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## Rethinking the Federal Indian Status Test: A Look at the Supreme Court's Classification of the Freedmen Of The Five Civilized Tribe of Oklahoma

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RETHINKING THE FEDERAL INDIAN STATUS TEST:  
A LOOK AT THE SUPREME COURT’S  
CLASSIFICATION OF THE FREEDMEN OF THE FIVE  
CIVILIZED TRIBE OF OKLAHOMA

*Clint Summers*

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# RETHINKING THE FEDERAL INDIAN STATUS TEST: A LOOK AT THE SUPREME COURT'S CLASSIFICATION OF THE FREEDMEN OF THE FIVE CIVILIZED TRIBE OF OKLAHOMA

*Clint Summers\**

## I. INTRODUCTION

Federal courts have used the same test to determine Indian status in the context of criminal jurisdiction for over 150 years: they require Indian blood (meaning a genealogical tie to an Indian tribe) and membership in a federally recognized tribe.<sup>1</sup> Since the test (known hereafter as the “Rogers test”) was first developed, legal scholars and courts alike have agreed that the racial prong (Indian blood) is necessary.<sup>2</sup> Furthermore, when the Supreme Court finally had occasion to decide whether federal classifications based on Indian status violate the Fourteenth Amendment, it held that Indian status is not a racial classification; rather, because Indian status is dependent on membership in a federally recognized tribe, it is a permissible “political classification.”<sup>3</sup>

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\* JD Candidate, 2019, the University of Tulsa College of Law. I am a member of the Muscogee (Creek) Nation. This paper represents my own opinions based on current federal Indian law and does not necessarily reflect the opinions of my tribe. Thanks to Barbara Bucholtz, Russell Christopher, Dallas Jones, Deric McClellan, Robert McClendon, Judith Royster, and to the editors with the American Indian Law Journal for their helpful comments. Any errors are my own.

<sup>1</sup> *United States v. Rogers*, 45 U.S. 567, 573 (1846). Civil jurisdiction is not based on Indian status, but on membership status. *Montana v. United States*, 450 U.S. 544, 564 (1981).

<sup>2</sup> See Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L.R. 503, 518-20 (1976); *United States v. Prentiss*, 273 F.3d 1277, 1280-81 (10th Cir. 2001); *United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984).

<sup>3</sup> *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *United States v. Antelope*, 430 U.S. 641, 645 (1977); see also Clinton, *supra* note 2, at n.60. Importantly, the Supreme Court did not simply ignore the racial prong of the test; the issue of non-racially Indian members had not arisen for over a century because most Freedmen were granted membership after the Civil War. Therefore, all members considered by the Court were racially Indian members. Additionally, once Oklahoma transitioned from Indian Territory to the state we know today, Indian country decreased significantly, making it less likely that a crime committed by

However, a new development in federal Indian law has arisen which neither legal scholars nor courts have had the opportunity to consider: *Cherokee Nation v. Nash*.<sup>4</sup> Following the court's holding in *Cherokee Nation*, over 25,000 Freedmen<sup>5</sup> became Cherokee members.<sup>6</sup> This decision is highly significant—the Cherokee Nation is the largest federally recognized tribe in America with over 360,000 members and growing.<sup>7</sup> According to Supreme Court precedent, these new members are not Indians and as such are not entitled to the benefit of federal criminal jurisdiction; instead they are subject to state criminal laws which can have more severe penalties for the same crime.<sup>8</sup>

No one has yet argued that denying a Freedman a federal benefit provided to other members solely because of his race violates the Equal Protection Clause. This paper fills the gap. This paper does not argue that Supreme Court precedent is wrong. On the

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or against a Freedmen would meet the criteria necessary to have a chance of going to federal court. See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. # (1995).

<sup>4</sup> *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 140 (D.D.C. 2017).

<sup>5</sup> Freedmen can also refer to ex-slaves in general. “Freedmen” is used gender-neutrally. It is also used to refer both to ex-slaves of the tribes and to African-Americans who were never slaves of their respective tribes, such as the Freedmen of the Seminoles, many of whom fled their masters in other parts of the pre-Civil War South to live with the Seminoles. See KEVIN MULROY, *THE SEMINOLE FREEDMEN: A HISTORY*, xxvii-xxviii, (2007); see also M. THOMAS BAILEY, *RECONSTRUCTION IN INDIAN TERRITORY: A STORY OF AVARICE, DISCRIMINATION, AND OPPORTUNISM* 48 (1972); see also Linda Reese, *Freedmen*, OKLAHOMA HISTORY SOCIETY, <http://www.okhistory.org/publications/enc/entry.php?entry=FR016>.

<sup>6</sup> *Cherokee Nation*, 267 F. Supp. 3d at 140; Michael Dekker, *Cherokees begin processing Freedmen descendants for tribal citizenship*, TULSA WORLD (Sept. 8, 2017), [http://www.tulsaworld.com/news/state/cherokees-begin-processing-Freedmen-descendants-for-tribal-citizenship/article\\_555b6279-79fe-5571-b2a2-c88bb2005f2d.html](http://www.tulsaworld.com/news/state/cherokees-begin-processing-Freedmen-descendants-for-tribal-citizenship/article_555b6279-79fe-5571-b2a2-c88bb2005f2d.html) [<https://perma.cc/5SVS-FKJD>].

<sup>7</sup> Cherokee Nation, *About the Nation*, <http://www.cherokee.org/About-The-Nation> [<https://perma.cc/AM33-96PD>]; see also National Center for Education Statistics, *Table 1.3. Largest American Indian and Alaska Native tribes according to number of self-identified members, by race and tribal group: 2000*, [https://nces.ed.gov/pubs2008/nativetrends/tables/table\\_1\\_3.asp](https://nces.ed.gov/pubs2008/nativetrends/tables/table_1_3.asp) [<https://perma.cc/QD6D-MU59>] (The Cherokees are at the top of the list for American Indian tribes.)

<sup>8</sup> *Lucas v. United States*, 163 U.S. 612, 617 (1896); *Alberty v. United States*, 162 U.S. 499, 501 (1896). In *Murphy*, the defendant challenges the State of Oklahoma's jurisdiction primarily because if he were availed of state jurisdiction, he would get out of his death penalty conviction. Oklahoma allows the death penalty while the federal government does not; hence, the benefit of being subject to federal criminal jurisdiction.

contrary, it argues that the Rogers test is facially constitutional as demonstrated by Supreme Court precedent; however, this paper argues that the Rogers test is unconstitutional under Supreme Court precedent as applied to the Freedmen and other non-racial members. The Rogers test as applied to the Freedmen also violates federal policy in significant ways. This paper offers a simple solution: change the Rogers test, which is antiquated and redundant. Doing so would place all Indians on equal footing, give power back to the tribes—whose rigid membership requirements meet the Rogers test’s current standard—and create judicial efficiencies, which will be necessary if the Murphy mandate issues.

Prior to offering a roadmap of this paper, a definition of key terms is helpful. “Indian” is a term of art in federal Indian law, used to describe racial members of a tribe. With the exception of Freedman, all members of a federally-recognized tribe are Indians. All Indians, however, are not members, because the federal government does not recognize every tribe.<sup>9</sup> “Freedmen” are members, but not Indians, unless they are biologically related to a racial Indian. This paper uses “Freedmen” to refer to the Freedmen of the Five Civilized Tribes of Oklahoma.<sup>10</sup>

This paper begins by discussing the history of the Freedmen. This is followed by a discussion of the basics of criminal jurisdiction in Indian country, which is necessary to understand in order to see that Freedmen members are not entitled to these jurisdictional benefits. This paper next argues that under current law, the Freedmen of the Five Civilized Tribes are members but not Indians; therefore, they are not entitled to federal criminal jurisdiction. To resolve constitutional and federal policy violations resulting from the Freedmen not being Indians, this paper proposes removing the first prong of the Rogers test. This change would fix the equal protection and federal policy pitfalls and increase judicial efficiency, ultimately giving power back to the tribes to determine who is Indian.

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<sup>9</sup> See FELIX COHEN, *Cohen’s Handbook of Federal Indian law*, 84-93 (2012).

<sup>10</sup> The Five Civilized Tribes of Oklahoma consist of the Creeks, Cherokees, Seminoles, Choctaws, and Chickasaws. All are currently headquartered in eastern Oklahoma. See KATJA MAY, *AFRICAN AMERICANS AND NATIVE AMERICANS IN THE CREEK AND CHEROKEE NATIONS, 1830S TO 1920S*, 3 (1996); see also LITTLEFIELD, *supra* note 3, at 3 (“[The Creeks, Cherokees, Seminoles, Choctaws, and Chickasaws] are known as . . . the Five Civilized Tribes because of their rapid acculturation in the eighteenth and early nineteenth centuries.”)

## II. THE FREEDMEN MEMBERS OF THE FIVE CIVILIZED TRIBES OF OKLAHOMA

As an initial matter, it is helpful to understand where the Freedmen come from and why one should care about their Indian status now, considering that Freedmen membership is not a novel issue. Prior to the Civil War, all of the Oklahoma tribes practiced slavery.<sup>11</sup> Each tribe brought their slaves with them when they were removed to Indian Territory<sup>12</sup> in the first half of the 19<sup>th</sup> century.<sup>13</sup> All Five Civilized Tribes joined sides with the Confederacy during the Civil War.<sup>14</sup> After the Confederacy lost to the Union, the Five Civilized Tribes were forced to free their slaves and grant them full membership rights as a condition of being admitted back into the Union.<sup>15</sup> One of these four tribes—the Cherokee Nation, which is the largest of the tribes in Oklahoma—changed its constitution in 2007 to exclude Freedmen from its membership rolls.<sup>16</sup> This became the climax of a more than century-long legal battle between the Cherokee Freedmen and the Cherokee Nation, ending in 2017 with a U.S. District Court granting Cherokee Freedmen all the rights of native members.<sup>17</sup> Since this decision went into effect, more than 25,000 Freedmen have claimed membership in the Cherokee

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<sup>11</sup> Reese, *supra* note 5; see also ANNIE HELOISE ABEL, *THE AMERICAN INDIAN UNDER RECONSTRUCTION* (1925).

<sup>12</sup> Indian Territory refers to pre-statehood Oklahoma. Prior to 1907, when Oklahoma became a state, Indian Territory was occupied and owned through treaties by the Five Civilized Tribes. This paper uses “Oklahoma” and “Indian Territory” interchangeably. However, when “Indian Territory” is used, it always refers to Oklahoma prior to its becoming a state. See generally COHEN, *supra* note 9, at 288-91.

<sup>13</sup> Reese, *supra* note 5.

<sup>14</sup> James L. Huston, *Civil War Era*, OKLAHOMA HISTORY SOCIETY, <https://www.okhistory.org/publications/enc/entry.php?entry=CI011>.

<sup>15</sup> Treaty with the Creeks, 1866, U.S.—Creek Nation of Indians, art. 9, July 19, 1866, 14 Stat. 799; Treaty with the Seminole, 1866, U.S.—Seminole Nation of Indians, July 19, 1866, 14 Stat. 755; Treaty with the Choctaw and Chickasaw, 1866, U.S.—Choctaw and Chickasaw Nation of Indians, July 10, 1866, 14 Stat. 769; Treaty with the Cherokee, 1866, U.S.—Cherokee Nation of Indians, July 19, 1866, 14 Stat. 799; see also BAILEY, *supra* note 5, at 123; Cherokee Nation, 267 F.Supp. 3d 86 at 140; LITTLEFIELD *supra* note 3, at 51. The Chickasaw Nation is the only tribe in Oklahoma not to recognize the citizenship of its Freedmen in a treaty. See LITTLEFIELD, *supra* note 3, at 51.

<sup>16</sup> See DANIEL F. LITTLEFIELD, JR., *THE CHEROKEE FREEDMEN: FROM EMANCIPATION TO AMERICAN CITIZENSHIP* (1978).

<sup>17</sup> *Cherokee Nation*, 267 F. Supp. 3d at 140.

Nation.<sup>18</sup> The next question courts will have to decide is whether these Freedmen have a right to the criminal jurisdiction statutes to which native members are entitled.

#### A. *History of the Freedmen*

Like European-Americans, many Indian tribal members of the Five Civilized Tribes owned slaves of African descent.<sup>19</sup> However, unlike European Americans, the Indians of the Five Civilized Tribes generally treated their slaves well.<sup>20</sup> In fact, there are instances of slaves fleeing their masters in the south to live with Indian tribes, such as the Seminoles, prior to the tribes' removal to Oklahoma.<sup>21</sup> Slavery came with the Indian tribes who were moved to Oklahoma on the Trail of Tears.<sup>22</sup> It is estimated that around the year 1839, the Creeks<sup>23</sup> owned around 400 slaves, the Cherokees owned around 1,000 slaves, the Seminoles owned around 1,000 slaves and former slaves (many were adopted into the tribe even before the tribe was moved to Indian Territory), and the Choctaws owned around 600 slaves.<sup>24</sup>

The end of the Civil War signaled the end of slavery for both the United States and the Five Civilized Tribes.<sup>25</sup> But the war had tragic consequences for the Five Civilized Tribes. Although the Choctaws and Chickasaws joined with the Confederacy as soon as called upon, the other tribes had factions which sought to remain neutral or sided with the Union.<sup>26</sup> For example, the leader of the Creeks, Opothleyahola, encouraged neutrality.<sup>27</sup> When it was clear his tribe would side with the Confederacy, he took a large group of pro-Union Creeks north to Kansas, where they were attacked by the

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<sup>18</sup> Dekker, *supra* note 6.

<sup>19</sup> Reese, *supra* note 5; *see also* ABEL, *supra* note 11.

<sup>20</sup> BAILEY, *supra* note 5, at 23.

<sup>21</sup> *Id.*

<sup>22</sup> Reese, *supra* note 5.

<sup>23</sup> This paper uses "Creek" or "Creek Nation" to refer to the Muscogee (Creek) Nation, or the Mvskoke Nation. For a discussion on the origin and proper linguistic use of the tribe's name, *see* SARAH DEER AND CECILIA KNAPP, *Muscogee Constitutional Jurisprudence: Vhaky Em Pvtaky (The Carpet Under the Law)*, 49 TULSA L. REV. 125, 125 n.2 (2013-2014).

<sup>24</sup> BAILEY, *supra* note 5, at 22.

<sup>25</sup> KATJA, *supra* note 10, at 95.

<sup>26</sup> BAILEY, *supra* note 5, at 24.

<sup>27</sup> *Id.* at 25.

Confederate army.<sup>28</sup> The northern faction suffered staggering losses and terrible conditions as they had to return to Indian Territory in the middle of the winter.<sup>29</sup>

Chief John Ross of the Cherokees also preferred to remain neutral, and the full-blooded Cherokee faction<sup>30</sup> preferred to side with the Union.<sup>31</sup> Adding to the tribes' difficulty in remaining neutral or siding with the Union, the Confederacy and Confederacy sympathizers held positions in much of the Southern Superintendency of Indian Affairs (the primary federal representative in Indian Territory), and these Southern sympathizers controlled the information that went to the tribes, sending much anti-Union propaganda to them.<sup>32</sup> Eventually, the Confederacy lost the battle for Indian Territory at the Battle of Honey Springs.<sup>33</sup> The Five Civilized Tribes suffered greatly during the war, losing much of their agriculture, cattle, and people.<sup>34</sup> The tribes did not recover from these losses after the war.

The United States Government's policy towards the tribes during the post-Civil War Reconstruction Era has been heavily criticized as its attempt to attain justice at the sole expense of a displaced, impoverished, and helpless people.<sup>35</sup> To ensure that the Freedmen were given equal rights and to begin assimilating the tribes and Freedmen into the greater picture of a unified federal government, the United States sent General Sanborn to Indian Territory in October of 1865.<sup>36</sup> General Sanborn's direct task was to observe the Five Civilized Tribes' treatment of the Freedmen and to report back to the Secretary of the Interior.<sup>37</sup> His instructions were to refrain from intervention if the tribes were treating the Freedmen well and to intervene immediately if it was clear that the tribes were

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Each of the Five Civilized Tribes had "full-blood" factions, who retained more of the tribes' culture, and "mixed-blood," who adopted more of the white culture. The mixed-blood factions more frequently owned slaves. *See Id.* at 22.

<sup>31</sup> LITTLEFIELD, *supra* note 16, at 10.

<sup>32</sup> *Id.*

<sup>33</sup> BAILEY, *supra* note 5, at 28.

<sup>34</sup> *Id.* at 28–29, 30.

<sup>35</sup> *See generally* ABEL, *supra* note 11, at 290-92; *see also* LITTLEFIELD, *supra* note 27, at 15.

<sup>36</sup> ABEL, *supra* note 11, at 275 (quoting Office of Indian Affairs, *Circular no. I*, in FREEDMEN FILES (1866)).

<sup>37</sup> *Id.*



abusing or denying rights to the Freedmen.<sup>38</sup> Sanborn saw no problem incorporating the Freedmen of the Creeks and Seminoles into those tribes, which would have welcomed such an incorporation; however, he thought that the Cherokees would be more resistant.<sup>39</sup> Sanborn informed the tribes that the Freedmen must be paid for their work and that contracts with the Freedmen featuring terms in excess of one month must be in writing.<sup>40</sup> Additionally, he communicated that the government would not tolerate prejudices against the Freedmen.<sup>41</sup> Within other reports, Sanborn noted the Freedmen's adoption of the Indian practice of polygamy, which he informed the Indians and Freedmen would no longer be tolerated as it was against Anglo-American values.<sup>42</sup> After reporting to the Secretary of the Interior three times, Sanborn left Indian Territory.<sup>43</sup>

On April 26, 1906, after nearly forty years of the Department of the Interior (now in charge of Indian affairs) attempting to adopt General Sanborn's prohibitions and incorporate tribes and Freedmen into white society, members of each of the Five Civilized Tribes signed the Dawes Rolls, named after Senator Henry L. Dawes, founder of the Dawes Commission, the congressional commission in charge of allotting Indian lands in Oklahoma to individual tribal members in the early 1900s.<sup>44</sup> These rolls were federal records used to keep track of members and to distribute federal benefits.<sup>45</sup> For the Five Civilized Tribes, the rolls were divided into citizen by blood rolls and Freedmen rolls, with the racially Indian members signing the former and the Freedmen signing the latter.<sup>46</sup>

What follows is a more in-depth examination of how the current membership requirements of each of the Five Civilized Tribes affect the Freedmen, which will help determine how the Rogers test will be applied to them.

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<sup>38</sup> *Id.* (quoting Office of Indian Affairs, *Circular no. 1*, in FREEDMEN FILES (1866)); LITTLEFIELD, *supra* note 27, at 18-19.

<sup>39</sup> ABEL, *supra* note 11, at 297.

<sup>40</sup> LITTLEFIELD, *supra* note 16, at 20.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 23.

<sup>44</sup> COHEN, *supra* note 9, at 290.

<sup>45</sup> *Id.* at 290, 296-97.

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

## B. *Cherokee Nation v. Nash*

On August 30, 2017, the United States District Court for the District of Columbia determined that the descendants of the Cherokee Freedmen are entitled to the same citizenship rights as all members of the Cherokee Nation.<sup>47</sup> The case analyzed the following issues: whether a treaty entered into between the United States and the Cherokee Nation in 1866 offered citizenship rights to the Freedmen, and if so, whether the descendants of the Freedmen are entitled to the rights of citizenship to which their ancestors, who are identified on the Final Roll of Cherokee Freedmen, were entitled.<sup>48</sup>

After reviewing the history of the 1866 Treaty (Treaty), the court turned its analysis to the meaning of the relevant language in Article 9 of the Treaty, which guaranteed that “all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees.”<sup>49</sup> First, the court asked what “all” means from the Treaty.<sup>50</sup> It concluded that “all the rights of native Cherokees” means the entirety of those rights “without limitations.”<sup>51</sup> Next, the court analyzed what “rights” means.<sup>52</sup> It concluded that “rights of native Cherokees” means citizenship rights identical to those of native Cherokees.<sup>53</sup> This grant of citizenship rights was not self-executing, for the Treaty guarantees rights that are only fully defined within the Cherokee Nation Constitution.<sup>54</sup> Because the constitution of the Cherokee Nation granted citizenship to its native citizens, it also granted citizenship to the Freedmen by implication of the Treaty.<sup>55</sup>

Turning to the second issue, the court determined that all descendants of the Freedmen, as determined by the Final Roll of

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<sup>47</sup> *Cherokee Nation*, 267 F. Supp. 3d 86 at 140.

<sup>48</sup> *Id.* at 114.

<sup>49</sup> *Id.* (quoting Treaty with the Cherokees, 1866, U.S.—Cherokee Nation of Indians, art. 9, July 19, 1866, 14 Stat. 799).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 117.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 122.

<sup>54</sup> *Id.*

<sup>55</sup> *Cherokee Nation*, 267 F. Supp. 3d 86 at 125.

Cherokee Freedmen, were entitled to citizenship rights.<sup>56</sup> In its analysis, the court interpreted the meaning of the Five Tribes Act of 1906, which gave the President of the United States the right to choose each of the Five Civilized Tribe’s principal chiefs, removed tribal taxes, and required presidential approval of tribal legislation and contracts for tribal property.<sup>57</sup> The Cherokee Nation argued that the Five Tribes Act of 1906 amended the Treaty so that only Freedmen and their descendants “who were bona-fide residents of the Cherokee Nation by February 11, 1867” were entitled to citizenship rights.<sup>58</sup> The court concluded that the purposes of the Five Tribes Act were allotment and dissolution, not to limit or amend Article 9 of the Treaty.<sup>59</sup> The court also held that there is nothing in the legislative history of the Five Tribes Act which would indicate that Congress intended to amend Article 9 of the Treaty.<sup>60</sup> Finally, the Court rejected the Cherokee Nation’s argument that certain federal court cases limited the number of Freedmen entitled to citizenship rights, holding, inter alia, that Article 9 of the Treaty had never been altered.<sup>61</sup> In summary, the court determined that all descendants of the Freedmen whose names appear on the Final Roll of Cherokee Freedmen are entitled to the same citizenship rights as native Cherokees.<sup>62</sup>

Currently, in order to be eligible for citizenship, a Freedman “must be able to provide documents that connect [him or her] to an enrolled lineal ancestor, who is listed on the . . . FINAL ROLLS OF CITIZENS AND FREEDMEN OF THE FIVE CIVILIZED TRIBES, Cherokee Nation with a blood degree.”<sup>63</sup>

As an important note leading into the next section, proving ancestry by reference to Freedmen rolls proves nothing more than an ancestral tie to a Freedman; it does not prove the biological tie required by the Rogers test used to determine criminal jurisdiction.

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<sup>56</sup> *Id.* at 132.

<sup>57</sup> Act of Apr. 26, 1906, §§ 6, 11, and 28, 34 Stat. 137. *See also* COHEN, *supra* note 9, at 295.

<sup>58</sup> *Cherokee Nation*, 267 F. Supp. 3d 86 at 132.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 140.

<sup>62</sup> *Id.*

<sup>63</sup> Cherokee Nation, *Cherokee Nation Tribal Registration*, [https://www.cherokee.org/Portals/0/Documents/2012/8/31660Application\\_Instractions.pdf](https://www.cherokee.org/Portals/0/Documents/2012/8/31660Application_Instractions.pdf) (last visited Nov. 19, 2018) [<https://perma.cc/EV8Z-LNGB>].

### III. CRIMINAL JURISDICTION IN INDIAN COUNTRY

Criminal jurisdiction in Indian country is determined by the location of the crime and the identities of the victim and offender (Indian status).<sup>64</sup> The two primary federal statutes which use these two elements to grant jurisdiction to the federal courts are the Indian Country Crimes Act (ICCA), for minor crimes and major crimes where the offender is non-Indian,<sup>65</sup> and the Major Crimes Act (MCA), for major crimes where the offender is Indian.<sup>66</sup> Any crime committed by an Indian in Indian country that is not adjudicated in federal court is adjudicated in tribal court, which includes minor crimes committed by one Indian against another Indian, as the ICCA only applies to inter-racial crimes involving an Indian and a non-Indian.<sup>67</sup> State jurisdiction applies in Indian country when both the offender and victim are non-Indians, or probably when the offender is non-Indian and there is no victim.<sup>68</sup>

An illustration is helpful. James is a biological member of the Cherokee Nation and Lisa is a non-Indian. Both live in Oklahoma. If James steals Lisa's lawnmower on an Indian allotment

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<sup>64</sup> Federal criminal jurisdictional statutes for Indian lands have long been described with reference to "Indian country." Clinton, *supra* note 2, at 507. The language of the federal criminal jurisdictional statutes "not only limits the application of federal Indian criminal jurisdiction to Indian country; it also draws significant jurisdictional distinctions based on whether the victim or the accused is Indian." *Id.* at 513.

<sup>65</sup> 18 U.S.C. § 1153.

<sup>66</sup> Federal courts have jurisdiction over major crimes committed by an Indian in Indian country and minor crimes where either the victim or the offender (not both) is Indian. 18 U.S.C. §§ 1152–53 (2012). 18 U.S.C. § 1153, or the ICCA, has an "inter-racial" exception, whereby federal courts cannot adjudicate crimes committed by an Indian against another Indian. *See* COHEN, *supra* note 9, at 741. For minor crimes committed in Indian country where both the offender and victim are Indians, tribal courts have exclusive jurisdiction. *United States v. Lara*, 541 U.S. 193, 200 (2004); 25 U.S.C. § 1301(2) (1990).

<sup>67</sup> *Lara*, 541 U.S. at 200; 25 U.S.C. § 1301(2). If the crime is victimless, two approaches are taken—one essentially saying there is no Indian victim and thus, federal jurisdiction and the other saying that there is an Indian victim and thus, tribal jurisdiction. *United States v. Quiver*, 241 U.S. 602, 605 (1916); *See also* Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J. L. REFORM 275, 284 (2000/2001) (citing 137 Cong. Rec. 23,673 (1991), in which Senator Daniel K. Inouye explains the policy behind having one definition for "Indian" so that it will apply to federal and tribal jurisdiction.) For the inter-racial exception, *see* 18 U.S.C. § 1153.

<sup>68</sup> *United States v. McBratney*, 104 U.S. 621 (1881) (This rule came to be known as the "McBratney rule").

held in trust for the Cherokee Nation, which is Indian country as defined by statute, James could be prosecuted in federal court or Cherokee tribal court because he is an Indian (he is a member of a federally recognized tribe and has a biological tie to a tribe), and he committed a minor crime against a non-Indian in Indian country. If James were non-Indian, he would be prosecuted in state court. And if James were Indian and Lisa was also Indian, James would be tried in Cherokee tribal court. If James committed murder, he could be prosecuted in federal or tribal court; however, due to statutory limitations on tribal court sentencing,<sup>69</sup> James would probably be prosecuted in federal court. Beyond the location of the crime, James's and Lisa's Indian status is the primary variable in this hypothetical. Therefore, it is easiest to keep in mind two concepts when discussing criminal jurisdiction over Indians: Indian country and Indian status. This paper takes each in turn.

### A. *Indian Country*

Indian country consists of Indian reservations, dependent Indian communities, and Indian allotments to which Indian title has never been extinguished.<sup>70</sup> Since the onset of the allotment period, much of Indian country in Oklahoma has transitioned from reservation lands to allotments, which are held in trust for tribal members or the tribe.<sup>71</sup> The holding in *Murphy* stands to make one of the two largest metropolitan areas in the state a reservation and, thereby, expand Indian country immensely.<sup>72</sup> But regardless of the

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<sup>69</sup> 25 U.S.C. § 1302(a)(7)(D) (2010).

<sup>70</sup> 18 U.S.C. § 1151; *see also* COHEN, *supra* note 9, at 741. Allotments are individual plots of land on a reservation, usually 160 acres each, designated to tribal members after Congress decided to assimilate the Indians into white society at the turn of the 20<sup>th</sup> century.

<sup>71</sup> *See generally* Royster, *supra* note 3; COHEN, *supra* note 9, at 294-98; DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI*, CH. 19 (2017); *see generally* Philip H. Tinker, *Is Oklahoma Still Indian Country – Justifiable Expectations and Reservation Disestablishment in Murphy v. Sirmons and Osage Nation v. Irby*, 9 DARTMOUTH L.J. (2011).

<sup>72</sup> 875 F.3d 896, 918 (10th Cir. 2017), *petition for cert. filed* (U.S. Feb. 7, 2018) (No. 17-1107) (holding that Congress never disestablished or diminished the Creek Reservation, which includes most of Tulsa, Oklahoma). As stated at the beginning of this paper, *Murphy* is currently on appeal to the United States Supreme Court. *See* Petition for Writ of Certiorari at 23-26, *Murphy v. Royal*, 875 F.3d 896 (No. 17-1107). If the Supreme Court grants certiorari review, it will either affirm the Tenth Circuit's holding that the Creek reservation is still

holding in ~~Murphy~~, Indian country in Oklahoma is substantial. When the Dawes Commission initially allotted Indian tribal lands to individual members, that land was held in trust by the federal government.<sup>73</sup> Some of these allotments were converted to lands held in fee, which were subsequently sold to non-Indians.<sup>74</sup> However, much of the allotted lands are still held in trust, making them a significant part of Indian country in Oklahoma.<sup>75</sup>

### 1. Expanding Indian Country in Oklahoma: *Murphy v. Royal*

On August 8, 2017, a Tenth Circuit panel reversed a State of Oklahoma murder conviction of Patrick Murphy and ruled that Congress has never disestablished or diminished the Creek reservation.<sup>76</sup> Murphy was convicted in 2002 in state court for murdering George Jacobs in McIntosh County, near Henryetta, Oklahoma.<sup>77</sup> After Murphy's conviction, he sought direct appeal and the judgment was affirmed.<sup>78</sup> Murphy then sought post-conviction relief in 2004 with the Oklahoma Court of Criminal Appeals (OCCA), this time challenging the State's jurisdiction over

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intact or reverse the holding. If it affirms or denies cert., the mandate of the Tenth Circuit will issue and the Creek reservation boundaries will be effectively intact. Regardless of whether *Murphy* is upheld, Indian country will continue to exist in Oklahoma in the form of trust lands to which Indian title has never been extinguished, and informal reservations. *See Sac & Fox Nation*, 508 U.S. at 123. This would be a much smaller area of lands, but still enough to where the Indian status of the Freedmen members will eventually need to be examined by courts.

<sup>73</sup> COHEN, *supra* note 9, at 288-94.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Murphy v. Royal*, 866 F.3d 1164, 1173 (10th Cir. 2017). The terms "disestablish" and "diminish" refer to Congress's extinguishment or reduction of Indian reservations. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries."); *Lone Wolf*, 187 U.S. 553 (1903) (holding that Congress may abrogate a treaty at will, even if the Indians never understood the treaty due to a deceptive translation). Once the mandate issues, the 1866 boundaries of the Creek reservation will be reinstated, including parts of Tulsa, Seminole, Mayes, and Rogers counties, as well as McIntosh, Okfuskee, Hughes, Wagoner, Okmulgee, and Creek counties. Curtis Killman, *Experts: Court ruling overturning Native American man's murder conviction, death penalty could have huge implications*, TULSA WORLD (August 8, 2017), [http://www.tulsaworld.com/news/courts/experts-court-ruling-overturning-native-american-man-s-murder-conviction/article\\_dd761b1d-2d9c-5542-8a50-771f2f92de85.html](http://www.tulsaworld.com/news/courts/experts-court-ruling-overturning-native-american-man-s-murder-conviction/article_dd761b1d-2d9c-5542-8a50-771f2f92de85.html) [<https://perma.cc/CZ9W-M9R9>].

<sup>77</sup> *Murphy*, 866 F.3d at 1173.

<sup>78</sup> *Id.* at 906.

him.<sup>79</sup> If the Creek reservation was considered intact at the time, Murphy's crime was committed in Indian country and the state lacked jurisdiction when it prosecuted him, for both parties accepted the fact that Murphy was for all intents and purposes an Indian.<sup>80</sup> The OCCA held that the state had jurisdiction over Murphy because his crime was not committed in Indian country.<sup>81</sup> Murphy then sought post-conviction habeas relief in federal court, again challenging the state's jurisdiction.<sup>82</sup> The U.S. District Court for the Eastern District of Oklahoma denied habeas relief. Murphy appealed to the Tenth Circuit Court of Appeals, which ultimately reversed this decision, holding that the state lacked jurisdiction over Murphy because his crime was committed on the Creek reservation.<sup>83</sup> The primary issue the Tenth Circuit discussed was whether Congress disestablished or diminished the Creek reservation, meaning whether they reduced its borders or eliminated them altogether.<sup>84</sup> The court focused on this issue because diminishment of the Creek reservation could have affected the whether or not the scene of the crime was Indian country, an essential element in deciding jurisdiction.

The Tenth Circuit noted that whether the Creek Reservation had been disestablished or diminished was a matter of unsettled law.<sup>85</sup> The Tenth Circuit applied the test derived from the 1984 Supreme Court's decision, *Solem v. Bartlett* for determining whether Congress diminished or disestablished an Indian reservation.<sup>86</sup>

Prior to discussing *Solem*, it is important to note why the Tenth Circuit chose that particular disestablishment or diminishment case, for it was not the diminishment case utilized by OCCA.<sup>87</sup> The Antiterrorism and Effective Death Penalty Act requires that the state court's ruling be against clearly establish law. Therefore, in order to overturn Murphy's conviction and find that the state lack jurisdiction, the court had to show that OCCA erred

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

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

<sup>82</sup> *Id.* at 1173.

<sup>83</sup> *Id.* at 1173–78.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1230.

<sup>86</sup> *Solem*, 465 U.S. 463 (1984).

<sup>87</sup> *Murphy*, 866 F.3d at 926-27.

by ignoring clearly established law.<sup>88</sup> The Tenth Circuit held that OCCA erred by not applying the caselaw previously established by the Supreme Court in *Solem*, which had been in effect for over twenty years and was consistently applied by both the Supreme Court and federal appellate courts.<sup>89</sup>

*Solem* was a habeas case brought by a member of the Cheyenne River Sioux Tribe who was convicted of attempted rape by a state court in South Dakota.<sup>90</sup> Like the defendant in *Murphy*, the defendant in *Solem* argued that the state court decision should be overturned because the state court lacked jurisdiction under the MCA.<sup>91</sup> The Supreme Court applied a three-factor test to determine whether Congress had disestablished or diminished the Cheyenne River Sioux Reservation in South Dakota.<sup>92</sup> The Court looked at the following: (1) the specific statutory language to determine whether Congress expressly intended to diminish or disestablish the reservation, (2) the “events surrounding the passage” of the statute to determine implicit intent, and (3) the “events that occurred after the passage” of the statute to determine whether congressional hearings and reactions to the statutes or treaties indicated an intent to diminish or disestablish the reservation.<sup>93</sup>

The Tenth Circuit noted in *Murphy* that “events that occurred after the passage” of the statute should be given less weight if the court cannot find that Congress explicitly or implicitly intended to dissolve or diminish a reservation by treaty or statutory enactment.<sup>94</sup>

In *Murphy*, the State of Oklahoma presented the language of eight statutes governing the relationship between the United States and the Creek Nation in an attempt to demonstrate that Congress expressly intended to diminish or disestablish the Creek Reservation.<sup>95</sup> After analyzing these statutes, the Tenth Circuit

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 921-22 (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333, 344 (1998); *Hagen v. Utah*, 510 U.S. 399, 410-11; *Shawnee Tribe v. United States*, 423 F.3d 1204, 1221 (10th Cir. 2005); *United States v. Webb*, 219 F.3d 1127, 1131 (9th Cir. 2000) and other courts of appeals and district courts utilizing *Solem*).

<sup>90</sup> *Solem*, 465 U.S. at 465.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 470-80.

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

<sup>94</sup> *Murphy*, 866 F.3d at 1232-33.

<sup>95</sup> *Id.* at 1206-15.



concluded that there was no language explicitly indicating that Congress intended to disestablish or diminish the Creek reservation.<sup>96</sup> For example, the State cited to the Curtis Act,<sup>97</sup> arguing that the Act explicitly diminished the Creek Reservation; however, the court held that the Act merely eliminated tribal courts on the reservation and did not address the reservation borders.<sup>98</sup> In sum, the court found that the statutory language indicated that the reservation borders were still in existence because Congress did not expressly intend to diminish the reservation.<sup>99</sup>

Next, the Tenth Circuit looked for “contemporary historical evidence” that demonstrated by implication that Congress intended to disestablish or diminish the Creek Reservation.<sup>100</sup> In this context, effectively demonstrating the implied intent of Congress “requires ‘unambiguous evidence’ that ‘unequivocally reveals’ congressional intent” to disestablish or diminish the reservation.<sup>101</sup> Here, the State produced evidence that Congress considered the eventual demise of the Creek Nation’s government.<sup>102</sup> However, the Tenth Circuit concluded that the State failed to produce evidence that Congress specifically intended to diminish or disestablish the reservation.<sup>103</sup> Despite Congress’s consideration of the eventual demise of the Creek Nation’s government, the Creek Nation’s government was never terminated.<sup>104</sup> And, even if the Creek Nation’s government had been terminated, the reservation could still be intact.<sup>105</sup>

Finally, after concluding that contemporary historical evidence did not demonstrate the implied intent of Congress, the court looked to “later history.”<sup>106</sup> The Tenth Circuit acknowledged that there is some confusion amongst federal courts about whether the Creek Reservation was disestablished.<sup>107</sup> However, such

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<sup>96</sup> *Id.* at 1215.

<sup>97</sup> 30 Stat. 495 (June 28, 1898).

<sup>98</sup> *Murphy*, 866 F.3d at 1208.

<sup>99</sup> *Id.* at 1218.

<sup>100</sup> *Id.* at 1220.

<sup>101</sup> *Id.* (quoting *Nebraska v. Parker*, 136 S. Ct. 1076, 1080–81 (2016)).

<sup>102</sup> *Id.* at 1221–24.

<sup>103</sup> *Murphy*, 866 F.3d at 1221–24.

<sup>104</sup> *Id.* at 1223–24 (emphasis added).

<sup>105</sup> *Id.* at 1223–24.

<sup>106</sup> *Id.* at 1226.

<sup>107</sup> *See, e.g., Turner v. United States*, 51 Ct. Cl. 125, 127 (1916), *aff’d*, 248 U.S. 354 (1919) (The Federal Court of Claims erroneously remarked, according to the Supreme Court, that the “Creek Nation of Indians kept up their tribal organization . . . until the year 1906, at which date the tribal government was

confusion is not evidence of a congressional intent to disestablish or diminish the Creek Reservation.<sup>108</sup> Here, the court applied the Indian canons of construction.<sup>109</sup> While their application is not mandatory, the canons encourage federal courts to interpret ambiguities or uncertainties in favor of the tribes.<sup>110</sup> Applying this concept, the courts must have an express indication that Congress intended to disestablish or diminish the Creek reservation.<sup>111</sup> While the Tenth Circuit recognized that there may be some confusion, it concluded that evidence of the continuation of the Creek Reservation outweighed any evidence of its disestablishment or diminishment.<sup>112</sup> Taking the *Solem* factors into consideration, the Tenth Circuit overturned the lower court’s decision and held that the Creek Reservation is still intact.<sup>113</sup>

If the Tenth Circuit’s decision in *Murphy v. Royal* is not overruled by the Supreme Court,<sup>114</sup> the 1866 borders of the Creek Reservation will continue to be recognized (these were the post-

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terminated by the general provision of [the Original Allotment Agreement].”); *but see* Board of Com’rs of Creek County v. Seber, 318 U.S. 705, 718 (1943) (The Supreme Court, after *Turner*, concluded that the Creek Nation “still exists.”).

<sup>108</sup> *Murphy*, 866 F.3d at 1231.

<sup>109</sup> *See generally* COHEN, *supra* note 9, at 113–28.

<sup>110</sup> *See generally* COHEN, *supra* note 9, at 113–28.

<sup>111</sup> *See generally* ROBERT T. ANDERSON, BETHANY BERGER, SARAH KRAKOFF, & PHILIP P. FRICKEY, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 170-72 (3d ed. 2015); *see also* Choctaw Nation of Indians v. United States, 397 U.S. 620, 631 (1970) (Treaties “must be interpreted as [the tribes] would have understood them, and any doubtful expressions in them should be resolved in the Indians’ favor.”).

<sup>112</sup> *Murphy*, 866 F.3d at 1232-33. In another interesting part of the *Murphy* case, the Tenth Circuit recognized that this decision impacts Tulsa—a metropolitan area—and that many of the people residing on the Creek reservation are not in fact members of the reservation or even Indians (“only 5.3%” of people living in Tulsa are Indian). *Id.* at 1232. This, the Tenth Circuit notes, is no indication that the reservation has been diminished or disestablished. *Id.* Interestingly, the Petition for Writ of Certiorari argues that the population factor in Tulsa should cause the Supreme Court to go the other way with its analysis—that the reservation was disestablished. Petition for Writ of Certiorari at 15-18, *Murphy v. Royal*, 875 F.3d 896 (No. 17-1107).

<sup>113</sup> *Id.* at 1233.

<sup>114</sup> The Tenth Circuit denied to rehear *Murphy en banc*. However, Chief Judge Tymkovich wrote separately, concurring with the results, and recommending that *Murphy* would be a good case for Supreme Court review. *See Murphy*, 866 F.3d, Nos. 07-7068 at 1-4 (Tymkovich, C.J. concurring). On February 6, 2018, the State of Oklahoma petitioned the United States Supreme Court for writ of certiorari to review the Tenth Circuit’s holding. *See* Petition for Writ of Certiorari at 23-26, *Murphy v. Royal*, 875 F.3d 896 (No. 17-1107).

Civil War borders which represented the last explicit congressional diminishment of the Creek reservation).<sup>115</sup> The reservation will consist of all or part of eleven counties in Northeastern Oklahoma, including most of Tulsa County.<sup>116</sup> This area includes over 4,600 square miles inhabited by over 750,000 people (see n.178 for an illustration).<sup>117</sup> Because Indian country in Oklahoma will be expanded to include a major metropolitan area, which is home to many of the Freedmen that became members of the Cherokee Nation after the D.C. Circuit Court decided *Nash*,<sup>118</sup> it is more likely that a Freedmen member will be either a victim or perpetrator of a crime committed in Indian country.

Returning briefly to our hypothetical, assume now that James, a member of the Cherokee Nation, and Lisa both live in Tulsa, Oklahoma, much of which will be part of the Creek reservation if the *Murphy* mandate issues. It is much more likely that James's crime of stealing Lisa's lawnmower, were it to occur after the issuance of that mandate, would be committed in Indian country and that James would be prosecuted in federal court or tribal court. Although Cherokee trust land, where the crime was committed in the original hypothetical, is prevalent in Northeastern Oklahoma, it is not nearly as prevalent as it will be if the *Murphy* mandate issues.

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<sup>115</sup> *Id.* at 1232.

<sup>116</sup> Muscogee (Creek) Nation Geospatial Department, *Muscogee (Creek) Nation Maps*, <http://mcngis.com/index.php/maps> [<https://perma.cc/H2J9-F2S2>].

<sup>117</sup> Petition for Writ of Certiorari at 16, *Murphy v. Royal*, 875 F.3d 896 (No. 17-1107).



(copied from *Id.*) The United States filed an *amicus curiae* brief estimating the area affected by *Murphy* at over 3 million acres and the total population at around 950,000 people. Brief for the United States as Amicus Curiae Supporting Petitioner at 1, 21, *Murphy v. Royal*, 875 F.3d 896 (No. 17-1107).

<sup>118</sup> See Part II.B.v. *supra*.

## 2. Indian Status

This brings us to the second part of criminal jurisdiction in Indian country—Indian status. The answer to how federal, state, and tribal courts determine Indian status lies in federal common law. The method for determining whether or not a party possesses Indian status for the purposes of determining criminal jurisdiction has been developed by courts applying what has become known as the *Rogers* test. In this section, this article. This section discusses the *Rogers* case, and that discussion is followed by an analysis of how lower courts have applied the test developed in that case. These applications will provide evidence that federal courts will not retain jurisdiction over the Freedmen.

Congress has not specifically defined “Indian” for purposes of interpreting the ICCA.<sup>119</sup> In this context, the current test for Indian status is derived from *United States v. Rogers*, which was decided in 1846, and involves two parts.<sup>120</sup> First, a court must determine if the person has any Indian blood.<sup>121</sup> This is a question of fact and can be proven by DNA evidence,<sup>122</sup> testimony from family members, or recorded family genealogy (such as a tribal roll, or the Dawes Rolls if the tribe is in Oklahoma).<sup>123</sup> Next, the court must determine whether the person is a recognized Indian, which the Supreme Court later defined in *United States v. Antelope* as being recognized by membership or affiliation with a federally-recognized tribe.<sup>124</sup> For the second part of the *Rogers* test, it is an issue of fact whether the person is a member of a federally-recognized tribe and

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<sup>119</sup> COHEN, *supra* note 9, at 746. Cohen points out that “Congress has stated only that ‘Indian’ means any person who would be subject to the jurisdiction of the United States as an Indian under the [Major Crimes Act].” 25 U.S.C. § 1301(4) (1990). This provision was designed to make clear that the term “Indian” encompasses both members and nonmembers of a tribe exercising criminal jurisdiction. It does not define the term, however, incorporating instead the judicial glosses on the term in cases adjudicated under the Major Crimes Act.” *Id.* at n.49.

<sup>120</sup> *Id.* citing *Rogers*, 45 U.S. 567; *Ex parte Pero*, 99 F.2d 28 (7th Cir. 1938).

<sup>121</sup> *Rogers*, 45 U.S. at 573; see generally Sharon O’Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1463 (1991) (explaining how the government uses race to determine Indian status).

<sup>122</sup> Proving a genetic tie to a racial Indian who can demonstrate race through an ancestral tie or membership card.

<sup>123</sup> See, e.g., *Torres*, 733 F.2d at 455.

<sup>124</sup> COHEN, *supra* note 9, at 746 citing *Antelope*, 430 U.S. 641.

a court may instruct a jury to look at the following factors “in declining order of importance”: “1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.”<sup>125</sup>

The issue before the Court in *Rogers* was whether a white man who was adopted by the Cherokee Nation but having no blood relations could be considered Indian within the meaning of the ICCA—which only applies to crimes committed by or against an Indian where a non-Indian was the other party.<sup>126</sup> The Court held that neither the white defendant nor the white victim qualified as Indian.<sup>127</sup> The Court reasoned that one must have a racial tie to the tribe to be considered Indian.<sup>128</sup> The Court further defined “racial tie” as follows:

[T]he exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.<sup>129</sup>

Although the *Rogers* Court had not developed a coherent test for determining Indian status, it is clear that the races of the offender and the victim were important to the Court. In applying the *Rogers*

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<sup>125</sup> United States v. Stymiest, 581 F.3d 759, 763 (8th Cir. 2009) (quoting *St. Cloud*, 702 F.Supp. at 1461). The reason courts look at factors beyond mere membership is that not all Indians are members of their tribes. The main reason for this is—especially in Oklahoma—is that an Indian’s ancestors refused or were not given the opportunity to sign the membership rolls, known as the Dawes Rolls. A person might have refused to sign the rolls because of the negative stigma associated with being Indian or because of the poor treatment Indians were given by the government at the time when the rolls were signed. For a discussion of how state courts treat the second prong of the *Rogers* test, see Katharine C. Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 AM. INDIAN L. REV. 177, 185 (2010-2011) (noting that state courts apply different tests, such as “significant” Indian blood).

<sup>126</sup> *Rogers*, 45 U.S. at 572–73; see Part III *supra* (The ICCA does not apply to “inter-racial” crimes; that is, a crime where both the offender and victim are Indian or non-Indian).

<sup>127</sup> *Id.* at 573.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

test, the Tenth Circuit has held that a person must meet both prongs—the racial component and the membership component.<sup>130</sup> The Ninth Circuit has held that the first prong of the *Rogers* test “requires ancestry living in America before the Europeans arrived.”<sup>131</sup> However, because “this fact is obviously rarely provable as such . . . the general requirement is only of ‘some’ blood [as proven by] evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian . . .”<sup>132</sup> As a matter of practice, a court looks to the quantum of Indian blood an individual possesses, and if it is “some” blood, the individual passes the first prong of the *Rogers* test.<sup>133</sup>

In applying the first prong of the *Rogers* test, federal courts require the party seeking to establish Indian status to proffer evidence of the relevant person’s Indian blood quantum.<sup>134</sup> Courts allow the admittance of a party’s tribal roll, which is usually in the form of a certificate of enrollment indicating that the party possesses a certain quantum of Indian blood in order to satisfy the first prong.<sup>135</sup> As “[t]he BIA has explained, . . . a certificate of degree of Indian blood ‘certifies that an individual possesses a specified degree of Indian blood of a federally recognized Indian tribe.’”<sup>136</sup> The tribe that issued such a certificate need not be the same tribe referred to when applying the second prong of the test nor does that tribe need to be federally recognized.<sup>137</sup> Additionally, when a tribe

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<sup>130</sup> *Id.*

<sup>131</sup> *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005).

<sup>132</sup> *Id.*; *see also United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010) *overruled by* 792 F.3d 1103 (9th Cir. 2015).

<sup>133</sup> *See, e.g., Bruce*, 394 F.3d at 1223–24 (one-eighth Indian blood quantum was sufficient); *see also United States v. Loera*, 952 F.Supp.2d 862 (Dist. Ct. Ariz. 2013) (3/16ths Indian blood quantum is sufficient to satisfy the first-prong); *St. Cloud*, 703 F.Supp. at 1460 (15/32s Yankton Sioux is sufficient for “some” Indian blood).

<sup>134</sup> *Prentiss*, 273 F.3d at 1280–83 (The government failed to prove Indian status where it failed to produce any evidence of “some” Indian blood).

<sup>135</sup> *See, e.g., Torres*, 733 F.2d at 455 (“[T]he Government introduced certificates of tribal enrollment, certifying that appellants . . . were each listed on the Menominee Tribal Roll [one appellant was 25/64 degree Menominee Indian blood and the other was 11/32 degree Menominee Indian blood].”)

<sup>136</sup> *United States v. Rainbow*, 813 F.3d 1097, 1103 (8th Cir. 2016) (quoting Certificate of Degree of Indian or Alaska Native Blood, 65 Fed. Reg. 20775-01 (proposed Apr. 18, 2000)).

<sup>137</sup> *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015); *see also St. Cloud*, 702 F.Supp. at 1460–61 (“Even assuming away *St. Cloud*’s Ponca heritage, *St. Cloud*’s 15/32 of Yankton Sioux blood is sufficient to satisfy the first requirement of having a degree of Indian blood.”).

requires a certain quantum of Indian blood as a prerequisite for membership, testimony that a party is a member of the tribe is sufficient to establish that the person is Indian.<sup>138</sup>

Now that this paper has discussed the history of the Freedmen, including their placement on separate rolls from racially Indian members, and criminal jurisdiction, which involves a fact intensive test requiring a biological tie to the tribe, we are ready to address the thesis of this article.

#### IV. THE FREEDMAN OF THE FIVE CIVILIZED TRIBES OF OKLAHOMA ARE MEMBERS, BUT NOT INDIANS: FUTURE IMPLICATIONS FOR FEDERAL INDIAN LAW

The Freedmen of the Five Civilized Tribes are tribal members, but they are not racially Indian. Therefore, the Freedmen are not entitled to the protections of the federal criminal jurisdiction statutes. Because the Freedmen are excluded from these statutes solely on the basis of their race, the current definition of Indian status as it is applied to the Freedmen violates the Equal Protection Clause. Classifying the Freedmen as non-Indians also violates federal policy towards the tribes, which is a policy of tribal self-determination. Requiring Indians to demonstrate blood quantum does not stand to benefit the tribes, many of which have blood quantum requirements for membership. If the first prong of the *Rogers* test were removed, Indians could prove a racial tie to their tribe by proving membership, and the Freedmen would simply be classified as Indians.

##### *A. The Freedmen Members of the Five Civilized Tribes of Oklahoma are not Indians*

In the late nineteenth century, the Supreme Court twice addressed the Indian status of the Freedmen. These cases have never been overturned. Therefore, their application holds true today; despite being members of federally recognized tribes, the Freedmen of the Five Civilized Tribes of Oklahoma are not Indians.

1. *Alberty v. United States* and the Notion that the Freedmen Are Not Indians.

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<sup>138</sup> See *Rainbow*, 813 F.3d at 1105.

In *Alberty v. United States*, which the Supreme Court decided in 1896, the Court concluded that a Freedmen member of the Cherokee Nation was not an Indian.<sup>139</sup> Because this case was decided over a century ago under different circumstances, some background information is helpful. Prior to 1907, when present day Oklahoma was Indian Territory, the United States Supreme Court decided a number of cases in which the issue of whether the offender or victim was Indian was analyzed for purposes of deciding federal criminal jurisdiction.<sup>140</sup> At the time, if a crime was committed in Indian Territory, there were only two options for prosecuting the offender: The offender could be prosecuted in tribal court under the Act of May 2, 1890 (now repealed), or he or she could be prosecuted in federal court under the ICCA or the MCA.<sup>141</sup> The Act of May 2, 1890 provided exclusive jurisdiction, civil and criminal, to the Indian Nation in whose land the wrongful act occurred, assuming that both parties were Indian “by nativity or adoption.”<sup>142</sup> “By

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<sup>139</sup> 162 U.S. at 501. See Clinton, *supra* note 2, at n.60. In the footnote, Professor Clinton points out the anomaly of the 19<sup>th</sup> Century courts in determining that a non-racially Indian member was Indian for purposes of the protective federal criminal jurisdiction statutes. *Id.* He proposes that this would theoretically just apply to tribal jurisdiction, citing *Nofire v. United States*, 164 U.S. 657 (1897). *Id.* However, although he cites *Alberty*, he does not analyze that case in particular. The argument of this paper is that by applying *Alberty*, courts can rule that non-racially Indian members, like many of the Freedmen, are non-Indians for purposes of the federal criminal jurisdiction statutes such as 18 U.S.C. § 1152 and 18 U.S.C. § 1152. By following this application, courts would violate the Equal Protection Clause and federal policy towards the tribes. The solution to these pitfalls is to remove the first prong of the *Rogers* test whereby the Freedmen would be Indians and obtain federal criminal jurisdiction.

<sup>140</sup> *Lucas*, 163 U.S. at 617; *Alberty*, 162 U.S. at 501. The issue of who is or is not Indian for jurisdictional purposes had many different interpretations by lower courts at this time. For example, many courts applied the English common law presumption that a child born to a white father and Indian mother was white and not Indian, although the tribes would have mostly recognized the child as the ethnicity of the mother. For more on this, see Clinton, *supra* note 2, at 515 n.53; see also *United States v. Hadley*, 99 F. 437, 438 (C.C.D. Wash. 1900); but see *United States v. Sanders*, 27 F. Cas. 950, 951 (1847) (a child takes the ethnicity—Indian or non-Indian—of their mother without regard to quantum of blood).

<sup>141</sup> *Lucas*, 163 U.S. at 617; *Alberty*, 162 U.S. at 501; *Rogers*, 45 U.S. at 573; *Ex parte Wilson*, 140 U.S. 575 (1891); *Pickett v. United States*, 216 U.S. 456, 458 (1910). The offense occurred prior to Oklahoma’s statehood but was not decided by the Supreme Court until 1910. *Pickett*, 216 U.S. at 458. Now, the state of Oklahoma is a third avenue for prosecution. *Id.*

<sup>142</sup> *Lucas*, 163 U.S. at 614-15 (citing the Act of May 2, 1890); see also *Nofire*, 164 U.S. at 662 (A citizen by adoption is an Indian for jurisdictional purposes



nativity,” meant that the party maintained a biological tie to the tribe. “By adoption,” in contrast, meant that the party was a member of the tribe but maintained no racial tie to the tribe; ICCA and MCA are substantially the same as they were in the late 1800s.<sup>143</sup>

In *Alberty*, the Supreme Court determined that a Freedmen member of the Cherokee Nation was not an Indian for purposes of the *Rogers* test.<sup>144</sup> A Cherokee Freedmen, who went by the names Burns and Alberty,<sup>145</sup> was convicted and sentenced to death for the murder of Phil Duncan. Duncan was a non-Indian son of a Choctaw man and an African-American woman, which Alberty allegedly committed in the Cherokee Nation.<sup>146</sup> At the time, the Choctaw Nation did not grant citizenship to the son or daughter of a Choctaw man and a non-Choctaw woman, although it did the reverse—it granted citizenship to the son or daughter of a Choctaw woman and a non-Choctaw man.<sup>147</sup> On appeal, the Supreme Court first determined the jurisdictional basis for the claim being brought in federal court.<sup>148</sup> The Court noted that, although Alberty was “not a native Indian, but a negro born in slavery, it was not disputed that he became a citizen of the Cherokee Nation, under the ninth article of the treaty of 1866.”<sup>149</sup> However, “while this article of the treaty gave him the rights of a native Cherokee, it did not, standing alone, make him an Indian, within the meaning of [the Indian Country Crimes Act], or absolve him from responsibility to the criminal laws of the United States, as was held in *U.S. v. Rogers*.”<sup>150</sup>

As to the victim’s status, the Court held that Duncan, “the illegitimate child of a Choctaw Indian [and] a colored woman, who was . . . a slave in the Cherokee Nation . . . must be treated as a negro

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and thus under the exclusive jurisdiction of the tribe in whose nation the crime occurs).

<sup>143</sup> *Cf.* 18 U.S.C. §§ 1152, 1153 with Act Cong. June 30, 1834, § 25.

<sup>144</sup> *Alberty*, 162 U.S. at 501 (“For the purposes of jurisdiction, then, Alberty [a Freedmen citizen of the Cherokee Nation] must be treated as a member of the Cherokee Nation, *but not an Indian*; and Duncan as a colored citizen of the United States.”) (emphasis added).

<sup>145</sup> *Id.* at 499.

<sup>146</sup> *Id.* at 499–501.

<sup>147</sup> *Id.*

<sup>148</sup> *Alberty*, 162 U.S. at 500

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 500–01.

by birth, and not as a Choctaw Indian.”<sup>151</sup> Duncan moved to the Cherokee Nation when he was about seventeen and married a Cherokee citizen.<sup>152</sup> However, the Court could not determine from the Cherokee laws that marrying a Cherokee citizen made Duncan a Cherokee citizen.<sup>153</sup> Therefore, it concluded that Duncan was not a Cherokee citizen but “a citizen of the United States.”<sup>154</sup> The Court went on to discuss whether the victim to a murder was a “party” in the lawsuit, which would give the federal courts jurisdiction over this crime or whether the victim was not a party and thus, the Cherokee Nation would have jurisdiction over this crime.<sup>155</sup> However, for the purposes of this paper, it is important to note the holding that *Alberty*, a Freedmen member of the Cherokee Nation, “must be treated as a member of the Cherokee Nation, but not an Indian.”<sup>156</sup>

## 2. *Lucas v. United States*: An African-American in Indian Country

In the same year that *Alberty* was decided, the Supreme Court found error in a trial court’s jury instructions establishing a conclusive presumption that an African-American man found in the Choctaw Nation was not an Indian.<sup>157</sup> The case was brought in federal court under the ICCA when a Choctaw Indian killed an African-American man residing in the Choctaw Nation.<sup>158</sup> At the time, the Choctaw Nation had given citizenship rights to their Freedmen. Therefore, if the freedman victim was deemed an Indian “by adoption,” the Choctaw Nation would have exclusive jurisdiction over the case because the offender, a racially Indian member, was an Indian “by nativity” and the freedman would be an Indian “by adoption” under the statute.<sup>159</sup> However, if the freedman was deemed a non-Indian and merely a citizen of the United States, the federal court would have exclusive jurisdiction under the

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<sup>151</sup> *Id.* at 501. According to Choctaw laws at the time, the son of a Choctaw man and a non-Choctaw woman was not a citizen of the Choctaw Nation. The other Five Civilized Tribes had similar laws.

<sup>152</sup> *Id.*

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

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 504.

<sup>156</sup> *Id.* at 501.

<sup>157</sup> *Lucas*, 163 U.S. at 617.

<sup>158</sup> *Id.* at 615.

<sup>159</sup> *Id.* at 613–14.

ICCA.<sup>160</sup> The federal judge instructed the jury that “you are required to find that Kemp, the man killed [the freedman], . . . was a negro, and not an Indian. That means he was a citizen of the United States. That means that the [federal] court has jurisdiction of the case under the law.”<sup>161</sup> The judge went on to explain, “it may be said that there are some people who are negroes who are adopted into that Nation, but that is the exception to the rule.”<sup>162</sup> The Supreme Court found this presumption to be in error.<sup>163</sup> In the Court’s view, the presumption should have been reversed— a presumption of membership (“by adoption”) should be given to an African-American man residing in the Choctaw Nation.<sup>164</sup> However, the Supreme Court did not go as far as creating that presumption.<sup>165</sup> The Court merely held that it was error to presume that the freedman was not a member simply because he was African-American.<sup>166</sup>

Although the act of May 2, 1890 has been repealed, the criminal jurisdiction statutes and the *Rogers* test have not changed since *Alberty* and *Lucas*. Thus, the holding from the cases would likely still be affirmed today. The Freedmen are Indians “by adoption” and thus, are not Indians under the *Rogers* test.

### 3. Application of Roger Facts

In addition to *Alberty* and *Lucas* applying to the Freedmen, the facts from *Rogers* also demonstrate that the Freedmen are non-Indians. As discussed above, *United States v. Rogers* involved a white adopted member of the Cherokee Nation who killed another white man in Cherokee Territory.<sup>167</sup> The offender was tried in federal court, and the Supreme Court affirmed the lower court’s ruling that the offender and victim were both non-Indian due to their lack of Indian blood.<sup>168</sup>

Applying the holding in *Rogers*, a member of a tribe who is not racially Indian is not an Indian. In *Rogers*, neither the offender

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<sup>160</sup> *Id.* at 613.

<sup>161</sup> *Id.* at 615.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 616.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 618.

<sup>167</sup> *Rogers*, 45 U.S. at 572-73.

<sup>168</sup> *Id.* at 573.

nor the victim were considered Indian because both were white and only maintained membership ties to the Cherokee Nation.<sup>169</sup> Therefore, neither the MCA nor the ICCA applied.<sup>170</sup> Similar to the parties in *Rogers*, many of the Freedmen either have no Indian blood or cannot prove that they have Indian blood because their ancestry was recorded on the Freedmen rolls rather than on the citizen by blood rolls. Thus, they fail the first prong of the *Rogers* test. While racially Indian members may use tribal membership documents to prove that they possess “some Indian blood” under the first requirement of *Rogers*, the Freedmen’s membership documents will only prove that they are descended from tribal members who signed the Freedmen rolls. In many cases, these documents include no proof of Indian blood upon which Freedmen could establish Indian status.<sup>171</sup>

#### B. *The Freedmen of the Five Civilized Tribes Should be Indians*

Although they are not Indians under current law, the Freedmen of the Five Civilized Tribes should be classified as Indians. First, refusal to classify Freedmen as Indians violates the Equal Protection Clause. Indian status classifications are only justified because of the political nature of tribal membership. The Freedmen maintain this political classification—they are members of federally recognized tribes—but still flunk the *Rogers* test. The test should be changed to allow Freedmen to be Indians. Denying Freedmen federal criminal jurisdiction also violates federal policy towards the tribes, which is focused on the promotion of tribal self-

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> It is important to note that despite this argument, the Freedmen are distinguishable from the *Rogers* parties in many ways. Unlike the offender and victim in *Rogers*, who became members of the Cherokee Nation directly through the tribe *without* federal involvement, the Freedmen are deemed members of the Cherokee Nation *as the result of* federal involvement. Because Congress has plenary power over Indian affairs, if it gives someone status as a member of an Indian tribe, it is different than the person obtaining status as a member of the tribe by circumventing federal approval. In addition, the Freedmen’s ancestor’s names are on the Freedmen rolls for their respective tribes. It is impossible, absent a DNA test, to prove that many of the Freedmen do or do not have “some” Indian blood. *See Williamson, supra* note 59, at 256 (explaining that regardless of blood quantum, African-American Seminoles were required to sign the Freedmen rolls). Therefore, applying the Indian canons of construction, a federal court should give the Freedmen the benefit of the doubt and determine that they do have “some” Indian blood.

determination. Because all tribes have established blood quantum requirements for membership (which the Freedmen are excepted from), the government should allow the tribes to determine Indian status.

### 1. Equal Protection Clause Violation

Denying the Freedmen federal criminal jurisdiction because of their race indicates that the *Rogers* test establishes a racial classification that should be subject to strict scrutiny under the Equal Protection Clause, for it is distinguishable from purely political classifications related to Indian identity that courts have accepted in the past. Racial classifications are subject to strict scrutiny and, under most circumstances, courts have held that they are impermissible; under this standard of review, they can only survive if they are narrowly tailored to serve a compelling governmental interest, which is a stringent standard to meet.<sup>172</sup> However, the Supreme Court has determined that classifying a person as Indian is not a suspect classification based on race.<sup>173</sup> Rather, the Constitution expressly provides Congress the ability to single out tribes for purposes of legislation because of the Indian Commerce Clause, which states that Congress shall have power “To regulate Commerce . . . with the Indian Tribes.”<sup>174</sup> This singling out is not based on a racial classification but is instead based on the recognition of Indian tribes as “quasi-sovereign tribal entities.”<sup>175</sup> Therefore, federal statutes and federal common law specifically pertaining to “Indians” are generally seen as establishing political rather than racial classifications, which are subject to rational basis review.<sup>176</sup> They will survive this level of review if they are rationally

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<sup>172</sup> See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect,” meaning strict scrutiny applies.); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (“[T]he fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”)

<sup>173</sup> *Mancari*, 417 U.S. at 552–53; see also *Antelope*, 430 U.S. at 646–47.

<sup>174</sup> *Antelope*, 430 U.S. at 645 n.6.

<sup>175</sup> *Id.* at 645 (quoting *Mancari*, 417 U.S. at 554).

<sup>176</sup> This “political” classification justifies the entirety of Title 25 of the United States Code. See *Mancari*, 417 U.S. at 552 (“If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased . . .”).

related to a legitimate governmental interest.<sup>177</sup> Because congressional power over Indian affairs is plenary, federal statutes almost certainly pass this test; they will almost always be rationally related to what Congress deems a legitimate governmental interest.<sup>178</sup>

Current Supreme Court precedent indicates, correctly, that the *Rogers* test is constitutional on its face; however, the *Rogers* test is unconstitutional, as applied to the Freedmen. The Supreme Court first confronted an equal protection challenge to Indian status as a basis of discrimination in *Morton v. Mancari*.<sup>179</sup> There, non-Indian employees of the Bureau of Indian Affairs (BIA), which is responsible for supervising all Indian relations in the United States, challenged a policy which the BIA sought to hire Indians over non-Indians.<sup>180</sup> This positive form of discrimination, the Court held, was not a violation of the Equal Protection Clause because “the [employment] preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”<sup>181</sup> The Court reasoned that this “preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”<sup>182</sup> Although the Court here insisted that race is not determinant of Indian status, it puzzlingly contradicts its own holding in *Rogers*, that Indian status “does not speak of members of

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<sup>177</sup> *Antelope*, 430 U.S. at 646-47; *Mancari*, 417 U.S. at 554.

<sup>178</sup> *Antelope*, 430 U.S. at 646-47; *Mancari*, 417 U.S. at 554.

<sup>179</sup> 417 U.S. at 535.

<sup>180</sup> *Id.* at 537.

<sup>181</sup> *Id.* at 554.

<sup>182</sup> *Id.* at 553 n.24. The most likely reason the Court held that race is not the determining factor in Indian status in both *Mancari* and *Antelope* is that between the times those cases were decided and the times *Rogers*, *Alberty*, and *Lucas* were decided, tribes did not adopt non-rationally Indian members. See Clinton, *supra* note 2, at n.60. To the contrary, all tribes have biological connection requirements for membership. See Part III *supra*. When an equal protection challenge went up to the Supreme Court, the Court could safely say that membership in a federally recognized tribe was *the* determining factor in Indian status. However, after the Cherokee Freedmen were granted membership rights in 2017, the Court can no longer say that membership in a federally recognized tribe determines Indian status. Now, it is clear that race is important.

a tribe, but of the race generally.”<sup>183</sup> The *Mancari* Court went on to hold that “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians [to further Indian self-government], such legislative judgments will not be disturbed.”<sup>184</sup>

The Court applied the same analysis in the criminal jurisdiction context in *United States v. Antelope*.<sup>185</sup> In *Antelope*, a defendant challenged his prosecution for felony murder under the MCA.<sup>186</sup> There was no equivalent felony murder charge under the laws of the state where the death occurred, and therefore, the defendant could only be tried for felony murder under federal law vis-a-vis the MCA.<sup>187</sup> The Court rejected the defendant’s equal protection challenge, affirming its holding in *Mancari* that “Indian” denotes a political status of a member of a quasi-sovereign tribe, not a suspect racial classification.<sup>188</sup> According to the *Antelope* Court, in order to be a permissible political classification rather than an impermissible racial classification, a relationship between the tribe and federal government must exist.<sup>189</sup> Therefore, “members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act.”<sup>190</sup> Furthermore, being subjected to federal criminal jurisdiction is not because of race but because of membership in a federally recognized tribe.<sup>191</sup> This seemingly opens the door to the Freedmen, who are members in a federally recognized tribe, to challenge their lack of access to federal criminal jurisdiction statutes as unconstitutional as applied to them.

Finally, the Tenth Circuit, in *United States v. Wanoskia*, inferred that disparate treatment of an Indian under federal law does not violate equal protection.<sup>192</sup> In *Wanoskia*, the defendant Indian

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<sup>183</sup> *Rogers*, 45 U.S. at 573.

<sup>184</sup> *Mancari*, 417 U.S. at 554.

<sup>185</sup> *Antelope*, 430 U.S. at 646–47.

<sup>186</sup> *Id.* at 643.

<sup>187</sup> *Id.* at 644.

<sup>188</sup> *Id.* at 646–47.

<sup>189</sup> *Id.* at 646 n.7.

<sup>190</sup> *Id.* Again, this contradicts the Court’s holding in *Rogers*, that Indian status “does not speak of members of a tribe, but of the race generally.” *Rogers*, 45 U.S. at 573.

<sup>191</sup> *Antelope*, 430 U.S. at 646–47.

<sup>192</sup> *United States v. Wanoskia*, 800 F.2d 235, 239 (10th Cir. 1986); *see also Prentiss*, 273 F.3d at 1280-81.

challenged his conviction as a violation of the Fifth Amendment because he would have received better treatment had he been convicted under state law.<sup>193</sup> The court explained that there was no disparate treatment, because if the offender was a non-Indian and the victim was an Indian, ICCA would apply and the non-Indian would receive the disparate treatment.<sup>194</sup> Therefore, both Indians and non-Indians are subjected to the same jurisdiction when a major crime is committed by or against an Indian.<sup>195</sup> Thus far, the only criminal equal protection challenge a court has viewed as a violation of equal protection is where MCA and ICCA provide different definitions for the same crime; this is possible because ICCA in some instances uses a state law definition of a crime through the Assimilative Crimes Act.<sup>196</sup> What is clear to the courts is that the *Rogers* test is facially constitutional—race plus membership in a federally recognized tribe is a political classification. What is unclear, however, is the test’s constitutionality as it is applied to non-racial members such as the Freedmen.

The Supreme Court should review how Indian status—particularly as it applies to the Freedmen—is used to determine criminal jurisdiction under strict scrutiny, for the political justification from both *Mancari* and *Antelope* does not apply in this context. *Mancari* and *Antelope* indicate that a classification based on Indian status is political rather than racial. Therefore, the *Rogers* test is facially constitutional. In *Mancari*, the Court justified the government’s providing a benefit to Indians because the “preference [was] not directed towards a ‘racial’ group consisting of ‘Indians’ . . . [but] applie[d] only to members of ‘federally recognized’ tribes.”<sup>197</sup> The hiring preference applied to tribal members who were racially Indian, but it did not apply to nonmembers who were racially Indian; therefore, this did not establish a racial classification.<sup>198</sup> Similarly, the Court in *Antelope* held that racially Indian tribal members being subject to federal criminal jurisdiction where racially Indian nonmembers were subject to state criminal jurisdiction was indicative of only a political classification. By contrast, the Freedmen members of the Five Civilized Tribes of

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<sup>193</sup> *United States v. Wanoskia*, 800 F.2d 235, 239 (10th Cir. 1986).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> 18 U.S.C. § 13 (1996); *see* COHEN, *supra* note 9, at 753.

<sup>197</sup> *Mancari*, 417 U.S. at 553 n.24.

<sup>198</sup> *Id.*



Oklahoma are members of federally recognized tribes, but they are denied federal benefits because of their race. Here, the political classification does not hold up because the Freedmen are tribal members, and the only thing distinguishing the Freedmen from those possessing Indian status is a quantum of Indian blood. As such, this classification demands strict scrutiny review.

Under strict scrutiny, classifying the Freedmen as non-Indians will only be allowed by the Supreme Court if it is necessary to serve a compelling governmental interest.<sup>199</sup> Maintaining the status quo in regards to the applicability of criminal statutes may or may not be a compelling governmental interest. And not extending Indian status to Freedmen because of a lack of blood quantum may or may not be narrowly tailored to serve this or another similarly compelling interest. After all, one could argue that there is a greater risk of racial Indians being discriminated against by a state jury than Freedmen Indians. But a federal court will have to decide this conundrum. And there is only one Supreme Court case where the Court determined that a racial classification met strict scrutiny, which makes one wonder if strict scrutiny as applied towards the Freedmen's classification as non-Indians will be "strict in theory, fatal in fact."<sup>200</sup> Given how the standard has been applied in the past, the racial classification of Freedmen will likely be struck down under strict scrutiny.<sup>201</sup>

## 2. Federal Policy Towards the Tribes is Violated

In addition to violating the Equal Protection Clause, denying the Freedmen of the Five Civilized Tribes federal criminal

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<sup>199</sup> *Korematsu*, 323 U.S. at 216; *Loving*, 388 U.S. at 9.

<sup>200</sup> *Fisher v. University of Texas at Austin*, 570 U.S. 297, 313-14 (2013) citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995); *see also* *Regents of the Univ. of Cal v. Blakke*, 438 U.S. 265, 362 (1978). The case in which the Court upheld a racial classification is *Korematsu*, 323 U.S. at 223-24. There, the Court concluded that the United States government's confinement in concentration camps of thousands of Japanese-Americans during World War II was constitutional.

<sup>201</sup> One solution to the problem of the *Rogers* test being race-based is to simply say that it meets strict scrutiny. Although this solution would not benefit the Freedmen, who would still be denied access to federal criminal jurisdiction benefits, it may be justified in order to keep 18 U.S.C. §§ 1152 and 1153. It would only be the second racial classification upheld by the Supreme Court, but fostering the federal-tribal relationship provides ample justification for the Court to make this decision.

jurisdiction violates federal policy. There are at least three policies for the federal criminal jurisdiction statutes discussed in this article.<sup>202</sup> First, the statutes ensure that a racial Indian who is a member of a federally recognized tribe is not discriminated against by a state jury.<sup>203</sup> There is a problem with this rationale if it is not applied to Freedmen members. As is, a person can possess only a small fraction of Indian blood and still be subject to federal criminal jurisdiction. For example, the Five Civilized Tribes have no minimum blood quantum requirement, they just require that a member have some racial tie to the tribe.<sup>204</sup> A state jury is probably just as likely to discriminate against a person for being Indian with a relatively small degree of Indian blood as they are to discriminate against a Freedmen member who has no Indian blood.

A second policy for having federal criminal jurisdiction statutes for Indians is that it fosters the federal-tribal relationship.<sup>205</sup> The federal government and the tribes are in a guardian-ward relationship, and, similar to a trustee's duty to the beneficiaries of a trust, the United States has a duty to work for the benefit of the tribes.<sup>206</sup> This duty is nearly as old as this country.<sup>207</sup> By not allowing over 25,000 members of the Cherokee Nation, as well as many members of the other Five Civilized Tribes, access to criminal jurisdiction statutes, the United States breaches a fiduciary duty to the tribes to work for their benefit. Although this would not be the first time the United States government has broken a promise to work "for the benefit of the tribes,"<sup>208</sup> there is no excuse to deny the

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<sup>202</sup> See Clinton, *supra* note 2, at 518-20.

<sup>203</sup> GRANN, *supra* note 72; see also Clinton, *supra* note 2, at 518-20.

<sup>204</sup> See Muscogee (Creek) Nation Constitution, Art. III §3 (a)-(c); The Great Seminole Nation of Oklahoma, *Tribal Enrollment*, <http://sno-nsn.gov/services/tribalenrollment>; Choctaw Nation of Oklahoma, *CDIB & Tribal Membership: Frequently Requested Information*, [https://www.choctawnation.com/sites/default/files/Frequently\\_Requested\\_Information\\_CDIB\\_%26\\_Tribal\\_Membership.pdf](https://www.choctawnation.com/sites/default/files/Frequently_Requested_Information_CDIB_%26_Tribal_Membership.pdf); Cherokee Nation, *Cherokee Nation Tribal Registration*, [https://www.cherokee.org/Portals/0/Documents/2012/8/31660Application\\_Instructions.pdf](https://www.cherokee.org/Portals/0/Documents/2012/8/31660Application_Instructions.pdf).

<sup>205</sup> See generally COHEN, *supra* note 9, at 209-11; see also Clinton, *supra* note 2, at 518-20.

<sup>206</sup> COHEN, *supra* note 9, at 209-11.

<sup>207</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester*, 31 U.S. at 561; see also *United States v. Kagama*, 118 U.S. 375 (1886).

<sup>208</sup> See generally D. BROWN, *BURY MY HEART AT WOUNDED KNEE* (1970).

Freedmen members of the Five Civilized Tribes the same access to criminal jurisdiction benefits as are provided to racially Indian tribal members.

A third policy for the federal criminal jurisdiction statutes is that they exist to increase tribal and tribal member autonomy.<sup>209</sup> In one of the premier cases on Indian law, Chief Justice Marshall held that “the laws of Georgia can have no force” in Cherokee territory.<sup>210</sup> This idea of tribal autonomy from state laws that applies throughout the nation has never been overturned by the Supreme Court. Rather, it has become stronger. Federal Indian policy from the Nixon administration onwards has been that of self-determination for the tribes.<sup>211</sup> It is inconsistent with tribal self-determination for the federal government to deny federal court access to a large number of members of the Five Civilized Tribes.

*C. Solution: Make the Freedmen “Indians” by Removing the First Prong of the Rogers Test*

In order to correct the equal protection and federal policy violations that have resulted in the Freedmen members of the Five Civilized Tribes being recognized as members but not as Indians, this paper proposes the following solution: Federal courts or Congress should remove the first prong of the *Rogers* test, i.e. the blood quantum requirement. Beyond correcting the constitutional and policy-related problems and providing some benefit for the Freedmen, removing the first prong of the *Rogers* test benefits the tribes. As the test currently stands, a party can possess quantum of blood from a tribe other than the one in which the party is claiming

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<sup>209</sup> See Clinton, *supra* note 2, at 518-20.

<sup>210</sup> *Worcester*, 31 U.S. at 561; see also COHEN, *supra* note 9, at 210.

<sup>211</sup> Message from President Nixon to Congress, H.R. Doc. No. 91-363, 91st Cong., 2d Sess. 2-3 (1970), in 116 CONG. REC. 23258 (1970). Because of the rapid changes in Indian law over the past two hundred fifty years or so, Indian law is best viewed as a series of eras. See ANDERSON, BERGER, KRAKOFF, & FRICKEY, *supra* note 111, at 15-164. For example, during and right after the Civil War when the Five Civilized Tribes signed the 1866 treaties, Indian law was in what some scholars refer to as the “Reservation Era”. *Id.* When the Supreme Court decided *Alberty* and *Lucas*, Indian law was in the “Allotment and Assimilation Era”. *Id.* Since around 1961, Indian law has been in what is known as the “Self-Determination Era”, in which Congress has signed many pro-Indian laws into effect, including the Indian Civil Rights Act, the Indian Child Welfare Act, and others. *Id.*

membership and still meet this requirement.<sup>212</sup> This does not benefit the tribe of which the party is a member because the government is essentially devaluing that Indian's connection to his or her tribe. In other words, the first prong of the *Rogers* test tells us that proving lineage which ties back to pre-Columbus America is more important than proving a tie to an Indian's particular tribe.

There are also judicial efficiencies to be gained by removing the first prong of the *Rogers* test, efficiencies which will most certainly be needed by federal courts if the Murphy mandate issues.<sup>213</sup> First, requiring a biological tie to establish Indian status is not necessary. With the exception of the Creeks, Cherokees, Seminoles, and Choctaws,<sup>214</sup> every federally-recognized tribe requires a biological tie to the tribe in order to be eligible for membership.<sup>215</sup> Because criminal parties must prove membership in

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<sup>212</sup> See Part III.B.1. *supra*; see also *Zepeda*, 792 F.3d at 1110; *St. Cloud*, 702 F.Supp. at 1460-61.

<sup>213</sup> According to the latest census data, 6.8% of Tulsans report to be "American Indian and Alaskan Native alone," 6% report to be "Two or More Races," and 10.8% report to be "Black or African-American alone." QuickFacts: Tulsa County, Oklahoma, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/tulsacountyoklahoma/PST045216#qf-headnote-a> (census data as of July 1, 2016). The third category likely includes Freedmen members of the Cherokee tribe because, at the time of the census, the D.C. Circuit had not yet decided *Nash* and therefore, Cherokee Freedmen were simply African-Americans. To put these numbers in perspective, the census estimated Tulsa's population as 642,940 people, all of which fall within a single federal court's jurisdiction (the Northern District of Oklahoma). In Tulsa alone, at least 43,719 of those who report to be American Indians will be in federal jurisdiction. See Part II, *supra*. This number is likely much lower than reality, and only includes Tulsa. In regard to the Cherokee Freedmen, an article from the *Tulsa World* reports that "potentially up to 25,000 descendants of Freedmen could apply" for membership in the tribe since *Cherokee Nation* has been decided. Dekker, *supra* note 6.

<sup>214</sup> The Chickasaws are the only tribe of the Five Civilized Tribes of Oklahoma to have not adopted their Freedmen. See Part II *supra* n.15.

<sup>215</sup> See, e.g., Navajo Nation Constitution, Art. I § 1(a) (requiring at least one quarter Navajo blood); see also Constitution of the Oglala Sioux Tribe, Art. II § 1 (a)–(b) (requiring either that the person's name appear on the official tribal roll or that the person be a child of an Oglala Sioux member); Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota, Art. II § 2(a)–(c) (requiring that the person's name appear on the official tribal roll, that the person is a child of a full-blooded Minnesota Chippewa Indian born between April 14, 1941 and July 3, 1961, or that the person be a child of a Minnesota Chippewa member with at least one quarter Minnesota Chippewa blood); Muscogee (Creek) Nation Constitution, Art. III § 3 (a)–(c). The Creek Nation actually requires a blood tie to the tribe. It does not have an exception for Freedmen because all Creek Freedmen were given citizenship rights in the 1866 Treaty. See Part II.B.1. *supra*.

the second prong of the Rogers test, the first prong is redundant. Second, by removing the first prong of the test, courts can accept a membership card or enrollment form as proof of Indian status without the added burdens the first prong brings, such as obtaining a DNA test or testimony from a relative that the party is in fact a biological Indian.<sup>216</sup> And if no membership card exists, which happens often when an Indian's ancestors did not sign the membership rolls, the burden will be on the alleged Indian to prove that he receives benefits from the federal government which are traditionally given solely to Indians, receives benefits from tribal affiliation, and/or has social recognition by the tribe.<sup>217</sup>

These efficiencies would benefit all Indians in criminal cases and relieve judicial burdens if Indian country expands to include almost all of Tulsa. But despite the efficiencies, traditional criminal jurisdiction jurisprudence does not accommodate the unique history of the Freedmen members of the Five Civilized Tribes of Oklahoma, regardless of whether *Murphy* is affirmed at the Supreme Court level. Therefore, courts must consider changing the status quo regarding how federal jurisdictions applies to tribal members unless they want to promote constitutional and federal policy infringements.

## V. CONCLUSION

Supreme Court precedent indicates that the Freedmen are not Indians for purposes of criminal jurisdiction. But courts should rethink the logic of this outcome because it violates the Equal Protection Clause and runs contrary to federal policy. If the *Murphy v. Royal* mandate issues, it is conceivable that a Cherokee Freedman could commit a crime in Tulsa, Oklahoma and still be denied access

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<sup>216</sup> See, e.g., *Torres*, 733 F.2d at 454 (“[U]ncontradicted evidence of tribal enrollment and a degree of Indian blood constitutes adequate proof that one is an Indian for purposes of [one of the Indian criminal jurisdiction statutes].”); see also *United States v. Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976) (A certificate of tribal enrollment was “adequate proof that defendant was a Cherokee Indian.”). But see *United States v. Diaz*, 679 F.3d 1183, 1188 (10th Cir. 2012) (A father’s research of his family’s genealogy and subsequent testimony that his son, the defendant, was neither enrolled in a tribe nor associated with a tribe—other than for his job—coupled with the government’s lack of production of a DNA test proving the defendant had Indian blood, was sufficient to determine the defendant did not meet the first prong of the *Rogers* test. The court stated that “evidence from DNA testing might have been helpful.”)

<sup>217</sup> See *Stymiest*, 581 F.3d at 763.

to federal court. This denial of federal court jurisdiction could be crucial to the liberty of such a defendant. For example, like the defendant in *Murphy*, she could be up against the death penalty if convicted of murder in Oklahoma state court, but up against life in prison if convicted of murder in federal court. She could challenge the court's holding that she is non-Indian as a violation of the Equal Protection Clause. Her argument would be that it is unconstitutional that a racially Indian member of the Cherokee tribe be given access to federal criminal jurisdiction benefits and she be denied them based solely on her race. At a minimum, the traditional "political status" justification from *Mancari* and *Antelope* should not apply in this context. A much better justification is needed for this racial classification. However, if courts were to eliminate the blood quantum requirement of the Rogers test while still requiring a defendant's membership in a federally recognized tribe, it would solve potential equal protection problems by allowing all Freedmen members to obtain Indian status. It would also maintain the integrity of the test by not allowing anyone who has merely possesses Indian ancestry to be entitled to the protection-based benefits of federal criminal jurisdiction statutes. Rather, a person would need to be a member of a tribe to obtain access to the statutes. This change would give power back to the tribes, who already decide their membership requirements, by allowing tribes to decide who is Indian for purposes of federal criminal jurisdiction statutes.