IN THE DISTRICT COURT OF THE CHEROKEE NATION

RAYMOND NASH, et al, Plaintiff, Appellant vs. CHEROKEE NATION REGISTRAR, Defendant, Appellee.	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

BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT IN FAVOR OF THE CHEROKEE FREEDMEN

Comes now the Class Appellants, by and through appointed Class Counsel, Ralph F Keen II, who offers the following facts, arguments and legal authorities in support of the Class's motion for partial summary judgment[1] in favor of the Cherokee Freedmen in this cause.

INTRODUCTION

This cause is a class appeal of over 380 individual appeals timely filed in response to negative final enrollment decisions of the Registrar's office in connection with the implementation of the March 3, 2007 amendment to the Cherokee Constitution. The amendment, as applied by the Appellee, operated to disenroll more than 2,800 citizens of the Cherokee Nation, who are descendants of enrollees of the Cherokee Freedmen and/or Cherokee Freedmen – Minors Rolls, prepared and finalized by the Dawes Commission in 1907.[2]

[1] This motion is limited in scope to the rights of the Cherokee Freedmen as a class, and preserves for later determination any issues relating to adopted whites or other non-Freedmen claims.

[2] Class counsel has recently learned that a small number of appellants may in fact be descendants of enrollees of either the Cherokee by Blood Roll, designated "AW" (adopted white), or the Intermarried White Roll. At the time of this filing, counsel is in the process of seeking discovery on these questions for determination by the Court at a later time.

In this brief Appellants will establish that there are no genuine issues of material fact in dispute, and Appellants are entitled to judgment as a matter of law for three separate and independent reasons, any one of which being more than adequate to support a finding of summary judgment as to the rights of Cherokee Freedmen. First, Appellants will establish that the Amendment is void as a matter of law under the Treaty of 1866, by virtue of the supremacy clause of the United States Constitution. This argument establishes the status of treaty provisions as being co-equal to legislation under federal supremacy, and the resulting diminishing effects the 1866 Treaty had on Cherokee sovereignty, which left it powerless to disenfranchise the Cherokee Freedmen. Section II sets forth how the Amendment is equally void for violating the Thirteenth Amendment's prohibition on slavery, and badges and incidents of slavery, based on the 1866 Treaty being a special congressional tool of enforcement of the Thirteenth Amendment. Section III examines how the Amendment violates both the equal protection clause of the Cherokee Constitution, as well as the federal Indian Civil Right Act, as invidious race-based discrimination which denies two distinct classes of citizens the equal protection of the law. Finally, Appellants argue in the alternative, if found valid, the Amendment cannot be applied retroactively to disenroll Cherokee citizens enrolled prior to its effective date.

TABLE OF CONTENTS

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. The Cherokee Nation, since time immemorial, has exercised the sovereign rights of self-governance on behalf of the Cherokee People.

2. In 1839, following their forced removal from their indigenous homelands in the East to the Indian Territory, the Cherokee people organized to set up a new constitutional government, and adopted a written constitution on September 6, 1839.

3. Following the close of the American Civil War and the abolition of slavery, the Cherokee Nation entered into a treaty with the United States of America on July 19, 1866. Article IX of the treaty addressed the status of freed slaves ("Freedmen") within the Cherokee Nation and provided that Freedmen and their descendants "shall have all the rights of native Cherokees."[3]

4. In accord with the 1866 Treaty, on November 26, 1866, the Cherokee people adopted certain amendments to the 1839 Constitution which provided that Freedmen and their descendants "shall be taken, and deemed to be, citizens of the Cherokee Nation." [4]

5. In 1895 the United States Court of Claims ruled that Cherokee Freedmen, and their descendants, were "admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities, and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood."[5]

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[3] Treaty with the Cherokee Indians, July 19, 1866, Art IX, 14 Stat. 799 (*hereinafter* 1866 Treaty) attached hereto as Exhibit "A."

[4] *See* Amendment to Art. III, Sec. 5 of the Cherokee Const. of 1839, as reprinted in: Jack Gregory & Rennard Strickand, *Starr's History of the Cherokee Indians,* Indian Heritage Assoc., 1967, attached hereto as Exhibit "B."

[5] Whitmire v. Cherokee Nation, 30 Ct. Cl. 180, 191 (1895) , attached hereto as Exhibit "C".

6. In 1906 the United States Supreme Court ruled that intermarried whites were not entitled to the same citizenship rights as Cherokee by blood, or as adopted Shawnee, Delaware and Freedmen, who acquired their property rights by the express words of treaties.[6]

7. In 1962 Cherokee Freedmen were included in per capita payments from the sale of tribal lands at the instruction of Congress.[7]

8. In 1967, the United States Court of Claims ruled that the Cherokee Freedmen were entitled to receive payments from the Cherokee Nation judgment fund as descendants of citizens listed on the Dawes Commission Rolls.[8]

9. Congress provided for the reestablishment of free elections of the Principal Chief in Cherokee Nation by passage of the Principal Chiefs Act of 1970.[9]

10. In 1971 the United States Court of Claims reaffirmed that Freedmen and their descendants listed on the Dawes Rolls were entitled to share in Cherokee Nation funds.[10]

11. Cherokee Nation reestablished a constitutional form of government by approving a new constitution on June 26, 1976.

12. The Cherokee Council codified a statute in 1992 which required proof of ancestry to an original enrollee of the "by blood" Cherokee rolls of the Dawes Commission as a precondition to tribal membership, and existentially to tribal voting rights.[11]

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[6] Daniel Red Bird v. U.S., a/k/a/ Cherokee Intermarriage Cases, 203 U.S. 76, 88 (1906).
[7] Act of October 9, 1962, Pub. L. No. 87-775.
[8] Cherokee Nation v. U.S., 180 Ct. Cl. 181 (1967).
[9] Act of October 22, 1970, Pub. L. No 91-495, 84 Stat. 1091 (1970), attached hereto as Exhibit "D".
[10] Cherokee Freedmen & Cherokee Freedmen's Association v. U.S. and the Cherokee Nation, 195 Ct. Cl. 39 (1971).
[11] 11 C.N.C.A. § 12 (declared unconstitutional as to the Freedmen in Allen v. Cherokee Nation, JAT-04-09 (2004).

13. Following a duly called Constitutional Convention in 1999, the Cherokee People approved a new constitution at referendum on July 26, 2003.

14. By opinion issued March 7, 2006, the Judicial Appeals Tribunal found 11 C.N.C.A. § 12 to be unconstitutional, and required enrollment of Cherokee Freedmen as citizens.[12]

15. By opinion issued June 7, 2006, the 2003 Constitution was validated and ordered implemented by the Judicial Appeals as the fundamental law of Cherokee Nation, effective July 26, 2003.[13]

16. On June 12, 2006, the Council of the Cherokee Nation approved a proposed amendment to the Cherokee Nation Constitution affecting the criteria for citizenship into the Cherokee Nation. [14]

17. The language of The Amendment provided as follows:

> 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.[15]

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[12] Allen v. Cherokee Nation Tribal Council, et al, JAT-04-09 (2006), attached hereto as Exhibit "E."
[13] In re: Status and Implementation of the 1999 Constitution of the Cherokee Nation, JAT-05-04 (2005).
[14] Council Resolution 63-06, attached hereto as Exhibit "F."
[15] *See* Joint Stipulation of the Parties, attached hereto as Exhibit "G," stipulation No. 6

18. The proposed amendment (hereinafter "Amendment") was approved by majority vote of the Cherokee People on March 3, 2007 during a special election conducted in compliance with Cherokee Nation election laws and procedures.[16]

19. The Cherokee Nation Registrar interpreted the Amendment language as applying the new criteria for citizenship to existing, enrolled citizens of the Cherokee Nation.[17]

20. As a result, Appellee notified Appellant Class of its determination of ineligibility for continued membership in March of 2007.[18]

21. Appellant Class was removed from the citizenship rolls of the Cherokee Nation, effective March 16, 2007.[19]

22. As a result of the disenrollment, Appellant Class has been denied tribal services and rights as Cherokee citizens.[20]

23. All unprocessed applications for citizenship in Appellee's possession received from Appellant Class members are being held in abeyance without further processing, pending the final outcome of this appeal.[21]

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[16] Exhibit "G," stipulation Nos. 4 & 5.
[17] Exhibit "G," stipulation No. 7.
[18] Exhibit "G," stipulation No. 8.
[19] Exhibit "G," stipulation No. 9.
[20] Exhibit "G," stipulation No. 10. (A very small number of critically ill people continued to receive health services, paid from tribal funds, because to have interrupted treatment for those individuals would have been very hazardous.)
[21] Exhibit "G," stipulation No. 11.

ARGUMENTS AND AUTHORITIES

Rule 124 of the Cherokee Nation District Court Rules provides: "[e]ither party may move for summary judgment by alleging that there is no genuine issue as to any material fact and by alleging that the moving part is entitled to judgment as a matter of law." Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.[22] A material fact is one that could affect the outcome of the suit under governing law, and a genuine issue is one for which the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[23] A close examination of the undisputed facts and issues presented by this case reveals that there are no genuine issues of material fact, and that Plaintiff/Appellants are entitled to judgment as a matter of law.

I. THE CHEROKEE AMENDMENT IS VOID AS A MATTER OF LAW UNDER THE TREATY OF 1866, BY VIRTUE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

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

There is no dispute that Cherokee Nation is a sovereign nation. Organized as a distinct political community under its inherent sovereign authority to do so, Cherokee Nation has either retained, or regained, many attributes of its original inherent sovereignty.[24] 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 federal law. The power of the

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[22] Fed. R. Civ. P. 56 (c).

[23] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[24] Less we forget, only 38 years ago the government of the Cherokee Nation consisted of only a single individual appointed by the President of the United States. The reawakening of the Nation and the re-establishment of its constitutional government with three distinct fully functioning branches is a tremendous achievement in self-governance by the Cherokee People.

federal government over Indian tribes is well-settled in American jurisprudence, stemming primarily from the Indian commerce clause of the U.S. Constitution,[25]and the Treaty Clause, which grants exclusive authority to the national government to enter into treaties with Indian tribes.[26] Based on these two sources, Congress' power over Indian affairs has been described as "plenary"[27]and extends to the very political existence of a tribe, as recognized by the federal government.[28] 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 cornerstones of modern Indian law.[29] Chief Justice John Marshall described Cherokee Nation as a "domestic dependant nation"[30] 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.[31]

However, since the revolutionary war and the emergence of the federal government as the dominant sovereign, the sovereignty of Cherokee Nation has never been recognized as being on equal footing as, or superior to that of the United States. In 1855 the U.S. Supreme Court so found in 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**

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[25] 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.

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

[27] 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).

[28] 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. This federal recognition can be granted, continued, or terminated at the will of the United States.

[29] 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).

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

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

> **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.[32]

Indeed, throughout Cherokee/American history, the supremacy of the federal law has been openly expressed and acknowledged, but never more concisely 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.[33]

While this phraseology did not find its way into the 2003 Cherokee Constitution, federal supremacy is nonetheless acknowledged 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:

> All officers elected or appointed shall, before entering upon the duties of their respective offices, take and subscribe to the following oath or affirmation: "I do solemnly swear, or affirm, that I will faithfully execute the duties of _____ of the Cherokee Nation, and will, to the best of my ability, preserve, protect and defend the **Constitutions of the Cherokee Nation, and the United States of America.** I swear or affirm further, that I will do everything within my power to promote the culture, heritage and traditions of the Cherokee Nation."[34]

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

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

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 subject to the supremacy of federal law, then Cherokee jurisprudence must also necessarily acknowledge the plain language of Article VI, Section 2, of the United States Constitution, which states:

> 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, any Thing 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:

> 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.[35]

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.[36] Historically, this principle was expressly incorporated into Cherokee law vis-à-vis the Cherokee

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[35] 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).

[36] 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).

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."[37] 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 in-providential alliances with the Confederate States of America and long history of slavery.[38] The Treaty addressed a number of issues and provisos for readmitting Cherokee Nation to the federal union, including amnesty for all war crimes committed by its citizens,[39] establishment of federal courts in the Indian territory,[40] the settlement of "civilized friendly Indians" within the Cherokee Nation,[41] and case-in-point to this dispute, the adoption of all freed slaves 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

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

[38] Cherokee Nation was one of the few slave-holding Indian tribes. Dating to early contact with the British Colonists, Cherokees owned more African slaves than any other Indian tribe. Jon Velie, *Should the United States Be Fighting For Jim Crow's Survival By Its Complicity In Denying Voting Rights To The Cherokee Freedmen?* 54-FEB Fed. Law. 43, 45 (2007). 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).

[39] Exhibit "A," Art. II.

[40] Exhibit "A," Art. VII.

[41] Exhibit "A," Art. XV.

> 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.[42]

The Treaty language is clear and concise. It contains no ambiguity. It requires no special maxims of interpretation or 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. The Treaty Of 1866 Remains In Full Force And Effect.

The Treaty of 1866 was entered by Cherokee Nation and its terms were incorporated into Cherokee law. Within four months of the signing of the Treaty of 1866, the Cherokee Nation adopted a series of amendments to the 1839 Cherokee Constitution which carried out the terms of the treaty, including expressly granting Freedmen and their descendants citizenship in the Cherokee Nation.[43] The Treaty of 1866 has not been abrogated or repealed by congress, and remains in full force and effect. The Cherokee Nation Judicial Appeals Tribunal reached the same conclusion in the Allen decision, which struck down as unconstitutional the tribal registration statute that excluded the Freedmen from tribal membership. The Allen Court held:

> It cannot be overstated that the 1866 Treaty, in which the Cherokee Nation agreed to extend citizenship to the Freedmen is the exact same treaty where the Cherokee Nation agreed to have other Indian tribes (ultimately the Shawnee and Delaware) relocated inside the Cherokee Nation. After the 1866 Treaty, the Cherokee Nation

[42] Exhibit "A," Article IX [*emphasis added*].
[43] *See* Exhibit "B."

> amended the 1839 Constitution to extend citizenship to the Freedmen as a matter of tribal law. After the 1866 Treaty, the Cherokee Nation also entered into individual treaties with both the Delaware and the Shawnee Indian tribes. Both of these actions show that the Cherokee Nation complied with the terms of 1866 Treaty. . . .
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> If the Treaty is enforceable for the ultimate inclusion of Shawnee and Delaware it must be enforceable as to the Freedmen. The fact that internal Cherokee laws were amended to acknowledge the Cherokee Nation's compliance with the 1866 Treaty should not be ignored.[44]

The Allen Court also found that the framers of the 1976 Cherokee Constitution could not have been unaware that the Freedmen had been citizens for more than 110 years,[45] and were entitled to vote in the 1976 constitutional referendum.[46] Without reservation the Allen Court reaffirmed the continuing validity of the 1866 Treaty, and its conclusions are supported by numerous federal court opinions and acts of Congress over the 141 years since its passage. Allen observed that in 1888 Congress referenced the 1866 Treaty in an Act specifically securing the Cherokee Freedmen their proportion of certain proceeds of lands under the Act of March 3, 1883.[47] The following year Congress passed appropriations to fulfill the treaty stipulations to the Freedmen.[48] When the Cherokee Nation excluded the Freedmen from payments, Congress passed legislation in 1890 authorizing them to bring suit against Nation in the Court of Claims.[49]

In 1895 the United States Court of Claims relied on the Treaty of 1866 in *Whitmire v. Cherokee Nation* in concluding that Cherokee Freedmen, and their descendants, were:

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[44] Exhibit "E," p. 18-19.
[45] *Id,* at 15.
[46] *Id,* at 12-13 *holding*: "This Court unanimously agrees on one thing: the Cherokees by blood, Cherokee Freedmen, Shawnee and Delaware were all citizens in 1975 on the eve of the adoption of the Constitution. If they were citizens in 1975, then they all would have been legally entitled to vote."
[47] Act of October 19, 1888, 25 Stat. L. 608.
[48] Act of March 2, 1889, 25 Stat. L. 980.
[49] Act of October 1, 1890, 26 Stat. L. 636.

> [A]dmitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities, and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood.[50]

As a result Cherokee Freedmen were entitled to share in the proceeds from the sale of Cherokee lands. The *Whitmire* Court also took an unequivocal stance on the binding nature of treaty provisions, foreclosing any question as to whether they could be violated by the tribe.

> It needs no argument to show that the Cherokee Nation cannot violate its treaty obligations. The United States, not only as a party to the treaty, but as guardian of the rights and interests of those affected by the treaty, will insist upon and secure the observance of all the treaty stipulations.[51]

In 1906, citing the Treaty of 1866, the United States Supreme Court ruled that intermarried whites were not entitled to the same citizenship rights as Cherokee by blood, or as adopted Shawnee, Delaware and Freedmen, who acquired their property rights by the express words of treaties.[52] In 1962 Cherokee Freedmen were included in per capita payments from the sale of tribal lands at the instruction of Congress.[53] In 1967, the United States Court of Claims again ruled that the Cherokee Freedmen were entitled to receive payments from the Cherokee Nation judgment fund as descendants of citizens listed on the Dawes Commission Rolls.[54] In 1971 a federal court reaffirmed that Freedmen and their descendants listed on the Dawes Rolls were entitled to share in Cherokee Nation funds.[55]

Time and again, throughout history, federal courts and Congress have consistently upheld the rights of Cherokee Freedmen based on the continuing validity of the Treaty of 1866. The

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[50] Whitmire, Exhibit "C" at 191.
[51] Whitmire, Exhibit "C" at 143.
[52] Cherokee Intermarriage Cases, 203 U.S. 76, 88 (1906).
[53] Public Law 87-775 (October 9, 1962).
[54] Undisputed Fact No. 8.
[55] Undisputed Fact No. 10.

Treaty language has been consistently found to be controlling law in federal forums, and is more than sufficient to invalidate any source of tribal law inconsistent with its provisions. The next section establishes how the Treaty diminished the tribe's sovereignty, and left it powerless to discriminate against the Freedmen on the basis of their status as former slaves.

e. The Treaty Of 1866 Diminished Cherokee Nation's Sovereignty In The Area Of Membership Related To Cherokee Freedmen.

As stated above, Cherokee Nation is a sovereign nation, yet overwhelming federal precedent and responsible sovereign leadership requires us to acknowledge that Cherokee Nation's sovereignty is not without limits. While it is well-settled that Indian tribes have the power to determine their own tribal "membership,"[56] that power is also subject to federal supremacy and potential diminishment at the hands of the United States.[57] 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.[58] 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*
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> Each tribe, as a distinct political community, has the power to determine its own tribal membership. A tribe may determine who

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[56] *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).

[57] *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).

[58] 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 conenants made with the United States of America.

> 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.**[59]

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 fundamental and axiomatic by the 1895 Court of Claims in Whitmire when it observed "it needs no argument to show that Cherokee Nation cannot violate its treaty provisions."[60]

Whitmire drew this conclusion one hundred and thirteen years ago, which to some might allow room for additional analysis given the stark shifts in federal Indian policy since that time. However, the 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

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[59] 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).

[60] *Supra* note 51.

Affairs, the Cherokee Nation, and individual Cherokee officials for denial of citizenship rights guaranteed by the 1866 treaty and other federal law.[61] 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.[62] 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.[63] 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 call for a similar result. We reject this argument. **The Cherokee Nation has no interest in protecting a sovereignty concern that**

[61] 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.
[62] Vann v. Kempthorne, 467 F. Supp. 2d 56 (D.D.C. 2006), attached hereto as Exhibit "H."
[63] Vann v. Kempthorne, 534 F.3d 741, 750 (D.C. Cir. 2008), attached hereto as Exhibit "I."

> **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.**[64]

As a result, what was viewed as axiomatic by Whitmire 113 years ago has now been confirmed by Vann, who has pronounced that the Treaty of 1866 was a clear diminishment of Cherokee sovereignty in the area of tribal membership, as applied to Cherokee Freedmen. 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, the Appellant Class asserts that the Vann precedent is mandatory binding authority concerning the Thirteenth Amendment, the Treaty of 1866, and the rights of Cherokee Freedmen. If the courts of this great Nation openly acknowledge the supremacy clause of the United States Constitution and controlling federal precedent relating thereto, it must find that the Cherokee Amendment, which operates to disregard and violate the terms and conditions of the 1866 Treaty, is void and unenforceable as a matter of law. Indeed, any other conclusion would run the risk of creating "bad law" for the Cherokee Nation and all of Indian Country. As one author prophetically observed in 2007:

> The sovereign right of Cherokee Nation to determine its criteria for citizenship should never be denied or compromised by federal intervention. The "hard case" of whether to sustain a decision of the Cherokee Nation to exclude the Freedmen's descendants, were the issue to reach federal court or the floor of Congress, would surely "make bad law." The wise use of Cherokee sovereignty, however, counsels patience, not a rush to the polls. It requires honest, sustained, and no doubt, difficult language, not politicking,

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[64] Exhibit "I" at 755-756.

> and the critical reinterpretation of cultural resources in the service of kinship, not the blind reproduction of divisive racial hegemonies-in-short, ga-du-gi, "all working together."[65]

Recent events in the Seminole Nation teach us assertions of sovereignty improvidently made in violation of treaty provisions can lead to extreme responses by the United States in its government-to-government relationship with Indian tribes. In an ill-advised move, the Seminoles attempted to disenfranchise its freedmen citizens by amending its Constitution in 2002 in violation of the terms of its post-civil war treaty with the United States.[66] 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 Secretary's drastic reaction and demands were later upheld by the D.C. District Court.[67] In the Cherokee Freedmen situation, it is a matter of public record worthy of judicial notice that certain members of Congress, sympathetic to the Freedmens' plight, have introduced extreme legislation to sever all government relations with the Cherokee Nation. By its terms, this legislation would terminate all federal funding to the Cherokee Nation and suspend its right to conduct gaming operations.[68] While political matters 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 in the Cherokee Nation.

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[65] S. Alan Ray "*A Race or a Nation? Cherokee National Identity and the Status of the Freedmen's Descendents*" 12 Mich. J. Race & L. 387, 462-463 (2007) [*internal footnotes omitted*] attached hereto in pertinent part as Exhibit "J."

[66] *See* Treaty with the Seminole Nation, 1866 Art. II, 14 Stat. 756.

[67] Seminole Nation v. Norton, 223 F. Supp 2d 122 (D.D.C. 2002) attached hereto as Exhibit "K.".

[68] *See* H.R. 2824 (June 21, 2007), attached hereto as Exhibit "L."

f. 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.[69]

The 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; and 2), the Delaware Cherokee.[70] By elimination through omission, the Amendment would appear to deny citizenship for the remaining categories of Dawes enrollees, including the Cherokee Freedmen, Cherokee Freedmen–Minor Children, the Cherokee by Intermarriage,[71]and the Cherokee by Blood–Minor Children.[72] It bears attention that the Amendment is silent as to Cherokee children's roll, which should place those enrollees and descendants in the identical status of the Cherokee Freedmen as being ineligible for citizenship. However, quite inexplicably, in the course of disenrolling over

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[69] Undisputed Fact No. 17.

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

[71] The Cherokee Peoples' ability to exclude the Cherokee by Intermarriage (a/k/a Intermarried Whites) is well-settled and not in dispute, as their one-time citizenship came solely as matter 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).

[72] The Amendment is strangely silent as to this entire category of Dawes enrollees. While one would think Cherokee children were intended to be included, particularly in light of arguments of preserving Indian heritage, the Amendment is very deliberate and specific on which rolls qualify, which ironically does not include the Cherokee children's roll. One might observe this glaring oversight by the architects of the Amendment to be a figurative case of throwing the baby out with the bath water.

2,800 Cherokee Freedmen, Nation has made no effort to disenroll or disenfranchise any descendants of the Cherokee by Blood-Minor Children Roll. This highly suspicious conduct will be further analyzed in the equal protection arguments in Section III of this brief.

While the status of the Children's Roll remains in question, it is undisputed that the Amendment brought about a mass disenrollment of the Cherokee Freedmen as an entire class, who as a result were denied tribal services and rights as Cherokee citizens.[73] 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 contained in the Treaty of 1866. Hence, the Cherokee Amendment can only be determined to be void as a matter of law under the Treaty of 1866, which is binding federal law within the Cherokee Nation under the supremacy clause of the United States Constitution.

[73] *See* Undisputed Fact Nos. 21 & 22.

II. 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."[74] Section 2 of the Amendment provides that "Congress shall have the power to enforce this article by appropriate legislation."[75] 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."[76] 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.[77] Given its broad scope and absolute prohibition, it is self-evident that the Thirteenth Amendment applies equally to Indian tribes.[78] Indeed, even *Cohen's Handbook on Federal Indian Law* opines that any other interpretation of the Amendment would be "inconceivable."[79]

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[74] U.S. Const. Amend. XIII (1865).
[75] *Id.*
[76] Civil Rights Cases, 109 U.S. 3,20 (1883).
[77] 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).
[78] *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.)
[79] *Cohens* (2005 Edition) at 918.

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."[80] The Thirteenth Amendment was ratified on December 18, 1865.[81] 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.[82] 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.[83]

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,"[84]guaranteed them that laws "shall be uniform throughout said Nation,"[85] 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."[86] 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 made these

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[80] Akhil Reed Amar, *America's Constitution*: A Biography 362 (2006).
[81] Jones, 392 U.S. 409, 431.
[82] *See* Exhibit "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.
[83] 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).
[84] Exhibit "A," Art. IX.
[85] *Id*, at Art VI.
[86] *Id* at Art. XII

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.[87]

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.[88] 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.[89] 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."[90]

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[87] The Cherokee Nation was regarding 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).

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

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

[90] Vann Exhibit "H," 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.

Following this line of reasoning, the district court in Vann concluded: "Denying the Freedmen the right to vote in tribal elections violates the Thirteen 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."[91] While reversing the district court's decision on sovereign immunity, the Circuit Court of Appeals affirmed its rationale in finding a violation of the Thirteenth Amendment, and drew an even stronger conclusion:

> [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.[92]

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.

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[91] Vann, Exhibit "H" at 69.
[92] Vann, Exhibit "I" at 755.

III. 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.).[93] 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."[94] The new Cherokee Constitution of 2003 does not incorporate by reference federal law, but rather makes a direct guarantee of equality 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.[95]

This constitutional guarantee of "equal protection of the laws" means that no Cherokee 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.[96] Classifications created by governmental action based on race are the paradigmatic example of a "suspect" classification under equal protection, and must be strictly scrutinized by the Courts.[97] Laws which facially discriminate against race-based classes (e.g. "blacks") violate

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[93] *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."
[94] 25 U.S.C.A. § 1302(8) attached hereto as Exhibit "M."
[95] Cherokee Const. 2003 Art III, Sec. 1.
[96] Black Law Dictionary, 6th ed. (1990) Equal Protection of the Law.
[97] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973).

equal protection.[98] Similarly, laws which appear neutral on their face, but discriminate as to race in their administration also violate equal protection.[99]

Moreover, 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.[100] The Peoples' power to amend their organic document cannot be used as a subterfuge for discrimination.[101] An objective analysis of the application of the March 3, 2007 Amendment confirms that it engenders invidious race-based discrimination which denies 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. There is no dispute that 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 has asserted it has special sovereignty interest in defining its own membership

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[98] Strauder v. West Virginia, 100. U.S. 303 (1880).
[99] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[100] 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).
[101] *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.)

which outweighs the *de jure* discrimination. However, as cited in Section I(e) above, the Federal 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.'[102]

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

The invidious nature of the Amendment with respect to Freedmen of African American descent is obvious. What is less obvious, but also fully accurate is that Cherokee Freedmen include a sub-class, which is also being denied equal protection of Cherokee law by operation of the March 2007 Amendment. The sub-class referred is descendants of Freedmen enrollees with mixed African American and Cherokee heritage. This unique classification was created by the inconsistent enrollment practices of the Dawes Commission, which resulted in at least three discriminatory policies: 1) application of the "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 consider or record 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 policies are well documented by legal scholars and historians alike. In his recent 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'

[102] <u>Vann,</u> Exhibit "I" at 755.

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 than 25 percent of the African American population reported having Native American ancestry.**

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