Allen case was the constitutionality of the specific tribal registration statute requiring lineage to Cherokee ancestry on the by-blood rolls. The issues in Allen did not necessitate any analysis of the People's authority to define Cherokee citizenship, nor did it mandate a discussion of the appropriate procedures to be followed to change the legal definition of Cherokee citizenship. Justice Leeds included these nonessential expressions apparently as a matter of personal philosophy, as it clearly had no bearing on the Court's analysis of constitutionality of the statute in question. Thus, the statements relied upon by Nation can only be considered nonessential expressions amounting to dicta that is not binding under the doctrine of *stare decisis*.

c. The Dictum in The Allen Decision Is Also Prospective and Advisory, Which Is Not Permitted under the Cherokee Jurisprudence.

While it could be said that the modern Cherokee judiciary is relatively young, it has nevertheless adopted certain fundamental concepts of justiciability, including the doctrines of standing, judicial ripeness, and a prohibition against issuing advisory opinions. In the case of Bryant v. Cherokee Nation Election Commission, JAT 98-11, plaintiff, Jessup Bryant sought judicial review of thirty-two questions regarding alleged inconsistencies in or requiring interpretations of provisions found in Title 26 of the Cherokee Nation Code. In dismissing the petition, Chief Justice Ralph Keen adopted a judicial prohibition on advisory opinions:

> [T]he Court finds that, in this cause, there are no disagreements arising under any provision of the Cherokee Constitution or any

[58] 20 Am. Jur. 2d Courts § 36.

> Enactment of Council, nor is there any alleged injury. In short, it appears that Plaintiff is asking this Court for an advisory opinion, which under our Constitution is not allowed.

Again, the issue in Allen was whether the tribal registration statute was constitutional under the 1975 Constitution. There was no issues regarding who had the ultimate authority to define tribal citizenship, or what would be required should the Cherokee people wish to re-define Cherokee citizenship. These nonessential expressions by Justice Leeds are not only dictum, but because of their prospective nature must also be characterized as advisory, which under *stare decisis* and the *Bryant* case, is not allowed in Cherokee jurisprudence.

For all these myriad reasons the Allen decision is not binding precedent in this matter, and is not *stare decisis* to the instant cause as alleged by Nation.

IV. THE CHEROKEE AMENDMENT IS VOID FOR VIOLATING THE THIRTEENTH AMENDMENT'S PROHIBITION ON SLAVERY AND BADGES AND INCIDENTS OF SLAVERY.

a. Slavery, Together With Acts Of Discrimination Determined To Be Badges And Incidents Of Slavery, Are Prohibited By The Thirteenth Amendment.

Section I of the Thirteenth Amendment provides that *"[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction."*[59] Section 2 of the Amendment provides that *"Congress shall have the power to enforce this article by appropriate legislation."*[60] While other Amendments are limited in scope to only binding state or federal action, the Thirteenth Amendment applies to all actors within the United States. The U.S. Supreme Court has held the Thirteenth Amendment *"is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."*[61] Accordingly, the Thirteenth Amendment's eradication of slavery and *"badges and incidents of slavery"* has been held to reach non-state actors, and private individuals.[62] Given its broad scope and absolute prohibition, it is

---

[59] U.S. Const. Amend. XIII (1865).
[60] *Id.*
[61] Civil Rights Cases, 109 U.S. 3,20 (1883).
[62] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-39 (1968) (affirming Congress' ability to ban discrimination by individuals in real estate sales under the Thirteenth Amendment); Runyon v. McCrary, 427 U.S. 160,175 (1976) (upholding Congressional ban on discrimination in private contracting pursuant to the Thirteenth Amendment).

self-evident that the Thirteenth Amendment applies equally to Indian tribes.[63] Indeed, even *Cohen's Handbook on Federal Indian Law* opines that any other interpretation of the Amendment would be *"inconceivable."*[64]

b. The Treaty Of 1866 Is A Congressional Tool Of Enforcement Of The Thirteenth Amendment.

The Thirteenth Amendment was constructed to authorize Congress *"to legislate not merely against slavery itself, but against all the badges and relics of a slave system."*[65] The Thirteenth Amendment was ratified on December 18, 1865.[66] Less than eight months later on July 19, the 1866 Treaty was concluded. In this same year the United States entered into reconstruction treaties with all of the Five Civilized Tribes in Indian Territory who had engaged in slavery. One common theme and purpose of this treaty-making was to require the abolition of slavery, and the bestowal of tribal rights on former slaves of tribal members.[67] As one federal court has observed:

> [A]n examination of the treaties made immediately after the close of the Civil War with the Tribes who had entered into treaties with the Confederacy, unmistakably discloses that the predominant purpose and intent of the government as to pre-existing slavery was to protect and care for the Freedmen.[68]

It was within this historical context that Congress ratified the Treaty of 1866 with the Cherokees which granted the Freedmen *"all rights of native Cherokees,"*[69]guaranteeing them that laws *"shall be uniform throughout said Nation,"*[70] and provided that *"no laws shall be enacted inconsistent with the Constitution of the United States, or laws of Congress, or existing treaty stipulations with the United States."*[71] The 1866 Treaty not only incorporated the principles of the Thirteenth Amendment and its ban on slavery and badges and incidents of slavery, but also

---

[63] *See, e.g.,* United States v. Choctaw Nation, 193 U.S. 115,124 (1904) (acknowledging that the Emancipation Proclamation and the Thirteenth Amendment ended slavery in Indian nations); In re: Sah Quah, 31 F. 327 (D. Alaska 1886) (ordering the release of an Indian held in slavery by an Indian according to tribal custom, based on the Thirteenth Amendment, even though neither were U.S. citizens at the time.)

[64] *Cohens* (2005 Edition) at 918.

[65] Akhil Reed Amar, *America's Constitution*: A Biography 362 (2006).

[66] Jones, 392 U.S. 409, 431.

[67] *See* Appendix "A," Arts. IV, V, VI and IX; Treaty with the Creeks, 1866, Art. II, 14 Stat. 785; Treaty with the Choctaws and Chickasaws, 1866, Arts. II, IV, 14 Stat. 769; Treaty with the Seminoles, 1866, Art. II, 14 Stat. 755.

[68] Seminole Nation v. United States, 78 Ct.Cl. 455, 466 (Ct.Cl. 1993) (holding that Seminole Freedmen were entitled to full membership in the Tribe based upon the Treaty with the Seminoles of 1866).

[69] Appendix "A," Art. IX.

[70] *Id*, at Art VI.

[71] *Id* at Art. XII

made these principles a condition of the Cherokee Nation's readmission to the Union, and the re-establishment of its government-to-government relationship with the United States.[72]

c. The Cherokee Amendment Is A Badge And Incident Of Slavery Which Violates The Thirteenth Amendment vis-à-vis The Treaty of 1866.

The Cherokee Amendment clearly denies fundamental rights and privileges guaranteed by the Thirteenth Amendment vis-à-vis the Treaty of 1866. The Cherokee Amendment disenrolls Freedmen as a class of citizens, thereby denying them the right of suffrage as well as their citizenship rights guaranteed to all native Cherokees. Although the right to vote is not explicitly cited in the Thirteenth Amendment, it is nevertheless a fundamental right that cannot be denied on account of race.[73] History teaches that the right to vote was repeatedly denied to former slaves and their descendants in the decades following emancipation, through the use of poll taxes, literacy tests, and outright intimidation.[74] The Cherokee Amendment does not deny other Non-Cherokee tribal members the right to vote, only the descendants of African Americans. The denial of the right to vote based upon one's race is nothing, if not a *"badge and incident of slavery."*[75]

Following this line of reasoning, the district court in Vann concluded: *"Denying the Freedmen the right to vote in tribal elections violates the Thirteenth Amendment and the 1866 Treaty, so the Cherokee Nation cannot claim tribal sovereign immunity against a suit complaining of such a badge and incident of slavery."*[76] While reversing the district court's decision on sovereign immunity, the Circuit Court of Appeals affirmed its rationale relating to a violation of the Thirteenth Amendment, drawing an even stronger conclusion:

---

[72] The Cherokee Nation was regarded as having forfeited its previous treaty rights *"but the United States was willing to renew relations with them stipulating among other things that the institution of slavery which had existed among several of the Tribes, must forthwith be abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for the incorporation into the tribes on an equal footing with the original members, or suitably provided for."* United States ex rel Lowe v. Fisher, 223 U.S. 95, 98 (1912).

[73] Wesberry v. Sanders, 376 U.S. 1,17 (1964)(*"other rights, even the most basic, are illusory if the right to vote is undermined"*).

[74] South Carolina v. Katzenbach, 383 U.S. 301,311 note 9 (1966).

[75] Vann Appendix "B," at 70, *citing* 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, 146 (*"Although voting is not a right under the Thirteenth Amendment, it is a civil right that cannot be denied on account of race. Because denial of civil rights that are enjoyed by other citizens on account of race is a badge and incident of slavery, it follows that denial of the right to vote in this case is also a badge and incident of slavery."*); This analysis is also supported by the fact that Freedmen are not protected by the Fourteenth or Fifteenth Amendments under which voting rights are normally enforced, placing additional importance of the Thirteenth Amendment and the Treaty of 1866.

[76] Vann, Appendix "B" at 69.

> [T]he Thirteenth Amendment and the 1866 Treaty whittled away the tribe's sovereignty with regard to slavery and left it powerless to discriminate against the Freedmen on the basis of their status as former slaves. The tribe does not just lack a "special sovereignty interest" in discriminatory elections -- it lacks *any* sovereign interest in such behavior.[77]

Thus, both the Vann Courts confirm that the Cherokee Amendment is a badge and incident of slavery which violates the Thirteenth Amendment. Consequently, the 1866 Treaty must be viewed as a tool of congressional enforcement by Congress under the Thirteenth Amendment, making its terms and conditions protected by the Thirteenth Amendment. These fundamental rights are clearly abridged, violated and denied by the Cherokee Amendment. Accordingly, said Amendment can only be considered void as a badge and incident of slavery prohibited by the Thirteenth Amendment of the United States of Constitution.

V. THE AMENDMENT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE CHEROKEE NATION CONSTITUTION AS INVIDIOUS RACE-BASED DISCRIMINATION WHICH DENIES TWO DISTINCT CLASSES OF CITIZENS THE EQUAL PROTECTION OF CHEROKEE LAW.

Since the reorganization of the Cherokee Nation government in 1976, our laws have consistently recognized and protected the civil rights of our citizens by guaranteeing them equal protection of the law. The 1976 Constitution incorporated the protections guaranteed by the Indian Civil Rights Act of 1968 (I.C.R.A.).[78] Section 1302(8) of the I.C.R.A. provides: *"No Indian tribe in exercising powers of self government shall: (8) deny to any person within its jurisdiction the equal protection of its laws."*[79] The 2003 Cherokee Constitution does not incorporate by reference federal law, but rather makes a direct guarantee of equal protection of our laws in Article III, Bill of Rights:

> The People of the Cherokee Nation shall have and do affirm the following rights:
>
> Section 1. The judicial process of the Cherokee Nation shall be open to every person and entity within the jurisdiction of the Cherokee Nation. Speedy and certain remedy and equal protection shall be afforded under the laws of the Cherokee Nation.[80]

---

[77] Vann, Appendix "C" at 755.
[78] *See* Cherokee Const. 1976 Art. II, Sec. 1 Bill of Rights *"The appropriate protections guaranteed by the Indian Civil Rights Act of 1968 shall apply to all members of the Cherokee Nation."*
[79] 25 U.S.C.A. § 1302(8).
[80] Cherokee Const. 2003 Art III, Sec. 1.

This constitutional right of equal protection guarantees that no citizen, or class of citizens, shall be denied the same protection of the laws which is enjoyed by other citizens or other classes in like circumstances in their lives, liberty, and in the pursuit of happiness.[81] Classifications created by governmental action based on race are the paradigmatic example of a suspect classification under equal protection analysis, and must be strictly scrutinized by the Courts.[82] Laws which facially discriminate against race-based classes are considered invidious violations of equal protection.[83] Similarly, laws which appear neutral on their face, but exhibit a discriminatory intent or purpose in their application also violate equal protection.[84]

Furthermore, equal protection encompasses all aspects and sources of the law, whether it be legislative, judicial, or constitutional amendment. Constitutional amendments that selectively seek to destroy fundamental core freedoms, rights and liberties guaranteed by the document as a whole are themselves unconstitutional.[85] The Peoples' power to amend their organic document cannot be used as a subterfuge for discrimination.[86] An objective analysis of the application of the March 3, 2007 Amendment confirms that it engenders invidious race-based discrimination which denies at least two classes of Cherokee citizens the equal protection of Cherokee law.

a. The Amendment Denies Cherokee Freedmen With No Cherokee Heritage Equal Protection Of The Law.

It is undisputed that the Amendment operates to exclude from citizenship the class of Cherokee Citizens known as the Cherokee Freedmen. The Cherokee Freedmen Roll was a product of racial segregation initiated by the Dawes Commission, predicated upon the freed slaves being of African American descent. Consequently, by definition, any Cherokee law which singles out descendants of the Cherokee Freedmen enrollees can only be creating a race-based classification, as the Roll itself was predicated on race. Unquestionably, the Amendment operates to disenroll and disenfranchise Freedmen of African American descent based solely on their classification of being African American. Cherokee Nation does not deny this, but rather

---

[81] Black Law Dictionary, 6th ed. (1990) Equal Protection of the Law.
[82] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973).
[83] Strauder v. West Virginia, 100. U.S. 303 (1880). Invidious being arbitrary, irrational and not related to any legitimate purpose - Black Law Dictionary, 6th ed. (1990) Invidious Discrimination.
[84] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[85] Charles A. Kelbley, *Are There Limits To Constitutional Change? Rawls On Comprehensive Doctrines, Unconstitutional Amendments, And The Basis Of Equality,* 72 Fordham L. Rev. 1487 (2004).
[86] *See e.g.* Romer v. Evans, 517 U.S. 620 (1996) (striking down as a violation of equal protection a Colorado constitutional amendment that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination.)

has asserted it has special sovereignty interest in defining its own membership which outweighs the discrimination. However, the D.C. Circuit Court of Appeals has already determined that Cherokee Nation *"does not just lack a special sovereignty interest in discriminatory elections -- it lacks any sovereign interest in such behavior."* [87]

b. <u>The Amendment Denies Cherokee Freedmen With Unrecorded Cherokee Heritage Equal Protection Of The Law.</u>

The invidious effect of the Amendment with respect to Freedmen solely of African American descent is apparent. What is less apparent, but nonetheless historically accurate and fully verifiable is that Cherokee Freedmen include a <u>major</u> sub-class made up of descendants of original Freedmen enrollees who possessed both African American and Cherokee heritage. This sub-class was the result of racial and inconsistent enrollment practices of the Dawes Commission, which engendered at least three discriminatory policies: 1) application of the so-called *"One Drop Rule,"* which forced any citizen who either admitted to, or physically appeared to possess even *"one drop"* of African American blood to be enrolled as a Freedmen; 2) refusing to record or even consider evidence of Cherokee blood quantum presented by mixed heritage Cherokee-Freedmen who were forced to enroll on the Freedmen Roll under the One Drop Rule; and 3), allowing other mixed heritage Cherokee/Freedmen to enroll as Cherokee by blood.

The existence and effects of these discriminatory policies are well documented by legal scholars and historians alike. Case-in-point, in his scholarly article: *"A Race or a Nation? Cherokee National Identity and the Status of the Freedmen's Descendents"* Professor S. Alan Ray pointedly writes:

> The utility of "Cherokee blood" as a marker for citizenship is limited by the inaccuracy of the Dawes Rolls and by the Rolls' reliance on nineteenth-century race science. The Rolls' inaccuracy is especially evident in three areas.
>
> First, though purporting to separately identify Cherokees by blood and Freedmen, many on the Freedmen's roll descended from persons with "Indian blood." Despite the best efforts of the Nation's laws to prevent miscegenation, persons of African and Cherokee descents did marry and have children . . .. **Indeed, in an anthropological study conducted between 1926 and 1928, more**

[87] <u>Vann,</u> Appendix "C" at 755.

than 25 percent of the African American population reported having Native American ancestry.[88]

Yet, the Freedmen's roll systematically excluded evidence of Native American ancestry, and agents refused to record it, even when proffers of proof of "Indian blood" were made by enrollees themselves. For example, Mary Walker, a woman of African-Cherokee heritage, attempted to enroll as a Cherokee citizen "by blood," after reciting her Cherokee ancestry to an agent of the Dawes Commission. She was refused by a second agent present, who insisted she be enrolled as a Freedman's descendant, saying, *"She ain't no Cherokee. She's a nigger. That woman is a nigger and you are going to put her down as a nigger."* If not excluding enrollees from the "blood" rolls based on their appearance alone, Dawes agents channeled enrollees like Mary Walker onto the Freedmen's roll by applying the rule of hypodescent, the so-called "one drop" rule, devised by Euroamerican slave owners, whereby "a person who has one drop of Black blood is Black," and therefore ineligible for inclusion on the Cherokee "blood" rolls. Because the Freedmen's roll systematically omits proof of Cherokee ancestry where such ancestry could be established by independent evidence, and because there is no other Dawes roll on which such ancestry can appear, the Dawes Rolls are incomplete and therefore cannot serve as an accurate resource for identifying all Cherokees by "blood."

Second, the Dawes Rolls elided the Cherokee ancestry of African-descended persons by accepting only proof of Cherokee "blood" through the applicant's mother. Although, as we have seen, the Anti-Amalgamation Act penalized intermarriage of both male and female Cherokee citizens with "persons of color," and imposed capital punishment for the rape of Cherokee women by men of any race, it is unknown, as historian Yarbrough states, whether Cherokee statutory law even penalized sexual intercourse, consensual or non-consensual, between Cherokee men and African-descended women. Given the unequal positions of power between Cherokee masters and their African slaves, and the disincentives created by Cherokee law for intermarriage between [B]lack men and Cherokee women, or rape of Cherokee women by [B]lack men, it is reasonable to expect that the typical descendant of otherwise prohibited interracial unions would be African-descended through the mother's line. **The Dawes registration system, based on its own "amalgamation" of Indian blood and matrilineal preference-making, shunted descendants of Cherokee men and African women onto the Freedmen's roll.**

---

[88] One local genealogist working closely with Freedmen descendants of the Five Civilized Tribes recently estimated as many as 85% can trace their ancestry to some Indian heritage - Ron Graham, *"The Freedmen Saga"*, Tulsa College of Law Lecture Series, February 9, 2011.

> Because this "amalgamation" of race and matrilinearity resulted in reducing the roster of persons otherwise eligible for inclusion on the Cherokee "blood" rolls, the Dawes Rolls are incomplete and therefore cannot serve as an accurate resource for identifying all Cherokees by "blood."[89]

As a consequence of the flawed enrollment policies of the Dawes Commission, the Amendment denies Cherokee Freedmen with Cherokee heritage the equal protection of the law by disenfranchising them for being classified as Negro by the Dawes Commission under the One Drop Rule,[90] despite their ability to document their Cherokee ancestry by clear and convincing evidence even to this day,[91] while other mixed heritage Cherokee/Freedmen citizens whose ancestors were allowed to enroll as Cherokee by blood continue to enjoy citizenship.

c. <u>The Amendment Is Invidious Race-Based Discrimination.</u>

The Amendment constitutes invidious discrimination because it operates to disenfranchise <u>only</u> citizens of African American descent whose ancestors were required to enroll as Freedmen, while continuing to allow citizenship to Cherokee by blood, Cherokee by blood with African American descent,[92] non-Cherokee Indians (the Delaware and Shawnee), and a miscellaneous class of non-Indians.[93] The following chart compares the different classifications of Cherokee citizens both before and after the Amendment, to illustrate how the Amendment discriminates by race.

---

[89] Alan Ray, *A RACE OR A NATION? CHEROKEE NATIONAL IDENTITY AND THE STATUS OF THE FREEDMEN'S DESCENDENTS* 12 Mich. J. Race & L. 387 attached hereto as Appendix "G" [*internal footnotes omitted*].

[90] For additional discussion of the Dawes Commission's use of the "one drop" rule *see* Lydia Edwards, *PROTECTING BLACK TRIBAL MEMBERS: IS THE THIRTEENTH AMENDMENT THE LINCHPIN TO SECURING EQUAL RIGHTS WITHIN INDIAN COUNTRY?* 8 Berkeley L. Afr.-Am. L. & Pol'y 122, 127 (2006); Terrion 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, 245-246 (2004);.

[91] A number of your class representatives possess extensive documentary evidence of their Cherokee ancestry, and take extreme pride in their Cherokee heritage.

[92] In an attempt to defray accusations of racial discrimination, Cherokee Nation has publicized the fact that some Cherokee with mixed blood African American ancestry were allowed to enroll as Cherokees by blood. Attached as Appendix "H" is a flier prepared by Nation promoting this fact, but omitting the larger fact that most mixed-blood Freedmen were forced to enroll on the Freedmen Roll.

[93] Non-Indian adopted whites were enrolled on the Cherokee By Blood rolls, designated as "AW" in the blood quantum column. While this would appear counterintuitive in creating a Indian Nation of "Indians" as Nation has publicized, the language of the Amendment clearly includes all those listed on the Cherokee by blood Rolls (and their descendants).

CITIZENSHIP PRIOR TO AMENDMENT	CITIZENSHIP AFTER AMENDMENT AS APPLIED
Cherokees "By Blood"	Cherokees "By Blood"
Cherokee "By Blood" – Minor Children	Cherokee "By Blood" – Minor Children (in apparent contravention of the Amendment)
Cherokee with mixed Freedmen heritage permitted to enroll on the "By Blood" Rolls	Cherokee with mixed Freedmen heritage permitted to enroll on the "By Blood" Rolls
Adopted Delaware (regardless of Cherokee heritage)	Adopted Delaware (regardless of Cherokee heritage)
Adopted Shawnee (regardless of Cherokee heritage)	Adopted Shawnee (regardless of Cherokee heritage)
Miscellaneous adopted whites appearing on the "By Blood" Rolls	Miscellaneous adopted whites appearing on the "By Blood" Rolls
Cherokee Freedmen of African American heritage	**Disenfranchised**
Cherokee Freedmen with mixed African American and Cherokee heritage, <u>not</u> permitted to enroll on the "By Blood" Rolls.	**Disenfranchised**

Thus, only descendants of enrollees of the Cherokee Freedmen Rolls, (both the adult roll and the minor roll), are disenfranchised. However, Nation has made no efforts to disenroll descendants of the Cherokee by Blood-Minor Children Roll, although this roll is clearly omitted from the Amendment. This inexplicable racial bias in its application underscores the invidious nature of the Amendment.

In summary, the Amendment denies two classes of Cherokee citizens the equal protection of the laws based solely on race. It denies descendants of those with African American heritage, and those with mixed Cherokee and African American heritage, tribal citizenship and all rights and privileges within the Cherokee Nation. Indeed, the only common denominator to this

scheme of disenfranchisement is being of African American heritage.[94] The Amendment denies rights and privileges based upon African American race alone, even to the point of disenfranchising documentable Cherokees the rights and privileges of citizenship. Therefore, the Amendment clearly violates the Equal Protection Clause of the Cherokee Constitution as well as the federal law of equal protection as applied to Indian tribes by the Indian Civil Rights Act, and the District Court's finding that the Amendment is void as a matter of law should be affirmed.

CONCLUSION

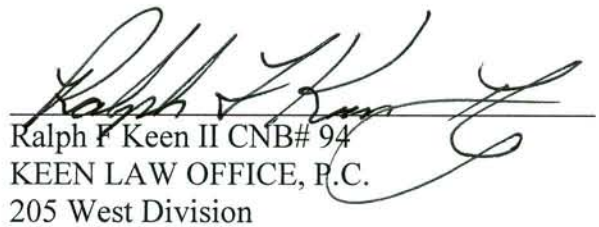
In conclusion, your Appellees have set forth compelling arguments and binding legal authority to affirm the trial court's invalidation of the March 3, 2007 Amendment on three separate grounds: federal supremacy, Thirteenth Amendment, and equal protection. While the trial court did not need to look any further than federal supremacy, either of the remaining two basis would be equally sufficient to invalidate the Amendment as being contrary to law. Nation's theory that Congress divested all Freedmen descendants through implied repealer and silent abrogation is unsupported by fact or law. The true question is whether the Cherokee Nation is willing to bind itself to treaty covenants some may find distasteful, in exchange for the myriad benefits and protections of its mutually beneficial relationship with the United States arising out of the same treaty. If that answer be "no," then we not only repudiate the solemn word of the Cherokee Nation, but we also jeopardize our federal relationship and expose our sovereignty to further diminishment at the hands of federal authorities. If that answer be "yes," we strike several victories. First, we exercise responsible sovereign self-governance by defining the outer limits of our own sovereignty by our own hand. Second, we set up a new paradigm for the protection of civil rights in Indian Country. Last, and perhaps most importantly, we proclaim to the world that being Cherokee is much more than being of a particular race; it is being a citizen of a Nation, a Nation of people with diverse and mixed ethnic backgrounds, yet sharing a common history, culture and heritage.

For all the reasons set forth herein, premises and precedence considered, your Appellate Class Representatives pray that the trial court's decision finding the Amendment to be void as a matter of law be affirmed in its entirety.

---

[94] The Intermarried Whites are not relevant to this analysis as they were lawfully disenfranchised prior to allotment. The Amendment only reaffirms their status. Any assertions that the Amendment does not single out African Americans because it also denies Intermarried Whites citizenship is both illusory and misleading.

Respectfully Submitted:



Ralph F Keen II CNB# 94
KEEN LAW OFFICE, P.C.
205 West Division
Stilwell, OK 74960
(918) 696 - 3355
Attorney for Appellee Class

CERTIFICATE OF SERVICE

I certify that I mailed true and correct copy of the Appellee's Answer Brief was mailed by depositing it in the U.S. Mail, postage prepaid, this 6th day of June, 2011, to:

Cherokee Nation Attorney General
Diane Hammons
P.O. Box 948
Tahlequah, OK 74465

Ralph F Keen II