

**THE THIRTEENTH AMENDMENT:
RECONSIDERING ITS IMPACT ON
TRIBAL GOVERNMENTS AND INDIAN COUNTRY**

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Ample scholarship exists regarding American Indians and the Civil War. Likewise, an extensive amount of research exists on the subject of the weakening of state power in the wake of the Civil War. However, little attention has been directed toward the constitutional connection between the Civil War Amendments and their direct impact upon the sovereignty of tribal governments. This article attempts to demonstrate that the Thirteenth Amendment impacted the long term sovereignty of Indian Tribes by granting Congress the authority to directly expand its reach over Indian Country. The work begins with an introduction to the significance of the Thirteenth Amendment than turns the political climate in which it was passed. This is followed by a discussion of the specific connection of the Thirteenth Amendment to Indian Country via the experience of the Five Civilized Tribes in eastern Oklahoma. Next the article considers the effects of the Civil War upon the post-bellum Cherokee Nation and how constitutional realities such as the Thirteenth Amendment impacted the Cherokee Nation's long term political independence and sovereignty. Contemporary matters such as the Freedmen's Issue within the modern Cherokee Nation are presented for consideration. Finally, the article concludes with a discussion of the unique, direct historical connection of the Thirteenth Amendment to Oklahoma's Five Civilized Tribes, the paradoxical nature of the freedom of individuals versus the freedom of peoples, and the enduring issue of paternalism versus self-determination in Indian Country.

INTRODUCTION

In 2012 the motion picture *Lincoln* was released. Directed by Steven Spielberg and starring Daniel Day Lewis, Tommy Lee Jones and Sally Field, the film featured the nation's sixteenth chief executive in his crucial role of handling the events of the American Civil War. Its focus, however, was upon the Lincoln Administration's extraordinary efforts to secure passage of the Thirteenth Amendment to the United States Constitution. The movie generally received high marks and positive reviews. One critic at the *Chicago Sun Times* observed that, "[r]arely has a film attended more carefully to the details of politics" (Ebert 2012). Another at USA TODAY noted that the film displayed "an artful way to weave in the texts of the Gettysburg Address and the Thirteenth Amendment" (Puig 2012). In an age in which celebrity comedians and comic book heroes dominate the box office, how often does an amendment to the U.S. Constitution become the focus of a well-received Hollywood film? What qualities does this amendment possess to create such interest?

To be sure, the Thirteenth Amendment is important. First and foremost it abolished the detestable and barbaric practice of slavery. It settled, in a legal sense at least, the most divisive issue of the early Republic and one which threatened to tear asunder the nation. Of course, it did not eliminate the systemic discrimination which black citizens would continue to face for another century. However, it did, at least on paper, commit the United States to a legal standard of abolishing the ownership of human beings and thus provide greater legal rights for black citizens in the future.

Second, it established a precedent for subsequent amendments regarding federalism, civil liberties, and civil rights. It was the first amendment to contain the phrase "Congress shall have power to enforce this article by appropriate legislation." This phrase would be subsequently included in later amendments and play a crucial role in expanding the power of the federal legislature. In sum, the Thirteenth Amendment represents a watershed event in American Constitutionalism whereby substantial authority moved from the states to the federal government. While the "necessary and proper" or "elastic" clause had been used by proponents of greater federal power

to justify a national bank, internal improvements, and other initiatives, it could not be used to destroy the “peculiar institution” itself. Only the Thirteenth Amendment could accomplish the death of slavery in America.

This is the common viewpoint of the Amendment, and objectively speaking, the correct one. It expanded personal freedom for the individual. It was, however, a paradoxical development since it represented a consolidation of power. The Amendment provided the federal government with a level of authority which it had been denied in many ways before. No longer could states invoke the spirit of the Virginia and Kentucky Resolutions of the 1790s in which James Madison and Thomas Jefferson had suggested that a state legislature might nullify a federal law deemed unconstitutional (De Conde 1996). Indeed, the wording of the Thirteenth Amendment afforded federal authorities with an unquestioned mandate to not only end slavery but to also regulate social and cultural practices which had been the exclusive domain of state and local governments. From the enforcement clause of the Thirteenth Amendment would emanate innovations such as the Freedmen’s Bureau (the first federal relief agency) and the Civil Rights Act of 1875, which was aimed at “outlawing discrimination in transportation, theaters, restaurants and hotels” (Cruden 1969). This is not to say that the effect of the Amendment was immediate and without qualification. Black citizens continued to be systemically abused for over another century. However, the Thirteenth Amendment did pave the way for Congress to initiate a new chapter in American history regarding greater freedom for blacks. The nation is of course far better for the Thirteenth Amendment. It unquestionably represents the steady and direct march toward the advancement of human freedom and dignity. It helped the American people to establish new individual rights and to abandon the right to oppress.

However, the amendment also provided the federal government with greater authority to pursue a more aggressive and muscular Indian policy by undercutting the political autonomy of tribal governments. This can be demonstrated in a variety of ways. Perhaps the best example can be seen in the relationship between the Five Civilized Tribes in general and the Cherokee Nation in particular. This article

will endeavor to illustrate the manner in which the Thirteenth Amendment was crucial in the weakening of tribal independence and played a key role in the undermining of the sovereignty of the Cherokee Nation.

BACKGROUND OF THE AMENDMENT

By the mid-point of the Civil War, those wishing to abolish slavery by constitutional amendment knew it would be no easy task to accomplish. However, passage in the Senate was not so difficult, and that body approved the amendment on April 8, 1864 by a margin of 38 to 6 (McPherson 1982). The House was a different matter. The measure was initially introduced by congressmen James Mitchell Ashley of Ohio but failed to gain the necessary 2/3 vote in June of 1864 (Burlingame 2008). Later, Rep. James Wilson introduced a similar bill, yet the effort to end slavery was frustrated by war-time politics which often drained the political capital of the Lincoln Administration.

Making a political calculation, Lincoln targeted the lame duck members of Congress after the 1864 elections. The president hoped that offering them patronage jobs and other favors for supporting the Amendment would secure its passage. According to one source, Lincoln not only doled out patronage, but affected the release of family members in prison and accelerated statehood for Nevada to gain the necessary votes in the House (Sandburg 1939). Leaving no doubt as to his willingness to use the full power of the executive branch, Lincoln was quoted as saying to political operatives and surrogates sent forth to accomplish his purpose, “I am the President of the United States clothed with great power. The abolition of slavery by constitutional provision settles the fate, for all coming time, not only the millions in bondage, but of unborn millions to come—a measure of such importance that those two votes must be procured. I leave it to you gentlemen to determine how it should be done” (Sandburg 1939). Through back door dealing and artful political maneuvering, the measure narrowly passed the House on January 31, 1865 by a vote of 119 to 65 (Burlingame 2008). Eventual ratification by the states was a foregone conclusion. The final draft of the bill, which was incorporated into the Constitution, reads as follows.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.

THE SPECIAL CONNECTION BETWEEN INDIAN TERRITORY AND THE THIRTEENTH AMENDMENT

Many people read the amendment today and give little thought to the section which states “or any place subject to their jurisdiction.” To what places might this refer? When the amendment was passed by Congress and ratified by the requisite number of states, there were three possible ways this provision could be interpreted to apply. The first included federal territories, such as New Mexico, Nevada, and Utah which were acquired as a result of the Mexican War.

A second possibility included future territorial possessions of the United States, such as Alaska and Hawaii. The third and most likely possibility, however, involved the Indian Territory of modern-day Oklahoma. Of all the western lands in which slavery was permitted, only in Oklahoma was it practiced on a scale which would draw the attention of and require regulation by federal officials. Thus it seems likely that Congress had the slave-holding Five Civilized Tribes in mind when it included “or any place subject to their jurisdiction” in the Thirteenth Amendment.

This sweeping language in the Thirteenth Amendment was designed to “cover all the bases” and reflected the spirit of anti-slavery forces since the early days of the abolition movement. The question of which level of government, state or federal, should control slavery had been discussed at the Constitutional Convention in 1787. While the document signed by the Framers protected the institution of slavery, the Convention contained a number of delegates who opposed it, including Benjamin Franklin, John Dickinson and Alexander Hamilton. Conversely, John Rutledge of South Carolina argued for the necessity of maintaining slavery in the South and opposed giving Congress the power to abolish it (Rossiter 1967). In the end, the price of Union demanded compromise, which included the Slave

Importation Clause. This feature of the Constitution (Article I, Section 9) prevented Congress from interfering with the importation of slaves until the year 1808. This satisfied both sides for the time being. Yet on the eve of its expiration in late 1807, Congress passed an Act Prohibiting Importation of Slaves. The language of this statute, which took effect on January 1, 1808, banned the international trade in slaves “into the United States or the territories thereof” (Schomburg 2016).

The key words included here concern the phrase “or the territories thereof,” which is very similar to the Thirteenth Amendment’s “or any place subject to their jurisdiction.” The wording of the 1807 law was significant for the native tribes since they existed outside of the normal channels of state-federal relations. Consequently, Congress would eventually need to extend its power over the tribes to prevent the smuggling of slaves from the Republic of Texas into the Choctaw Nation and from there into states such as Arkansas. Of course, the illicit trade in slaves from Texas into bordering states did occur, but the language of the statute did apply to the tribes as well. However, as a mere statute it could be repealed or modified by Congress. In addition, the law only forbade the transport of slaves and not the possession thereof. The problem would only be exacerbated with the passage of time. By mid-century slavery had spread into Texas, Louisiana, Arkansas and Missouri and was practiced among the Five Civilized Tribes, including the Cherokees. Now the stakes were higher than ever. Those wishing for the full measure of abolition knew that only by fundamentally altering the Constitution itself could their goal be realized. But doing so would require a weakening of tribal sovereignty. In this way and only in this way could the death of slavery be assured in each state, all territories, and among every tribal government.

SLAVE HOLDING IN THE CHEROKEE NATION

What was slave-owning like in the Cherokee Nation in the antebellum period? Many have argued that as contacts grew between Cherokees and Americans in the South it was inevitable that black chattel slavery would become an accepted institution within the Cherokee Nation. Indeed, as southern whites began to intermarry with Cherokees and become Cherokee citizens, black slaves would enter the Nation. But even prior to this, the Cherokees were already dealing with blacks as

slaves. Long before American independence, the Cherokee were enlisted by imperial officials to assist in the return of runaway slaves. For example, on May 4, 1730 “a delegation of 7 Cherokees accompanied by two English representatives sailed from Charleston to the man of warship *Fox*. On June 5th, they arrived in London and on June 18th signed a treaty with the British which stated that ‘if any Negro slave shall run away into the woods from their English Masters, the Cherokee Indians shall endeavor to apprehend them and either bring them back to the Plantation from whence they run away or to the Governor’” (Halliburton 1977). The treaty also provided material rewards for the return of slaves, such as guns, clothing, and tools. Thus, there was little sympathy for blacks as slaves among the early Cherokees. They were seen largely as property and thus as something to bargain over with whites. This was quite different from the practice of other tribes, such as the Seminole and the Creeks who sometimes accepted and even embraced blacks as full citizens within their respective nations.

As time passed there was a greater willingness on the part of some Cherokees to accept the form of chattel slavery being practiced by whites. This was largely due to the erosion of the formal clan structures and conventions of traditional Cherokee society. In fact by the late 1790s and early 1800s, many of the most well-known and influential Cherokee families were slave owners. A list would include such names as Ross, Vann, Foreman, Scales, Boudinot, Lowery, Rogers, Downing, Jolly, Adair, and Waite. Of course slave holding in the Cherokee Nation was not universal. It tended to have parallels with slave holding among whites, especially among wealthier individuals. The statistics on slave-holding among the Cherokee are revealing. An 1835 tribal census recorded that of the 16,542 tribal members counted, there were a total of 1,592 black slaves living in the Cherokee Nation. That roughly amounts to one slave per 10 Cherokee citizens (Halliburton 1977). This is not to say that all Cherokees were pro-slavery in their sentiments. Groups such as the Keetoowah Society, which was primarily composed of full bloods and traditionalists, often opposed slavery and its practice within the Nation. However, no serious effort was made among the antebellum Cherokee to abolish slavery.

On the whole attitudes toward slaves and their treatment among Cherokees were often similar to that of whites in the South. In 1841, the Cherokee National Council passed the following acts and resolutions to control and regulate the institution of slavery within the Nation (Halliburton 1977).

Be it enacted by the National Council, That from and after the passage of this act, it shall be lawful to organize patrol companies in any neighborhood, where the people of such neighborhood shall deem it necessary; and such company, when organized, shall take up and bring to punishment any Negro or Negroes that may be strolling about, not on their owners premises without a pass from their owner or owners.

Be it further enacted that all masters or owners of slaves, who may suffer or allow their Negroes to carry or own firearms of any description, bowie or butcher knives, dirks or any unlawful instrument shall be subject to be fined in a sum not less than 25 dollars.

Be it further enacted that from and after the passage of this act, it shall not be lawful for any person or persons whatever to teach any free Negro or Negroes not of Cherokee blood or any slave belonging to any citizen or citizens of the Nation to read or write.

Thus with many elements of southern American culture assimilated into the fabric of Cherokee society, including the institution of chattel slavery, it is not difficult to understand why a majority of Cherokees would eventually support the southern Confederacy in 1861. The Cherokee Tribal Constitution adopted in 1839 excluded blacks from citizenship and made clear that the Cherokee Nation would exist as a political entity exclusively for Native Cherokees and intermarried or mixed-blood whites. This was essentially the policy of the Cherokee Nation for the next 20 years. Then came the seismic shift which would forever alter the nature of federalism and its attendant relationships—the American Civil War. And just as in the case of the slave states, it would require a war to end slavery in the Indian Nations.

ANTEBELLUM AND POSTBELLUM
FEDERAL-TRIBAL INTERACTIONS

The Civil War in the Indian Territory, while not on a scale with warfare in the East, was nonetheless quite destructive and protracted. It had a devastating effect upon the Cherokee Nation in particular. According to one observer, “no other Native American community was more disastrously affected by the Civil War than the Cherokee Nation of Indian Territory” (Hauptman 1995). Contrary to popular belief, the war did not end in Virginia with the surrender of Robert E. Lee, but continued for a number of weeks in Indian Territory. In the Choctaw Nation in June of 1865, Cherokee Chief and Confederate Brigadier General Stand Watie was “one of the last confederate generals to surrender and abandon the lost cause” (Hauptman 1995).

Figure 1

Map of Indian Territory Around the Time of the Civil War



Soon after the war ended, the federal government recognized the need for the Reconstruction of Indian Territory. The Lincoln Administration had long sought to avoid adopting the principle of *inter arma silent leges* or “in times of war, the law is silent” (McGinty 2011). Nevertheless, Lincoln’s foes accused him of trampling the Constitution

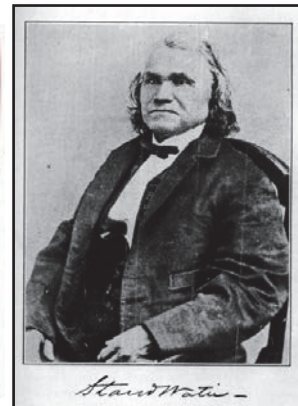
by suspending habeas corpus, supporting the admission of West Virginia under war-time conditions, and suppressing civil rights and liberties. Yet to his supporters, he was the great savior of the Union who had honored the law in a time of grave crisis. Perhaps the greatest test of his attempt to observe a legal and constitutional orthodoxy would come in the Reconstruction of Indian Territory. This was primarily due to the fact that any change or modification in the relationship of the federal government to the tribes could not be accomplished by a simple congressional statute. Unlike the states, the federal government had traditionally relied upon treaties in its relations with the tribes. Organic treaties such as the Cherokee Treaty of New Echota of 1835 would have to be re-negotiated.

Figures 2 & 3

Civil War & Native American Artifacts



Cherokee Regimental Banner



Stand Waite, Confederate
Brig. Gen. and Civil War
Chief

THE SIGNIFICANCE OF THE THIRTEENTH AMENDMENT FOR THE CHEROKEE NATION

How can we assess the relationship among the Thirteenth Amendment, Reconstruction, post-Civil War treaties, and the loss of sovereignty by the Cherokee Nation? The following three sections offer arguments for consideration.

I. Enforcement of the Thirteenth Amendment

The manner in which the provisions of the Thirteenth Amendment were to be enforced speaks to the importance of Indian tribes and their level of self-government in the American political system. More specifically, for Congress to apply the Thirteenth Amendment to tribal governments, the tribes' special status would have to be diminished. The federal government understood that an amendment which barred slavery from "states" would not necessarily do so in Indian Country. Due to their unique legal, political and constitutional tribal status, the abolition of slavery in Indian Country required language within the amendment which would permit the federal government to ban it everywhere subject to its jurisdiction. The specific wording of "or any place subject to their jurisdiction" speaks to this reality and covers the tribes as well as the states. Both states and tribal nations possess qualities and characteristics which afford them a unique status under American federalism. For their part the tribes can rightfully claim that their aboriginal land status combined with certain constitutional provisions such as the Supremacy Clause, the Commerce Clause, and the Treaty Clause afford them powers beyond those of the state governments. Consequently, for the Amendment to be enforced, the federal government would have to gain power at the expense of the tribes.

Another way to establish the connection between the post-Civil War treaties, the Thirteenth Amendment, and the weakening of tribal sovereignty involves the manner in which civil rights were advanced for blacks among the tribes as opposed to the states. Under the Treaty of 1866, for example, the Cherokee Nation was not only forced to free its slaves, but was required to provide full citizenship, including granting the Freedmen voting rights. Congress exercised this power on

the basis of the Thirteenth Amendment's "or any place subject to their jurisdiction" clause, adopted in 1865. However, the states were not required to accommodate the issues of citizenship or voting rights until the passage of the Fourteenth (1868) and Fifteenth Amendments (1870), which specifically gave Congress the authority to mandate these changes in state law. In other words, the Thirteenth Amendment was used by the Congress via the treaty power to force the Cherokee Nation to grant freedom, citizenship, and voting rights to blacks despite the fact that the Thirteenth Amendment only addresses the issue of slavery.

II. Treaty Abrogation and Contradictory Treatment of States and Tribes

The second aspect of Reconstruction under the Thirteenth Amendment was the willingness of Congress to abrogate the treaty rights of tribes. For example, the Treaty of New Echota of 1835, which originally removed the Cherokee to Indian Country, implied that the Cherokee Nation could pass laws independently as long as those laws did not affect commerce with the United States. Domestic slavery within the Cherokee Nation could therefore constitute an internal matter for the tribe to decide. Nonetheless, the United States abrogated this treaty under the Thirteenth Amendment. The federal government essentially argued that since the Cherokee had aligned itself with the Confederacy, the Nation had been in a state of rebellion and could be treated as a conquered people and have the terms of its surrender dictated.

Accordingly, it was necessary to re-establish the political relationship between the United States and the Cherokee Nation. As such, new realities would have to be dealt with such as the emancipation of Indian slaves. The federal government based its right to impose its will on the tribes via the assertion that their governments had acted as rebels. This is an important issue to consider. Were the individual Indians in a state of rebellion or were the tribal governments? Under the Lincoln Administration, the federal government's stated policy declared that since secession was a legal and constitutional impossibility, it was not the *state governments* in rebellion but rather the *people of those states* who were acting illegally as rebels. This distinction may seem a minor issue, but it is an important one. Lincoln

often argued against the legality of secession by saying that state governments could not separate themselves from the federal union. Based on the so-called Hamiltonian-Emanation theory, the individual actions of state *citizens*, even if those actions were illegal and constituted treason, did not constitute actual rebellion by the state *governments*. This distinction is significant for two reasons.

First, it informed the Lincoln Administration's view of denying international recognition of the Confederacy. Lincoln understood that if the Confederates were able to obtain foreign recognition, it might lead to a Union defeat. If he could construct an argument which denied this possibility then so much the better. Second, it framed the basis for Reconstruction. Since it was the citizens of the states and not the states themselves who were in rebellion, it made sense that the states could be reconstructed with only minor changes to their original relations to the Union. This is evident in the fact that with the exception of Virginia and the admission of West Virginia, the remaining ten states of the Confederacy were reconstructed with their pre-Civil War borders intact. These states also had the same rights of self-government they had enjoyed prior to the war as well. The only difference involved temporary federal military occupation of their territory. How is this related to the treatment of Indian Country?

In the case of Indian Country the same logic did not apply. Much of the justification for the new treaties supplanting those which guaranteed self-government was based upon the idea that *the tribal governments had indeed engaged in rebellion* against the United States. While this was factually correct, it is also true that some tribal members supported the Union cause. Moreover, the removal of many Union soldiers from western posts such as Fort Gibson for action in the east left the Cherokees and other tribes in eastern Oklahoma vulnerable to attack from their Osage and Comanche neighbors. As a result, many of the tribes believed they needed new allies such as the Confederate government to aid in their defense. From this perspective, one can see why the tribes turned to the Confederacy.

One can question whether or not the federal government had the legal basis to abrogate those earlier treaties such as New Echota and impose new treaties which stripped the tribes of the right to conduct internal

commercial activities which had hitherto included the right to own slaves. This question relates to the broader issue of treaty abrogation. The process of abrogation is a difficult one to justify strictly by the text of the Constitution. The modern interpretation of treaties, however, is that they are similar to other federal statutes and when ratified become part of the federal law and thus the fundamental law of the nation under the Supremacy Clause. An important precedent affording the federal government the authority to abrogate a treaty came in the so-called *Head Money Cases* (1884). In this important ruling, the U.S. Supreme Court stated that once they are ratified, treaties become a part of the federal law code and as such are subject to the legislative discretion of Congress and can thus be modified. This is similar to the logic employed by the Supreme Court in *Missouri v. Holland* (1920). In this case, the Court ruled that federal treaties can override state laws in conflict with such treaties. Some have noted that the Holland case “raised the possibility of using treaties as a means of expanding the legislative powers of the national government” (Stephens and Scheb 2012).

However, these decisions occurred long after the Thirteenth Amendment was adopted. Thus in the absence of specific court decisions which now afford Congress the authority to modify or abrogate treaties, the Thirteenth Amendment was necessary at the time to permit Congress the power to legislate the issue of slavery in Indian Country. But the real significance here involves the unintended consequences of such abrogation: tribal sovereignty was severely undermined. Eventually this would lead to the passage of measures such as the Major Crimes Act of 1885. This law extended the reach of the national government by federalizing certain criminal offenses involving Indian and non-Indians (Getches, Wilkinson, and Williams 1993). This and subsequent acts appeared to give Congress greater power over the internal workings of the tribes, including the power to modify or abrogate a treaty in a capricious or arbitrary manner.

III. Contemporary Effects of the Loss of Tribal Sovereignty

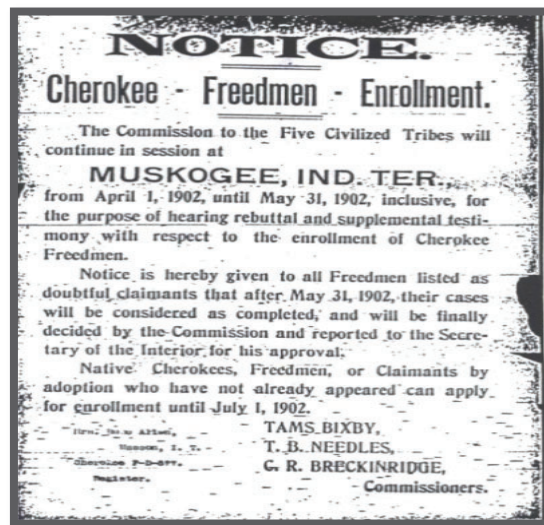
Reconstruction’s long term effects upon tribal sovereignty are still being felt today. It ultimately weakened tribal sovereignty and

accelerated the concept of federal paternalism. An example of this concerns the so-called Freedmen Issue—the descendants of slaves which were held by members of the ante-bellum Cherokee Nation. After the Civil War, the Treaty of 1866 forced the Cherokee Nation to emancipate all its slaves and to provide them and their descendants with perpetual citizenship rights within the Nation. The relationship between the Freedmen and other Cherokee citizens, however, was often strained, and historically the Freedmen have sometimes struggled to assert their full rights as Cherokee citizens. In the last two decades a movement has been stirring among some Cherokee citizens to revoke the citizenship of the Freedmen descendants in the name of creating an Indian Tribe composed solely of Indians. In the early 2000s, active steps were taken to formally remove the Freedmen descendants from the official rolls of the Cherokee Nation.

Both the Freedmen and the Cherokee Nation can offer solid arguments to support their respective positions. However, the point for our discussion is the connection between these current disputes and the Thirteenth Amendment and the Reconstruction treaties imposed upon the Cherokee Nation. The Freedmen Descendants, as legally defined Cherokee Citizens, have sought judicial relief from the federal courts to prevent the implementation of the proposed exclusion. This situation relates to the larger issue of the Incorporation of the Bill of Rights and other sections of the Constitution in Indian Country. Strengthening tribal sovereignty weakens paternalism. If the true goal of current Indian policy is self-determination for the tribes, this sounds like a positive development. However, this freedom potentially comes at a price. In this case, the Freedmen's status is being sacrificed. At stake here is the principle of Madisonian Democracy and its concern for balancing majority and minority rights. Permitting the tribes the right to decide these matters as sovereign entities has caused some from outside the Cherokee Nation to seek to intervene on behalf of the Freedmen. Members of the Congressional Black Caucus (CBC), for example, have threatened to remove federal funds from the Cherokee Nation if the Freedmen are expelled from the tribe. While debating the passage of the Native American Housing Assistance and Self-Determination Act, prominent members of the CBC, led by Representative Diane Watson (D-California), stated in a letter that they would oppose the measure and prevent the Cherokee Nation from

“receiving any benefits or funding under the bill” if the Nation was not in “full compliance with the Treaty of 1866 and recognizes all Cherokee Freedmen and their descendants as tribal citizens” (Giago 2011). The threat may appear inconsistent with previous policy and rhetoric. These same members of Congress have supported tribal sovereignty and generally voice the greatest concern for tribal governments and self-determination. However, their message now appears opaque. Their actions seem to imply that tribes are free to utilize their right to sovereignty, so long as it is not exercised in a way which challenges the CBC’s orthodoxy on civil rights. Can such a definition of sovereignty be taken seriously?

Figure 4
Notice of the Enrollment of Cherokee Freedmen



The debate over the Thirteenth Amendment and its connection to Indian Country can be illuminated by reference to George Fletcher’s *The Secret Constitution* (2001). In this work, Fletcher argues that our modern Constitution is essentially two separate documents representing two different eras. The first era began in 1787 and ended in 1865, and was marked by the aristocratic aura of the founding

fathers and the advent of Jacksonian Democracy. The second era from 1865 to the present embraces a more diverse and inclusive constitutional ethic and one in which the federal government gained power at the expense of the states. We often recognize this reality as it applies to the relationship between the federal government and the state and local governments. However, it can also be seen in Indian Country. For example, the Indian Appropriation Act of March 3, 1871 ended treaty making with tribes and made tribal governments subject to increased regulation by Congress (Wilkins and Stark 2011). This of course coincided with the fact that the federal government was militarily gaining an upper hand over the tribes and Indian communities no longer constituted a major security threat to American settlers. However, the change was accomplished in large measure due to the Thirteenth Amendment which gave Congress authority over Indian lands to address the problem of slavery. More specifically, we can see how it helped to create federal hegemony over the tribes.

CONCLUSION

The Thirteenth Amendment’s phrase “or any place subject to their jurisdiction” enjoys a specific, historical applicability to the area known as Indian Territory, home to the Five Civilized Tribes of eastern Oklahoma. Accordingly, no other provision of an amendment—with the exception of the 23rd which granted electoral votes for the District of Columbia—was ever germane to a particular area or state of the nation.

A few amendments are applicable to regions of the nation or are linked to several states which share historical experiences in common with the spirit of that amendment. The Thirteenth Amendment, however, is arguably the first to have direct applicability to Indian Country. The first twelve amendments only applied to federal and state relations or individual states or individual federal responsibilities. This demonstrates that the development of tribal governments and their respective rights, prerogatives, and place in modern American federalism has influenced the course of American constitutionalism.

But beyond these points, the story of the Thirteenth Amendment involves the quest to resolve a problem. This problem, which Thomas Jefferson initially blamed on King George III, was the issue of slavery. This problem was present at the Constitutional Convention in 1787 and was not resolved. The resolution of the problem would come in the middle of the next century and thereby expand the blessings of liberty to those once held as slaves and their descendants. Since its establishment the United States has defined itself as the standard bearer for freedom and liberty throughout the world. As Thomas Paine stated in *Common Sense*, “The cause of America is in a great measure the cause of all mankind” (Ellis 2007).

Sometimes America has been true to this call and sometimes it has not. If perfection and adherence to this goal at all times is the sole definition of success, then the United States has failed. However, if we adopt a more reasonable perspective and declare that perfection is not required and that striving toward greater liberty for more people over time is the goal then its record is worthy of respect and admiration. The Thirteenth Amendment is a shining example of that success.

However, the additional power it conferred on Congress involved the eventual dilution of the political liberty and freedom of Indian peoples and ended their attempts to maintain a separate political identity. The definition of what freedom is and what it ultimately means is not as simple as it may appear. But in a more specific sense, the primary issue here concerns the seemingly never ending problem of modern federal Indian policy, namely the conflicting forces of paternalism and sovereignty. This has certainly been one of the most difficult obstacles to overcome for modern tribal governments in the era of self-determination. The Cherokee Nation, as well as other tribal governments, demand the right of self-government and the right to determine issues such as citizenship. At the same time, the Cherokee Nation also wrestles with the realities of the modern world, and at times benefits from a degree of intervention from the federal government.

Yet the federal government's role in the Freedmen's case is emblematic of the type of involvement which has long plagued tribal governments. Consequently, the idea of federal paternalism influencing the concept

of Cherokee citizenship is alive and well. The right to define the policy and citizenship of its people is among the most basic rights which any government can claim to possess. Thus, tribal governments can make powerful arguments regarding their right to determine their own citizenship requirements. Likewise, the Freedmen can generate strong arguments to support their position as well.

There is of course a difference between the freedom and liberty of individuals and the freedom and liberty of nations. It has been observed that when political leaders, often demagogues, gain power, the liberty of individuals is often sacrificed in the name of the “common good.” One prominent scholar has noted that “[t]he greatest enemy of liberty has always been some vision of the good. It might be the good of community engaged for the glory of a city, nation, race, or party” (Fried 2007).

The notion that “[i]t is the liberty of persons, not peoples” is instructive here (Fried, 2007). It provides an interesting perspective by which we can observe an alternative narrative of the Thirteenth Amendment. It undoubtedly did lead to greater freedom for the formerly held slaves of the United States and the Indian Territory. However, this freedom came at the expense of tribal sovereignty. Balancing the issue of whose freedom is sacrificed for the good of others is an important element in this discussion.

With regard to slavery the political independence of the Cherokee Nation was curtailed to advance the American ethic of egalitarianism, freedom, and liberty. It led to the freedom of an oppressed minority within the Cherokee Nation. However, it was imposed by outsiders who used this power to implement other initiatives and take actions which would ultimately lead to even more significant losses of sovereignty in the future. In this way it may be said that the road to freedom for the Freedmen was akin to Hayek’s “Road to Serfdom” for the Cherokees.

This kind of “political serfdom” which federal paternalism has helped to create should also give the tribes reason for caution. Modern tribal governments should perhaps tread carefully in asserting their sense of sovereignty in matters such as the Freedmen issue. If powerful establishment voices such as the Congressional Black Caucus wish to

carry out their threats to defund or otherwise punish the tribes for exercising their sovereignty, the tribes may pay a high price for the right of self-government. Similar expressions of tribal autonomy might even result in a backlash of anti-tribal legislation from Capitol Hill. In the end, the issue of federal paternalism is a symptom of a legacy exacerbated in part by the greater power afforded to the Congress as a result of the Civil War. It is a mixed legacy which has both promoted freedom and reduced tribal autonomy. It is a paradox which Indian Country will continue to face for the foreseeable future.

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