IN THE SUPREME COURT OF THE MUSCOGEE (CREEK) NATION

RON GRAHAM, Petitioner/Appellant, v. MUSCOGEE (CREEK) NATION CITIZENSHIP BOARD, Respondent/Appellee.	)	Appeal No.: SC-2020-01

APPELLANT'S REPLY BRIEF

John E. Parris, M(C)N Bar
PO BOX 1021
Sand Springs, OK 74063-1021
(918) 931-8928
jeparris@gmail.com
Counsel for Appellant

July 10, 2020

Table of Contents

Table of Authorities

Statutes

APPELLANT'S REPLY BRIEF

Comes now Appellant in Reply to the Appellee's Response and would state that this at this stage this case is about *stare decisis*. What did this Court rule on November 2, 2007 and is the Court bound to reconsider that ruling. U.S. Chief

Justice Roberts recently summarized the principle in *June Medical Services v. Russo,* Slip Op. No. 18-1323:

> *Stare decisis* is not an "inexorable command." *Ramos* v. *Louisiana*, 590 U. S. ___, ___ (2020) (slip op., at 20) (internal quotation marks omitted). But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered. See *Janus* v. *State, County, and Municipal Employees,* 585 U. S. ___, ____–____ (2018) (slip op., at 34–35). P. 4 (Roberts Concurring).

In *June Medical Services* the U.S. Supreme Court struck down a Louisiana law restricting abortion providers primarily because it was a nearly identical statute and facts with *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ___ (2016). The two cases were in District Court at the same time and no intervening cases had questioned the decision. Here this Court should recognize significant legal developments in the past 13 years that mandate overruling the 2007 decision, notably *Cherokee Nation v. Nash et al.*, 267 F.Supp.3d 86 (U.S.D.C., D.C. 2017); 2017WL3833870.

Appellee, at p. 19, makes a brief argument that *Cherokee Nation v. Nash et al.*, is distinguishable because Cherokee Nation had allowed Freedmen Citizenship before a 1979 Constitutional amendment excluded them. Also, that this Nation, M(C)N, has never permitted citizenship of Freedmen. However, there

is no citation to evidence to this contention. The Cherokee Nation Supreme Court struck down the 1979 citizenship law regarding Freedmen as being inconsistent with the 1975 Cherokee Constitution. *Lucy Allen v. Cherokee Nation Tribal Council*, JAT-04-09. Copy attached. This Opinion clarifies that Freedmen were citizens of the Cherokee Nation since 1866, by treaty and constitution, and the 1979 statute purported to remove Freedmen. Ultimately it doesn't matter what the historic practice has been. The clear language of the Treaty should control. The Cherokee Nation v. Nash decision is on point and more than persuasive.

The 1866 Treaties between the Muscogee (Creek) Nation, Cherokee Nation, and Seminole Nation are all nearly identical regarding the Freedmen. Relevant portions here:

Muscogee (Creek) Nation:

> and inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek country under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens [thereof,] shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe.

Cherokee Nation:

> They further agree 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:

Seminole Nation:

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

The citizenship language in the three treaties is similar but is notably more clear in the Muscogee (Creek) Nation treaty, which uses the term "citizen" three times. The Cherokee treaty does not use the term "citizen" at all. Yet the *Cherokee Nation v. Nash* decision found that Cherokee Freedmen are entitled to citizenship. Clearly the *Cherokee Nation v. Nash* decision is on point here. A different jurisdiction certainly but this case may well find itself in the same court.

The recent case of *McGirt v. Oklahoma*, Slip Op. No. 18–9526, reaffirmed the historic Muscogee (Creek) Nation laws and treaties. A seminal quote is: "But whatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. In the end, Congress moved in the opposite direction." This court now

has the opportunity to correct years of incorrect law and bring the Muscogee (Creek) Nation in line with the Cherokee Nation and Seminole Nation Freedmen decisions. The November 2, 2007, order of this court should be overruled.

Appellant prays that this Court find that the 1866 Creek Treaty granted citizenship to qualified freedmen and their descendants and remand this case to the Citizenship Board for a determination of Appellant's descendancy from a Creek Freedman Citizen.

Respectfully Submitted on July 10, 2020.

John E. Parris, M(C)N Bar #664
PO BOX 1021
Sand Springs, OK 74063-1021
(918) 931-8928
jeparris@gmail.com

CERTIFICATE OF MAILING

This hereby certifies that on this 10 day of July, 2020, a true and correct copy of the above and foregoing Entry of Appearance was mailed or hand delivered to the following:

Roger Wiley,
Kyle B. Haskins,
The Muscogee (Creek) Nation
Office of the Attorney General

John E. Parris

IN THE JUDICIAL APPEALS TRIBUNAL
OF THE CHEROKEE NATION

Lucy Allen,	)	
	)	
Petitioner,	)	
	)	
v.	)	**JAT-04-09**
	)	
Cherokee Nation Tribal Council, Lela Ummerteskee, Registrar, and Registration Committee,	)	
	)	
Respondents.	)	

For the Petitioner: David Allen Cornsilk

For the Respondents: Todd Hembree for the Cherokee Nation Tribal Council

Richard D. Osburn for Lela Ummerteskee, Registrar, and the Registration Committee

The majority opinion is filed by Justice Stacy L. Leeds (special concurrence by Justice Darrell Dowty). A dissenting opinion is herein filed by Chief Justice Darell Matlock, Jr.

OPINION OF THE COURT

Petitioner Lucy Allen is a descendant of individuals listed on the Dawes Commission Rolls as "Cherokee Freedmen." To become a tribal member under the current legislation, she must prove she is "Cherokee by blood." She asks this Court to declare 11 C.N.C.A. § 12 unconstitutional because it is more restrictive than the membership criteria set forth in Article III of the 1975 Constitution.

Sovereign Immunity

Respondent Cherokee Nation asks this Court to follow the United States Supreme Court's decision in *Santa Clara v. Martinez*[1] and dismiss this case because the Cherokee Nation is immune from suit. If this case were filed against the Cherokee Nation in a federal or state court, *Santa Clara* would certainly require dismissal. In fact, when other Cherokee Freedmen have asked the federal courts to enforce their rights under the 1975 Constitution, the federal courts have properly dismissed those lawsuits.[2]

Article VII of the 1975 Constitution, however, created this Court to "hear and resolve any disagreements" arising under the "constitution or any enactments of the Council." This case involves a direct conflict between the language of the constitution and legislation passed by the Council. The Cherokee JAT is the only proper forum.

The Power of the Cherokee People

The Cherokee citizenry has the ultimate authority to define tribal citizenship. When they adopted the 1975 Constitution, they did not limit membership to people who possess Cherokee blood. Instead, they extended membership to all the people who were "citizens" of the Cherokee Nation as listed on the Dawes Commission Rolls.

The Constitution could be amended to require that all tribal members possess Cherokee blood. The people could also choose to set a minimum Cherokee blood quantum.[3] However, if the Cherokee people wish to limit tribal citizenship, and such limitation would terminate the pre-existing citizenship of even one Cherokee citizen, then it must be done in the open. It cannot be accomplished through silence.

---

[1] 436 U.S. 49 (1978).
[2] See Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457 (10th Cir. 1989).
[3] The people of the United Keetoowah Band and the Eastern Band of Cherokee Indians have done so.

The Council lacks the power to redefine tribal membership absent a constitutional amendment. The Council is empowered to enact enrollment procedures, but those laws must be consistent with the 1975 Constitution. The current legislation is contrary to the plain language of the 1975 Constitution.

The 1975 Cherokee Constitution

Article III of the 1975 Constitution defines eligibility for tribal membership very broadly:

> All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May 1867, and the Shawnee Cherokees as of Article III of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants.[1] (emphasis added)

There is simply no "by blood" requirement in Article III. There is no ambiguity to resolve. The words "by blood" or "Cherokee by blood" do not appear.

Article III only requires proof of citizenship by referencing the "Dawes Commission Rolls." Article III does not exclude anyone who is listed on the Dawes Commission Rolls.

It is important to note that the phrase "Dawes Commission Rolls" is plural. While the overwhelming majority of people on the Dawes rolls are Cherokee by blood, the rolls also include other people who the Cherokee Nation recognized as citizens at the time the Dawes rolls were compiled. Membership is not limited, in Article III, to those individuals only appearing on the "Cherokee by blood" pages of the Dawes rolls.

[1] Cherokee Constitution of 1975, Article III, Section 1.

In the dissenting opinion, Chief Justice Matlock agrees with the majority on one very crucial point: "The Cherokee Freedmen, Delaware Cherokee and Shawnee Cherokees were citizens of the Cherokee Nation prior to the adoption of the 1975 Constitution of the Cherokee Nation." If the Cherokee Freedmen were "citizens" in 1975, as all three justices unanimously agree, then they must have been "citizens" at the time the Dawes Rolls were completed. If they were citizens of the Cherokee Nation at the time the Dawes Rolls were compiled, then they are expressly included in the 1975 Constitution, which extends membership to the "citizens" on the Dawes Rolls.

If the Freedmen's citizenship rights existed on the very night before the 1975 Constitution was approved, then they must necessarily survive today. These rights were not terminated by the adoption of the 1975 Constitution. In fact, the 1975 Constitution affirms these rights by linking citizenship to one single document: the Dawes Commission Rolls.

The Disputed Legislation

The disputed legislation sets forth "membership requirements" in 11 C.N.C.A. § 12. These "membership requirements" are more restrictive than the "membership" provision of Article III. 11 C.N.C.A. § 12 states:

> **A. Tribal membership is derived only through proof of Cherokee blood based on the Final Rolls.**
>
> **B. The Registrar will issue tribal membership to a person who can prove that he or she is an original enrollee listed on the Final Rolls by blood or who can prove to at least one direct ancestor listed by blood on the Final Rolls.**

This legislation adds new and more restrictive membership requirements than those found in the Constitution. The legislation in subsection (A) states that "tribal membership is derived only through proof of Cherokee blood." This is contrary to the plain language of the Constitution.

In subsection (B), the legislation requires proof of lineage "by blood." This too is contrary to the plain language of Article III, which lacks any "blood" requirement whatsoever. The Constitution only requires proof of lineage from a "citizen." It does not require proof of Cherokee or Indian blood.

Providing proof of Cherokee blood is clearly one way to become a member. It is not the only way to prove membership. In fact, Article III expressly mentions the Shawnee and Delaware, who posses some Indian blood, but not Cherokee blood. The Shawnee and Delaware are not citizens "by blood" of the Cherokee Nation.

Article III expressly includes all people, who can prove that they were "citizens" on the Dawes Commission Rolls with no mention (one way or the other) about Cherokee or Indian blood quantum. The Cherokee Freedmen, the Shawnee and Delaware were all citizens at the time the Dawes rolls were finalized and they all continue as citizens to this day.

Scope of Additional Inquiry

When interpreting legislation or constitutional provisions, this Court must look at the plain language of the document. If this Court can reach its conclusion by looking at the plain language alone, there is no need to look to additional sources. The language should speak for itself and in this case, it does. Article III does not limit membership to

"Cherokees by blood," but instead, refers to the "citizens" on the Dawes rolls, which include Freedmen. 11 C.N.C.A. § 12, however, requires proof of Cherokee blood where no such requirement is found in Article III. There is no ambiguity and this Court could end the discussion with that simple conclusion. The legislation is unconstitutional.

This Court does, however, recognize that the word "citizen" in Article III might require further discussion so that the Cherokee people fully understand this Court's decision. For this reason, the Court will engage in a more detailed discussion of legal citizenship in the Cherokee Nation.

This Court will also discuss the 1975 Constitution as a whole, paying particular attention to those provisions in the Constitution that define the rights of Cherokee citizens by blood. The Court will note that under the 1975 Constitution, the rights of Cherokee citizens by blood differ from the rights of the other citizens of the Cherokee Nation.

The Dawes Commission Rolls

The Dawes Commission Rolls were not created by the federal government from scratch. When the Dawes Commission compiled the rolls, they referred to previous Cherokee Nation census records which also included a broad citizenry. Most of the people listed on the Dawes Rolls will also appear on the Cherokee Nation's own tribally controlled censuses that pre-date the Dawes rolls. The Cherokee Nation's own censuses included Freedmen in addition to "native Cherokees," intermarried whites, and Indians of other tribes, all of whom were recognized by the Cherokee Nation as citizens. The 1975 Constitution makes no reference to these tribal rolls, but instead, relies on the Dawes Rolls for inclusion and exclusion.

The Dawes Commission Rolls are the final citizenship rolls of the Cherokee Nation.[5] On the basis of their Cherokee citizenship, the people who were listed on these rolls were entitled to allotments from the Cherokee Nation, including the Cherokee Freedmen. The Dawes Rolls include several groups of people and are not limited to Cherokees by blood.

Individual Shawnees are actually listed on the "Cherokee by blood" pages of the Dawes Commission Rolls. There are no separate Cherokee Shawnee pages. On the census cards, Shawnees are listed with a blood degree and are referenced as "AS" or "Adopted Shawnee." The Shawnee are Cherokee citizens on the Dawes rolls, but they are citizens by adoption, not "by blood."

Individual Delaware are listed on separate pages in the Dawes Commission Rolls with the caption "Delaware Cherokee" at the top. On the census cards, the Delaware are listed with a blood degree and are referenced as "AD" or "Adopted Delaware." The Delaware are Cherokee citizens on the Dawes rolls, but they are citizens by adoption, not "by blood."

---

[5] The cover page to the Dawes Commission Rolls reads: "Index to the Final Rolls of the Citizens and Freedmen of the Five Civilized Tribes in Indian Territory." Respondents argue that this title suggests that the Freedmen were not citizens of the Cherokee Nation. There are at least two reasons for the distinction.

First, not all of the Five Tribes recognized the Freedmen as citizens of their nations. Unlike the other tribes, the Chickasaw never adopted the Freedmen as citizens by amending their own tribal laws. Chickasaw Nation v. United States, 318 U.S. 423 (1943). All of the other tribes, including Cherokee, adopted the Freedmen by amending their tribal laws or constitutions.

Second, the Curtis Act mentioned Freedmen separately from other citizens as a result of the *Whitmore* federal court case dealing with the distribution of Cherokee Nation funds to Freedmen, as Cherokee citizens. As a result of the *Whitmore* case, in which Freedmen citizenship rights were upheld, a new Freedmen roll was to be taken to ensure that only those individuals who met the qualifications for citizenship would be included on the rolls. The Curtis Act specifically mentions this litigation. It is unreasonable to argue that the Curtis Act deprived Freedmen of citizenship when it specifically refers to a court case that upheld Freedmen citizenship.

Individual Freedmen, like the Delaware, appear on separate pages with the caption "Cherokee Freedmen" at the top.[6] On these census cards, there is no blood degree listed but there is an "F" or "Freedmen" notation. The Freedmen are Cherokee citizens on the Dawes rolls, but they are citizens by adoption, not "by blood."

The only time the words "by blood" appear in the Dawes Commission Rolls is at the top of the "Cherokee by blood" pages (which actually includes some Shawnees) and "Minor Cherokees by blood" pages. It is true that the Dawes Commission listed a blood degree on the census cards for Delaware and Shawnee. This degree of blood would refer to Delaware or Shawnee Indian blood, not a degree of Cherokee blood.[7] Therefore, it is incorrect to refer to Delaware and Shawnee as citizens by blood of the Cherokee Nation, even if they possess a CDIB card. The Delaware and Shawnee, like the Freedmen, are citizens of the Cherokee Nation by adoption only.

The Dawes Commission had their own federal purposes for including a blood degree on their documents. The federal government continues to use these blood degrees for their own purposes today.[8] It is not clear that the Dawes Commission had any appreciation for the fact that Indian blood, of the various tribes, is different. Shawnee blood is not Cherokee blood. Delaware blood is not Cherokee blood. It is important for

---

[6] There are also pages that list "Minor Cherokee Freedmen." There are no separate pages for Shawnee, Delaware or intermarried White minors.

[7] If some of the Shawnee or Delaware were also mixed Cherokee, there is no way to confirm it on the Dawes rolls. Likewise, if some of the Cherokee Freedmen were mixed with Cherokee, there is no way to confirm it on the Dawes rolls. It is inconceivable that not a single Delaware, Cherokee Freedmen, or Shawnee had any Cherokee blood, yet that is what the Dawes rolls suggests.

[8] We continue to lose more and more of our land base every year because the federal government only protects against alienation the lands owned by individuals with high blood degrees. When lands are owned by Cherokees with less Indian blood, those lands are subjected to state taxation and vulnerable to state eminent domain. The federal and state governments benefit when Cherokee blood quantum drops. Federal protection of our lands cease and state regulatory authority begins.

this Court to question whether all these federal blood degrees really matter today, for purposes of Cherokee citizenship laws.

The "blood" degrees of the Dawes Commission are absolutely irrelevant for the purpose of determining who is a legal citizen of the Cherokee Nation of Oklahoma.[9] A 1/64 blood Shawnee has the same legal citizenship rights as a full blood Cherokee Indian. A Cherokee Freedmen has the same legal citizenship rights as 1/8 blood Cherokee Indian. A full blood Delaware Indian has the same legal citizenship rights as a person who is 1/1024th Cherokee by blood or less. They are all legal citizens of the Cherokee Nation pursuant to the plain language of our Constitution.

The only time a legal right, under Cherokee law, depends on Cherokee blood, is when a person decides to run for elected office. In that instance, we rely on the blood degree findings of the Dawes Commission to make sure our Principal Chief and Council members are Cherokee citizens by blood. This guarantees Cherokee control of government, but that government is ultimately elected by a larger and more diverse constituency of citizens.

The Cherokee Nation is a Sovereign. The Cherokee Nation is much more than just a group of families with a common ancestry. For almost 150 years, the Cherokee Nation has included not only citizens that are Cherokee by blood, but also citizens who have origins in other Indian nations and/or African and/or European ancestry. Many of these citizens are mixed race and a small minority of these citizens possess no Cherokee blood at all.

---

[9] The federal government might have a purpose for the blood quantum in the administration of services or for determining who is an "Indian" by their standards. This has no effect on legal citizenship status under Cherokee law.

People will always disagree on who is culturally Cherokee and who possesses enough Cherokee blood to be "racially" Indian. It is not the role of this Court to engage in these political or social debates. This Court must interpret the law as it is plainly written in our Constitution.

Other Provisions of the 1975 Constitution

This Court must look at all the language in the 1975 Constitution. As this Court has stated, Article III has no "by blood" requirement. There are, however, two other constitutional provisions that actually do impose a "by blood" requirement. Article VI, Section 2 requires the Principal Chief to be a member "by blood":

> The Principal Chief of the Cherokee Nation shall be a citizen of the Cherokee Nation of Oklahoma in accordance with Article III. He shall have been born within the boundaries of the United States of America, its territories or possession; and he shall have obtained the age of thirty (30) years of age at the time of his election and be a member by blood of the Cherokee Nation of Oklahoma. (emphasis added)[10]

Article V, Section 3 requires that Council to be "members by blood:"

> The Council shall consist of 15 members, who are members by blood of the Cherokee Nation of Oklahoma, and shall be elected at large.

A "by blood" requirement is only needed, in these two provisions, if there are people who are not citizens by blood. Otherwise, it would be pointless to have a "by blood" requirement to hold office. If everyone was a citizen by blood, then everyone could hold office. The Shawnee, Delaware and Freedmen make up the class of people

[10] This provision has been changed, through constitutional amendment, to add a residency requirement for the Principal Chief.

who are not citizens by blood. They are all citizens by adoption and therefore, ineligible to hold elected office.

The fact that the "by blood" requirement was written into two other provisions of the Constitution, shows that the authors knew exactly what words to use when they intended to restrict a right to "by blood" citizens only. If there was any intent to exclude the Cherokee Freedmen from membership, there should have been the same type of unmistakably clear language.

The laws of the other four tribes that appeared on the Dawes Commission Rolls are not, of course, binding on the Cherokee Nation. The constitutions of the other tribes are instructive, however, in terms of the type of language that would be required to clearly terminate Freedmen citizenship rights.

In 1979, the Muscogee (Creek) Nation adopted a new Constitution that provided: "Each Muscogee (Creek) Indian by blood shall have the opportunity for citizenship in the Muscogee (Creek) Nation."[11] In doing so, the Muscogee (Creek) Nation excluded Freedmen unless that individual can also prove Creek Indian blood pursuant to Muscogee (Creek) law.

In 1983, the Choctaw Nation of Oklahoma adopted a new constitution that limited membership to "all Choctaw Indians by blood whose names appear on the final rolls of the Choctaw Nation."[12] In doing so, the Choctaws decided to reference the Dawes Commission Rolls for membership, but they were very clear that they were only using those pages that list "Choctaws by blood." This clearly excluded the Choctaw Freedmen.

---

[11]Constitution of the Muscogee (Creek) Nation, Art. II, Section 1 (1979).
[12]Constitution of the Choctaw Nation of Oklahoma, Article II, Section 1 (1983).

The Chickasaw Nation Constitution restricts citizenship to "Chickasaw Indians by blood" who are listed on the Dawes Commission final rolls.[13] They clarified exactly which portion of the Dawes Commission Rolls that could be referenced.

The language in the Choctaw, Chickasaw and Muscogee (Creek) Nation constitutions makes it unmistakably clear that membership is limited to their citizens "by blood" only. The Cherokee Constitution is a completely different matter. It lacks the type of clear language to terminate the pre-existing citizenship rights of the Freedmen.

The Respondent Cherokee Nation argues that the Cherokee Freedmen are not eligible for membership because they are not specifically mentioned by name in Article III. It is true that the "Cherokee Freedmen" are not mentioned by name in Article III. It is also true that the "Cherokees by blood" are not mentioned by name in Article III. Only the Shawnee and Delaware are listed by name. Are both the "Cherokees by blood" and the "Cherokee Freedmen" included by silence? If not, can one group be included by silence while the other is excluded by silence?

This Court is guided by the principles set forth in *DeMoss v. Jones*, JAT 96-01. In that case, the Court established parameters for how the 1975 Cherokee Constitution should be interpreted.

According to *DeMoss*, this Court must interpret the language of Article III as "the people voting upon it" would have understood it in 1975 and "in the sense most obvious to the common understanding at the time of its adoption." This Court unanimously agrees on one thing: the Cherokees by blood, Cherokee Freedmen, Shawnee and Delaware were all citizens in 1975 on the eve of the adoption of the Constitution. If they

[13] Constitution of the Chickasaw Nation, Article II, Section 1 (1990). The Chickasaw have always contested the inclusion of the Freedmen and unlike the other tribes, they never amended their constitution or passed new tribal laws extending citizenship to Freedmen following their post-Civil war treaty.

were all citizens in 1975, then they all would have been legally entitled to vote. Following the instructions in *DeMoss*, this Court must consider how each of these groups would have understood the language in Article III at that time.

When the average Cherokee by blood read Article III, there is little doubt what they would have thought. They would have thought they were necessarily included, despite the fact that their group was not specifically mentioned like the Shawnee and the Delaware were. They knew they (or their parents/grandparents) were "citizens" of the Cherokee Nation as listed on the Dawes Commission Rolls.

When the average Cherokee Freedmen read the language of Article III, it is reasonable that they too, would have thought they were included, despite the fact that their group was not specifically mentioned like the Shawnee and Delaware were. They knew their history. They knew they (or their parents/grandparent) were "citizens" of the Cherokee Nation as listed on the Cherokee Dawes rolls.

It is not a requirement that the "Cherokees by blood" or the "Cherokee Freedmen" be specifically mentioned in Article III, like the Shawnee and Delaware were. The "Cherokees by blood" and the "Cherokee Freedmen" were all citizens of the Cherokee Nation when the Dawes Rolls were completed. When Article III stated that "all members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls" it expressly included both the Cherokees by blood and the Cherokee Freedmen.

Drafting the 1975 Constitution

The dissenting opinion spends significant time discussing the "intent of the framers." The dissent improperly focuses on the Preamble of the Constitution rather than on the membership provisions of Article III. The dissent suggests that the individuals who drafted the 1975 Constitution intended to exclude the Cherokee Freedmen as a means of preserving tribal culture.[14] The dissent then speaks in terms of "Cherokee Indian identity" and of "common character and ancestry."

No one disputes that the Shawnee and Delaware are entitled to citizenship in the Cherokee Nation. The Shawnee and Delaware are not, however, Cherokee Indians. They have very different languages and they have a culture of their own. They do not share a common ancestry with each other, or with the Cherokee people. They are, nonetheless, legal citizens of the Cherokee Nation.

If the dissent is correct, in that the 1975 Constitution sought to create an exclusively "Cherokee" Nation for purposing of preserving tribal culture and common ancestry, then why would Indians from other tribes be included?

A truly "Cherokee" Nation, in a strictly cultural sense, might have limited citizenship to Cherokee ancestry and/or required a cultural tie to clan, religion or language. The 1975 Constitution does none of these things. The 1975 Constitution, as it is plainly written, envisions something much more inclusive in terms of qualifications for legal citizenship.

The plain language of the Constitution does not impose a "by blood" requirement. The language of the Constitution controls. The framers did not include a "by blood"

[14] This argument was not presented by either party to this lawsuit.

requirement when they drafted the Constitution. This Court cannot rewrite the language today.

The dissent's discussion of the intent of the framers lacks historical context. If this Court is to engage in a retrospective review of what the framer's thought, it should also focus on what those people knew, or must have known, about the citizenship status of the Cherokee Freedmen. The individuals who drafted the 1975 Constitution were well-educated and some were attorneys. They were familiar with Cherokee Nation legal history. When they included a direct reference to the Dawes Commission Rolls in the 1975 Constitution, they knew the Cherokee Freedmen were included in that document.

These individuals were also familiar with Cherokee history under the 1839 Constitution, the Cherokee Nation's treaties and agreements, and the allotment process. The authors could not have been unaware of the citizenship status of Cherokee Freedmen. At that point in time, the Cherokee Freedmen had been legal citizens of the Cherokee Nation for 110 years.

On the eve of the new 1975 constitution, the Cherokee Nation would have been very mindful of the citizenship rights of Cherokee Freedmen. Those rights had just been the subject of two federal court cases in which the Cherokee Nation participated. Both of these cases were concluded just a few years before the 1975 Constitution was drafted.

(1) In 1967, the United States Court of Claims ruled that the Cherokee Freedmen were entitled to receive payments from the Cherokee Nation judgment fund like any other Cherokee citizen listed on the Dawes Commission Rolls.[15]

(2) In 1971, a small group of individuals who were not listed on the Dawes Commission Rolls tried to be included in these payments. This group argued that they were Freedmen who were inadvertently left off the Dawes Rolls. The federal

[15] Cherokee Nation v. US, 180 Ct. Cl. 181 (1967) affirming 12 Ind. Cl. Comm. 570 (1963)(the Cherokee Nation was the Plaintiff that initiated this lawsuit).

court rejected their claims.[16] Only those Freedmen that are actually listed on the Dawes Rolls were entitled to share in Cherokee Nation funds. This case reaffirms the notion that the Dawes Rolls (in their entirety) are the final citizenship rolls of the Cherokee Nation.

The individuals who drafted the 1975 Constitution would have also been well aware of additional legal realities:

(1) In 1962, Congress passed legislation ordering payments to the Cherokee Nation for prior takings of Cherokee lands. Congress instructed the money to be distributed to individuals on the Dawes Commission Rolls.[17] The Freedmen were paid just like all the other citizens.

(2) No laws changing Cherokee citizenship were passed by the federal or the tribal government between the completion of the Dawes Commission Rolls and the adoption of the 1975 Constitution.

(3) In 1906, the United States Supreme Court heard a challenge about the allotment of Cherokee lands. The U.S. Supreme Court ruled that Intermarried Whites were not entitled to the same citizenship rights (unless they married in before 1875) as the Cherokees by blood, Shawnee, Delaware and Freedmen.[18]

(4) The Cherokee Freedmen were included on the Dawes Commission Rolls and as a result, they received allotments as citizens of the Cherokee Nation. The allotments were not free grants of land from the United States. The lands were conveyed by the Cherokee Nation and signed by the Principal Chief.[19]

(5) In 1895, the United States Court of Claims ruled that Cherokee Freedmen have the same rights as "native" Cherokees and therefore Freedmen were entitled to a share of payments from sales of Cherokee lands. This decision was based on the Treaty of 1866 and tribal amendments to the 1839 Constitution.[20]

---

[16] Cherokee Freedmen & Cherokee Freedmen's Association v. the United States and the Cherokee Nation, 195 Ct. Cl. 39 (1971)(the Cherokee Nation was a named Defendant to this lawsuit).

[17] Public Law 87-775 (October 9, 1962).

[18] Redbird v. United States, 203 U.S. 76 (1906). The Respondent Cherokee Nation argues that if this Court allows Freedmen citizenship, then there will also be Intermarried Whites that would be entitled to citizenship. If there are any Intermarried Whites still living, that are listed on the Dawes Rolls, they would be entitled to citizenship. Keep in mind that these people would have been married to native Cherokees on or before 1875. To the extent that they have lineal descendants, those children would likely be the product of a marriage with a Cherokee person and those children would be Cherokees by blood.

[19] These conveyances were the result of the 1902 Agreement in which the Cherokee Nation agreed to allot the Cherokee lands to individual citizens.

[20] Whitmore v. Cherokee Nation, 30 Ct. Cl. 138 (1895).

(6) In the late 1800s the Cherokee Nation conducted several censuses as a matter of tribal law. The censuses included native Cherokees, Freedmen, adopted whites and various other adopted Indians, including Shawnee and Delaware. The Cherokee census does not list blood degrees for anyone. Blood degrees appeared on the Dawes rolls but not in Cherokee Nation's own documents.

(7) In the 1870s, the Cherokee Nation Supreme Court (this Court's predecessor) heard several citizenship cases but never rejected the Freedmen as a class. Some Freedmen were individually rejected because they did not meet residency or timing requirements. The Court admitted many individual Freedmen as citizens.[21]

(8) The Cherokee Nation signed a Treaty with the United States in 1866 agreeing to extend citizenship to the Freedmen

In light of this long and consistent history, the 1975 Constitution was adopted with a membership provision which includes "citizens" and descendants of the Dawes Commission Rolls. If the Cherokee Freedmen are to be treated differently than all the other people on the rolls, then specific language should demonstrate that the Freedmen were being excluded. There is no such language.

Further Discussion of the 1866 Treaty

It has been argued that the Cherokee Freedmen were forced on the Cherokee Nation by the federal government and that the Cherokee Nation never voluntarily accepted the Freedmen as citizens. This is simply not the case.

In the Treaty of 1866, the Cherokee Nation agreed to extend citizenship to Freedmen and agreed to give them the same rights as "native" Cherokees. Although this

[21] The dissent argues that there is no instance were the Cherokee Nation voluntarily extended citizenship to the Freedmen. This is inaccurate. The Cherokee Nation Supreme Court extended citizenship to Freedmen as a matter of Cherokee law, based on a Cherokee amendment to the 1839 Cherokee Constitution.

treaty was signed at the end of the Civil War, when the Cherokee Nation was in a weaker bargaining position, it is nonetheless an agreement between two sovereign nations.

When the Cherokee Nation enters into treaties with other nations, we expect the other sovereign to live up to the promises they make. It is rightly expected that we will also keep the promises we make.

It cannot be overstated that the 1866 Treaty, in which the Cherokee Nation agreed to extend citizenship to the Freedmen is the exact same treaty where the Cherokee Nation agreed to have other Indian tribes (ultimately the Shawnee and Delaware) relocated inside the Cherokee Nation. After the 1866 Treaty, the Cherokee Nation amended the 1839 Constitution to extend citizenship to the Freedmen as a matter of tribal law. After the 1866 Treaty, the Cherokee Nation also entered into individual treaties with both the Delaware and the Shawnee Indian tribes. Both of these actions show that the Cherokee Nation complied with the terms of 1866 Treaty.

The inter-tribal treaties with the Shawnee and Delaware were not as freely negotiated as the Respondent Cherokee Nation contends. First, the United States completed relocation treaties with the Shawnee and the Delaware. Then, the Cherokee Nation agreed with the United States to accept the relocation of the Shawnee and Delaware. Only after making a treaty with the United States did the Cherokee Nation embark on the inter-tribal treaty negotiations with the Shawnee and the Delaware. With the approval of the United States, the inter-tribal treaties set forth that the Shawnee and Delaware Tribes will be incorporated into the Cherokee Nation. This is how individual Shawnee and Delaware came to have citizenship rights in the Cherokee Nation.

The Cherokee treaties with both the Shawnee and Delaware required the approval of the United States with reference to the 1866 Treaty. A freely negotiated treaty between two independent sovereigns does not need the approval of a third sovereign.

It is argued that the 1866 Treaty should not be binding for purposes of Cherokee Freedmen citizenship. The Cherokee Nation argues, however, that the 1866 Treaty (and the resulting inter-tribal treaties that followed) is binding for Shawnee and Delaware purposes.

The Respondent Cherokee Nation asserts that extending citizenship to the Delaware and Shawnee was the Cherokee Nation's free and independent choice but that the Freedmen were forced on the Cherokee Nation against the will of the Cherokee people. The timing of the treaties does not support this argument. It is not as if the Cherokee Nation approached the United States and asked them to settle some other Indian tribes on lands perpetually that had been guaranteed in fee to the Cherokee Nation. To the contrary, the United States stood in a strong position and needed a place to relocate other Indians and the Cherokee Nation obliged. After these agreements, the Cherokee Nation ultimately extended citizenship to these new citizens just as it had already done with the Freedmen.

If the 1866 Treaty is enforceable for the ultimate inclusion of Shawnee and Delaware it must be enforceable as to the Freedmen. The fact that internal Cherokee laws were amended to acknowledge the Cherokee Nation's compliance with the 1866 Treaty should not be ignored.[22]

---

[22] Petitioner argues that the 1839 Constitution was amended to extend citizenship rights to the Freedmen. Respondent Cherokee Nation argues that this amendment was not properly adopted. We cannot address whether it was properly adopted or not. That would have been the role of the Cherokee Nation Supreme

This case poses an interesting question of whether the Cherokee Nation, like other sovereigns, has the internal power to unilaterally abrogate treaties. This Court sees no reason why the Cherokee Nation must be bound by a treaty until the end of time, particularly when that treaty has been broken by the other sovereign.

However, if the Cherokee Nation is going to make a decision not to abide by a previous treaty provision, it must do so by clear actions which are consistent with the Cherokee Nation Constitution. A treaty provision cannot be set aside by mere implication. This treaty discussion leads to the same conclusion as the constitutional discussion. If the Cherokee people want to change the legal definition of Cherokee citizenship, they must do so expressly.

Declaring Legislation Unconstitutional

This Court has been given clear guidance, in two cases, for when legislation must be set aside as unconstitutional. (1) *McLain v. Cherokee Nation Election Commission* and (2) *Leach v. Tribal Election Commission*. Both of these cases were binding precedent at the time *Riggs v. Ummerteske* was decided and they are good law today. There is no need to cite to the laws of other jurisdictions to interpret the 1975 Cherokee Constitution. Cherokee law controls Cherokee citizenship.

In *McLain v. Cherokee Nation Election Commission*, JAT 98-12 (1998), this Court set aside a legislative act which imposed a residency requirement on candidates.[25]

Court at that time. We note, however, that Cherokee Nation Supreme Court did extend citizenship to the individual Freedmen who met the requirements under the treaty and under tribal law.

[25] The 1975 Constitution has now been amended to include a residency requirement. The constitutional amendment did not go into effect until it was adopted by the people and obtained federal approval, as required by the language of the 1975 Constitution.

The Court found that the legislation placed a "more stringent restrictions on candidates for office than are required by the Cherokee constitution." As a result, the legislation was unconstitutional. In that case, there was no express residency requirement in the Constitution. In the present case, there is no express "by blood" requirement for citizenship in the Constitution.

In *Leach v. Tribal Election Commission*, JAT 94-01, this Court reached the same conclusion. "Any legislative acts that would establish requirements over and above those in the constitution are "contrary" to the constitution, and as such, are unconstitutional." In the present case, the legislation requires individuals to prove they possess Cherokee blood. This goes over and above the proof required by the Constitution.

The Riggs Decision

In *Riggs v. Ummerteske*, JAT 97-03, this Court ruled that 11 C.N.C.A. § 12 was constitutional. At the time *Riggs* was decided it was a case of first impression under the 1975 Constitution. The *Riggs* Court was presented with federal court decisions that had repeatedly upheld the citizenship rights of Cherokee Freedmen class. Those federal decisions were based on the federal treaty interpretation, federal interpretation of the 1839 Cherokee Constitution, and the federal documents from the Dawes Commission.

I agree with the *Riggs* Court on one point: citizenship is an internal matter for the Cherokee citizenry to ultimately decide. I do not fault the *Riggs* Court for basing their decision solely on the 1975 Constitution. I must, however, respectfully disagree with the *Riggs* Court's interpretation of the Constitution. The conclusion of *Riggs* Court is

contrary to the plain language of Article III of the 1975 Constitution. If Article III was intended to limit membership to citizens "by blood" it should have said so

The principle of *stare decisis*,[24] which gives strong weight to the prior decisions, has been the norm in this jurisdiction and I respect the predictability it provides. The *Riggs* Court, however, failed to apply previous precedents for interpreting the constitution as set forth in *Leach v. Tribal Election Commission* and *McLain v. Cherokee Nation Election Commission*.

Leach and *McLain* require a legislative act be held unconstitutional if it adds new requirements to a constitutional provision. 11 C.N.C.A § 12 adds a "by blood" requirement that simply does not exist in Article III.

11 C.N.C.A. §12 is hereby deemed unconstitutional. This Court's decision in *Riggs v. Ummerteske* is hereby reversed.

IT IS SO ORDERED this 7th day of March, 2006.

Justice Stacy L. Leeds

Special Concurring Opinion of Justice Dowty:

In light of the argument made by Justice Leeds, I am compelled to revisit and reconsider my concurrence in *Riggs v. Ummerteske*. I agree with Chief Justice Matlock, citing *Demoss*, for guidance in constitutional interpretation, and that " [t]o determine this

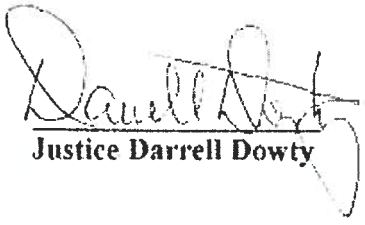
[24] Stare decisis is Latin for "to stand by things decided."

intent we look to the instrument itself and when the test of a constitutional provision is ambiguous, this Court in constructing it is not at liberty to search for meaning beyond the instrument." In considering the matter, I note that the Justices are in agreement that the Freedmen were citizens of the Cherokee Nation at the time the 1975 Constitution was drafted.

I agree with Justice Leeds that to exclude a class of citizens from membership, the constitution would have to do so with specific and clear language. Exclusion cannot be left to inference by omission or by silence. The Cherokee Freedmen were citizens of the Cherokee Nation prior to the enactment of the 1975 Constitution. The language of Article III does not specifically exclude them from continuing membership. The constitutional language requires membership by reference to the Dawes Commission Rolls and the Freedmen were included in those rolls.

I, therefore, concur that *Riggs v. Ummerteske* must be reversed and that 11 CNCA §12 is unconstitutional because it imposes a more restrictive requirement on membership than does the plain language of the Constitution of 1975.

Accordingly, I concur in the Opinion of Justice Leeds.



Justice Darrell Dowty

Dissenting Opinion of Chief Justice Matlock:

After reviewing the majority opinion and concurrence, I respectfully dissent and offer the following:

Factual Record

The parties entered into a stipulation of facts to govern this Court's determination and are as follows:

1. A person cannot enroll in the Cherokee Nation without a Certificate Degree of Indian Blood (CDIB) card or an ancestor listed on the Dawes Rolls with a degree of Cherokee, Loyal Shawnee, or Delaware Cherokee blood.

2. A person cannot complete the Cherokee Nation enrollment process without a CDIB card or an ancestor listed on the Dawes Rolls with a degree of Cherokee, Loyal Shawnee, or Cherokee Delaware blood.

3. The Plaintiff, Lucy Allen does not possess a CDIB card. The Plaintiff has been denied a CDIB card by the Cherokee Nation and the Bureau of Indian Affairs but has not appealed the decision of the Bureau of Indian Affairs to the appropriate Federal District Court.

4. That the language of the 1975 Constitution of the Cherokee Nation controls in this case.

I take judicial notice that Article III of the 1975 Constitution of the Cherokee Nation has not been amended and that 11 C.N.C.A § 12 has not been amended.

I take judicial notice the Cherokee Freedmen, Delaware Cherokees and Shawnee Cherokees were citizens of the Cherokee Nation prior to the adoption of the 1975 Constitution of the Cherokee Nation.

I further find that the parties' stipulation of facts and my judicial notice findings put the issues raised by the Petitioner, Lucy Allen, squarely within the issues decided by this Court in *Riggs v. Ummerteske*, JAT 97-03 by unanimous decision on August 15, 2001 and therefore the Petitioner's request for relief must fail for the reason of the doctrine of stare decisis and that the Petitioner has failed to prove standing.

I further adopt the universally accepted doctrine of stare decisis to promote a stable and orderly system of justice in Cherokee Nation juris prudence

Majority's Incorrect Factual Record Citations

No where in the evidentiary record can be found that the Plaintiff, Lucy Allen, is a descendant of individuals listed on the Dawes Commission Rolls as "Cherokee Freedmen"

Petitioner's Request for Relief

The Petitioner, Lucy Allen, in her pleadings has, in effect, asked this Court to revisit the decision rendered in the *Riggs* case, and I will for the limited purpose of explaining the findings of the *Riggs* decision, address the following issues which are joined in these proceedings:

1. Does Article III Section 1 of the 1975 Constitution of the Cherokee Nation include the Cherokee Freedmen as persons eligible for citizenship in the Cherokee Nation?

2. Is 11 C.N.C.A. § 12 as enacted by the Council, constitutional under Article III of the 1975 Constitution of the Cherokee Nation?

Discussion

1. ARTICLE III SECTION 1 OF THE 1975 CONSTITUTION OF THE CHEROKEE NATION DOES NOT INCLUDE THE CHEROKEE FREEDMEN AS PERSONS ELIGIBLE FOR CITIZENSHIP IN THE CHEROKEE NATION.

A. The Court in the case of *Demoss v. Jones*, JAT 96-01 set forth the rules of construction the Court uses when interpreting the 1975 Constitution of the Cherokee Nation.

1. "The 1975 Constitution of the Cherokee Nation of Oklahoma, totally, completely and unconditionally replaces the 1839 Constitution of the Cherokee Nation of Oklahoma in its entirety and none of the provisions of the 1839 Constitution remain in force or in effect."

2. "In interpreting a Cherokee Nation Constitutional provision our goal is to give effect to the intent of its framers and the people adoption it. To determine this intent we look to the instrument itself and when the text of a constitutional provision is ambiguous, this Court in constructing it is not at liberty to search for meaning beyond the instrument." (emphasis added)

3. "Words or terms used in construction on ratification by the people voting upon it must be understood in the sense most obvious to the common understanding at the time of its adoption."

4. "That words appearing in the constitution are presumed to have been used according to their ordinary, plain, natural and usual signification and import."

B. The United States Supreme Court in *Santa Clara v. Martinez*, 436 U.S. 49 (1978) confirmed the right of Sovereign Tribes to determine their citizenship.

The Court in the *Piggs* decision looked to all the language of the 1975 Constitution of the Cherokee Nation to clarify the language of Article III Section 1.

THE AUTHORITY OF THE PREAMBLE IS TO BE A GUIDE TO THE MEANING OF THE CONSTITUTION AND THE CONSTITUTION IS TO BE CONSIDERED AS A WHOLE AND NOT A COLLECTION OF UNCONNECTED PARTS

The Preamble of the 1975 Constitution of the Cherokee Nation sets forth the language,

> "We, the people of the Cherokee Nation, in order to preserve . . . our tribal culture . . . do ordain and establish this Constitution . . . ." (emphasis added)

The word tribe or tribal, according to English dictionaries, refers to a group of persons having a common character, or who come from the same ancestor; an ethnic group. (emphasis added)

It is apparent that the word tribal refers to the Cherokee Indians who are joined by their common character and ancestry.

Synonyms for ancestry are blood, bloodline and genealogy.

The word culture is defined in part by English dictionaries as social forms or material traits of a racial group. (emphasis added)

Again, it is apparent that the word culture refers to the Cherokee Indians who are joined by a material trait and is a racial group. (emphasis added)

Therefore, the framers of the 1975 Constitution of the Cherokee Nation and those who adopted it were defining the language that follows the Preamble and were obviously preserving the Cherokee Indians identity and autonomy.

The language of Article III Section 1 of the 1975 Constitution of the Cherokee Nation:

> "All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May 1867, and the Shawnee Cherokees as of Article III of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants."

When considered in light of the Preamble of the Constitution the words contained in Article III, Section 1, "All members of the Cherokee Nation" must be interpreted to mean, "All Cherokee Indians of the Cherokee Nation", and, the words in Article III, Section 1, "must be citizens as proven by reference to the Dawes Commission Rolls" is a mandate of genealogy which can only be accomplished by tracing one's bloodline.

The use of the foregoing common word definitions and elementary language construction rules produce the meaning of the language of Article III, Section 1 of the 1975 Constitution which is as follows:

> "All Cherokee Indians of the Cherokee Nation must be citizens as proven by bloodline to the Dawes Commission Rolls including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May 1867, and the Shawnee Cherokees as of Article III of the Shawnee Agreement dated the 9th day of June 1869, and/or their descendents."

This interpretation is also supported, by the framers and the people adopting it, finding it necessary to expressly include two other ethnic classifications of people listed on the Dawes Commission Rolls, those being the Delaware Cherokees and the Shawnee Cherokees and who also were members of the Cherokee Nation prior to the adoption of

the 1975 Constitution of the Cherokee Nation. The majority opinion correctly sets forth that the three ethnic groups, Cherokee Freedmen, Shawnees and Delawares were in the same legal position on the eve of the adoption of the Constitution. If the three ethnic groups had the same legal status before the adoption of the Constitution, it would be logical that all three ethnic groups would have to be expressly included as citizens. Any other interpretation and particularly the one adopted by the majority opinion would indicate that the Cherokee Freedmen had a superior right to citizenship status than the Delaware Cherokees and the Shawnee Cherokees, and, that was not the case as admitted herein by the majority opinion. The majority decision also mentions that it was argued some Freedmen actually did vote in the Constitution adoption election. The evidentiary record is void as to this speculation and as to whether or not the Freedmen voted against or for the Constitution.

The majority opinion goes to great lengths of historical rhetoric to prove what is obvious; that the Cherokee Freedmen were citizens of the Cherokee Nation prior to the adoption of the 1975 Cherokee Nation because of the 1866 amendment to the 1839 Constitution of the Cherokee Nation. However, the majority opinion fails to point out that the Treaty of 1866 and the 1866 amendment to the 1839 Constitution of the Cherokee Nation which was a direct result of the 1866 Treaty was brought about by duress from the United States Federal Government after the Cherokee Nation chose the losing side of the Civil War. The Dawes Rolls were a product of the United States Government and not the Cherokee Nation. My colleagues in the majority opinion have failed to cite any instance where the Cherokee Nation voluntarily granted citizenship to the Cherokee Freedman prior to and after 1866.

The majority opinion completely ignores the Preamble of the 1975 Cherokee Nation Constitution and attempts to justify their position by citing documents that are outside the language of the 1975 Constitution of the Cherokee Nation and the evidentiary record as presented by the parties herein. By so doing they have violated the precedents they profess to follow as set out in *Demoss v. Jones*, JAT 96-01 and sound principles of due process.

It is irrelevant what the Muskogee (Creek) Nation, the Choctaw Nation or the Chickasaw Nation did or didn't do in their constitutions.

The strong intent of preservation of tribal culture expressed throughout the 1975 Constitution of the Cherokee Nation requires that the Cherokee Freedmen would have to be expressly included as one of those ethnic groups in the language of the 1975 Constitution as are the other ethnic groups, Shawnee Cherokees and Delaware Cherokees before they would be eligible for citizenship.

2. 11 C.N.C.A. §12 IS CONSTITUTIONAL AS WRITTEN

The Court in *Riggs* applied the following well established principles of considering a statute's constitutionality:

A. A heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality and every presumption is to be indulged in favor of the constitutionality of a statute. If two possible interpretations of a statute are possible, only one of which would render it unconstitutional, a Court is bound to give the statute an interpretation that will render it constitutional, unless constitutional infirmity is shown

beyond a reasonable doubt. A Court is bound to accept an interpretation that avoids constitutional doubt as to the legality of a legislative enactment.

It is firmly recognized that it is not the place of this Court, or any Court, to concern itself with the statute's propriety, desirability, wisdom, or its practicality as a working proposition. The judiciary cannot challenge the wisdom, need or desirability of any constitutionally valid legislation. Such questions are plainly and definitely established by our fundamental law as functions of the legislative branch of government.

The foregoing language was found in *Fent v. Oklahoma Capital Improvement Authority*, 1999 OK 64, 984 P2d 200, cert denied 528 U.S. 1021 (1999) and should be adopted by this Court.

B. The "*Riggs Court*" contrary to the wrong assumption expressed in the majority opinion, did apply the precedents set forth in both, *McLain v. Cherokee Nation Election Commission*, JAT 98-12 and *Leach v. Tribal Election Commission*, JAT 94-01. That being,

> "Any Legislative Acts that would establish requirements over and above those in the Constitution are contrary to the Constitution, and as such would be unconstitutional."

ARTICLE V SECTION 7 OF THE 1975 CONSTITUTION OF THE CHEROKEE NATION

> "The Council shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation, which shall not be contrary to the provisions of this Constitution . . . ."

empowers the Council to enact 11 C.N.C.A. § 12.

The language of 11 C.N.C.A § 12,

> "A Tribal membership is derived only through proof of Cherokee Blood based on the final 'olls . . ."

pertains only to the Cherokee Indians which is consistent with the foregoing interpretation of Article III, Section 1. It does not apply to the constitutionally granted citizenship of the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May, 1867 and the Shawnee Cherokees as of Article III of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants by reference to the Dawes Commission Rolls. If 11 C.N.C.A. § 12 were applied to the Delaware Cherokees and the Shawnee Cherokees it would obviously be an unconstitutional application of said enactment.

The language of 11 C.N.C.A. § 12(B) applies to the Cherokee Indians, Delaware Cherokees and the Shawnee Cherokees for tribal membership.

CONCLUSION

The majority of the Court has chosen to ignore the simple reading of the language of the whole 1975 Constitution of the Cherokee Nation and instead has engaged in the difficult task of determining not what the Constitution indicates but what it should say and how it should say it. This approach, obviously caused the majority to engage in conjecture, and, cannot be done without violating the precedents set forth in *Demoss v. Jones*, JAT 96-01. The 1975 Constitution of the Cherokee Nation does reference the Dawes Commission Rolls, but only for the limited purpose of determining who is listed on those rolls and how they have been characterized. This reference was not an invitation to this Court to examine the inadequacies of that document.

The Cherokee Indians as a Nation were almost forced into extinction by the United States Federal Government and for the first time since the adoption of the 1839 Constitution of the Cherokee Nation, the Cherokee Indians seized the opportunity in 1975 to exert their sovereign status and maintain their autonomy by defining its citizenship in the 1975 Constitution of the Cherokee Nation and this Court should not weaken that expression by relying on any events occurring prior to 1975.

For these reasons, I would deny Petitioner's request in all respects and thereby leave the precedents set forth in *Riggs v. Ummerteske*, JAT 97-03, undisturbed.

Chief Justice Darrell R. Matlock, Jr.