

Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity

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I. INTRODUCTION

“Law is embroiled in the politics of identity. It names parties, defines their speech and conduct, and assigns their rights and duties. Its judgments declare, enjoin, and award the tangible and intangible benefits of race and racial privilege.”¹ Law has been deeply involved in the politics of defining racial identity. The rule of hypo-descent,² also known as the “one-drop rule,” was codified as law in many states in an effort to define the group of people who were black and therefore subject to the deprivation of liberty through the institution of slavery and later subject to social, economic, and educational subjugation through Jim Crow. Although the rule has been repealed from the statutory compilations of law in those states that once had such a rule, it continues to operate on a cognitive and cultural level in American law and society. On a social and cultural level, most Americans still perceive anyone with known African ancestry and the skin coloration, hair texture, or facial features that serve as evidence

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¹ Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1306 (1998) (citing Martha Minow, *Not Only for Myself: Identity, Politics and Law*, 75 OR. L. REV. 647 (1996)).

² See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1178 n.72 (1997) (noting that at different times in history, “Alabama and Arkansas defined anyone with one drop of ‘Negro’ blood as Black,” and that Texas labeled as Negro, “all persons of mixed blood descended from negro [sic] ancestry.”). For an enlightening discussion of the legal construction of race, see generally IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

of African ancestry, to be “black” or African American.³

Unbeknownst to many, the rule of hypo-descent still operates in law on a structural level, particularly with respect to federal Indian law and the law of some Native American tribes. Within some Native American tribes, the rule is still covertly operating to construct Native American identity. In the struggle to preserve their very existence, some Native American tribes have subscribed to the basic assumptions of the dominant culture, including the assumption that whiteness is to be prized and non-whiteness devalued on a scale relative to the degree of color of one’s skin, with blackness constituting the most devalued state of being.

Few extant cases are more illustrative of law embroiled in the politics of racial identity than the case of *Davis v. United States*,⁴ which the United States Supreme Court recently declined to review. *Davis* was brought by two groups of people who are members of a federally recognized Indian tribe called the Seminole Nation of Oklahoma. These groups, or “bands” of people, as they are commonly referred to in Indian discourse, are known as the Dosar-Barkus and Bruner bands of the Seminole Nation.⁵ They brought a lawsuit in federal court seeking to obtain treatment equal in nature and degree to the treatment received by other members of their tribe. Specifically, they sought to participate in certain tribal programs that are funded by a judgment paid by the United States for tribal lands taken by the United States government in 1823 when the tribe was in Florida.⁶ The federal courts ultimately refused to allow these bands of

³ It is this type of racial essentialism that golfer Tiger Woods and other multiracial people have resisted in seeking to construct their identity. While I argue against racial essentialism, in this context, I do think that multiracial people with African ancestry must resist the temptation to privilege their non-black ancestry over their African ancestry in constructing their personal identity. I cringe when I hear people in my own family boast about their Indian ancestry in a manner that implicitly suggests that Indian ancestry somehow elevates them above African Americans who have no Indian ancestry. The temptation to identify oneself as something other than black is understandable given the privileges that flow to non-black people, but yielding to this temptation is yielding to the systems of oppression that serve to perpetuate the “mytho-narrative” that black or African is inferior to all other racial categories. See Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. AND MARY L. REV. 69, 73–74 (1995) (defining the “master narrative of black inferiority” as “a systemic story, whether openly spoken or silently acted upon, that describes, solely on racial terms, how and why whites legitimately hold power over blacks”) (footnotes omitted).

⁴ *Davis v. United States*, 199 F. Supp. 2d 1164 (W.D. Okla. 2002), *aff’d*, 343 F.3d 1282 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 2907 (2004).

⁵ *Id.* at 1167.

⁶ *Id.*

Seminole to have their case heard on the merits by holding that Rule 19 of the Federal Rules of Civil Procedure precluded the hearing of the case because the tribe was an indispensable party which could not be joined in the action due to its sovereign immunity.⁷ The Seminole tribe's culture war over the Dosar-Barkus and Bruner bands of Seminoles has even resulted in tribal efforts to amend the Seminole constitution in a manner that would exclude these Seminoles from tribal membership.⁸ Why are these bands of Indians treated differently from the remainder of their tribe? Why is their own tribe so hostile to them? What separates them from the majority of their tribe? They are black.

This Essay explores how law has utilized the master narrative⁹ of white supremacy and black inferiority to construct Native American identity in a way that presently enforces the rule of hypo-descent. I must concede that while the Seminole Nation or "tribe" is not culturally representative of the diversity of Indian Nations or tribes in the United States, an inquiry into the experience of the Seminoles provides a basis for identifying how the master narrative of white supremacy and black inferiority is used to construct Native American identity, and how the construction of Native American identity in this fashion serves to further advance white supremacy.

II. RACE IDEOLOGY OF THE SEMINOLES FROM A HISTORICAL PERSPECTIVE

In order to contextualize the extant Seminole dispute and to understand the narrative of black inferiority operating within the tribe, it is necessary to understand some of the history of the Seminole Nation. In the eighteenth and nineteenth centuries, European explorers who landed in the geographic region of what is now the southeastern United States conducted campaigns of violence against the indigenous populations, killing many Native American

⁷ *Id.* at 1176. For more discussion of the *Davis* case, see Martha Melaku, *Seeking Acceptance: Are the Black Seminoles Native Americans?* Sylvia Davis v. The United States of America, 27 AM. INDIAN L. REV. 539 (2003).

⁸ The tribe sued the federal government because the Department of the Interior refused to recognize certain amendments to the Seminole constitution that would have effectively dissolved the membership status of most of the tribe's black members. See *Seminole Nation of Okla. v. Norton*, 206 F.R.D. 1 (D.D.C. 2001).

⁹ I use the term "master narrative" in much the same way as other scholars have used the term. It describes how "culturally-embedded . . . racism . . . deploys exclusionary concepts of race and privilege in ways that [serve to] maintain intergroup conflict" and white supremacy. Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581, 1582 (1993).

people.¹⁰ Several tribes were nearly decimated, with only a few members left to survive. Rather than try to survive independently, the remnants of these tribes banded together to form a new unified group of Native Americans living together in present day Florida.¹¹

Like these indigenous refugees, Africans were also fighting Europeans for their very survival and freedom. Africans who escaped slavery in the American colonies, and subsequently the Southern states, fled to the non-slave territory of Spanish-owned Florida and initially formed a coalition with the Native American people who were living there.¹² This group of people, both Native American and African, became known as the Seminoles.¹³ Hence, the term Seminole has been used historically to refer to this multiracial group of people living together in a community rather than to persons of the same ancestral lineage or racial group.¹⁴

As a result of this historical connection between Native Americans and Africans, Indian or “Red Seminoles”¹⁵ sometimes married African or “Black Seminoles,”¹⁶ creating biracial offspring—”Brown Seminoles.” Red Seminoles began to use the term “estelusti”

¹⁰ See Jean West, *Seminoles and Slaves: Florida's Freedom Seekers*, at http://www.slaveryinamerica.org/history/hs_es_seminole.htm (last visited Apr. 12, 2005).

¹¹ See J. LEITCH WRIGHT, JR., CREEKS AND SEMINOLES: THE DESTRUCTION AND REGENERATION OF THE MUSCOGULGE PEOPLE 1–2 (1986).

¹² See DANIEL F. LITTLEFIELD, JR., AFRICANS AND SEMINOLES: FROM REMOVAL TO EMANCIPATION 4–6 (1977).

¹³ See WRIGHT, *supra* note 11, at 6.

¹⁴ See *id.*

¹⁵ The discourse referring to the Seminoles has privileged whiteness through the use of language. Most literature only uses a color adjective to describe the Black Seminoles, thereby rendering the Red Seminoles and even the White Seminoles as colorless and normative. Moreover, people who would be socially constructed by most Americans as white because of their fair skin color, and eye and hair color, are recognized in most of the written literature as simply Indian or Native American. Their whiteness is deemed irrelevant to their status as Native Americans, whereas the people who have both African and Native American ancestry are typically referred to as the “Black Seminoles.”

In the historical section of this Essay, I will attempt to treat people equally as well as be as accurate as possible in recounting the historical interactions of the three groups of people to which I refer. Accordingly, in this part of the Essay, I will refer to people who have only Native American ancestry as “Red Seminoles” or “Indian.” Also, I will refer to people who have European and Native American ancestry or who have all European ancestry but who lived as part of the tribe as “White Seminoles” or “White Indians.” Finally, the people who have African and Native American ancestry or all African ancestry, but who lived as part of the tribe will be referred to as “Black Indians” or “Black Seminoles.” Later in this Essay, I admittedly resort to essentialist racial categories to avoid confusion in the course of abstract argument.

¹⁶ WILLIAM LOREN KATZ, BLACK INDIANS: A HIDDEN HERITAGE 57 (1986).

to refer to the Black Seminoles,¹⁷ but the status of the estelusti within the tribe varied. Some estelusti either married into or were adopted into the tribe.¹⁸ In the eighteenth century, the Red Seminoles' relationship with the Black Seminoles was not really based on slavery as we use that term to refer to southern slavery in the United States. The Black Seminoles who did not marry or otherwise integrate fully into the Seminole tribe had a relationship with the tribe more akin to a sharecropper.¹⁹ Black Seminoles that were not part of red tribal families resided on and cultivated land in towns separate from the Red Seminoles.²⁰ Black Seminoles also owned herds of livestock.²¹ Because the Red Seminoles depended on the Africans' "greater agricultural skill and the resulting economic advantage,"²² the Red Seminoles granted the Black Seminoles "ownership" rights in exchange for an annual share of their produce and livestock.²³ Moreover, because many of the Black Seminoles were multilingual, speaking Spanish, English, and Native American languages, they served as interpreters and intermediaries when the Red Seminoles dealt with whites.²⁴ Finally, black male Seminoles owned guns²⁵ and served as Seminole warriors alongside the Red Seminoles in wars between the Seminole tribe and the Europeans.²⁶ Accordingly, the Seminole tribe's pre-1840 relationship with people of African descent was one of sharing culture and resources. And if there truly was a pre-1840 version of slavery in the Seminole tribe, it was significantly different than the institution in the southern states and other Native American tribes.²⁷

By the time Spain ceded Florida to the United States in 1819, this collaborative relationship between Red and Black Seminoles was firmly established. Nonetheless, whites who interacted with the Seminoles referred to the Black Seminoles as "slaves" because during this period of time, blackness was culturally and, in many respects, legally synonymous with slave status.²⁸ But the characteristics of

¹⁷ LITTLEFIELD, *supra* note 12, at 4.

¹⁸ KENNETH W. PORTER, *THE BLACK SEMINOLES* 4–7 (1996).

¹⁹ *See generally* LITTLEFIELD, *supra* note 12, at 8.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 9.

²³ LITTLEFIELD, *supra* note 12, at 8.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 6–7.

²⁷ *Id.* at 5–6.

²⁸ *See* WRIGHT, *supra* note 11, at 98.

Seminole slavery, which allowed blacks to live in separate villages and serve essentially as sharecroppers and respected mediators, brought the Seminole tribe into conflict with both whites and the nearby Creek Indians who believed that the Black Seminoles were slaves that escaped from white or Creek slave owners.²⁹ Both whites and Creeks viewed black settlements in Seminole territory as a threat to slavery throughout the South.³⁰ Moreover, the United States government did not wish to continue fighting wars with the Seminoles, and the government understood that much of the Seminoles' military strength was due to their alliance with the people whom the United States government called "Negroes."³¹ Hence, the master hand began to use other indigenous peoples, primarily Creeks, as pawns in a campaign to divide and conquer the Red and Black Seminoles.

To disrupt the racial alliance between red and black people living in the Seminole Nation, the United States government promoted black slavery by hiring wealthy slave-owning Creek Indians to persuade Seminole chiefs to become true slave masters.³² After hearing the Creek Indians explain the financial, political, and cultural benefits of adopting the master's form of slavery for Black Seminoles, a war over culture and race erupted in the Seminole tribe. The tribe was split politically and morally over how to treat the Black Seminoles.³³ Some Red and White Seminoles wanted Black Seminoles to hold the same status as black slaves in the southern confederate states, while other Red Seminoles, probably those who had a kinship with the Black Seminoles, wanted equality or at least free status for Black Seminoles.³⁴ As a result of this intertribal Kulturkampf, some Seminole Indians began practicing a truer form of black slavery by utilizing Black Seminoles as field laborers.³⁵

The master hand also sought to divide the Red and Black

²⁹ West, *supra* note 10.

³⁰ LITTLEFIELD, *supra* note 12, at 5, 7, 8.

³¹ *Id.* at 11–12.

³² KATZ, *supra* note 16, at 56.

³³ By 1837, Chief Osceola, who had a black wife, had become the leader of a band of Black and Red Seminoles who organized resistance to U.S. and Creek slaveholders. *Id.* at 59. Osceola's band pledged "to defend their black brothers and sisters to the death." *Id.* at 60. See also *Seminole Nation v. United States*, 78 Ct. Cl. 455, 459 (1933) ("In their ancient habitat the Seminoles were not averse to the presence of the Negro race among their tribe. The wife of Osceola, one of their most noted, brave, and celebrated chiefs, was a descendant of a fugitive slave, and it was on account of her recapture as a fugitive that this intrepid half-breed chief waged a cruel and protracted warfare against the whites in which Negro troops participated to an important extent.").

³⁴ KATZ, *supra* note 16, at 59–62.

³⁵ See KATZ, *supra* note 16, at 57.

Seminole by persuading the Black Seminoles that they would be better off politically if they would separate themselves from the Seminole tribe and surrender to the United States government. Major General Jesup negotiated with the Black Seminoles and promised them that they would settle in a separate village in the Seminole Nation in Indian Territory, would be under the protection of the United States government, and would never be separated from each other or sold into slavery.³⁶ As a result of this promise, some Black Seminoles separated from the tribe and surrendered to the United States government.

In the early 1840s, the Seminole tribe began the process of removal to Indian Territory. Nearly five hundred Seminoles of African descent accompanied the Seminole tribe to Indian Territory.³⁷ After the Seminole tribe arrived in Indian Territory (presently Oklahoma), their relationship with the Black Seminole “slaves” changed. The Red Seminoles, feeling pressure from pro-slavery War Department officials, as well as some of their own tribal members and the other four large tribes in Indian Territory, found it politically inexpedient to maintain their close relationship with the blacks.³⁸

As a result of this tribal disassociation, the Black Seminoles became targets of slave hunters. The United States government failed to honor its promise to protect the Black Seminoles from slavery.³⁹ Creek Indians raided the Seminole Nation and claimed many of the Black Seminoles as slaves, asserting that they had either fled from them or their ancestors while in Florida.⁴⁰ In an effort to resolve the cultural conflict over whether blacks could be deemed Indian, the United States Attorney General interceded and ruled that Black Seminoles were slaves under United States law.⁴¹ Accordingly, the Black Seminoles who were not taken by the Creeks were ordered to return to their proper Seminole owners to serve as true slaves.⁴² Rather than submit to a lifetime of bondage, in 1849 approximately eight hundred members of the Black Seminole Wild Cat band, including their famous leaders Wild Cat and John Horse, fled to

³⁶ PORTER, *supra* note 18, at 118; Restoration of Certain Negroes to the Seminoles, 4 Op. Att’y Gen. 720, 721–23 (1848).

³⁷ LITTLEFIELD, *supra* note 12, at 12.

³⁸ *Id.* at 13.

³⁹ See KATZ, *supra* note 16, at 70.

⁴⁰ PORTER, *supra* note 18, at 119.

⁴¹ KATZ, *supra* note 16, at 70 (citing Restoration of Certain Negroes to the Seminoles, 4 Op. Att’y Gen. 720 (1848)).

⁴² LITTLEFIELD, *supra* note 12, at 126–27.

Mexico.⁴³ The Black Seminoles who remained in Indian Territory were treated as true slaves and their struggle in Indian Territory to establish their freedom proved futile until after the Civil War.⁴⁴

During the Civil War, the Seminole tribe elected to fight with the Confederacy to preserve the institution of slavery—although there were some dissenters who fought with the Union.⁴⁵ In 1866, after the Civil War ended, the federal government treated the Seminole tribe as a defeated enemy and forced the tribe to enter a treaty with the government wherein the tribe agreed to surrender certain tribal lands, end slavery in its Nation, and adopt the freed slaves or “freedmen” as citizens of the tribe.⁴⁶ The tribe honored the terms of the treaty and adopted the freed slaves as citizens of the tribe.⁴⁷ Many whites and Indians believed the government had wrongfully forced the tribe to take the “Negroes” into the tribe. As a result, much resentment developed toward the Black Seminoles or “freedmen.”⁴⁸ In the early 1900s, when the federal government enacted laws mandating that tribal lands be allotted in severalty to tribal members, that resentment was exploited. Whites capitalized on these feelings of resentment and once again pitted the Seminoles, whom they perceived as “Indian,” against the freedmen, who were referred to as “Negroes.” An editorial in a newspaper in the soon-to-be-established state of Oklahoma opined that, “The right of the negro to Indian lands and the treatment of the Indians at the hands of the government will be the two main issues with which the fight will be made for the Indian vote in the new state”⁴⁹ Thus, rather than attempt to convince the tribes that granting land allotments to freedmen was a fair and equitable deed in light of the decades of forced uncompensated labor the tribes had extracted from the African slaves, white politicians fanned the flames of resentment and argued that it was unfair for the federal government to take Indian lands and give them to the Negro.

⁴³ KATZ, *supra* note 16, at 71. Little has been written about the underground railroad leading to Mexico. On his journey to Mexico, Wild Cat also took along some Cherokee and Creek slaves who learned the route to the Rio Grande so that they could return to Indian Territory and lead other blacks to freedom. *Id.*

⁴⁴ LITTLEFIELD, *supra* note 12, at 13.

⁴⁵ *See generally id.* at 182–87.

⁴⁶ Treaty with the Seminole Indians, Act of Mar. 21, 1866, 14 Stat. 755, 756, arts. 2 & 3.

⁴⁷ LITTLEFIELD, *supra* note 12, at 203.

⁴⁸ ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 135 (U. Okla. Press 1984) (1940).

⁴⁹ T. Baker Tritos, *Editorial on Indian Slave Holders*, HOLDENVILLE TIMES (Aug. 17, 1906) (copy on file with author).

The end of slavery in the Seminole Nation did not result in true equality for the freed slaves. The leaders of the Seminole Nation chose to continue the master narrative of white supremacy and subjugated the Black Seminole freedmen by granting them a type of second class tribal citizenship. Voting rights for freedmen were limited and other basic civil rights were restricted. For example, the Indian Territory became the state of Oklahoma in 1907. The first law passed in the new state, known as “Senate Bill One,” adopted the black codes of Jim Crow, thus ensuring that blacks in Oklahoma continued in a state of subjugation.⁵⁰ The Seminoles and the other major tribes in Oklahoma were then forced by state law to enforce the segregationist agenda by excluding blacks from Indian schools and disassociating with blacks to an even greater degree—even the black people who were considered citizens of the Seminole Nation.⁵¹

The most glaring example of the Seminole Indians’ view that Black Seminoles were inferior to Indian Seminoles arises out of the allotment process. When the tribe was forced by federal legislation to allot its tribal land to individual members of the tribe, it was required to make a list of all the citizens of the Seminole Nation so that the land could be allotted to the individual members in fee.⁵² In furtherance of this goal, the federal government formed the Dawes Commission, which was charged with the administrative duty of compiling the list or “roll” of citizens of the Seminole Nation.⁵³ The federal government, with the advice and consent of the Seminole tribal leaders, decided to create racially segregated rolls of membership. The primary roll, which was intended to identify the “real Indians,” is known as the “Blood Roll.”⁵⁴ The secondary roll, which was intended to identify the “Negro” freed slaves still residing within the Seminole Nation’s geographical boundaries, is called the “Freedmen Roll.”⁵⁵ The Blood Roll is the tribe’s certified list of

⁵⁰ See OKLA. STAT. ANN. Tit. 13, §§ 181–191 (1907) (repealed 1965) (Oklahoma’s Separate Coach Law, providing for segregated railroad coaches); Don Ross, *Prologue to OKLA. COMM’N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT* iv, vi (2001), available at <http://www.ok-history.mus.ok.us/trrc/freport.htm> (Feb. 28, 2001).

⁵¹ See West, *supra* note 10. For an example of segregated towns and boarding schools, see HANNIBAL B. JOHNSON, *ACRES OF ASPIRATION: THE ALL-BLACK TOWNS IN OKLAHOMA* 159–60 (2002).

⁵² See generally KENT CARTER, *THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893–1914*, at 1 (1999).

⁵³ *Id.* at 2, 39.

⁵⁴ See generally *id.* at 49.

⁵⁵ See generally *id.*

people who are “Indian” by “blood.”⁵⁶ Accordingly, the Blood Roll contains the name of the individual person as well as that person’s quantum of Indian blood. For example, if the person had three white grandparents and one Indian grandparent, that person would be listed on the Blood Roll and the fraction “¼” would be next to his or her name.⁵⁷ The Dawes Commission and the tribe, however, did not record the blood quantum of the people on the Freedmen Roll despite the fact that some of the freedmen did have Indian blood.⁵⁸ The rule of hypo-descent was adopted to construct the racial identity of Black Seminoles as “Negro” regardless of whether a particular person had Indian ancestry or not. The rule also served to construct the racial identity of Native Americans as “Indians,” which meant having all or some indigenous ancestry, but generally no African ancestry.

Some freedmen may have possessed Indian blood from the pre-removal historical period when the Red Seminoles intermarried with Black Seminoles.⁵⁹ Other freedmen obtained their Indian blood as a result of the institution of slavery. Just as white slave owners took sexual liberties with enslaved African women, so too did Native American slave owners, resulting in many slaves having mixed ancestry.⁶⁰ However, the tribe and Dawes Commission ignored the fact that some slaves had reddish brown skin and straight silky black hair.

The Dawes Commission and the tribe used the tribal custom of matrilineal families to justify excluding the overwhelming majority of freed slaves with Indian blood from the blood rolls.⁶¹ The matrilineal

⁵⁶ See generally *id.*

⁵⁷ See, e.g., J. Read Moore & E. Hastain, Moore’s Seminole Roll and Land Guide 1898 (listing one Myrtle Aldridge as a sixteen-year-old female of one-quarter Native American Indian blood), available at <http://ftp.rootsweb.com/pub/usgenweb/ok/seminole/rolls/mooresrolla.txt> (last visited Apr. 12, 2005).

⁵⁸ *Davis v. United States*, 199 F. Supp. 2d 1164, 1168 (W.D. Okla. 2002), *aff’d*, 343 F.3d 1282 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 2907 (2004).

⁵⁹ KATZ, *supra* note 16, at 57.

⁶⁰ Sexual encounters between Native American slave masters and African slave women were documented by the Commissioner of Indian Affairs in 1866 wherein he reported, “There is a large number of young freedwomen who have from one to eight children, born while they were slaves, and who never had husbands. Many of these children are mixed bloods” J. H. Johnston, *Documentary Evidence of the Relations of Negroes and Indians*, 14 J. OF NEGRO HISTORY 21, 42 (Jan. 1929).

⁶¹ See Brief for the Federal Appellees at 13–14, *Davis v. United States*, 343 F.3d 1282 (10th Cir. 2002) (No. 02-6198) (“The Dawes Commission Rolls, which generally establish Indian blood degree of various citizens of the Seminole Nation, were prepared according to the Tribe’s traditional matrilineal structure. This means that an individual belongs to the tribal band to which his mother belongs. Accordingly, a

tradition dictates that a child belongs to the tribal band of his or her mother.⁶² The tradition arises from the fact that the paternity of a child was not always clear and could not be determined accurately. However, there was never any question that a child belonged to his or her mother, so children were deemed part of the mother's tribal band. While this rule of matrilineal descent is ostensibly race neutral, the racial realities of the time make it evident that the invocation of the rule with respect to enrollment of the Black Seminoles was racially motivated. The Dawes Commission and the tribal law makers knew that in the overwhelming majority of instances of Indians having children with Africans, it was the paternal line that contributed the Indian ancestry. In other words, everyone knew that it was the male Indian slave master, not his wife, who crept to the African slave quarters at night. Accordingly, instances of Indian women birthing offspring fathered by African men were virtually non-existent when compared with the numerous instances of African women giving birth to offspring fathered by Indian men. The Dawes Commission and the tribal leaders understood this racial and gender reality when they chose to invoke the matrilineal rule of descent as the guiding principle for enrollment. This means that they also understood that use of the rule would have the effect of excluding most of the freedmen with Native American ancestry from the Blood Roll.

Historically, it is understandable that Indian tribal leaders would seek to disassociate the tribe from blacks. Indian tribal leaders perceived the former slaves' identity through the lens of the master narrative of black inferiority reinforced by the rule of hypo-descent, which meant that any person with any African ancestry was simply "Negro" or black. African blood was deemed so corrupt in both society and law that it was perceived to taint the bloodstream to the point that no other racial ancestry could be recognized in a person with African blood.⁶³ Moreover, the master narrative of black

Seminole Nation member with a Seminole Indian mother and a Freedmen father would customarily have been enrolled on the Seminole Citizen Roll. Likewise, a member with a Freedmen mother and a Seminole Indian father would customarily have been enrolled on the Freedmen Roll."), *available at* 2002 WL 32388160.

⁶² *Id.*

⁶³ In one case, a woman who was three-quarters Indian and one-quarter African was placed on the Freedmen Roll by the Dawes Commission. *Miller v. Allen*, 229 P. 152 (Okla. 1924). She sued to be recognized as a blood Indian. *Id.* at 152. The court defined the issue as "whether or not the enrollment record of the Five Civilized Tribes is conclusive as to plaintiff's descent and race as negro or Indian." *Id.* The court reasoned that, "[i]f slavery were in force at this time, Annie Miller, the plaintiff, would be a slave. One drop of slave blood taints the stream and makes it African in

inferiority was at work informing tribal leaders that blackness was ugly, ignorant, lazy, immoral, and, in every way, inferior to whiteness and “Indianness.” For decades the tribe had been bombarded by the cultural messages of the dominant white American society. These cultural messages both explicitly and implicitly informed the Native American that he was superior to the “Negro.”⁶⁴ Whites were the politically powerful and the economically wealthy racial group. The white army had vast resources and superior weapons. It is only logical that Native Americans would seek to aspire to be like the group of people who had social, political, and economic security and stability. Whites offered Native Americans a position on the ladder of racial hierarchy several rungs above blacks, and the fear of being positioned equally with blacks—on the very bottom that is—motivated Native American tribes to accept this intermediate placement.⁶⁵ The master narrative was able to lull the Native Americans into the position of being the intermediate racial class in the Indian Territory, therefore serving as a racial buffer between whites and blacks much as the middle class in America serves as the economic buffer between the over-privileged and the severely underprivileged classes of people.

The Seminoles, like other Native American slaveholding tribes, internalized the basic assumptions of the dominant white American culture and redeployed the subordinating tools of the dominant culture by creating a racial caste system wherein red or white people, who were members of the tribe, were viewed as “Indian” and were granted full tribal rights and privileges. These rights and privileges included the right to identify themselves as Seminole and obtain recognition from the Bureau of Indian Affairs of their status as Native Americans. Meanwhile, the tribe constructed an identity for Black Seminoles that replicated the master narrative of the dominant culture. The institutions of slavery and Jim Crow were imported from the dominant culture and redeployed by the tribe in an effort to elevate the racial status of Native Americans to one more on par with

its descent.” *Id.* at 154. Accordingly, Annie Miller’s native ancestry was ignored and the rule of hypo-descent operated to deny her the identity, status, and benefits of being Indian. *Id.*

⁶⁴ See DEBO, *supra* note 48, at 292. Debo notes that the Oklahoma Territory Seal depicted a white frontiersman and an Indian clasping hands and recalls how the Governor of the state of Oklahoma portrayed the red and white stripes of the American flag as symbolic of the red and white man united under a blue sky. *Id.* Moreover, the Oklahoma constitution elevated the Indian to the status of white by defining the term “colored” to apply only to persons of African descent. *Id.*

⁶⁵ One editorial observer noted, “The average Indian, especially of that class which controls political matters of his nation, considers himself as far above the negro socially as does the white man.” Tritos, *supra* note 49.

the racial status of whites. The tribe deployed the rule of hypo-descent to construct the identity of Black Seminoles. Any freed slave was simply a “Negro” regardless of whether the person had Native American ancestry or not. The master narrative offered Indians an association with the supreme race—whites, which would afford Indians many of the privileges enjoyed by whites. But whites were willing to extend some of the privileges of whiteness to Indians only if the Indians subscribed to and implemented the social, cultural, and legal subjugation of blacks. Tribal leaders did not wish to further denigrate Native American identity by associating it with blackness, so they invoked the matrilineal tradition as a tool to exclude blacks from the Blood Roll, thereby effectively denying many freed slaves the Indian portion of their identity. An acknowledgment of any of the freedmen as blood members of the tribe, and therefore “Indian” in identity, would have served to undermine the rule of hypo-descent, which was essential for preserving Jim Crow. In addition, acknowledgment of the freedmen as true “blood” Indians would have sent the message that Indians considered blacks as equals on a political and social level. Such a message would have been dangerous because it would have undermined the mytho-narrative of black inferiority that had been used to justify slavery and Jim Crow.

It is important to note that some white people recorded in the blood rolls are alleged to have had no Indian blood at all, but were added to the rolls under fraudulent circumstances in order to receive an allotment of land.⁶⁶ Nonetheless, the descendants of those whites would be recognized by the Seminole Nation today as “true” blood Indians. Conversely, many of the descendants of the people placed on the Freedmen Roll, known today as the Dosar-Barkus and Bruner bands of Seminoles, or the “Black Seminoles,” are descended from Native Americans. Unfortunately for the Black Seminoles, there are rarely any marriage or birth records to prove their ancestral connection to the tribe since Native American slave masters did not marry their African mistresses nor legitimate the offspring produced by those sexual encounters. Likewise, biracial children produced by post-slavery, out-of-wedlock unions were rarely legitimated. Without documented proof of an ancestral connection to someone on the Blood Roll, such as a marriage license or birth certificate, the descendant of a freedman will not be recognized by her tribe even if DNA tests reveal Native American ancestry.

⁶⁶ See generally CARTER, *supra* note 52, at 51, 73–74.

III. INDIAN IDENTITY UNDER FEDERAL AND TRIBAL LAW

Lying at the heart of the current dispute within the Seminole tribe is the question of what it means to be Native American and/or Seminole. The two are not one and the same. Native American identity is not purely cultural, nor is it solely based on race or phenotype. Native American identity is at times racial, ethnological, cultural, and political. A person can be Indian in one instance, yet not Indian in another.

A Caucasian or person of little Indian ancestry might become a tribal member by adoption for some purposes, such as voting and participation in tribal government, but not be an Indian for purposes of federal criminal jurisdiction. An Indian whose tribe has been terminated will not be considered Indian for most federal purposes. Nevertheless, such a person remains an Indian ethnologically and continues to be a tribal member for internal tribal purposes.⁶⁷

Much to its credit, the Seminole Nation, unlike other slaveholding tribes, honored the terms of the 1866 treaty it entered with the United States government and granted tribal membership to its freed slaves. This act made the black freedmen members of the Seminole tribe, but it did not make them “Indian.” Their status as “Negroes” continued and the tribe treated them differently than Indian and white members of the tribe.

To be Seminole does not necessarily mean that one is Native American ethnologically. Some Black Seminoles probably have no Native American ancestry, yet they view themselves as Native American on a cultural level because of their long history of affiliation with the Seminole tribe. Many Black Seminoles celebrate and practice the traditions of Seminole culture even though they may have no Native American ancestry. Through the creation of the Dawes Roll, the federal government and the tribe collaboratively defined Native American identity utilizing race, rather than culture, as the hallmark of Indian identity. In creating the Blood Roll, the federal government and the tribe defined Indian identity as all persons possessing Native American blood or ancestry, except those persons who also possess African ancestry from their maternal line. The Dawes Commission and the tribe put a limit on the definition of

⁶⁷ Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 277 (2000-2001) (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 26 (1982)). See also Christine Metteer, *The Trust Doctrine, Sovereignty, and Membership: Determining Who Is Indian*, 5 RUTGERS RACE & L. REV. 53 (2003) (discussing the incongruent nature of defining Indian identity).

Indian identity by invoking the matrilineal rule which they understood would exclude from the Blood Roll most black people who had Native American blood. The effect of exclusion from the Blood Roll is to deny the individual's Native American identity. The creation of the Blood Roll as the official record of all Indians generated a false cultural belief within the tribe, the federal government, and American society that all of the "real" Indians were named on the Blood Roll, and the people on the Freedmen Roll were "just black." Thus, the Seminole's tribal policy of failing to recognize the Indian identity of its black freed slaves served as a validation of white supremacy. By recognizing most white people with Indian ancestry as Indian while simultaneously refusing to recognize most black people with Indian ancestry, the policy prized whiteness and continued the enforcement of the rule of hypo-descent.

IV. THE MODERN-DAY APPLICATION OF THE RULE OF HYPO-DESCENT

The fact that makes the Seminole tribe's history relevant to the extant dispute in *Davis* is that the tribe and federal Indian law still utilize the racially-biased Dawes Commission Blood Roll as the *exclusive* mechanism for ascertaining who is Indian and thereby entitled to all applicable tribal and federally created rights and privileges. Only a person who can prove an ancestral connection to a person identified on the Blood Roll can obtain a card from the federal government certifying that he or she is an Indian.⁶⁸ Thus, the tribe and the federal government use a document which has its genesis in slavery and Jim Crow as the exclusive and final authority for determining who is Indian and who is not.

V. USE OF BLOOD QUANTUM TO DEFINE NATIVE AMERICAN IDENTITY

Ideally, we should respect the self-determination of the indigenous people of the United States, which means that they should be the ones to define Native American identity.⁶⁹ Presently,

⁶⁸ The card is known as the C.D.I.B. card, which stands for Certificate of Degree of Indian Blood.

⁶⁹ The United States Supreme Court has previously recognized the right of self-determination in this context. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53 (1978) (holding that sovereign immunity protected an Indian tribe from the jurisdiction of federal courts in an equal protection challenge to a tribal ordinance that prevented "[c]hildren born of marriages between female members of the Santa Clara Pueblo and non-members" from being members of the tribe); *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (concluding that the Bureau of Indian Affairs' employment preference for Indians, granted by the Indian Reorganization Act of 1934, was constitutional under the Due Process Clause of the Fifth Amendment because it was "reasonable and rationally designed to further Indian self-

the Seminole Nation has elected to limit Native American identity to those people who are lineal descendants of a person identified on the tribe's federally created Blood Roll. By utilizing this approach, the tribe, in conjunction with federal law, has not defined Indian identity broadly enough to encompass all persons with Indian blood or ancestry.⁷⁰ Arguably, the Seminole Nation has a legitimate purpose in trying to exclude from tribal membership those persons who have no Native American ancestry.⁷¹ But little interest seems to be served in excluding people who have a cultural affiliation with the tribe and may have an ancestral connection. Moreover, if ancestry or "bloodline" is truly the litmus test for determining Indian identity, the Seminole Nation may wish to conduct DNA tests on its members of European ancestry since some white persons who had no Indian ancestry are suspected to have made it onto the Dawes Commission's rolls due to fraud and bribery.⁷² Because the Seminole Nation is not trying to ascertain which of its black members have Indian "blood" or ancestry, it seems that they are not truly using a biological ancestral connection as the litmus test to define Native American identity, but rather the flawed and racially-biased Dawes Rolls. Surely there is a better way.

VI. ALTERNATIVES TO STRICT ADHERENCE TO THE RACIALLY BIASED DAWES ROLL

If the tribe is inclined to reclaim all people who have a connection to the Seminole Nation, it could take a different approach to defining the Indian identity of its members. For example, the tribe could use the common denominator of culture as

government").

⁷⁰ Professor Strickland has illustrated the under-inclusiveness of the Dawes Rolls. Rennard Strickland, *Things Not Spoken: The Burial of Native American History, Law and Culture*, 13 ST. THOMAS L. REV. 11 (2000). He points out that people who ethnologically are Indian have been excluded from tribal membership because their ancestors do not appear on the tribal roll created by the Dawes Commission. *Id.* at 15. This omission could have occurred because the ancestor refused to be enrolled in an effort to try to protect communal tribal land. *Id.* The omission could also have occurred if the individual failed to comply with some procedural requirement of the Dawes Commission or because the individual simply did not know of the enrollment process.

⁷¹ See Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002) (offering persuasive rationales for why blood quantum or proof of ancestry requirements for membership in tribes may reflect contemporary concerns of tribal governments and therefore may be legitimate and appropriate).

⁷² See generally CARTER, *supra* note 52, at 12, 73–74.

the test for defining who is truly a Seminole Indian.⁷³ This approach makes sense given that the people whom the tribe would identify as full-blood Seminoles are not really full-blood “Seminoles” because the Seminoles are not one people ethnologically. As stated previously, the Seminoles are a culture comprised of many different indigenous and African peoples. The people who historically comprised the Seminole tribe came from various tribes in Africa as well as tribes here in America. These African people and people from various American tribes, such as the Creek, Yamasee, Hitchiti, Natchez, Shawnee, and Yuchi, banded together in an effort to survive.⁷⁴ If the Seminole Nation is comprised of people who descended from the Yamasee or Natchez Indians, those people’s claim to being Seminole is primarily based upon their ancestral tribe’s absorption into the multicultural tribe known as the Seminoles. Hence, the notion that someone has “Seminole blood” is a fiction.

Moreover, historically, a number of white people without any Native American ancestry either married or were adopted into the tribe, and were treated as Indian members of the tribe.⁷⁵ This suggests that being Seminole is not simply based on blood, but rather on a desire to assimilate into the culture that was created by the multicultural group of people who became known as Seminole. Today, being a Seminole culturally would mean having an ancestral connection to people who, through their language, spirituality, dress, music, food, and customs and traditions, identified themselves as Seminole.⁷⁶ When contextualized by the history of the tribe, being a Seminole Indian could mean being culturally connected to the people who banded together to ultimately form the Seminole Nation of Oklahoma. To ascertain who is a Seminole today, under this framework, one would need to establish an ancestral connection to someone who was part of the Seminole Nation, regardless of his or her race. This could be done by using both the Blood Role and the Freedmen Roll, since the freedmen also comprised the Seminole Nation.

⁷³ See L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 710 (2001) (arguing that the use of race to construct Indian identity and tribal membership is European in origin and that “cultural survival for most tribes may depend on eliminating race as the essential criterion for membership”).

⁷⁴ WRIGHT, *supra* note, 11, at 1–2.

⁷⁵ LITTLEFIELD, *supra* note 12, at 202.

⁷⁶ Black Seminoles today practice many of the cultural traditions of the Seminole tribe. They share oral histories of the tribe and prepare Seminole foods and crafts. See John Tidwell, *The Maroons*, AM. LEGACY, Winter 2003, at 50.

Support for this approach is grounded in history and law. When the Seminoles entered into the 1866 treaty with the United States government, the Seminole Nation agreed to adopt the freedmen of African descent “as citizens or members of said tribe” and to give them “all the rights of native citizens.”⁷⁷ While the Seminole Nation has argued that it merely intended to grant political citizenship and equal rights to blacks living in its geographical boundaries, at least one court interpreted the treaty in light of the Seminole Nation’s historical interactions, including intermarriage with Black Seminoles.

In *Seminole Nation v. United States*, the Seminole Nation argued that the United States government’s allotment of tribal lands to black freedmen was a violation of the Treaty of 1866.⁷⁸ The Seminole Nation argued that the treaty conveyed citizenship rights to the black freedmen, but not membership rights.⁷⁹ The Seminole Nation argued that citizenship rights meant only that blacks would have the same civil rights as native Indians, whereas membership rights would convey civil, property, and voting rights to members of the tribe.⁸⁰ The Court of Claims reviewed the history of the Seminole Nation and found that the Nation historically had not distinguished between citizenship in the Nation and membership in the tribe.⁸¹ Accordingly, the court held that the Seminole Nation intended to grant tribal membership rights to the Black Seminoles equal to native Indian members of the tribes.⁸²

Admittedly, the court was confined by the racial conceptions of identity prevalent during the early twentieth century, and did not go so far as to say that blacks living in the Seminole Nation are racially Indian. The court did say that Black Seminoles have the same rights as Red Seminoles. If Black Seminoles have the same rights as and share a history and culture with the Red Seminoles, it seems that race

⁷⁷ Treaty with the Seminole Indians, Act of Mar. 21, 1866, 14 Stat. 755, 756, art. 2. The treaty provided:

inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.

Id.

⁷⁸ *Seminole Nation v. United States*, 78 Ct. Cl. 455, 457 (1933).

⁷⁹ *Id.* at 457–58.

⁸⁰ *Id.* at 458.

⁸¹ *Id.* at 460.

⁸² *Id.* at 473.

should not stand as the basis for excluding the Black Seminoles from claiming Indian identity or the benefits thereof. In other words, given the social and legal history of the Seminoles, a cultural definition of Seminole identity seems appropriate. Under a cultural ideology of Seminole identity, all persons who are descended from any Seminole, whether on the Blood or Freedmen Roll, would be entitled to tribal membership and thereby all of the attendant burdens and benefits, without regard to race. If being Seminole is defined in this way, then all of the Black Seminoles qualify as Seminole Indians. However, the master narrative of race rejects the history of the Seminoles, as well as the notion of cultural identity, and seeks to invoke the racial rules of Jim Crow to define Indian identity.

If the tribe is unwilling to define "Seminole" as encompassing all people of the Seminole culture, the tribe could define tribal Indian identity as those persons who have an ancestral connection to someone on *any* Seminole tribal roll *and* have Native American ancestry of some kind as demonstrated through DNA testing. This approach, which I will call the "ancestral approach," would address the tribe's concern that only those persons who have an ancestral connection to the indigenous peoples of the Americas should be deemed "Indian." The ancestral approach would also enable the Black Seminoles who have Indian blood, but no paper documentation of such, to prove their ancestral connection to the tribe and participate fully in tribal membership and programs. Allowing Black Seminoles the opportunity to prove their Indian identity through DNA testing would serve as a repudiation of the master narrative of black inferiority by asserting that black people will no longer be subject to the rule of hypo-descent and that in no way does their blackness degrade, diminish, or destroy their Indian identity. While this approach is less inclusive, and is still arguably race-based because it would exclude people based on racial ancestry, it would at least serve to repudiate the rule of hypo-descent, since it would allow for the inclusion of people who have both native and African ancestry, but who are presently excluded from full tribal membership because of the Dawes Commission's racially-flawed scheme.

VII. CONCLUSION

This Essay has attempted to expose how the narrative of black inferiority and racism in general has affected the construction of Native American identity. Presently, the Seminoles continue to downgrade their historical association with African Americans in an

effort to disassociate themselves with blackness. Admittedly there are benefits to doing so. Disassociation is perhaps the primary operating rule of racism. Disassociation by the privileged—meaning those outside of the oppressed group—ensures that they do not lose their privileged status. Just as association with criminals will result in being treated as one, association with blacks historically has resulted in being treated like blacks—inferior to all other racial categories. By segregating Indian identity from blackness, the tribe insulates itself from becoming the target of the master narrative of black inferiority. Such segregation redeems the tribe from the pejorative images of blackness. Today, the tribe basks in the benefits of disassociation, and continues to ignore and/or disavow its history of kinship with Africans.

Moreover, the Seminoles are using law, specifically the law of sovereign immunity, to protect a tribal identity that was created by utilizing a racist ideology. The use of sovereign immunity to protect tribal identity in this instance ignores the racist origins of the legal rules that define Indian Seminole identity and serves to further subjugate people of color, specifically black Indians, by continuing the enforcement of the corrupt rule of hypo-descent.