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# Lost in Transition: The Waning of Cherokee Women's Independence from 1808-1832

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## *Lost in Transition:*

### The waning of Cherokee women's independence from 1808-1832.

*Where are your women?—Cherokee leader Attakullakulla questioning why no Euro-American women were sent by Great Britain to negotiate in 1759.*<sup>1</sup>

*No person shall be eligible to a seat in the General Council, but a free Cherokee male citizen, who shall have attained to the age of twenty-five years.—The Cherokee Constitution in 1827*<sup>2</sup>

#### I. INTRODUCTION

A hallmark of modern western society is its belief in human rights and in equality of all people regardless of race, religion, and gender. Even while the battle rages for the civil rights of gay and lesbian couples, Western states exert pressure on other nations to liberalize their policies.<sup>3</sup> While beliefs on the equality of women are now commonplace in the United States, many feminists would point out that women have only had the right to vote since 1920.<sup>4</sup> Many might assume that because the United States was a pioneer of women's suffrage, it was at the forefront of women's civil liberties before 1920.<sup>5</sup> One might assume this particularly when comparing the rights of women in the United States to non-western cultures.<sup>6</sup> A careful examination of the facts, however, shows that in some cases this schema does not hold true.<sup>7</sup>

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<sup>1</sup> Minutes of February 9, 1757, S.C. Council Journal, *microfilmed in* South Carolina Colonial Records Legislative and Indian Records, 1706-75 reel 11.

<sup>2</sup> CHEROKEE CONST. art. I § 4 (1827).

<sup>3</sup> David Leigh, *US put[s] pressure on Saudi Arabia to let women drive, leaked cables reveal*, THE GUARDIAN (May 27, 2011 10:24 EDT). <http://www.guardian.com/world/2011/may/27/us-pressurised-saudi-let-women-drive>.

<sup>4</sup> U.S. CONST. amend XIX.

<sup>5</sup> Suzanne Venker, *The War on Men*, FOX NEWS (Nov. 24, 2012) <http://www.foxnews.com/opinion/2012/11/24/war-on-men/> (article which argues that women's rights have decreased since the feminist movement and that men do not like to marry modern women because they are too argumentative).

<sup>6</sup> This is a longstanding viewpoint deriving from beliefs of cultural superiority. See Mary Rowlandson, *The Narrative of the Captivity and the Restoration of Mrs. Mary Rowlandson* (1682) in PURITANS AMONG THE INDIANS ACCOUNTS OF CAPTIVITY AND REDEMPTION 16-76-1724, 29 (Alden T. Vaughan & Edward W. Clark eds. 1981) (Rowlandson frequently derides her captures with primitive stereotypes).

<sup>7</sup> LYDIA MARIA CHILD, 2 HISTORY OF THE CONDITION OF WOMEN IN VARIOUS AGES, (1835). (Lydia Maria Child was the premier female author in American in the early nineteenth century. When she published a work arguing that

The history and laws of the Cherokee show that their women enjoyed a level of autonomy that their Euro-American counterparts could have only dreamed about.<sup>8</sup> The traditional culture and formal laws of the Cherokee respected women and did not subjugate them to men.<sup>9</sup> The Cherokee's culture and laws offered all women power over many forms of property, the ability to sell property on their own accord, absolute control over their children, the ability to divorce, and political power.<sup>10</sup> In stark contrast, the contemporary eighteenth and early nineteenth century Euro-American woman would not have enjoyed any of these rights during marriage, as they were expressly forbidden by law.<sup>11</sup> Cherokee women's legal rights were embedded deeply in their culture and, seemingly, were immutable.

The introduction of European laws, culture, and religion altered the balance of Cherokee society and negatively affected women's rights. From the beginning of colonization, European powers assumed certain similarities between the Cherokee and themselves on a range of issues such as heredity and kingship.<sup>12</sup> These basic assumptions were incorrect, the Cherokee did not

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men and women of all races were equal the public withdrew support from her publications. After her death she was all but forgotten from the cannon of American writers).

<sup>8</sup> See *infra* Part II B at 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* However, The Cherokee did distinguish, between female slaves and free females. See Cherokee Supreme Court docket *microfilmed* in The Tennessee State Library and Archives State Library Penelope Johnson Allen Cherokee Collection Microfilm Reel 1: Box 3 (a court case which involved a Cherokee women who owned slaves).

<sup>11</sup> In the early nineteenth century coverture laws, which vested virtually all property rights to a married couple's assets in the husband, were widespread in Anglo-American jurisprudence. See generally CURTIS J. BERGER & JOAN WILLIAMS, OWNERSHIP AND USE, (4th ed. 1995) (detailing the historical property rights of women extensively in chapter five).

<sup>12</sup> In 1730, a poor but noble Scotsman, Sir Alexander Cumming, in an effort to win favor with the British Crown, decreed a Cherokee Chief named Moytoy Emperor of all Cherokee. Sir Cumming had hoped that after Moytoy signed a treaty pledging the Cherokee to the British he would be named governor of the Cherokee. At the time, the Cherokee had no such position and the efforts of Sir Cumming were futile. VICKI ROZEMA, CHEROKEE VOICES EARLY ACCOUNTS OF CHEROKEE LIFE IN THE EAST, 1-6 (2002).

even maintain a central governmental authority.<sup>13</sup> Their society was matrilineal with power earned through deeds and age not via one's parentage.<sup>14</sup>

As European contact with the Cherokee increased, so did the influence of European culture.<sup>15</sup> In particular, the mixed heritage children of Cherokee women and Euro-American traders challenged traditional ideas by introducing Anglo-American education directly into Cherokee culture.<sup>16</sup> Thus during the early 1800s, Cherokee society radically altered, transforming from a collection of aligned people with a common religion and language into a constitutional republic. The new government led by a faction of mix-heritage Cherokee, many of whom were considerably wealthy, altered Cherokee laws. Emulating western ideas of property and government, the new laws dramatically curtailed women's rights and expanded the rights of men.

Despite the new laws altering the station of Cherokee women, their position was not the same as Euro-American women. They still enjoyed certain preexisting liberties and gained the new ability to bring suit in the Cherokee court system.<sup>17</sup> The tension between the new laws and the pre-existing unwritten laws ultimately led to the passing of a women's right bill, preserving some of the preexisting rights of Cherokee women. Given the radical transformation of property and constitutional law, the rights of Cherokee women never returned to their earlier eighteenth century state.

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<sup>13</sup> *Id.* at 1-6.

<sup>14</sup> See *infra* Part II B at 5.

<sup>15</sup> Skiagunsta, the headman of the lower towns, *microfilmed in* Colonial Records of South Carolina: Journals of the Commissioners of the Indian Trade, reel 321.

<sup>16</sup> See *infra* Part III A at 9.

<sup>17</sup> See *infra* Part III B 4 at 14.

This paper inspects the shifting status of Cherokee women rights in the acculturation era, 1750-1838, before Cherokee removal. After outlining how the culture of the Cherokee informed pre-contact rights of Cherokee women the paper examines the Republic era laws affecting women's independence and subjugation. Parts III, IV, and V looks at the men who wrote the laws which lessened women's liberties and the strain between the laws they passed and the decisions of the Cherokee court system. Unlike other scholarly work on the Cherokee, this paper examines the manner in which the laws were written. In particular, how from the first written law passed by the Cherokee government, the new leaders included provisions changing women's liberties in largely unrelated laws. This tactic was used many times by the government to usurp the traditional law while expanding liberties for male Cherokees. Ultimately, the paper comes to the conclusion that women's rights altered during the Republic period because the acculturated men who transformed the government were indoctrinated to Euro-American views on women and property by their Christian upbringing and the only way to secure their property holdings for descendents and Cherokee territory was to rewrite the law and culture of the Cherokee.

## **II. THE LIBERTIES CHEROKEE WOMEN MAINTAINED FLOWED FROM AND WERE AN INTRICATE PART OF THEIR NATIVE CULTURE**

### **A. THE CULTURE OF THE CHEROKEE INFORMED THEIR LAWS**

The Cherokee society that European settlers encountered was fundamentally foreign to European culture. To understand the laws of the Cherokee, a cursory explanation of their culture is necessary. Of particular import for comprehending women's rights are the cultural principles surrounding heredity, religion, personal property, and government.<sup>18</sup> Before European contact, the Cherokee were not a nation state, but a collection of loosely aligned towns that shared a

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<sup>18</sup> Otis Lee, *Social Values and the Philosophy of Law*, 32 VA. L. REV. 811-812 (1946).

common language, religion, and traditions that informed their understanding of the world.<sup>19</sup> They were a matrilineal society, one in which the rearing of children were the responsibility of the mother and her brothers. Thus, the identity of all Cherokee children was established through their mother and her clan and not the father and his clan. Since Cherokee fathers were always from a different clan than the child's mother, he had little say in the upbringing of his offspring. This was in stark contrast to European parenting model and incompatible with British and latter American inheritance laws.

A central theme of the Cherokee religion was an emphasis on maintaining balance and harmony in the world.<sup>20</sup> Flowing from this tenant, Cherokee society sought to maintain harmony among its people.<sup>21</sup> The second area of culture dictated that most minor and major offenses should be forgiven by the injured party.<sup>22</sup> Moreover, because it was a system based on forgiveness, not *poena dare*,<sup>23</sup> there were fewer criminal laws in comparison to Anglo-American society.<sup>24</sup>

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<sup>19</sup> RENNARD STRICKLAND, *FIRE AND THE SPIRITS CHEROKEE LAW FROM CLAN TO COURT*, 10 (1975) (hereinafter FSCL).

<sup>20</sup> Wilma P. Mankiller, *Foreword* to MARLIOU AWAKATA, *SELU SEEKING THE CORN MOTHER'S WISDOM*, XI (1994); J.T. GARRETT & MICHAEL TLANUSTA GARRETT, *THE CHEROKEE FULL CIRCLE: A PRACTICAL GUIDE TO CEREMONIES AND TRADITIONS*, 104 (2002).

<sup>21</sup> Jason Curreri, *Acculturation and Assimilation as Defined by the Cherokee and Euro-American Perspectives*, (unpublished BA thesis, Hofstra University) (May 2010), available [http://www.hofstra.edu/pdf/Library/lib\\_ULRA\\_2010\\_Curreri.pdf](http://www.hofstra.edu/pdf/Library/lib_ULRA_2010_Curreri.pdf) (The Cherokee believed the world was in a fragile balance and if strayed from chaos would rule).

<sup>22</sup> FSCL, *supra* note 19 at 45.

<sup>23</sup> "To pay the penalty" (a punishment for a wrongdoing).

<sup>24</sup> To guarantee the success of the system, once a year at a large festival pre-contact Cherokee law was recited by a religious authority where:

[the authority] enumerate[d] the crimes [people] have committed, great and small, and bid them to look into the holy fire, which has forgiven them...all who partake of it must be forgiven, no matter what may be the offence [sans murder].

This feast consigns to oblivion and extinguishes all vengeance.

FSCL, *supra* note 19 at 45. Only Cherokees who did not seek revenge could come to this forgiveness ceremony and the social pressure to attend was enormous. Avoiding stiff penalties for smaller offenses permitted the Cherokee to avoid the costs involved with a judicial system and the stigma associated with punishment in small communities. JOHN HAYWORD, *THE NATURAL AND ABORIGINAL HISTORY OF TENNESSEE*, 243,246 (1959). Murder involved a

## **B. TRADITIONAL CHEROKEE LAWS AFFORDED CHEROKEE WOMEN INDEPENDENCE UNKNOWN IN WESTERN LAW**

In many areas, the laws of the Cherokee were not compatible with Euro-American ideas of what “law” is. The four areas of Cherokee culture discussed here flouted ideas so basic to Euro-American culture that the early settlers and traders regarded the Cherokee people as “savage unacquainted with the laws of war nor nations.”<sup>25</sup> The Euro-centric lens expected the Cherokee forms of law to resemble its own ideas, and when the settlers did not find a system similar to their own they did not delve further into the structure of Cherokee society.<sup>26</sup> Their conception of Cherokee lawlessness obviously was not true.<sup>27</sup> With some knowledge on Cherokee culture however Cherokee laws can be readily understood.

Cherokee matrilineal practices inspired laws that favored women’s independence in marital and heredity law. Since women were the central family unit, the Cherokee did not confront the paternity dilemmas faced in Euro-American culture.<sup>28</sup> No matter who the father was, the child’s clan, central to Cherokee identity, was established through the mother.

Consequently, the *filius nullius* concept did not exist in Cherokee society.<sup>29</sup> A woman could raise

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complex clan revenge scheme; however, the rationale behind the scheme was not pure “revenge,” but the necessity of the act to permit the ghost of the deceased to move on. FSCL, *supra* note 19 at 27.

<sup>25</sup> HENRY TIMBERLAKE, THE MEMOIRS OF LT. HENRY TIMBERLAKE: THE STORY OF A SOLDIER, ADVENTURER, AND EMISSARY TO THE CHEROKEES, 1756-1765, 8, (ed. Duane H. King, 2007) (1765).

<sup>26</sup> *Id.*

<sup>27</sup> Indeed, even the early settlers realized the falseness of the statement when convenient. See Articles of Friendship and Commerce prepared by the Lord Commissioners for Trade and Plantations to the Deputies of the Cherokee Nation in South Carolina by His Majesty’s Order, on Monday the 7<sup>th</sup> day of September 1730, Great Britain-Cherokee, Sep. 7, 1730. reprinted CECIL HEADLAM, CALENDAR OF STATE PAPERS, 37 COLONIAL AMERICAN, AND WEST INDIES 297-8 (1937) (Here Great Britain purported to bind all of the Cherokee Nation to it and claimed to respect Cherokee laws.)

<sup>28</sup> THEDA PERDUE, CHEROKEE WOMEN, 42 (2002) (hereinafter CW).

<sup>29</sup> “The son of nobody” *i.e.* a bastard. At common law a bastard could not inherit property from either their mother or father. Lili Mostofi, *Legitimizing the Bastard: The Supreme Court’s Treatment of the Illegitimate Child*, 14 J. CONTEMP. LEGAL ISSUES, 453 (2004).

a child with the help of any male clan member.<sup>30</sup> The identity of every Cherokee was established at birth and connected the offspring to their mother for life.<sup>31</sup> The extensive power of a woman over her family included the ability to commit infanticide and abortion.<sup>32</sup> Conversely, a husband had no power over his wife's body, and if he committed infanticide or forced an abortion for any reason the woman's clan would kill him.<sup>33</sup> There are many recorded stories by Euro-Americans citing the frequency of divorce among the Cherokee.<sup>34</sup> Any wife or husband could easily obtain divorce.<sup>35</sup>

Secondly, the Cherokee heredity laws were founded on the matrilineal model. A child's claim to inherit flowed from their relationship to their mother and her clan, never from their father.<sup>36</sup> The early Cherokee possessed few heirloom objects; still, the law held that the largest Cherokee possession, the mother's home, would pass to the youngest daughter.<sup>37</sup> These rights of women were seldom understood or followed by Euro-American settlers and would become a source of tension when intermarrying between the two cultures occurred.<sup>38</sup>

The Cherokee laws based on Cherokee religious and personal property practices privileged neither sex. Under the penumbra of religious harmony, Cherokee women were not

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<sup>30</sup> CW, *supra* note 28 at 42.

<sup>31</sup> *Id.*

<sup>32</sup> CW, *supra* note 28 at 33, 148

<sup>33</sup> *Id.*

<sup>34</sup> CW, *supra* note 28 at 44-5 (noting the frequency of divorce among the Cherokee).

<sup>35</sup> There is also a preserved Cherokee legend of the "singing bird" describing women who had many lovers outside of their present marriage. The legend and the recordings of early Euro-American writers offer substantial proof the accepted custom. JOHN M. OSKISON, *THE SINGING BIRD: A CHEROKEE NOVEL*. (Eds. Timothy B. Powell, Melinda Smith Mullikin) (2007). (Written by a late nineteenth century Cherokee author, the novel concerns a woman who symbolizes the mythical singing bird).

<sup>36</sup> CW, *supra* note 28 at 137.

<sup>37</sup> JOHN PHILLIP REID, *A LAW OF BLOOD*, 144 (2006) (hereinafter LOB).

<sup>38</sup> CW at 82-3 (noting the new culture mixed-heritage children brought to the Cherokee and subtle changes to Cherokee culture introduced by them).

treated as property of their husbands, nor did they lose their independence upon marriage.<sup>39</sup>

Cherokee gender roles, however, did not permit males or females to freely choose any occupation they desired.<sup>40</sup> Generally, women sowed corn on the land near the village, while men hunted in the woods.<sup>41</sup> Within the gender roles, however, men and women had autonomy. The products of hunting and agricultural efforts were privately owned by the worker.<sup>42</sup>

Even though the land was communal, Cherokee law recognized personal property. Thus, a very early Cherokee acculturation to Anglo-American culture was the selling of furs by men and the selling of crops by women to Euro-Americans.<sup>43</sup> Legally, a woman could sell her crops to anyone even the enemies of the Cherokee.<sup>44</sup> For example in 1760, during the Anglo-Cherokee War, Cherokee men were powerless from prohibiting the sale of food to English soldiers they were actively besieging.<sup>45</sup> The Cherokee law favored no sex's rights in the use of private property and did not hold one gender to own the work of another.<sup>46</sup> The very early adoption of selling personal property actually increased woman's rights.

The laws of government maintained a space for women to participate. Within the system women could gain significant power.<sup>47</sup> When the Cherokee approved of a treaty or a major alteration to their society, a National Congress was assembled.<sup>48</sup> Here all of the Cherokee,

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<sup>39</sup> CW, *supra* note 28 at 24 (Anglo-American sources noted that "marriage gives not property to the husband over the property of his wife.").

<sup>40</sup> *Id.*

<sup>41</sup> Both hunting and agricultural activities were further regulated by religious ceremonies. See Parks Lanier Jr., *Afterward in MARILOU AWIAKTA, ABIDING APPALACHIA*, at 58, 62 (2d. ed. 2002).

<sup>42</sup> FSCL, *supra* note 19 at 22.

<sup>43</sup> LOB, *supra* note 37 at 129; William S. Willis, "Colonial Conflict and the Cherokee Indians," 1710-1768," (PH.D. dissertation, Columbia University, 1955), 259-261. Despite these initial cultural changes, Cherokee principles of harmony still required individuals to share with anyone Cherokee who came into their home.

<sup>44</sup> LOB, *supra* note 37 at 114,129.

<sup>45</sup> CW, *supra* note 28 at 74.

<sup>46</sup> *Id.*

<sup>47</sup> LOB, *supra* note 37 at 187-9.

<sup>48</sup> LOB, *supra* note 37 at 58.

including women and children, would come to the designated place and confer on the important issue.<sup>49</sup> While individuals gained prestige through war and orator skills, the core of Cherokee culture regarded all members of the community as equal.<sup>50</sup> Nonetheless, those Cherokee with title and power wielded the most influence over the discussion.<sup>51</sup> The Council would meet until a consensus was created.<sup>52</sup> In the Cherokee tradition after a decision was reached those who did not agree would remain silent or ultimately withdraw from the group.<sup>53</sup>

The government reserved a status position for women called “[a] Beloved Woman,” the most famous of whom is ᎠᎵᎠᎵᎠ or Nancy Ward.<sup>54</sup> The position of Beloved Woman that was gained through combat bestowed the holder with great respect in the Council.<sup>55</sup> For example, in the Council Nancy Ward argued for new agriculture practices and against selling anymore land to Anglo-Americans.<sup>56</sup> After everyone had spoken and the Cherokee had established a consensus, a person who was called the National Speaker and later the Principal Chief, could negotiate on behalf of the Cherokee.<sup>57</sup> Critically, in recorded history the position of National Speaker and Principal Chief were always men.<sup>58</sup>

### III. CHEROKEE ACCULTURATION AND MODERNIZATION BASED ON THE EURO-AMERICAN MODEL DRASTICALLY CHANGED WOMEN’S RIGHTS

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<sup>49</sup> LOB, *supra* note 37 at 144-5.

<sup>50</sup> LOB, *supra* note 37 at 144.

<sup>51</sup> LOB, *supra* note 37 at 58.

<sup>52</sup> LOB, *supra* note 37 at 30-1.

<sup>53</sup> *Id.*

<sup>54</sup> Nancy Ward obtained the title of “beloved woman” after participating in battle and killing a man. She espoused peaceful coexistence between Cherokee and Euro-Americans, and Nancy Ward famously saved the life of Cherokee captive Lydia Russell Bean and protested against selling land to Euro-Americans. LOB, *supra* note 37 at 69,198.

<sup>55</sup> LOB, *supra* note 37 at 187-9.

<sup>56</sup> CW, *supra* note 28 at 54,61 (Detailing Nancy Ward’s speech at the Long Island Treaty of Holston convention).

<sup>57</sup> LOB, *supra* note 37 at 61.

<sup>58</sup> The first female leader of the Cherokee Nation did not occur until the 1985. See Sam Howf Verhovek, *Wilma Mankiller, Cherokee Chief and First Woman to Lead Major Tribe, Is Dead at 64*, N.Y. TIMES, May 7, 2010, available [http://www.nytimes.com/2010/04/07/us/07mankiller.html?\\_r=0](http://www.nytimes.com/2010/04/07/us/07mankiller.html?_r=0).

## A. THE PROPONENTS OF CHANGE WERE MALE PROPERTY OWNERS

After the Cherokee abandoned war with Euro-Americans and trade became central to the Cherokee economy, property ownership became the main avenue to power.<sup>59</sup> Very early the Cherokee readily adopted certain European items such as guns and clothing as Cherokee headman Skiagunsta noted in 1753:

I am an old man...and have always told my people to be well with the English for they cannot expect any supply from anywhere else, nor can they live independent of the English. What are the red people? The clothes we wear, we cannot make ourselves, they are made for us. We use their ammunition with which to kill the deer. We cannot make our guns, they are made to us. Every necessary thing in life we must have from the white people.<sup>60</sup>

This observation acutely illustrates the economic repercussions the Cherokee faced only twenty-three years after the first Anglo-Cherokee treaty.<sup>61</sup> The lucrative deerskin industry had altered the Cherokee culture.<sup>62</sup> Cherokee men now hunted not only deer for their own needs but for the new trading market with South Carolina as well.<sup>63</sup> The Cherokee elder Skiagunsta's lamentation on the old ways versus the new ways reveals how the Cherokee people had become reliant on European goods.<sup>64</sup> Clothes originally made of deerskin had been replaced with cotton and the

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<sup>59</sup> In 1794, the Chickamaugan War between a band of Cherokee and the United States ended. This proved to be the last Cherokee-American war. LOB, *supra* note 37 at 196.

<sup>60</sup> Skiagunsta, the headman of the lower towns, *microfilmed in* Colonial Records of South Carolina: Journals of the Commissioners of the Indian Trade, reel 321.

<sup>61</sup> Articles of Friendship and Commerce prepared by the Lord Commissioners for Trade and Plantations to the deputies of the Cherokee Nation in South Carolina by His Majesty's order, on Monday the 7<sup>th</sup> day of September 1730, Gr. Brit-Cherokee, Sep. 7, 1730. *reprinted in* CECIL HEADLAM, 37 CALENDAR OF STATE PAPERS, COLONIAL AMERICAN, AND WEST INDIES 297-8 (1937).

<sup>62</sup> Philip M. Brown, *Early Indian Trade in the Development of South Carolina: Politics, Economics, and Social Mobility during the Proprietary Period, 1670-1719*, 76 THE SOUTH CAROLINA HISTORICAL MAGAZINE, 118-128 (1975); accord W.O. Moore, Jr. *The largest exporters of Deerskins from Charles Town 1735-1775*, THE SOUTH CAROLINA HISTORICAL MAGAZINE 3 at 144-150 (1973).

<sup>63</sup> *Id.*

<sup>64</sup> Skiagunsta, the headman of the lower towns, *microfilmed in* Colonial Records of South Carolina: Journals of the Commissioners of the Indian Trade, reel 321.

bow was replaced with firearms.<sup>65</sup> This practice made the Cherokee dependent on trade and made war with South Carolina colony perilous.<sup>66</sup> Skiagunsta's astute understanding of how economic power limited Cherokee actions foreshadowed future Cherokee issues.

Several Cherokee recognized that the economic system Skiagunsta described would spell doom for their people.<sup>67</sup> Less than a half century later, in hope of saving the Cherokee from perceived extinction a small group of Cherokee centralized and reformed the Cherokee nation.<sup>68</sup> They were all male. Right before the reformation, a series of treaties in the late eighteenth and early nineteenth century greatly diminished the hunting grounds of the Cherokee.<sup>69</sup> In 1794, while the Cherokee were ceding land through treaties, the last war between the Cherokee and the United States finished, reducing further traditional male activities.<sup>70</sup> During these changing times, a new group of Cherokee rose to wield power over their nation, unlike any who had come before them. Among the three most important of whom were Major Ridge, his son John Ridge, and John Ross, who would lead the Cherokee as Principle Chief from 1828-1866.<sup>71</sup>

These three men were early adopters of acculturation and used economic power to establish their position. Major Ridge, the oldest and most traditional of the three, was the richest man in the Cherokee Nation.<sup>72</sup> He was among the first Cherokee to farm using the European model and he created a large plantation valued at more than twenty thousand dollars.<sup>73</sup> Breaking

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<sup>65</sup> *Id.*

<sup>66</sup> See *supra* note 35 at 9.

<sup>67</sup> Elias Boudinot, CHEROKEE PHOENIX, Feb. 18, 1829, at Pg. 2 col. 2, 5a (Elias Boudinot discussed the necessity of a national school to secure the future prosperity of the Cherokee Nation).

<sup>68</sup> FSCL, *supra* note 19 at 5.

<sup>69</sup> A total of fourteen United States-Cherokee treaties were made between 1776-1806. 2 INDIAN AFFAIRS: LAWS, AND TREATIES, (Charles Kappler ed. 1904); GARY E. MOULTON, JOHN ROSS: CHEROKEE CHIEF, 23 (2004).

<sup>70</sup> LOB, *supra* note 37 at 196.

<sup>71</sup> LOB, *supra* note 37 at 174.

<sup>72</sup> THURMAN WILKINS, CHEROKEE TRAGEDY: THE RIDGE FAMILY AND THE DECIMATION OF A PEOPLE, 302 (1986) (hereinafter CT).

<sup>73</sup> *Id.*

with traditional law Major Ridge took control of the education of his own son John Ridge as well as his brother's son Elias Boudinot.<sup>74</sup> His son John Ridge and nephew Elias Boudinot continued their education in a Foreign Mission school in Connecticut.<sup>75</sup> They both married the daughters of prominent white families during their pupilage. John Ross, the son of a Scottish Trader, was also educated outside of the Cherokee Nation, and was not fluent in Cherokee.<sup>76</sup>

These three men of property—one a plantation owner who educated his own children—one a Euro-American educated Cherokee who married white women—and the third a Cherokee who could not speak his mother's tongue did not conform to traditional Cherokee law. Each man was intelligent, acculturated, successful, and keen to preserve Cherokee land even at the price of Cherokee culture.<sup>77</sup> Together the four men used their acculturated ideas on law and property to gain power among the Cherokee and transformed the government to accept their behavior.

## B. THE LAWS TRANSFORMED CHEROKEE NORMS

From the first Cherokee written law in 1808, the influence of the acculturated Cherokee is evident and their goals for the Cherokee nation established. The first written law's preamble begins, "Resolved by the Chiefs and Warriors in a National Council assembled" thereby establishing the authority of the decree.<sup>78</sup> The power of the National Council, then invested in Chiefs and Warriors, was not new to the Cherokee and its influence was respected by all.<sup>79</sup>

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<sup>74</sup> CT, *supra* note 72 at 98,107. His brother's son then, named Buck Watie, would later take the name Elias Boudinot. Elias Boudinot would become the editor of the Cherokee Phoenix, the first Native American newspaper. His affiliation with his cousin and uncle ultimately lead to his assassination. Theda Perdue *introduction* ELIAS BOUDINOT, CHEROKEE EDITOR, i-x (Theda Perdue ed., 2nd ed.1996).

<sup>75</sup> CT, *supra* note 72 at 144-16,121.

<sup>76</sup> CT, *supra* note 72 at 97.

<sup>77</sup> Thomas Jefferson, President of the United States, to the Cherokee deputies, detailing how the Cherokee could form a national government (January 9, 1809) in RENNARD STRICKLAND, FIRE AND THE SPIRITS CHEROKEE LAW FROM CLAN TO COURT, 237-8 (1975).

<sup>78</sup> CHEROKEE NATION, LAWS OF THE CHEROKEE NATION ADOPTED BY THE COUNCIL AT VARIOUS PERIODS: PRINTED FOR THE BENEFIT OF THE NATION, 3-4 (reprinted 1973) (1852) (hereinafter LCN) (enacted September 11<sup>th</sup> 1808).

<sup>79</sup> LOB, *supra* note 37 at 57-63.

Although the form of government was familiar to the Cherokee, the law passed by the National Council was unprecedented. Obscured halfway through the law creating a police force, the Nation Council restructured the ancient law of inheritance, giving a pension “to [his] children as heirs to their father’s property, and the widow’s share to whom he may have had children with or cohabited with.”<sup>80</sup> The law further providing males could make a valid will when substantiated by two or more disinterested witnesses.<sup>81</sup> This radical new inheritance law, essentially a rider, is based on the Anglo-American tradition.<sup>82</sup> The law fundamentally changes the relationship of Cherokee citizens to one another and to their property. The new legal framework attached the new items of personal property and currency to individuals through a family unit. Moreover, the law, signed only by men, endorses change from a matrilineal and clan society to patrilineal society with reorganized familial relationships and responsibilities. Children became the default heirs to their fathers’ property.<sup>83</sup> For the first time officially, a portion of the husband’s property defaulted to his wife, not to people from his own clan. Moreover, the new legal ability to create a will introduces another Anglo-American tradition, the ability to bequeath personal property.<sup>84</sup> Together, the two provisions show that from the first written law the leaders of the Cherokee aimed to reform Cherokee law regardless of the effect on women’s rights. The hidden inheritance law within the law creating a police force usurps a woman’s right to completely control their children’s upbringing and removes women from the center of the family.

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<sup>80</sup> *Id.* The law’s stated purpose was to create a police force.

<sup>81</sup> *Id.*

<sup>82</sup> 2 SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 260 (2d ed. 1959); Anne-Marie Rhodes, *Blood and Behavior*, 36 *ACTEC J.* 143, 146 (2010).

<sup>83</sup> *Id.*

<sup>84</sup> The codification of a will system and patrilineal law by acculturated Cherokee is not surprising. Before the law was written several high ranking Cherokee had attempted to pass property to their children in the European fashion. CW, *supra* note 28 at 126. Moreover, Sir Cumming’s early attempt to create a Cherokee Emperor imported the idea of succession to the Cherokee. VICKI ROZEMA, *CHEROKEE VOICES EARLY ACCOUNTS OF CHEROKEE LIFE IN THE EAST*, 1-6 (2002).

The 1808 written law also tacitly acknowledges the existence and continuation of practices inconsistent with Anglo-American law, by providing a place for traditional practices under the law.<sup>85</sup> While the full extent of wealth and acculturation will never be known there was a significant disparity in possessions between the poorest and most traditional Cherokee and the wealthiest and most acculturated Cherokee. The law, while based on Anglo-American theory of society, acknowledges and accepts familial relationships that Anglo-American laws would not.<sup>86</sup> For instance, the statute provided a widows share to a women the deceased “cohabitated with, as his wife” and the ability of the male to leave property to a child “which he may have had with another women.”<sup>87</sup> This concession recognizes the traditional Cherokee law permitting men and women to divorce frequently and how women could have multiple children from multiple men. This concession shows how the acculturated Cherokee recognized the practice of more traditional Cherokee.<sup>88</sup> Rather than outright prohibiting the traditional law, the leaders accepted it.

### **1. THE NEW LEADERS FIRST IMPORTED ANGLO-AMERICAN LEGAL TERMS TO TRADITIONAL MATERNAL LAWS EXPANDING OPPORTUNITIES FOR MALES**

After the 1808 law’s passing, the acculturated Cherokee would “gradually then suddenly” reduce women’s legal rights in property, government, agriculture, and finally family law. The new Cherokee leaders continued the pattern displayed in the 1808 law of creating new laws that reformed the law in the favor of the acculturated, and limiting the traditional law under the new model. Because the National Council did not meet regularly, it passed few written laws from

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<sup>85</sup> LCN, *supra* note 78 at 3-4.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 3.

<sup>88</sup> Cherokee leaders often spoke of traditional Cherokee culture as if it were a distant memory. In the Cherokee Phoenix Elias Boudinot opined that the laws of clan murder “are remembered as vestiges of ignorance and barbarism.” Ironically, after the removal of the Cherokee to Oklahoma Elias Boudinot was assassinated in accordance with ancient law. Elias Boudinot, CHEROKEE PHOENIX, Feb. 18, 1829, at Pg. 2 col. 2, 5a

1808-1819.<sup>89</sup> The last law it passed in 1819, however, marked the end of the traditional National Council and the beginning of the Cherokee Republic, but it was a democracy that excluded women.<sup>90</sup> The 1819 law approved by the people and Council created a thirteen seat elected group whose laws all Cherokee were bound to abide by, except in issues regarding common property.<sup>91</sup> The 1819 law was silent on who was eligible to vote for the thirteen members of the new Standing Committee and the continuing existence of the Beloved Woman title.

Halfway through the 1819 law creating a government, the acculturated Cherokee discuss matrilineality.<sup>92</sup> Abruptly after discussing the common property of the Cherokee, the 1819 law's fourth article opines that "the improvements and labors of our people by their mother's side shall be inviolate during the time of their occupancy."<sup>93</sup> At first glance and when viewed in isolation, this law appears to protect traditional law.<sup>94</sup> After the law is compared to the first written law 1808, however, it becomes clear the Cherokee leaders created a law that constrained matrilineal descent with Anglo-American ideas. Unlike the 1808 law, which designated intestate heirs, and approved of will making, the 1819 law left unclear what rights, if any, successors have. The newer 1819 law seems to protect the right of women to manage their own property, but does not affirm the will making right of women like the 1808 law gave men.<sup>95</sup> In effect, the 1808 and 1819 laws created two standards a Cherokee could follow—a traditional lifestyle with stagnant

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<sup>89</sup> The National Council only passed three laws during this period. All three of the laws however impacted women's rights and the structure of society.

<sup>90</sup> LCN, *supra* note 78 at 4-6 (enacted Oct 26, 1819).

<sup>91</sup> *Id.* In this period common property referred to the Cherokee Nation's territory. Traditionally, when the Cherokee entered into any treaty the National met to discuss the terms. In effect the law keeps the traditional power with the people while creating a much larger power for the newly created elected government.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 5.

<sup>94</sup> WILLIAM G. MCLOUGHLIN, *CHEROKEE RENASCENCE IN THE NEW REPUBLIC*, 225 (1992).

<sup>95</sup> *Id.* Moreover, the last article embedded in the law granted the new representative government the power to "amend" any approved provision without reassembling the traditional National Council.

or receding rights for men and women—or an acculturated lifestyle where new rights and powers were created particularly for men.

## **2. FUTURE TAXED MEN BUT EXCLUDED SINGLE WOMEN DANDIFYING WOMEN.**

The new government, The National Committee and Standing Council, created laws favoring men and upending traditional family law. In 1820, the new government created a tax law requiring each “head of a family shall pay a poll tax.”<sup>96</sup> This gender neutral language would tax traditional matrilineal and acculturated patrilineal households equally for the poll tax. This allowed the new government to collect a more taxes. It is the second provision of the law which shows a shift towards Euro-American ideas on women. This provision taxed only single males under sixty.<sup>97</sup> While it may seem odd to complain about not being taxed, the fact the Council saw fit to tax just males reflects Euro-American ideas. At this time Cherokee women still had control over their own property and could sell goods to traders, and an independent woman could support herself on agriculture or cotton products.<sup>98</sup> This law seemingly arbitrarily exempts a portion of the population which produces revenue solely because of their gender and marital status.

The most logical explanation as to why the Cherokee leaders acted protectively towards women in taxation is acculturation. The Anglo-Americans instructing the Cherokee on “civilization” reported: “the best informed and most intelligent Cherokees are very favorably

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<sup>96</sup> LCN, *supra* note 78 at 13. (Enacted October 25, 1820).

<sup>97</sup> *Id.*

<sup>98</sup> CW, *supra* note 28 at 74; LOB, *supra* note 37 at 114, 129.

disposed toward the [Christian] mission and school at Brainerd.”<sup>99</sup> Christian missions did not approve of Native American women’s traditional life style believing “in all uncivilized and pagan countries, the women are doomed to perform the drudgery of the nation.”<sup>100</sup> By marking Cherokee single men as a separate group which would be taxed at the same rate as the then gender neutral heads of families, the government subtly marked young single men as the future heads of families. In other words, this law accepts the reality that in the 1820s, both men and women could be the head of their respected families. At the same time the law is forward looking and treats single men and women as not equal. Thus this law, which purposely taxes only single males, subjugates Cherokee women and excludes them from paying the poll tax. In a few years Cherokee women would be barred from the legal ability that accompanies a poll tax—the vote.

### **3. THE NEW GOVERNMENT DISCOURAGED TRADITIONAL AGRICULTURE AND LIMITED ITS PRACTICE**

In quick succession, Cherokee leaders encouraged and expanded Anglo-American property rights and then limited traditional agricultural methods. The acculturated Cherokee leaders were practitioners of plantation style agriculture and they desired to spread the Anglo-American system to all Cherokee.<sup>101</sup> Cherokee leaders could not altogether adopt Anglo-American legal concepts since no Cherokee owned individual title to the land they cultivated. Nonetheless, these men needed to exclude others from their valuable fields. To circumvent the

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<sup>99</sup> J. Evarts, Esq. Secretary to the Board of Commissioners for Foreign Missions, to the Prudential Committee of the Board, Knoxville May 29, 1822 *in* Rev. J. J. Morse D.D., A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES, ON INDIAN AFFAIRS: COMPRISING A NARRATIVE OF A TOUR PERFORMED IN THE SUMMER OF 1820, UNDER A COMMISSION FROM THE PRESIDENT OF THE UNITED STATES, FOR THE PURPOSE OF ASCERTAINING, FOR THE USE OF THE GOVERNMENT, THE ACTUAL STATE OF THE INDIAN TRIBES IN OUR COUNTRY (1822).

<sup>100</sup> *Id.* at 219. The collected annual report here is for the Osages Nation, but the blanket stereotypes quoted were applied to Cherokee women too.

<sup>101</sup> ELIAS BOUDINOT, AN ADDRESS TO THE WHITES SPEECH DELIVERED IN THE FIRST PRESBYTERIAN CHURCH OF PHILADELPHIA, MAY 26, 1826 *available in* ELIAS BOUDINOT, CHEROKEE EDITOR, 68-79 (Theda Perdue ed., 2d ed. 1996).

traditional Cherokee communal land law, the leaders enacted a rule prohibiting “persons whatsoever” from settling on land within one fourth of a mile of a preexisting field or plantation without consent of the first resident.<sup>102</sup> The law provided further that the person who built too close to another would forfeit the fruit of his/her labor to the person who settled first.<sup>103</sup> This law had three effects it protected the interests of the new Cherokee leaders; it encouraged Cherokee to quickly take up land; it rewrote the traditional law of shared fields. The law imported the Anglo-American concept of “superior title” to the Cherokee and protected Cherokee leaders from encroachment. By creating the right to exclude and granting superior title to the first settler, the law encouraged other Cherokee to adopt European style agriculture. This right to exclude contradicted the traditional method in which women farmed land, and encouraged the creation of “fields or plantations.”<sup>104</sup> Plantation life and the increase in wealth associated with it favored male participation, and relegating women to cotton production.<sup>105</sup>

On the same day that the Council passed the property exclusion law, it created another farming law which restricted traditional farming. The National Council passed an act which prohibited “sett[ing] the woods on fire” before March.<sup>106</sup> This outwardly innocuous law, however, was in fact a direct attack on traditional land clearing methods. Many Native Americans groups throughout the eastern seaboard used the “slashing and burning” technique to clear land for farming.<sup>107</sup> The new law, which delayed the clearing of forests until March,

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<sup>102</sup> LCN, *supra* note 78 at 40. (enacted November 12, 1824).

<sup>103</sup> In the Cherokee Supreme Court case *C?ilington v. Williams* the Court found for the plaintiff that a portion of the defendant’s field was within a mile of his improvements. The plaintiff received “all the land contained within ¼ a mile of the upper field and [illegible text] ½ of the part” that came within another section of the Plaintiff’s improvements. Cherokee Supreme Court docket *microfilmed* in The Tennessee State Library and Archives State Library Penelope Johnson Allen Cherokee Collection Microfilm Reel 1: Box 3.

<sup>104</sup> *Id.*

<sup>105</sup> CW, *supra* note 28 at 111, 115-17.

<sup>106</sup> LCN, *supra* note 78 at 41 (enacted Nov. 12, 1825).

<sup>107</sup> GORDON F. DEJONG, APPALACHIAN FERTILITY DECLINE: A DEMOGRAPHIC AND SOCIOLOGICAL ANALYSIS (1968) (discusses the use of slash and burn methods in the Appalachian mountains).

disrupted the traditional Cherokee farming cycle. In the traditional system, every year in March the Cherokee celebrated the First New Moon of Spring Ceremony.<sup>108</sup> The ceremony marked the beginning of planting season for Cherokee women.<sup>109</sup> The connection of women to farming was tied not only to this ceremony but one of the central stories of Cherokee religion.<sup>110</sup> By prohibiting the burning of new fields the National Council stifled the traditional planting timeline.<sup>111</sup> This increased burden on Cherokee women's crop growing limited their ability to farm and incentivized the switch to Anglo-American agriculture.

#### **4. AFTER YEARS OF INACTION, THE GOVERNMENT ISSUED A SERIES OF LAWS IN 1825, THAT EFFECTIVELY REMOVED WOMEN FROM THE CENTER OF THE FAMILY**

After creating a new male centric model the new government continued eroding women's rights in property, marriage, and government in the name of civilization. The new elected government created in 1820 did not act against traditional women's liberties directly until 1825.<sup>112</sup> When the government returned to addressing women's laws, it swiftly downgraded women's place in the family unit. The Cherokee's first complete wills statute, passed in 1825, establishes "his or her" signature would be required for a valid will. The new law affirmed the ability of women to own and devise property to whomever they please; however, the attached intestacy law replaced matrilineal inheritance. The new hidden inheritance law created a new default inheritance system for all Cherokee using Anglo-American family unit ideas:

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<sup>108</sup> Seven Sacred Cherokee Ceremonies, <http://www.ehotacherokeewolfclan.com/id1.html> (last accessed on April 10, 2013).

<sup>109</sup> *Id.*

<sup>110</sup> MARLIOU AWAKATA, SELU SEEKING THE CORN MOTHER'S WISDOM, 1-40 (1994) (describing the story Selu the corn-grandmother whose life and death gave the Cherokee their most important crop, corn. Her husband Kana-ti's occupation was hunter).

<sup>111</sup> *Id.*; Colin Stief, *Slash and Burn Agriculture*, available <http://geography.about.com/od/urbaneconomicgeography/a/slashburn.htm>. (last accessed on April 10, 2013).

<sup>112</sup> LCN, *supra* note 78 at 53 (enacted Nov. 12, 1825).

That where a person possessing property and dies intestate, and having a wife and children, the property of the deceased shall be equally divided among his lawful and acknowledged children, allowing the widow and equal share with the children...and in case the deceased leave a wife without children, then, in that case the widow shall be entitled to one fourth the estate...and the residue of the estate to go to his nearest kin.<sup>113</sup>

The inheritance system, approved by both John Ross, President of the National Committee, and Major Ridge, the Speaker of the Council, cements a patrilineal and Anglo-American influenced society on to the Cherokee. The law is not consistent with the traditional laws of the Cherokee. In stark contrast to the traditional laws, which gave Cherokee fathers little parental authority, the new law centered the family unit on the father. The husband now “had” a single wife, and the children and property rights flowed through him.<sup>114</sup> The law makes no mention of clans, the rights and responsibilities of the mother’s siblings, or the father’s responsibilities to his sister’s children. Moreover, the law distinguishes between legitimate and non-legitimate children swift—a nonexistent concept under the traditional law. By separating property between a wife and his issue, the Cherokee leaders showed an acculturated attitude towards women in marriage and mimicked contemporary Anglo-American laws.

The new inheritance law acquiesced to traditional law in only one limited circumstances. The last sentence of the law provides “in case a woman claiming and *having exclusive* property right *and* leaving a husband and children...shall revert [in the same manner as males].”<sup>115</sup> This did not protect or enhance traditional women’s rights, but reinforced the male-centric model. Here, the law treats women’s property as an exception to the standard rule. Intestate property only came through a married woman when she had exclusive property in addition to a child and

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<sup>113</sup> *Id.*

<sup>114</sup> In contrast to the 1808 law, there is no mentioning of cohabitation between males and females or previous wives. Compare LCN, *supra* note 78 at 3.

<sup>115</sup> *Id.* (emphasis added).

husband to inherit it.<sup>116</sup> Moreover, any property that was held jointly now defaulted to the husband, significantly lessening the ability of a Cherokee woman to pass her home and traditional property to her youngest daughter. The law in its entirety reorganizes the government stance on Cherokee family and inheritance law and places the father and his legitimate children above the mother and her children.

The day after rewriting the intestacy law, the new leaders of the Cherokee passed two new laws that directly protected their own property interests and undermined traditional law. The first law continued to erode matrilineal law. It established that the children of Cherokee men and white women “are equally entitled” to the privileges enjoyed by Cherokee descending from their mother’s side.<sup>117</sup> The second act resolved that the Council’s previous “recommend[ation]” that all Cherokee have one wife was amended and thereafter no person could take more than one wife.<sup>118</sup> Together, these two acts were a crippling blow to traditional law. By giving citizenship to the children of white women and by limiting the ability of a woman to enter into a marriage to a man who had another wife, the government undermined the essence of Cherokee matrilineal law: identity.<sup>119</sup> No longer was Cherokee status based strictly through a maternal bond but it could originate from any Cherokee father.<sup>120</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> LCN, *supra* note 78 at 57 (enacted Nov. 10<sup>th</sup> 1825).

<sup>118</sup> LCN, *supra* note 78 at 57 (enacted Nov. 10<sup>th</sup> 1825). Please note that the Cherokee did not number their laws thus while the citation is the same these are in fact two different laws.

<sup>119</sup> By limiting marriage to only one spouse possible and later the Council adopting Christianity as the state’s official religion, the leaders eliminated the availability of divorce and subjugated women’s power. LCN, *supra* note 78 at 77 (October 13, 1826).

<sup>120</sup> Cherokee offspring who had African American blood however were not granted citizenship. LCN, *supra* note 78 at 38 (enacted Nov. 11 1824) (Cherokee law prohibiting and punishing marriage with slaves).

The effect of these laws was very beneficial to Cherokee leaders who had created large plantations. Families like the Ridges and Ross' had created large plantations, ferries<sup>121</sup>, and political connections. These men had only one wife and personally controlled their own children, like the laws that they passed. They also desired to bequeath their property to their children and in the case of Major Ridge's son and nephew had married Anglo-Americans.<sup>122</sup> The bequeathing of land and property on such a scale had never been done in the Cherokee culture and conflicted with the older tradition of working for power in the Cherokee Nation. These laws thus protected their property interest and afforded legal power to their own plans. Accepting that the children of white women were Cherokee citizens was necessary for the acculturated and wealthy leaders to continue their nascent dynasties. The average Cherokee, who might not have the means of courting an Anglo-American wife, was not affected by the law, the law, however, gave legitimacy to the lifestyles of the wealthy.<sup>123</sup> The National Council's acts demonstrated its hostility towards traditional law and an acculturated nineteenth century view on the rights of women.<sup>124</sup>

### **5. THE CHEROKEE REPUBLIC'S ZENITH AND GREATEST ACHIEVEMENT WAS PARADOXICALLY THE NADIR FOR GENDER EQUALITY IN THE NATION**

In July of 1827, the Cherokee National Council created the first Native American written Constitution. The Cherokee Constitution, signed by twenty-seven men, divided the government into a three separate bodies with a bicameral legislature.<sup>125</sup> The instrument was heavily

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<sup>121</sup> Ferries were a primary method of transporting goods in the Cherokee Nation and beyond. Many Cherokee court cases and legislation concern ferry rights.

<sup>122</sup> CT, *supra* note 72 at 268 (citing Susan Rice, daughter of John Ridge to the Hon. John Spencer, reminiscing on the Ridge family's arrival in the new Cherokee territory Jun. 7, 1842).

<sup>123</sup> Much later in 1895, an acculturated Cherokee columnist wrote: "The policy of our fore-fathers in establishing our present government was largely paternal. The educated and enlightened Indians to foster and guard the interests and rights of the full blood..." THE CHEROKEE ADVOCATE January 9, 1895.

<sup>124</sup> *Accord* Alison Bernstein, 21 AM. L. REV. 1 at 54 (1997) (noting Anglo-American ideals in early Cherokee laws).

<sup>125</sup> CHEROKEE CONST. (1827).

influenced by the United States' Constitution, but retained some aspects of traditional Cherokee property law.<sup>126</sup> Nevertheless, the view of the Cherokee founding fathers as expressed by Elias Boudinot,<sup>127</sup> perceived traditional law and its practitioners in a Euro-American view:

[they are in] deep darkness in which the nobler qualities of their souls have slept. Yes, methinks I can view my native country, rising from the ashes of her degradation, wearing her purified and beautiful garments, and taking her seat with the nations of the earth. I can behold her sons bursting the fetters of ignorance and unshackling her from the vice of heathenism.<sup>128</sup>

This praise of acculturation and dismissal of traditional practices states in plain words the underlying prejudices against traditional law the Council had. This statement is the Anglo-American schema that the Cherokee tradition which granted women rights is wrong and that the survival of the Cherokee mandated its annihilation and replacement with an Anglo-American system.

The Cherokee leaders were not beholden to the past, and used tradition only when it suited their reformation goals. The acculturated view of traditional law permeates through their legislation and informs the structure of the government the Cherokee leaders created. Nowhere is this more certain than in the curtailing of gender equality in the Constitution. Critical to their goals, the Cherokee included a Supremacy Clause in its Constitution that allowed the leaders to elevate acculturated laws higher than ever before. The instrument restated the act that the children of Cherokee men, except those with slaves, were entitled to full citizenship.<sup>129</sup> Now that

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<sup>126</sup> The Cherokee Constitution vested ownership of all land in the Nation to the sovereign. This article was necessary to stop renegade Cherokee from entering treaties with the United States. CHEROKEE CONST. art. 1 § 2 (1827).

<sup>127</sup> The National Council ordered Elias Boudinot to conduct a speaking tour across the United States in an effort to raise money for a printing press. While Elias Boudinot's actual power in government was limited his ability as a writer and editor of the Cherokee Phoenix was instrumental in spreading the will of the Council. ELIAS BOUDINOT, CHEROKEE EDITOR, (Theda Perdue ed., 2d ed.1996).

<sup>128</sup> ELIAS BOUDINOT, AN ADDRESS TO THE WHITES SPEECH DELIVERED IN THE FIRST PRESBYTERIAN CHURCH OF PHILADELPHIA, MAY 26, 1826 *compiled in* ELIAS BOUDINOT, CHEROKEE EDITOR, 68-79 (Theda Perdue ed., 2d ed.1996).

<sup>129</sup> CHEROKEE CONST. art. III §4 (1827).

the patrilineal system was the Supreme law of the land, it was clear maternal lineage no longer was required for Cherokee identity. Furthermore, the Constitution proclaimed only men could be elected to office and only male citizens eighteen and older could vote.<sup>130</sup> Finally, the new government actively disfavored traditional religion, which respected women's independence, and ordered that any male who denied the existence of God and heaven was barred from office. The cultivation of corn by women was linked to religion, and without it women lost their claim to the occupation. From the passage of the Cherokee Constitution, the position of Beloved Women that also derived from traditional ceremonies and gave women power in the political process would remain dormant until the 1980s. Where once Cherokee leaders asked the British where were their women when discussing treaty terms, now the Cherokee had barred their own from public life.

**IV. DESPITE LEGISLATIVE EFFORTS, WOMEN'S INDEPENDENCE WAS  
PERSERVED BY THE COURTS**

**A. THE COURT'S CASES INDICATE WOMEN WERE TREATED  
EQUALLY UNDER THE NEW LAWS**

The Cherokee government created a court system soon after reforming the National Council. Akin to the legislative body all of the judges and the juries were men, however, unlike the Council in the 1820s the court system protected women's rights. The first recorded case before the Cherokee Supreme Court was a suit for damages between James Griffin and Nancy West.<sup>131</sup> The judicial body never questioned the standing of a single or married woman to be sued nor is there a record at any time of a male defendant challenging the right of women to bring suit.<sup>132</sup> This is the one area in the Cherokee Republic era where after a new right was

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<sup>130</sup> CHEROKEE CONST. art. III §7 (1827).

<sup>131</sup> FSCL, *supra* note 19 at 73.

<sup>132</sup> Determination made based on author's inspection of the extant records.

created it applied equally to both sexes.<sup>133</sup> Importantly, when the National Council was silent on women's rights in new fields the court acted in accord with traditional Cherokee law.

Where laws could be interpreted to give women the right to sue the Court system aided them. In 1829 the Court permitted Elizabeth Hildebrand Pettit to file suit against her white husband who had another wife in Mississippi.<sup>134</sup> Practice of polygamy under the traditional law was not illegal, but the Court had discretion to punish polygamy as it saw fit because of an Act passed in 1824 prohibiting the practice.<sup>135</sup> The Court used this power to protect the Mrs. Pettit and awarded her the husband's farm and five hundred dollars.<sup>136</sup> The Court's discretionary decision to protect Mrs. Pettit served two important functions; first it protected her from what the new law considered an illegal practice; and secondly it protected Cherokee land from Anglo-American ownership.<sup>137</sup> Concededly, this judgment rings of protectionism as does the law it enforces, but here this suit was filed by Mrs. Pettit and not the State. To some extent this afforded Mrs. Pettit a right similar to traditional Cherokee divorce law and allowed her to leave her husband.

Most likely gender parity in judicial proceedings was necessary during the transition era.

First, the laws which officially granted equal or greater legal status to men in property and family

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<sup>133</sup> The Court proved itself to be rather impartial on several occasions to political pressure. For instance in *Hughes v. Pathkiller*, the Court found both men possessed equal right to the ferry. The Court's ruling against Pathkiller, then the Principal Chief, could have been politically dangerous. In *Chisolm v. McAvery*, an extraordinary case from 1827, the Cherokee Supreme Court opined it did not have the power to establish roads, ferry, and turnpikes, and deferred to the legislator. Sadly, this respect for the decisions of the other branches was not shared by their Anglo-American contemporaries. Tennessee State Library and Archives State Library Penelope Johnson Allen Cherokee Collection Microfilm

<sup>134</sup> John Howard Payne Papers, *microfilmed* in The Newberry Library Roger and Julie Baskes Department of Special Collections box 7 reel 114.

<sup>135</sup> LCN, *supra* note 78 at 171 (enacted Sep. 24, 1824).

<sup>136</sup> Accounting for inflation 500 dollars in 1829 is worth \$12, 195.12 dollars today. *Inflation Calculator*, <http://www.davemanuel.com/inflation-calculator.php> (last accessed on April 10, 2013).

<sup>137</sup> Legal disputes between Native Americans and Anglo-Americans were precarious. Most treaties did not allow United States citizens to be punished by Native Americans for crimes committed against them and land disputes rarely went in favor of Native Americans. Treaty With the Cherokee (Treaty of Hopewell), U.S.-Cherokee, Nov. 28 1785, 7 Stat. 1785 Art I.

law were largely passed after 1825. The laws creating the Cherokee judiciary were written in 1820 and the record book of the Supreme Court begins in 1823.<sup>138</sup> Secondly, before the Courts were formed, the National Council occasionally settled legal disputes. One of those cases had two women named as plaintiffs. In that case six individuals sued to stop what was alleged to be an illegal turnpike, among the plaintiffs were two women Mrs. Lesley and Betsey Broom.<sup>139</sup> Here, the Cherokee Council, acting as a judiciary, diverges from Anglo-American law. In the early nineteenth century American law, married women were not allowed to own individual property or sue as an individual. In this instance, the National Council departed from “civilized” Anglo-American practices and silently embraced traditional Cherokee law, making no distinction between married and single women.<sup>140</sup> Thus the judicial process permitted women to sue for debts, ferries, and chattel even as the legislature relegated women’s rights in all other areas.

**B. IN RESPONSE TO THE CHEROKEE COURTS RULINGS THE COUNCIL WROTE A LAW ABOUT WOMENS INDEPENDENCE IN 1829.**

As the Cherokee courts continued to hear cases involving debts involving married women the National Council was forced to act. In 1829, two years after the Cherokee created their Constitution, the National Council readdressed women’s rights.<sup>141</sup> Unlike most previous acts, which addressed women’s rights inside unrelated laws, the 1829 Act directly addressed the position of women in Cherokee society. The preamble declares:

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<sup>138</sup> LCN, *supra* note 78 at 11 (enacted Oct. 20, 1820).

<sup>139</sup> After marriage, women did not have the right to own their own property, keep their own wages, sign a contract, or to sue in early 19<sup>th</sup> century America. Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO.L.J. 1359 (1983); *Accord* National Women’s History Museum, <http://www.nwhm.org/online.exhibits/rightsforwomen/introduction.html>. (last accessed on April 10, 2013).

<sup>140</sup> The Cherokee Supreme Court did distinguish, however, between female slaves and free females. In *The Administrators of Dragging Canoe’s estate v. Peggy Pathkiller*, the female defendant was ordered to surrender “a negro man Simon, a negro woman Pheby (sic) and her children” to the estate. Cherokee Supreme Court docket *microfilmed* in The Tennessee State Library and Archives State Library Penelope Johnson Allen Cherokee Collection Microfilm Reel 1: Box 3.

<sup>141</sup> LCN, *supra* note 78 at 142,143 (emphasis in original) (enacted Nov. 2 1829).

*Whereas*, It has long been an established custom in this Nation and admitted by the courts as law, yet never committed to writing, that the property of Cherokee women after their marriage cannot be disposed of by their husbands, or levied upon...<sup>142</sup>

This preface is unique in the Cherokee laws and is the only law where the actions of the judiciary and customary *i.e.* traditional law are mentioned. The Council's language reveals: the reason the law was written; how the Court ruled when the law was silent on an issue; and a critical distinction the Council made between the new laws and ancient ones. The women's independence law was written in response to the actions of the courts. This is important for it reveals the Cherokee Court's had already held women to have this right and the Council were not leading the push for women's independence. This action also exposes a practice of the Court which is unclear from the surviving Court records, when the Council had not overruled traditional "custom" the Court relied on it to settle disputes.

The Council does not consider unwritten traditional laws to be more than custom. Critically, in the Preamble to the act the Council uses the word "custom" and not law to describe the unwritten traditional separation of property. The Council only admits the traditional law is in fact a law after the Court declares it. Regrettably, this attitude of not recognizing traditional Cherokee law as only custom was the same attitude Europeans had towards Native Americans.<sup>143</sup> Nonetheless, the law preserved women's rights to

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<sup>142</sup> *Id.*

<sup>143</sup> One of the original Englishman to spent time with the Cherokee reported that they were "savage unacquainted with the laws of war nor nations." HENRY TIMBERLAKE, THE MEMOIRS OF LT. HENRY TIMBERLAKE: THE STORY OF A SOLDIER, ADVENTURER, AND EMISSARY TO THE CHEROKEES, 1756-1765 8, (ed. Duane H. King. 2007) (1765). Whenever Timberlake noted differences in Cherokee culture to his own he acquainted it to savageness and not a different legal code. *See generally* Jason Curreri, Sins of Our Forefathers: How the Cherokee Efforts to Reform Their Property Laws Led To Their Removal at the Bayonet of Euro-Americans, 7 (May 2012) (unpublished J.D. thesis, Seton Hall Law) (on file with author).

property management even when it was in discord with Anglo-American law and updated the breath of it to include seizures, the actions of officers, and monetary damages.<sup>144</sup>

**V. THE COUNCIL'S MAIN OBJECTIVE WAS TO PROTECT CHEROKEE LAND WOMEN'S INDEPENDENCE WAS RELEGATED TO SECONDARY STATUS.**

The Cherokee leaders, though acculturated, acted for what they perceived as the Cherokee Nations best interest following the model of Anglo-Americans. For many years the United States had pursued the policy of “civilization” towards Native Americans.<sup>145</sup> In 1808, when the Cherokee leaders began reforming the government, however, the existence of the Cherokee people was threatened by their Anglo-American neighbors. Several leaders of the Cherokee adopted the federal government’s farming plan,<sup>146</sup> but while the government wanted them to farm on the family level; several Cherokee took up the plantation method instead.<sup>147</sup> This increase in capital and wealth among the Cherokee concerned Georgia who saw the Cherokee Republic as a threat to its land claims.<sup>148</sup> Once Georgia began acting adversely towards the Cherokee the Cherokee’s main objective was the defense of their land.<sup>149</sup> The Cherokee responded to the storming of their capital and murdering of their citizens with appeals of peace to the United States Courts and

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<sup>144</sup> LCN, *supra* note 78 at 143.

<sup>145</sup> Thomas Jefferson, President of the United States, to the Cherokee deputies, detailing how the Cherokee could form a national government (January 9, 1809) in RENNARD STRICKLAND, *FIRE AND THE SPIRITS CHEROKEE LAW FROM CLAN TO COURT*, 237-8 (1975).

<sup>146</sup> CT, *supra* note 72 at 32-4.

<sup>147</sup> CW, *supra* note 28 at 126.

<sup>148</sup> Letter from John Clark Executive Department Milledgeville, to Georgia Senate and House Representatives (Dec. 3, 1822) (on file with John Clark Telamon Cuyler, Hargrett Rare Book and Manuscript Library, The University of Georgia Libraries box 48, folder 07, document 04).

<sup>149</sup> Acts of the General Assembly 1828, 88-89 (Milledgeville 1828) (extending the law of Georgia over all Cherokee land).

Congress.<sup>150</sup> It was within this maelstrom that families like the Ridges and Ross tried to show the world the Cherokee had “tak[en] her seat with the nations of the earth.”<sup>151</sup>

The acculturated National Council, believed the best way to protect the nation from outside forces was through acculturation. Naturally these men who built their fortunes by agriculture believed the best way to secure the Cherokee Nation’s future was through farming in the Anglo-American model. Moreover, the Anglo-American men who supported the Cherokee like Congressman Edward Everett of Massachusetts spoke of their progress in terms of property and male superiority:

But among the Cherokee are men of intelligence and shrewdness, who have acquired and possess large accumulations of property houses, shops, plantations, stock, mills, ferries, and other valuable possessions; men who understand property and its uses as well as we do, and who need all the law which property requires for its judicious management. Notwithstanding this, Georgia, at one blow makes all these people incapable of contracting. Men as competent as ourselves to all business transactions are reduced by a sweeping law to a state of pupilage.<sup>152</sup>

Edward Everett’s Congressional speech in support of the Cherokee reveals attitude of the progressive Anglo-Americans in the 1820s.<sup>153</sup> Progress, modernization, and civilization were entwined with wealth gathered through property. Intelligence was proved through business sense.<sup>154</sup> These were the positive characteristics found in men that demonstrated

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<sup>150</sup> *Cherokee v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); Memorial of the Cherokee Delegation, Doc. 316 25 Congress Second Session 1836 (copy held by author).

<sup>151</sup> ELIAS BOUDINOT, AN ADDRESS TO THE WHITES SPEECH DELIVERED IN THE FIRST PRESBYTERIAN CHURCH OF PHILADELPHIA, MAY 26, 1826 *available in* ELIAS BOUDINOT, CHEROKEE EDITOR, 68-79 (Theda Perdue ed., 2d ed.1996).

<sup>152</sup> Speech of Mr. Everett, of Massachusetts in the House of Representatives on the execution of the 14<sup>th</sup> and 21<sup>st</sup> of February 1831 at 9 *available* <http://www.archive.org/details/speecheverettmass00ever>.

<sup>153</sup> *Id.*

<sup>154</sup> Sequoyah, the famed inventor of the Cherokee syllabary, was the rare Cherokee who was respected by Anglo-Americans for his mind. A relief of Sequoyah can be found in the Library of Congress’s John Adams Building and a statue of him remains in the United States Capitol. *See generally* ROBERT F. SIBERT, SEQUOYAH: THE CHEROKEE MAN WHO GAVE HIS PEOPLE WRITING (2004) (short book in English and Cherokee that describes Sequoyah’s accomplishments).

intelligence; nowhere in Everett's twenty-three page speech did he even use the word women. Thus, for the Cherokee to gain Anglo-American support they needed to show an acceptance of Anglo-American ideas.

The Christian leaders of the Cherokee were taught Anglo-American ideas on women. Many of the acculturated leaders of the Cherokee were educated in schools run by Anglo-Americans.<sup>155</sup> These schools, funded by Christian groups, did not respect traditional Cherokee law. For religious leaders women working sowing the fields was a "degraded state" and it should be the "primary objective with the instruction of Indians" to put women in their "proper place."<sup>156</sup> Young girls and boys who were enrolled in Christian schools were all taught the Christian religion.<sup>157</sup> An early letter from Elias Boudinot's in support of American Board's Foreign Mission School letter show his indoctrination into Christian thinking:

We are here far from our native countries, brought here by the kind providence of God; and blessed be his name, that he has given us friends to support us, and to instruct us on human knowledge...I sometimes feel an ardent desire to return to my countrymen and to teach them the way of salvation.<sup>158</sup>

This Christian philosophy clarifies the rationale behind the laws passed by the National Council that supported missions and made the Christian God the *de facto* religion of the government.<sup>159</sup>

The rationale basis for traditional laws relating to women were tied to the Cherokee religion and the acculturated leaders adherence to Christianity created a

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<sup>155</sup> CT, *supra* note 72 at 112, 114-6.

<sup>156</sup> CW, *supra* note 28 at 161.

<sup>157</sup> Elias Boudinot to Baron de Compagne, letter of appreciation, Jan. 8. 1821. (While thanking the Baron for his donation of 100 ducats to the school Elias speaks of his desire to spread Christianity among the Cherokee). *available in* Elias Boudinot, Cherokee Editor 3-11 (Theda Perdue ed., 2nd ed.1996).

<sup>158</sup> *Id.*

<sup>159</sup> LCN, *supra* note 78 at 77 (enacted Oct. 13, 1826).

cultural disconnect. The connection of Cherokee women to agriculture was based on the Cherokee religion.<sup>160</sup> The Cherokee word for corn, *selu*, is also the name of the woman who gave corn to the Cherokee. As the official newspaper for the Cherokee shows those who led the nation were disconnected from their mother culture:

[an Indian clan] is no more than a division of an Indian tribe into large families...it was the mutual law of clans as connected with murder which rendered this custom savage and barbaric...the Cherokee were then to be pitied.<sup>161</sup>

This explanation of Cherokee clans is incorrect. Clans defined the relationship of a person with the entire nation, helped decide who one could marry, and critically was an integral part of the matrilineal descendance of all Cherokee. Identically to the 1829 law on women's independence, the newspaper describes traditional law as only a "custom." The same disconnect used to belittle Cherokee laws in the 1700s. Moreover, the acculturated Cherokee leaders had even adopted Anglo-American stereotypes calling practitioners of the old ways, only abolished by law twenty years earlier, savages. It was this adoption of Anglo-American ideas that led to the usurpation of Cherokee women's rights and the creation of a government in which women had no official power.

## VI. CONCLUSION

The Cherokee were in a precarious position in the concluding half of the eighteenth and early nineteenth centuries. European and later Anglo-American powers attempted to import their ideas onto the Cherokee. No Cherokee group fared worse under this policy than women. The law treated men and women equally and divided work along gender lines. Cherokee identity flowed through the mother, property transferred

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<sup>160</sup> The word for corn in Cherokee, *Selu*, is the same as the woman who became corn. RUTH BRADLEY HOLMES & BETTY SHARP SMITH, *BEGINNING CHEROKEE* 271 (1976).

<sup>161</sup> Elias Boudinot, *CHEROKEE PHOENIX*, Feb. 18, 1829, at Pg. 2 col. 2, 5a.

through her, religion mandate her working in the fields and the government gave women a position in politics.

The Cherokee government was reformed in the beginning of the nineteenth century by a collection of Cherokee men who were educated by Anglo-Americans. These men acquired wealth and prestige among the Cherokee not by traditional methods but through economic power. They built plantations and ferries to increase their wealth, maintained close relationships with their children, and some married Anglo-Americans. In order to secure the prosperity of their country and themselves these men reformed the government and passed laws which followed the Anglo-American tradition they were taught in school.

The new government created another sphere of law for acculturated Cherokee. The Acts passed by the reformed National Council favored and expanded male rights and property rights usually at the detriment of women's rights. When the new government created the first Cherokee Constitution the government permanently bared women from office and the right to vote. This method burying restrictions on women's liberties inside legislative acts that were only tangentially related to rest of the act would be used repeatedly by the National Council.

While the legislative branch reduced women's autonomy, the Courts drew upon traditional law to settle disputes. The Court permitted women to sue for property regardless of their marital status and used traditional law when the new code did not cover an area. The Court's actions eventually forced the National Council to recognize some of the traditional rights of women, but did not restore the rights the Council had

previously taken from them. The women's liberties law passed in response to the Court's dealings demonstrated Anglo-American attitudes towards traditional Cherokee laws believing them little more than customs.

Ultimately, the acculturated Cherokee who made up the Council were willing to take away women's liberties and advantage male opportunities because of Anglo-American ideas. The most ardent supporters of the Cherokee often described progress as an increase in personal wealth and Christianization. Many of the leaders of the Cherokee were taught by such supporters and developed attitudes in accord with Anglo-American sentiment on traditional Cherokee law. Their writings show a disconnect between the traditional Cherokee clan and religious rationales, and an oversimplification of Cherokee culture. Viewing Cherokee law as just a custom and something simplistic the Cherokee leaders failed to see the merit in women's liberties, and instead looked to Anglo-American ideas. This allowed the acculturated leaders to draft and pass legislation which subjected women and removed them from their traditional rolls while depriving them of new rights. Because of these actions, in less than a hundred years, the Cherokee went from questioning why the English had not brought any women to a treaty convention to removing women from public life themselves.