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Anth 320
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# Cherokee Freedmen and Sovereignty

The written word of law shape-shifted and betrayed Indians through evolution and through interpretation. The meanings of treaties constantly changed, and Washington put words into the mouths of all Indians. Implied repeals and court decisions have only ever stripped away or, at best, preserved reserved rights. Pluralism and Liberalism have failed Indian individuals. So is it a numbers game and whichever hurts fewer is better? Or is it not even anyone's business to judge because pluralism is the natural state of the multiple sovereignties that all have immunity? The answer to this is not easy because of the complicated relationships among sovereigns. This is the question I ask regarding American Indians when tribes are removing or not continuing tribal affiliation for certain individuals for what appear to be reasons that the U.S. or other governments couldn't legally remove citizenship, i.e. race or sex. It was never the intention of the government to protect tribes but to protect Indians and their cultures and allow for growth. In fact, the government has more than once tried to eliminate tribes as entities altogether.

It was only in finding that tribes benefitted many Indians in ways better than forced and mandatory assimilation, and after several failed attempts at multiple ways to mainstream Indians, that tribes were embraced as the best way to 'save' Indians. But the tribal system was ad-hoc from the beginning. Many tribes were given status that were made up of multiple and different or even enemy bands. In fact, the current organisations and makeups of tribes are to large extent U.S. federal constructions (Harmon). Tribal identities and affiliations exist within a continuum (Sutton), and assimilation exists on a spectrum. Archaic definitions serve to privilege certain bands and tribes over others within what makes up what the U.S.

government called tribes. This is an issue that should be corrected retroactively, and Indian law is in need of major reform from the ground up. Excluding that until a later time, we need to work toward a better future for Indians with considerations being given to the individuals who make up the tribes but not at the expense of tribes themselves. This isn't easy, but it's not as difficult as it might sound.

There are a number of ways to go about it if the U.S. government were to recognise more tribes and allow support of new factions, or simply extend services that normally exist for tribes to those who leave a tribe or are cast out. But I'm not going to be suggesting new policy here. My goal is to consider the implications of federal government interference in cases like the current Cherokee Freedmen case, and to explain why, though tribal governmental interference may not be the preferred course, that government obligations to Indians does not end at simply not deconstructing tribes and providing BIA services and tribal indicia.

The Cherokee Nation voted to remove all tribal members not considered Cherokee by blood. This eliminated many 'freedmen', former slaves of the Cherokee who were accepted into the tribe and given full tribal assistance via an 1866 treaty and their own Emancipation Proclamation. There were a number of different reasons cited by the Freedmen themselves, by the media, and by the Cherokee Nation as to why they were cast out. The main points that the Cherokee nation make are that they fought primarily on the side of the union in the Civil War, that it is not a racial issue, " nothing to do with race and everything to do with who is a Cherokee", so rather one of Cherokee identity (by default ethnicity if not race, though the vote had to do with blood ties, so this could appear a dubious framing), and that they are complying with the 1866 treaty that guarantees full rights to all freedmen (Cherokee.org). U.S. v Rogers (1846), in which it was determined that a white Cherokee is still foremost white, would support them in there being a separation based on who is Cherokee.

The Freedmen case is still in litigation, but on the surface, the tribe is kicking out former slaves and black people from their tribe. The Cherokee, perhaps because of their mainstream 'civilised' identity with their embrace of American values and slavery among their elite, have found themselves in the court systems in some of the most if not the absolute most important cases for tribal sovereignty. They have fought for their sovereignty within the court system arguably more prominently than any other tribe. This case really does come down to sovereignty, so it's important to consider all of the issues at hand rather than just the immorality of oppressing one's former slaves. The federal government allotted, assimilated and terminated tribes. It banned the Ghost Dance, banned a cultural practice. The IGRA required federal oversight on what should have been a reserved right. Combined with Seminole Tribe of Florida v. Florida (1996) Indian rights were outsourced to states. There's the DAPL and Nuclear Testing on reservation land, soil runoff in drinking water, and so on. These things occur when Indian sovereignty is made secondary to American morality and ideology; basically, these things occur when Congress and The SCOTUS interfere in Indian tribal affairs. So it's important to preserve sovereignty. But the morality of the Cherokee's actions is important as well.

When the Freedmen became Cherokee, they became part of an Indian tribe, and Cherokees likewise all became people who were related to the Freedmen or any other Cherokees. Any ethnic Indians should be able to have their rights as Indians protected and represented. Further, ICRA may not apply to anything but habeas corpus, but oppressive practices by some tribal councils should not be final if Indians are wards. As evidenced in Marshall's *Johnson v M'Intosh* decision, the U.S. federal government bases this ward status on savagery; an inherent superiority in European descended culture; and, military power. This is, then, the foundation of Indian-American government relations.

From this and Sovereign Immunity, you have, first, the untouchable power of the

Federal Government, and then the Congressional oversight and limited sovereignty (still containing immunity) of Indian governments. Indian governments would never be expected to reach equal footing in military power of course, but that spirit of justice and resistance that separated England and America also can't exist with America blindly supporting any and all tribal decisions, if they were in fact to do that. Maybe Congress and the SCOTUS should not step in, but the obligation to protect Indians as well as minorities and women still exists. If none are protected then how is that being a guardian? Still, U.S Government interference would not only be an unpopular and damaging choice, but there is little precedent for it even being possible statutorily, as will be discussed later. So what kind of options for resistance do Indians have against their councils?

"The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is it's natural manure."(Thomas Jefferson via American Creation). This relates to discourse and a resistance of pacification or ignorance. (American Creation) The two extremes will always exist, and to keep people sharp, the patriots have to resist the tyrants lest they rule over an unthinking society. Tyrants represent oppression and patriots liberty. But the patriots must bleed too otherwise people won't see what the tyrants are doing. This is about violence, yes, but not necessarily physical violence, rather a violent force of change. But when it comes to Indians, the dynamic has been shifted because of the guardian status that the federal U.S. government has assumed. Violence as in forceful action, particularly by minorities within tribes, would find no ground gained, and if it were to snowball, it could lead to the loss of yet another fraction of sovereignty for all tribes. This leaves a difficult situation for Indians not closely associated or affiliated with their tribe's central government.

Pluralism and liberalism are as the blood of statutes. But there are grey areas when it comes to liberty versus pluralism, and this is where liberal constructions come in to support individual liberties. Where should the line be drawn? In my interpretation, it should be drawn

at Indian status. When situations like the Cherokee Freedmen issue or the Santa Clara Pueblo v. Martinez (1978) case come up, you've got people losing or being denied their Indian status. Santa Clara Pueblo v. Martinez (1978) showed that tribes are generally not affected by the Indian Civil Rights Act and can control their enrollment/membership. This is fine in the eyes of the tribes as they're the ones making the call, and their stance should be supported and valid. It's their country club and they should be able to kick all of the black and women-folk and whatever out just like their white brothers up in D.C. That being said, Indian status preserves Indians' reserved rights.

At what point does the individual's rights infringe on the other individuals? Pluralism implies two autonomous entities operating in concert, but unless their values and needs synch up perfectly, they will eventually come into conflict. Riley notes that this aspect of liberalism is inherently flawed and questions whether individual liberty or national autonomy/sovereignty are more important. A huge issue is that the federal government, in playing the role of guardian to its ward, is left with two options: Either Congress can step in and legislate policy for Indians, or in their silence they'll support what could be construed as individual violations of liberty. The federal government has identified Indians before. The government's qualifications are, in some cases, the very foundation of tribal affiliation, so there is an obligation to protect that version of Indianness at least.

Carolyn A. Liebler and Meghan Zacher completed a study that focused on American Indians' responses or lack thereof to indicia of Indianness on census forms. They note that although identifying with Indian can be empowering and clarifying, doing the opposite can be the same. A person can go in the direction of the establishment and proudly declare oneself, but considering that there are three parties here; the people, the tribe, and the federal government, the response can be nuanced. Someone might feel that the term has been tainted or feel a separation from their historically related tribe, and might feel more Indian by not

declaring themselves as Indian (or Native American). This can be to empower oneself against the tribe or government in this case. Additionally, it could be representative of a connection to a racial but not ethnic identity. (Liebler, Zacher). Regardless, these people who do not publicly identify as Indian for whatever reason are still Indian regardless of what they or either of those two sovereigns say. They may be additional things too or may not think it's important, but the History doesn't change. But do Indians view themselves as inferior, equal, or even superior to other Americans?

One man's good is another's evil, and in this situation, Indian tribes can certainly be viewed as individual self-contained societies with their own views. Actually, Indian nations may be considered equal to America conceptually by some, but many people generally do view the governments as inferior to those of countries. Be it because an individual views Indians as inherently savage, extinct, their governments less powerful, or just by their lack of representation internationally, Indian governments are not valued equally to those of even third world governments (whom are also the victims of unfair condescension). And America, of course, puts itself above Indian nations. So is there even any potential for these two sovereigns to work together for one to be uplifted when by its very nature it must remain below the other hierarchically?

VAWA, or The Violence Against Women Act, as it applies to Indians, extends jurisdiction to external powers:

"In cases involving couples living on a reservation when one partner is Indian and the other partner is not […], but it creates two issues. First, the VAWA further complicates an already complex jurisdictional scheme by granting jurisdiction to tribal courts in a narrow class of cases, while leaving the remaining cases under federal (and sometimes state) jurisdiction. Second, the VAWA presents complex constitutional and federal common law issues."(Castillo)

House Republicans fought its passage because of its potential to provide protection in equal manners to the LGBT community but arguing a different framing than civil rights as a concern. As to the first issue, it became optional, and on the second, it was difficult but necessary, and was eventually simplified. The goal is for everyone to have protection from dangerous criminals who would otherwise be able to get away with their crimes. Previously, rape, torture, and event assault with intent to kill, had in some cases been essentially excused because of conflicts over jurisdiction. Fixing this is huge. Also, a big positive for the Act is that it is a rare instance where Indians and Congress have worked together to create a situation where two sovereigns are willingly working together in respect of the commitment of one to the other for support and justice. Additionally, we have a situation where a civil rights issue overlapped with a different framing and reached a resolution due to federal support and a lack of imposition for tribes. It appears that they can work together then. But should they?

Harvard Juris Doctor, Angela R. Riley, asserts that "American Indian tribes do not neatly fit into existing legal paradigms because they inhabit a strange sovereign space in the U.S. legal system, one which they alone occupy […] increased federal control over intra-tribal matters will likely mean the end of core aspects of tribal differentness"(802). So she is suggesting that to maintain Indianness, Indian and federal government must remain as separate as possible. She doesn't comment on the morality/immorality of this decision, but assuming she supports Indianness as being worthy of preservation, she would support Indian sovereignty and immunity over individual Indians' liberties. The assumption is that once you pull that string the whole thing will unravel (though I think it's survived a few tugs thus far i.e. removal, allotment, termination, a non-agreed-to wardship status extending over all tribes, and so on).

But is there a middle ground? The government's decision to recognise tribes and not bands

or sovereign individual Indians is not the fault of individual Indians though. When an Indian who still considers him/herself Indian has their status severed by a tribe where their views differ, this is the point where discourse and possibly wars or exile would have occurred, but they'd still have been some type of Indian. By pursuing a course of inaction in these cases and allowing these tribal governments to determine Indian status (which the federal government has made clear is Congress' determination to first grant by recognising certain tribes, in obligatory and often senseless ways, and sometimes basically assembling tribes themselves out of different groups of Indians), the federal government is supporting certain tribal policies that have evolved and offenses to liberty.

There is no conceivable situation where tribes should be able to deny Indianness to those who would be or would have been considered members by congressional statutes, and considering the assertion of American governmental superiority (and hence ward to guardian status) established in the very first case of the Marshall Trilogy, it would be hard to argue that they should be able to deny official status, at least not in consideration of all factors and precedents. Being in control of whoever happens to be allowed into a tribe is important for sovereignty, but denying the status, rights, and particularly, ethnicity of an individual is not within the rights of a nation, and not within the power of a nation that defers to a 'superior' nation. If the Cherokee are going to be fully sovereign and independent though, then they should have the power to remove whomever they want. But the U.S. still has an obligation to assist all Indians. That is, if the USA is to be held true to her word and is not governed first and foremost by laziness and false statements as President Jackson once asserted. If they are going to allow the Cherokee to do as they please in consideration of the sovereignty of their ward, which is admirable, they still have a responsibility to the Indians affected by their inaction.

New action would have to be taken to secure Indians' rights even if their federally

acknowledged tribe does not do so. Just as people are not allowed to neglect their pets, the federal government is not allowed to neglect its wards. The parallel is unfortunate in that it even has to be stated because Indians are people. Citizens are people. Simply because Indians were given U.S. citizenship in addition to their tribal citizenship, it does not wipe America's hands clean of protecting their rights as Indians. When tribes would disagree they would fraction, but now with government approval over tribal actions, we simply have Indians literally lose their right to call themselves Indian (i.e. the Indian Arts and Crafts Act). Just as the American Emancipation Proclamation wasn't followed by withdrawal of the citizenship of blacks, so should Indian citizenship not be so easily disposed of. Many racists wanted to send black people back to Africa. But America kept them. I suppose that is what the Cherokee thought, that America would keep them so they didn't have that obligation. Would it have been more polite if the Cherokee had offered to send the freedmen back to Africa? Regardless, if plurality is to be protected, so then are Indian citizens who are also American citizens. Change is inevitable, but it should not take shape in this form, where former slaves are cast out by the rich families who profited from them.

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