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"Power Over this Unfortunate Race," Race, Power and Indian Law in U.S. v. Rogers

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"POWER OVER THIS UNFORTUNATE RACE": RACE, POLITICS AND INDIAN LAW IN *UNITED STATES v. ROGERS*

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ABSTRACT

[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 endeavoured 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.[1]

In 1846, in *United States v. Rogers*, the Supreme Court blithely announced the above vision of the history of Indian-United States relations. The first part of the quote describes Indian people as a race and an inferior one; the second part describes a positive and paternal federal relationship to this race. As even the most casual student of American Indian history knows, this vision was more fantasy than reality, more desire than description. Although such fantasies are commonplace in Indian history, in this case the statement signaled a shift in federal Indian law and policy, heralding a move from viewing Indian tribes as sovereign governments to viewing them as collections of individuals bound together by ethnicity. As governments, tribes posed a legal barrier to federal interference with their members. Although the federal government could wage war against them, could demand unfair agreements from them, and could usurp their property, they were still governments, and thus their members and territory were subject to tribal, not federal, authority. By redefining Indians as individuals joined not by politics but by race, the federal government could assert a new kind of power: the power to breach tribal boundaries and regulate their members in order to "enlighten their minds and increase their comforts" and "save them ... from the consequences of their own vices."[2] What "humanity" demanded then was not that tribes be treated, as far as possible, according to the law of nations but that Indians be treated as subjects in need of guidance to fully incorporate into the American mainstream.

The decision of the Supreme Court in *United States v. Rogers* did not initiate this change. It was instead the product of a growing

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

movement to increase federal power to regulate Indian lives. This movement was tied to such diverse factors as the bureaucratic centralization of the Indian Department, the emergence of the science of ethnology, and the debates over American identity in the face of increasing immigration to the United States and international conflicts over the North American continent. The success of this vision in the Supreme Court was fueled by distortions of law and fact ranging from mischaracterization of the role of white men in Indian country to the fact that the case was moot at the time it was decided. By memorializing the vision of this movement in law, however, the *Rogers* decision provided it with powerful legal and moral ammunition in ways that continue to resound in the courts and on Indian reservations today. In this Article, I use *Rogers* as a lens through which to examine the nature and origins of this shift.

INTRODUCTION

United States v. Rogers arose from homely facts. In 1844, in the Cherokee territory west of Arkansas, William S. Rogers allegedly stabbed his brother-in-law Jacob Nicholson to death with a five-dollar knife.[3] Although both men were racially white, both had also married Cherokee women, thereby becoming citizens of the tribe under Cherokee law.[4] When federal authorities sought to prosecute Rogers for the murder, he argued that the court had no power over him because the law that provided for federal jurisdiction in Indian country exempted crimes between Indians, and he, as a citizen of the Cherokee Nation, was an Indian for purposes of the exemption.[5]

In 1846, the Supreme Court summarily dismissed Rogers' challenge.[6] A white man was a white man, and no political affiliation could change this.[7] Although the term "race" had often been used to refer to Indians before this time, it contained an ambiguity indicating both a group with a common biological heritage and a

3. *See* Indictment at 1-2, *Rogers* (No. 114), *microformed on* U.S. Supreme Court Records and Briefs (Scholarly Resources, Inc.); CHEROKEE ADVOC., May 22, 1845, at 3.

4. *Rogers*, 45 U.S. at 568.

5. *Id.* at 568, 571.

6. *Id.* at 573-74.

7. *Id.* at 572-73.

group with a common national or political identity.[8] The assumption of policymakers in the time before *Rogers* was that the two senses of the word were identical, that the political and biological boundaries around Indian tribes were the same. But what if they were not? What if whites or blacks became citizens of Indian tribes? The *Rogers* opinion, for the first time, established a biological limitation on the federal definition of "Indian."

Authors have seized on this limitation as evidence that Indian law is a "blood law"[9] based on racial distinctions between Indians and non-Indians.[10] Some scholars and courts have recently extrapolated from this assertion to suggest that descent-based tribal membership requirements and even Indian law itself must be discarded as irredeemably tainted by racial discrimination.[11] This Article shows that neither the historical record nor the *Rogers* opinion support this understanding. Although the 1840s saw the growth of scientific racism and its use to justify oppression of African Americans, policymakers and ethnologists continually emphasized that race did not define Indian people, stressing instead the equal potential of Indians and whites.[12] In *Rogers* itself, the inferior people are not the Cherokees themselves but the "mischie-

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8. THE NEW OXFORD AMERICAN DICTIONARY 1402 (2001). For a modern use of the latter definition, see Justice Scalia's concurrence in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("In the eyes of government, we are just one race here. It is American.").

9. John Rockwell Snowden et al., *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 NEB. L. REV. 171, 200 (2001) (calling *Rogers* the "foundational case" for federal "blood law").

10. *See, e.g.*, Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1263 (1994) (citing *Rogers* for the proposition that "[t]raditionally, the term 'Indian' was conceived in classically racial terms"); Snowden et al., *supra* note 9, at 205 (calling racism the "fourth pillar" of Indian law); Patricia Owen, Note, *Who is an Indian?:* Duro v. Reina*'s Examination of Tribal Sovereignty and Criminal Jurisdiction over Nonmember Indians*, 1988 BYU L. REV. 161, 177-78 ("*Rogers* demonstrates that historically race was the determinative factor in dealing with Indians.").

11. *See, e.g.*, Williams v. Babbitt, 115 F.3d 657, 665-66 (9th Cir. 1997) (reinterpreting the Reindeer Act of 1937 so as to eliminate race-based protections for Alaskan natives); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 771-72 (2001); Snowden et al., *supra* note 9, at 173-76, 231-38; *see also* Carole Goldberg, *Critical Race Studies: Descent Into Race*, 49 UCLA L. REV. 1373, 1375-76 (2002) (discussing and criticizing this trend).

12. *See* discussion *infra* Part IV.B.3.

vous and dangerous" whites that associated with the Cherokees.[13] The primary legal significance of *Rogers*, moreover, is that it was the first time that the Court asserted federal authority and control over *any* person in Indian territory, regardless of race.[14]

This is not to say that race was irrelevant to the decision or the federal policy behind it. To understand its role, however, requires broadening one's understanding of the many ways race works in American law.[15] By defining tribes as collections of individuals united by race rather than as governments bound together by the political choices of their members, the United States could justify regulating Indians without regard to the barriers that governmental status might pose. At the same time, the belief that individual Indians were not defined by this racialized group status justified destruction of the tribal group in the name of assimilation. It was, therefore, the fact that Indian tribes—not Indian individuals—were indelibly raced that supported this expansion of federal power.

The history behind *Rogers* is replete with fabrications of law and fact to achieve this result.[16] The Court's opinion presents Congress as having unlimited authority over tribes and their property. Close

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13. *See Rogers*, 45 U.S. at 573.

14. *Id.*

15. Others have pointed to the need for a new understanding of the way that race works with regard to Indians. Vine Deloria, for example, has discussed the oversimplification of equating treatment of American Indians with African Americans, suggesting instead that federal assumptions must be understood according to federal needs regarding the two groups: Because those in power needed the involuntary labor of African Americans, it had to imagine them as "draft animals," justly separated from Anglo-American society and rights; because the powerful needed not labor but land from the American Indian, it had to imagine them as wild animals, to justify taking their land and governmental rights in the name of assimilation. VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 169-74 (Univ. of Okla. Press 1988). Similarly, Joseph Singer juxtaposed the 1924 Immigration Act that denied American citizenship to Chinese immigrants with the 1924 Citizenship Act that involuntarily thrust it upon American Indians to show that the "means of oppression are various." Joseph William Singer, *The Stranger Who Resides with You: Ironies of Asian-American and American Indian Legal History*, 40 B.C. L. REV. 171, 172-73 (1998).

16. For earlier critiques of the legal basis of the *Rogers* decision, see Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 524 (1987); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 210-11 (1984); Daniel L. Rotenberg, *American Indian Tribal Death—A Centennial Remembrance*, 41 U. MIAMI L. REV. 409, 420 (1986); David E. Wilkins, *A Constitutional Conundrum: The Resilience of Tribal Sovereignty During American Nationalism and Expansion: 1810-1871*, 25 OKLA. CITY U. L. REV. 87, 106-07 (2000).

examination of earlier case law and Congress' own statements regarding its power paint a sharply contrasting picture, one in which the federal government has no power over tribes or their members on reservations[17] and in which tribal property rights were as sacred and protected from federal intrusion as those of non-Indians.[18] Subsequent Indian law cases, moreover, show that the Court, and even Justice Taney himself, did not adopt the vision of Indian law that the *Rogers* opinion espoused.[19]

The facts behind the decision were equally distorted. Most startling, at the time the case was argued before the Supreme Court, the defendant William Rogers was ten months dead—a circumstance that if recognized would have deprived the Court of jurisdiction to hear the case.[20] This fact was omitted from both the certified record compiled in Arkansas two months after Rogers' death[21] and the Attorney General's argument before the Court eight months later.[22] More subtly, the assertion of jurisdiction rested on the argument that Indian tribes were neither able nor willing to control the white men in their midst.[23] The historical record, in contrast, reveals that the Cherokee government neither wanted nor needed federal assistance in controlling white men in Indian country and that federal attempts to exercise jurisdiction only increased lawlessness in the Cherokee territory.[24]

This Article shows that rather than representing an accurate reflection of the law or the policy needs of the time, the *Rogers* decision was the product of a broader campaign by the executive branch of the federal government to expand its power over Indians. This campaign was catalyzed by the increased bureaucratization of the Indian Department as well as the development of the science of ethnology, both of which created institutional interests in regulating Indians not as members of political entities but as individuals. Concerns about two impending wars over federal power on the

17. *See* discussion *infra* Part II.A.
18. *See, e.g.*, Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746-48 (1835).
19. *See* discussion *infra* Part III.A.
20. *See* discussion *infra* Part II.B.3.
21. *See infra* note 212 and accompanying text.
22. *See infra* notes 213-14 and accompanying text.
23. *See* discussion *infra* Part II.B.2.
24. *See* discussion *infra* Part II.B.2.

North American continent led the Supreme Court to concur with the executive branch's expansive definition of federal power over Indian territory.

Although the decision had little basis in law or fact, it represents a turning point in Indian law. The decision represents a moment in which what might have been a trend to increase the political power of tribes became instead a vast increase in federal power over tribes. The decision immediately provided legal grounding for the coalescing executive branch policy that treated Indians as individuals being groomed for inclusion into American society rather than as members of political entities negotiating their rights as governments.[25] When Congress decided to test the limits of its power over Indian tribes forty years later, *Rogers* became the core precedent justifying this extension of federal power.[26] Although contemporary Indian law scholars often point to these late nineteenth century decisions as the origin of the "plenary power" doctrine,[27] *Rogers* provided the legal grounding for these opinions. *Rogers* has resurfaced in the modern era in the "implicit divestiture" doctrine, which further racializes tribal power by limiting tribal jurisdiction to members of the subject tribe.[28]

The remainder of this Article proceeds in several parts. Part I of this Article describes the legal challenge that *Rogers* posed and the Supreme Court's response to this challenge. Part II attempts to unmask the reality the opinion obscures in its portrayals of both the law and the facts of the case.[29] Part III examines the historical

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25. *See* discussion *infra* Part III.B.4.

26. *See* United States v. Kagama, 118 U.S. 375, 380-81 (1886); discussion *infra* Part V.A.

27. This is the doctrine that: "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

28. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209-10 (1978); *infra* Part V.B.

29. John T. Noonan, Jr. developed the concept of "masks" of the law. *See* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976). Judge Noonan argued that by concealing the reality of the parties whom the court was acting on, and by obscuring the institutional power of the court in acting on those persons, courts were able to cloak lawmaking in the guise of inevitability and compulsion, rather than human agency and suffering. *Id.* at 14-28. In a recent book, David Wilkins applied this concept to fifteen Indian law cases, including *Rogers*. DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE (1997). Wilkins' work provides the most thorough legal historical analysis of *Rogers* to date. *See id.* at 38-49. This Article, however, focuses more sharply on the history behind the case,

factors that may have led to these misrepresentations. Part IV considers the reasons that race and power came together so powerfully in the opinion, and Part V discusses the long shadow the case has cast on Indian law jurisprudence. Finally, in conclusion, I consider the impact of this history both on Indian law and on our understanding of race and politics today, and suggest that in light of this history, those that cry racism to undermine protection for tribal sovereignty have it exactly backwards.

I. THE *ROGERS* DECISION

When William Rogers was indicted for Jacob Nicholson's murder, the federal Trade and Intercourse Act of 1834[30] was the sole source of federal jurisdiction in Indian country. Section 25 of the Act provided that:

> [S]o much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.*[31]

Rogers argued that as both he and Nicholson had married Cherokee women, left their homes in the East, and been fully incorporated as citizens of the Cherokee Nation, they were "Indians" for purposes of this exemption.[32]

It appears that the Court had little trouble rejecting this assertion. The decision amounts to only four pages in the official reporter.[33] The only briefs in the case were the pleadings submitted to the trial court in Arkansas almost a year earlier.[34] At a time when the Court might take over a year to decide a single case, there was precisely one week between the date the case was argued and the

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and reaches significantly different conclusions about its legal and cultural significance.

30. Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729 (1834).

31. *Id.* § 25, 4 Stat. at 733 (emphasis added).

32. United States v. Rogers, 45 U.S. (4 How.) 567, 571 (1846).

33. *See id.* at 571-74.

34. *See* Index of Records, *Rogers* (No. 114), *microformed on* U.S. Supreme Court Records and Briefs (Scholarly Resources, Inc.).

date the decision was announced.[35] The opinion inspired no dissents or concurrences and failed to cite a single source of law besides the statute and treaty provision actually construed.[36] Despite—or perhaps because of—this lack of scholarly reflection, the decision contains sweeping assertions regarding the powers of Congress and Indian tribes.

Congress' understanding of the term "Indian" would be irrelevant if the Cherokee Nation could, through its political decisions, immunize those in its territory from federal control. Before deciding whether Congress intended to assert jurisdiction over men like Rogers, therefore, the Court first had to decide whether Congress had the power to do so.[37] The Court held that tribal political decisions had no impact on the scope of federal power.[38]

To reach this conclusion, the Court merged the status of Indian land as federal territory with the subjection of the people there to federal control. According to the Court, although it was true that the land where the crime occurred was "occupied by the tribe of Cherokee Indians," it had "been assigned to them by the United States, as a place of domicile for the tribe, and they [held] and occup[ied] it with the assent of the United States, and under their authority."[39] From the first interactions between European governments and Indian tribes, moreover,

> native tribes ... [had] never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.[40]

35. *See id.*
36. *See Rogers*, 45 U.S. at 571-74.
37. *Id.* at 571-72.
38. *Id.* at 572.
39. *Id.*
40. *Id.*

It was, therefore,

> too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and ... [that] Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.[41]

Neither the race of the residents of Indian country nor their tribal status was relevant; Congress had power to regulate tribal and nontribal citizens alike.

Immediately upon establishing an apparently unlimited federal power in Indian country, the Court shielded the exercise of this power from judicial review:

> It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many instances exercised.... [I]t is a question for the law-making and political department of the government, and not for the judicial.[42]

In other words, the duty of the Court was not to question federal treatment of Indians but to "expound and execute the law as [they found] it."[43] As discussed below, the *Rogers* vision of federal power was not "found" law but was instead a radical judicial departure from previous understandings.[44] The political question doctrine, however, masked this judicial lawmaking from view.[45]

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41. *Id.*

42. *Id.*

43. *Id.*

44. *See* discussion *infra* Part II.A.

45. This was not the first time the political question doctrine had been used to circumscribe the judicial role in reviewing federal interactions with Indian tribes. Justice Marshall first used it in *Johnson v. M'Intosh* in holding that "however extravagant the pretension of converting the discovery of an inhabited country into conquest may appear," the "Courts of the conqueror" could not question the legality of the federal assertion of title to Indian land. 21 U.S. (8 Wheat.) 543, 588-89, 591 (1823). He used it more poignantly in *Cherokee Nation v. Georgia*, in stating that the Court did not have the power to restrain the Georgia legislature in its attempt to destroy the Cherokee Nation, because such an action would

> savor[] too much of the exercise of political power, to be within the proper province of the judicial department.... If it be true, that the Cherokee nation

Having established the power of Congress to legislate with respect to any person in Indian country, the Court had no trouble concluding that the exception for crimes between Indians did not include men like Rogers:

> [W]e think it very clear, that a white man who at a mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.... Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption ...[, h]e was still a white man, of the white race, and therefore not within the exception in the act of Congress.[46]

Even though the Court asserted that whether federal power over Indians was just was not subject to judicial review,[47] it could not rest without declaring that federal use of this power was in the best interests of the Indians:

> have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

30 U.S. (5 Pet.) 1, 20 (1831). The latter part of the quote can be interpreted as a restatement of the holding of the opinion that the Cherokee Nation was not a "foreign nation" and therefore could not be heard within the original jurisdiction of the Court. Its eloquence, the context, and Marshall's attempt to use the case as a tool in the upcoming election, however, suggest that the "tribunal" to which Marshall was referring was Congress.

46. *Rogers*, 45 U.S. at 572-73.

47. For an illuminating discussion of the need for American law to mediate between its history of colonialism and its tradition of constitutionalism in forging Indian law, see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993). Frickey describes the way in which Justice Marshall, while bowing to the history of colonialism in *Johnson v. M'Intosh* by holding that European countries and subsequently the United States had ultimate title to Indian lands, subsequently affirmed the competing tradition of constitutionalism in the *Cherokee Nation* and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), cases. Frickey, *supra*, at 385.

> It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet, from 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 endeavoured 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.[48]

The Court found this assertion to be equally true with respect to the case at hand. In what one scholar has called the "most substantive issue behind the Court's ruling,"[49] the Court argued that federal jurisdiction was required not only to serve federal interests but also to protect the Indians themselves:

> [I]t would perhaps be found difficult to preserve peace among them, if white men of every description might at pleasure settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that Congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country.[50]

Without federal jurisdiction, in other words, there would be no way to protect either the Cherokees by blood or the residents of the frontier from a scourge of lawless white men.

The opinion presents a seamless web of law and fact. The federal government had complete control over Indian territory and the people found therein. This control had existed since the first moment of colonial contact with the Indian tribes and had never been questioned. Congress, therefore, could assert jurisdiction over

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48. *Rogers*, 45 U.S. at 572.
49. WILKINS, *supra* note 29, at 48.
50. *Rogers*, 45 U.S. at 573.

men like Rogers and, of course, intended to do so. Even if this control clashed with the principles of justice established in other contexts, the Court had no power to question it. In addition, given Indian vulnerability to unscrupulous outsiders, this control was nevertheless in the best interests of "this unfortunate race." As the next part will show, both the law and the facts represented in the opinion were the stuff of fiction.

II. UNMASKING THE LAW

Virtually every element of the *Rogers* opinion obscures or distorts the reality behind the case. (The opinion does not even get the name of the defendant right; he seems to have spelled his name "Rodgers.")[51] The errors range from a skewed portrayal of Indian law and policy to an explicit effort to have the Supreme Court decide a case without legal jurisdiction to do so. Each of these distortions suggests that the United States had far more at stake in the case than a simple question of statutory construction.

A. Indian Law Before Rogers *in Congress and the Court*

The *Rogers* opinion presented federal power in Indian country as boundless, and tribal sovereignty as nonexistent. These relationships, for the Court, were the product of an uninterrupted historical trend. Earlier cases and congressional documents, however, show a very different view of the federal-tribal relationship, and even reveal contemporaneous congressional efforts to increase tribal political

51. In his military records, the man is cross-listed under both William S. Rogers and William S. Rodgers, but the records indicate that "Rodgers" was the primary spelling. Compiled Service Records of Volunteers in the Cherokee War, 1836-39, Nat'l Archives, Washington, D.C., RG 94, Gen. Index Card 382, Card No. 24613989 [hereinafter N.A.R.A., Cherokee War Volunteers]; *see also* Compiled Service Records of Volunteer Soldiers Who Served During the Cherokee Disturbances and Removal in Organizations from the State of Tennessee and Field and Staff of the Army of the Cherokee Nation, 1836-39, Nat'l Archives, Washington, D.C., RG 94, M908, Roll 2 [hereinafter N.A.R.A., Cherokee Removal Volunteers] (cross-listing William S. Rodgers and William S. Rogers in Tennessee Infantry in Cherokee Wars). Although the case was styled as "United States v. Rogers" from the beginning, in his pro se pleadings the defendant at least once referred to himself as "Rodgers." Motion for Discharge, *Rogers* (No. 114), *microformed on* U.S. Supreme Court Records and Briefs (Scholarly Resources, Inc.). I will, however, adopt the law's choice of his name and continue to refer to the defendant as "Rogers" to avoid confusion.

power. *Rogers*, in this light, becomes not the inevitable result of centuries of history, but a turning point, a moment that might easily have resulted in solidification of tribal sovereignty but became instead a sudden expansion of federal power.

Scholars have noted that much of the expansive federal power described by the opinion stems from the idea that tribes were not "owners of the territories they ... occupied."[52] Just as the United States had ultimate dominion over Indian land, so the Indians residing there were "subject to [federal] dominion and control."[53] The way the opinion portrayed tribal property rights, however, was a radical departure from existing precedent. *Mitchel v. United States*, the last significant decision on tribal lands before *Rogers* had called it "a settled principle, that [the tribal] right of occupancy is considered as sacred as the fee simple of the whites" and the Indians' right to "exclusive enjoyment" of their lands was "as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals."[54] The legal protection for tribal property rights was even greater in the case of the Cherokees, who had been guaranteed a patent to their lands in the 1835 Treaty of New Echota, amounting to a fee simple right with right of reversion to the federal government.[55]

The 1835 Treaty also provides direct evidence that the United States intended to shield outsiders who had affiliated with the tribe from federal jurisdiction. In the Treaty, the United States had pledged to "secure to the Cherokee nation the 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 belonging to their people or such persons as have connected themselves with them."[56] Although the Supreme Court in 1978 declared that tribes had no criminal jurisdiction over non-Indians,[57] the Treaty of New Echota not only recognized tribal jurisdiction over non-Indians voluntarily on Cherokee land, but also

52. *Rogers*, 45 U.S. at 572; *see also* Newton, *supra* note 16, at 209.

53. *Rogers*, 45 U.S. at 572.

54. Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

55. Treaty of New Echota, Dec. 29, 1835, U.S.-Cherokee, art. 2, 7 Stat. 478, 479-80; *see also* Newton, *supra* note 16, at 210.

56. Treaty of New Echota, *supra* note 55, at 481.

57. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

made it a matter of federal law to protect this jurisdiction. With respect to men like Rogers, therefore, the federal government would seem to have pledged not to allow federal law to interfere with the enforcement of Cherokee law.

History reveals an even deeper flaw in the Court's reasoning. Although Great Britain and the United States had never treated Indian tribes as *equal* governments, they had at least treated them *as* governments. The relationships between the United States and Indians were those of one government to another, and the United States had not assumed the power to regulate tribal members as individuals. Although the period just before the *Rogers* decision saw heightened attention to this relationship, the evidence shows that this attention might well have resulted in greater protection for the political sovereignty of Indian tribes. *Rogers* presented an understanding of tribal and federal power in direct conflict with this trend.

The 1820s and 1830s were decades of intense debate regarding the future of Indian policy. The Removal Period, in which the government proposed removing tribes from their treaty-protected lands to make way for white settlement, drew attention and intense sympathy to Indian concerns. Communities sent multiple petitions to Congress arguing for the legal and moral right of the Indians to remain in their homelands.[58] Writers in the popular press extolled the civilization, morality, and industry of the so-called civilized

58. *See* S. DOC. NO. 21-53 (2d Sess. 1831) (containing a petition from Pittsburgh, Pennsylvania decrying the failure of the government to protect the Cherokees from removal from their land); S. DOC. NO. 21-50 (2d Sess. 1831) (containing a similar letter from the Memorial Board of Foreign Missions); S. DOC. NO. 21-34 (2d Sess. 1831) (claiming in a petition from the inhabitants of Andover, Massachusetts that not to protect Choctaws in their treaty rights is "denounced with one voice by the civilized world"); S. DOC. NO. 21-33 (2d Sess. 1831) (containing a similar petition from the inhabitants of Pennsylvania); S. DOC. NO. 21-18 (2d Sess. 1831) (claiming in an 1831 petition from the people of Vassalboro, Maine that failure to protect would be a "palpable violation of national faith"); S. DOC. NO. 21-16 (2d Sess. 1831) (stating in a petition from inhabitants of Chester City, Pennsylvania that not to protect tribes against removal would "leave an indelible stain on the national honor"); *see also* SENATE JOURNAL, 25th Cong., 2d Sess., at 398 (presenting memorials from the inhabitants of Hamden, Connecticut, New Haven, Connecticut, Southborough, Massachusetts, Durham, Connecticut, and New Windsor, New York praying that the false removal treaty with the Cherokees not be enforced); *id.* at 397 (presenting seven memorials from citizens of Pennsylvania praying that the treaty be set aside); *id.* at 386 (presenting a memorial of citizens of New Jersey praying that treaty not be enforced); *id.* (presenting a petition of David Orery and others praying that the treaty not be enforced).

tribes subject to removal.[59] Members of Congress spent hours debating the competing legal claims of states and tribes to the land.[60] The Cherokee cases, for which the newly widowed and dying Chief Justice John Marshall[61] used the last of his strength to assert the sovereignty and independence of Indian tribes, provoked a constitutional crisis.[62]

The crisis was ultimately resolved not by law but by force. In 1838, federal troops removed the Cherokees from their southern homelands at point of bayonet. The removal was allegedly in compliance with the 1835 Treaty.[63] The United States knew, however, that the signers of the treaty did not represent the Cherokee Nation. Unable to get the Cherokee leadership to agree to removal, the Georgia Guard had imprisoned John Ross, the Principal Chief of the Cherokees, during its negotiation.[64] The Treaty was signed by a handful of Cherokees who knew they did not have the authority of their government, but believed that removal was the only hope for survival of the Cherokee people.[65] Even after the Treaty was signed, the great majority of Cherokees refused to leave their homes. Between 1836 and 1838, only a small minority of Cherokees, many of them signers of the Treaty fearful of retaliation,[66] or families headed by white men hoping for better lives in the West, made the journey across the Mississippi. It was not until

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59. *See* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 505 (1969).

60. *See id.* at 506-08.

61. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 439 (2001).

62. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 102 (4th ed. 1998).

63. *See* GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 268-71 (Univ. of Okla. Press 1956).

64. *Id.* at 268.

65. The signers of the Treaty knew not only that they had no authority to do so, but that their actions also violated an 1829 law providing that those who signed away Cherokee land without the authority of the government might forfeit their lives for their actions. Major Ridge, one of the signers of the Treaty and an architect of the law, said to his friends upon signing, "I have signed my death warrant." WILLIAM G. MCLOUGHLIN, AFTER THE TRAIL OF TEARS: THE CHEROKEES' STRUGGLE FOR SOVEREIGNTY, 1839-1880, at 15 (1993). His son John Ridge similarly declared, "I may yet die some day by the hand of some poor, infatuated Indian deluded by the counsels of Ross and his minions.... I am resigned to my fate, whatever it may be." *Id.* Both were killed for their actions. *See infra* note 273.

66. *See* MORRIS L. WARDELL, A POLITICAL HISTORY OF THE CHEROKEE NATION, 1838-1907, at 8, 10 (2d prtg. 1977).

1838, after federal troops had rounded the Cherokees into "concentration camps" on the banks of the Aquohee River, that the bulk of the Cherokees finally left.[67]

Although it ended in force, the crisis produced a powerful legal legacy.[68] In *Cherokee Nation v. Georgia*,[69] a majority of the Court agreed that the Cherokee Nation was a sovereign nation, a "distinct political society, separated from others, capable of managing its own affairs and governing itself."[70] The Cherokees, however, effectively lost the case, whose only direct holding was that the Cherokee Nation was not a "foreign state" entitled to assert the original jurisdiction of the Supreme Court in a suit against Georgia.

Despite this loss, the decision laid the groundwork for the Court's opinion in *Worcester v. Georgia*.[71] *Worcester* considered whether Georgia could assert state law over Samuel Worcester and Elizur Butler, both non-Indian missionaries living on Cherokee lands. Building on and incorporating the arguments of the dissenters in *Cherokee Nation*, Justice Marshall declared that "the several Indian nations [were] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a

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67. *See id.* at 11. Even then, about a thousand Cherokees escaped removal by hiding in the mountains in North Carolina Cherokee territory. *Id.* at 11-12. After decades of seeking to make the North Carolina Cherokee join the rest of the tribe in the West or fully assimilate into the non-Indian community, the federal government finally recognized them as an independent tribe deserving of land and protection. *See* United States v. Wright, 53 F.2d 300, 302-05 (4th Cir. 1931) (summarizing the history of the North Carolina Cherokee).

68. While time has abrogated the direct holding of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), see *Nevada v. Hicks*, 533 U.S. 353, 361 (2002), only three other pre-Civil War opinions have been cited more since the 1970s: *United States v. Perez*, 22 U.S. (4 Wheat.) 579 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). GETCHES ET AL., *supra* note 62, at 125.

69. 30 U.S. (5 Pet.) 1 (1831).

70. *Id.* at 16.

71. 31 U.S. (6 Pet.) 515 (1832). As Kent Newmyer persuasively argues, the connection was deliberate. NEWMYER, *supra* note 61, at 450-51. Justice Marshall, while not convinced of the Court's jurisdiction over the case, was moved deeply by the plight of the Cherokees. *See Cherokee Nation*, 30 U.S. at 15 ("If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined."). In order to move the public and the legislative branch and to help establish the legal foundation for a subsequent case, he wrote an opinion that did much more than necessary to resolve the case, and encouraged Justices Thompson and Story to write a dissent to his opinion that would emphasize even more forcefully the sovereignty retained by the Cherokee people, and the federal government's obligation to address Georgia's attempts to violate this sovereignty. *Id.* at 50 (Thompson, J., dissenting); NEWMYER, *supra* note 61, at 450-51.

right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States."[72] The acts of Georgia in asserting state law over Cherokee soil, therefore, were "repugnant to the constitution, laws and treaties of the United States."[73]

For the executive branch, the opinions were a political embarrassment, but little more. Although President Jackson persuaded Georgia to pardon the missionaries, he did nothing to protect the Cherokees from further state encroachment.[74] After the Treaty of New Echota provided a façade of legality for removal, the spirit of the Cherokee opinions did not stay the President's hand.[75]

The removal crisis had a far different effect on Congress. Between the 1830s and the 1850s, national shame over removal continued to color congressional attitudes towards Indian law and policy. In 1851, the southern states requested indemnification from Congress for depredations committed by the Choctaws before removal.[76] In recommending rejection of the request, the House Report condemned federal and Georgian intrusions on Choctaw sovereignty in the most damning terms. It called Georgia's extension of state laws over Indian country an act of "disloyalty and disobedience to the authority of the general government, disregarding the acts of Congress and the plighted faith of the nation, as well

72. *Worcester*, 31 U.S. at 557.

73. *Id.* at 561.

74. *See* Burke, *supra* note 59, at 530.

75. *See* NEWMYER, *supra* note 61, at 455. Alexis de Tocqueville wrote of the observance of the letter of the law in the removal of the Choctaw tribes, saying: "It is impossible to destroy men with more respect for the laws of humanity." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 355 (Philips Bradley ed., Henry Reeve trans., 1945) (1835). As with the Choctaws, in Cherokee removal the letter of the law was respected as men were destroyed.

76. *See* H.R. REP. NO. 31-37, at 1-2 (1851). Congress laid the blame for any depredations squarely on the white population, on "lawless people" who flocked to the Indian lands as soon as the treaty had been signed and drove the Indians from their homes. *Id.* at 25. Even where land was allegedly purchased by contract, Congress declared that the purchases were marked by "dark and shameful outrages" and "large numbers of the Indians were robbed and despoiled of their lands." *Id.* As a result of these outrages, the Indians suffered poverty and starvation, in many cases having only water in which tree bark had been soaked to keep alive. *Id.* at 25-26. Congress found that the Choctaws only stole from the whites when driven to it to survive, and that it was not until whites injured innocents in revenge that some Choctaws took hostile action against them. *Id.* at 26.

as their own duty to obey the enactments of the national legislature."[77] Nor was the federal government free from blame:

> Under these circumstances it became the duty of the President to see the laws for the protection of the Indians faithfully executed; or, disregarding his duty, tamely to acquiesce in practical nullification and the insolent usurpations of these States. To the lasting reproach of the government and the country, the latter course was adopted.[78]

The heightened concern for Indian tribes generated by the removal crisis suggested two possible paths for future Indian policy. While both were intended to benefit the tribes, they were very different and had very different consequences. The first path was to address abuse of Indians by increasing their political power as governmental entities incorporated within, yet partially independent from, the American political system. The second was to increase the federal role in overseeing and improving the lives of the Indians.

The need to choose between these paths reflects a tension in the Cherokee decisions themselves. The opinions had established that states had no authority in Indian country, but left the scope of federal power undecided. Justice Marshall's decision in *Cherokee Nation* described Indian tribes as "domestic dependent nations,"[79] a paradoxical phrase leaving unclear whether questions of federal power nationhood or dependency should win out. The opinion described the relation of tribes to the United States as "that of a ward to his guardian,"[80] another ambiguous phrase. Was the federal-tribal relationship like that of a parent to his child, allowing the United States to do virtually anything it considered in the best interests of its child; or was it more like that of a trustee to the owner of the trust, in which power was limited to the purposes of the trust?

Close reading of the Cherokee opinions suggests that the latter is the better interpretation.[81] Federal power was limited to a

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77. *Id.* at 2.

78. *Id.*

79. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1841).

80. *Id.*

81. For a good discussion of the development of Justice Marshall's Indian law jurisprudence, see Frickey, *supra* note 47, at 395-96, discussing the ways that the Cherokee

particular purpose: the protection of tribal sovereignty. In contrast to the now-established principle that dependency subjects tribal sovereignty to "complete defeasance" by the federal government,[82] Marshall believed that "[p]rotection does not imply the destruction of the protected."[83] Rather, like the European protectorates, a tribe might be considered as "holding its right of self-government under the guarantee and protection of one or more allies."[84] The Court understood "dependence" to be limited to acceptance of supplies and the restraint of dangerous intruders from entering Indian country, and to leave "their actual independence ... untouched, and their right to self-government acknowledged."[85]

Although the opinion stated that tribes were "within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens," such restraints were limited to situations arising in "our intercourse with foreign nations, in our commercial regulations, in any attempts at intercourse between the Indians and foreign nations."[86] Federal restrictions on tribal sovereignty were limited to the "exclusive right of purchasing such lands as the natives were willing to sell,"[87] and loss of the tribal power to enter into relationships with foreign nations.[88] Outside of these two limitations, Congress could interfere with tribal governments only with the permission of the tribes themselves.[89]

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opinions tempered the implications of *Johnson v. M'Intosh* by drawing a distinction between the powerlessness of the Court to review "historical aspects of colonization," and its ability to protect tribes against "efforts to destroy whatever rights they still possess."

82. *See, e.g.*, Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 857 (1982).

83. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552 (1832).

84. *Id.* at 561.

85. *Id.* at 547.

86. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

87. *Worcester*, 31 U.S. at 545.

88. *Cherokee Nation*, 30 U.S. at 17.

89. According to Marshall:

> [O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown, to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies, but never intruded into the interior of their affairs, nor interfered with their self-government, so far as respected themselves only.

Contemporaneous congressional understandings of federal power over Indians confirm this reading. Two years after *Worcester*, Congress proposed a comprehensive bill to amend the Indian Trade and Intercourse Act, reorganize the Indian Department, and organize the Western Territory to which the tribes were removed. The House Report on the bill showed a vision of Indian sovereignty in tune with the first reading of *Worcester*, one that was far more expansive than that held in the modern era.[90]

The bill was based on the principle that Indian tribes were to be "secured in ... [their right] to self-government" and that they would "be eventually placed on an equality, with respect to their civil and political rights."[91] This governmental equality included that "whenever their advance in civilization should warrant the measure, and they desire it ... they may be admitted as a State to become a member of the Union."[92] Immediately, the arbitrary power that the executive had previously exercised over Indian relations was to be put to an end.

An early writer on the Western Territory bill suggested that its pro-sovereignty provisions could be explained by ongoing removal negotiations with the Cherokee Nation and the hope that a favorable bill would lure the tribe to the Indian territory.[93] House Report 474, however, supported the opposite conclusion: because Congress felt less concern about preventing an Indian war, it felt more powerfully obligated to act in the interests of the Indians:

> The time has been when conciliation was sought; but the time is now passed when the fear of Indian hostility should be a leading feature of our Indian intercourse. Our relation to them is now that of the strong to the weak, and demands at our hands a more

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Worcester, 31 U.S. at 547. Any other interference with tribal affairs would have to be with *both* the consent of the tribe *and* the permission of Congress. The laws of Georgia, for example, could have no force on Cherokee land "but with the assent of the Cherokees themselves, *or* in conformity with treaties, *and* with the acts of congress." *Id.* at 561 (emphasis added). The juxtaposition of "or" to connect the two elements representing tribal consent with "and" to indicate the federal consent, shows that both were necessary for intrusion on tribal affairs.

90. H.R. REP. NO. 23-474 (1834).

91. *Id.* at 17.

92. *Id.* at 14.

93. Annie H. Abel, *Proposals for an Indian State, 1778-1878*, *in* 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 89, 96 (1907).

> liberal policy, as well directed to promote their welfare as our political interests.[94]

The first impulse resulting from this new obligation was to increase the political power of the tribes.

While the pro-sovereignty statements of a failed bill might seem to have little weight, the Western Territory bill failed to pass not because it recognized too much sovereignty in Indian tribes, but because it recognized too little. Under the bill, the Five Civilized Tribes in the Indian territory were to form a confederated government and elect a representative together.[95] The federal government would appoint a governor who would have the power to approve or disapprove laws of the confederacy.[96] Opponents of the bill objected that such provisions were beyond the power of the government,[97] and inconsistent with the sovereign rights of tribes.[98] Representative Archer, for example, objected to the bill because "it established military despotism, under the authority of the United States, within the territory which we guaranty [sic] to the Indians. At the very time that we propose to protect them and respect their rights, we subject them to a proconsular government."[99] Because of these objections, the bill was shelved.[100]

The portion of House Report 474 concerning tribal jurisdiction is equally significant. A tribe was assumed to have "jurisdiction over

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94. H.R. REP. NO. 23-474, at 10-11.

95. *See id.* at 35-37.

96. *See id.* at 36.

97. Representative John Quincy Adams, for example, asked: "What constitutional right had the United States to form a constitution and form a government for Indians?" 10 REG. DEB. 4763 (1834). Responding to the suggestion that the power came from the federal power to govern territories, he asked: "Were human beings the 'property of the United States,' although in a savage condition? Surely not." *Id.* at 4769. Upon resurrection of these proposals in 1838, the Cherokee government also objected, expressing "fears that a form of government might be imposed which they were neither prepared for nor desirous of." S. EXEC. DOC. NO. 376, 25th Cong., 2d Sess., vol X. (1838).

98. Representative Archer objected that Congress

> had pledged ... that [the removing tribes] should enjoy a real national independence .... But what was the government set up by this bill? A government of the Indian tribes over themselves? No; it was the Government of the United States over them; and in a form which had well been characterized ... as the very worst form of despotism.

10 REG. DEB. 4776 (1834).

99. CONG. GLOBE, 23d Cong., 1st Sess. 472 (1834).

100. 10 REG. DEB. 4779 (1834).

all persons and property within its limits."[101] Federal law did not create this power; rather it was understood to be inherent in tribes. The proposed bill was necessary, therefore, not to provide for tribal jurisdiction but to place certain limitations on it, by empowering the United States to pardon American citizens convicted by the tribe of capital offenses.[102] Original federal jurisdiction was limited to individuals sent to Indian country as agents of the United States and those merely traveling across the country, under principles analogous to protections provided by international law.[103] Even these people, however, were subject to expulsion from Indian country if they violated tribal law.[104] Outside these limited categories, tribal jurisdiction was plenary: "As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes."[105]

The report is also significant for its understanding of the limits on congressional power. Although the Trade and Intercourse Act of 1817 provided for federal criminal jurisdiction in Indian country, Congress believed that its treaties with the Indian tribes barred the exercise of this jurisdiction. Though the federal government in practice exercised jurisdiction over crimes committed by or against U.S. citizens, this was "rather of courtesy than of right."[106] With regard to Indians themselves, Congress believed it had no power to exercise jurisdiction: "It is not perceived that we can with any justice or propriety extend our laws to offences committed by Indians against Indians, *at any place* within their own limits."[107]

An unpublished 1840 report by the Senate Committee on Indian Affairs has a similar tone.[108] According to the report, "[t]he policy of

101. H.R. REP. NO. 23-474, at 18 (1834).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* Ironically, the Supreme Court cited this report in *Oliphant v. Suquamish Indian Tribe* as support for its conclusion that "Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians." 435 U.S. 191, 203 (1978).

106. H.R. REP. NO. 23-474, at 13.

107. *Id.*

108. Mr. Bell's Suppressed Report in Relation to Difficulties Between the Eastern and Western Cherokees (on file with author) [hereinafter Mr. Bell's Suppressed Report]. See *infra* notes 277-280 and accompanying text for more on this opinion.

the Federal Government has been to regard the country secured to the Indian tribes as foreign to the citizens of the United States, and as exclusively under the jurisdiction and political sovereignty of the Indian, as any foreign country whatever."[109] Whether this was the best policy that could have been pursued was no longer an open question, as it had been memorialized in long-standing practice and law. The Committee condemned the efforts of the executive branch to exercise criminal jurisdiction over Cherokees in a political dispute as "the most inexplicable, and, in the opinion of the [Senate] committee, one of the most exceptionable orders that ever emanated from the Executive Department of the United States."[110] The assumption of such a power, the Committee felt, "would effect an entire revolution in our Indian relations and policy."[111]

By contrast, in *Rogers*, the Supreme Court presented federal power over individuals in Indian country as plenary, and tribal power as virtually nonexistent. It claimed that this expansive vision of federal power was "a question for the law-making and political department of the government, and not for the judicial."[112] As I have shown, there was a stark contrast between this judicial vision and Congress' own understanding of its power with respect to tribes. While disclaiming judicial power to define the relationship between the United States and Indian tribes, the Court was creating it out of whole cloth.

B. Back to the Facts

This legal sleight of hand was accompanied by equally great distortions of the facts of the case. The opinion distorted three central facts: the role of white citizens in Indian country; the ability and desire of the Cherokee government to control these citizens; and, most striking, the fact that Rogers had died long before the case ever came to the Court.

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109. Mr. Bell's Suppressed Report, *supra* note 108, at 6.
110. *Id.* at 5.
111. *Id.*
112. United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846).

1. Developing the Test Case

Federal officials often portrayed white men in Indian country as opportunists, there to escape the restraint of civilized society and exploit the loose morals and economic benefits of marriage to Indian women.[113] Federal jurisdiction was needed to protect the Indians from this scourge of white men. The Supreme Court accepted this characterization. The reality was more complex.

It is true that William S. Rogers did not come to Indian country out of sympathy for the Indians. A native of Tennessee, he first came to Cherokee country as a volunteer in what came to be known as the "Cherokee War," in which troops assembled to help remove the Cherokees from their eastern homelands. He enrolled at the beginning of the operation, in June 1836.[114] Just over a month later, by the end of July, Rogers had been discharged from the army.[115] In November of that year, Rogers married a Cherokee woman and with her began the long journey across the Mississippi.

Why did Rogers abandon his army and his people? Is this a story of true romance, of star-crossed lovers that began as enemies and

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113. *See, e.g.*, H.R. REP. NO. 23-474, at 98 (1834) ("If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men. Some have eluded the pursuit of justice, and located themselves here, where they fancy themselves free from punishment for the past, and without restraint for the future."); *see also* COMM'R INDIAN AFFAIRS ANN. REP. 1843, S. DOC. NO. 28-1, at 416-17 (1st Sess. 1843). The Commissioner of Indian Affairs stated that his concern was also the Indians':

> One of the greatest evils of which the Cherokees have cause to complain, and of which they do complain, is the habit of irresponsible and transient white men intruding themselves upon them. This is a class of people that would be of little value any where, and exercise a mischievous influence on the more unthinking portion of the Indians.

COMM'R INDIAN AFFAIRS ANN. REP. 1843, S. DOC. NO. 28-1, at 416-17. For a more recent iteration of this portrayal, see GLENN SHIRLEY, LAW WEST OF FORT SMITH: A HISTORY OF FRONTIER JUSTICE IN THE INDIAN TERRITORY, 1834-1896 (1957). The author explains:

> This march of civilization and primitive condition of the country attracted a horde of riffraff, the refuse of humanity. There were no extradition laws effective by which a criminal entering the area could be removed to answer for his offense elsewhere, and the country became infested with hundreds of fugitives from justice. Many of this type married among the Indians, and the half-breed was reputed to be a product "inheriting the bad traits of both races and the good ones of neither."

Id. at 21.

114. N.A.R.A., Cherokee War Volunteers, *supra* note 51; N.A.R.A., Cherokee Removal Volunteers, *supra* note 51.

115. N.A.R.A., Cherokee War Volunteers, *supra* note 51.

ended as husband and wife? Probably not. More likely Rogers signed up with the army to be all that he could be, and then, after clashing with military discipline, decided that what he really wanted to be was a western settler with an Indian bride. The radical nature of the shift from volunteer soldier seeking to assert Tennessee's power over the Cherokees to a citizen of the Cherokee Nation suggests that the decision was not made lightly. Rogers was not recorded as claiming compensation for property left behind,[116] which could be a motivation for white citizens to leave the territory. Immediately upon his marriage he and his bride began the "Trail of Tears," the thousand mile walk from the Southeast to the Indian Territory in what is now Oklahoma. Many of the emigrants suffered and died on the hard journey west,[117] which became a defining experience for the Cherokee people. Although as a citizen of the Cherokee Nation Rogers would have been entitled to "annuities," federal rations pledged by treaty, these annuities were withheld for years after the settlers arrived.[118] Settlers struggled to get through the first years in the new country, and many died from hardship and disease.[119] Despite this, Rogers remained in Cherokee country even after his wife died in 1843, leaving only when he was dragged away by the Cherokee sheriff in 1845.

Jacob Nicholson, Rogers' victim, was another white man who had married into the Nation. According to the Cherokee press, Nicholson was Rogers' brother-in-law.[120] The names of the sisters that brought these men together are not recorded—instead, they were what Indian women often were in federally recorded history, nameless vectors between the races.[121] Nicholson, however, was at least a citizen of longer standing than Rogers. In 1835 the federal govern-

116. *See* Nat'l Archives, Washington, D.C., RG 75, M234, Rolls 114-16 (emigrant rolls). He would have received, however, annuities to support him on the journey. At least one white man without any Indian connections did travel to the Indian territory with the Cherokees, presumably because he thereby received support on the way. *See* Letter of Apr. 11, 1837, Nat'l Archives, Washington, D.C., RG 75, M234, Roll 114.

117. FOREMAN, *supra* note 63, at 279-85 (describing suffering among early emigrants).

118. *See* COMM'R INDIAN AFFAIRS ANN. REP. 1840, S. DOC. NO. 26-1, at 240-41 (2d Sess. 1840) (reporting annuities ordered withheld until the end of Cherokee difficulties); MCLOUGHLIN, *supra* note 65, at 31 (describing need for annuities).

119. MCLOUGHLIN, *supra* note 65, at 7 (describing hardship after arrival).

120. CHEROKEE ADVOC., May 22, 1845, at 3.

121. *See* Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830-1934*, 21 AM. INDIAN L. REV. 1, 28-29 (1997) (discussing implications of the *Rogers* case for women).

ment compiled a census of the Cherokees to determine how many there were and how much it would cost to remove them. On the census of Cherokees in Georgia, Nicholson appears as a head of household of four with a small farm producing 100 bushels of corn a year.[122] Despite his establishment in the East, Nicholson, like many intermarried white men, did not wait to be forced out by bayonet before joining the vanguard across the Mississippi; he is listed on the emigration rolls as early as 1837.[123]

There is no record of the reason for the dispute between the two men. Maybe the recently widowed Rogers turned to alcohol and attacked Nicholson in a drunken rage. Maybe he shirked his responsibilities to his children, and Nicholson resented caring for them. Maybe Rogers, who was never tried for the crime, was falsely accused. According to the indictment, however, on September 1, 1844:

> Rogers, with a certain knife, of the value of five dollars, which he ... in his right hand then and there had and held ... feloniously, willfully, and of his malice aforethought, did strike and thrust, giving to the said Jacob Nicholson ... one mortal wound, of the breadth of two inches, of the depth of six inches, of which mortal wound the said Jacob Nicholson ... instantly died.[124]

After Nicholson's death, Rogers escaped capture for seven months by dodging along the Arkansas/Cherokee border. Finally, on April 2, 1845, Alexander Foreman, a sheriff of the Cherokee Nation, arrested him near the Cherokee capital of Tahlequah.[125] Because the Cherokee Nation did not have its own jail, the sheriff brought him for safekeeping to Fort Gibson, the U.S. military base just outside the borders of the Nation.[126] The next day, the *Cherokee Advocate* reported the arrest, and its expectation that Rogers would soon be

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122. Census Roll, 1835, of the Cherokee Indians East of the Mississippi, and Index, Nat'l Archives, Washington, D.C., T496, at 56.

123. When Nicholson removed to the West, he claimed the value of the improvements he left behind was $1299.77. Nat'l Archives, Washington, D.C., RG 75, M234, Roll 114 (listing Nicholson as emigrant 88).

124. Indictment, United States v. Rogers, 45 U.S. (4 How.) 567 (1846) (No. 114), *microformed on* U.S. Supreme Court Records and Briefs (Scholarly Resources, Inc.).

125. CHEROKEE ADVOC., Apr. 3, 1845, at 3.

126. *Id.*

remanded to the Cherokee authorities.[127] Shortly afterwards, a Cherokee officer asked the officer of the fort to turn Rogers over for trial.[128] By this time, however, the military commander of the fort already had begun work on a different plan.

The fort's logbooks of April 2, 1845 contain two letters to Pierce M. Butler, the federal Indian agent in Cherokee country. The first letter states that the commanding officer

> has been directed that whenever a citizen of the Cherokee Nation (meaning a white man) is arrested under the provisions of General Taylor's order of the 3d of October 1843, to keep him in confinement at this post until the orders of the President of the United States can be given in the case. It is supposed that Rogers, the man this day arrested, comes within the scope of that order. I have, therefore, to request that you will inform me of facts charged against him, that I may be enabled to lay the case fully before the authorities at Washington.[129]

This letter is not signed, and only the name of the addressee and not the sender is given. Another letter in the logbook for this period, which was similarly not signed, also indicated that it had not been sent,[130] and this is likely the case with this letter as well.

Immediately after the unsigned letter in the logbook is a second letter with the same date. This letter is also from Fort Gibson to Butler, and also concerns the *Rogers* case. The second letter does not mention the Cherokee citizenship of the defendant or the President's order, but instead simply states that, "the man Rogers, who has since been arrested, was a white man, and charged with the murder of another white man in the Cherokee Nation."[131] The letter then asks Butler to provide facts and the names of witnesses for the District Attorney at the federal court in Little Rock, so that Rogers could be sent to Little Rock for trial that Saturday.[132] Unlike the

127. *Id.*

128. CHEROKEE ADVOC., Apr. 17, 1845, at 3.

129. Letter to Pierce M. Butler, Apr. 2, 1845, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 222.

130. Letter, July 28, 1846, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 322 (marking unaddressed letter "annulled").

131. Letter from Lieutenant Colonel Mason to Pierce M. Butler, Apr. 2, 1845, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 223.

132. *Id.*

preceding letter, Lieutenant Colonel Mason, the commander of the fort, signed this one.

This exchange was followed by a flurry of letters in which Mason sought to build the record against Rogers and speed his transfer to federal court. On April 4, 1845, Mason wrote to Butler that Rogers had been arrested pursuant to an oral request by Mr. M. Duval, who had been acting Cherokee agent during Mr. Butler's absence from the territory.[133] The letter asked for the request in writing so that it could become part of the record.[134] If the written request was provided, it has not been recorded. Instead, it appears that Butler questioned the legality of federal jurisdiction and urged Mason to hold Rogers until this question could be resolved. On April 5, Mason responded:

> I do not think I have any right to detain [Rogers] longer than a reasonable time preparatory to sending him to the civil authority ... Rogers has either been arrested rightfully or wrongfully—if rightfully, the law will do justice; if wrongfully, I will not increase that wrong by keeping him a prisoner longer than I can turn him over to the civil authority.[135]

The same day Mason wrote another letter on the same point, apparently responding to a suggestion by Butler that Mason should "keep him some two or three weeks until [Butler heard] from the district attorney."[136] Mason, however, insisted that

> [I have] no authority to detain for an indefinite period until legal and doubtful questions are settled .... If there be any law or treaty stipulation by which the Cherokees can demand a white man from any U.S. Indian Agent or other officer then I suppose Rogers could be delivered up to them at Little Rock, as well as here .... These are not points for me but the proper law officers to decide.[137]

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133. Letter from Lieutenant Colonel Mason to Pierce M. Butler, Apr. 4, 1845, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 225.

134. *Id.*

135. Letter from Pierce M. Butler to Lieutenant Colonel Mason, Apr. 5, 1845, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 226.

136. *Id.*

137. *Id.*

That day, Mason sent Rogers to Little Rock.[138] Both Butler and Mason apparently spent some effort to form their own opinions as to these "doubtful and legal questions." On April 7, 1845, Mason wrote Butler saying that he had turned Rogers in and that he had received Butler's book of treaties, and asking Butler to return Mason's "as promised some time since."[139]

As the last comment suggests, personal animosity colored Mason and Butler's disputes over jurisdiction in Indian country. The previous December, Butler had moved his agency from Fort Gibson in order to be farther from "one or two commanding officers at Fort Gibson" with whom it was "impossible to preserve peace and quiet.... Law or restraint finds no favor with an arbitrary officer on the frontier, long unaccustomed to any control but his own will."[140] It seems, however, that Mason could give as good as he got: When Butler charged that commissioned officers participated in prostitution and drinking with the Cherokees around the fort, Mason retorted that "if the reports through the Country be true, the same charge applies to the Cherokee agent."[141]

But far more was at stake than personal animosity. The dispute regarding the disposition of Rogers' case involved sharply diverging understandings of federal and tribal power in Indian country. The existence of the fort was a sore point with the Cherokee government, which felt that the presence of soldiers encouraged trafficking in alcohol and prostitution as well as federal interference with Cherokee affairs. Agent Butler, who was popular among the Cherokees, seems to have shared this view. This ongoing dispute was at a head at the time of Rogers' arrest. A few weeks earlier, in retaliation for the death of a soldier in a fight at the home of a Cherokee woman, eight or ten soldiers had burned the woman's home to the ground and clubbed her and other women as they fled the fire.[142] When Rogers was arrested, the accused soldiers were

138. *Id.* at 227.

139. Letter from Lieutenant Colonel Mason to Pierce M. Butler, Apr. 7, 1845, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 228-29.

140. Letter from Pierce M. Butler to T. Hartley Crawford, Dec. 1844, Nat'l Archives, Washington, D.C., RG 75, M234, Roll 91, at 91 (letter is undated, but is logged after a letter of December 6, 1844 and before Butler's removal on December 21, 1844).

141. Letter from Lieutenant Colonel Mason to Pierce M. Butler, Apr. 30, 1845, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 230.

142. CHEROKEE ADVOC., Mar. 20, 1845, at 3.

being held at the Fort awaiting their journey to the Little Rock court.[143]

The incident inspired outrage among the Cherokees and calls for the removal of the fort.[144] These complaints only increased the resentment of the military, as exemplified in the following editorial from an anonymous "Officer of the Army," who claimed that "[t]he military would gladly quit the Territory and leave you all to the part of Kilkenny-cats," the legendary Irish cats who loathed each other so much that they fought until nothing was left of either but their tails.[145] According to the officer, the soldiers complained that their commanders indulged the Cherokees,

> regarding them ... as making a feeble effort, which ought to be encouraged, to rise from their degradation. How have you met this disposition to aid you? In the spirit of the Negro, who regards the indulgence of a master as a license for the commission of all kinds of excesses ... [, m]ay [the Cherokees] be freed from the burdensome protection of the United States and be left to their boasted refinement.[146]

Any respect for Cherokee legal rights also would have posed a personal threat to Lieutenant Colonel Mason. The week before Rogers' arrest, the *Cherokee Advocate* had published an 1843 speech by Mason objecting to the admission of Indian testimony in a military proceeding against him.[147] Mason had argued that if this precedent were established, "you will soon see a plenty of charges with no other witnesses to support them but Indians," and every Indian who felt his rights or dignity violated would bring a case.[148] Those with an axe to grind against the military could purchase Indian testimony with a "barrel of whiskey."[149] He continued,

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143. Letter from Lieutenant Colonel Mason to Pierce M. Butler, Apr. 1, 1845, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 222.

144. Letter from Lieutenant Colonel Mason to John Prentiss, Nov. 14, 1845, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 221 (claiming that Butler instigated calls for removal for "selfish and vindictive purposes").

145. CHEROKEE ADVOC., May 15, 1845, at 3. William Ross, in responding to the letter, called the anonymous officer Captain Wood. *Id.*

146. *Id.*

147. CHEROKEE ADVOC., Mar. 27, 1845, at 3.

148. *Id.*

149. *Id.*

"[s]oured as ignorant Indians generally are against the military, (the Cherokees and Seminoles who have been removed to this country at the point of bayonet, in particular,) if you establish that they are *legal* witnesses—who of us are safe?"[150] Such opinions doubtless influenced Mason's determination that white men could not safely be turned over to the Cherokee courts.

With Rogers in federal custody, Mason's wishes prevailed. Within two weeks after his arrest, Rogers was sent to Little Rock with the soldiers. An officer went with them to act as a witness against the soldiers, but no witnesses went to present evidence against Rogers.[151] The practice of the court was to dismiss defendants if the prosecution could not present witnesses against them,[152] and the soldiers sent with him were soon "discharged for want of testimony."[153] But the *Rogers* case was not dismissed for lack of evidence. This may have been because the trial court judge felt the case could be dismissed on other grounds. Or it may have been that both the trial and appellate court judges wanted the case to be heard by the Supreme Court, regardless of the legality of the indictment.

On April 18, 1845, Rogers, apparently pro se, pled that because of his Cherokee citizenship, the federal courts had no jurisdiction over him at all.[154] Although the Supreme Court quickly dismissed the suggestion that men like Rogers were included in the definition of "Indian,"[155] this resolution was not so obvious to either the executive branch or the lower courts. In the fall of 1843, the Cherokee Nation had tried a white man, Jacob West, for participating in the murder of a Cherokee and sentenced him to death.[156]

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150. *Id.*

151. Letter from Lieutenant Colonel Mason to Samuel H. Hempstead, Apr. 5, 1845, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 227.

152. Letter from Lieutenant Colonel Mason to Pierce M. Butler, *supra* note 143; *see also* CHEROKEE ADVOC., May 22, 1845, at 3 (reporting that "it is almost impossible to get testimony against offenders ... [who] so often get off unpunished after a short confinement in jail, that the fact of a culprit being sent to Little Rock for trial amounts in public estimation almost to an acquittal").

153. CHEROKEE ADVOC., May 15, 1845, at 3 ("So the rascals go unwhipt of justice.").

154. Plea to Jurisdiction, United States v. Rogers, 45 U.S. (4 How.) 567 (1846) (No. 114), *microformed on* U.S. Supreme Court Records and Briefs (Scholarly Resources, Inc.).

155. *Rogers*, 45 U.S. at 572-73.

156. COMM'R INDIAN AFFAIRS ANN. REP. 1844, S. EXEC. DOC. NO. 28-2, at 457 (2d Sess. 1844).

After West filed a writ of habeas corpus with the federal district court in Little Rock, "[t]he judge decided that West, by marrying an Indian, and living in the Indian country, had, for all legal purposes, become one of the tribe. The application was refused, and West was hung."[157] In the fall of 1844, the Acting Superintendent of the Western Territory reported this case with consternation to the Commissioner of Indian Affairs, saying it was "important that the officers and agents of the Indian Department should understand this matter distinctly in all its bearings."[158] Would all tribes come within the same rule? Might the Osages "be suffered to scalp any white man married among them, whenever, according to their peculiar customs, he may have incurred that penalty?"[159] Could white men conversely insist that they were not subject to federal jurisdiction, and that the federal government could not regulate their presence in Indian country absent a request from the tribe?[160] The superintendent did not assert that the decision was wrong under the law, but rather pointed to a need for the legislature to define "with greater precision, the rights of white men in the Indian country."[161]

The day before Rogers was sent to Little Rock, the *Arkansas Banner* had reported an even more closely related case.[162] According to the report, Judge Benjamin Johnson, the judge presiding over the District Court for the District of Arkansas, had heard a case involving the federal prosecution of Harvey Wyatte, an intermarried white man, for allegedly passing counterfeit gold eagles.[163] The court held that the federal courts had no jurisdiction, and ordered the man turned over to the Cherokee authorities.[164] Although the decision was not reported, the paper quoted the judge as remarking

> that a citizen of the United States might expatriate himself and become a citizen of the Cherokee Nation, in any form that the government of that Nation might prescribe or recognize—and

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 458.
162. ARK. BANNER, Apr. 16, 1845, *reprinted in* CHEROKEE ADVOC., May 1, 1845, at 3.
163. *Id.*
164. *Id.*

> then he would be an *Indian* within the meaning of the act of Congress, amenable to the laws, and subject to the jurisdiction of the Courts of that Nation, and without the jurisdiction of the Courts of the U.S.[165]

In making his argument in Little Rock, therefore, Rogers faced a judge who had upheld an identical argument a few weeks earlier. Unfortunately for Rogers, however, Justice Peter Daniel was in Little Rock at the time. During this period U.S. Supreme Court justices served double duty as circuit judges for the various appellate courts.[166] Justice Daniel, much to his displeasure, rode circuit for Arkansas and Missouri, and was required to sit in the Little Rock court for the last two weeks of April every year.[167] Daniel and Johnson were unable to agree on whether the court had jurisdiction over Rogers. Pursuant to the law in effect at the time, this resulted in their questions being certified directly to the Supreme Court.[168]

Both the Cherokee and Arkansas communities recognized the importance of the case. The *Cherokee Advocate* incorrectly concluded that the refusal to turn Rogers over to Cherokee authorities was motivated by a belief that "a citizen of the United States by birth ... is not subject to the laws of the Cherokee Nation."[169] This principle was felt to be "repugnant to the plainest dictates of common justice."[170] It editorialized that the case involved "questions of paramount importance to [Cherokee] social and political relations."[171] If Cherokee jurisdiction was not upheld, the *Advocate* continued, the

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165. *Id.*

166. JOHN P. FRANK, JUSTICE DANIEL DISSENTING: A BIOGRAPHY OF PETER V. DANIEL, 1784-1860, at 275 (1964).

167. *Id.* at 275-76.

168. Judiciary Act of 1793, ch. 22, § 2, 2 Stat. 333, 334 (1793). There was thus no judgment or opinion in the case when it went before the Supreme Court. Although there is an 1845 circuit court opinion, *United States v. Rogers*, 27 F. Cas. 886 (C.C.D. Ark. 1845) (No. 16,187), this opinion was authored by Justice Taney, not Justice Daniels, and is identical to the Supreme Court opinion announced on March 12, 1846. *See* United States v. Rogers, 45 U.S. (4 How.) 567, 571 (1846). It appears that the circuit court opinion is not, in fact, an earlier opinion, but that it is the Supreme Court opinion postdated by the U.S. Attorney for Arkansas, Samuel H. Hempstead, in compiling the decisions. *See Rogers*, 27 F. Cas. at 886, 888.

169. CHEROKEE ADVOC., Apr. 17, 1845, at 3.

170. *Id.*

171. CHEROKEE ADVOC., May 22, 1845, at 3.

"enforcement of law and justice will be, beyond remedy, extremely partial and that the foundations of society, the peace and harmony of the Cherokee people will be shaken to their centre, perhaps entirely uprooted."[172]

The non-Indian take on the case was no less dramatic. The Arkansas press agreed that the peace of their community depended on the decision, but, for them, peace required federal jurisdiction: "Of this much, we can be sure, if the present law of Congress denies to the court jurisdiction in such cases, it ought to be amended, and jurisdiction conferred beyond a doubt. The peace of the frontier, and the enforcement of law and justice require this."[173] According to U.S. Attorney Hempstead, "if the plea was sustained, it would be an encouragement to our worthless citizens to harbor among them, for the purpose of freeing themselves from the rigor of the laws of the United States."[174]

2. Fabricating a Jurisdictional Gap

The need for federal jurisdiction to control unscrupulous white men echoed arguments that policymakers had been making and would continue to make for years: Such men must be controlled, not only to protect the frontier citizens, but also to protect the tribes and fulfill federal responsibilities to them.[175] Although white intruders had been and continued to be a significant problem for Indian peoples, policymakers needed to make two further assumptions to justify federal jurisdiction: first, that the tribes were in favor of federal jurisdiction over their naturalized citizens, and second, that there were no tribal justice systems that could or should do the job.[176]

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172. *Id.*

173. ARK. ST. GAZETTE, Apr. 21, 1845, at 2.

174. *Id.*

175. *See, e.g.*, COMM'R INDIAN AFFAIRS ANN. REP. 1843, S. DOC. NO. 28-1 (1st Sess. 1843); ROGER H. TULLER, "LET NO GUILTY MAN ESCAPE": A JUDICIAL BIOGRAPHY OF 'HANGING JUDGE' ISAAC C. PARKER 5 (Univ. of Okla. Press 2001) (declaring that federal court had done "more than all agencies ... to make civilization a reality in the Indian country").

176. See, for example, the message of the President of the United States on extending federal jurisdiction into Indian country: "Such a modification of existing laws is suggested, because, if offenders against the laws of humanity in the Indian country are left to be punished by Indian laws, they will generally, if not always, be permitted to escape with impunity." H.R. DOC. NO. 29-185, at 2 (1st Sess. 1846); *see also* CHEROKEE ADVOC., Jan. 9,

Both assumptions were unfounded. First, the Cherokee government was wholly opposed to federal jurisdiction over intermarried white men. The Cherokee press, as we have seen, was very much against federal jurisdiction in *Rogers*. Even after the case had been decided, the Cherokee government continued to argue that neither the Cherokee treaty nor the Trade and Intercourse Act permitted federal jurisdiction over naturalized Cherokee citizens.[177] In 1853, the Cherokees sent a delegation to Washington to complain that the exercise of federal jurisdiction over adopted whites and blacks was "unjust, it is an incompatible power—it is harassment—it is oppressive—and in its process it is abolishing the Cherokee government."[178] Upholding such jurisdiction, the delegation argued, was not only contrary to the treaty between the United States and the Cherokee government, but also to the tenor of the Trade and Intercourse laws, whose administration had been distorted by the conflicting interests of the border states.[179] Equally telling, the 1861 Cherokee treaty with the Confederate States of America, a treaty which John Ross called the strongest he had ever negotiated, specifically provided that adopted citizens would not be subject to the jurisdiction of the Confederacy.[180] The Cherokee government, therefore, certainly did not feel jurisdiction was necessary to save it from the dangerous white men.

1845, at 3 (reprinting speech of Secretary of War that federal government must intervene to "save the minority from the barbarity of '*Indian law*'").

177. Even at that late date, the question of jurisdiction over adopted citizens was not yet resolved. As discussed below, it certainly was not resolved for the Cherokees, who continued to insist that the federal government had no jurisdiction over any Cherokee citizens, whatever their race. It also was not resolved in the courts. When the issue of jurisdiction over an intermarried white man came before the Arkansas district court in 1847, the court construed an 1846 treaty to divest the court of jurisdiction in the case. United States v. Ragsdale, 27 F. Cas. 684, 686 (C.C.D. Ark. 1847) (No. 16,113). In fact, when the question came before the Supreme Court again in 1897, the Court went in the opposite direction, holding that the Court did not have jurisdiction over two Cherokees by blood who had killed an intermarried white man because the victim came within the Indian against Indian exception. Nofire v. United States, 164 U.S. 657, 661-62 (1897).

178. Petition of Elijah Hicks and William Adair, Apr. 15, 1853, Nat'l Archives, Washington, D.C., RG 75, M234, Roll 96, at 299.

179. Letter from Elijah Hicks to William Manypenny, June 8, 1853, Nat'l Archives, Washington, D.C., RG 75, M234, Roll 96, at 309.

180. 1 DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979, at 669 (Vine Deloria, Jr. & Raymond J. DeMallie eds., 1999).

Turning to the second assumption, despite Cherokee objections, was federal jurisdiction nevertheless necessary to preserve the peace? Newspaper and government reports portrayed Indian country in general and Cherokee country in particular as a lawless place, a haven for fugitives from justice of all races.[181] Greater federal or state control might have been necessary to address this turmoil. Again, however, the truth was just the opposite: it was the land immediately outside the borders of the reservation that was the haven for outlaws, and federal interference and restrictions on tribal jurisdiction were to blame.

At the time *Rogers* was decided, the Cherokee Nation had an established police force, nine judicial districts, appellate courts, and a supreme court.[182] Criminals were tried before juries,[183] who appear to have been scrupulously insistent on adequate evidence before conviction. The *Cherokee Advocate* regularly reported on the murder trials taking place in the Cherokee courts; a review of these reports shows that a majority of the defendants tried at this time were acquitted of the charges,[184] a figure that gives the lie to popular reports of the vengeful nature of the Cherokees. Further evidence of the balanced nature of Cherokee justice is provided by the transcription of an 1840 murder trial by a white reporter, John Howard Payne.[185] The judicial instructions can only be read as encouraging the faithful pursuit of truth and justice, including the admonition that "it is better for ten guilty to escape than for one

181. *See, e.g.*, TULLER, *supra* note 175, at 3-4.

182. THE CONSTITUTION AND LAWS OF THE CHEROKEE NATION: PASSED AT TAHLEQUAH, CHEROKEE NATION, 1839-51, at 21-26 (1852) [hereinafter LAWS OF THE CHEROKEE NATION], *reprinted in* 5 THE CONSTITUTIONS AND LAWS OF THE AMERICAN INDIAN TRIBES (Scholarly Resources, Inc. 1973).

183. *Id.* at 21.

184. A review of these reports over a six month period in 1845, for example, shows that five out of seven cases ended in acquittal or failure to reach a verdict. *See* CHEROKEE ADVOC., Feb. 2, 1845 (one defendant convicted and one acquitted); CHEROKEE ADVOC., Feb. 13, 1845 (man convicted for murder of wife; two acquitted); CHEROKEE ADVOC., Apr. 17, 1845 (man acquitted for murder); CHEROKEE ADVOC., May 15, 1845 (acquittal for murder); CHEROKEE ADVOC., May 29, 1845 (defendant escaped after being tried twice without a verdict; another defendant tried and acquitted); CHEROKEE ADVOC., July 24, 1845 (acquittal for murder). This phenomenon is perhaps in line with that in American courts in the nineteenth century, in which acquittal rates were higher than today. LAURENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 283-84 (2d ed. 1986).

185. *See generally* JOHN HOWARD PAYNE, INDIAN JUSTICE: A CHEROKEE MURDER TRIAL AT TAHLEQUAH IN 1840 (Grant Foreman ed., Univ. of Okla. Press 2002).

who is innocent to suffer."[186] The first jury, moreover, was unable to agree on a verdict. The second jury was also undecided until they themselves questioned the witnesses as to what they saw. This account of Cherokee justice is even more striking in light of the fact that the defendant was a member of a minority that had signed the fraudulent 1835 removal treaty and that was still protesting against the legitimacy of the Cherokee government,[187] and in whose name the federal authorities insisted that Cherokee law could not be

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186. *Id.* at 46. Judge Price was too ill to preside over the second trial, and was replaced by the Chief Justice of the Cherokee Supreme Court, Jesse Bushyhead. *Id.* at 49-50. Justice Bushyhead's instructions also demanded that the jury decide according to the facts before them and not prejudice:

> In carefully sifting this evidence and in concluding upon the case, I would farther [sic] enjoin upon you, Jurors, and that emphatically, to remember that the only point which you have a right to consider in this matter is the charge against Archilla Smith for murdering John MacIntosh. Whatever you may know or have heard about him or his actions or his character before, must be dismissed entirely from your minds. You break your oath if you allow any impression whatever to mingle with the proofs for or against this single charge. You break your oath equally if you permit the political difficulties under which the nation laboured not long since, and to which the counsel on both sides have made some allusion, in any way to influence your judgment. You have no right to believe evil of Archilla Smith, because you may object to his course in politics;—you have no right to shrink from condemning him, if guilty, from the fear that your condemnation may be ascribed to political prejudices. You must keep yourselves equally free from the desire to be vindictive or to show mercy;—the one would make you the criminal instead of him whom you would condemn;—the other is the prerogative of a department of our government, to which we have ourselves prescribed regulations for its exercise. Your duty bids you examine testimony; and to give your honest verdict fearlessly, whenever you are convinced; and may you be guided to such a judgment as your conscience may never hereafter disapprove.

Id. at 69-70. After several days of deliberation, the jury asked for instructions on how to evaluate the evidence. In response, Justice Bushyhead cautioned the jury about the dangers of relying on circumstantial evidence: "No matter how strong the proofs may appear, it is never prudent to condemn upon evidence merely '*circumstantial.*' An act for which a life is to be forfeited, should be seen and seen by more than one." *Id.* at 78. These instructions are all the more striking when contrasted with the instructions of Judge Isaac Parker, who became the federal judge for the area in 1876. He was of the belief that scruples as to law and evidence often got in the way of justice, and expressed this belief through jury instructions as much as seventy pages long, with frequent admonitions about biblical justice. For example, he instructed a jury in a murder trial that any claim that a criminal should not be convicted on circumstantial evidence alone was "a declaration of either fools or knaves [or] sympathetic criminals." Hickory v. United States, 151 U.S. 303, 310 (1894).

187. *See* PAYNE, *supra* note 185, at 1 n.11, 2.

trusted. It seems that contrary to these reports, the Cherokee courts provided a measure of fairness that many governments might envy.

Other observers affirmed the efficiency of Cherokee justice. In 1844, the President appointed an independent commission to investigate claims of oppression by the Cherokee government. As part of this commission, Captain A. Cady prepared a report on the Cherokee laws.[188] In examining these laws, Cady wrote, he had "been forcibly impressed with the moderation, fairness, and evident regard to the general and individual rights and interests of the people affected thereby."[189] With two possible exceptions,[190] neither the laws nor their execution were unduly harsh or oppressive. Rather, they were "framed with much wisdom, and admirably adapted to the character and wants" of the Cherokee people.[191]

The federal agent to the Cherokees argued that although Cherokee justice was fair and efficient, federal justice was not. Reacting to a proposal to increase the federal role in preventing alcohol from entering Cherokee country, Agent Butler responded that federal interference would only hinder Cherokee enforcement of Cherokee laws against traffic in alcohol.[192] The agent was "decidedly of [the] opinion that all restrictive laws or arbitrary action by superior power is productive of evil consequences" and failed to stop trade in liquor.[193] During a period in which federal

188. The majority of the report of the commission was published as a government document and is reprinted in the official compilation of documents of the federal government as: WILLIAM WILKINS, THE REPORT AND CORRESPONDENCE OF THE BOARD OF INQUIRY, TO PROSECUTE AN EXAMINATION INTO THE CAUSES AND EXTENT OF THE DISCONTENTS AND DIFFICULTIES AMONG THE CHEROKEE INDIANS, S. DOC. NO. 28-140 (2d Sess. 1845). Captain Cady's separate report on the Cherokee laws is referred to as Appendix V of that report and the letter transmitting the full report specifically addresses the attention of the Secretary of War to this report, with which the full board concurred. *Id.* at 4 (letter from Adjutant General R. Jones to Secretary of War Wilkins). Despite this, Cady's report itself was not included in the published report. The reasons for this failure are not disclosed, but the omission may indicate that it contrasted too strongly with the dominant views of tribal justice systems. Fortunately, the *Cherokee Advocate* reprinted Captain Cady's report. *See* CHEROKEE ADVOC., June 21, 1845, at 3.

189. CHEROKEE ADVOC., June 21, 1845, at 3.

190. The first exception was the possibility that a decades old law declaring salines, or salt-producing lakes, on Cherokee land the common property of the nation might be interpreted to include artificially created salines, and the second was the law providing that the signers of the false 1835 treaty were outlaws to the nation. *Id.*

191. *Id.*

192. COMM'R INDIAN AFFAIRS ANN. REP. 1844, S. DOC. NO. 28-2, at 459 (2d Sess. 1844).

193. COMM'R INDIAN AFFAIRS ANN. REP. 1845, S. DOC. NO. 29-1, at 511 (1st Sess. 1845).

enforcement of the non-intercourse laws was suspended, he claimed, "it was ascertained that as little or less liquor was introduced during its suspension than there was under its operation."[194] The military construction of the intercourse law, on the other hand, was "as variable as the climate is changeable."[195]

Federal forces also directly prevented the Cherokees from enforcing their laws, making it far more difficult for the Cherokee police to capture lawbreakers. The military post at Fort Gibson prevented the Cherokee police from crossing the line into Arkansas to pursue fleeing criminals,[196] but rarely captured the criminals or turned them over to Cherokee authorities themselves.[197] For one notable period they even provided refugees from the Cherokee government with food and assistance.[198]

These actions created a haven for outlaws along the Cherokee/Arkansas border. During the 1840s, the Cherokee nation was tormented by a group of "banditti" that committed numerous crimes in Cherokee country[199] but eluded capture by the Cherokee police and resided with impunity among the residents of Arkansas.[200] The facts of the *Rogers* case are emblematic of this situation. Rogers escaped justice for many months after the murder, not by hiding deep within Cherokee territory, but by dodging along the line, first in Cherokee territory then in Arkansas. Although the Cherokee Agent had asked the military to help capture him, it was the Cherokee sheriff that finally did so.

Even when federal justice was administered, it was very partial. In 1846, the Superintendent of the Western Territory reported that although the crimes by whites against Indians were "doubtless very

194. *Id.*

195. COMM'R INDIAN AFFAIRS ANN. REP. 1844, S. DOC. NO. 28-2, at 463.

196. MCLOUGHLIN, *supra* note 65, at 104; Letter from Lieutenant Colonel Mason to John Prentiss, Nov. 14, 1845, Nat'l Archives, Washington, D.C., RG 94, M1466, Roll 1, at 262 (suggesting that Prentiss send out both dragoons to prevent Cherokees from crossing the border to capture bandits).

197. *See* CHEROKEE ADVOC., May 1, 1845, at 3.

198. H.R. DOC. NO. 29-185, at 162-64 (1st Sess. 1846) (printing a Dec. 1, 1845 report entitled, *Report and Resolutions Made by a Select Committee, and Unanimously Adopted by the National Council of the Cherokee Nation, Respecting Disturbances and the Extraordinary Course and High-Handed Conduct of Brigadier General Arbuckle*); *see also* MCLOUGHLIN, *supra* note 65, at 51.

199. *See* S. DOC. NO. 28-140, at 9-10 (2d Sess. 1845).

200. CHEROKEE ADVOC., Jan. 15, 1846, at 3.

numerous," he did not recollect "a single instance of a white man having been tried and punished, under the [Trade and Intercourse Act], for a crime against the person or property of an Indian," in the seven years he had been Superintendent.[201]

Nor did the record improve once federal jurisdiction was better established. Between 1875 and 1896, the Western District of Arkansas presided over seventy-nine hangings under Judge Parker, who earned the sobriquet "Hanging Judge Parker."[202] As far as it is possible to tell from the accounts of these hangings, in not one was the defendant tried for a crime against an Indian.[203] Many of the defendants, however, were Indian and there is evidence that they had little reason to trust the justice that the court dispensed. When the marshals informed one full-blood Cherokee that he was being charged with the murder of a white man, for example, he seemed to know what would be his fate: "Don't take me to Fort Smith; kill me right now."[204] Another Cherokee, Smoke Mankiller, who spoke no English, declared through his interpreter to the crowd waiting to see him hanged: "I did not kill Short; I would admit it if I did. I stand before you convicted by prejudice and false testimony."[205] Jack Spaniard, half-Cherokee and half-Spanish, was convicted by a jury on purely circumstantial evidence after only an hour of deliberation.[206] Whatever federal jurisdiction provided the Cherokees, it was neither protection nor justice.

3. Prosecuting the Dead Defendant

With all of the attention to the case at the time it was argued in Arkansas, it might be surprising that neither the Arkansas nor Cherokee press even mentioned the decision of the Supreme Court

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201. S. DOC. NO. 29-461, at 6-7 (1st Sess. 1846).

202. *See* TULLER, *supra* note 175, at 3-4.

203. SHIRLEY, *supra* note 113, at 209-31 (describing crimes). To be fair, the defendants might be *accused* of crimes against Indians. Nevertheless, it was their subsequent crimes against non-Indians that brought them into court.

204. *Id.* at 222.

205. *Id.* at 238.

206. *Id.* at 225. This was likely due in part not only to prejudice of the jury, but also the judicial philosophy of Judge Parker, who believed that punishing those he believed to be guilty was more important than technicalities of law and evidence. His jury instructions, between twenty and seventy pages in length, almost invariably were reversed as prejudicial when reviewed by the Supreme Court. *See id.* at 184, 239-42 (summarizing appeals).

the following March. On closer examination, however, the reason for this omission seems clear: Both communities knew that Rogers had died shortly after first appearing in the Little Rock court and understandably assumed that the case had ended with his life.

On May 12, 1845, Rogers and another prisoner escaped from the Little Rock jail.[207] The other man was soon recaptured but claimed that Rogers had drowned trying to swim across the Arkansas River to freedom.[208] Although the authorities initially thought that he was lying to help Rogers in his escape, Rogers' drowned body was recovered two days later.[209] The Cherokee and Arkansas newspapers quickly reported this fact,[210] and the local U.S. Attorney knew it as well, noting it in his compilation of cases arising from the Arkansas court.[211] It was not until July 28th, over two months later, that the district court clerk in Little Rock certified the record on appeal for the Supreme Court.[212] The record failed to mention, however, that the defendant was long dead. When the Supreme Court heard arguments in the case the following March, U.S. Attorney General John Mason argued the case for the United States, but (not surprisingly) no one argued for the defendant.[213] Although the decision referred to the Court's expectation that Rogers would be tried,[214] the Attorney General must have known that this would not and could not happen. It seems clear that the executive branch had knowingly gone through the time and expense of arguing before the Supreme Court for its right to prosecute a man who was at the time ten months dead.

Federal Indian law has often been made in the absence of the people it most intimately affects.[215] The *Rogers* case is a unique

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207. ARK. ST. GAZETTE, May 19, 1845, at 2.

208. *Id.*

209. *Id.*

210. *Id.*; CHEROKEE ADVOC., June 5, 1845, at 2.

211. *See* United States v. Rogers, 27 F. Cas. 886, 890 n.2 (C.C.D. Ark. 1845) (No. 16,187) (reporting that Rogers drowned before the Supreme Court case was decided).

212. *See* Clerk's Certificate, United States v. Rogers, 45 U.S. (4 How.) 567 (1846) (No. 114), *microformed on* U.S. Supreme Court Records and Briefs (Scholarly Resources, Inc.).

213. FRANK, *supra* note 166, at 284. Given the lack of a recognized right to appointed counsel at the time and the distance from Little Rock, the lack of representation would not have raised eyebrows in the Court. *Id.*

214. *Rogers*, 45 U.S. at 573-74.

215. Perhaps the case that resonates most closely with the *Rogers* story is *Ex parte Crow Dog*, 109 U.S. 556 (1883), which led to congressional extension of federal law over internal

exemplar of this absence. This prosecution of a dead white Indian was not only well calculated to prevent a full understanding of the law and facts of the case, but also was illegal.

It is clear today that federal courts have no power to decide cases regarding the rights of dead criminal defendants.[216] It is also unquestioned that if the parties on both sides of a case do not have an actual interest in its outcome, the federal courts have no power to hear it.[217] Outside certain limited exceptions,[218] it is not enough that a live controversy existed when the case began: if the controversy between the parties no longer exists at the time of appeal, it is moot.[219]

Although the constitutional basis for this rule may not have been established at the time *Rogers* was decided, the rule itself certainly had. As early as 1736, English courts had held that attempting to feign a dispute in order to have it decided by the courts constituted contempt of court.[220] In 1810, Supreme Court Justice Johnson

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Indian affairs. As discussed further below, the matter already had been resolved under Brûlé Sioux law, but was used by the executive branch in the absence of any real controversy to further its campaign to obtain jurisdiction over crimes between Indians. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 100-41 (1994). There are, however, many more examples. *See, e.g.*, Beecher v. Wetherby, 95 U.S. 517, 525-27 (1877) (establishing the principle that would ultimately allow the federal government to take aboriginal title without being subjected to the Fifth Amendment Takings Clause in a timber dispute between two white men); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 603 (1823) (establishing U.S. title to Indian land in a controversy between two non-Indian claimants); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 121-25 (1810) (discussing Indian property rights in a feigned case between collusive land speculators); *see also* Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 LAW & HIST. REV. 67, 98-101 (2001) (arguing that *Johnson v. M'Intosh* was a feigned case).

216. *See* Mintzes v. Buchanon, 471 U.S. 154, 154 (1985).

217. *See* Honig v. Doe, 484 U.S. 305, 317 (1988) ("[T]his Court may only adjudicate actual, ongoing controversies.... That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires.").

218. *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 51-52 (1991) (holding class action not moot where any class members still have live claims although class representative's claims now moot); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976) (finding case not moot where capable of repetition yet evading review).

219. *See Honig*, 484 U.S. at 317.

220. *See* Coxe v. Phillips, 95 Eng. Rep. 152, 152 (K.B. 1736); *see also In re* Elsam, 107 Eng. Rep. 855, 856 (K.B. 1824) (fining plaintiff in feigned case forty pounds and ordering imprisonment until paid even though he did not intend fraud). Although the English courts would hear certain "feigned cases"—cases where the controversy giving the court jurisdiction

reiterated this rule in *Fletcher v. Peck*, stating that he had been "very unwilling" to decide that case, because it bore marks of being "a mere feigned case," and, he declared, "[i]t is our duty to decide on the rights, but not on the speculations of parties."[221] Only his belief that honorable attorneys would not seek to violate this rule persuaded him to decide the case: "My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court."[222]

Four years after deciding the *Rogers* case, Justice Taney made this point even more forcibly in *Lord v. Veazie*.[223] In *Veazie*, the Court dismissed a writ of error because there was no real dispute between the parties.[224] According to Justice Taney:

> [A]ny attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real

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over the dispute was fictitious—an attempt to bring a feigned case without the knowledge and permission of the court was punishable as a contempt of court. *See, e.g.*, Hoskins v. Berkeley, 100 Eng. Rep. 1086, 1086 (K.B. 1791). For origins of the feigned case in England, see Lindsay G. Robertson, *"A Mere Feigned Case": Rethinking the* Fletcher v. Peck *Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249, 260.

221. 10 U.S. (6 Cranch) 87, 147 (1810).

222. *Id.* at 147-48. There is good evidence, of course, that this belief was unjustified, and that the parties mutually agreed to create the suit for purposes of establishing that their title was valid despite a Georgia act invalidating land purchases including the land at issue. *See* NEWMYER, *supra* note 61, at 225. There is also no reason to believe that either Justice Marshall or Justice Johnson was deceived as to the feigned nature of the case. Justice Marshall was a savvy politician, not easily duped by his trust in human honor. It is more likely that Marshall knew the suit was collusive, but used it as a vehicle to resolve an important point of law, and that Johnson was using his concurrence to accuse Marshall of countenancing this collusion. *See Fletcher*, 10 U.S. at 233 (Johnson, J., concurring). By 1846, however, the assertion that the Court could not decide a feigned suit and that honorable attorneys would not seek to impose one upon the Court was firmly established despite the reality taking place behind the opinion. *See* Robertson, *supra* note 220, at 263 (suggesting that the use of feigned cases was accepted in the period before *Fletcher* but that popular opinion had turned against them by the time the case was decided).

223. 49 U.S. (8 How.) 251 (1850).

224. *Id.* at 254. Nathaniel Lord had sued John Veazie concerning a covenant purporting to transmit Veazie's right of way on the Penobscot River to Lord. *Id.* at 252. The issue in the suit was not whether Veazie had refused to transmit the right to Lord, but whether Veazie had the right of way at all, the state having awarded an exclusive right of way to William and Daniel Moor, who were not named in the suit. *Id.* at 251. The Circuit Court of the United States for the District of Maine had issued an order *pro forma* in favor of the defendant so that the case might be heard on writ of error to the Supreme Court. *Id.* at 256.

> and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.[225]

The circuit court judgment upon which the writ of error was based was also invalid: "A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it."[226]

When *Rogers* was heard, moreover, numerous state supreme court opinions had also established that where events subsequent to the commencement of a suit had ended the controversy between the parties, the case could not be heard.[227] In the decades after the *Rogers* decision, the U.S. Supreme Court would accept without question the principle that the Court "does not sit here to decide questions arising in cases which no longer exist, in regard to rights which it cannot enforce."[228]

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225. *Id.* at 255.

226. *Id.* at 256.

227. In 1817, the New York Chancery Court refused to decide a lawsuit that had been settled except for the issue of costs, holding that "sound policy would seem to condemn" a decision on the merits of a case in which there was no longer any real controversy between the parties. Eastburn v. Kirk, 1 N.Y. Ch. Ann. 393, 393-94 (1817). In 1844, the Supreme Court of Illinois decided that where the defendant had relinquished his claim to a disputed property, and transferred it to the plaintiff, "[t]here was no subject matter left to be tried" and the appeal was correctly dismissed. Morgan v. Griffin, 6 Ill. (1 Gilm.) 565, 566 (1844). The Supreme Court of Louisiana ruled in 1843 that where, during the pendency of an action to remove a minor from the control of her grandmother, the minor had married and thereby legally freed herself from her grandmother's guardianship, "[i]t is clear, that the present appeal is now without any object, and that, under the circumstances, it should be dismissed at the costs of the appellant." *In re* Wilds, 6 Rob. 31, 31 (La. 1843). The U.S. Supreme Court finally did so as well, in 1861, by dismissing a writ of error because the appellant had purchased the interest of the appellee during the pendency of the suit. Cleveland v. Chamberlain, 66 U.S. (1 Black) 419, 419 (1861).

228. Cheong Ah Moy v. United States, 113 U.S. 216, 218 (1885) (dismissing challenge to deportation order where petitioner deported during pendency of suit); *see also* California v. San Pablo & Tulane R.R. Co., 149 U.S. 308, 314 (1893):

> [T]he court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

San Pablo & Tulane R.R. Co., 149 U.S. at 314; *cf.* Gardner v. Goodyear Dental Vulcanite Co., 131 U.S. 103 (1873) (dismissing writ where parties reached compromise during course of appeal); Wood Paper Co. v. Heft, 75 U.S. (8 Wall.) 333, 336-37 (1869) (dismissing writ of error

It was also very clear that a criminal appeal could not be heard after the death of the defendant. The rule at common law was that a suit abated at the death of either of the parties.[229] Although Congress modified this rule with respect to suits for compensation in 1789,[230] a cause of action that was punitive in nature did not survive the death of the defendant.[231] A criminal case thus ended with the life of the accused.[232]

By trying a dead white Indian in the Supreme Court, therefore, the Attorney General asked the Court to preside over a "nullity,"[233] contravening the rules observed by "respectable gentlemen,"[234] and committing an "abuse which courts of justice have always reprehended."[235] I will next examine the reasons behind this extraordinary step.

III. THE QUEST FOR FEDERAL POWER

In the *Rogers* case, the executive branch, likely aided by the district court in Arkansas, incurred time, expense, and risk of contempt of court to argue for its right to prosecute a dead man. Why was the federal government so eager to establish its power to exercise criminal jurisdiction in Indian country? Why was it so intent to establish its ability to say who was an Indian for purposes of federal law?

The answer is complex: The *Rogers* case came at a time when national military aspirations, the organizational interests of the developing Indian Department bureaucracy, and the growth of the scientific discipline of ethnology all converged to support the increase in federal power over individual Indians.

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where plaintiffs had purchased assets of defendants during pendency of suit); *Cleveland*, 66 U.S. at 425-26 (dismissing writ of error by appellant that had purchased interest of appellee and finding contempt of court).

229. *See, e.g.*, Macker's Heirs v. Thomas, 20 U.S. (7 Wheat.) 530, 531 (1822).

230. Judiciary Act of 1789, ch. 20, § 31, 1 Stat. 73, 90 (1789).

231. *See Ex parte* Schreiber, 110 U.S. 76, 80 (1884); *see also* Little v. Conant, 19 Mass. (1 Pick.) 527, 527 (1824); People v. Gibbs, 9 Wend. 29, 30 (N.Y. Sup. Ct. 1832); Reed v. Cist, 7 Serg. & Rawle 183, 183 (Pa. 1821).

232. List v. Pennsylvania, 131 U.S. 396, 396 (1888).

233. Lord v. Veazie, 49 U.S. (8 How.) 251, 256 (1850).

234. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147-48 (1810).

235. *Veazie*, 49 U.S. at 255.

A. Why Did the Court Go Along?

As discussed above, the rules announced in *Rogers* regarding federal power and tribal sovereignty constituted a significant break with the prior jurisprudence of the Court. Other scholars have blamed this disregard for precedent on the Court. In particular, authors have condemned Justice Taney for the *Rogers* opinion,[236] often linking its disregard for tribal rights to his dehumanization of African Americans in the infamous *Dred Scott* opinion.[237] The evidence suggests, however, that Taney did little more than rubber stamp the opinions presented to him by the Attorney General. Much of the opinion seems directly drawn from the arguments that U.S. Attorney Samuel Hempstead had made in Little Rock almost a year earlier.[238] Attorney General Mason probably contributed the rest of the opinion in his argument before the Supreme Court. Given the death of the defendant, there was no one to present Taney with an alternative opinion. The only argument against jurisdiction, therefore, was the one page objection that Rogers had drafted in his jail cell.

The disconnect between *Rogers* and Justice Taney's other comments on Indian law provides further evidence that Taney had little to do with writing the opinion. Famously, in *Dred Scott*, Justice Taney remarked that:

> The situation of [the African] population was altogether unlike that of the Indian race .... [The Indians] were yet a free and independent people, associated together in nations or tribes, and governed by their own laws .... These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day....[239]

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236. Rotenberg, *supra* note 16, at 420.

237. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); WILKINS, *supra* note 29, at 44; Frank Shockey, *"Invidious" American Indian Tribal Sovereignty*, 25 AM. INDIAN L. REV. 275, 284 (2001).

238. *See* ARK. ST. GAZETTE, Apr. 21, 1845, at 2.

239. *Dred Scott*, 60 U.S. at 403-04

Can this be the same man who wrote that Indian tribes had "never been acknowledged or treated as independent nations by the European governments" in the *Rogers* opinion?[240]

Dred Scott also turns the *Rogers* perspective on Indian property rights on its head:

> Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it.[241]

What had become of the view that tribal land could be "divided and parcelled out ... as if it had been vacant and unoccupied land"?[242] These reversals led to David Wilkins' apt demand that "the real Justice Taney please stand up."[243]

One might understandably read the disjunction between the *Rogers* and *Dred Scott* opinions as opportunistic. When the question was one of Indian rights, race was equivalent to political status, and tribal sovereignty was nonexistent. In *Dred Scott*, one could argue, the Court affirmed tribal sovereignty and divorced Indian race from status only to highlight their unity for the African American plaintiff.[244] It is hard to deny that Indian race and sovereignty are conveniently malleable depending on the federal needs at the

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

241. *Dred Scott*, 60 U.S. at 403-04.

242. *Rogers*, 45 U.S. at 572. In the one bit of evidence that Taney retained any memory of the *Rogers* opinion, he conceded that

> [i]t is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy.

Dred Scott, 60 U.S. at 404. This qualified expression of federal power is still a far cry from the expansive "dominion and control" asserted in *Rogers*. *Rogers*, 45 U.S. at 572.

243. WILKINS, *supra* note 29, at 49.

244. *See, e.g.*, Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2299 n.89 (1989) ("Perhaps the endorsement of Indian autonomy in *Dred Scott* had the sole purpose of comparing Indians with black people to the detriment of the latter.").

time.[245] While Taney was on the Court, however, he presided over several cases affirming Indian rights against those of non-Indians. Taney was Chief Justice when the Court issued its most powerful opinion on tribal property rights, declaring it "a settled principle, that [the Indians'] right of occupancy is considered as sacred as the fee-simple of the whites."[246] Two years before *Rogers*, Taney presided over the Court when it issued its opinion in *Ladiga v. Roland* affirming the duty of the federal courts to review and correct federal miscarriages of justice to the Indians.[247] In 1856, moreover, his Court prohibited state citizens from ejecting Indians even from lands to which the government had extinguished the Indian right of occupancy, holding that because the agreement to leave the lands had been made with the tribe "as a quasi nation, possessing some of the attributes of an independent people," only the federal government could remove them from the lands.[248]

In addition, in his brief tenure as Secretary of War, Justice Taney had written several opinions for the attorney general that were fairly respectful of Indian rights. In particular, Justice Taney appears to have articulated the method of interpreting Indian treaties that was a cornerstone of Justice Marshall's pro-tribal jurisprudence before Marshall himself did. Concerning the interpretation of the Choctaw Treaty of 1828, Justice Taney opined:

> In an instrument of this sort, and made with such persons as the Choctaws, I do not think that strict and technical rules of construction should be applied to it. It ought to be expounded liberally, according to its spirit, so as to give the Indians all the advantages and facilities in their removal, which appears to have been contemplated by the general scope and spirit of the treaty.[249]

This principle of liberal construction of Indian treaties would become one of the most influential elements of Justice Marshall's

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245. *See* Conference, *Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 608-11 (1996) (Professor Nell Newton speaking).

246. Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

247. 43 U.S. (2 How.) 581 (1844).

248. Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 371 (1856).

249. Choctaw Reserves Under Supplemental Treaty, 2 Op. Att'y Gen. 465, 467 (1831).

Cherokee opinions.[250] Marshall, however, would not articulate it until 1832—a year after Taney's letter.[251]

This divergence between Taney's other statements of Indian law and *Rogers* suggests that the case should not be considered as primarily an opinion about Indian law. For the Court, the case likely was not about federal power over tribes, but instead about the power of the federal government over the North American continent. On March 1, 1845, Congress had annexed Texas to the United States, a move quickly followed by military buildup by both sides on the U.S.-Mexico border.[252] On March 4, 1845, President Polk had declared the "unquestionable" right of the United States to Oregon,[253] whose ownership it had previously shared with the British. On December 2, 1845, President Polk used his first annual message to declare that the "continent [was] a unity" under American control.[254] The tensions with Mexico and Great Britain came to a head at the time *Rogers* was being argued before the Court, culminating in a declaration of war against Mexico in May 1846, and the establishment of the forty-ninth parallel between the United States and Canada that June.[255] The Court probably saw the *Rogers* case as one about federal power over North American territory—a question over which the country was about to enter one if not two wars, and hardly one over which the Court would wish to question the Attorney General.[256] For the Court, at least, the case

250. *See, e.g.*, Antoine v. Washington, 420 U.S. 194, 199 (1975) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), as origin of the canons of construction of Indian treaties); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 193-200 (1999) (relying on Indian canons of construction to hold that off-reservation hunting and fishing rights had not been extinguished); Frickey, *supra* note 47, at 398 (discussing indebtedness of modern Indian law to Marshall's interpretive strategies).

251. *Worcester*, 31 U.S. at 551-56 (interpreting treaties with the Cherokees).

252. *See* MARTIN SIEGEL, THE TANEY COURT: 1836-1864, at 32 (1987).

253. *Id.*

254. *Id.* at 33.

255. *Id.* at 35-36.

256. Three of the four decisions preceding *Rogers* in 1846 similarly emphasized the supremacy of federal power. *See* Hunt v. Palao, 45 U.S. (4 How.) 589 (1846) (invalidating a Florida law declaring federal territorial court records part of the records of the new state of Florida); United States v. McLemore, 45 U.S. (4 How.) 286 (1846) (holding the United States exempt from suits or decrees pertaining to court costs); Jourdan v. Barrett, 45 U.S. (4 How.) 169 (1846) (holding that title to public domains of the United States could not be granted by state law).

was not seen as a considered opinion concerning Indian law, but rather as one about control over American lands in a time of war.

B. The Executive Push for Power

The same cannot be said for the executive branch. While Congress and the courts were promulgating a fairly robust view of tribal sovereignty and a concomitantly restrained view of federal power in Indian relations, the executive branch was advocating the extension of broad power over Indian lives.

1. Bureaucratic Consolidation

Before the 1830s, the exercise of executive power over Indians was haphazard, guided by no legislation and without accountability to Congress. According to the 1834 House Report on reorganization, "[t]he present organization of [the Indian Department was] of doubtful origin and authority. Its administration is expensive, inefficient, and irresponsible."[257] The tribes were too far from the Government

> to make their complaints against the arbitrary acts of our agents heard; and it is believed they have had much cause of complaint. Hitherto they have suffered in silence. The agents, being subject to no immediate control, have acted under scarcely any other responsibility than that of accountability for moneys received.[258]

The proposed reorganization was designed to reign in the arbitrary power of federal Indian agents and the resulting abuses of the Indians.[259] Agents were made accountable to superintendents, who were in turn accountable to the newly created Commissioner of Indian Affairs and finally the President.[260] This process was the culmination of a gradual process of bureaucratization of Indian policy, beginning with the creation of the Indian Department in

257. *See* H.R. REP. NO. 23-474, at 2 (1834).
258. *Id.* at 8.
259. *Id.*
260. *Id.*

1822, and the designation of an appointed Commissioner of Indian Affairs in 1832.

In trying to reduce executive power, however, Congress created the incentive and means to increase it. By creating direct lines of accountability and reporting, the Reorganization Act of 1834[261] created a centralized bureaucracy and a direct channel to influence national Indian policy. Each year, individual agents would report to their superintendents, who in turn reported to the Commissioner of Indian Affairs, who then reported to the Secretary of War. All of these reports were compiled in the Annual Report of the Commissioner of Indian Affairs, which was presented to the President and Congress. What had been a diffuse exercise of power by many individual agents now became a centralized administrative agency.[262]

These forces came together in 1845 with President Polk's appointment of William Medill as the Commissioner of Indian Affairs.[263] Medill, a former U.S. Representative, had leapfrogged into the commissionership a few months after his appointment as second assistant postmaster general.[264] He was an ambitious man who sought to transform the post into a springboard to greater political positions, and who became Governor of Ohio soon after his commissionership ended.[265] Under him, the Indian Department began to formulate its ambitious reservation policy, under which reservations would be seen not as sovereign territories of the tribes, but essentially as schools in which the Indians would be groomed for assimilation.[266]

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261. H.R. 488, 23d Cong. (1st Sess. 1834) (enacted).

262. *See* ROBERT A. TRENNERT, JR., ALTERNATIVE TO EXTINCTION: FEDERAL INDIAN POLICY AND THE BEGINNINGS OF THE RESERVATION SYSTEM: 1846-51, at 3-5 (1975).

263. *See id.* at 17.

264. OHIO HIST. SOC'Y, OHIO FUNDAMENTAL DOCUMENTS, *available at* http://www.ohiohistory.org/onlinedoc/ohgovernment/governors/medill.html (last visited Apr. 2, 2004).

265. *Id.*

266. *See* TRENNERT, *supra* note 262, at 29-31; *see also* United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) ("[T]he reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.").

2. Emergence of Ethnology

This bureaucratic growth in interest in the lives of Indians was accompanied by a parallel scientific development. The 1830s saw the emergence of the science of ethnology, the study of the distinctive characteristics of races and peoples.[267] People like George Caitlin, Thomas McKinney, and Henry Schoolcraft began to collect data, artifacts, and stories regarding the history and culture of Indian people.[268] Like the reorganization of the Indian Department, this development was also an outgrowth of the increased concern for Indian tribes. Like reorganization, it would also backfire against tribes. Although many of the new scientists were motivated by an intent to help Indians towards a more prosperous future, the development also created a profession of people who believed they were peculiarly qualified to say what was best for the Indian.

This movement won a victory in 1846, when in response to a petition by the new Indian scholars, Congress first ordered compilation of an annual census of the Indians of the United States.[269] The census was not a mere enumeration, but was intended to encompass the "history, current conditions, and prospects of the Indians."[270] This development was explicitly connected to an expanded role for the federal government in overseeing the lives of the Indians. The next year, in an appeal to Congress for appropriations to conduct this study, the scholars argued that the results would be valuable "not only to history and ethnology, but important, and indeed necessary, to enable government to perform its high and sacred duties of protection and guardianship over the weak and still savage

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267. 5 OXFORD ENGLISH DICTIONARY 425 (2d ed. 1989) (citing uses of the term in 1842 and 1847).

268. ROBERT E. BERKHOFER, JR., THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT 89 (1979).

269. The Constitution, while requiring a census of all persons in the United States, specifically excludes "Indians not taxed" from this enumeration. U.S. CONST. art. I, § 2, cl. 3.

270. Act of June 27, 1846, ch. 34, 9 Stat. 20; SENATE JOURNAL, 29th Cong., 1st Sess., at 491 (Aug. 7, 1846). The Act required the Secretary of War

> to avail himself of such means as may be afforded by the organization of the Indian department to collect all such information as may be practicable respecting the condition, habits, and progress of the Indian tribes of the United States, and to lay the same from time to time, as may be convenient, before the Senate.

race placed by Providence under its care."[271] The Committee on Indian Affairs "most cheerfully" approved the request, which was subsequently enacted by Congress.[272]

3. Battle Between the Cherokee Nation and the Executive Branch

The *Rogers* case also came about at the height of the battle between the executive branch and the Cherokee government surrounding the so-called Cherokee Civil War. Federal reports of the Cherokee Nation between 1839 and 1846 were dominated by a conflict between three groups of Cherokees: what the United States called the "Ross Party," the Cherokee government of which John Ross was Chief; the "Old Settlers" or "Western Cherokees," the Cherokees that had emigrated to the Western Territory before 1835; and the "Treaty Party," the Cherokees that had signed the 1835 treaty.[273] The local military, the Commissioner of Indian Affairs, the

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271. H.R. REP. NO. 29-53, at 2 (2d Sess. 1847). The Indians seem to have understood the potentially sinister nature of the government's interest, refusing to cooperate with the voluminous inquiries with which the agents were armed. In 1854, eight years into his project, Henry Schoolcraft wrote, "It has, from the inception of the plan, been found difficult to overcome the reluctance of the Indians to furnish their statistics. Even their gross population has been wrung from them." S. EXEC. DOC. NO. 33-13, at 2 (2d Sess. 1854).

272. H.R. REP. NO. 29-53, at 1.

273. There were two main sources of this conflict. The Eastern Cherokees were removed to lands that had already been guaranteed by treaty to "the old settlers," the 6,000 or so Cherokees that had agreed to move since 1819, and had set up an independent government unwilling to relinquish its power. When the new emigrants, led by John Ross, proposed a joint government, the leaders of the Old Settlers refused, and instead offered to incorporate the new emigrants under the rule of the current leaders. When this offer was not accepted, the Old Settlers walked out of the joint council.

Immediately after the unsuccessful joint council, a large group of the recent emigrant Cherokees killed Major Ridge, his son John Ridge, and Elias Boudinot—three of the principal signers of the false 1835 Treaty. Although the killers were careful not to let Chief John Ross know of their plans, their actions must be understood as political. Cherokee law provided that the penalty for signing a treaty relinquishing Cherokee land without government authority was death, and that private citizens carrying out this act were not guilty of murder under Cherokee law. Major Ridge himself had participated in the enforcement of this law in 1806, killing Cherokee Chief Doublehead for signing Cherokee land away to the United States. *See* WARDELL, *supra* note 66, at 17-18. While an act of sovereignty, however, the assassinations were absolutely contrary to federal interests, challenging the basis of the federal removal, and jeopardizing a long-standing method of obtaining a treaty from a tribe that did not want to negotiate.

Although within a few months most influential people among the Old Settlers, including

Secretary of War, and the President repeatedly argued that the federal government needed to intervene to protect the Old Settlers and the Treaty Party from oppression and violence at the hands of the dominant party.[274] During this period, Cherokee country was briefly placed under military rule, Fort Gibson provided protection and rations to Cherokees leaving Cherokee land for the Arkansas border, and the President threatened to partition Cherokee land in response to the conflict.[275]

Like the claims that federal jurisdiction was needed to protect Cherokees from unscrupulous white men, the claim that federal interference was necessary to protect the Cherokees from themselves seems unfounded. The Cherokees on both sides of the dispute were savvy political actors, and reports from either side must be taken with a grain of salt. But independent reports of the situation in Cherokee country simply do not confirm the views of the federal government. As discussed above, the detailed report of the 1840 trial of Archilla Smith, a member of the Treaty Party, was marked by conspicuous concern for fairness.[276] That same year, the Senate Committee on Indian Affairs drafted a report declaring that not only did the executive branch have no authority to interfere as it had, but also that its interference had only prolonged the conflict by encouraging the Old Settler chiefs to continue their opposition to the joint government.[277] The Committee agreed to six resolutions, starting with the resolution that "the interference of the Executive in the affairs of the Cherokee Indians ... [was] an assumption of discretionary power contrary to the principles of the Constitution."[278] After reaching these resolutions, however, five of the nine members of the Committee retracted their decision to publish the report, and the

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one of their three chiefs, agreed to form a cooperative government with the new emigrants, the above factors irrevocably turned the local military commander, General Arbuckle, as well as the Commissioner of Indian Affairs and the Secretary of War against the Ross Party. In the early stage of the conflict, it was General Arbuckle, rather than the Old Settlers, who provided written condemnations of the Ross government. Throughout the period from 1839 to 1846, moreover, the executive branch provided support and assistance to the Old Settlers and members of the Treaty Party and repeatedly argued for federal authority to intervene.

274. *Id.* at 63.

275. *Id.* at 64-70.

276. *See supra* text accompanying notes 185-87.

277. Mr. Bell's Suppressed Report, *supra* note 108, at 22.

278. *Id.*; *see also* CHEROKEE ADVOC., Feb. 12, 1846-Mar. 26, 1846.

House forbade the resolutions from being reported.[279] Angered at what he perceived to be political quashing of the report, Committee member John A. Bell of Tennessee released it to the *National Intelligencer*, where it was published as *Mr. Bell's Suppressed Report*.[280]

The report of an independent commission appointed by the Secretary of War is even more persuasive.[281] The Board of Inquiry spent two months in Cherokee territory, during which it received reports from 908 members of the opposition parties, 546 Old Settlers and 362 Treaty Party members.[282] Most of the reports did not complain of wrongs or oppression by the dominant party, but rather of the desire for money from the United States to compensate for occupation of their land by the eastern emigrants and for the per capita payments promised under their treaties but withheld by the United States.[283] Apparently the leaders of the Old Settlers told them that if more than 400 Cherokees enrolled with the Commission, the Cherokee territory would be partitioned and that they would get money from the United States for the part assigned to the Eastern Cherokees.[284] There was thus little evidence of repression by the Cherokee government, and many indications that economic concerns rather than political ones motivated the complainants.[285] In addition, many of those testifying were not in favor of partition at all, but rather were anxious to see harmony restored to the Nation.[286] The Commissioners also found little evidence of the reputed divisions between the parties. They found that the political distinctions between new emigrants and Old Settlers had disappeared by 1841, and that, by the time of the Commission, Western Cherokees held a majority of legislative, judicial, and other offices.[287] The claims of unjustified arrests were also not supported

279. Mr. Bell's Suppressed Report, *supra* note 108, at 1 (July 27, 1840 letter from John Bell to editors of the *National Intelligencer*).

280. *Id.*

281. WILLIAM WILKINS, THE REPORT AND CORRESPONDENCE OF THE BOARD OF INQUIRY, TO PROSECUTE AN EXAMINATION INTO THE CAUSES AND EXTENT OF THE DISCONTENTS AND DIFFICULTIES AMONG THE CHEROKEE INDIANS, S. DOC. NO. 28-140, at 1 (2d Sess. 1845).

282. *Id.* at 5.

283. *Id.* at 6.

284. *Id.*

285. *Id.* at 8.

286. *Id.*

287. *Id.* Another complaint of the opposition was that the 1840 Act of Union between the

by the evidence; rather, the arrests appeared to have been made for sufficient and just cause.[288]

The Commission found a significant threat to the safety of the Cherokees, but it was not the one that the federal government expected. The Commission stated that:

> It cannot be denied that human life in the Cherokee country is in danger—great danger. But the danger lies in the frequent and stealthy incursions of a desperate gang of banditti ... whose fraternity is not of the dominant party; nor are the dangers from these outlaws most dreaded by the parties who send up their complaints of the insecurity of life.[289]

In fact, the Cherokees had complained of these outlaws for years, but the military at Fort Gibson and the Arkansas residents on the Cherokee border, citing oppression by the Cherokee government, had helped them to elude capture.[290]

The only valid causes for complaint were ones that the Board of Inquiry had not been appointed to investigate, as they had been overshadowed by the unfounded complaints of a few.[291] These complaints did not concern the Cherokee government, but the failure of the U.S. government to keep its promises did. The Commission believed that the Western Cherokees should be compensated for the imposition of the Eastern Cherokees on the land reserved to the Western Cherokees by treaty, and that the Eastern Cherokees might have a claim for compensation for any monies paid to the Western Cherokees from the proceeds of the sale of the Eastern Cherokee lands in the Southeast.[292] In addition, the

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old and new settlers was a fraudulent document fabricated by the new settlers with an unrepresentative minority of Old Settlers. *Id.* at 7. Despite this, seven of the twelve Western Cherokees that signed the Act of Union had been selected to represent their complaints before the Commission. *Id.* at 7-8. The Board concluded that had the signers indeed acted against the authority or wishes of the Old Settlers in 1840, they would not again be deputed to represent their people. *Id.*

288. *Id.* at 9.

289. *Id.* at 9-10. These banditti were members of the Starr gang, who, while children of one of the signers of the 1835 Treaty and motivated by the perceived unfairness of the Ross government, attacked white travelers not connected to either party as well as Cherokees. WARDELL, *supra* note 66, at 54.

290. WARDELL, *supra* note 66, at 66-67.

291. S. DOC. NO. 28-140, at 11.

292. *Id.* at 12.

Commission agreed that the Cherokees had been unjustly denied the per capita payments to which they were entitled to under the 1835 treaty.[293] The Cherokee government had pressed this complaint with the United States for years, but it had always been pushed aside with federal complaints regarding the Cherokee leadership. The Commission strongly recommended a new treaty to settle these claims.[294]

With respect to the claims of oppression by the Cherokee government, however, the commissioners had found that,

> even while present on the spot, where they are able in most cases to elicit the truth, complaints have come up, either frivolous in the extreme, or not true. And it is believed that the "old settlers" and "treaty party" enjoy, under the "act of union" and the constitution of the Cherokee nation, liberty, property, and life, in as much insecurity as the rest of the Cherokees.[295]

The Commission also found that the bitterness against the dominant party was "confined only to a few.... [T]he masses on either side, are as well disposed to each other as in most communities divided into political parties."[296] Whether they would be able to live in harmony depended mainly on the actions of the United States.

> Nothing is more calculated to keep alive the flame of discord in the Cherokee nation, than the belief that the restless or discontented, though comparatively few in number, will always find a ready audience at Washington, and the hope that complaints of oppressions, and the like, may enlist the sympathies of the Government and the community.[297]

This report, although published, was wholly ignored.[298] Only a year later, the President of the United States used oppression by the Cherokee government as the central argument for extending federal

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293. *Id.* at 12-14.
294. *Id.* at 14.
295. *Id.* at 10.
296. *Id.* at 11.
297. *Id.*
298. *See* MCLOUGHLIN, *supra* note 65, at 47-48 (describing surprise and inaction in response to the Commission's report).

criminal jurisdiction over all Indians.[299] Despite the failure to obtain such jurisdiction, the Cherokee Civil War mysteriously came to an end a few months later after the federal government agreed to a new treaty that satisfied many of the claims for compensation and ended hopes for a profitable partition of Cherokee lands.[300] The reliance on useful fiction instead of fact during the Cherokee Civil War bears a striking resemblance to similar fabrications in the *Rogers* case.[301]

4. Executive Use of the Rogers *Decision*

In *Rogers*,[302] the executive branch got exactly what it wanted. The opinion immediately helped to transform Indian policy, justifying the Reservation Policy that was coalescing in the Indian Department. In April 1846, the month after the decision was announced, President Polk asked Congress to pass legislation extending federal jurisdiction over crimes between Indians on reservations.[303] Three months later, Commissioner Medill relied on *Rogers* to justify this request:

> Of the original power and right of the United States to subject the Indian tribes within the limits of their sovereignty to any system of laws having for their object the prevention or punishment of crime, or the melioration of the condition and improvement of the red race, there cannot be a doubt. The correct doctrine on this point is laid down in the decision of the Supreme court [sic], at its recent term, in the case of the United States vs. William S. Rogers.... These views of the highest judicial tribunal of the land must be deemed to be conclusive.[304]

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299. JAMES K. POLK, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO THE CHEROKEE DIFFICULTIES, H.R. DOC. NO. 29-185, at 2 (1st Sess. 1846).

300. WILLIAM MEDILL, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, S. DOC. NO. 29-11, at 218 (2d Sess. 1846) ("Since the provisions of the treaty were generally made known in the country, not a murder or outrage, unfortunately of frequent occurrence previously, has been reported.").

301. *See* United States v. Rogers, 45 U.S. (4 How.) 567, 571-73 (1864); S. DOC. NO. 29-11, at 218.

302. *Rogers*, 45 U.S. at 567.

303. H.R. DOC. NO. 29-185, at 2.

304. S. DOC. NO. 29-461, at 2 (1st Sess. 1846) (setting forth a July 21, 1846 letter from William Medill to Senator Ashley).

The bill was never enacted. Congress apparently was not ready for this abrupt expansion of federal power into Indian country.[305] But the decision continued to inform the views of the executive branch. Between the years 1846 and 1850, Commissioner Medill and the Indian Department formulated the Reservation Policy that dominated Indian policy from 1853 through the 1870s.[306] This policy concentrated tribes on small reservations and appointed Indian agents to "civilize" them through such methods as dividing their land in severalty and forcing them to become farmers, denying them rations if their children failed to attend school, and punishing them for practicing their traditional religions.[307]

The Indian Department saw the *Rogers* opinion as establishing its legal authority to take these intrusive steps. In 1851, for example, the Governor of the Minnesota Territory advocated the division of Indian lands among individual Indians, and the creation and enforcement of laws to secure the rights of individual property owners.[308] Although Governor Ramsay recognized that this would amount to an unprecedented intrusion on tribal sovereignty, he asserted that the *Rogers* decision

> disposes at once of the fanciful pretensions and artificial rules of construction to which the assumed sovereignty of Indian tribes

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305. Providing additional evidence that the proposal was not in line with current congressional Indian policy, the bill was sponsored by the Senate Judiciary Committee, rather than the Committee on Indian Affairs, which sponsored most other amendments to the Indian laws. *Id.* at 1.

306. The Commissioner of Indian Affairs proposed a plan

> to colonize our Indian tribes beyond the reach, for some years, of our white population; confining each within a small district of country, so that, as the game decreases and becomes scarce, the adults will gradually be compelled to resort to agriculture and other kinds of labor to obtain a subsistence.

WILLIAM MEDILL, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H.R. EXEC. DOC. NO. 30-1, at 386 (2d Sess. 1848); *see also* CHARLES E. MIX, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, S. EXEC. DOC. NO. 35-1, at 354-59 (2d Sess. 1858) (stating that policy was first implemented in 1853); TRENNERT, *supra* note 262, at 29-31 (dating beginning of reservation idea to 1845).

307. *See infra* note 310, *see also* S. EXEC. DOC. NO. 35-1, at 357-58 (stating that Indians must "be subjected to the pangs of hunger, if not actual starvation" to force them to become farmers); 2 FRANCIS P. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND AMERICAN INDIANS 317 (1984). As discussed below, as these were matters of executive policy rather than statute, much of the policy must be deduced from the treaties enacted at the time.

308. LUKE LEA, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, S. EXEC. DOC. NO. 31-1, at 416-17 (1st Sess. 1851) (setting forth the report of Governor Alexander Ramsay, Superintendent of the Minnesota Superintendency).

> has so often given rise, and provides ... for the prescription of laws, which shall not alone punish criminal offenses, but which may also protect the more delicate and complicated rights which arise when the relations between man and man are carried to a high degree of perfection.[309]

Congress did not codify these policies; instead they were simply a matter of executive policy and the practice of individual agents and treaty commissioners.[310] In the 1880s, however, Congress began to enact laws mandating the policies the Indian Department had long practiced.[311] As discussed in Part V below, when these laws were challenged before the Supreme Court, the Court used the *Rogers* decision as the core precedent to justify them.[312]

IV. REVISITING THE ROLE OF RACE IN *UNITED STATES V. ROGERS*

Scholars frequently cite the *Rogers* decision[313] as evidence that federal Indian law is all about race.[314] Despite these assertions, the decision has had little influence on the definition of the Indian as an individual. Later cases seeking to define who is an Indian are all over the map: some, while following *Rogers'* requirement of Indian

309. *Id.* at 417.

310. For treaties providing that tribal lands would be divided among individual Indians, see Treaty with the Kansas Tribe of Indians, Oct. 5, 1859, U.S.-Kansas Indians, art. 1, 12 Stat. 1111, 1111; Treaty with the Sisseeton, & C., Sioux, June 19, 1858, U.S.-Sisseeton Indians-Sioux Indians, art. 1, 12 Stat. 1037, 1037; Treaty with the Wyandotts, Jan. 31, 1855, U.S.-Wyandott Indians, art. 3, 10 Stat. 1159, 1160. For treaties denying parents compensation and rations if they did not send their children to school, see Treaty with the Poncas, Mar. 12, 1858, U.S.-Ponca Indians, art. 2, 12 Stat. 997, 998; Treaty with the Pawnees, Sept. 24, 1857, U.S.-Pawnee Indians, art. 3, 11 Stat. 729, 730.

311. *See* Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390 (1887) (making every Indian who accepted an allotment a citizen of the United States, and subject to U.S. laws); Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (1885) (applying local criminal laws to Indians on reservations, and giving local courts jurisdiction in criminal cases involving Indians or occurring on Indian land).

312. United States v. Kagama, 118 U.S. 375, 380-81 (1886) (relying on *Rogers* to uphold act asserting jurisdiction); *Ex parte* Crow Dog, 109 U.S. 556, 559-60 (1883) (relying on *Rogers* for the proposition that Congress could assert federal jurisdiction over Indians in Indian country); *see also* The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 619 (1870) (relying on *Rogers* to uphold extension of federal tax laws to Indians on reservation); Newton, *supra* note 16, at 210-11 (tracing origins of plenary power doctrine to *Rogers*).

313. United States v. Rogers, 45 U.S. (4 How.) 567 (1864).

314. *See, e.g.*, Ford, *supra* note 10, at 1263-67; Snowden et al., *supra* note 9, at 200-16; Owen, *supra* note 10, at 178-79.

blood, hold that the individual must also be a member of a federally recognized Indian community;[315] others hold that Indian status must be inherited from one's mother;[316] some hold that it must be inherited from one's father;[317] and still others hold that it can be asserted without any Indian blood at all.[318] In *Elk v. Wilkins*,[319] a case often condemned as affirming racism toward individual Indians, both the majority and the dissent cited *Rogers* as supporting their conclusions.[320]

Was it then a coincidence that the quest for power described in this Article coincided with the first time the Supreme Court defined "Indian" as an explicitly racial category? Or can *Rogers* be taken as evidence that Indian law is based on assumptions regarding the biological differences between Indians and whites? Neither explanation is correct. This Part argues that race played a significant role in the *Rogers* case, one integrally tied to the diminished understand-

315. United States v. Prentiss, 273 F.3d 1277, 1282-83 (10th Cir. 2001).

316. *See, e.g.*, Alberty v. United States, 162 U.S. 499, 501 (1896) (holding that a child of a black slave mother and Choctaw father took status of mother and was not Indian for purposes of federal law).

317. United States v. Hadley, 99 F. 437, 438 (D. Wash. 1900) (stating that a child of a white father and Indian mother is not Indian for purposes of federal criminal law).

318. Turner v. Fish, 28 Miss. 306, 310-11 (1854) (holding that a white man that married a Choctaw woman was entitled to an allotment as the "Choctaw head of a family" under the Treaty of Dancing Rabbit Creek); *In re* Dependency & Neglect of A.L., 442 N.W.2d 233, 235 (S.D. 1989) (finding that a caucasian child adopted by an Indian family was an "Indian child" for purposes of the Indian Child Welfare Act). Indeed, the year after the Supreme Court's decision, Judge Johnson again held that the federal court in Little Rock had no jurisdiction over a white man who had intermarried with the Cherokee tribe, because of a provision in the 1846 treaty pardoning all Cherokee citizens. United States v. Ragsdale, 27 F. Cas. 684, 685-86 (D. Ark. 1847). Although Judge Johnson was careful not to say that Ragsdale had become Indian through his adoption, Judge Johnson asked: "In this plenary pardon to all native born Cherokees, why should it not also extend to adopted members of the tribe? After adoption they became members of the community, subject to all the burdens, and entitled to all the immunities of native born citizens." *Id.* at 686. The Supreme Court even went back on its prior holding. In 1897, in *Nofire v. United States*, the Supreme Court ordered the release of two full-blooded Cherokees who were charged with the murder of an intermarried white Cherokee citizen, holding that the Cherokee courts, and not the federal court, had jurisdiction over the crime. 164 U.S. 657, 660-62 (1897). Although this puzzling conclusion likely was based on an 1890 law providing that the Cherokee courts had exclusive jurisdiction over cases in which both parties were Cherokee, whether adopted or native born, Act of May 2, 1890, ch. 182, § 31, 26 Stat. 81 (1890), the case did not cite the law. *See Nofire*, 164 U.S. at 657-62.

319. Elk v. Wilkins, 112 U.S. 94, 109 (1884) (holding that an Indian who had chosen to leave the reservation and had fully assimilated with non-Indian society was not a citizen of the United States and was not entitled to vote in state elections).

320. *Id.* at 100; *id.* at 122 (Harlan, J., dissenting).

ing of the power of Indian tribes. This role, however, did not depend on defining individual Indians according to their race, but defining tribes as inherently bounded by race, and therefore inherently inferior to sovereign nations.

A. Cherokee Understandings of Race

This Article's analysis of the role of race in the *Rogers* case concentrates on the federal discourse of Indian race, a discourse that took place largely in the absence of accurate perceptions of Indian attitudes towards race. Before continuing with this discussion, it is important to try to understand what race meant to the Cherokees themselves.

The Cherokees were not unique in naturalizing racial outsiders as members of the tribe. As others have noted, for many tribes, race was initially a marker for national distinctions among outsiders rather than a category in itself.[321] Many tribes had practices of incorporating outsiders, whether through marriage or adoption.[322] These incorporations served a variety of political and social purposes. Taking in outsiders might help to cement political alliances, facilitate trade, or ensure that newcomers would be fully incorporated into the life of the community.[323]

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321. *See* ALEXANDRA HARMON, INDIANS IN THE MAKING: ETHNIC RELATIONS AND INDIAN IDENTITIES AROUND PUGET SOUND 10 (2000) (noting that Northwestern Indians referred to settlers not as "whites" but as "Bostons" or "King's Men" depending on whether they were American or English); Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 16 n.7 (1990) (arguing that Dakotas perceived conflict of 1862 as war between Dakota and United States nations, rather than as conflict between whites and Indians).

322. *See* MCLOUGHLIN, *supra* note 65, at 121 (describing Cherokee adoption of captives); JUNE NAMIAS, WHITE CAPTIVES: GENDER AND ETHNICITY ON THE AMERICAN FRONTIER 3-5 (1993) (describing practice of adopting captives); Berger, *supra* note 121, at 24-26 (discussing reasons for intermarriage).

323. *See, e.g.*, JAMES AXTELL, THE INVASION WITHIN: THE CONQUEST OF CULTURES IN COLONIAL NORTH AMERICA 302-28 (1986) (describing adoption of outsiders as a means of replacing lost family members); JACQUELINE LOUISE PETERSON, THE PEOPLE IN BETWEEN: INDIAN-WHITE MARRIAGE AND THE GENESIS OF A METIS SOCIETY AND CULTURE IN THE GREAT LAKES REGION, 1680-1830, at 87-88 (1981) (describing intermarriage as a "means of entangling strangers in a series of kinship obligations. Relatives by marriage were expected not only to deal fairly, but to provide protection, hospitality, and sustenance in time of famine").

In the Cherokee Nation, significant numbers of white men began to intermarry with the Cherokees after the Revolutionary War. British loyalists settled with the Cherokees, who had supported England, as a politically sympathetic community and a possible staging ground for rebellion.[324] The names of these men—Adair, Rogers, Coodey—were later borne by many politically influential Cherokees. As time went on, some Cherokees who left their lands to be educated or participate in politics also married outsiders.[325] One of the earliest written laws of the Cherokee Nation concerned the status of these intermarried citizens, providing while naturalized citizens could not hold elected positions, they could vote for office and their children would have full political rights.[326]

It might be tempting, given these facts, to portray racial distinctions among Cherokees as wholly external and imposed. That would be wrong. Just before the turn of the century, around the same time that Americans were becoming citizens of the Cherokee Nation, black Americans were becoming Cherokee slaves.[327] During the 1840s, the same period in which *Rogers* was decided, the Cherokee

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324. WILLIAM G. MCLOUGHLIN, CHEROKEE RENASCENCE IN THE NEW REPUBLIC 20 (1983).

325. The marriages of Elias Boudinot and John Ridge provide a particularly revealing story about American perceptions of Indian race. Boudinot and Ridge left the reservation in the 1820s to study at the American Board of Missions School in Cornwall, Connecticut, an academy whose missionaries were preaching racial equality to the Cherokees and to American policymakers. *Id.* at 367. While there they became engaged to two young white women. *Id.* The residents of the Connecticut town were outraged, holding mass meetings against the marriage and burning one of the couples in effigy. *Id.* at 367-68. The trustees of the academy closed the school to prevent future interracial marriages. *Id.* at 368. While the Indian wives of prominent white men were celebrated by some, *id.* at 70, the idea of white women marrying dark-skinned men was too much for the New Englanders to stomach. *Id.* at 368.

326. LAWS OF THE CHEROKEE NATION, *supra* note 182, at 10.

327. MCLOUGHLIN, *supra* note 324, at 32. During the seventeenth and much of the eighteenth centuries, Africans living among the Cherokees, like members of other tribes, were eligible for adoption and equal citizenship after a period of years. *Id.* at 338. English-speaking blacks, with their knowledge of European language, crafts, and customs, could become valued members of the Cherokee community. *Id.* Racial consciousness, however, quickly arose with the influence of the dominant white society and the adoption by elite Cherokees of plantation agriculture. In 1793, for example, Chief Little Turkey explained that he would never ally with the Spanish because they seemed more like blacks than "real white people ... and what few I have seen of them looked like mulattoes, and I would never have anything to say to them." *Id.* at 339. Traditional Cherokees adopted a creation myth in which the Great Spirit had created three kinds of man, allotting the plow and the hoe to the black man. *Id.* at 342. By 1825, the younger generation of Cherokees took it as a point of pride that among the Cherokee people "there is hardly any intermixture of Cherokee and African blood." *Id.* at 339 (citation omitted).

tribe adopted laws similar to many southern slave laws, prohibiting marriages between Indians or whites and blacks, outlawing teaching blacks to read or write, and forbidding blacks from owning real property, livestock, or firearms.[328] Although these racial distinctions may have been inspired by the distinctions Cherokees observed in white society and the pressure to conform to white expectations of "civilization,"[329] neither slavery nor the repressive laws were the result of direct coercion by outsiders.

At the same time that race was increasingly defining the rights of blacks in the Cherokee Nation, significant political and class divisions were arising between mixed bloods and whites and the full bloods that still composed seven-eighths of the tribe's population.[330] Children raised in homes speaking English and practicing non-Cherokee customs faced far less of a challenge in learning to read and write in the mission schools.[331] Christian education thus became an arena in which full-blooded children felt themselves inferior to their mixed-blood peers.[332] Eventually most full bloods withdrew their children from the mission schools and spurned the education they provided.[333] With the invention of the Cherokee alphabet by George Guess, the full bloods quickly became literate, but in their own language.[334] The different attitudes towards missionary education corresponded with different attitudes toward the religion and customs the missionaries preached. Being a mixed blood came to epitomize a preference for acculturation, Christianity, the English language, and individualistic materialism, while being full-blooded

328. LAWS OF THE CHEROKEE NATION, *supra* note 182, at 19 (discussing a September 19, 1839 law prohibiting intermarriage between free citizens and slaves or persons of color not entitled to citizenship); *id.* at 44 (discussing November 7, 1840 law prohibiting "any free negro or mulatto, not of Cherokee blood," from owning improvements and prohibiting slaves from owning livestock or firearms); *id.* at 53 (noting an October 19, 1841 law allowing organization of neighborhood patrols to gather and punish blacks leaving owners' premises without pass); *id.* at 55 (discussing an October 22, 1841 law prohibiting teaching slaves or blacks not of Cherokee blood to read or write).

329. MCLOUGHLIN, *supra* note 324, at 337-38; RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 80-81 (1975).

330. MCLOUGHLIN, *supra* note 324, at 360-61.

331. *Id.* at 361.

332. *Id.* at 360.

333. *Id.* at 378.

334. *Id.* at 350-53; *see also* MORRIS L. WARDELL, A POLITICAL HISTORY OF THE CHEROKEE NATION, 1838-1907, at 4 (1938) (noting that Cherokees learned to read and write Cherokee in three days).

symbolized a preference for traditional ways and the Cherokee language. These tensions erupted at least twice in Cherokee politics, first in "White Path's Rebellion" in 1827[335] and next in the Keetoowah Movement of 1858.[336]

Incorporation of racial outsiders was problematic for reasons inherent to Cherokee culture as well. Much of traditional Cherokee law was based on a clanship system in which social obligations were determined by family connections.[337] Incorporation of outsiders without clan affiliations troubled this system. In particular, one's primary economic responsibilities were to the members of one's maternal clan. It was a woman's brothers, sisters, or mother, not her husband, who were responsible for her economic support.[338] Property descended to one's maternal relatives, not to one's spouse. White men and their relatives, however, felt entitled to inherit and dispose of the property of their wives.[339] By 1819, these conflicting property regimes posed enough of a concern that the Cherokee Council enacted laws providing that "in order to avoid imposition on the part of any white man," citizenship by marriage would only be afforded to white men who were married by ministers of the gospel or upon obtaining a license from the national council.[340] In addition, a white man could not, by marriage, gain the right to dispose of a Cherokee woman's property without her consent.[341]

White women, about a third of intermarried white citizens, posed an even greater problem; because clan affiliation descended through the maternal line, their children had no clan at all.[342] It was not until 1825 that the Nation addressed this problem by providing that children of Cherokee men and white women were entitled to the same privileges as children of Cherokee women and white men.[343]

Despite these apparently race-based distinctions, political alliances and attitudes do not appear to have turned on racial grounds in the same way they did for white Americans. Although

335. MCLOUGHLIN, *supra* note 324, at 366-67.
336. MCLOUGHLIN, *supra* note 65, at 155-58.
337. STRICKLAND, *supra* note 329, at 22.
338. MCLOUGHLIN, *supra* note 324, at 13.
339. *Id.* at 31, 330.
340. *See* LAWS OF THE CHEROKEE NATION, *supra* note 182, at 10.
341. *Id.*
342. MCLOUGHLIN, *supra* note 324, at 333.
343. LAWS OF THE CHEROKEE NATION, *supra* note 182, at 57.

many Cherokee leaders held significant numbers of slaves, chattel slavery was confined to mixed and white Cherokees, and only a third of those (about four percent of the total Cherokee population) held slaves.[344] Poor whites in the South identified with white slaveholders and supported slavery, but the full-blood component of the Cherokee Nation opposed it, not because of feelings of fellowship with black slaves, but because it was part of a materialist economic and cultural framework contrary to the Cherokee way.[345] The repressive slave laws were apparently not enforced because of widespread resistance to their principles, and some black children attended school alongside Cherokee children.[346] Abolitionist missionaries like Evan Jones and Samuel Worcester were influential with the Cherokee people[347] and the Cherokee government long resisted efforts to have the missionaries expelled for their sentiments.[348]

Even the terms "full blood" and "mixed blood" seem to be American misnomers for cultural rather than racial divisions. Elias Boudinot, editor of the *Cherokee Phoenix* and advocate of preserving sovereignty through using the white man's tools, was considered a full-blood Cherokee.[349] His brother, Stand Watie, was the leader for many years of the white and mixed-blood treaty party, while John Ross, with only one-eighth Cherokee blood, remained Principal Chief of the Cherokee Nation for forty years largely because of the support of the full-blood majority.[350] The United Keetowah Society, the political action group of the "full bloods," was led by Lewis Downing, who was one-half Cherokee. The criteria for membership, translated as "[o]nly full blood, uneducated [that is, non-English

344. MCLOUGHLIN, *supra* note 65, at 125.

345. *Id.* at 123.

346. STRICKLAND, *supra* note 329, at 81-82.

347. MCLOUGHLIN, *supra* note 65, at 84, 132-34, 154-55. Worcester was also the plaintiff that successfully challenged Georgia's efforts to prevent his entry onto Cherokee land. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 562 (1832).

348. LAWS OF THE CHEROKEE NATION, *supra* note 182, at 33-34 (noting an October 2, 1839 resolution objecting to an order that an agent prohibit Jones from residing among Cherokees); MCLOUGHLIN, *supra* note 65, at 142-43 (detailing the efforts of Agent Butler to have Jones and Worcester expelled).

349. In reality, Boudinot was three-quarters Cherokee, as his mother's father was white. The family, however, was raised speaking only Cherokee, although Boudinot's father obtained a western education for his children.

350. MCLOUGHLIN, *supra* note 65, at 3.

speaking]"[351] thus appears to refer to cultural affiliation more than blood quantum. Similar differences seem to have divided the so-called mixed- and full-blood factions generally. Although blood quantum often went along with the attitudes towards assimilation that divided the factions, it did not define the division.

In other words, race was important for the Cherokees. It was also, however, less defining of status, education, or politics than outsiders often imagined it to be. This complex reality accorded poorly with what American policymakers needed to believe about Indian people.

B. White Americans' Ideas of Indian Race

1. The Racially Equal Indian

The easiest way to understand the function of race in *Rogers* is as part of a growing belief that Indian individuals were defined by and could not overcome their biological racial inheritance. At first glance, there is some evidence to support this interpretation. The case coincided with the rise of scientific racism in America. In 1839, Samuel Morton had published his renowned *Crania Americana*, comparing skulls from representatives of Indian tribes to challenge the biblically derived conception that all human beings descended from a common origin.[352] In the 1840s and 1850s, popular journals published articles on the differences of hair, wool, cranial capacity and aptitude for civilization of the Caucasian, African, and American races.[353] Henry Schoolcraft, the man Congress appointed to oversee the census and study of the Indians, was an amateur phrenologist who had published his own observations on his personal collection of over 410 Indian skulls.[354] At the same time, in

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351. *Id.* at 158.

352. SAMUEL GEORGE MORTON, CRANIA AMERICANA, OR, A COMPARATIVE VIEW OF THE SKULLS OF VARIOUS ABORIGINAL NATIONS OF NORTH AND SOUTH AMERICA (Philadelphia, Dobson 1839).

353. *See The Hair and Wool of the Different Species of Man*, 27 U.S. MAG. & DEMOCRATIC REV. 451 (1850); James Cowles Prichard, *Do the Various Races of Man Constitute a Single Species?*, 11 U.S. MAG. & DEMOCRATIC REV. 113 (1842); *see also* Reginald Horsman, *Scientific Racism and the American Indian in the Mid-Nineteenth Century*, 27 AM. Q. 152 (1975).

354. 2 HENRY R. SCHOOLCRAFT, INFORMATION RESPECTING THE HISTORY, CONDITION AND PROSPECTS OF THE INDIAN TRIBES OF THE UNITED STATES 328 (Philadelphia, Lippincott, Grambo & Co. 1853).

response to abolitionists in the Northeast, pro-slavery states like Arkansas enacted resolutions stating that blacks and mulattoes were not citizens of the United States and therefore were not entitled to the privileges and immunities afforded the citizens of the several states.[355] *Rogers* might therefore be read as part of a larger growth of an idea that race was innate and immutable and that the political status of Indians was an outgrowth of this inevitable biological inferiority.

There are two problems with this interpretation of *Rogers*. The first is that the idea of attaching permanent, race-based disabilities to Indians as individuals was not new at all and long predated the new science of race. The colonial laws of Georgia, South Carolina, and North Carolina declared Indians, along with blacks and mulattoes, to be "absolute" slaves—property, not only for their lives but also for the lives of their children.[356] They could not testify in court, except against each other, could not marry whites, and in most other cases were subject to the same disabilities and discrimination as blacks.[357] It was only as political groups, or "Indians in amity with this government," that Indians occasionally overcame these racial disabilities.[358]

Thomas Jefferson's statements regarding Indians in his 1784 *Notes on Virginia* are cited for the contrary view, that until the mid-nineteenth century, Americans believed that Indians were their racial equals.[359] Closer examination shows instead that Jefferson's statements were part of a response to attacks on Americans. Two

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355. ARK. ST. GAZETTE, May 21, 1845, at 2 .

356. 16 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789, at 297 (Alden T. Vaughan ed., 1998) [hereinafter EARLY AMERICAN INDIAN DOCUMENTS] (1740 South Carolina law declaring Negroes, Mulattoes, and Indians "absolute slaves" and their children also to be slaves); *id.* at 120 (1696 South Carolina law declaring Negroes, Mulattoes, and Indians to be slaves); *id.* at 381 (1755 Georgia law declaring blacks, Indians, Mulattoes, and Mestizos and "all their [i]ssue" to forever remain "absolute [s]laves"); *id.* at 16 (1716 North Carolina law regulating black, Mulatto and Indian slaves).

357. *See id.* at 13 (1716 North Carolina law declaring that no blacks, Mulattoes, Mustees, or Indians could vote); *id.* at 17 (1716 North Carolina law prohibiting intermarriage between whites and blacks or Indians); *id.* at 45 (1746 North Carolina law prohibiting blacks, Mulattoes, and Indians from testifying except against each other); *id.* at 202 (1717 South Carolina law providing that only Christian white men "and no other" were eligible to vote).

358. *Id.* at 297 (1740 South Carolina law exempting "free Indians in amity with this government" from absolute slavery); *id.* at 381 (1755 Georgia law exempting "free Indians in amity with this government" from absolute slavery).

359. MCLOUGHLIN, *supra* note 324, at xv.

French scholars had recently published claims that the small size and inferior quality of American-grown animals, plants, and human beings were evidence that the American environment was detrimental to life, and that, as a result, the American people and their new nation would never amount to much.[360] Jefferson's statements regarding Indians are part of his effort to refute this argument, just as the skeletons of mastodons showed that the American continent had produced the biggest animals, so America's Indians were the equal to any human beings, right down to their ability to grow just as much hair on their bodies as Europeans.[361] Jefferson's comments in this context, while certainly evidence that representations of Indian race could be manipulated according to American needs, are hardly conclusive evidence of a widespread belief in racial equality.[362]

Second, the belief in permanent Indian racial difference was not the dominant view of the new scientists of the Indian. Rather, Schoolcraft's census, the reports of most Indian commissioners and agents, and the statements of other federal officials, all emphasized Indian potential to achieve full equality with whites.[363] Indeed,

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360. THOMAS JEFFERSON, NOTES ON VIRGINIA (1784), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 205-06, 213 (Adrienne Koch & William Peden eds., 1944).

361. *Id.* at 212. In the modern age, in which much technology and time is devoted to the ideal of female hairlessness, Jefferson's insistence that Indian women were hirsute and therefore equal is particularly funny:

> It has been said that Indians have less hair than the whites, except on the head. But this is a fact of which fair proof can scarcely be had. With them it is disgraceful to be hairy on the body. They say it likens them to hogs. They therefore pluck the hair as fast as it appears. But the traders who marry their women, and prevail on them to discontinue this practice, say, that nature is the same with them as with the whites.

Id.

362. Indeed, immediately after praising America's Indians, Jefferson ensured that his statements could not be taken as a testament to racial equality:

> I do not mean to deny that there are varieties in the race of man, distinguished by their powers both of body and mind. I believe there are, as I see to be the case in the races of other animals. I only mean to suggest a doubt, whether the bulk and faculties of animals depend on the side of the Atlantic on which their food happens to grow....

Id. at 213.

363. *See, e.g.*, ALBERT G. ELLIS, DOCUMENT ACCOMPANYING THE REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, S. DOC. NO. 29-1, at 497 (1845) (noting in a report by a subagent for a Green Bay subagency that full-blood children had made good progress in the schools and that the Menomonies *"can be civilized"*); WILLIAM WILKINS, REPORT OF THE SECRETARY OF WAR, H.R. EXEC. DOC. NO. 28-2, at 125 (1844):

Schoolcraft, the most prominent contemporary scientist of Indian race, was married to an Indian woman, whom he lauded for her beauty and intelligence.[364]

The U.S. Supreme Court also did not espouse the view that individual Indians were innately inferior. Two years before the *Rogers* decision, the Court decided a case strongly affirming Indian individual rights. In *Rowland v. Ladiga*,[365] the Alabama Supreme Court held that a Choctaw grandmother, who had not been officially granted a federal right to her cabin or her fields, had no claim

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> In the course of the progress under our moral enterprise for their civilization, they must eventually attain the sagacity to look out for individual and social rights, and that degree of general intelligence to entitle them to the full extension of all the privileges of American citizens. When that time shall arrive, there will be no obstacle to political association by reason of any natural or acquired repugnance to the blood of the original American.

Id.; T. HARTLEY CRAWFORD, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H. EXEC. DOC. NO. 28-2, at 309 (1844):

> The condition of the Indian race, as connected with the United States, is, in the general, one of improvement, and slow but sure approaches to civilization, very distinctly marked in my judgment. It is proved, I think, conclusively, that it is in no respect inferior to our own race, except in being less fortunately circumstanced. As great an aptitude for learning the letters, the pursuits, and arts of civilized life, is evident; if their progress is slow, so has it been with us, and with masses of men in all nations and ages.

Id.; 2 SCHOOLCRAFT, *supra* note 354, at 523 ("The Indians, when young, are gay, sprightly, and acute, and are perfectly capable of being instructed, and consequently improved."); 3 SCHOOLCRAFT, *supra* note 354, at vii (stating that while the large territory of the Indians had led them to barbarism, examination of Indian crania showed no impediment to progress in the arts and sciences). In 1975, historian Reginald Horsman argued that this emphasis on Indian potential in the 1840s was a last gasp before the discourse of scientific racism took hold in the late 1840s and 1850s. Horsman, *supra* note 353, at 153, 168. The above quotations show that the idea of Indian potential continued to animate policymakers into the 1850s. None of this obscures the offensiveness of these sentiments, or the devastating policies they justified. Throughout the remainder of the nineteenth century, this idea would serve to justify increasingly repressive policies toward the Indians.

364. Schoolcraft, in his reports to Congress, cited this relationship as peculiarly qualifying him for his task:

> The peculiarly intimate relations the author has held to them (having married a highly educated lady, whose grandfather was a distinguished aboriginal chief-regnant, or king), has had the effect of breaking down towards himself, individually, the eternal distrust and suspicion of the Indian mind, and to open the most secret arcana of his hopes and fears, as imposed by his religious dogmas, and as revealed by the deeply hidden causes of his extraordinary acts and wonderful character.

1 SCHOOLCRAFT, *supra* note 354, at viii.

365. Rowland v. Ladiga, 9 Port. 488 (Ala. 1839), *rev'd*, 43 U.S. (2 How.) 581 (1844).

against a white man who moved onto the lands. Without a grant from the federal government, the state court declared, "the Indians are remediless in courts of law."[366] The U.S. Supreme Court disagreed, strongly affirming both the individual rights of the claimant, and the power of the courts to protect these rights against governmental intrusion.[367] In addition, as discussed above, ten years after *Rogers*, Chief Justice Taney emphasized in *Dred Scott v. Sandford* that for Indians, unlike blacks, race did not constitute an immutable political status.[368]

There is even some evidence that this idea of Indian racial equality was in part the product of the 1830s and 1840s, an alternative discourse supplementing that of scientific racism. An 1838 South Carolina Supreme Court case, for example, held that all free Indians, not only those who could prove their connection with a particular tribe, could take advantage of the rights of "free Indians in amity with the government" and testify in court.[369] This holding was not consistent with the 1740 law that the case construed. The law provided that

> all negroes and Indians, (free Indians in amity with this government, and negroes, mulattoes and mustizoes, who are now free, excepted) mulattoes or mustizoes who now are, or shall hereafter be, in this Province, and all their issue and offspring, born or to be born, shall be, and they are hereby declared to be, and remain forever hereafter, absolute slaves, and shall follow the condition of the mother.[370]

The statute then drew a further distinction between "free Indians" who had the burden of proving that they should not be enslaved, and "Indians in amity with this government," for whom the burden was reversed.[371] In contrast with the court's holding, therefore, under the statute not all free people who were racially Indian could assert the privileges of "Indians in amity with this government."[372]

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366. *Id.* at 492.
367. Ladiga v. Roland, 43 U.S. (2 How.) 581, 591-92 (1844).
368. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 403-04 (1856).
369. Miller v. Dawson, 23 S.C.L. (1 Dud.) 174, 175 (1838).
370. 16 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 356, at 297.
371. *Id.* at 298.
372. *Id.*

It might seem surprising that the idea of Indian racial equality should develop at the same time as scientific racism was being used to defend America's peculiar institution. This apparent contrast, however, was not benign. Removing racial disabilities from Indians seems to have been in service of the southern argument that slavery was reserved for the race that was particularly suited for it. In 1848, the South Carolina Supreme Court reaffirmed its earlier decision with explicit consideration of the slavery debate, asking:

> [M]ight not certain other States ask, is she so deep in the cause of slavery, as to reverse her own decisions, in order to re-assume that the Red race, like the African black, comes within the curse of Noah upon Ham and his offspring? Would not such a reversal of past adjudications be a libel upon our international spirit? For such reasons I am for adhering to the decision in the case of Charlotte Miller v. Dawson and Brown [sic], that spares the race of Shem.[373]

While by the late 1830s officials would affirm the equality of individual Indians, only a few years earlier they had been equally likely to explain any signs of equality as the result of Caucasian blood. In 1829, Secretary of War John Eaton urged policymakers to

> look to the red men as they are, and not as oftentimes they are represented to be; to their inaptitude to live under a well regulated system of law, and to the danger and hazard of the experiment. A few of them are well informed men, and capable of enjoying refined society. These are the mixed Indian—the half-breed, as they are usually termed.[374]

In 1834, Joel Roberts Poinsett, a South Carolina politician who later served as Secretary of War, suggested that hunting tribes could be civilized only through racial inbreeding.[375]

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373. State v. Belmont, 35 S.C.L. (4 Strob.) 445, 452-53 (1848).

374. JOHN H. EATON, REPORT OF THE SECRETARY OF WAR, H.R. EXEC. DOC. NO. 21-2, at 34 (1831).

375. J. R. POINSETT, AN INQUIRY INTO THE RECEIVED OPINIONS OF PHILOSOPHERS AND HISTORIANS, ON THE NATURAL PROGRESS OF THE HUMAN RACE FROM BARBARISM TO CIVILIZATION 10 (Charleston, S.C., J.S. Burges 1834).

The belief in Indian equal potential, of course, was at least as powerful an argument for control of Indian people as a belief in innate inferiority. The belief in potential combined with the idea that although Indians, when presented with the opportunity, were just as intelligent, moral, and capable as Caucasians, they also inherited a fierce resistance to the advancement that was in their best interest. After praising the inherent capacity of the Indian, for example, Schoolcraft insisted that, "[a]s a race, there never was one more impracticable; more bent on a nameless principle of *tribality*; more averse to combinations for their general good; more deaf to the voice of instruction; more determined to pursue all the elements of their own destruction."[376] It was not the Indian as an individual, but the tribal group that was hopelessly mired in race. Loyalty to the tribe became not patriotism to one's government, but adherence to a "nameless principle of *tribality*,"[377]—the call of race, not the call of civilization. The white idea of individual Indian equality, therefore, became a powerful justification for stamping out the Indian tribe.

2. The Dangerous Half-Breed

United States v. Rogers[378] is consistent with this idea of the racially equal Indian. In the *Rogers* opinion, the inferior people are not the Indians by blood, but the white men that settled among them, whom Taney characterizes as "the most mischievous and dangerous inhabitants of the Indian country."[379] Only a small minority of members of Indian tribes were either racially non-Indian or of mixed blood. Although the Cherokee Nation, for example, was assumed to be one of the most intermixed tribes, only 1.3% of Cherokee citizens were white and only about 10% were of mixed blood.[380] Despite their insignificant numbers, such racial line crossers loomed large in the minds of policymakers. Their role further illuminates the complex role of race in Indian policy.

376. 1 SCHOOLCRAFT, *supra* note 354, at 15.

377. *Id.*

378. 45 U.S. (4 How.) 567 (1846).

379. *Id.* at 573.

380. Census Roll, 1835, of the Cherokee Indians East of the Mississippi, and Index, Nat'l Archives, Washington, D.C., T496, at 66 (enumerating a total of 16,542 Cherokees with 12,468 full bloods; 1454 half-breeds; 1492 quadroons; 201 intermarried whites; and 74 mixed Negroes).

"Half-breeds" and intermarried whites or blacks were often the scapegoats for any failure of the Indians to conform to white expectations, and particularly for dissension among the Indians. If the Indians failed to civilize properly, resented a policy initiative of the federal government, or resisted efforts to enter into treaties, the blame was laid on some mixed-blood Indian, or dissolute whites or blacks among the Indians.[381] For example, when the Creeks refused to cede their land to the new federal government, it was because they were "much under the influence and direction" of the mixed blood Alexander McGillivray.[382] When the Seminoles fought in Florida rather than voluntarily moving west, it was the fault of the African Americans "whose influence was so great among the Indians" and who composed the "most insidious, dangerous, and ferocious part of the enemy."[383] When the Winnebagoes refused to sign a removal treaty, it was blamed on the influence of whites and half-breeds amongst them.[384]

Popular assumptions and fears about Indian women played into this perception. From the earliest contact with American Indians, Europeans and American observers portrayed them as sexually

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381. *See, e.g.*, JONATHAN PHILLIPS, DOCUMENT ACCOMPANYING THE REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H.R. EXEC. DOC. NO. 28-2, at 445 (1844) (stating the report of Subagent to Wyandots that "[t]he half-breeds control the tribe. A majority of them are stubborn and vindictive, subtle, lazy, and deceptive.... One of the Wyandot Tribe (a half-breed) has ... been called upon by the chiefs to write a very daring and threatening article against the government"); *id.* at 458 (stating the report of Acting Superintendent of Western Territory that tribes should not be allowed to shut out all but Indian traders because Indian traders were seven-eighths or three-fourths white, and would raise prices to the disadvantage of full bloods); CONG. GLOBE, 25th Cong., 2d Sess. app. at 374 (1838) (noting that the leader of the Seminoles "Oseola was not a noble savage battling for rights, but a miserable half breed, a traitor, and violator of every thing held sacred among all races of men, whether civilized or savage. His heart was warmed in equal proportions by the blood of the white man and the red").

382. HENRY KNOX, RELATING TO THE SOUTHERN INDIANS, S. DOC. NO. 1-2, at 15 (1789).

383. CONG. GLOBE, 25th Cong., 2d Sess. app. at 356 (1838).

384. HENRY DODGE, DOCUMENT ACCOMPANYING THE REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, S. DOC. NO. 29-1, at 461 (1845). The Document sets forth the report of Henry Dodge:

> The Winnebagoes are ... a most degraded race of Indians; their intercourse with the whites has made them reckless and profligate in their habits, and apparently abandoned in their principles ... the traders and the half-breeds have heretofore and still exercise an undue influence over the Indians, in making treaties with the United States.

Id.

desirable but lascivious, and their marriages as without obligation or propriety.[385] White men who married women according to Indian custom, therefore, were engaging in savagery and immorality detrimental to federal policies of civilizing the American Indians.[386] The Indian women that married them, like the wives of Rogers and Nicholson, were invisible, except as generic representatives of their race and sex, sources of trouble when they encouraged association of whites and Indians without acceptance of American culture, but vectors for assimilation when they did.

Such reactions against racial boundary crossers plainly colored arguments regarding the Cherokees. In 1827, after the United States sent John Cocke to the Cherokee territory to try to persuade the Cherokees to move west, he reported back that "two-thirds of [the Cherokees were] willing to cede their whole country and remove to the west of the Mississippi," but the mixed-blood elite had intimidated the "real Indians."[387] This report was in direct contrast with reality; the full bloods and traditionalists were, if anything, more determined to remain in their ancestral lands than many of the more acculturated Cherokees.[388] In the debates of the next decade, however, American advocates of removal found a powerful argument in their claim that they were "acting in the interests of the full bloods against the monopoly of power held by the mixed bloods."[389]

Such arguments persisted after removal. The executive branch used the fact that Ross was only one-eighth Cherokee by blood while his opponents were full bloods to argue for intervention to protect the real Cherokees against the Cherokee government. The influence of white northern missionaries was decried as the reason that the majority of Cherokees failed to embrace slavery. Lastly, the influence of scheming, lawbreaking whites and mixed bloods was

385. *See* Berger, *supra* note 121, at 25, 34, 38-40.

386. *Id.* at 29-30.

387. MCLOUGHLIN, *supra* note 324, at 402 (quoting John Cocke's Report on Cherokee Negotiations, Aug. 15-Oct. 11, 1827, M-234, reel 72, 0267-98); *see also* CONG. GLOBE, 25th Cong., 2d Sess. 484 (1838) (alleging that opponents to Cherokee removal "claim to be Indians" but "may be considered, from their complexion, white men, not Indians").

388. MCLOUGHLIN, *supra* note 324, at 402.

389. *Id.*

the most powerful justification for the extension of federal law enforcement over Indian lands.[390]

3. Racing the Indian Tribe

Why did those who crossed racial boundaries like Rogers pose such a powerful spectre to white policymakers? This was a time when the belief in the equal potential of Indian individuals provided a powerful engine to federal policy. Separation between the races was not advocated: Indians were encouraged to assimilate into white society. The primary objection rested not on beliefs about the racial characteristics of Indian and white individuals, but about what racial line crossers meant for shifting understandings of the tribe, and beliefs about the basis of American identity.

Federal Indian law and policy were based on the assumption that "Indian" was a discrete category, separate and distinct from the white community, with fixed boundaries permitting easy definition and control. To be an American, in contrast, meant to be part of a community bounded by universal ideals and aspirations. If tribes also had the ability to choose their members in ways not controlled by the federal government, they became uncomfortably like sovereign nations. In addition, if those the federal government treated as Indian could not be limited by race, it would undermine another fundamental assumption of federal Indian policy: the federal government knew who Indians were and what they needed.

Political theorists sometimes have overlooked the significance of the ability to determine the bounds of one's community. As Michael Walzer has pointed out, however, "[t]he primary good that we distribute to one another is membership in some human commu-

390. This is a persistent belief. As recently as 1957, a biographer of Isaac Parker wrote the following:

> Their savagery flaunted itself. It seemed that every white man, Negro, and half-breed who entered the country was a criminal in the state from which he had come; that the last thing on his mind at night was thievery and murder, and it was his first thought in the morning. No American frontier ever saw leagues of robbers so desperate, any hands so red with blood. By 1875 this civilization was in the balance. Decent men, red and white alike, cried to the government for protection.

SHIRLEY, *supra* note 113, at ix.

nity."[391] This choice structures "all our other distributive choices: it determines with whom we make those choices, from whom we require obedience and collect taxes, to whom we allocate goods and services."[392] Political theories that assume a polis, or an established group and a fixed population, thus "miss the first and most important distributive question: How is that group constituted?"[393]

Walzer addressed when communities may exclude others from membership.[394] Exclusion raises significant questions of justice. During the 1840s, these questions were coming to the fore with the exclusion of African Americans from full membership in the American community and efforts to stem the tide of immigrants to America's shores. The power of inclusion, however, is equally important for the idea of the modern nation. A nation is constituted not by the individuals that happen to be present when national boundaries are established, but by the imagined characteristics that provide the bonds between its members.[395] The ability to include geographic outsiders perceived to share those characteristics thus affirms that these bonds are indeed defining national ties.

Others argue that ideas of ethnic affinity form a distinctive bond between members of a nation.[396] It is certainly true that race played a significant role in America's immigration and naturalization decisions.[397] Even after the Fourteenth Amendment mandated citizenship for all those born in the United States, American law explicitly restricted naturalization to "free white persons" and persons of "African descent" until 1952.[398] Despite the Fourteenth Amendment, birthright citizenship also was denied to

391. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31 (1983).

392. *Id.*

393. *Id.*

394. *Id.* at 35-41, 61-63.

395. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6-7 (2d ed. 1991) (defining the nation-state as an imagined community, defined by its members' understanding of the geographic, cultural, and political bonds between themselves and multiple unknown others).

396. *See, e.g.*, ANTHONY D. SMITH, NATIONALISM AND MODERNISM 45-46 (1998).

397. See, *e.g.*, IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 49-53 (1996) (examining cases in which American courts sought to define who was white for purposes of federal naturalization). Race played an especially significant role in America's immigration and naturalization decisions from 1880-1965. *See, e.g.*, *id.* at 37-47.

398. *Id.* at 42-44.

most American Indians[399] until 1924 when Congress changed the status quo.[400]

It is equally true, however, that the modern nation-state was built around an ideal of universality.[401] Its theoretical traditions were those of theorists like Locke and Rousseau, based on the precept that philosophy could uncover the universal rules around which all human societies should be built. The French Revolution, for example, was perceived as great not because it embodied particularistic, ethnically defined goals, but because it embodied ideals that should govern all men.[402] Today, particularly with the collapse of the Soviet Union, we see the struggle for recognition of numerous ethnically defined national movements. These emerging governments, however, are perceived as a necessary evil for lesser nations than the inclusive America that appears in contemporary political rhetoric.[403]

The American concept of Manifest Destiny which emerged during the *Rogers* period, although part of an explicitly racist rhetoric, was no less tied to the ideal of universality. John O'Sullivan coined the term Manifest Destiny in an 1839 article in the *United States Magazine and Democratic Review*, the mouthpiece of the Democratic Party.[404] The Democratic Party was the strongest opponent of the abolition of slavery and the extension of citizenship to free blacks.

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399. *See* Elk v. Wilkins, 112 U.S. 94, 109 (1884) (holding that an Indian who had chosen to leave the reservation and had fully assimilated with non-Indian society was not a citizen of the United States and was not entitled to vote in state elections).

400. Act of June 2, 1924, ch. 237, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b) (2000)) (making all Indians born in the United States citizens). This denial was based not on explicitly racial grounds, but on the argument that Indians on reservations were not "subject to the jurisdiction" of the United States, and therefore not within the scope of the Fourteenth Amendment. *Elk*, 112 U.S. at 102. This argument finds some support in the history of the Amendment, *see* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 832-40 (1991), and may accord better with some Indian tribes' perception of their sovereignty and independence. *See Ex parte* Green, 123 F.2d 862, 863-64 (2d Cir. 1941) (rejecting a challenge by a member of an Iroquois Tribe to the government's extension of citizenship as inconsistent with tribal sovereignty).

401. *See* PETER FITZPATRICK, *'We know what it is when you do not ask us': Nationalism as Racism*, *in* NATIONALISM, RACISM AND THE RULE OF LAW, 3, 8-9 (Peter Fitzpatrick ed., 1995).

402. *See id.* at 8.

403. See, for example, the current government's representation of the United States as the country of freedom and tolerance of all ethnicities and religions, and the resistance to the creation of a separate Kurdish polity in the reconstruction of Iraq.

404. John O'Sullivan, *The Great Nation of Futurity*, 5 U.S. MAG. & DEMOCRATIC REV. 426, 427 (1839).

The article used the idea of Manifest Destiny to justify a disregard of the political rights of Mexicans and Indian tribes. Despite this, O'Sullivan's article explicitly rejected a particularistic, ethnic basis for the greatness of the United States. Rather, the American people had "derived their origin from many other nations."[405] For O'Sullivan, "American patriotism is not of soil; we are not aborigines, nor of ancestry, for we are of all nations."[406] How then could the Democrats argue that this "nation of many nations" was divinely chosen to conquer the world?[407] Not because of its particularity, but its inclusiveness and universality—"because the principle upon which a nation is organized fixes its destiny, and that of equality is perfect, is universal."[408]

The application of the outsider for membership and the acceptance of such outsiders as members are necessary confirmations of the universal appeal of the nation.[409] The liberal theory of governmental power is built on an idea of consent to the social contract.[410] This consent is not actual but mythic for the average American who is born into the nation, thus undermining national claims of choice and self-governance. The foreigner who chooses to join the American democracy, however, makes this consent concrete,

> address[ing] the need of a disaffected citizenry to experience its regime as choiceworthy, to see it through the eyes of still-enchanted newcomers whose choice to come here ... [reenacts democracy's] fictive foundation in individual acts of uncoerced consent. Simultaneously, the immigrant's decision to come here is seen as living proof of the would-be universality of America's liberal democratic principles.[411]

Using the foreigner to reinforce American myths of democracy and universality was very much part of the national discourse of the

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405. *Id.* at 426.

406. *Id.* at 429.

407. *Id.* at 427.

408. *Id.* at 426.

409. *See* BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 72-79 (2001).

410. The Declaration of Independence makes this idea explicit, stating that governments are "instituted among men, deriving their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

411. HONIG, *supra* note 409, at 75.

1840s. When *Rogers* was decided, the country was engaged in a national debate over the definition of the American. Immigrants were coming to America in unprecedented numbers,[412] prompting the birth of the Native American party, which argued that immigration and naturalization must be controlled.[413] The party argued for the need to ensure that America's universalist principles of democracy and equality would not be undermined by the influx of foreigners steeped in the antidemocratic prejudices of a Europe still dominated by monarchies and intolerant religious creeds.[414] Party opponents, in turn, referred explicitly to the proof of the superiority of American democracy that immigration provided, claiming that the immigrants "had abandoned their homes, and all that was dear to them, because of their superior love to freedom."[415] These universal principles caused "the eyes of the downtrodden nations of Europe ... [to be] fixed with [an] admiring gaze" on the United States.[416] During the American Revolution, these politicians claimed, French soldiers who fought for the British changed sides and "threw themselves into the ranks of those who declared to the world that man is capable of self-government."[417] The choice of outsiders to come to America thus affirmed America's myths of universality and democracy.

What could it mean, then, that American citizens chose to expatriate themselves from this icon and affiliate with another group? The only permissible answer was the one reached in *Rogers*: such men were outlaws, dangerous and mischievous characters.[418]

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412. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 202 (1997).

413. CONG. GLOBE, 29th Cong., 1st Sess. 67, 74, 77 (1845).

414. *Id.* at 74, 77.

415. *Id.* at 80 (statement of Rep. Bowlin). It is important to remember that this fervent advocacy of freedom and democracy lived side by side with equally fervent denial of freedom to those deemed not deserving of it. The Native American party was founded in Pennsylvania after they had learned that "a foreign demagogue" was urging Irish emigrants to vote for the destruction of an institution "[c]overed by the compromises of the Constitution." That institution was slavery. *Id.* at 81 (statement of Mr. Faran). An opponent of the party passionately replied that the Irish emigrants "knew that the destruction of that institution involved the destruction of the Union." *Id.* He claimed that in his district "he was yet to see the first Irish abolitionist." *Id.* At this declaration, "several voices here exclaimed 'Good!'" *Id.*

416. *Id.* at 72 (statement of Rep. Giles).

417. *Id.* at 78 (statement of Rep. Chase).

418. *See* United States v. Rogers, 45 U.S. (4 How.) 567, 572-73 (1846).

Native Indians could be forgiven for their ignorance in clinging to their inferior governments, but not so those born into American civilization. Their choices could not possibly be motivated by the desire to affiliate with another government, but only by the intention to take advantage of weakness and escape from justice. They were the worst of all men and must be controlled.

While the choice of non-Indians to join a tribe threatened the American self-concept, so did the ability of tribes to accept such outsiders. Where a nation claims that its "distinguishing characteristic"[419] is one of universality, it can only justify its distinctness from and corresponding oppression of other governments by characterizing them as particular and bounded.[420] In this manner the United States defined itself through its opposition to the non-universality of other political groups. Race becomes the "originating exclusion" not only of individuals but also of other groups claiming sovereignty.[421] A group whose boundaries were defined by race and limited by history could not claim political equality with a nation that was universal, a "nation of futurity."[422] The discourse of universality was therefore part of, not opposed to, the discourse of exclusion.[423]

Regardless of whether the new scientists of the Indian race believed that Indians were innately inferior to Caucasians, the fact that they could be isolated and defined as a distinct object of study encouraged paternalistic control. Unlike a "nation of futurity,"

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419. O'Sullivan, *supra* note 404, at 429.

420. "As universal, the nation can have no positive limits and would, without more, lack identity .... [I]dentity and its limits are generated from within, as it were, by constituting the nation as universal in opposition to what is exceptional to its universality." FITZPATRICK, *supra* note 401, at 10.

421. *Id.* at 17.

422. O'Sullivan, *supra* note 404, at 426 (emphasis omitted). Peter Fitzpatrick also argues that to give identity to the apparently boundless universality of the modern nation,

> the protean double comes to the fore, organizing and classifying the world along a spectrum ranging from the most "advanced" liberal democracies to barely coherent nations always about to slip into the abyss of ultimate alterity.... At various points along this formative spectrum are nations still afflicted by atavistic particularity, by fundamentalisms and ethnic hatreds, and by unpredictable destructive urges.

FITZPATRICK, *supra* note 401, at 20.

423. *Compare* SMITH, *supra* note 412, at 6 (arguing that there are two distinct threads in American discourse, one of inclusion and one of racism and exclusion), *with* HONIG, *supra* note 409, at 11-12 (challenging Smith's notion of distinct threads of discourse).

unknowable because it could accept outsiders and engage in a sovereign process of self-definition, ethnically defined tribes had fixed boundaries in time. Policymakers could therefore rest assured that they knew who Indians were and what they needed.

The debate over the *Rogers* case explicitly involved what the ability to naturalize outsiders would mean for both American and tribal identity. For the Arkansas press and the prosecuting attorney, the most important questions raised by the case did not concern Indian relations, but rather what it meant to be an American. According to the *Little Rock Gazette*, the case posed questions "involving the natural rights of man, as well as the political condition of the different Indian tribes."[424] The *Arkansas State Gazette* described the questions before the Supreme Court as

> whether an American citizen can at will ... become the subject of a country of which he was a not a native. *Unless Rogers is disposed of on some other ground, the Supreme Court will have to decide some of the most important questions, affecting the natural rights of man, which have arisen since the achievement of our revolution.*[425]

In the district court, United States Attorney Samuel Hempstead challenged the idea that

> it had ever been judicially decided ... that a citizen of our government could expatriate himself, and, conceding this right, the Cherokee Nation was within the limits of the United States, and not such a foreign, independent nation, as would admit of the idea, that a citizen of the American Union, by living among the tribe, could throw off his allegiance to the government.[426]

The first two questions posed to the Supreme Court concerned the ability of American citizens to expatriate themselves from the United States, while the third was whether tribes could be "held and recognized ... as a separate and distinct government or nation,

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424. *Reprinted in* CHEROKEE ADVOC., June 5, 1845, at 3.
425. ARK. ST. GAZETTE, Apr. 28, 1845, at 2 (emphasis added).
426. CHEROKEE ADVOC., May 8, 1845, at 3.

possessing political rights and powers such as authorize them" to naturalize such citizens.[427]

The answer to the third question was a resounding "no."[428] Naturalization was not consistent with the increasingly inferior position of tribes within the American political scheme. Rogers' chosen political affiliation could not overcome his inherited affiliation and, while tribes might have some indicia of nationhood, that nationhood had ethnic limits.[429] Whatever privileges of self-government might be granted to individuals living as a tribe, tribal boundaries would be fixed by the United States, not the tribe itself.[430]

This result affirmed that tribes were not national political entities, but racial ones.[431] Racial outsiders might choose to join them and abide by their rules, but this choice was disparaged and disrespected by federal law.[432] Tribal members were not alien citizens, free from federal regulation, but individuals subject to the jurisdiction of the federal government.[433] Racializing the Indian tribe, not the Indian individual, accomplished this result.

V. IMPACT OF *ROGERS* ON INDIAN LAW

Although legal scholars have paid little sustained attention to *United States v. Rogers*, the case has had a tremendous impact on Indian law. The *Rogers* decision was not the immediate catalyst of a change in the law, but instead confirmed the coalescing legal posture of the executive branch. Although Congress and the courts largely ignored its legal implications for many years, eventually the executive branch was able to translate its administrative policy into statutory law. When these laws were challenged in the courts, *Rogers* became the core precedent justifying congressional power over reservations. The decision has raised its head again in the

427. United States v. Rogers, 45 U.S. (4 How.) 567, 569-70 (1846).
428. *See id.* at 572-73.
429. *See id.* at 573.
430. *See id.*
431. *See id.*
432. *See id.*
433. *See id.*

modern era by justifying judicial diminishment of tribal power under the common law doctrine of implicit divestiture.

A. Rogers *and the Origins of Federal Plenary Power*

One of the most significant challenges to the idea of tribal sovereignty is the doctrine that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[434] This power is largely unconstrained either by treaties or the U.S. Constitution. Through most of the history of Indian policy, moreover, the political question doctrine has been invoked successfully to shield congressional power from judicial review. Although the origin of the plenary power doctrine has been traced to the Supreme Court decisions of the 1880s through the 1920s,[435] analysis of these decisions shows that the *Rogers* case and its reasoning were important to the development of the doctrine.[436]

For almost one hundred years, the principle that the United States could only diminish tribal rights with tribal consent in the form of treaties provided powerful protection for tribal sovereignty.[437] In 1870, however, the Supreme Court relied on *Rogers* to undermine this rule. In *The Cherokee Tobacco*, the Court considered whether an 1868 law providing a federal tax on tobacco applied to tobacco grown by Cherokees on their land.[438] The 1866 treaty with the Cherokees provided that Cherokees and others residing in the territory could sell farm products grown in the territory without paying such taxes.[439] The federal law, enacted only two years after the treaty, did not refer to Indian country but simply to articles produced "anywhere within the exterior boundaries of the United

434. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

435. *See, e.g.*, Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 171 (2002).

436. *See* Newton, *supra* note 16, at 209-11 (tracing the origins of formulation of plenary power doctrine to *Rogers*).

437. Even in *United States v. Rogers*, the Court reluctantly agreed that the Cherokee treaty might have some impact on the construction of the Intercourse Act, but through a somewhat dubious interpretation of the treaty, held that there was no conflict between the two. *Rogers*, 45 U.S. at 573.

438. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 617-18 (1870).

439. *Id.* at 618.

States."[440] The Court nevertheless relied on *Rogers* to hold that tribes were subject to the authority of the United States, and Congress could therefore extend its laws over the Indian territory at will.[441] According to the Court, these principles were "so well settled in our jurisprudence that it would be a waste of time to discuss them or refer to further authorities in their support."[442] That established, the Court had little trouble concluding that Indian treaties provided no bar to congressional legislation.[443] In the same year, Congress resolved to deal with tribes in the future through congressional legislation rather than treaties.[444]

Still, Congress did not unilaterally break treaties with Indian tribes, and continued to seek tribal consent to abandon these treaties for many years. In 1903, however, the Court relied on *The Cherokee Tobacco* and its progeny to affirm the exercise of congressional power over Indians without regard to treaty obligations in *Lone Wolf v. Hitchcock*.[445] The decision was immediately excoriated

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440. *Id.* It appears, therefore, that the decision to subject Cherokee products to the law had its origins in the executive branch's tax collectors rather than Congress.

441. *Id.* at 619. Although the Court used Cherokee cases, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823), and *Mackey v. Coxe*, 59 U.S. (18 How.) 100 (1855), as support for the proposition that Indian territory was part of the United States, only *Rogers* supported the Court's interpretation of the range of congressional power there.

442. *The Cherokee Tobacco*, 78 U.S. at 619.

443. *Id.* at 621. Following *Rogers'* self-imposed limits on the range of judicial power, the Court also asserted that the judiciary had no power to check the hand of Congress in violating its treaties with the Indians: "Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved ... are beyond the sphere of judicial cognizance.... [T]he act of Congress must prevail as if the treaty were not an element to be considered." *Id.* Subsequent law has mitigated this principle by providing that the Courts will not interpret a statute as abrogating an Indian treaty unless the statute or its legislative history provides clear evidence of congressional intent to do so. *See, e.g.*, United States v. Dion, 476 U.S. 734, 739 (1986).

444. Act of March 3, 1871, ch. 120, 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71 (2000)). Although the law was enacted as a rider to an appropriations act before *The Cherokee Tobacco* was argued or decided, the temporal correspondence between the two suggests that each provided support for the other. *See* WILKINS, *supra* note 29, at 54-55.

445. Lone Wolf v. Hitchcock, 187 U.S. 553, 565-68 (1903).

as the *Dred Scott* of Indian law.[446] Unlike *Dred Scott*, no Civil War or constitutional amendment has yet abrogated *Lone Wolf*.[447]

The decision had an even stronger impact in defining the range of federal power over Indians. For over thirty years, the executive branch had been advocating unsuccessfully for a provision subjecting crimes between Indians to federal jurisdiction.[448] In 1883 the executive branch brought a test case prosecuting a member of the Brûlé Sioux Tribe named Kan-gi-shun-ca, or Crow Dog, for the alleged murder of Spotted Tail, another Brûlé Sioux, before the Supreme Court.[449] There is a striking similarity between the methods of the executive branch in this case and those in *Rogers*. As Sidney Harring documented, beginning the day after Spotted Tail's killing, the Bureau of Indian Affairs (BIA) "engaged in a systematic distortion of the facts of the case" by suggesting that the prosecution

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446. A month after the decision, Senator Matthew Quey of Pennsylvania, in a debate as to how many copies of the decision should be printed for Congress, declared that

> It is a very remarkable decision. It is the *Dred Scott* decision No. 2, except that in this case the victim is red instead of black. It practically inculcates the doctrine that the red man has no rights which the white man is bound to respect, and, that no treaty or contract made with him is binding. Is that not about it?

WILKINS, *supra* note 29, at 116.

447. Subsequent decisions, however, have somewhat ameliorated its impact. First, the Court has established that while Congress may abrogate Indian treaty rights, "it must clearly express its intent to do so" and the Court will not find such an intent absent "'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202-03 (1999) (quoting United States v. Dion, 476 U.S. 734, 740 (1986)). Second, the Court has established that federal acts with respect to Indians are not as immune from judicial review as *Rogers*, *Cherokee Tobacco*, and *Lone Wolf* suggest. Decisions that are not rationally related to the federal obligations to the Indians may be reviewed and condemned by the Court. *See, e.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371, 424 (1980) (requiring compensation with interest for federal taking of land that was not consistent with federal obligations toward the Indians); Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.") (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion)); Morton v. Mancari, 417 U.S. 535, 555 (1974) (suggesting Congress may not constitutionally single out Indians for special treatment which is not rationally tied to the fulfillment of Congress' unique obligation toward the Indians); *see also* Newton, *supra* note 16, at 228-37 (discussing the decline of absolute plenary power).

448. *See* S. DOC. NO. 29, at 461 (1846) (setting forth an early proposal to extend criminal jurisdiction); *see also* HARRING, *supra* note 215, at 134-36 (discussing efforts since 1874 to obtain such jurisdiction).

449. *Ex parte* Crow Dog, 109 U.S. 556, 557-58 (1883).

was motivated by a popular outcry for the killer to be brought to justice.[450] The BIA, in fact, was well aware that the dispute had already been resolved through Brûlé Sioux laws.[451] The BIA also knew that these laws differed sharply from "blood revenge," the popular misconception of Indian law.[452] Instead, the families of Crow Dog and Spotted Tail met as ordered by the tribal council, and Spotted Tail's family had accepted horses, blankets, and sweet grass as a symbol of their reconciliation.[453] In both *Rogers* and *Crow Dog*, therefore, the executive branch was aware that the matter already had been resolved, obviating the need for resolution by the federal courts. In both cases, the executive branch fabricated a tribal demand for federal interference in the matter. In both, moreover, its arguments relied on eliding the existence of tribal legal systems capable of handling such disputes.

While the Supreme Court held in *Crow Dog* that current federal law did not authorize the prosecution, it relied on *Rogers* to suggest that Congress had the power to create jurisdiction over such crimes.[454] In 1885, in response to popular outrage at the apparent refusal to protect Indians from Indian crimes, Congress enacted the Major Crimes Act. When the act was challenged in the Supreme Court, the Court extensively quoted *Rogers'* assertion that Congress had the power to prosecute anyone on an Indian reservation, and that the limits on the exercise of this power were a political question not subject to judicial review.[455] With these principles established, the Court arrived at a further, even more startling conclusion: Congress could regulate internal relations on Indian reservations, even though such power was not authorized by the Constitution, simply because "the theatre of its exercise is within the geographical

450. HARRING, *supra* note 215, at 102-05, 115.

451. *Id.* at 103.

452. *Id.* at 105. The focus of Brûlé Sioux law was reestablishing harmony in the community in which the crime had occurred. In the most serious cases, the tribal council ordered the parties to meet and the accused to offer gifts to the family of the victim. *Id.* at 104-05. These gifts were not considered either as an admission of guilt or as compensation for the life of the victim—indeed, the victim's family would often refuse to take the gifts as a testament to their pride and wealth. *Id.* at 105. Rather, it was "an offer of reconciliation and a symbolic commitment to continuation of tribal social relations." *Id.*

453. *Id.* at 104-05.

454. *Ex parte Crow Dog*, 109 U.S. at 559-60.

455. United States v. Kagama, 118 U.S. 375, 380-81 (1886).

limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."[456] Thus, while the *Rogers* decision was initially a product of the executive branch whose influence was confined to executive actions, it soon became independent support for wide reaching judicial and congressional action.

B. Rogers *and the Doctrine of Implicit Divestiture*

The *Rogers* decision has resurfaced in the modern era to contribute to one of the most disturbing recent trends in Indian law. Since the 1970s, Congress has acted with restraint in exercising its plenary power, passing legislation that is designed in consultation with tribes and intended to enhance tribal self-determination.[457] In 1978, however, in *Oliphant v. Suquamish Indian Tribe*,[458] the Supreme Court assumed judicial power to erode tribal sovereignty by creating the doctrine of implicit divestiture. According to this doctrine, tribes lost much power over non-Indians on their land simply through their incorporation within the United States, despite the absence of any treaty or statute removing this power.[459] As with the development of the plenary power doctrine, *Rogers'* expansive vision of federal power over Indians was fundamental to this holding.

Until recently, the understanding that tribes retained all attributes of sovereignty not expressly removed by congressional action or tribal consent tempered the plenary power doctrine. As articulated by Felix Cohen, who almost fifty years after his death remains the most influential scholar of Indian law:

> *[T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished....* The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive

456. *Id.* at 384-85.
457. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 83 (1987).
458. 435 U.S. 191 (1978).
459. *Id.* at 209.

> content. What is not expressly limited remains within the domain of tribal sovereignty.[460]

The only powers removed without express congressional action were those inconsistent with the sovereign integrity of the United States: the power to sell land without federal permission and the power to make treaties with foreign nations. In *Oliphant*, the Supreme Court broadened the doctrine to include implicit divestiture of tribal powers whenever they were deemed "inconsistent" with the interests of the United States.[461] For the Supreme Court, this meant jurisdiction over non-Indians.

The case concerned the tribal prosecution of two non-Indians for crimes committed on Suquamish land. Relying on the concept of retained inherent sovereignty, the Ninth Circuit held that

> the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish originally possessed.... "[I]t must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it."[462]

The Supreme Court, in an opinion by Justice Rehnquist, rejected this formulation of the problem. Despite the decision's extensive discussion of nonjudicial assumptions about tribal jurisdiction over non-Indians,[463] its precedential underpinnings were extremely thin.[464] The *Rogers* holding that Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority"[465] therefore was central to the conclusion that "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United

460. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942).

461. *Oliphant*, 435 U.S. at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

462. *Oliphant*, 544 F.2d at 1009-10 (quoting Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905)).

463. *See Oliphant*, 435 U.S. at 196-208 (identifying tribal, congressional, and executive historical attitudes regarding jurisdiction of Indian legal systems over non-Indians).

464. *See id.* at 208-12.

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

States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."[466] The Court held that this constraint implicitly divested tribes of the power to prosecute non-Indians criminally.[467]

Over the past twenty-five years, the Court has expanded on *Oliphant* to whittle away tribal civil jurisdiction over nonmembers of the tribe.[468] These decisions represent judicial attacks on tribal sovereignty in the absence of congressional authorization, which one scholar called the common law of colonialism.[469] While *Rogers* has not figured prominently in these subsequent decisions,[470] its holdings that federal power trumped tribal power, and that the federal government did not intend to extend tribal sovereignty to those whose tribal affiliation was not a matter of biological inheritance, could well have been the model for these later decisions. In effect, the decisions make law of Justice Johnson's dismissive concurrence in *Cherokee Nation v. Georgia*,[471] which stated that tribes were not true sovereigns, but, like the Israelites wandering in the desert, "nothing more than wandering hordes, held together only by ties of blood and habit," with an extremely circumscribed right of "personal self-government" and nothing else.[472]

The *Rogers* decision did not compel any of these legal developments. All of them, however, rested on the precedent it provided. This is a long shadow to be cast by a decision that relied on legal

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466. *See Oliphant*, 435 U.S. at 208-09.

467. *See id.* (interpreting precedent and statutes to allow broad preemption of Indian law).

468. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001) (denying tribal jurisdiction over action by tribal member against state officials for action arising on land held by tribe); Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997) (denying tribal civil adjudicatory jurisdiction over case between nonmembers arising on state right of way through reservation); Montana v. United States, 450 U.S. 544, 561 (1981) (denying tribal civil legislative jurisdiction over nonmembers on land owned in fee by nonmembers outside limited exceptions).

469. *See generally* Philip Frickey, *A Common Law For Our Age Of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE. L.J. 1 (1999) (discussing the divestiture of tribal sovereignty through reduction of territory and reduction of jurisdiction over nonmember matters arising on tribal lands).

470. *But see* Brief for Petitioners at 17, *Hicks*, (No. 99-1994) (citing *United States v. Rogers* to support the ultimately successful proposition that tribes should not have jurisdiction over state officials).

471. 30 U.S. (5 Pet.) 1, 21 (1831) (denying that "a people so low in the grade of organized society as our Indian tribes most generally are" were states at all).

472. *Id.* at 27.

and factual misrepresentations to adjudicate the rights of a dead man.

CONCLUSION

The *Rogers* opinion provided the bridge between Justice Marshall's jurisprudence, with its relatively robust idea of tribal sovereignty and accordingly limited idea of federal power, and the current doctrine that tribal sovereignty is subject to "complete defeasance" by the federal government.[473] The decision has returned to significance in the Supreme Court's doctrine of implicit divestiture, under which tribes are deemed to have lost jurisdiction over nonmembers simply by virtue of their incorporation within the territory of the United States.[474] The two developments are flip sides of the same coin. In the first, tribal power was diminished by permitting outside control of its members. In the second, tribal power was again diminished by removing internal control over all but members of the tribe.

The weakness of the legal foundation for these developments should raise questions as to the stability of the edifice built upon it. The Supreme Court at least once withdrew an opinion after discovering that, without its knowledge, the controversy in the case had ended before it reached the Court.[475] Although the Court is, to say the least, unlikely to withdraw an opinion 167 years after

473. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 857 (1982); *see* United States v. Kagama, 118 U.S. 375, 380-81 (1886) (relying on *Rogers* to uphold act asserting jurisdiction); *Ex parte* Crow Dog, 109 U.S. 556, 559-60 (1883) (relying on *Rogers* for proposition that Congress could assert federal jurisdiction over Indians in Indian country); Newton, *supra* note 16, at 210-11 (tracing origins of plenary power doctrine to *Rogers*).

474. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) (relying on the *Rogers* vision of federal control in holding that "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty").

475. Gardner v. Goodyear Dental Vulcanite Co., 131 U.S. App. at ciii-civ (1873). On May 6, 1872, the Supreme Court had affirmed a decree in favor of the company. *Id.* Subsequent to this affirmance, however, the Court learned that the costs and fees of both parties had been paid by the company. *Id.* Ten months after its original decision (although apparently before the decision had been read), on March 3, 1873, the Court withdrew its affirmance and dismissed the appeal. *Id.*

issuing it, future courts should think twice before relying on this shaky legal ground or on the legal principles it has spawned.

The *Rogers* case also provides a cautionary tale directly relevant to contemporary Indian law. As in *Rogers*, judges today continue to establish radical principles based upon their retelling of a history of Indian relations that never existed.[476] They continue to rule based on their interpretations of congressional policy, when the views of contemporary Congresses are in stark contrast with the legal principles they pronounce.[477] They continue to write opinions based not so much on precedent as on their assumptions about Indian tribes and the inadequacy of their legal systems.[478] The 1846

476. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 363 (2001) (taking nineteenth century cases out of context to find the assumption that state courts could serve process on Indians on reservations for commission of off-reservation crimes); Duro v. Reina, 495 U.S. 676, 688-89 (1990) (using history to deny tribal jurisdiction over nonmember Indians although history relied on in *Oliphant* lumped all Indians together); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 462-63 (1989) (Blackmun, J., dissenting) (criticizing Justice Stevens' reliance on the hypothetical intent of nineteenth century Congress); *Oliphant*, 435 U.S. at 196-208 (using a doctored historical record to deny tribal jurisdiction over non-Indians); Russell L. Barsh & James Y. Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Shark*, 63 MINN. L. REV. 609, 617-31 (1979) (criticizing the use of history in *Oliphant*).

477. Since the 1970s, Congress has pursued a policy of tribal self-determination, and has generally acted to help tribes govern themselves and their territories. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 276-77 (2001). During the same period, however, the Court through its decisions has persistently undermined tribal sovereignty. *See id.* at 277-79 (attributing the court's decisions to subjective judgment rather than reasoned interpretation of the laws). At least once the Court has invalidated a portion of federal legislation on Indian affairs, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and at least one of the Court's efforts has been reversed by congressional legislation, United States v. Enas, 255 F.3d 662, 669 (2001) (discussing the history of legislation to reverse Duro v. Reina, 495 U.S. 676 (1990)).

478. *See, e.g.*, *Hicks*, 533 U.S. at 383-84 (Souter, J., concurring) (expressing concern about subjecting nonmembers to tribal courts); Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997) (denying that "requiring [defendants] to defend this commonplace state highway accident claim in an unfamiliar court" was necessary for tribal sovereignty); Hagen v. Utah, 510 U.S. 399, 421 (1993) (holding that reservation was diminished in part because holding that land was still part of reservation would "seriously disrupt the justifiable expectations of the people living in the area"); *Oliphant*, 435 U.S. at 210-11 (holding that tribal jurisdiction over non-Indians would contravene the federal "great solicitude to protect against intrusions on personal liberty."). The Court decided against tribal jurisdiction in *Strate v. A-1 Contractors*, in the face of a pending case concerning tribal jurisdiction that was the subject of horror stories about the tribal justice process. GETCHES ET AL., *supra* note 62, at 554-55. In *Nevada v. Hicks* the Court held, without citation to legal precedent except dicta in two nineteenth century cases, that the state interest in serving process for off-reservation crimes was so

Supreme Court might be forgiven for these lapses in *Rogers*, as the only source of a contrary view was a discharged soldier who had died a year earlier. Today, when tribes are eager and able to participate in legal debates concerning their rights, when accurate information regarding what occurs in tribal courts is only a mouse click away,[479] these lapses are less forgivable.

Taking an even broader perspective, how does the *Rogers* story enhance our understanding of the ways race works in politics and law? Outside the Indian context, America is a country with few colonies. American race scholars, therefore, began their work with the experience of African Americans, a group whose members were forcibly separated from their national identities, and whose individual equality was persistently denied. The resulting discourse, however, can only with difficulty be expanded to relationships with groups acknowledged as politically distinct.[480]

Because of these origins, proclaiming the equality of the *individual* members of such groups often masks the ways that racism or ethnocentrism colors how we analyze the political rights of the *group*. In *Rogers* and the policies of which it was part, however,

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considerable as to prevent any tribal jurisdiction over state officials doing so, even though the facts in the case suggested that tribal cooperation with the state police in the matter had in fact led to additional evidence regarding the alleged crimes. *Hicks*, 533 U.S. at 356, 363-64. In a case recently before the Supreme Court, Inyo County v. Paiute-Shoshone Indians of Bishop County, 538 U.S. 701 (2003), the petitioner explicitly sought to revive the image used so successfully in *Rogers* that reservations were enclaves for lawbreakers of all stripes. Brief for Petitioner at 21, 23-24, *Inyo County* (No. 02-0281).

479. *See, e.g.*, http://www.versuslaw.com (last visited Apr. 7, 2004) (providing searchable versions of hundreds of tribal court cases); http://thorpe.ou.edu/codes.html (last visited Apr. 7, 2004) (providing links to many tribal codes).

480. This difficulty is particularly poignant in Indian law. Much of federal Indian law depends on different treatment for groups that are, in large part, defined by the ancestry of their members. To apply strict scrutiny to such treatment could result in taking away most of the protection for tribal sovereignty that the federal government has provided. To deny heightened scrutiny to such treatment, however, leaves tribal groups subject to the destructive "whim of the sovereign." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289 n.21 (1955). For various perspectives on this difficulty, see generally Goldberg, *supra* note 11 (discussing error in treating descent-based laws regarding Indian people as race-based laws); Newton, *supra* note 16, at 286-88 (arguing for heightened scrutiny as protection against federal plenary power); Williams, *supra* note 400 (arguing that strict scrutiny should be applied to classification of Indians as individuals but not to those applying to them as tribal entities); Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. REV. 169, 170 (1991) (arguing that Williams' response would "invite the complete demolition of federal Indian law as we know it today").

the government proclaimed the racial equality of Indians while emphasizing the racial limits on tribal power. The result was not equal treatment of either Indians or tribes, but instead coerced assimilation of Indian people and enshrined inferiority of tribal governments.

This process continues in modern Indian law, as the Court emphasizes the racially closed nature of Indian tribes in order to deny tribal jurisdiction over nonmembers and affirm state jurisdiction over non-Indians on tribal land.[481] These efforts replicate nineteenth century attempts to deny tribes political rights by defining them as groups tied together by "blood and habit" rather than as governmental entities.[482] Paradoxically, although these limitations on tribal power are sometimes justified as efforts to undo the "racism" of Indian law,[483] they only reinscribe it, by denying tribes the right to make choices as governmental rather than ethnic entities, and denying the federal government the power to protect those choices. The story of *Rogers* should teach us that it is not federal recognition of tribal power that enshrines race in law, but instead federal efforts to place racially defined limits around it. Perhaps a better understanding of the complex ways race works in this situation and others will help us to ensure that our legal responses conform to the ideals of equality that we espouse.

481. Duro v. Reina, 495 U.S. 676, 688, 693 (1990); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1981); *Oliphant*, 435 U.S. at 210-11.

482. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 27 (1831).

483. *See* Rice v. Cayetano, 528 U.S. 495, 514 (2000) (invalidating qualifications based on Native Hawaiian ancestry for voting on trustees for land held in trust for Native Hawaiians); Williams v. Babbitt, 115 F.3d 657, 666 (9th Cir. 1997) (striking down protections for Alaska Natives in Reindeer Act of 1937 as race-based); Gould, *supra* note 11, at 771-72; Snowden et al., *supra* note 9, at 173-76, 231-38 (criticizing the continuing adherence to foundations of Indian law based on racism and colonialism); *see also* Goldberg, *supra* note 11, at 1375 (discussing and criticizing this trend).