

WHAT WAS TANEY THINKING? AMERICAN INDIAN
CITIZENSHIP IN THE ERA OF *DRED SCOTT*

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INTRODUCTION

In addition to being an object of derision, Chief Justice Taney's opinion in *Dred Scott* opens a window onto the way that lawyers and politicians thought about constitutional issues in the antebellum era. That period—particularly the decade of the 1850s when leaders struggled to understand and control a dissolving American nation state—is in many ways a “lost world” of ideas. The years surrounding the *Dred Scott* decision were a time when articulate Americans tried to square the issues of democracy and slavery; to balance the ambitions of equality with the racial privileges chiseled into governmental institutions; and to imagine a nation that was at once decentralized, expanding, and united. The Chief Justice's statements regarding American Indian citizenship in *Dred Scott* are an example of these prewar intellectual gymnastics. Puzzling at first, Taney's observations illuminate the sharp distinctions between the way Native Americans and African Americans were viewed by the courts in this prewar period. At the same time, the Chief Justice's formulations help us comprehend the actions of American Indian leaders of his day, particularly those from the politically sophisticated slave-holding tribes that had been forcibly removed from the East a generation before *Dred Scott* sought his freedom.

Taney's statements regarding Indian citizenship came early in his opinion, at the point where he framed the central issue under dispute: “Can a negro . . . become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges . . . guaranteed by that instrument to the citizen?”¹ As he began to explain why the answer to this question should be no, Taney paused to compare African Americans to the nation's indigenous population:

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1. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857).

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities But . . . they were yet a free and independent people . . . governed by their own laws. . . . These Indian Governments were regarded and treated as foreign Governments . . . and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day²

By contrast, Taney argued, African Americans were “a subordinate and inferior class of beings, who had been subjugated by the dominant race . . . and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”³

The Chief Justice added that because of their earlier status as “free and independent people,” American Indians could become citizens. They were eligible for citizenship status even though “the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race”⁴ He wrote:

[T]hey may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.⁵

In the antebellum legal world, it was not clear what the “rights and privileges” of state citizens would be, since there was no federal civil rights legislation on the books and no constitutional guidance regarding racial equality or equal protection. Nevertheless, the Chief Justice believed Indians could be naturalized and could join the “political community” of the United States.

It is not hard to pick apart Taney’s argument. His assertion that Indian citizenship could be justified on the basis of the natives’ distinctive identity as “free and independent” people was an obvious overstatement. He noted, for example, that the courts had considered African Americans “a subordinate and inferior class of beings,” but ignored his predecessor John Marshall’s statement in *Johnson v. McIntosh* that Indians could *not* be assimilated because they were savages.⁶ In most historical instances of conquest, the Chief Justice had written in 1823, “conquered inhabitants” were typically “blended with the conquerors, or safely governed as a dis-

2. *Id.* at 403–04.

3. *Id.* at 404–05.

4. *Id.* at 404.

5. *Id.*

6. *Johnson & Graham’s Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 589–90 (1823).

tinct people” This tradition could not be ignored by the conqueror “without injury to his fame, and hazard to his power.” But Marshall claimed the United States was an exception to this general rule because of the Indians’ savage nature. He wrote,

[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible⁷

Taney appeared to have forgotten this passage.

Taney also argued that state citizenship did not create national citizenship (thereby eliminating this as an argument in favor of Dred Scott’s freedom), but ignored the fact that there had never been a discussion of Indian citizenship among federal lawmakers. There was no evidence in 1857 that anyone but the Chief Justice had entertained the idea that Indians could be naturalized as citizens of the United States.

While Taney argued that the “words used in that memorable instrument,”⁸ the Declaration of Independence, were not meant to include blacks (but did include Indians), he failed to cite that document’s explicit description of Indians as “merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.”⁹ The Chief Justice also cited discriminatory state legislation limiting the rights of blacks but ignored the laws that discriminated against Indians.¹⁰ Most remarkable, Taney noted that even though the first federal naturalization law limited citizens to “free white persons” and that “[n]o one supposed . . . that any Indian . . . was capable of enjoying[] the privileges of an American citizen,” that still, in his words, “the word white was not used with any particular reference to them.”¹¹

Finally, it must be noted that Taney’s statements in *Dred Scott* directly contradict his holding in *United States v. Rogers*, decided in 1846, that Indian tribes were not independent governments with the power to welcome new members or operate outside the jurisdiction of the United States.¹² *Rogers* arose from the attempted federal criminal prosecution of a white man who had married into the Cherokee tribe in Indian Territory.

7. *Id.* at 590.

8. *Dred Scott*, 60 U.S. (19 How.) at 407.

9. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

10. See *Dred Scott*, 60 U.S. (19 How.) at 412–15, 420. Taney’s oversight was most obvious when he quoted—without comment—anti-miscegenation laws that lumped together Native Americans and African Americans. *Id.* at 413.

11. *Id.* at 419–20.

12. 45 U.S. (4 How.) 567, 572 (1846).

William S. Rogers was accused of murder but he claimed U.S. courts had no jurisdiction over citizens of the Cherokee nation. In his decision upholding the prosecution of Rogers (delivered several months after Rogers had died attempting to escape from incarceration in Arkansas) Chief Justice Taney had declared that “native tribes . . . have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied.”¹³ He added that the United States had consistently followed this approach:

[F]rom the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices.¹⁴

So what was Taney thinking in 1857? Why did he take such pains to distinguish between Indians and blacks? And why was it so important to him to preserve the idea that Native Americans could be naturalized citizens even as he took note of the existence of a national racial hierarchy and accepted the concept of white privilege?

I. THOMAS JEFFERSON, GODFATHER OF REMOVAL

The first answer is ideological. American political leaders had long avoided classifying Indians purely in racial terms. This habit grew out of political and strategic necessity—from the beginning of European settlement, tribal nations wielded diplomatic and military power that demanded official recognition.¹⁵ The Indians’ power was the reason settlers established the tradition of making treaties with native groups. Beginning in the seventeenth century, French, Spanish, and English settlers in every section of North America had tried to forge legal agreements between their communities and the indigenous peoples they sought to displace.¹⁶ Treaties were practical instruments for minimizing conflict and, when they included land sales, tools for acquiring new territory peacefully.

13. *Id.*

14. *Id.* This passage is also discussed in DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 45 (1997).

15. See ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800, at 5, *passim* (1997).

16. See R. DAVID EDMUNDS, FREDERICK E. HOXIE & NEAL SALISBURY, THE PEOPLE: A HISTORY OF NATIVE AMERICA 81–107 (2007) (detailing series of wartime treaties signed between Native Americans and European forces); DOROTHY V. JONES, LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA 1–20 (1982) (focusing on disparate expectations with which Europeans and American Indians viewed binding agreements amongst themselves).

While the legal and diplomatic tradition of recognizing the Indians' distinctive political status had a long history, the creation of the United States—a new, settler state, not an outpost of an imperial power—posed new problems. How could citizens of this new country square the universal ideals on which they founded their nation with their obvious desire to dispossess the continent's indigenous peoples? How could free men and women justify the destruction of indigenous societies? Many in the founding generation struggled with this problem, but it was the most imaginative of them—Thomas Jefferson—who created the ideological formulation that reconciled the nation's twin commitments to democracy and dispossession. His scheme shaped early federal Indian policies and ultimately inspired Taney's thinking and rhetoric.

Jefferson's view of American Indians—like his view of many complex subjects—was both subtle and self-serving. He wrote positively about the “genius” of Native Americans in *Notes on the State of Virginia* and predicted education and “civilization” could raise them to equality with Europeans.¹⁷ At the same time, Jefferson was fiercely protective of American national interests and willing to take extraordinary measures to defend the nation's borders. As Anthony Wallace has shown in *Jefferson and the Indians*, the third President viewed indigenous people through a tragic lens. Indians were human beings, but they were fatally backward.¹⁸ They were eligible for membership in the Republic, but only if they abandoned their traditional cultures and lifeways. If they refused to renounce their past, they would inevitably come into conflict with violent frontiersmen or be swindled by unscrupulous traders and clever land speculators. The destruction that followed would doom them to extinction. Indians were therefore the inevitable casualties of American expansion. Jefferson's foremost goal, Wallace concludes, was “to ensure the survival of the United States as a republic governed by Anglo-Saxon yeomen.”¹⁹

Jefferson reconciled his nationalism and his benevolence by advocating “civilization” for Indians.²⁰ He argued that by supporting Native education and regulating trade with the tribes, the national government would inevitably foster the evolution of Indian social life in the direction of commercial agriculture and western-style social organization. The President's

17. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 58–64 (William Peden ed., Univ. of N.C. Press 1954) (1787).

18. See ANTHONY F.C. WALLACE, JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS 1–20 (1999).

19. *Id.* at 20.

20. See BERNARD W. SHEEHAN, SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN 119–47 (1973).

theory predicted that tribes who incorporated “civilized” habits—the use of draft animals by male farmers, domestic labor for women, single-family residences on privately-owned tracts of land—would eventually abandon their traditional allegiances and could theoretically become integrated into settler society.²¹ The fact that his theory was not confirmed in practice underscored both American superiority and, ironically, American humanity. The Indians’ “failures” proved they could not adapt to progress.

Jefferson summarized his tragic view of Indian-white relations in a letter to the naturalist Alexander Von Humboldt in December 1813. The now-former President noted with regret that Indians had thus far refused to settle alongside American communities and had decided to ally themselves with the British in the War of 1812. But Jefferson felt little pity for the tribes’ current situation. The government’s goal, he wrote, had been

[t]o teach them agriculture and the rudiments of the most necessary arts, and to encourage industry by establishing among them separate property. In this way they would have been enabled to subsist and multiply on a moderate scale of landed possession. They would have mixed their blood with ours, and been amalgamated and identified with us within no distant period of time. On the commencement of our present war, we pressed on them the observance of peace and neutrality, but the interested and unprincipled policy of England has defeated all our labors for the salvation of these unfortunate people. They have seduced the greater part of the tribes within our neighborhood, to take up the hatchet against us, and the cruel massacres they have committed on the women . . .²²

In a single paragraph Jefferson endorsed both the intermarriage of Indians and whites and the idea that Indians were savages who could be “seduced” by foreigners to commit “cruel massacres” on innocent people. This leap required the former President to ignore not only the Indians’ long agricultural traditions and their willingness to negotiate new borders with the U.S., but also the tribes’ strategic interest in an alliance with Great Britain. This blinkered perspective rested on his faith in a cultural hierarchy that set the American nation above indigenous peoples.

Jefferson’s conception also contained a hard-nosed corollary: when conditions reached the kind of conflict he described during the War of 1812 and tribes rejected the idea of changing their ways or allying themselves with “civilized” Americans, the most humane response was for the national government to force them to leave the United States. Dispossession would provide recalcitrant or slowly-adapting tribes with safe havens in the West

21. *Id.* at 125, 141–42.

22. Letter from Thomas Jefferson to Alexander Von Humboldt (Dec. 6, 1813), in THOMAS JEFFERSON: WRITINGS 1311, 1312 (Merrill D. Peterson ed., 1984).

and give them the time to develop their “civilized” skills and keep open the possibility that they might yet “amalgamate” with the American majority.

While the acquisition of the seemingly-limitless lands of Louisiana Territory encouraged Jefferson’s enthusiasm for this formulation, the most prominent example of his administration’s endorsement of removal came in 1802, the year prior to that event. Georgia, like many other former colonies, had originally been granted a charter that set its western boundary at the Mississippi. But unlike Virginia and other states to its north, Georgia had not resolved the question of its western claims by the time Jefferson took office. The standoff jeopardized national efforts to open new western lands for settlement, but in Georgia it was politically unpopular for leaders to surrender their paper claim to the West. Jefferson proposed a compromise: state officials would give up their territorial claims in exchange for a federal pledge to extinguish the Indian title to lands within the state’s modern borders. This unprecedented “Georgia Compact” had no immediate impact—state officials were content to allow the Indians to remain at present in their relatively isolated villages—but it translated Jefferson’s corollary into the hard words of a federal statute.²³ Historian Tim Alan Garrison was correct when he wrote recently that the Georgia Compact marked “[t]he real seed of the movement that resulted in the wholesale removal of the Southeastern tribes”²⁴

II. TANEY’S POLITICAL ALLIES: CITIZENSHIP AS AN INSTRUMENT OF REMOVAL

But Taney was not simply echoing Thomas Jefferson. Jefferson provided the broad framework; his crocodile tears shed over the decline of Indian tribes inspired other politicians to pose as the Indians’ friends who sought to incorporate Native people into their states *as individuals*, or, failing that, to force them move west. The removal era of the 1820s and 1830s produced a sharper and more effective version of Jefferson’s disingenuousness. Confronted by tribes determined to maintain their status as independent political entities within the boundaries of American states, settler politicians proposed extending state citizenship to Indians as a way to dissolve their allegiance to their tribes while eliminating the federal govern-

23. For a concise narration of events leading to the Georgia Compact and its aftermath, see THEDA PERDUE & MICHAEL D. GREEN, *THE CHEROKEE REMOVAL: A BRIEF HISTORY WITH DOCUMENTS* 14–18 (1995).

24. TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* 20 (2002).

ment's need to enforce its obligations under ratified treaties.²⁵ Coinciding with the Chief Justice's arrival on the national scene, the removal era shaped his specific understanding of Indian eligibility for state citizenship. His endorsement of citizenship for Indians was not the product of a commitment to racial justice; it was a sign of his allegiance and indebtedness to the ambitious politicians who in the 1820s and 1830s made Indian removal—the American version of what is today called “ethnic cleansing”—a national issue.

The greatest proponent of removal, of course, was Andrew Jackson, the western general and politician who began speaking publicly about the impracticality of Indian treaties in the immediate aftermath of the War of 1812. Jackson rode to power on his support for American expansion and settler nationalism.²⁶ Jackson had long urged the leaders of southeastern tribes to move west before their lands were overrun by whites, but he experienced mixed results until 1819.²⁷ In that year, President James Monroe appointed the Tennessean to serve as a treaty commissioner to negotiate with the Mississippi Choctaws for the sale of all their eastern lands and their relocation to Arkansas Territory.²⁸ Acting on the President's orders, Jackson wrote directly to the tribe's agent, John McKee, telling him that this would be the Choctaws' single opportunity to make a deal: “Now is the time, and the only time, the Government will have it in its power to make [the Choctaws] happy, by holding the land west of the Mississippi for them,” he declared. “[A]nd this can only be done by their consent to an exchange, in whole or in part.”²⁹

Meeting four months later, the tribe's leaders rejected Jackson's invitation.³⁰ The Choctaws had long used the woods of modern Arkansas as a hunting ground, crossing regularly at Nogales, and drew on the territory's inventory of deerskins to supply their needs. But as familiar as they were with these western territories, tribal leaders had no interest in leaving Mississippi. “We wish to remain here,” Pushamataha, a chief who had served

25. For a discussion of southern states' definitions of Indian citizenship, see *id.* at 152, 158, 165, 167–68.

26. See ROBERT V. REMINI, *ANDREW JACKSON & HIS INDIAN WARS* 33–34 (2001).

27. See generally *id.* at 108–79 (recounting Jackson's attempts to convince tribe leaders to move west).

28. Letter from Andrew Jackson to John McKee (Apr. 22, 1819), in 2 *AMERICAN STATE PAPERS: INDIAN AFFAIRS* 229, 229 (1834) [hereinafter *INDIAN AFFAIRS*].

29. *Id.* The Choctaw had made one minor land sale to the U.S. in 1816. See Treaty of Cession, U.S.-Choctaw Nation of Indians, Oct. 24, 1816, 7 Stat. 152.

30. Letter from General Council of the Choctaw Tribe to President Monroe (Aug. 12, 1819), in 2 *INDIAN AFFAIRS*, *supra* note 28, at 230, 230.

under Jackson at New Orleans, told the agent. As for selling land in Mississippi he could speak for everyone: “we have none to spare.”³¹

President Monroe and Secretary of War Calhoun insisted that the tribe meet with Jackson despite its opposition both to migration and to land sales.³² And Jackson, despite his determination “never to have any thing to do again in Indian treaties,” agreed to travel south for a face to face meeting.³³ When he gathered the Choctaw leaders together in October 1820, at a spot called Doak’s Stand, the general was blunt. Ignoring the tribe’s expanding plantations and cattle ranches, he announced, “[Y]ou have more land than is necessary. . . . Without a change in your situation, the Choctaw nation must dwindle to nothing.”³⁴ He added, “the President expects no difficulty with his Choctaw children” Jackson presented the tribe with a choice. Those who wished to travel west “can live in abundance, and acquire riches and independence” Those who chose to remain would be “protected by our laws. . . . As all parties are accommodated,” he concluded, “and the interest and happiness of all consulted, there cannot be any honest opposition made to the friendly proposals of your father the President”³⁵

According to the general, the Choctaw tribe could move west; Choctaw individuals who wished to live in Mississippi could remain behind. Since “all parties are accommodated,” Jackson insisted there could be no reasonable objection to the proposal. If the Choctaws rejected it, their decision would prove that evil influences were at work in the tribe. Echoing Jefferson’s language concerning the Indians’ “seduction” by the British a few years earlier, Jackson asserted that any opposition to his proposal “must proceed from the false statements of some of the white men and half-breeds living amongst you.”³⁶ Refusing the government’s invitation, he warned, would mean that the President “can no longer look upon you as friends and brothers, and as deserving his fatherly protection. . . . If you suffer any injury,” he concluded darkly, “none but yourselves will be to blame.”³⁷

31. *Id.*

32. Letter from J.C. Calhoun to Andrew Jackson (May 23, 1820), in 2 INDIAN AFFAIRS, *supra* note 28, at 230, 230.

33. Letter from Andrew Jackson to J.C. Calhoun (June 19, 1820), in 2 INDIAN AFFAIRS, *supra* note 28, at 230, 231.

34. Address of Andrew Jackson to the Chiefs and Warriors of the Choctaw Nation (Oct. 10, 1820), in 2 INDIAN AFFAIRS, *supra* note 28, at 235, 236 [hereinafter Jackson’s First Address].

35. *Id.*

36. *Id.*

37. *Id.* at 237.

After the opening session on October 10, the Choctaw chiefs met in council for a full week, but nothing changed.³⁸ At the end of that week, Jackson had had enough. On October 17, the general delivered a second blistering address to the chiefs, repeating his charge that opposition to a land sale could only come from “the counsel of bad men,” and warning them Congress had the “right to manage the affairs of this nation.”³⁹ It would do so, he threatened, “if compelled by the obstinacy of your chiefs and the wickedness of your advisers.”⁴⁰ Jackson then delivered his body blow: if the chiefs refused to cooperate, the government would simply recognize whatever Choctaws assembled in the West as the tribal government. This meeting “will be the last time a talk will ever be delivered by your father the President to his Choctaw children on this side of the Mississippi. You are advised to beware. . . . Your father the President will not be trifled with and put at defiance,” he told the group. He ended with a warning:

A heavy cloud may burst upon you, and you may be without friends to counsel or protect you. The chain which has hitherto united us may be broken. Listen well, and then determine. Your existence as a nation is in your own hands.

. . . .
. . . Should you reject [the treaty], it will be source of great regret, as it may be a measure fatal to your nation.⁴¹

Jackson would not compromise or retreat. He had no military force at hand and no authorization from Congress to act, but no one doubted his ability to back up his words with force. The Hero of New Orleans had set out Jefferson’s formulation as a stark choice: leave as a tribe or remain as individuals.

For the Choctaws, the drama at Doak’s Stand came not only from the experience of being browbeaten and bribed by a former military ally. More terrifying even than his threatening posture was Andrew Jackson’s eager grasp of pro-settler rhetoric—the propositions that would soon propel him to the White House. Jackson’s argument was a tougher version of Jefferson’s original formulation: Indians were backward hunters who by definition did not develop their land. Native tribes were therefore anachronistic; they could not exist within the boundaries of American settlements. “Civi-

38. See Report on Meeting of Commissioners and Choctaw Council (Oct. 14, 1820), in 2 INDIAN AFFAIRS, *supra* note 28, at 238, 238–39; Report on Meeting of Commissioners and Choctaw Council (Oct. 15, 1820), in 2 INDIAN AFFAIRS, *supra* note 28, at 239, 239.

39. Address of Andrew Jackson to the Chiefs and Warriors of the Choctaw Nation (Oct. 17, 1820), in 2 INDIAN AFFAIRS, *supra* note 28, at 239, 240.

40. *Id.*

41. *Id.*

lized” Indians who farmed and owned businesses might live as individuals within new frontier states like Mississippi—provided they obeyed local laws—but “civilized tribes” by definition did not—and could not—exist. Eastern tribes like the Choctaws were nothing more than disorganized groups of Indians, he cried, “straggl[ing] about in every direction,” whose minds were inevitably “poisoned by white men and half-breeds living among them”⁴² Federal power might protect tribes in the West, but it could not do so in the East. Jackson underscored this viewpoint in Article Four of the Choctaw treaty, a provision which cautioned that the boundaries established around the remaining tribal territory in Mississippi would remain only “until the period at which said nation shall become so civilized and enlightened as to be made citizens of the United States”⁴³

Jackson’s hardened version of Jefferson’s logic would define the removal era. Historians have focused most of their attention on the Cherokees and their heroic struggle to resist Georgia’s determination to expel them from the state, but the principal legal and political arguments were laid out by Jackson and his Choctaw adversaries in 1820.⁴⁴ Writing at the conclusion of his meeting at Doak’s Stand the future President predicted—based on “the information which has reached us since the treaty was signed”—that “at least two-thirds of the nation here will remove to the country ceded to them” and “[t]he remainder . . . will then be prepared to have the laws of the United States extended over them” He added, “we shall no longer witness the farce and absurdity of holding treaties with the Indians residing within our territorial limits.”⁴⁵

Citizenship, then, was introduced into discussions of Indian affairs both as a way of fulfilling Thomas Jefferson’s original formulation excluding Native tribes from the American state and as an instrument to force tribes to leave the East and settle beyond the boundaries of the states in the West. During the 1820s, as the debate over removal spread across Georgia,

42. These phrases are from Jackson’s first speech to the tribe and from his report on the treaty council. Jackson’s First Address, *supra* note 34, at 236; Report to the U.S. Secretary of War on the Choctaw Treaty Council (Oct. 21, 1820), in 2 INDIAN AFFAIRS, *supra* note 28, at 241, 242 [hereinafter Report to the U.S. Secretary of War]. It is irresistible to note that one of the principal “malcontents” at Doaks Stand was Pooshamataha, the second chief to sign the treaty, and that “mixed bloods” such as Edmund Folsom and James Pichlynn received “donations” and approved the final agreement.

43. A Treaty of Friendship, Limits, and Accomodation, U.S.-Choctaw Nation of Indians, art. 4, Oct. 18, 1820, 7 Stat. 210, 211.

44. See GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 19–30 (2d ed. 1953) (discussing the arguments in the context of a later treaty with the Choctaws, the Treaty of Dancing Rabbit Creek).

45. Report to the U.S. Secretary of War, *supra* note 42, at 243.

Alabama, and Mississippi, local politicians turned repeatedly to state citizenship as a tool for forcing removal.⁴⁶

The tribes fought back by invoking the government's obligations under the treaties it had signed over the previous quarter century and by proposing an alternative to Jefferson's and Jackson's idea that Indians must exist either as tribes in the West, outside the boundaries of the states, or as individual citizens inside the boundaries of the states. The Cherokees, for example, published a memorial to Congress in the midst of the 1824 presidential contest which outlined a third path for tribes to follow. The "Cherokee nation" submitted a rebuttal to Georgia's politicians which contained the declaration that the tribe "ha[d] turned [its] attention to the pursuits of the civilized man"⁴⁷ For the Cherokees, this commitment did not require them to dissolve their tribal government. In fact, the memorial declared that the tribe as a collective was "peacefully endeavoring to enjoy the blessings of civilization and Christianity," and that it expected the federal authorities to support its effort.⁴⁸ The United States was obligated to extend this protection, the memorial added, both because of its treaty commitments and because the Cherokees—as civilized people—asserted their rights "under that *memorable* declaration 'that all men are created equal'"⁴⁹ Here was a "civilized" tribe seeking to remain in the East to pursue "the blessings of civilization."

The Choctaws issued a similar declaration the following year.⁵⁰ The "one great reason" for the Americans' success, a tribal delegation to Washington wrote, "has been the general diffusion of literature and the arts of civilized life among them."⁵¹ Far from opposing "civilization," these leaders embraced it and argued that the principals of American democracy should lead the United States to respect the rights of tribes:

You have institutions to promote and disseminate the knowledge of every branch of science; you have a government, and you have laws, all founded upon those principles of liberty and equality which have ever been dear to us The theory of your government is[] justice and good

46. See, e.g., FOREMAN, *supra* note 44, at 102–03 (describing mixed results from attempts to remove Choctaws who had become citizens of Mississippi); *id.* at 183–90 (focusing on removal of the Creeks to the West by local authorities in violation of the government's promise to care for Creek families while some served in the army). State jurisdiction is also a central theme in the conclusions of GARRISON, *supra* note 24, at 234–39.

47. *Indian Lands in Georgia*, NILES WKLY. REG., May 1, 1824, at 139.

48. *Id.*

49. *Id.* The surprising outcome of the "civilization" effort—more, rather than less attachment to tribal traditions—is also discussed in GARRISON, *supra* note 24, at 33.

50. Memorial from Choctaw Representatives to the U.S. Congress (Feb. 18, 1825), in THOMAS L. MCKENNEY, 2 MEMOIRS: OFFICIAL AND PERSONAL 120 (New York, Paine & Burgess 1846).

51. *Id.* at 121.

faith to all men. You will not submit to injury from one party because it is powerful, nor will you oppress another because it is weak. Impressed with that persuasion, we are confident that our rights will be respected.⁵²

American government and law—the visible symbols of the Americans’ commitment to liberty and equality—would prevent greedy settlers and politicians from oppressing the weak tribes living within the borders of the eastern states.⁵³ The leaders of one of the largest tribes in the nation were staking their future on the proposition that there was a place for their group to exist within the “civilized” institutions of the United States. They were calling for the creation of a substitute for Jefferson’s and Jackson’s formulations. They sought a new political culture, both for themselves and for other tribes who reached similar conclusions about the American nation and its future potential.

In the Southeast, Georgia, Alabama, and Mississippi rejected these proposals, insisting instead on the stark choice of state citizenship or removal. And they won. Georgia extended its laws over Cherokee lands in 1828; a decade later the Cherokees were gone—even though their removal treaty declared them to be state citizens.⁵⁴ Mississippi unilaterally extended its laws over the Choctaws and Chickasaws in January of 1830.⁵⁵ Within two years removal treaties had been signed with both tribes.⁵⁶ Alabama extended its laws over the Creeks in 1832; within months removal was underway there.⁵⁷ Taney’s invocation of state citizenship, then, was consistent with this removal-era formulation. Indians would have no place within the boundaries of the United States except as individuals, and Congress would have no obligation to enforce Indian treaty rights on behalf of people who, in Jackson’s phrase, had “the laws of the United States extended over them.”⁵⁸ This failure was acutely evident in Mississippi and Alabama where tribal members were allowed to select individual homesteads on former tribal lands and operate them as family farms. These new state citi-

52. *Id.*

53. *See id.* at 121–22.

54. *See* Treaty of Dec. 29, 1835, U.S.-Cherokee tribe of Indians, art. 12, 7 Stat. 478, 483; *see also* PERDUE & GREEN, *supra* note 23, at 17–18.

55. *See* A Treaty of Perpetual Friendship, Cession and Limits, U.S.-Choctaw Nation, pmbl., Sept. 27, 1830, 7 Stat. 333, 333 (acknowledging that the “State of Mississippi ha[d] extended the laws of said State to persons and property within the chartered limits of the same . . .”).

56. The Choctaw Treaty explicitly declared that Indians who remained in the state would become citizens. *Id.* at art. XIV, 7 Stat. at 335.

57. Treaty of Mar. 24, 1832, U.S.-Creek tribe of Indians, 7 Stat. 366, *reprinted in* NILES WKLY. REG., Apr. 14, 1832, at 116; *see also* *The Creek Indians*, NILES WKLY. REG., May 16, 1829, at 182.

58. Report to the U.S. Secretary of War, *supra* note 42, at 243. For a summary of these actions, *see* MARY ELIZABETH YOUNG, REDSKINS, RUFFLESHIRTS, AND REDNECKS: INDIAN ALLOTMENTS IN ALABAMA AND MISSISSIPPI 1830–1860, at 14–16, 29, 38 (1961).

zens rapidly became the victims of land enterprising merchants and land speculators.⁵⁹

Constitutionally, in the antebellum era there was no federal power to enforce a set of rights that all Indians might enjoy. Mississippi had the most liberal definition of Indian citizenship, allowing Natives to testify in court and serve on juries, but it continued to limit the privilege of voting to white men. Alabama and Georgia did not allow Indians to testify in court, even though legislation in both states allowed Native people to be sued for debt. No states sought to protect Indians within their boundaries from speculators or unscrupulous merchants who descended on the tribes with offers to lease or purchase their lands. "Once the contract was signed," historian Mary Young declared, "what he 'chose' to do . . . was his own business . . . Once this big lie was signed and sealed into the supreme law of the land, no effort on the part of the government to secure the proper execution of its promises could avail."⁶⁰

A similar, if less dramatic, pairing of individual "rights" and a descent into poverty occurred in the Midwest when Indians who refused to move west opted for individual plots of land. During the decade of the *Dred Scott* decision, treaties dividing tribal landholdings into individual plots of land and making Indians subject to state jurisdiction were signed by the Miamis, Winnebagoes, Ottawas and Chippewas of Michigan, the Stockbridge-Munsees of Wisconsin, and the Kansas.⁶¹ The exact legal experience of these tribes remains largely unstudied, but none of these cases prompted federal supervision of state authorities or a clear enunciation of the rights of Native Americans under state law.

Taney's references to Indian citizenship in *Dred Scott*, therefore, should not be taken as an endorsement of the racial equality of Native Americans and whites. They should be viewed instead as the statements of a Jacksonian Democrat who employed the language of Indian competence to justify the dismantling of tribal governments and the acquisition of tribal lands. If Indians could be citizens, they should not belong to tribes. Citizenship in a republic was superior to affiliation with an Indian tribe. Tribes by definition were uncivilized and backward. By becoming citizens, and com-

59. YOUNG, *supra* note 58, at 45–46.

60. *Id.* at 45.

61. See Treaty with the Miami Indians, U.S.-Miami tribe of Indians, June 5, 1854, 10 Stat. 1093; Treaty with the Winnebagoes, U.S.-Winnebago tribe of Indians, Feb. 27, 1855, 10 Stat. 1172; Treaty with the Ottawas and Chippewas, U.S.-Ottawa and Chippewa Indians, July 31, 1855, 11 Stat. 621; Treaty with the Stockbridges and Munsees, U.S.-Stockbridge and Munsee tribes of Indians, Feb. 5, 1856, 11 Stat. 663; Treaty with the Kansas Tribe of Indians, U.S.-Kansas tribe of Indians, Oct. 5, 1859, 12 Stat. 1111.

ing under the jurisdiction of the states, Indians would enter Jefferson's imaginary process of education and uplift, a process that would produce either "amalgamation" or—more likely—the transfer of their property to white ownership and the quiet extermination of their communities.

For whites to maintain their faith in the ideals of their settler state, it was crucial that individual Indians living within state boundaries not be defined as backward savages. To define them that way would be to justify continued federal supervision of relations with the tribes, more treaties, and more intrusion into state politics. If Indians living within the borders of states were indeed "dependent nations," as John Marshall had famously declared, then they would need continuing support and federal protection.⁶² But if they were potential citizens, national benevolence could be expressed by ignoring both tribes and treaties and by extending the laws of the states over their individual members. From the perspective of white politicians and white settlers on Indian lands, it was far better to define Native Americans as potential citizens, ready for state jurisdiction, and capable of entry into the expanding American nation, than it was to recognize their legal status as tribes. This was the source of the "big lie" white people told themselves about Indians then—and to a large extent it is the big lie Americans continue to tell themselves about Indians today. Ignoring tribes and defining Indians as nothing other than potential citizens erases their separate and distinctive political identity and cancels the nation's treaty obligations to tribes.

Politicians like Jackson and his allies embraced the idea of Indian citizenship because they were confident of what would happen once Indians became state citizens—in the absence of federal guardianship, they would rapidly be victimized by more powerful whites—and because extending state laws over Indians provided an alternative to recognizing the existence of communities of people who, like the Cherokees, were both politically distinct and had turned their attention "to the pursuits of civilized man." The ideology undergirding the American settler state and its policy of Indian dispossession required that the United States be the only entity deemed capable of "civilization."

62. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *see also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 534 (1832) (finding unconstitutional a Georgia law that interfered with the administration of federal treaties with Indian tribes designed to educate and civilize the tribes).

III. WHAT WERE THE INDIANS THINKING?

Taney's statements help clarify the Supreme Court's definitions of Indian rights in 1857, but they can also help illuminate the actions of tribal leaders during this same, tumultuous era. How did this language of citizenship, and the "big lie" of officials who welcomed Indian citizenship while happily witnessing tribal dispossession, affect indigenous leaders who were trying to chart a legal and political strategy for their communities' future? If Taney offers a window onto the deceptive and complex language of Indian rights in the 1850s, what else can we see through that opening?

We can begin to answer this broad question by examining the life of a remarkable individual, one of the most articulate leaders among the Indians who read Justice Taney's 1857 decision, the Cherokee lawyer, William Potter Ross. Born near modern Chattanooga, Tennessee, in the summer of 1820, Ross came of age during the removal crisis and belonged to the generation of tribal leaders who tried to maneuver through the rapidly shifting legal and political environment of the 1850s and 1860s.⁶³ William Potter belonged to the extended Ross family that provided John Ross and other leaders of the Cherokees' campaign to remain in Georgia. William's father, John Golden Ross, was born in Scotland but his mother Eliza—who shared the same last name as her husband but was not related to him—was the sister of Chief John Ross.⁶⁴ Thanks to his stellar academic record compiled at the Presbyterian mission school in Will's Valley, Alabama, and Greenville Academy in Tennessee, together with the support of his famous uncle, William Potter left Tennessee in 1837 to attend Hamil's Preparatory School in Lawrenceville, New Jersey.⁶⁵ He entered Princeton University a year later and graduated in 1842. Ross was in the East throughout the removal crisis; he retraced his parents' grueling journey west on the "Trail of Tears" by carriage during the summer following his college graduation.⁶⁶

Despite his relatively comfortable journey west in 1842, William Potter could not escape the trauma echoing through his community. As a teacher in a rural school in the fall of 1842, he witnessed the Cherokees' struggle to farm their new lands and to reorganize their tribal govern-

63. For a narrative of tribal politics in these decades, see generally WILLIAM G. MCLOUGHLIN, *AFTER THE TRAIL OF TEARS: THE CHEROKEES' STRUGGLE FOR SOVEREIGNTY, 1839-1880*, at 59-175 (1993).

64. WILLIAM P. ROSS, *Biography of Hon. William P. Ross*, in *THE LIFE AND TIMES OF HON. WILLIAM P. ROSS* (Fort Smith, Weldon & Williams 1893).

65. John Bartlett Meserve, *Chief William Potter Ross*, 15 *CHRON. OKLA.* 21, 23 (1937).

66. *Id.*

ment.⁶⁷ He was not directly involved in the murders of Major Ridge and other leaders of the minority who signed the Treaty of New Echota in 1835 (the agreement that authorized the tribe's removal to the West), nor was he a target of the retaliatory violence organized by Ridge's relatives during the ensuing decade, but these conflicts swirled around him. After a year in the classroom, William Potter moved to the new Cherokee capital, Tahlequah, and joined the many relatives active in tribal government. He secured a position as clerk of the national senate, and in 1844, the legislature appointed him the first editor of the tribal newspaper, *The Advocate*.⁶⁸

William Potter certainly witnessed the distrust and fear that infected Cherokee life during the undeclared tribal civil war of the 1840s. During that decade he moved to the commercial center of Fort Gibson, became a merchant and, later, a lawyer. While an active ally of his uncle, William Potter appears to have avoided partisanship. He remained largely neutral as the tribal divisions of the 1830s morphed into debates over slavery and secession.⁶⁹ Ross is a fascinating counterpoint to Justice Taney because he represents the Indian intellectuals who struggled to respond both to the trauma of removal and the intellectual challenge of the legal decisions that helped set it in motion. Ross recognized that the Cherokees could not escape the power of the United States.⁷⁰ He knew that neither the courts nor the politicians would accept Indian communities as the equivalent of foreign nations, but he also knew that Indian communities could not survive if their only alternative to their tribal existence was forced state citizenship. Ross, more than we, understood what Taney was thinking. What was his response?

The resettled nations in Indian Territory shared both the human trauma of dispossession and the political legacy of the removal struggle. They had fought their expulsions before the public and in court by insisting that the settlers who now called themselves "Americans" recognize the obligations they had incurred by negotiating treaties with indigenous peoples.⁷¹ They also believed that these treaty obligations formed the basis for a set of tribal "rights," enforceable against the national government.⁷² As

67. See 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 271–79 (1984).

68. Meserve, *supra* note 65, at 23–24.

69. *Id.* at 24–25.

70. See *id.* at 25–26.

71. The tribes and their allies made this case most eloquently in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2–14 (1831).

72. For a summary of the humanitarians' defense of treaty rights during the early 1830s, see 1 PRUCHA, *supra* note 67, at 200–06.

they founded new governments in the West, they pursued these ideas and sought to anchor the rights of tribes in the treaties and statutes that established their new governments in Indian Territory. The removed tribes insisted on treaties, tribal charters, and letters of understanding with federal officials. They were also quick to pursue suits in the Court of Claims for damages to their property incurred during their move west.⁷³

Other Indian people shared similar experiences in other parts of North America, but the southeastern tribes shared a unique status: they had no ancestral claim to their new homelands. Their sovereignty was now completely dependent on the commitment of the United States, embodied in a series of laws, treaty agreements, and other written understandings.⁷⁴ Removal created an archipelago of legal islands in the center of North America, each inhabited by a distinct indigenous group. There was therefore a striking disjuncture between the resettled eastern tribes dependent on American legal guarantees and their new indigenous neighbors.

The resettled nations in Indian Territory relied on treaties to guarantee their existence, but they shared a continent with Navajos living beyond the authority of federal agents, Lakotas migrating rapidly into the Yellowstone valley, Catholic Flatheads trading with Hudson's Bay men in the northern Rockies, and Paiute bands adjusting to the ecological disruption caused by Americans crossing the Great Basin.⁷⁵ Erroneously labeled "civilized" by outsiders, the resettled groups were not junior versions of the white communities that had surrounded them in the East. Nor, despite their missionary advisors, schools, and courts, did they represent Native versions of American Christian civilization. Indeed, their governments were not the only markers of their distinctive tribal identities. Their social systems, economies, and religious institutions also represented something new and unprecedented. They were not purely "Indian" or "white" or "Cherokee" or "Choctaw," yet in a sense they were all—or many—of these things as well. In sociologist Paul Gilroy's terms, they were products of "the processes of cultural mutation and restless (dis)continuity that exceed racial discourse and avoid capture by its agents."⁷⁶

73. For a discussion of the tribes' desire to prosecute claims, see Harvey D. Rosenthal, *Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission*, in *IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS* 35 (Imre Sutton ed., 1985).

74. The dependency of tribes on the sovereignty of the United States was spelled out in *Rogers v. Cherokee Nation* (United States v. Rogers), 45 U.S. (4 How.) 567 (1846), a decision's whose consequences are discussed in MCLOUGHLIN, *supra* note 63, at 106–07.

75. See generally EDMUNDS, HOXIE & SALISBURY, *supra* note 16, at 241–66 (discussing tribes native to the West and the impact migrating populations had on western tribes).

76. PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* 2 (1993).

Because William Potter Ross's world exceeded the "racial discourse" that conventionally applied to Native Americans (and that was exemplified in Taney's pronouncements), it is important to frame his life in a way that allows him to "avoid capture" by those who want simply to tell the story of defeat and dispossession. The destruction of the Cherokee Nation—or at least the catastrophe that rendered it invisible for most of the twentieth century—surely occurred, but it did not define the significance of William Potter's life. His significance arises from his role as an originator and communicator of ideas that suggested a way forward for tribes, and not by his quixotic resistance of the expanding American settler state. From this perspective, Ross was centrally engaged with "cultural mutations" in Indian Territory that had a profound impact on Native peoples for decades after his death. These "mutations" emerged from three separate, but related, arenas.

First, William Potter Ross was an early advocate of cooperation among the Indian Territory tribes. As a newspaper editor in the 1840s, he reported regularly on councils held by Cherokees and neighboring groups to discuss matters of common concern.⁷⁷ He helped maintain that tradition after the Civil War when, as Principal Chief in 1866, he used "Grand Councils" to rally support among neighboring tribes and present a more powerful voice in Congress. In the fall of 1870 he led the Cherokee delegation to the Ockmulgee Convention that passed a series of resolutions opposing the extension of American jurisdiction over Indian Territory.⁷⁸ William Potter was the principal author of a Native constitution to bring about an autonomous Indian-run territory within the United States. The *Cherokee Advocate* praised his efforts, noting that the constitution would "secure our protection in what we already have and . . . obtain from the Government, what is justly due us." Such a path, the paper noted, "involving as it does our duty and obligations to the Government, supported by the moral force of humanity, justice and the Christian religion, is . . . the only successful one available to us."⁷⁹

Second, Ross was a fierce defender of treaties, contributing substantially to the idea that the privileges conveyed in these agreements should be properly understood as "rights" sanctioned by the U.S. Constitution.⁸⁰ These rights could range from personal freedoms to the privilege of con-

77. See, e.g., *Nebraska Territory*, CHEROKEE ADVOC., Apr. 24, 1845, at 3 (on Nebraska Territory); *Indian Council*, CHEROKEE ADVOC., May 8, 1845, at 3 (on an intertribal council).

78. MCLOUGHLIN, *supra* note 63, at 274–75.

79. CHEROKEE ADVOC., Oct. 22, 1870, at 1.

80. The Cherokees' views on treaty rights were written into the Treaty of 1868, which the U.S. Senate refused to ratify. See MCLOUGHLIN, *supra* note 63, at 247–50.

ducting tribal affairs without federal interference. Ross's most famous effort in this connection was his leadership during the campaign to win federal recognition for tax-exempt businesses based in Indian Territory. That exemption had been written into the tribe's 1866 treaty with the United States—a treaty Ross had helped negotiate—but was undermined by a new revenue statute that the federal government attempted to apply to a Cherokee tobacco producer.⁸¹ The Supreme Court heard the Cherokees' appeal in 1870 but refused to recognize power of the treaty's language. It declared instead that the tax law could cancel the guarantees contained in a formal treaty.⁸² The *Cherokee Advocate* responded angrily to the decision, pointing out—correctly—that

[i]t imperils . . . all our rights. It commits us wholly to the “political department” of the government, and places us entirely at its mercy. In our ignorance we have supposed that Treaties were contracts entered into under the most solemn forms, and the most sacred pledges of human faith, and that they could be abrogated only by mutual consent. We are now taught differently.⁸³

In their struggle to defend treaty rights, Ross had pressed for a definition of tribal sovereignty within the United States. And despite the Cherokees' defeat in the courts, he had devised a powerful critique of the rapidly-consolidating American state and sketched out a vision of governmental pluralism others would draw upon in the future.

Finally, William Potter Ross articulated the benefits of citizenship in a modern Indian tribe functioning within the boundaries of the American nation. During the 1870s and 1880s, critics of tribal governments in Indian Territory and supporters of the non-Indian settlers eager to claim “undeveloped” lands there argued that the Native nations were lawless and chaotic and that their tradition of communal land ownership was backward and impractical.⁸⁴ Whether fueled by racism or fear, these critics could not imagine that Choctaws or Cherokees could police their own communities or that tribal institutions could prosper in a modern economy. Ross defended tribal governments as defenders of law and order and tribal traditions as equally worthy of existence in a modern setting. He also pointed

81. Treaty with the Cherokee Indians, U.S.-Cherokee nation of Indians, art. X, July 19, 1866, 14 Stat. 799, 801; see also Act of July 20, 1868, ch. 186, § 107, 15 Stat. 125, 167.

82. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1871). For a concise summary of the controversy, see MCLOUGHLIN, *supra* note 63, at 265–67.

83. James Shelton, *The Indians Address to Congress—They Humbly Beg for Justice and Fair Treatment—Memorial of the Grand Council of June 1871*, CHEROKEE ADVOC., July 8, 1871, at 2.

84. See FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 1–39 (1984) (discussing critics' and expansionists' desire to assimilate the Indians, so as to “civilize” the tribes and to prevent them from “usurping” large tracts of land).

out that tribal control over community resources could provide for the common welfare at least as well as individual landownership and unfettered capitalism.⁸⁵ He wrote in an 1844 editorial, for example, that

from time immemorial the original Domain of the Cherokees was held by the Nation No individual or number of individuals were allowed to control the cession or the acquisition of territory. This power was ever regarded as the *sacred* and *inalienable* right of the Nation in its Sovereign capacity.⁸⁶

In William Potter's view, tribal citizenship embodied something both sacred and modern; it did not only protect the customs of the past.

William Potter Ross's ideas allow us to trace a trajectory of political thinking from the Southeast to Indian Territory. His life offers a lens through which we may view the post-removal history of the political cultures created during the removal crisis. It illuminates the political culture of the people often labeled the "Five Civilized Tribes" while making clear how far from the American standard of "civilization" these communities remained. His achievements as a newspaper editor, lawyer, and political leader do not necessarily mean that his goal was to be assimilated into the American majority society. Far from it. Instead, they sketch the outlines of a life that reflects the "discontinuous," hybrid Native culture that responded to the formulations of Jefferson and Taney.

In the *Cherokee Tobacco* case, the Supreme Court followed in the footsteps of Thomas Jefferson and Andrew Jackson by recognizing Indians in "tribes" as having nothing but a "savage" identity.⁸⁷ At the same time, congressmen and senators debating the future of Indian Territory could only imagine culturally-distinct Native communities as artifacts of the past who had no significant role to play in a modern United States. Both sets of assumptions represented what sociologist David Theo Goldberg has called the process of "sew[ing] . . . modern social exclusions into the seams of the social fabric . . ." ⁸⁸ Goldberg argues that the culmination of this needlework is modern nations that are nothing more than a "racial state," political entities that have transformed racial and cultural hierarchies into a national

85. See William P. Ross, Address to the Cherokee Council, in *THE LIFE AND TIMES OF HON. WILLIAM P. ROSS*, *supra* note 64, at 1; William P. Ross, Report to the General Council on Agriculture, in *THE LIFE AND TIMES OF HON. WILLIAM P. ROSS*, *supra* note 64, at 7; William P. Ross, Argument Delivered Feb. 1, 1872, in *THE LIFE AND TIMES OF HON. WILLIAM P. ROSS*, *supra* note 64, at 10; William P. Ross, Argument Delivered Mar. 5, 1872, in *THE LIFE AND TIMES OF HON. WILLIAM P. ROSS*, *supra* note 64, at 29.

86. William P. Ross, *The Correspondence*, *CHEROKEE ADVOC.*, Nov. 28, 1844, at 2.

87. See *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (holding that laws enacted by Congress may supersede treaties made with tribes and, therefore, may be enforced against members of the tribes).

88. DAVID THEO GOLDBERG, *THE RACIAL STATE* 10 (2002).

ideology.⁸⁹ Ross's career spanned the decades when the United States (led by Taney and others) followed this pathway to becoming a racial state. Defending slavery while simultaneously canceling its treaty obligations to Indians, nineteenth-century Americans established the institutions and laws that allowed twentieth-century commentators to call their nation, "A White Man's Country."⁹⁰

It is ironic that William Potter Ross, member of a Cherokee slave-owning family and a veteran of service in the Confederate cause, should be remembered as an opponent of the rapidly-consolidating American racial state. But his steady opposition to national authority in Indian Territory, and his careful defense of tribal rights and tribal citizenship, were mounted to oppose a nationalist campaign of social exclusion aimed at canceling the nation's moral and legal commitments to Native people. Cherokees like William Potter may have shared a belief in African American inferiority with whites, but he did not share their faith in white supremacy or their goal of creating a culturally homogeneous nation. Ross was an advocate of political pluralism. Unlike Taney, he conceived of a national community capable of containing both treaties and tribes. Even though the forces of American nationalism defeated him in his lifetime, his conceptual vision would prove to have a life of its own.

IV. ROSS'S STRATEGY IN THE ERA OF *DRED SCOTT*

The removal era was a time of multiple promises as well as extensive suffering. The expulsion of the Choctaws, Cherokees, Creeks, Chickasaws, and Seminoles—patronizingly called both then and now the "Five Civilized Tribes"—from the Southeast brought forth scenes of hardship and dislocation: frozen bodies buried alongside the gruesome "Trail of Tears," confused families herded onto steamboats bound for the unknown, and terrified men and women hunted down by soldiers across the Appalachians and as far south as the swamps of Florida.⁹¹ But mixed with these horrors were repeated pledges from federal authorities that once their relocation was complete, Native people could look forward to a life of peace and quiet.⁹² Andrew Jackson himself had declared in his first inaugural address that the tribes that agreed to removal would live on lands "guaranteed" to them and would "be secured in the enjoyments of governments of their own choice,

89. *See id.* at 34.

90. This theme is a central focus of ALEXANDER SAXTON, *THE RISE AND FALL OF THE WHITE REPUBLIC: CLASS POLITICS AND MASS CULTURE IN NINETEENTH-CENTURY AMERICA* (1990).

91. *See* EDMUNDS, HOXIE & SALISBURY, *supra* note 16, at 222–30.

92. *See* I PRUCHA, *supra* note 67, at 195–200.

subject to no other control from the United States than such as may be necessary to preserve peace on the frontier”⁹³

William P. Ross, who had followed the removal controversy carefully while completing his studies at Princeton, would have been acutely sensitive to any change in the government’s view of tribal autonomy once the Cherokees were relocated to the West. He would have shared his famous uncle’s disappointment when, on arriving in Washington in the spring of 1840, he learned that the Indian Office—still led by Andrew Jackson’s appointees—had already met with representatives of two minority groups within the tribe: the “Old Settlers,” (tribesmen who had emigrated voluntarily over the previous two decades) and the Cherokee “Treaty Party” (representatives of the minority who had signed the 1835 Treaty of New Echota authorizing removal).⁹⁴ To be sure, the Cherokees at this moment were deeply divided, but Ross represented the largest group within the tribe and his cooperation had enabled the United States to carry out the tribe’s removal with a minimum of conflict.⁹⁵ But Secretary of War Joel Poinsett told Ross the United States no longer recognized him as the tribe’s leader. Moreover, officials at the Indian Office told Ross any future agreement would require that he make concessions to his rivals and acknowledge the legitimacy of the fraudulent New Echota agreement. The Chief told his congressional supporters that the administration had laid a “scheme . . . to denationalize us”⁹⁶

For the next six years, while William Potter completed his studies, traveled to his new home in Oklahoma, and began work as a frontier school teacher, John Ross struggled with federal authorities over the terms of the Cherokees’ tribal status in the West. The chief did not agree to a new treaty until the summer of 1846 when, pressured by President Polk and politicians now concerned more with the imminent Mexican War than justice for Ross’s followers, Ross gave up and agreed to the terms of the 1835 treaty, including its \$5 million price tag for the tribe’s Georgia lands.⁹⁷ Not only did this retreat force Ross and his allies to accept a document they had long

93. Muriel H. Wright, *The Removal of the Choctaws to the Indian Territory 1830–1833*, 6 CHRON. OKLA. 103, 103 (1928) (internal quotations omitted) (quoting Andrew Jackson); see also GARRISON, *supra* note 24, at 103–04.

94. See MCLOUGHLIN, *supra* note 63, at 27–28.

95. See *id.* at 4–5 (discussing the division among the Cherokees).

96. *Id.* at 28 (internal quotations omitted).

97. Treaty of Dec. 29, 1835, U.S.–Cherokee tribe of Indians, art. 1, 7 Stat 478, 479 [hereinafter 1835 Cherokee Treaty]. Adding insult to injury, the costs incurred transporting the tribe to Oklahoma were deducted from the total payment. See Treaty of August 6, 1846, U.S.–Cherokee tribe of Indians, art. I, 9 Stat. 871, art III [hereinafter 1846 Cherokee Treaty] (acknowledging that the costs of spoliations and dispossessed property were subtracted from the \$5 million).

abhorred, but it meant the new Cherokee government would have far less financial support than it needed. The new treaty compensated Ross for his concessions by promising that a patent would be issued for the tribal territory and reiterating the government's pledge to "forever secure and guarantee" their country to them.⁹⁸ On the surface, there was nothing directly objectionable in the terms of the 1846 agreement, but the delay in reaching it, and the obvious enjoyment Indian Office personnel derived from undercutting and frustrating the powerful Cherokee leader, made it clear to all Cherokees that federal authorities in the 1840s were less enthusiastic about tribal autonomy in the West than they had been a decade earlier.

William Potter witnessed a second modification of pre-removal understandings in 1846 when Chief Justice Roger Taney announced the Supreme Court's decision in *United States v. Rogers*. Ross was also now in a position to comment directly on the case as his uncle had named him editor of the new tribal newspaper, the *Cherokee Advocate*, in 1844.⁹⁹ The Rogers case involved a white man who had sought to overturn his murder conviction in federal court by asserting that as a citizen of the Cherokee Nation since 1836, he was beyond the jurisdiction of the American justice system. Rogers seemed to have a solid argument. His victim, Jacob Nicholson, was also an adopted Cherokee and the Treaty of 1835 expressly recognized the tribe's right "to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country . . . or such persons as have connected themselves with them . . ." ¹⁰⁰ But Taney rejected that treaty pledge, noting that "from the very moment the general government came into existence . . . it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored . . . to enlighten their minds and . . . to save them if possible from the consequences of their own vices."¹⁰¹ In a sense, Taney wrote, all federal obligations were humanitarian and therefore voluntary.

Taney recognized that the criminal statutes governing federal territories specifically exempted crimes committed "by one Indian against the person or property of another Indian," but the Chief Justice could not accept a political definition of the Cherokee tribe. He wrote, "a white man who at mature age is adopted in an Indian tribe does not thereby become an

98. 1846 Cherokee Treaty, *supra* note 97, art. I, 9 Stat. at 871.

99. Meserve, *supra* note 65, at 23–24.

100. 1835 Cherokee Treaty, *supra* note 97, art. 5, 7 Stat. at 481.

101. *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846).

Indian”¹⁰² Despite Andrew Jackson’s pledge that tribes like the Cherokees would be “secured in the enjoyments of governments of their own choice,” Taney declared William Rogers could not renounce his racial identity: “Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress.”¹⁰³ And whatever guarantees had been promised the Cherokees, membership in their group was still a function of race, not political affiliation.

William Potter Ross responded to *Rogers* and the 1846 treaty with an editorial published in the *Advocate* in August of that year.¹⁰⁴ The unsettled atmosphere of the 1840s—marked for young Cherokees like William Potter Ross by the shortcomings of the 1846 treaty and the explicit racism of Justice Taney’s ruling—likely contributed to the expansion of a new phenomenon that was widely discussed in the columns of his newspaper. This new activity was the participation of Cherokees and other resettled tribes in multi-tribal conferences aimed at promoting peaceful relations among the region’s tribes. The young editor of the *Advocate* was particularly enthusiastic about these meetings.

The meetings likely originated in efforts to mediate disputes over land. Reports of conflicts between eastern tribes and groups native to the area such as the Osages had circulated in the East prior to the mass removals of the 1830s, and the Cherokees and others were eager to smooth over these disputes.¹⁰⁵ The eastern tribes also arrived in Oklahoma at the same time as the new Republic of Texas was establishing its borders and initiating its own campaign of removal.¹⁰⁶ At the same time, Mexican officials to the south and west—still resentful of the Texans recent success in their war of independence—worked to form alliances with Comanches and other groups willing to raid and harass the new nation’s frontier.¹⁰⁷ Finally, resettled tribes from the American Midwest—Miamis, Ottawas, Kickapoos, Potawatomis, and Shawnees—were making new homes in the area north of Indian Territory just as the southeastern tribes arrived.¹⁰⁸ The disruptions in

102. *Id.* (internal quotations omitted).

103. *Id.* at 573.

104. William P. Ross, *The Right of Self-Government*, CHEROKEE ADVOC., Aug. 27, 1846.

105. For background on these conflicts, see EDMUNDS, HOXIE & SALISBURY, *supra* note 16, at 241–46.

106. *See id.* at 250–53.

107. *Id.* at 253.

108. *See id.* at 231–33.

Kansas and Missouri triggered yet another round of retaliation and resentment among indigenous groups such as the Pawnees, Wichitas, and Kiowas.¹⁰⁹

In addition to the local pressures that encouraged better relations with surrounding tribes, William Potter Ross and his colleagues were probably inspired by the story of Sequoyah, the tribal elder who had first produced a written version of the Cherokee language. Sequoyah had settled voluntarily in the West in the 1820s, and in 1828 had joined a tribal delegation that traveled to Washington, D.C., on official business.¹¹⁰ While in the American capital, the Cherokee leader met a number of representatives from other tribes and became taken with the idea of bringing literacy to all Native people. Sequoyah returned to Oklahoma determined to compile a universal alphabet that could be used by all the tribes. To accomplish this goal, he set out with an ox cart to visit tribes in Oklahoma and across the Southwest. It was reported that he traveled as far west as New Mexico.¹¹¹ The Sequoyah story is difficult to verify, but there is no doubt that Ross was well aware of Sequoyah's travels. Ross even reprinted a report on the elder's "last wanderings" in the *Advocate* in 1845. Written by a man called the Worm, the article described the elder's final trip to Mexico to make contact with Cherokees who had emigrated there to live under the protection of the Mexican government.¹¹²

The first intertribal gatherings were reported to have occurred in 1837 and 1839 when the Cherokees tried to resolve disputes with western tribes by inviting representatives to their new home and sponsoring several days of talk and socializing.¹¹³ The first extensive coverage of these meetings appeared in the *Advocate* in the spring of 1845 when William Potter Ross traveled thirty-five miles southwest of Fort Gibson to a meeting site within the new Creek Nation.¹¹⁴ There he found over 700 Creeks gathered to receive delegations from resettled southeastern tribes (Choctaws, Chickasaws, and Seminoles), other tribes that had been forced from the Midwest (Shawnees, Piankashaws, Delawares, Peorias, and Kickapoos), and local groups (Osages, Caddoes, and Quapaws). Unfortunately, the Comanches—

109. An overview of this situation is provided in the opening pages of A.M. Gibson, *An Indian Territory United Nations: The Creek Council of 1845*, 39 CHRON. OKLA. 398 (1962).

110. John B. Davis, *The Life and Work of Sequoyah*, 8 CHRON. OKLA. 149, 170–71 (1930).

111. *Id.* at 172–73.

112. The account was published on June 26, 1845, and reprinted decades later as *The Story of Sequoyah's Last Days*, 12 CHRON. OKLA. 25 (1934).

113. DAVID LA VERE, CONTRARY NEIGHBORS: SOUTHERN PLAINS AND REMOVED INDIANS IN INDIAN TERRITORY 91–93 (2000).

114. See *The Indian Council*, CHEROKEE ADVOC., May 22, 1845.

who had been specially invited in hopes of negotiating an end to their raids—refused to attend. Ross noted that it was “a source of great regret” that the Cherokees had not sent an official delegation, but added that this was a consequence of a delay in notification and “by no means from any indifference on the part of this people, to whatever relates to the peace and prosperity of the whole Indian population.”¹¹⁵

“During the council,” Ross reported, “the pipe of peace was smoked, the white paths cleared, the Council fire lighted afresh, and several speeches of interest delivered by the heads of the different representations present . . .”¹¹⁶ The editor reprinted several of those speeches in the *Advocate*. He also noted that “the nights were enlivened by the ‘Terrapin Shell dance’ of the Muscogees, and the songs, drums, reeds and saltations (jumping and leaping) of the Osages.”¹¹⁷ All the delegations present appeared to accept the arrival of new tribes from the east and expressed a desire for peace. These messages of peace made the absence of Pawnee and Comanche delegations particularly ominous, but the tribes present represented a broad region. The group even received a communication—and a pipe—from the Great Lakes. A group of Winnebagoes, Chippeways, Tahwas, and Menawallys sent a message expressing a desire to “be friendly with all tribes, and to keep open the White path of peace, that we may train up our children in it, and teach them to be friendly with all men.”¹¹⁸

The council’s Creek hosts were passive hosts for most of the gathering, but at the close of the proceedings, Tuckabatchemicco, the Upper Creek leader who had opened the council, offered a summary and a set of suggestions. He urged everyone to follow the example of the Osages and “bring in all the stolen horses” to the next general council. “Hereafter,” he added, “quit stealing horses from one another . . .” Tuckabatchemicco added that he would give the absent Cherokees “a talk” urging them to stop the “stragglers” in their country from stealing and committing murder. Once the Indians succeeded in policing themselves, the Creek leader promised, the United States would have no reason to station troops in the territory. At that point, he suggested, the general council could act as a general government: “When we shall all get at peace again with the different tribes, the troops may be recalled or dispensed with . . . The Principal Chief of our different brothers must assemble their people when they get home and

115. *Id.* Historian Arrell Gibson annotated and reprinted the entire *Advocate* coverage of the council in Gibson, *supra* note 109.

116. *The Indian Council*, *supra* note 114.

117. Gibson, *supra* note 109, at 406 (alteration in original) (quoting *The Indian Council*, *supra* note 114).

118. *Id.* at 412.

explain all this . . .” Tuckabatchemicco’s closing statement suggested broadly that a stable, centralized tribal leadership similar to what the southeastern tribes had developed could eventually form a system of governance in Indian Territory.¹¹⁹

Ross’s newspaper continued to cover intertribal conferences. In December 1845, he reported on efforts by Creek and Cherokee leaders to make peace with the Comanches, and he traced a series of attempts made to hold councils with the group the following year.¹²⁰ Finally, in July 1846, the *Advocate* reported extensively on the Cherokee involvement in a council with this elusive goal and reprinted a number of speeches given by tribal officials at that event. Elijah Hicks, a judge in the Cherokee supreme court, expressed the tribe’s perspective on these negotiations when he told the assembled Comanches that “I feel towards you as my own brothers, all of the aboriginal race, and having the same blood . . . Therefore what I have to say cannot deceive you because I am an Indian and my feelings are on your side.” Hicks urged his audience to accept a boundary for their territory “to separate the Indians and the whites” and to consider a shift to agriculture. “If you can change your present pursuits to that of agriculture and homes,” he noted “it will afford your young people with moderate labor, numerous pursuits,” and “lead to the enlargement of the human mind.” Hicks claimed credit for persuading the Comanches to agree to a new treaty.¹²¹

In the 1850s, as pressure mounted on the resettled Midwestern tribes to relocate to Indian Territory, Ross was a ready defender of their right to remain in their new homelands. He had written as early as 1845 that the organization of new territories west of Missouri would violate the agreements the eastern tribes had made when they moved across the Mississippi.¹²² Once reductions in their territory is made, he warned bitterly, “[i]ntrusion will follow intrusion, wrong [will] be piled upon wrong till the condition of the Indians [will] become intolerable, . . . and they must . . . resume their weary pilgrimage to some more distant land of promise, where they will be permitted to live undisturbed forever.”¹²³

Ross’s interest in tribal alliances and his readiness to defend treaty rights in the 1850s indicate clearly that whatever Taney was thinking in his legal decisions, Native American leaders writing and planning at the same

119. *Id.* at 411 (reprinting Tuckabatchemicco’s Talk in its entirety).

120. *See Commission to the Comanches*, CHEROKEE ADVOC., Dec. 18, 1845, at 2.

121. Elijah Hicks, *Commission to the Comanches and Others*, CHEROKEE ADVOC., July 2, 1846, at 1; *see also Treaty with the Comanches and Other Tribes*, May 15, 1846, 9 Stat. 844.

122. *See Nebraska Territory*, *supra* note 77, at 3.

123. *Id.*

time were thinking something very different. The conferences themselves, and the rhetoric surrounding them, supported Ross's political vision: they supported intertribal alliances, they endorsed the tradition of treaty making, and they offered a progressive image of tribal citizenship. In this way, they provided an arena for tribes to demonstrate that they were institutions preparing for the future, not defending the past.

Indian lawyers like William Potter Ross imagined a place for Indian communities within the constitutional structure of the American nation, and they believed that the legal instruments that enabled them to survive in the West could be used to assure the survival of other tribes in other places. Moreover, they operated on the assumption that tribal membership did not mark them as "backward" or "uncivilized" people. There was a future outside the rigid and self-serving formulations of Jefferson, Jackson, and Taney. It was a future guaranteed by treaties, federal statutes, and negotiated solutions to complex political and cultural issues. And it was a future only the Indians could imagine in 1857. Taney's vision was confined by the past; Ross's was not. Ironically, it was the Chief Justice who was looking backward and the Indian who looked to the future. And what is more: the Indian's version of the future proved to be accurate.

POST-CONCLUSION REFLECTION

Anthropologist Patrick Wolfe has written provocatively about the "regimes of difference" that define social roles in colonial settings. He argues that African Americans and Indians in the United States, Aborigines in Australia, and Afro-Brazilians in Brazil have each entered a particular colonial context in which Europeans devised categories to buttress their rule and perpetuate their control over land and labor. "At stake" in the formulation of these regimes, Wolfe notes, "is the fundamental issue defining any social system—who exploits whom in the production and reproduction of power, wealth, and privilege?"¹²⁴ He argues that in North America the relationship of Native Americans to the European colonizers centered on land, while the parallel relationship with African Americans centered on labor. The American tendency to draw a sharp line of difference between colonists and African Americans while relaxing this practice with Indians reflects this difference, Wolfe argues, "since assimilation reduces an in-

124. Patrick Wolfe, *Land, Labor, and Difference: Elementary Structures of Race*, 106 AM. HIST. REV. 866, 905 (2001).

indigenous population with rival claims to the land, while an exclusive strategy enlarges an enslaved labor force.”¹²⁵

We cannot leave Justice Taney and William Potter Ross without reflecting on the varying “regimes of difference” embodied in their words. Taney—together with his predecessors Jefferson and Jackson—clearly envisioned Indian communities as unencumbered by their racial identity. Being Indian was not a barrier to their intimate interaction with colonists and their settler governments. Jefferson could imagine their physical amalgamation, while Jackson and Taney imagined they could become members of the Americans’ political community. The price for this membership, of course, was that individuals would give up their membership in an Indian political community and surrender their communal territories to the new “American” state. African Americans, on the other hand, were rejected as candidates for amalgamation and permanently barred from membership in the American political state.

Wolfe’s formulation—even in the simplified version rendered here—is enormously helpful as we try to make sense of *Dred Scott* and the moment it occupies in the history of the United States. It sets the Chief Justice’s words in a still-larger context, demonstrating again that whatever its legal significance, his decision buttressed the efforts of white politicians to maintain control over the settler state that was expanding so rapidly around them. Despite the existence of thousands of African Americans and Native Americans who did not fit the frameworks laid out in his decision, Taney described the outlines of what Wolfe would call a “regime of difference” that the jurist believed would enable the nation’s political and economic institutions to continue to function. This regime was rooted in the need to maintain access to Indian land and African American labor; it was not unrelated to similar regimes being devised in other settler states around the globe, from Australia to Hawaii to Brazil to British Columbia.¹²⁶

Second, Wolfe’s framework enables us to view the aftermath of *Dred Scott* from a fresh perspective. Rather than seeing the decision in the context of American race relations and the Civil War, Taney’s pronouncement—his statements about both Blacks and Indians—marks a moment in

125. *Id.* at 867.

126. In Hawaii, for example, a native government heavily influenced by missionary advisors embarked on a process of land distribution following the “Great Mahele,” or division of lands, of 1848. This process of transforming a collectively managed indigenous landscape into a set of individual landholdings (together with subsequent reforms that made it possible for foreigners to own these properties) enabled European settlers to take control of the local economy and, later, to overthrow the native rulers of the kingdom. See generally JONATHAN KAY KAMAKAWIWO’OLE OSORIO, DISMEMBERING LĀHUI (2002).

the history of struggles over racial and political hierarchies. Race is not a single label that encompasses and describes all groups, dividing them onto one or another side of a dividing line between “white” and “non-white.” Rather it is a category employed by those who seek to locate themselves within a diverse and contested landscape. From this point of view, the category of the colonizers—“white”—is a category of privilege and those who identify with that term will likely define those they exploit as racially inferior. Those who are marginalized and exploited in the colonial setting will likely reject the colonizers’ use of race as a hierarchical classification. Those who have a more complex identity—such as Native American slave holders who were both citizens of a distinct political entity and beneficiaries of the settler’s racial categories—would have a more complicated view. They would embrace the conventional racial hierarchies with regard to African Americans while rejecting the ideology of white supremacy. Looking forward from 1857, it is clear that these categories would grow more complex as differences within each group became more evident, the economy grew larger and more diverse, and the sources of group identity changed. Political freedom, legal power, political influence, geographic mobility, and demographic change would disrupt and re-form the simple divisions embedded in Taney’s decision. And Native thinkers like William Potter Ross would continue to assert both the enduring significance of federal treaty commitments and the progressive potential of tribal governments.

Dred Scott offers more than a window on a moment or a single legal mind. It also provides a profile of the “regimes of difference” whose creation defined the antebellum world and whose transformation—brought about by white judges, Native American lawyers, and African American leaders with many talents—would define the legal and political world that emerged from the cataclysm of the Civil War and the slow process of democratization that followed it.