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THE NATURE OF REPRESENTATION: THE CHEROKEE RIGHT TO A CONGRESSIONAL DELEGATE

EZRA ROSSER^{*}

I. INTRODUCTION

A right to a delegate to the U.S. House of Representatives is provided to the Cherokee nation by the Treaty of New Echota signed in 1835. The only tribe with its own unique right to a delegate, the Cherokee right is provided for in Article 7 of that treaty:

The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that *they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.*¹

The delegate right was included in the treaty as part of the federal government's consideration to the Cherokee nation for the seizure of Cherokee land east of the Mississippi, but the Cherokee nation has not yet made a continued and politically primary effort to act upon the delegate provision.

The ratification of the Treaty of New Echota 'legalized' the forced removal of Cherokees from their Georgia and Tennessee homeland and led directly to the

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¹ Treaty with the Cherokee, 1835, U.S.-Cherokee, Dec. 29, 1835, 7 Stat. 478 [hereinafter Treaty of New Echota].

infamous Trail of Tears. A cursory look at this period of American history suggests Indian removal was an inevitable result of manifest destiny; yet during the period of time surrounding the Treaty of New Echota, awareness that a great wrong was being inflicted upon the Cherokees formed the backdrop to the treaty negotiations. The Cherokee national government, under the talented leadership of John Ross, protested against removal, gaining sympathetic allies both within the U.S. government and the larger non-Cherokee population. However, this was also a contentious period regarding the leadership of the Cherokee people. An influential minority ultimately rebelled against Ross's leadership and signed the Treaty of New Echota on behalf of the Cherokee majority who did not share the treaty-signers' perspectives.

Three factors created pressure for Cherokee land: a federal-Georgia compact to remove the Cherokees, the continual takings of reservation land by non-Indians, and the discovery of gold on Cherokee land. The resulting pressure defeated initial Cherokee unity in opposition to the concession of any more land. Factionalism, encouraged by the U.S. government, generated a lengthy history of communications between the U.S. government and the competing Cherokee factions. But the lack of a single Cherokee party created maneuvering problems for the Cherokee factions and arguably contributed to the general Cherokee silence on the particulars of the delegate provision.

Presented officially by the administration of President Andrew Jackson as bringing with them liberal terms for the Cherokees, the U.S. negotiators for the Treaty of New Echota bypassed the elected Cherokee leadership. They convened with the 'democratically' assembled Cherokee people, primarily consisting of the minority in favor of removal. In response to criticism that the Treaty should not be imposed, Cherokee leaders were accused of greed and of not being truly Indian, while the general Cherokee resistance to removal was chalked up to a misguided adherence to their leaders' bad advice. The controversies regarding the Treaty, however, must be set against the U.S. government's oft-repeated assertion that the Treaty was 'unalterable' and against the continuing reliance upon the Treaty to justify removal. The right guaranteed in Article 7 has not been abrogated or altered, and is arguably a still-existing treaty right.²

² Following the Treaty of New Echota, the Cherokees and the U.S. government entered into additional treaties on Aug. 6, 1846, July 19, 1866, and Apr. 27, 1868, that remain valid. Treaty with the Cherokee, U.S.-Cherokee, Aug. 6, 1846, 9 Stat. 871; Treaty with the Cherokee, U.S.-Cherokee, July 19, 1866, 14 Stat. 799; Treaty with the Cherokee, U.S.-Cherokee, Apr. 27, 1868, 16 Stat. 727; see 1 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, *DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979*, at 192-201 (1999); Jack Blair, *Demanding a voice in our own best interest: a call for a delegate of the Cherokee Nation to the United States House of Representatives*, 20 AM. INDIAN L. REV. 225, 229 (1996) (detailing the arguments that the right still exists); CHARLES C. ROYCE, *THE CHEROKEE NATION OF INDIANS 176-249* (1975) (overviewing each Cherokee treaty along with its relevant history).

In order to realize the delegate right, the Cherokee nation must confront arguments that such a delegate right no longer exists, that it would not represent the 'right' groups, and that even if it is an existing right, its fulfillment would be unconstitutional. The Cherokee's alliance with the Confederacy, delay in acting upon the delegate provision, and the partial dissolution of the Cherokee government a hundred years ago all support the argument that the Cherokee nation has lost the right to act upon the delegate provision. Politically, a Cherokee delegate would raise questions regarding the role of such a representative and of who is being represented both within the Cherokee nation and across Indian country, questions likely accompanied by complaints from within and without the Indian community. The strongest critique is that such a delegate would violate the constitutional equal protections of non-Cherokees, who lacking their own group delegate would see the power of their vote diminished relative to the super-vote of the Cherokees.

While criticisms of the Cherokee delegate reveal the provision's current complexities, these criticisms ignore the existing link between the delegate right and the advantages and land use still enjoyed by non-Cherokees as a result of the Treaty's main purpose of removal. Comparing the Cherokee delegate provision both to earlier, lesser Indian treaty promises and to current non-voting delegate allowances permits the delegate to be seen more favorably, even by non-Cherokees. Though the Supreme Court is hesitant to recognize group rights, the recognition of an Indian nation's right to participation in the U.S. government in consideration for what that nation has given up might not succumb to group based constitutional challenges. Finally, even with the possibility that through Court decision or Congressional plenary power the delegate might be disallowed or not recognized, a push for a Cherokee delegate should not be abandoned. The denial of a Cherokee delegate ought to be accepted only if the Cherokees are provided additional payment or other consideration on an equitable basis to offset that denial.

II. ROAD TO NEW ECHOTA

To understand the delegate right, Cherokee removal and the disputes regarding the removal must be understood. By the time Andrew Jackson became President in 1829, the forcing of Indians beyond the territorial boundaries of the existing states, termed "removal," was considered a possible 'solution' to the Indian problem. Looking back on Indian removal almost two centuries later, it is tempting to characterize the removal as an unfortunate part of our history, but not of particular relevance today.³ But even in the 1830s, removal seemed to undermine

³ Removal is frequently described as "inevitable," and therefore implicitly not controversial. ARTHUR MEIER SCHLISINGER, *POLITICAL AND SOCIAL HISTORY OF THE UNITED STATES 1829-1925*, at 27 (1920). A partial explanation for the tendency to relegate removal to a bygone era (while those following Boston's Freedom Trail feel the past is more present) can perhaps be found in a telling sentence introducing a book on removal: "Nations, like men, are sometimes interested in burying the past." Richard E.

American claims of being a moral society. Ralph Waldo Emerson wrote of removal to then President Martin Van Buren:

Sir, does this government think that the people of the United States are become savage and mad? From their minds are the sentiments of love and a good nature wiped clean out? The soul of man, the justice, the mercy that is that heart's heart in all men, from Maine to Georgia, does abhor this business.⁴

As Daniel Webster stated in a speech from this period, there existed "a strong and growing feeling in the country that great wrong has been done to the Cherokees."⁵ In 1830, an increasingly prosperous and assimilated Cherokee people were living on land guaranteed for them by treaties with the U.S. government.⁶ By 1840, the U.S. military had forced Cherokees to relocate west of the Mississippi, a process in which the Cherokees lost "at least 4,000 and perhaps as many as 8,000" of their tribe in the infamous 'Trail of Tears,' as well as their political right to claim their eastern lands.⁷

The Cherokee nation, under Principal Chief John Ross, repeatedly highlighted the inherent wrong in removal in order to convince both politicians and the American public to not allow removal. Cherokee messages, to Congress, the press, and influential Americans focused first on the illegality of removal in light of the many treaties the Cherokees had signed with the U.S. government.⁸ Furthermore, Cherokee leaders expanded their focus beyond the law: "The idea of the Cherokee Nation as a test of American virtue clearly appealed to tribal leaders, and they adopted this element of the reformers' worldview. Cherokee writings continually reminded non-Indians that God and the rest of the world were watching"⁹ While Andrew Jackson agreed with the then Governor of Georgia, Wilson Lumpkin, that a "savage race of heathens" had no rights to their eastern lands,¹⁰ "[t]ime and again Ross outfought and outmaneuvered the powerful forces of the federal government with the weapons of law and public sentiment."¹¹

For those seeking Cherokee removal, Ross seemed constantly to be on "an

Rubenstein & Robert M. Fogelson, *Editorial Note*, 1 WILSON LUMPKIN, THE REMOVAL OF THE CHEROKEE INDIANS FROM GEORGIA (Arno Press, 1969) (1907).

⁴ JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION 303 (1988).

⁵ ROYCE, *supra* note 2, at 168.

⁶ Worcester v. Georgia, 31 U.S. 515 (6 Pet.), 556-561 (1832) (affirming the Cherokee tribe's right to its own territory).

⁷ JAMES WILSON, THE EARTH SHALL WEEP: A HISTORY OF NATIVE AMERICA 170 (2000); *see also*, ROBERT J. CONLEY, THE CHEROKEE NATION: A HISTORY 157 (2005) ("four thousand deaths is probably a reasonable figure").

⁸ ANDREW DENSON, DEMANDING THE CHEROKEE NATION: INDIAN AUTONOMY AND AMERICAN CULTURE 1830-1900, at 27-28 (2004).

⁹ *Id.* at 35.

¹⁰ 2 LUMPKIN, *supra* note 3, at 150.

¹¹ STANLEY W. HOIG, THE CHEROKEES AND THEIR CHIEFS IN THE WAKE OF EMPIRE 145 (1998).

embassy of mischief,"¹² working incessantly to help create "[s]ympathy for the underdog."¹³ Responding to arguments that removal benefited Indians, Ross wrote, "it is with deep regret and great diffidence we are constrained to say that in this scheme of Indian removal we can see more of expediency and policy to get rid of them than to perpetuate their race upon any fundamental principle."¹⁴ Ross's many communications to the U.S. government ultimately failed to prevent Cherokee removal, but his efforts can be credited in part with helping raise the awareness of the *great wrong* being done to the Cherokees through forced removal. In a telling critique of removal for the *National Intelligencer*, Jeremiah Evarts was arguably correct in asserting, "[h]istory furnishes no parallel case of palpable injustice and cruelty, committed, or allowed, by the mass of the inhabitants of a great country, after ample time for deliberation."¹⁵

A. *Role of Treaty Negotiation in Removal*

The attention Cherokees brought to their plight encouraged the U.S. government to continue its practice of using treaties rather than force alone to facilitate Cherokee removal. "[T]he unwillingness of government officials to adhere to their own ethics and written laws" went only so far.¹⁶ For while the Jackson administration felt comfortable not respecting the Cherokee's existing treaty rights to the security of their land in Georgia and Tennessee, the government felt bound to at least secure removal through a formal treaty. Francis Paul Prucha, an Indian treaty expert, observes:

Removal was accomplished, not by unrestrained executive action, but through the traditional forms of treaties, and those treaties preserved the ideas of Indian sovereignty and inviolable land titles, even while the Indians were being forced to abandon their homelands in the southern states and seek a new destiny west of the Mississippi.¹⁷

Removal and the removal treaties are inseparable. Removal cannot be understood simply by looking at the final version of the treaties used to secure and legitimize removal and the same is true for the treaties themselves. Rather, "an investigation of the historical context for each treaty and an understanding of the culture and

¹² Letter from Wilson Lumpkin to Governor of Georgia William Schley (Oct. 18, 1836), in 2 LUMPKIN, *supra* note 3, at 54.

¹³ RALPH HENRY GABRIEL, ELIAS BOUDINOT CHEROKEE & HIS AMERICA 159 (1941).

¹⁴ Letter from John Ross, R. Taylor, John F. Baldridge, and Joseph Vann to Lewis Cass (Feb. 14, 1833), in 1 THE PAPERS OF CHIEF JOHN ROSS, 1807-1839, at 261 (Gary E. Moulton ed., 1985).

¹⁵ Jeremiah Evarts, *Communication: Present State of the Indian Question to the Editors of the National Intelligencer* (Nov. 24, 1830), in CHEROKEE REMOVAL: THE "WILLIAM PENN" ESSAYS AND OTHER WRITINGS 281 (Francis Paul Prucha ed., 1981).

¹⁶ HOIG, *supra* note 11, at 3.

¹⁷ FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 167 (1994).

intentions of both sides are needed for a full interpretation of any treaty."¹⁸

B. *Cherokee Nation, Pre-removal*

Cherokees in 1830 lived under a constitutionally based government headed by the talented John Ross whose leadership was supported by both the Cherokee masses and by other influential Cherokees. According to Woodrow Wilson, during Andrew Jackson's era, the Cherokees "boasted a system of self-government and of orderly obedience to their own laws which seemed to promise, not extinction or decay or any decline of their power, but a great development and an assured permanency."¹⁹ Many Cherokees had successful plantations, worked by African-American slaves.²⁰

The Cherokees were united behind a wealthy, 1/8th Cherokee,²¹ politician and

¹⁸ Raymond J. DeMallie, *American Indian Treaty Making: Motives and Meanings*, 3 AM. INDIAN J. 2, 9 (1977).

¹⁹ 4 WOODROW WILSON, A HISTORY OF THE AMERICAN PEOPLE 16 (1931). Paradoxically, Cherokee formation of their government into a constitutional partial-democracy (for the Cherokees were slave-owners) led to an increased call by Georgia authorities for Cherokee removal. Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court*, 65-67 (1976), in GETCHES, WILKINSON, AND WILLIAMS, CASES AND MATERIALS ON FEDERAL INDIAN LAW 126 (4th ed., 1998). "While the Cherokees viewed the formation of the constitutional government as an important step in the preservation of their tribal lands, ironically it was the very success of the Cherokees in adopting a constitution and written code which convinced the 'land hungry Georgians' of the necessity of Indian removal." *Id.* at 66. A dim view of the Cherokee constitution highlights the disconnect that exists between the Georgia views of their own society and their antagonism to the Cherokee constitution. Some "scholars argue that the Cherokee constitution was designed primarily to control slave labor and promote the accumulation of wealth." DUANE CHAMPAGNE, SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK 141 (1992). Yet, as expressed in an annual message by William Hicks and John Ross, "this improvement in our government, is strictly in accordance with the recommendations, views and wishes of the Great [George] Washington under whose auspicious administration our Treaties of peace, Friendship and protection, were made." William Hicks and John Ross, Annual Message (Oct. 13, 1828), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 142.

²⁰ Many writings on the Cherokees prior to removal bury the fact that the Cherokees were slave-owners, perhaps concerned that this fact will lessen sympathy when looking back at removal. Yet, this is undeniable and it is worth drawing early attention to the fact that Cherokees were writing eloquently about the moral obligation on the U.S. to safeguard their rights, at the same time that they were slave-owners. For more on Cherokee slavery, *see*, R. HALLIBURTON, JR., RED OVER BLACK: BLACK SLAVERY AMONG THE CHEROKEE INDIANS (1977); CIRCE STURM, BLOOD POLITICS: RACE CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA 48-50 (2002).

²¹ "[M]any of the 'mixed-bloods' seem never to have thought of themselves as anything but Cherokee. White 'blood' did not wash away Cherokee identity, nor did

gifted writer, John Ross. "For the most part his assets consisted of slaves, perhaps twenty before removal, and of lands in Tennessee and Georgia . . . Ross may also have received as much as one thousand dollars a year from his ferry."²² Ross's two plantations—Red Hill and Head of Coosa—were valued at "\$23,665.75, making him one of the five wealthiest men in the Cherokee Nation."²³ In a telling appraisal of his Head of Coosa plantation, his two story house was valued at \$3,500 while his outhouse was valued the same as a larger Negro house at \$25.²⁴ Ross's esteem among the Cherokees rose when he told the Cherokee assembly on October 24, 1823 that U.S. commissioners had attempted to bribe him.²⁵ Then on January 21, 1832, the *Cherokee Phoenix* printed his personal account of an attempted assassination that he survived.²⁶ The Cherokee elite would later divide into factions, but Ross never lost the support of the majority of the Cherokee people.²⁷ While tirelessly seeking to prevent the loss of the Cherokee homeland, Ross worked both in Georgia/Tennessee and in Washington, D.C. As a result, "[h]e became such a figure at the federal capital that mail addressed simply "John Ross, Washington," would reach him."²⁸

C. Periods in Cherokee Negotiations

The election of Andrew Jackson as President of the United States began the Cherokee removal era. A divided Congress considered Indian removal,²⁹ but "[w]hen the removal bill was passed by a narrow majority, every possible means

formal education inevitably erode it." DENSON, *supra* note 8, at 19.

²² Gary E. Moulton, *Introduction* to 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 4-5. By the end of the civil war, Ross held between 50 and 100 slaves in Oklahoma. WILLIAM G. MCLOUGHLIN, *AFTER THE TRAIL OF TEARS: THE CHEROKEES' STRUGGLE FOR SOVEREIGNTY 1839-1880*, at 220 (1993). A different author puts the number at between 70 and 100 at the time Ross stated Cherokee neutrality on May 17, 1861. R. HALLIBURTON, JR., *supra* note 20, at 125.

²³ 1 GARY E. MOULTON, *JOHN ROSS: CHEROKEE CHIEF* 80 (1978).

²⁴ Property Appraisal of Head of the Coosa, Cherokee Register of Valuations (Dec. 16, 1836), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 465-466.

²⁵ 1 MOULTON, *supra* note 23, at 24.

²⁶ *Cherokee Phoenix* (Jan. 21, 1832), in PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 236-239.

²⁷ Georgia Governor Wilson Lumpkin felt that Ross also enjoyed the support of most members of the U.S. government: "[A]ll the officials of the United States, except General Jackson and a few of his personal friends, were Ross men at heart, and as far as their official position would allow they endeavored to elevate and strengthen Ross at the expense of the best interest of the Cherokee people." 2 LUMPKIN, *supra* note 3, at 33.

²⁸ 1 MOULTON, *supra* note 23, at 198.

²⁹ See, *House Debate on the Indian Removal Question* (May 15, 26, 1830) in 2 THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 1017-1123 (Wilcomb E. Washburn ed., 1973).

was used by the Jackson administration to implement the measure."³⁰ John Ross "fought by [Jackson's] side," yet would write in 1831 that Jackson's "policy towards the aborigines, in my opinion, has been unrelenting and in effect ruinous to their best interests and happiness."³¹ While the Georgia Governor in support of removal argued that Jackson "not only is, but has long been, [the Indians'] true friend and benefactor," Jackson's primary motive was to ensure that the Cherokees moved west of the Mississippi, regardless of the consequences to the Cherokee people.³²

Jackson was firm in his position that the Indians must be removed, and consequently, "spent no sleepless nights over Indian Removal."³³ Prior to becoming President and during his time teaching at Princeton, Woodrow Wilson wrote, "[Jackson's] attitude towards the Indians was frankly that of a frontier soldier. They had no right, in his eyes, to stand in the way of the white man."³⁴ It is worth quoting at length a summary of Ronald Takaki's take on Jackson:

Ronald T. Takaki, a historian of race and culture in America, refers to President Jackson as "the nation's confidence man," who developed "a metaphysics for genocide." According to Takaki, Jackson "recognized the need to explain the nation's conduct towards Indians, to give it a moral meaning. In his writings, messages to Congress, and personal letters, Jackson presented a philosophical justification for the extermination of native Americans." Takaki, borrowing language from the English author and literary critic D. H. Lawrence, asks of Jackson, "What sort of a white man is he?" And, again using Lawrence's words, he replies, "Why, he is a man with a gun. He is a killer, a slayer. Patient and gentle as he is, he is a slayer. Self-effacing . . . still he is a killer."³⁵

Takaki's stance finds support in Jackson's disregard of the Supreme Court when the Court supported the Cherokees. John Marshall's *Worcester v. Georgia* opinion bolstered the Cherokee position that Georgia had no right to take Cherokee land;³⁶ yet, "[w]hen Jackson learned of [*Worcester v. Georgia*], he is reported to

³⁰ REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 201 (1981).

³¹ Letter from John Ross to David Crockett (Jan. 13, 1831), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 211.

³² Wilson Lumpkin (Dem-Rep. of Georgia to U.S. House of Representatives), *House Debate on the Indian Removal Question* (May 15, 26, 1830) in 2 THE AMERICAN INDIAN AND THE UNITED STATES, *supra* note 29, at 1083.

³³ HORSMAN, *supra* note 30, at 202.

³⁴ 4 WOODROW WILSON, *supra* note 19, at 16-17.

³⁵ Ronald N. Satz, *Rhetoric Versus Reality: The Indian Policy of Andrew Jackson*, in CHEROKEE REMOVAL: BEFORE AND AFTER 31 (William L. Anderson ed., 1991) (quoting RONALD T. TAKAKI, IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA 100, 103, 106, 107 (1979)).

³⁶ 31 U.S. (6 Pet.) 515 (1832).

have said, 'John Marshall has made his decision; now let him enforce it!'"³⁷

1. Cherokees United Against Removal

Initially, the Cherokee leadership was both publicly and privately united against the acceptance of land cessions and removal as the only option for the Cherokee. In 1827, Major Ridge, who would later become an important member of the faction that signed the Treaty of New Echota, along with John Ross "reiterated the old stand of the Cherokees that not one single foot of soil would ever be sold."³⁸ The Blood Law of 1829, which made unauthorized land concession a capital crime, reinforced the Cherokees' position against ceding land. The law stated, "if any citizen or citizens of this nation should treat and dispose of any lands belonging to this nation without special permission from the national authorities, he or they shall suffer death."³⁹

The Cherokee position found expression through the Cherokee national newspaper, the *Cherokee Phoenix*. The *Phoenix* had "a wide circulation in the Cherokee Nation, the United States, and even parts of Europe."⁴⁰ The paper conveyed the Cherokee perspective and their plight at the hands of the U.S., which was failing "to honor its treaty obligations."⁴¹ According to Helen Hunt Jackson's influential writing on removal, it was precisely the "firm stand that they would give up no more land" that inspired forced removal of Indians from Georgia.⁴² The *Cherokee Phoenix* called attention to the Cherokee situation as the pressure for removal increased and, at least as was expressed to non-Cherokees, conveyed a united response not to engage in negotiations that would cede additional Cherokee land.

³⁷ SCHLISINGER, *supra* note 3, at 26-27.

³⁸ THURMAN WILKINS, *CHEROKEE TRAGEDY: THE STORY OF THE RIDGE FAMILY AND THE DECIMATION OF A PEOPLE* 196 (2nd ed., rev., 1986); *see also*, Letter from John Ross to John Lowrey (Oct. 22, 1830), in 1 *THE PAPERS OF CHIEF JOHN ROSS*, *supra* note 14, at 204 ("The Cherokees have long since come to the conclusion never again to cede *another foot of land*"); Letter from John Ross, Major Ridge, George Lowrey, and Elijah Hicks to President James Monroe (Jan. 19, 1824), in 1 *THE PAPERS OF CHIEF JOHN ROSS*, *supra* note 14, at 59 ("The Cherokee Nation have now come to a decisive and unalterable conclusion not to cede away any more lands . . .").

³⁹ WILKINS, *supra* note 38, at 201 (quoting the bill, passed on Oct. 24, 1829 in its entirety).

⁴⁰ JILL NORGREN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* 45 (1996).

⁴¹ *Id.*

⁴² Helen Hunt Jackson, *Georgia's Dishonor*, in *A CENTURY OF DISHONOR* (1881) *reprinted in* *THE REMOVAL OF THE CHEROKEE NATION: MANIFEST DESTINY OR NATIONAL DISHONOR?* 99 (Louis Filler and Allen Guttman eds., 1962).

2. Pressures on Cherokee Land

In 1802, the United States and Georgia reached an agreement: Georgia would "cede its western land claims to the United States," so long as the United States extinguished "Indian title to lands within the state."⁴³ By its terms the compact required the U.S. to make its best efforts to get the Cherokees to leave Georgia. "Strictly speaking, treaties should have held greater legal weight than did the 1802 agreement with Georgia, yet by the late 1810s some involved in Indian affairs were dismissing adherence to the treaties as needless, even foolish."⁴⁴ Though the Cherokees "held indisputable constitutional guarantees" against encroachment on Cherokee land,⁴⁵ the 1802 compact provided some authority on which those seeking removal could rely. Yet the 1802 compact did not justify forced removal. The *Cherokee Phoenix* suggested that to satisfy the compact, the U.S. government should pay off Georgia rather than try to purchase Cherokee land.⁴⁶ In 1824, President Monroe highlighted the limited obligation imposed by the compact:

I have full confidence that my predecessors exerted their best endeavors to execute this compact (between the United States and the State of Georgia) in all its parts, of which, indeed, the sums paid, in fulfillment of its stipulations, are a full proof . . . I have no hesitation, however, to declare it as my opinion, that the Indian title was not effected in the slightest circumstance by the compact with Georgia, and there is no obligation on the United States to remove the Indians by force.⁴⁷

Ultimately, societal pressure for Cherokee land subsumed the legal issue of the power and role of the compact. The discovery of gold in July of 1829 on Cherokee lands in northeastern Georgia, when coupled with the already existing desire by whites for Cherokee farming and agricultural land, made removal much more urgent for both Georgia and the Jackson administration.⁴⁸

3. Cherokee Leadership Divides

By 1834, Principal Chief John Ross, counter-intuitively, could have been both right and wrong when he wrote in a letter that "[t]he *Cherokees*, as a people are united."⁴⁹ Though *the people* were behind him, the *Cherokees* were no longer

⁴³ Strickland, *supra* note 19, at 96.

⁴⁴ DENSON, *supra* note 8, at 21.

⁴⁵ William MacDonald, *Jacksonian Democracy 1829-1837*, in 15 THE AMERICAN NATION: A HISTORY 170 (1906).

⁴⁶ *The Cherokee Phoenix*, July 27, 1833, at 3 ("No purchase can be made of the Cherokees, it will be cheaper to the Government to award Georgia a sum.").

⁴⁷ John Ross, Annual Message (Oct. 10, 1832), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 252 (citing James Monroe, 1817-1833, in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, at 234-37 (James D. Richardson, comp., 1905)).

⁴⁸ MOULTON, *supra* note 23, at 40.

⁴⁹ Letter from John Ross to William H. Underwood (Aug. 12, 1834), in 1 THE PAPERS

united, for a select group of Cherokees had come to believe that Ross was leading the people astray. John Ross was aware of the division, and in his 1833 Annual Message to the Cherokees he urged adherence to majority rule.⁵⁰ However, the Treaty party would eventually cease following Ross's call to respect "the duty of the minority to yield."⁵¹

Between 1830 and 1835, the leaders of the Cherokee minority that signed the Treaty of New Echota—the Treaty Party or the Ridge group—reversed their stance on removal and on Andrew Jackson. Two of the prominent treaty-signers, Elias Boudinot and Major Ridge, provide good examples of this reversal on an individual level.

The first editor of the *Cherokee Phoenix*, Boudinot went from being the publisher of Ross's perspective to accusing Ross of dragging "an ignorant train . . . to the last brink of destruction."⁵² Boudinot explained his position in a pamphlet responding to Ross's writing:

If one hundred persons are ignorant of their true situation, and are so completely blinded as not to see the destruction that awaits them, we can see strong reasons to justify the action of a minority of fifty persons—to do what the majority *would do* if they understood their condition—to save a *nation* from political thralldom and moral degradation.⁵³

Boudinot's justification for the actions of the minority betrayed both his perception that his condition was above that of the majority and his idea that the majority required being saved. Boudinot's biographer, Ralph Henry Gabriel, summarized, "[I]oyalty drove [Boudinot] to what his people called disloyalty."⁵⁴

Major Ridge's reversal was equally dramatic. He signed on with Ross in opposition to ceding even a square foot of land, and as late as 1832 referred to the President as "Chicken Snake General Jackson."⁵⁵ Yet, Ridge later "came to regard the president as the staunchest friend the Cherokees had. Indeed, he named his new son Andrew Jackson Ridge."⁵⁶ Major Ridge spoke at New Echota, giving perhaps the best argument of the Treaty party in favor of negotiated removal:

[T]hey are strong and we are weak. We are few, they are many . . . an

OF CHIEF JOHN ROSS, *supra* note 14, at 300.

⁵⁰ John Ross, Annual Message (Oct. 15, 1833), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 271.

⁵¹ *Id.*

⁵² Elias Boudinot, Letters and Other Papers Relating to Cherokee Affairs: Being a Reply to Sundry Publications Authorized by John Ross in CHEROKEE EDITOR: THE WRITINGS OF ELIAS BOUDINOT 199 (Theda Perdue ed., 1983).

⁵³ *Id.* at 162.

⁵⁴ GABRIEL, *supra* note 13, at 154.

⁵⁵ Letter from John Ridge to Stand Watie (April 6, 1832), in EDWARD EVERETT DALE & GASTON LITTON, CHEROKEE CAVALIERS: FORTY YEARS OF CHEROKEE HISTORY AS TOLD IN THE CORRESPONDENCE OF THE RIDGE-WATIE-BOUDINOT FAMILY 8 (Univ. of Okla. Press 1995) (1939).

⁵⁶ WILKINS, *supra* note 38, at 269 (emphasis added).

unbending, iron necessity tells us we must leave [our homes]. . . . There is but one path of safety, one road to future existence as a Nation. That path is open before you. Make a treaty of cession. Give up these lands and go over beyond the great Father of Waters.⁵⁷

At least with respect to Major Ridge, there is reason to doubt the argument often made against those who signed treaties with the government: that the Indian parties participated simply to be "made chiefs" by virtue of being selected by the U.S. government to sign the treaty.⁵⁸

The main challenge for the Ridge group was that they did not have the support of the Cherokee people. "In the final analysis, the wealthy, acculturated principal chief and not the editor [Boudinot] filled with missionary zeal represented the sentiments of the Cherokee people."⁵⁹ After Boudinot resigned from the *Cherokee Phoenix* because he disagreed with the single, Ross-driven message of the paper,⁶⁰ the Ridge group attempted to limit Ross's power. They enlisted the help of the Georgia Guard to seize the *Phoenix* press,⁶¹ which they believed had been "prostituted to party politics."⁶² Even after Ross had lost the *Phoenix* and the Cherokees were on the verge of being forced off their homeland through the maneuvering of the Ridge group and the U.S. government, the *Daily National Intelligencer* reported, "a more popular man with his own people does not live than John Ross."⁶³

Ross's continued popularity is only one factor that makes it inaccurate to characterize Cherokee leadership as imploding during the period leading up to the

⁵⁷ Major Ridge to Cherokees at New Echota Treaty negotiations (Dec. 22, 1835), in WILKINS, *supra* note 38, at 287.

⁵⁸ DeMallie, *supra* note 18, at 6. Ross accused the Ridge party of exactly this: "[The Cherokee People] deny the right of the few individuals who have presumed to arrogate to themselves the powers of the Nation [by signing the New Echota Treaty]." Letter from Cherokee Delegate headed by John Ross to Lewis Cass (Feb. 29, 1836), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 389.

While Major Ridge probably was not motivated by such ambition, historian Theda Perdue convincingly argues that "[the] rising middle-class, envious of the wealth and power of the elite and disdainful of the desires of the masses, saw in the removal issue an opportunity to usurp political authority and to reap rewards and concessions from the United States." Theda Perdue, *The Conflict Within: Cherokees and Removal*, in CHEROKEE REMOVAL: BEFORE AND AFTER 66 (William L. Anderson ed., 1991).

⁵⁹ CHEROKEE EDITOR: THE WRITINGS OF ELIAS BOUDINOT 158 (Theda Perdue ed., 1983).

⁶⁰ The *Cherokee Phoenix* was a Cherokee nation publication, and not an independent press. Ross explained, "[t]he views of the public authorities should continue and ever be in accordance with the will of the people; and the views of the editor of the national paper be the same." Speech of John Ross to the Cherokee General Council (Aug. 4, 1832), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 250.

⁶¹ MOULTON, *supra* note 23, at 65.

⁶² Letter from Benjamin F. Currey to John Ross (Sept. 9, 1835), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 353.

⁶³ *Daily National Intelligencer*, Sept. 22, 1838, in HOIG, *supra* note 11, at 165.

Treaty of New Echota. This is so, not only because of Ross's continued popularity, but also because of the role of the U.S. and Georgia governments in creating the seemingly 'internal' leadership split. One writer accuses the Ridge group of making a "secret alliance . . . with the Jackson-Georgia removal machine sometime between 1832-1835."⁶⁴ Even if this accusation is an overstatement, Cherokees supporting removal and those deciding to emigrate were favored, a policy "designed to take advantage of, and encourage, Cherokee factionalism."⁶⁵ Ross contended in 1829 that the U.S. government was "permitting emigrants to claim improvements they never possessed," which amounted to a bribe for favoring removal because these early emigrants were reimbursed for their alleged losses.⁶⁶

The most frequently used and most powerful mechanism for encouraging factionalism was the U.S. government practice of self-interested selection of "the particular chief or fraction of a tribe with whom the United States would deal."⁶⁷ The U.S. government as late as Reconstruction repeated its divide-and-conquer strategy by "[using] factionalism . . . to gain concessions."⁶⁸ In its dealings with the Cherokees, the U.S. and Georgian governments recognized that by dividing the Cherokees they were "making [the Cherokees] more vulnerable to removal."⁶⁹ The effect of the split in Cherokee leadership and the independent action of the minority group confirmed U.S. hopes that factionalism would lead to greater vulnerability. While Principal Chief Ross targeted most of his efforts at direct communication with, and memorials to, Congress and the Jackson administration, the Ridge group was a distraction and affected the Cherokees' position in negotiations with the U.S. government.

D. Cherokee Propositions

Little is known about the Cherokee position on the delegate promise contained in the Treaty of New Echota; the Cherokee leadership directed its efforts largely against the entire notion of removal or of a new treaty. Consequently, while the Cherokees under Ross constantly communicated with U.S. government officials and bodies, in the ten years leading up to forced removal there were few Cherokee proposals and the proposals were simple, without a detailed list of clauses.⁷⁰ After the Treaty of New Echota, Ross felt the necessity of reminding Congress what the

⁶⁴ GRACE STEELE WOODWARD, *THE CHEROKEES* 175 (1963).

⁶⁵ Kenneth Penn Davis, *Chaos in Indian Country: The Cherokee Nation, 1828-35*, in *THE CHEROKEE INDIAN NATION: A TROUBLED HISTORY* 129 (Duane H. King ed., 1979).

⁶⁶ John Ross and George Lowrey, Annual Message (Oct. 14, 1829), in 1 *THE PAPERS OF CHIEF JOHN ROSS*, *supra* note 14, at 172.

⁶⁷ Satz, *supra* note 35, at 34-35.

⁶⁸ JAMES W. PARINS, *JOHN ROLLIN RIDGE: HIS LIFE & WORKS* 213 (1991).

⁶⁹ MOULTON, *supra* note 23, at 46.

⁷⁰ See e.g., Letter from John Ross, Major Ridge, George Lowrey, and Elijah Hicks to President James Monroe (Jan. 19, 1824), in 1 *THE PAPERS OF CHIEF JOHN ROSS*, *supra* note 14, at 59.

Cherokees *had* advanced generally "two propositions—the one for a partial cession, and to be secured in the residue, the other . . . to sell the whole country for a gross sum of money."⁷¹

The first negotiation position that Ross took, other than a blanket denial of the right of the U.S. to remove the Cherokees or calls for the U.S. to first live up to prior treaties, was to float the idea of partial land concessions. Ross hoped that by giving up "an extensive portion of their territory," the U.S. government would "guarantee the fee-simple right of the property in the soil to the Cherokees in the lands thus reserved."⁷² In effect, Ross was proposing, under the force of necessity, to give up additional land so that the U.S. government would live up to its responsibility to safeguard Cherokee rights.⁷³ The possibility that the U.S. would conclude a removal treaty with the Cherokee minority faction spurred Ross to provide a concrete selling price for eastern Cherokee lands. Ross's silence regarding specific treaty provisions can be explained partially by the difficulty he had "uncover[ing] details of the treaty being worked out between Jackson and the dissidents."⁷⁴ Though he did not know the details, he did know the minority faction was negotiating with the U.S. government supposedly on behalf of all Cherokees. Ross's biographer, Gary Moulton, explained, "Because a rival delegation led by John Ridge and Elias Boudinot was also present in Washington, Ross and his colleagues were driven to desperation."⁷⁵ In February 1835, Ross offered complete "cession of [Cherokee] Territory [for] the gross sum of Twenty Millions of Dollars."⁷⁶ The same letter concerning the \$20 million explained that the offer was being made only out of duress and would not ordinarily be made:

We need not assure you, for the fact cannot be doubted—That, were the protection of the [United States Government] fully extended to them . . . no amount of money far above the sum proposed can be offered which could induce the Cherokee people voluntarily ever to yield their assent to a cession

⁷¹ Memorial from the Cherokee Delegation Headed by John Ross to the U.S. Senate (Mar. 8, 1836), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 397.

⁷² Letter from John Ross, Daniel McCoy, R. Taylor, Samuel Gunter, and William Rogers to Lewis Cass (Feb. 14, 1835), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 322.

⁷³ Prior to this letter, the Supreme Court acknowledged U.S. responsibility to protect Cherokee land rights against state encroachment. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

⁷⁴ NORGREN, *supra* note 40, at 134.

⁷⁵ MOULTON, *supra* note 23, at 60.

⁷⁶ Letter from John Ross, R. Taylor, Daniel McCoy, Samuel Gunter, and William Rogers to Lewis Cass (Feb. 25, 1835), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 325. An interesting aside in the larger story of removal is the possibility, which Ross explored briefly, of the Cherokees using the settlement money to establish a new Cherokee "Colony" in Mexico. Letter from John Ross to Friedrich Ludwig Von Roenne (Mar. 5, 1835), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 330.

of their homes and their firesides . . .⁷⁷

When President Jackson found out about the offer, he reacted by “accusing [Ross] of filibustering.”⁷⁸

Aware that not everyone in Washington shared President Jackson’s antagonistic stance towards Indians, Ross responded to the “filibustering” charge with a calculated move that, with the benefit of hindsight, was perhaps his biggest mistake. Ross wrote:

Having been informed . . . that the President [Andrew Jackson] considers the terms of our proposition to be too extravagant, we beg leave to remind him, that he has often remarked that he would grant us as liberal terms as the Senate or the friends of the Indians would be willing to allow. We would therefore respectfully ask, that our propositions be submitted to the Senate by the President, in order that the sense of that Honorable body may be had on them.⁷⁹

Jackson immediately accepted Ross’s offer to rely upon the generosity of the Senate, and the Senate quickly responded by offering only \$5 million.⁸⁰ Overestimating Senate support for the Cherokees, Ross had arguably “given a written obligation” to “take the gross amount in money which the Senate shall say will be sufficient.”⁸¹ With Ross’s obligation in hand and the Senate authorizing a mere \$5 million, “President Jackson, triumphant, was then ready to deal with Ross on the basis of the chief’s pledge, at least as he and [Secretary of War] Cass interpreted the pledge.”⁸² Finding himself in a corner regarding the Senate’s offer, Ross declared, “there is no committal on the part of the delegation . . . nor is the nation in any degree entrammelled by them.”⁸³

The Ross Party’s agreement to turn over the terms to the Senate, in effect to allow the Senate to set the Cherokee sale price,⁸⁴ cost the Cherokees dearly. The

⁷⁷ Letter from John Ross, R. Taylor, Daniel McCoy, Samuel Gunter, and William Rogers to Lewis Cass (Feb. 25, 1835), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 326.

⁷⁸ EHLE, *supra* note 4, at 274.

⁷⁹ Letter from John Ross, R. Taylor, Daniel McCoy, Samuel Gunter, and William Rogers to Lewis Cass (Feb. 27, 1835), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 327.

⁸⁰ MARION L. STARKEY, THE CHEROKEE NATION 255-256 (1946).

⁸¹ Letter from Elias Boudinot to Stand Watie (Feb. 28, 1835), in DALE & LITTON, *supra* note 55, at 11.

⁸² MOULTON, *supra* note 23, at 61.

⁸³ John Ross, Annual Message (Oct. 12, 1835), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 357.

⁸⁴ Ross would later write: “If you were desirous of purchasing our property you would offer us terms proportionate to the value you attached to that you wished to acquire.” Letter from John Ross and Edward Gunter to John Mason, Jr. (Nov. 14, 1837), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 547. While Ross said that the sale price of Cherokee land was \$20 million, his own accounting of the true amount (not

reliance on Senate generosity might not have been a firm Cherokee obligation, for as Roland Satz writes in *American Indian Policy in the Jacksonian Era*, "[w]hile presidents were well aware that the Senate could reject treaties, they were not always respectful of the fact that a chief might return with a treaty only to have his council or people reject it."⁸⁵ Nevertheless, it did set Ross up to the charge that he was merely "pursuing stalling tactics," and therefore was not a worthy negotiating partner.⁸⁶ Additionally, it allowed the U.S. government to narrow the terms which were negotiable and pretend removal was more or less settled, as Ross explained in an October 1835 speech to the Cherokee General Council: "We are thus left without any proposal from the United States Government to act upon, further than a vague suggestion that we must treat upon the basis of the five millions."⁸⁷

The undeveloped nature of the two Cherokee propositions should be understood against the general opposition of the Cherokees to removal and their continual efforts against it. Ross's writing first referenced a right to a delegate to Congress in 1846, and then only as an aside.⁸⁸ As Ross's October 1835 speech makes clear, the Senate's lack of generosity was coupled with a similar lack of proposals upon which the Cherokees could act. The Cherokee government likewise made only two true proposals—partial land cession or complete sale for \$20 million—providing few other propositions to the U.S. government that might be examined to find out more about Cherokee intent. Ultimately, the Cherokees and Ross were motivated to resist removal. For Ross, to participate more actively in the act of developing propositions for a future treaty whose primary purpose was Cherokee removal, regardless of the niceties of other clauses, arguably would be to betray the Cherokee people.

the subjective costs) as might be awarded under eminent domain power "totaled altogether more than \$13,000,000," for "the costs of public lands, private improvements, removal and subsistence for one year in the West." MOULTON, *supra* note 23, at 94.

⁸⁵ RONALD N. SATZ, *AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA* 106 (1975).

⁸⁶ WILKINS, *supra* note 38, at 268.

⁸⁷ Speech of John Ross to the General Council (Oct. 22, 1835), in 1 *THE PAPERS OF CHIEF JOHN ROSS*, *supra* note 14, at 361.

⁸⁸ Memorial from John Ross, John Looney, David Vann, Stephen Foreman, C.V. McNair, R. Taylor, T. Walker, Richard Fields, and John Thorn to the U.S. Senate and House of Representatives (Apr. 30, 1846), in 2 *THE PAPERS OF CHIEF JOHN ROSS, 1840-1866*, *supra* note 14, at 295-296 ("The seventh article of the treaty of 1835 stipulates that the Cherokees shall be entitled to a delegate in Congress! Can it be supposed that it was the intention of a people aspiring to the dignity of being represented in Congress, to have surrendered all the most essential elements of sovereignty, and to have transferred to another power the right to dispose of their territory without their consent, and to prescribe to them criminal and other laws? The articles of the treaty to which the undersigned have referred, are too explicit in their terms to admit of any doubt.").

III. TREATY OF NEW ECHOTA

A. *The Negotiation*

A right to a U.S. House of Representatives delegate is provided to the Cherokee nation under the Treaty of New Echota. The Treaty was negotiated in December 1835, and later the “United States Senate—by a single vote—ratified the New Echota treaty, and President Jackson, on May 23, 1836, proclaimed its validity.”⁸⁹ Rather than being an isolated provision, the right to a Congressional delegate is closely related to rights granted in earlier treaties. Only through the language of the parties to the treaty can the intentions underlying such an important right be understood.

1. The Delegate Right

The Cherokees are the only tribe with a right to a delegate. Article 7 of the Treaty of New Echota creates this right:

The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guaranteed to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.⁹⁰

This right has not been abrogated or altered, and consequently, is an existing treaty right.⁹¹

A letter written to the then U.S. Secretary of War, Joel R. Poinsett, from a U.S. special agent, J. Mason, Jr., provides key insights into why a delegate right was included in the New Echota Treaty and into the nature of that right.⁹² Mason, who went in August of 1837 on behalf of the President to a Cherokee council in order to urge acceptance of the 1835 Treaty, includes in this letter a general report on his intentions and observations as well as a transcript of a speech he gave to the council

⁸⁹ WOODWARD, *supra* note 64, at 192. Controversy regarding removal did not disappear with the Treaty of New Echota: “John Q. Adams, a member of the House from Massachusetts, termed the Senate’s acceptance of the New Echota treaty ‘infamous . . . It brings with it eternal disgrace upon the country.’” *Id.* at 193.

⁹⁰ Treaty of New Echota, *supra* note 1, at 482.

⁹¹ Following the Treaty of New Echota, the Cherokees and the U.S. government entered into other treaties that remain valid. *See* documents cited *supra* note 2. *See also* Blair, *supra* note 2.

⁹² Letter from J. Mason, Jr. to Joel R. Poinsett, Sec. of War (Sept. 25, 1837), H.R. Doc. No. 82, at 1-7 (1838), *microformed on* CIS No. 325-H82 (Cong. Info. Serv.).

presenting the U.S. government's views.⁹³ The letter intimates that the government's efforts were on behalf of the Cherokees and that the Treaty terms were liberal, describes Cherokee opposition to the treaty, expresses concerns about the nature of Cherokee leadership, and presents the treaty as unalterable.⁹⁴

2. Liberal Terms?

From a U.S. government perspective, not only was the treaty a necessity, but its terms were liberal, reflecting U.S. benevolence. Mason writes, "[f]rom the moment of my arrival among them, I sought every opportunity to assure the chiefs and people that the Government was actuated by the kindest feelings towards them, and anxious to do them justice in every particular."⁹⁵ When speaking to the council, Mason told the Cherokees that the President "is the true friend of the Cherokees," and that "[t]he President feels for you as a father for his children."⁹⁶ Mason's words to the Cherokees were not unique, for the U.S. government and Southern media presented the New Echota terms as benefiting the Cherokees. Before the New Echota negotiations, the Commissioner of Indian Affairs reported to Congress that "the provisions of the treaty are so liberal, and the disadvantages of continuing among the white population that has entrenched itself on their borders, and even interspersed itself among them are so glaring, that its cordial and speedy adoption might reasonably be anticipated."⁹⁷ Georgia Governor Wilson Lumpkin wrote: "The intelligent men of all parties are availing themselves of the liberal provisions of the Treaty . . . while we find the ignorant and misguided stand off at a distance."⁹⁸ President Andrew Jackson, when he first presented the basic treaty to the Cherokees in the form of a letter dated March 16, 1835, included a list of major land and financial provisions and then stated, "there are many other details favorable to you," of which Article 7 must have been one.⁹⁹ *The Southern Banner*

⁹³ The accuracy of Mason's transcript is verified by a nearly identical transcription included as an exhibit in a letter. Letter from John Ross to Congress, H.R. Doc. No. 99, at 33-35 (1839), *microformed on* CIS No. 325-H99 (Cong. Info. Serv.).

⁹⁴ Letter from J. Mason, Jr. to Joel R. Poinsett, *supra* note 92.

⁹⁵ *Id.* at 3.

⁹⁶ J. Mason, Jr., Address to the Cherokee nation in general council assembled, (Aug. 7, 1837), in letter from J. Mason, Jr. to Joel R. Poinsett, Sec. of War (Sept. 25, 1837), H.R. Doc. No. 99, at 33, 35 (1838), *microformed on* CIS No. 325-H82 (Cong. Info. Serv.).

⁹⁷ *Documents, Accompanying the Message of the President of the United States to Congress, Report from the Commissioner of Indian Affairs, Nov. 24, 1835*, DAILY NATIONAL INTELLIGENCER, Jan. 1, 1836, at 2.

⁹⁸ Letter from Wilson Lumpkin to the President and Treaty of 1835 National Committee members (Jun. 26, 1837), in 1 LUMPKIN, *supra* note 3, at 121.

⁹⁹ Letter from Andrew Jackson, U.S. President, to the Cherokee Tribe of Indians East of the Mississippi River (Mar. 16, 1835), in MEMORIAL AND PROTEST OF THE CHEROKEE NATION, 24th Cong., 1st Sess., 90-93. William MacDonald wrote about the Jackson administration: "It was fortunate, on the whole, for the Indians that they received from Jackson, an old frontier soldier, as generous treatment as they did." 15 MACDONALD,

reported the signing of the New Echota Treaty with even stronger language: "I have not time to give you any of the details of this arrangement, they are so liberal as to give entire satisfaction to every Cherokee of all parties in the Nation, with whom I conversed, with very few exceptions."¹⁰⁰

Although the treaty terms were held up as liberal, the Treaty's inability to garner full or even substantial support of the Cherokee people, forces the idea of the treaty's liberality to confront the dispute over Cherokee leadership. Ben Currey, the Superintendent of Cherokee removal, described the group that signed the Treaty as "that patriotic band headed by John Ridge, who were instrumental in eliciting from the Executive of the United States these liberal terms."¹⁰¹ The authorized commissioner in the negotiations, John F. Schermerhorn, wrote in a journal during the negotiations at New Echota that he believed the Cherokee had no "way to save themselves from degradation and final ruin, if not extirpation, but by accepting the liberal overtures of the Government."¹⁰²

The Cherokees did not accept the "liberal overtures" as such without justifiable skepticism. Two years before the New Echota Treaty was signed, the editors of the Cherokee newspaper, *The Cherokee Phoenix*, wrote:

The Secretary then speaks of the "liberal terms of the propositions, and are satisfactory to the American people, and would be so to the Cherokees were they to exercise their own judgment." Upon the admission of the people of the U.S. to the benefits of these propositions to the Cherokees were they accepted, we shall render no objections. But before the government could

supra note 45, at 181.

¹⁰⁰ Letter from William. H. Underwood to Mr. Gathright (Jan. 1, 1836), in *SOUTHERN BANNER*, Jan. 14, 1836, at 2. *The Federal Union* newspaper includes further description along a similar line of liberality: "[T]he agent of the Federal Government has received the assent of the Cherokees to a treaty, on the basis of that offered to them by the president, during the last winter, with a few additional clauses for their benefit." *Cherokee Treaty*, *THE FEDERAL UNION*, Jan. 15, 1836, at 3. Books with the proposed treaty "will be presented to the Cherokees, individually, for their assent, and signature; and as the terms are very favorable, it is believed that they will be embraced by a very large proportion of the tribe." *Id.* Of *The Federal Union*, the *Cherokee Phoenix* wrote:

If there has been a reaction in favor of a treaty, it must be found in the fiction of his own brain, we saw none in the Council. We have said heretofore no truth can be found in these Georgia papers on the Cherokee case, especially, in one that advocates the principles of a ROBBER.

THE CHEROKEE PHOENIX, July 27, 1833, at 2.

¹⁰¹ Letter from Ben Currey, Superintendent of Cherokee removal, to John Ross (Apr. 19, 1835), in *MEMORIAL AND PROTEST OF THE CHEROKEE NATION*, 24th Cong., 1st Sess., 93.

¹⁰² A journal of the proceedings of the Council held at New Echota, Georgia Dec.21-30, 1835, with the Cherokee people by John F. Schermerhorn, Commissioner on the part of the United States to treat with the Cherokees east, in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 20-27 at 22.

consistently hold up to the Cherokee its liberality in regard to a new treaty, is it not the incumbent and the paramount duty of the President, first to prove it by carrying into effect & in good faith his 17 treaties with us?¹⁰³

Though framed from the perspective of a U.S. agent, Mason's comments do acknowledge the conflict between the Treaty's liberality and Cherokee resistance to the Treaty: "Notwithstanding the very liberal terms of this treaty, by which the United States have made provision for the future quiet, comfort, and happiness of their red brethren . . . a portion of their nation are dissatisfied with that compact, and seek to overthrow it."¹⁰⁴ The most active, vocal, and persistent member of that dissatisfied portion was, of course, John Ross. In order to understand the history of the New Echota Treaty and the delegate promise, the disputes between the U.S. government and the Cherokees, as well as those amongst Cherokees, must be understood.

3. Democratic Negotiations?

For the purposes of Treaty negotiations, the U.S. government officially recognized neither a Cherokee government, nor Ross as Principal Chief of the Cherokee Nation. The stated U.S. policy, bolstered by verbal attacks on Ross and other leaders, supported democratic negotiations of the Treaty. While the ongoing leadership struggle between the Ross and the Ridge parties aided U.S. policy, it can probably be best characterized as one of political expediency.¹⁰⁵ By choosing not to recognize John Ross as the Principal Chief, the U.S. commissioners were able to ignore him for the purposes of Treaty negotiation and ratification (even while acknowledging his position in letters to him), and obtain terms that he would not have accepted.

The U.S. policy, as stated in a Presidential message to the Cherokees prior to negotiations, was a democratic one and dealt with the internal power disputes of the Cherokee nation:

It is expressly provided that it will not be binding upon them till a majority has assented to its stipulations. . . . We have frequently, in our intercourse with the Indians, treated with different portions of the same tribe as separate communities. Nor is there any injustice in this, as long as they are separated into divisions, without any very strong bond of union, and frequently with different interests and views. By requiring the assent of a majority to any act

¹⁰³ Editorial, THE CHEROKEE PHOENIX, Sept. 23, 1833, at 3.

¹⁰⁴ J. Mason, Jr., Address to the Cherokee nation in general counsel assembled, *supra* note 96, at 34.

¹⁰⁵ According to then Georgia Governor Wilson Lumpkin, *expedient* as opposed to *just* treaty negotiations were the standard practice rather than an exceptional one: "All the treaties which have ever been made with Indians have, in reality, been consummated by obtaining the influence of a very few individuals, and the few have been brought into the views of the civilized government treating with them, in most cases, by bribery, fraud and corruption." 2 LUMPKIN, *supra* note 3, at 150.

which will bind them, we insure the preservation of a principle which will afford adequate security to their rights.¹⁰⁶

The Presidential message cannot be accepted completely at face value, for the Cherokeees had a written constitution and a recognizable bond of union, if not a "very strong" one.¹⁰⁷ The statement that "final action upon the subject must be had by the people themselves in open council," made by Secretary of War Lewis Cass in a letter to U.S. Commissioner Schermerhorn and Governor William Carroll, must therefore be regarded skeptically.¹⁰⁸ Indeed, in the very same letter Cass wrote, "as the application will be made to the Cherokee people, assembled for that purpose, the Commissioners will not recognize any other authority."¹⁰⁹ For, as *The Federal Union* states, "the acceptance of the treaty is not to depend on the will of a council; the terms are offered to each individual Cherokee."¹¹⁰ The "open council," referenced by Lewis Cass, was a meeting of individuals and not a council formed by the Cherokeees for their own self-governance.¹¹¹

The *idea* of a democratically negotiated, ratified treaty has some emotional, and perhaps intellectual, appeal. Despite its failure to conform with the Cherokee nation's official view, it deserves attention for these reasons. Furthermore, Ross's earlier renegeing on his deal to rely on the Senate's generosity aided the commissioners' democratic position. After the Senate offered five million dollars, Ross maneuvered against the offer by claiming¹¹² that the Senate proposal would

¹⁰⁶ Presidential Message on the Treaty with the Cherokee Indians, S. Exec. Doc. No. 7, 23rd Cong., 1st Sess., 1-2 at 2.

¹⁰⁷ Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 21 (1831):

I cannot but think there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are. I would not here be understood as speaking of the Cherokeees under their present form of government; which certainly must be classed among the most approved forms of civil government. Whether it can be yet said to have received the consistency which entitles that people to admission into the family of nations is, I conceive, yet to be determined by the executive of these states. Until then I must think that we cannot recognize it as an existing state.

(Johnson, J. dissenting).

¹⁰⁸ Letter from Lew Cass, Secretary of War, to J.F. Schermerhorn and Gov. William Carroll (Apr. 2, 1835), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 15-18.

¹⁰⁹ *Id.*

¹¹⁰ *Cherokee Treaty*, *THE FEDERAL UNION*, July 2, 1834, at 2.

¹¹¹ A U.S. commissioner's version of the history of the Cherokee nation's government founding can be found in Letter from J.F. Schermerhorn, U.S. Commissioner, to John Ross (Sept. 15, 1835), in *MEMORIAL AND PROTEST OF THE CHEROKEE NATION*, 24th Cong., 1st Sess., 117-128.

¹¹² "Claiming" rather than "stating" is used because had Jackson agreed to the twenty million dollar initial offer, Ross probably would have immediately accepted.

have to be presented to the Cherokee people before a treaty could be agreed upon.¹¹³ While Ross urged the Cherokees to democratically accept or reject the Senate's offer, the U.S. commissioners argued that democratic negotiations were the only possible route to ensure meaningful treaty approval.¹¹⁴

This democratic *idea*, however, does not correspond with the actual attendance at the negotiations. Schermerhorn and Governor Carroll wrote to the "chiefs, head men, and people of the Cherokee nation" that they "must not listen, or believe any man that is sent to you to tell you not to come to the council at New Echota."¹¹⁵ Francis Paul Prucha highlights how the Treaty itself reveals the non-democratic nature of the negotiations:

In an unusual preamble, the United States sought to justify its reliance on only a portion of the tribe by reciting the history of negotiations with the Cherokees and by noting the earlier warning that those who did not attend the council would be considered to have given their assent to whatever might be done at the council. On this shaky foundation the United States procured a removal treaty with the Cherokees.¹¹⁶

The number of Cherokees who actually came to New Echota in December was only between 200 and 700, with Schermerhorn standing by the larger figures while Ross and even members of the U.S. negotiating party cited estimates at the low end of this range.¹¹⁷ A dispute would later erupt between Schermerhorn and a lower ranking U.S. agent who felt the Treaty was illegitimate because it failed even along the democratic lines professed to govern the negotiations: "[T]hat paper, containing the articles entered into at New Echota, in December last, called a treaty, is no

¹¹³ Memorial from the Cherokee Delegation headed by John Ross to the U.S. Senate and House of Representatives (Jun. 21, 1836), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 450.

¹¹⁴ Presidential Message on the Treaty with the Cherokee Indians, S. Exec. Doc. No. 7, 23rd Cong., 1st Sess., 1-2 at 2.

¹¹⁵ Notice from J.F. Schermerhorn and Gov. William Carroll, U.S. Commissioners, To the Chiefs, Head Men, and People of the Cherokee Nation of Indians (Nov. 3, 1835), in TREATY WITH THE CHEROKEE INDIANS, 24th Cong., 1st Sess., 19. Most Cherokees decided not to go to New Echota: "Ross and his followers disregarded this invitation [to the New Echota negotiations].... Schermerhorn's meeting, they knew, was bound to be another such fiasco as the one Ridge had called in the summer. Their departure at just this juncture was none the less a crucial strategic error." STARKEY, *supra* note 80, at 265.

¹¹⁶ PRUCHA, *supra* note 17, at 179.

¹¹⁷ Schermerhorn requested letters from different participants and observers at New Echota in response to a report in the *Athens Journal* on the numbers of Cherokees in attendance. These letters were collectively submitted to Congress alongside the Treaty for ratification. Journal of the proceedings of the Council held at New Echota, Georgia, Dec. 21-30, 1835, with the Cherokee people by John F. Schermerhorn, Commissioner on the part of the United States to treat with the Cherokees east, in TREATY WITH THE CHEROKEE INDIANS, 24th Cong., 1st Sess., 20-27.

treaty at all, because not sanctioned by the great body of the Cherokee people."¹¹⁸ Regardless of the range of numbers one accepts, it is clear the negotiations did not incorporate a significant number of Cherokees relative to the number bound by the Treaty.¹¹⁹

a. Power of the Cherokee Leaders

The stated democratic idea governing the negotiation form was largely based on U.S. fear of the Cherokee leadership's power. Schermerhorn explains the Cherokees' antagonism to removal with the convenient statement: "I also found it was impossible to obtain a fair expression of the sentiments of the people, while overawed by their leaders."¹²⁰ An "unfair" expression would, under Schermerhorn's logic, be one rejecting the premise that the Cherokees must move for their own good, explainable only by blaming their leaders. Wilson Lumpkin argued that most Cherokees were "dupes" of Ross,¹²¹ and later added, "[i]n truth, nineteen-twentieths of the Cherokees are too ignorant and depraved to entitle their opinions to any weight or consideration."¹²² Although Mason's talk to the Cherokee council in 1837 came as part of an effort to enforce the New Echota Treaty, the expressed sentiment that the Cherokee leaders were leading their people astray is the same: "Listen not to those who tell you to oppose the benevolent designs of the Government. They are wicked men; They speak with a forked tongue, and their bad advice would lead to your inevitable ruin."¹²³

Fear of Cherokee leadership shaped the United States' stated affinity for popular participation in negotiations, though not participation through the government established by the Cherokees. Schermerhorn appealed to Cherokees to attend New Echota individually by writing to them that "the commissioners cannot treat with any executive council and national counselors and committee, but only with the

¹¹⁸ Letter from William Davis to Lewis Cass, Sec. of War (March 5, 1836), in *LETTER OF MAJ. DAVIS, RELATIVE TO THE CHEROKEE TREATY, AND THE ACCOMPANYING CERTIFICATES*, 24th Cong., 1st Sess., 2-8 at 3. *Contra* Letter from J. F. Schermerhorn, U.S. Commissioner, to Lewis Cass, Sec. of War (Mar. 3, 1836), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 46-49.

¹¹⁹ One estimate placed the number bound by the Treaty at roughly 2,000 people: "About sixty leaders signed, representing perhaps two thousand out of 16,000 Cherokees. To Ross and his party, the treaty was such a patent fraud that they did not believe the Senate would have the audacity to ratify it. He was wrong." WILLIAM G. McLOUGHLIN, *CHAMPIONS OF THE CHEROKEES: EVAN AND JOHN B. JONES* 136 (1990).

¹²⁰ Letter from J.F. Schermerhorn, U.S. Commissioner, to Lewis Cass, Sec. of War (Mar. 3, 1836), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 54.

¹²¹ Letter from Wilson Lumpkin to Col. William N. Bishop (Aug. 16, 1835), in 1 LUMPKIN, *supra* note 3, at 361.

¹²² Letter from Wilson Lumpkin to President Andrew Jackson (Sep. 24, 1836), in 2 LUMPKIN, *supra* note 3, at 45.

¹²³ J. Mason, Jr., Address to the Cherokee nation in general counsel assembled, *supra* note 96, at 34.

Cherokee people, assembled in general council, according to their ancient usages and customs, as chiefs, head men, and warriors."¹²⁴

b. Accusations against Cherokee Leaders

The stated democratic idea was coupled with accusations of corruption and greed aimed against Ross and other leaders. Schermerhorn was particularly aggressive in attacking Ross, whom he believed to actually be the "Devil in Hell."¹²⁵ Schermerhorn wrote that complaints against the New Echota Treaty leveled in memorials to Congress came from:

the same men who in May, 1817, got themselves appointed a committee of the nation, and in reality, under pretense of saving their lands, gradually deprived the proper chiefs and council of the people of all their power and authority, and had themselves invested with it; so that no treaty could be made without their consent; and who in the treaties of 1817 and 1819, obtained for themselves reservations of 640 acres each, and agreed to become citizens of the United States, and reside permanently on their reservations; but who, in violation of their solemn engagements, on the first opportunity sold their lands at high prices, removed back again into the Indian country, and took possession of the best ferries and stands for public business.¹²⁶

The same accusations of corruption can be found in Schermerhorn's letter to the Cherokee people.¹²⁷ Written just prior to the New Echota Treaty negotiations, it warned against taking advice from their chiefs, "because they want to sell your land for themselves, as many of them did in 1819, when they secured reservations for themselves, which has made them rich, while you are poor."¹²⁸

Accusations of greedy misuse of tribal resources attempted to discredit and

¹²⁴ Notice from J.F. Schermerhorn and Gov. William Carroll, U.S. Commissioners, To the Chiefs, Head Men, and People of the Cherokee Nation of Indians (Nov. 3, 1835), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 19. Nearly identical language and logic is found in Schermerhorn's letter to Secretary of War Cass on March 3, 1836: "According to the government established under the Cherokee constitution, the general council is not composed, in conformity with the ancient usages and custom of the nation, of the chiefs and people assembled in their collective capacity." Letter from J.F. Schermerhorn, U.S. Commissioner, to Lewis Cass, Sec. of War (Mar. 3, 1836), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 54-61 at 58.

¹²⁵ MOULTON, *supra* note 23, at 67.

¹²⁶ Letter from John F. Schermerhorn, to Lewis Cass (Mar. 3, 1836), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 54-61, at 59. John Ross responded to critiques that he enriched himself through prior treaties in Letter from John Ross. . . In Answer to Inquiries from a Friend. . . (Oct. 1, 1836), in 1 *THE PAPERS OF CHIEF JOHN ROSS*, *supra* note 14, at 389.

¹²⁷ Notice from J.F. Schermerhorn and Gov. William Carroll, U.S. Commissioners, To the Chiefs, Head Men, and People of the Cherokee Nation of Indians (Nov. 3, 1835), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 19.

¹²⁸ *Id.*

diminish the leadership rights of Ross and other chiefs, as did questioning whether such leaders *really* were Cherokees.¹²⁹ During the summer before the negotiations, *The Federal Union* wrote that Cherokee leaders "have a large proportion of white blood in their veins."¹³⁰ The U.S. government was not alone in such racial questioning. The rival Cherokee leader John Ridge expressed as much when he defended the New Echota Treaty by writing:

[A] few men, at the head of whom is John Ross, who is nearly a white man in color and feelings, have affected to be the "*constituted authority*" in the nation, by holding councils in the frontier of our nation in the form of a committee and council of his friends, who have used up all the Cherokee annuities, and exhausted the credit of the nation, under the pretence of defending and saving the Cherokee lands.¹³¹

The similarity between Ross and U.S. agents in terms of manner, physical features, and perhaps corruption was used to support the democratic idea. These criticisms are ironic, however, considering that the tribal government was based upon the U.S. model and their leadership was comfortable navigating the U.S. capital.

4. Cherokee Resistance to Removal

The Cherokee resistance to removal goes a long way toward explaining the charges against the Cherokee leaders and the calls for a democratic treaty negotiation and ratification. According to President Jackson, the rejection of removal treaties by Cherokees "has been owing more to the ascendancy acquired by individuals who are unwilling to go, than to the deliberate opinion of a majority of the Cherokee people."¹³² A viewpoint similar to Jackson's can be found in Schermerhorn's journal: "The people generally were very anxious to have their difficulties settled, although they were deterred from attending on account of the influence and fear of some of their chiefs."¹³³ Schermerhorn later accused Cherokee

¹²⁹ See e.g., John Bell (Whig-Rep. of Tennessee to U.S. House of Representatives), *House Debate on the Removal of the Cherokees*, (Feb. 14, 21, 1831), in 2 THE AMERICAN INDIAN AND THE UNITED STATES, *supra* note 29, at 1187 ("It was not the red men who were benefited under the present system, but some twenty or thirty whites who had insinuated themselves into the confidence of the Indians, and who, together with the half-breeds, controlled the whole tribe, and acquired wealth at the expense of those for whose welfare so many philanthropic wishes were expressed in the House.").

¹³⁰ THE FEDERAL UNION, July 23, 1834, at 3.

¹³¹ Letter from John Ridge and S. Watie to John F. Schermerhorn, U.S. Commissioner (Feb. 26, 1836), in TREATY WITH THE CHEROKEE INDIANS, 24th Cong., 1st Sess., 46-49 at 46.

¹³² Presidential Message on the Treaty with the Cherokee Indians, S. Exec. Doc. No. 7, 23rd Cong., 1st Sess., 1-2 at 1.

¹³³ A journal of the proceedings of the Council held at New Echota, Georgia Dec. 21-30, 1835, with the Cherokee people by John F. Schermerhorn, Commissioner on the part of the United States to treat with the Cherokees east, in TREATY WITH THE CHEROKEE

leaders of "misrepresenting" Treaty propositions in order to "prejudice the minds of the common people," an accusation which Schermerhorn used to justify the form of U.S.-Cherokee negotiations that took place at New Echota.¹³⁴ U.S. frustration with the resistance to removal comes across in the report from the Commissioner of Indian Affairs that the *Daily National Intelligencer* printed for its District of Columbia readers:

There has been no intermission of exertion to induce the removal of the Cherokees to the west of the Mississippi, in conformity with the policy adopted by the Government in favor of the Indians, and to which they form almost, the sole exception. There can be little doubt that bad advisement and the intolerant control of chiefs adverse to the measure, have conduced to the disinclination of a large portion of the nation to emigrate, and avail themselves of the obvious benefit in the contemplated change.¹³⁵

The U.S. blamed the Cherokee leadership for difficulties in implementing removal in an attempt to deflect attention from general Cherokee resistance to forced relocation.

The internal Cherokee dispute should not be exaggerated, for though the U.S. government conveniently sided with the pro-removal Ridge group, the Cherokee people supported Ross's government. Mason recorded:

The influence of this chief is unbounded and unquestioned; the whole nation of eighteen thousand persons is with him. . . . It is evident, therefore, that Ross and his party are in fact the Cherokee nation. . . . I believe that the mass of the nation, particularly the mountain Indians, will stand or fall with Ross.¹³⁶

Major Ridge was aware that he did not represent the Cherokees, expressing as much when signing the Treaty of New Echota. Ridge "was heard to say, as he made an X, that he had signed his death warrant. He justified his action with the argument than an intelligent minority has a moral right and duty to save a blind and ignorant majority from inevitable ruin."¹³⁷

Ross was aware that the U.S. might not recognize him as anything more than one of several vying leaders. Not surprisingly, Ross's rejection of the New Echota

INDIANS, 24th Cong., 1st Sess., 20-27 at 21.

¹³⁴ Letter from John F. Schermerhorn, to Lewis Cass (Mar. 3, 1836), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 54-61, at 54.

¹³⁵ *Documents, Accompanying the Message of the President of the United States*, *supra* note 97, at 2.

¹³⁶ Letter from J. Mason, Jr., *supra* note 92, at 4. See also, GABRIEL, *supra* note 13, at 152 ("Andrew Jackson might dominate Washington, but John Ross still ruled in the mountains.").

¹³⁷ EHLE, *supra* note 4, at 295. Major Ridge was correct that he was probably forfeiting his life. On June 22, 1839, he along with Elias Boudinot and his son John Ridge who were both also treaty signers, were "brutally murdered.... John Ross denied any complicity or approval of the deed; but he could not completely shake the accusations made against his party." PRUCHA, *supra* note 17, at 181.

Treaty was framed in terms of his leadership responsibilities: "We cannot . . . disrobe ourselves of our delegated authority, and act as individuals, by uniting ourselves with the unauthorized few who have entered into a contract with the United States, in the form of a treaty."¹³⁸ The U.S. government oscillated between recognition and non-recognition of Ross's leadership, for while the Treaty was negotiated without Ross, the Senate did accept memorials of protest from the Ross group despite protests from Georgia that Ross was not a leader whom the Senate should implicitly recognize through memorial acceptance.¹³⁹ Schermerhorn believed, "the principal, if not only ground, of objection to the treaty, is, because it was made by unauthorized individuals, and not by the self-constituted authorities of the nation."¹⁴⁰ That even the U.S. negotiator expressed concern about the authority of the individuals signing the Treaty supports some of the Cherokee beliefs regarding the illegitimacy of the Treaty at the time it was signed.¹⁴¹

B. Understanding the New Echota Treaty Disputes

The disputes—among Cherokees, among U.S. agents, and between the U.S. government and the Cherokees—that make up the historical background of the New Echota Treaty do not ultimately undermine present claims based upon that Treaty. The history is important and must be understood because it can be used to question the delegate provisions. But disputes should not be divorced from the fact that the U.S. government wrote the Treaty, including the delegate provision, treated it as a valid treaty, and used it as the legal mechanism to force Cherokee removal.¹⁴² The history of the Treaty negotiations, including the disputes and

¹³⁸ Letter from Cherokee Delegate headed by John Ross to Lewis Cass (Feb. 29, 1836), in *1 THE PAPERS OF CHIEF JOHN ROSS*, *supra* note 14, at 389.

¹³⁹ *THE FEDERAL UNION*, June 4, 1834, at 3.

¹⁴⁰ Letter from John F. Schermerhorn, to Lewis Cass (Mar. 3, 1836), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 54-61, at 59. A similar point was made by Wilson Lumpkin who attacked Ross's insistence that negotiation occur only with representatives of the Cherokee government: "Ross opposed [the New Echota Treaty] because it was negotiated by his rivals and because it did not recognize him as anything more than a *common Indian*." 2 LUMPKIN, *supra* note 3, at 32.

¹⁴¹ For general description of the disputes involved in the New Echota Treaty negotiations, see Letter from John Ridge and S. Watie to John F. Schermerhorn, U.S. Commissioner (Feb. 26, 1836), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 46-49 at 46.; Petitions of Protest signed by 3,250 persons, S. Exec. Doc. No. 23-7, 23d Cong., 1st Sess., at 53; Letter from John F. Schermerhorn, to Lewis Cass (Mar. 3, 1836), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 54-61; Treaty of New Echota, *supra* note 1, Preamble. See generally, Notice from J.F. Schermerhorn and Gov. William Carroll, U.S. Commissioners, To the Chiefs, Head Men, and People of the Cherokee Nation of Indians (Nov. 3, 1835), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 19 (discussing authority of Cherokee nation).

¹⁴² The validity of the Treaty comes across through the number of citations the Treaty receives on a wide range of issues frequently related to water and land rights. For

legitimacy questions, does not logically lead to the conclusion that the U.S. government is not bound to rights granted in the resultant Treaty.

The long standing principle of interpreting treaties between the U.S. government and Indian tribes in the light most favorable to Indians provides the proper framework for judging the delegate right contained in the New Echota Treaty.¹⁴³ The Treaty was and continues to be treated by the U.S. government as valid. Furthermore, despite protests as to its legitimacy, Cherokees were told that the Treaty was unalterable. The right to a delegate was not a promise included by U.S. agents in the Treaty in an ad hoc manner, but instead reflects a history of similar, though importantly less definitive promises, aimed at Indian representation.

1. Unalterable Treaty

The Preamble of the Treaty of New Echota provides the U.S. position that the Treaty would be enforced as a legitimate instrument:

And whereas the said commissioners did appoint and notify a general council of the nation to convene at New Echota on the 21st day of December 1835; and informed them that the commissioners would be prepared to make a treaty with the Cherokee people who should assemble there and those who did not come they should conclude gave their assent and sanction to whatever should be transacted at this council and the people having met in council according to said notice.¹⁴⁴

The Preamble reflects Schermerhorn's sentiments during the negotiations, as recorded in his journal, that "[the Cherokees] were also distinctly informed that those who did not attend would be considered as giving their sanction to what was done and transacted by those who did attend."¹⁴⁵ Not surprisingly, Ross sent multiple memorials to Congress protesting the U.S. position that the New Echota Treaty was sanctioned by the Cherokees and that its stipulations were valid.¹⁴⁶ The U.S. government firmly held the treaty to be unalterable. According to Ross, the Secretary of War "intimated . . . the fixed and unalterable determination to enforce upon us the stipulations of the fraudulent and invalid instrument purporting

example, a *Lexis Search* yielded 46 citations.

¹⁴³ See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (describing the interpretive principle and canons of construction applicable to Indian treaties).

¹⁴⁴ Treaty of New Echota, *supra* note 1, Preamble.

¹⁴⁵ A journal of the proceedings of the Council held at New Echota, Georgia Dec. 21-30, 1835, with the Cherokee people by John F. Schermerhorn, Commissioner on the part of the United States to treat with the Cherokees east, in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 20-27 at 21.

¹⁴⁶ See e.g., Memorial from the Cherokee Delegation headed by John Ross to the U.S. Senate (Mar. 8, 1836), in 1 *THE PAPERS OF CHIEF JOHN ROSS*, *supra* note 14, at 412.

to be a treaty negotiated at New Echota in 1835.”¹⁴⁷ In the same memorial, written two years after New Echota, Ross further protested that Cherokees “are told that the Executive has no discretion—has no power to disregard [the Treaty of New Echota], or to enter into any arrangement inconsistent with its provisions.”¹⁴⁸

A critical observer might complain that Ross was exaggerating the U.S. position as held out to the Cherokees, for surely the U.S. government would not claim that discretion was out of the hands of the Executive. However, even Mason, when talking to the assembled Cherokee general council as a U.S. special agent, emphasized the same unalterable nature of the treaty from the U.S. standpoint:

Their delegation was assured by the Executive, that this instrument is now become, by mutual acts of ratification, the law of the land, and cannot be altered at the will of either party; that the President has no power over it, and that the constitution of the United States makes it his imperative duty to cause it to be executed.¹⁴⁹

“The President has no power over it” is a strong statement of the fixed status of the New Echota Treaty as a valid instrument. The U.S. position, though made for the purposes of Cherokee removal, was and has been that the New Echota Treaty is unalterable, and this should continue to hold when the Cherokees invoke the treaty for rights guaranteed them by the same instrument.

C. *Intent of Delegate Provision*

The New Echota Treaty provisions, including Article 7’s delegate right, were deliberate grants made by the U.S. government under no duress or imposition from Cherokee factions at the time of the Treaty’s acceptance.¹⁵⁰ Indeed, Article 7 might be best thought of as a form of payment for the land cession of which the bulk of the Treaty consists, a right granted in consideration for the taking of Cherokee lands in

¹⁴⁷ Memorial from John Ross et al. to Congress, Jan. 15, 1838, 2nd Sess., H.R. Doc. No. 99, at 2 (1838) *microformed on* CIS No. 325-H99 (Cong. Info. Serv.).

¹⁴⁸ *Id.*

¹⁴⁹ J. Mason, Jr., Address to the Cherokee nation in general counsel assembled, *supra* note 96, at 6.

¹⁵⁰ Richard Mack Bettis, *Introduction*, in ROYCE, *supra* note 2, at xi (“Each treaty is unilateral, however, in the sense that the [Cherokee] Tribe really had no choice.”). See also, PRUCHA, *supra* note 17, at 160 (citing Rev. Isaac McCoy, a Baptist missionary to the Indians, in UNITED STATES’ TELEGRAPH:

We cannot consider the Indians really a *party* to a contract in the conveyance of land when they are assembled at the pleasure of the whites, when the latter give the terms, and when the latter are as fully determined to have the land in question, or, rather, to *hold* the land in question, to which they already consider themselves entitled, if the terms offered to the Indians should *not* be agreed to, as if they should.).

Georgia.¹⁵¹ Ross should not be faulted for not clearly laying out a series of propositions, for much of his work was consumed by his attempt to get the U.S. government to recognize its responsibilities under prior treaties concluded with the Cherokees. Indeed, the limited Cherokee proposals—partial land concessions or outright land sale—ensure that the particular treaty articles represent the U.S. intent to a greater extent than they represent Cherokee intent. Ironically, although initially a negative as far as the Cherokee were concerned, the limited Cherokee proposals mean that Cherokee calls for a Congressional delegate stand on firmer ground in that now the U.S. government cannot claim that the U.S. intent was not contained in the delegate provision.¹⁵²

1. The Deputy Promise

Article 7's delegate right reflects a history of earlier promises that closely resemble it but fail to obligate the U.S. government in the same manner that Article 7 does. Therefore, Article 7 might best be understood for what it is not: it is not the lesser, similar, promises that preceded it. In 1778, the U.S. signed a treaty with the Delawares that included the following terms:

And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join

¹⁵¹ Wilkinson and Volkman explain: "It is important to recognize that the American Indian's treaty rights are not 'gifts' or 'grants.' Indians fought hard, bargained extensively, and made major concessions in return for such rights. Treaties can, therefore, properly be regarded as negotiated contracts of a high order." Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601, 603 (1975).

¹⁵² The terms in the New Echota treaty did not differ from those general terms which the U.S. treaty negotiator, Schermerhorn, was sent under Presidential authority to secure; consequently, the charge that Article 7 represents only Schermerhorn's intent and not the intent of the U.S. government cannot be made. The Secretary of War's charge to Schermerhorn and Governor Carroll, is indicative of the closeness between the U.S. intent and the treaty: "The provisional treaty contains the general terms which the President is disposed to offer to the Indians, and he is desirous that the Cherokee people should assent to this arrangement without making any change in its stipulations." Letter from Lew Cass, Secretary of War, to J.F. Schermerhorn and Gov. William Carroll (Apr. 2, 1835), in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 15-18, at 15. Similarly, Schermerhorn's journal reflects the crystallization of U.S. intent in the terms agreed upon at New Echota: "I will only add that, in the other articles of the treaty [including Article 7], no material alterations will be found from the propositions as originally drawn up." A journal of the proceedings of the Council held at New Echota, Georgia Dec.21-30, 1835, with the Cherokee people by John F. Schermerhorn, Commissioner on the part of the United States to treat with the Cherokees east, in *TREATY WITH THE CHEROKEE INDIANS*, 24th Cong., 1st Sess., 20-27 at 24.

the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: Provided, nothing contained in this article to be considered as conclusive until it meets with the approbation of Congress.¹⁵³

More important than the loose promise of representation are the qualifications placed on this particular promise: the representation is only associated with future statehood and no part of the promise is "conclusive" until Congress approves of it.¹⁵⁴ It is not clear whether under the 1778 treaty the Delawares would have any present rights, and similarly the Cherokee Treaty of Hopewell in 1785 does not provide any real right to representation in Congress. Article XII of the Treaty of Hopewell reads: "That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress."¹⁵⁵ The meaning of the "right to send a deputy" was a side issue addressed in *Cherokee Nation v. Georgia*, with the Supreme Court ultimately deciding that a deputy right was not a representative right.¹⁵⁶

In *Cherokee Nation*, the Justices wrote in dicta that the right to send a deputy did not impose upon the U.S. government any obligation to the Cherokees in terms of their participation in the national government.¹⁵⁷ However, the right was not devoid of meaning. Writing for the majority, Chief Justice Marshall felt compelled to highlight the singular nature of the promise: "The Cherokees in particular were allowed by the treaty of Hopewell, which preceded the constitution, 'to send a deputy of their choice, whenever they think fit, to congress.'"¹⁵⁸ In his dissent, Justice Baldwin observed the potentially farther reaching, though complicated, nature of the promise when he stated, "the meaning of the words 'deputy to congress' in the twelfth article may be as a person having a right to sit in that body, as at that time it was composed of delegates or deputies from the states, not as at present, representatives of the people of the states; or it may be as

¹⁵³ Treaty with the Delawares, U.S.-Delawares, Sept. 17, 1778, 7 Stat. 13.

¹⁵⁴ The Delaware's treaty promise of representation in Congress upon formation of a state, once it "meets with the approbation of Congress," was satisfied according to the influential removal era William Penn essays, for as Evarts writes, "That [Article 6] did meet with the approbation of Congress is manifest; because it is now part of a national treaty." JEREMIAH EVARTS, *ESSAYS ON THE PRESENT CRISIS IN THE CONDITION OF THE AMERICAN INDIANS* (signed by William Penn, 1829), reprinted in *CHEROKEE REMOVAL: THE "WILLIAM PENN" ESSAYS AND OTHER WRITINGS* 93 (Francis Paul Prucha ed., 1981).

¹⁵⁵ Treaty with the Cherokee, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18.

¹⁵⁶ 30 U.S. (5 Pet.) 1, 17 (1831).

¹⁵⁷ *Id.*; but see, *House Debate on the Indian Removal Question*, *supra* note 29, (statement of Rep. Henry Storrs) (citing the Deputy promise in the Congressional debates on removal as evidence that the Indians were not mere "serfs" transferred from the English crown to the U.S. government).

¹⁵⁸ *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

an agent or minister.”¹⁵⁹

If Baldwin’s first option—that the deputy would have the right to sit in the body of Congress—is the proper reading, then the deputy right would be highly analogous to the delegate right contained in the New Echota Treaty. However, Justices Johnson and Thompson accepted Baldwin’s second option in their dissents, namely that the deputy is merely an agent or minister. Johnson wrote:

It is true, that the twelfth article gives power to the Indians to send a deputy to congress; but such deputy, though dignified by the name, was nothing and could be nothing but an agent, such as any other company might be represented by. It cannot be supposed that he was to be recognized as a minister, or to sit in the congress as a delegate. There is nothing express and nothing implied, that would clothe him with the attributes of either of these characters. As to a seat among the delegates, it could not be granted to him.¹⁶⁰

Similarly, Thompson wrote in his separate dissent, “[n]o one can suppose that such deputy was to take his seat as a member of congress; but that he would be received as the agent of that nation.”¹⁶¹ Though the Justices did not feel the deputy promise required Congressional recognition of a Cherokee delegate, their 1831 interpretation in *Cherokee Nation v. Georgia*, formed the backdrop for the more substantive promise found in the New Echota Treaty of 1835. The communications and tentative agreements in the years between the Supreme Court ruling and the signing of the Treaty reveal the steps involved in moving from the deputy to the delegate promise.

2. The Agent Promise

U.S. policy that actively supported a Cherokee agent formalized the dicta claiming that the deputy right was merely the right to an agent. The *Cherokee Phoenix* printed the Department of War’s removal advocacy, including the promise to the Cherokees that they “shall have the privilege of appointing an agent, who shall reside at Washington, to communicate your claims and wishes to the Government.”¹⁶² Not surprisingly, Cherokee leaders desired more than a mere agent and, even among the non-Ross faction willing to negotiate with the U.S. government on the subject of removal, there was the additional desire to receive a

¹⁵⁹ *Id.* at 39; see also EVARTS, *supra* note 154, at 122 (supporting Baldwin’s first option):

Though the treaty of Hopewell was formed under the old confederation, it is not the less binding on that account; and good faith would now require, that the Cherokees should be allowed a privilege, as nearly as possible *tantamount* to what would have been the privilege of sending a deputy to the Old Congress.)

¹⁶⁰ *Cherokee Nation*, 30 U.S. (5 Pet.) at 25.

¹⁶¹ *Id.* at 66.

¹⁶² *Department of War, April 17, 1832, CHEROKEE PHOENIX*, Aug. 10, 1833, at 2.

treaty promise to a delegate.

The 1834 articles of agreement between John H. Eaton, U.S. Commissioner, and a delegation of Cherokees illustrates the difference at the time between the Cherokees and U.S. on the issue of a delegate right.¹⁶³ Article III puts forth Cherokee desires:

A desire is expressed that the Cherokee people may have a Delegate in the House of Representatives: it is laudable, and evinces a desire for an onward march to improvement and civilization; but the treaty-making branch of the Government is incompetent to grant such a privilege, it being one on which all the branches of the Government are necessary to a decision; but it is agreed that, as soon as a majority of the Cherokee people shall reach their western homes, the President will refer their application to the two Houses of Congress for their consideration and decision.¹⁶⁴

The third article does two things: (1) it presents the difference between the U.S. and Cherokee positions prior to the New Echota Treaty, and (2) it highlights issues that arguably bear on the legitimacy of the later New Echota delegate promise. First, it is clear that Cherokees did express interest in a meaningful delegate promise; therefore, the eventual promise found in Article 7 of the New Echota Treaty was not simply a U.S. presented article but rather part of a negotiated understanding of terms associated with removal.¹⁶⁵ Second, the statement that the

¹⁶³ The 1834 articles of agreement reflect the negotiating stance of the U.S. from at least 1832 when a U.S. negotiator was sent on a mission to conclude a treaty that included the following provisions:

4. To have an agent resident in Washington to represent their interest, who should be paid by the United States.

5. With the consent of Congress they should be organized as a Territory and be represented by a delegate in that body.

ROYCE, *supra* note 2, at 135.

¹⁶⁴ Articles of agreement entered into between John H. Eaton, Commissioner on the part of the United States, and the Cherokee delegation of Indians, June 19, 1834, S. Exec. Doc. No. 23-7, 23d Cong., 1st Sess., at 4.

¹⁶⁵ That the U.S. government understood the distinction between an agent and a delegate can be seen through Ronald Satz's recording of a racist protest against an Indian delegate as part of removal:

Democrat John Novell of Michigan vehemently opposed the attempt to provide the Indians with a delegate in Congress in order to bind them closer to the federal government. Novell, a Kentuckian by birth, feared that the proposal might be "the entering wedge to something more." He specifically warned that it might establish a precedent whereby abolitionists would later demand representation for free Negroes. Novell told his colleagues that he never wished to see the day when either Indians or blacks held seats in Congress. On April 27 he offered an amendment to the bill which sought to provide the tribesmen with an "agent" in Washington instead of a delegate to Congress.

Executive "is incompetent to grant" a delegate privilege because "all the branches of Government" are needed for such a decision could be used by detractors of the New Echota promise in efforts to invalidate the promise. However, by going on to say that Congress could make such a decision, Article III indicates that the New Echota promise is valid, for Congress approved the Treaty in its entirety. Article III fails to provide any definite promise to the Cherokees and Article IV includes only the lesser agent promise: "A wish is also expressed that an agent, to represent the rights and interests of the Cherokees, may remain at the city of Washington after a removal takes place. This request is admitted."¹⁶⁶ The fourth article demonstrates both that the Cherokees saw the promise of an agent and a promise of a delegate as distinct promises and that the U.S. government at the time of this agreement was not yet prepared to go as far as it would go in the 1835 New Echota Treaty in establishing a Cherokee delegate.

3. The Delegate Promise

In 1835, as a part of a more general treaty removing the Cherokees, the U.S. government granted the Cherokees a right to a delegate to Congress. This promise resides in Article 7 of the New Echota Treaty:

The Cherokee nation having already made great progress in civilization . . . it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.¹⁶⁷

The promise reflects the liberality that the U.S. government expressed as U.S. policy and also acknowledged as fundamental for the protection of Cherokee rights. Unlike the earlier Treaty with the Delawares and the deputy and agent promises, this promise is an affirmative right, subject only to minor qualification. Critics of the promise initially can highlight "whenever Congress shall make provision for the same" to suggest the promise is as meaningless as the Supreme Court found the deputy right to be. But the differences between this promise and the earlier, lesser promises demonstrate that being "entitled to a delegate" is an affirmative right granted to the Cherokees.

There are conflicting histories regarding the right versus obligation to seat

SATZ, *supra* note 85, at 217.

¹⁶⁶ Articles of agreement entered into between John H. Eaton, Commissioner on the part of the United States, and the Cherokee delegation of Indians, June 19, 1834, S. Exec. Doc. No. 23-7, 23d Cong., 1st Sess., at 4. The agent promise included payment terms from the U.S. government and a provision that the President could terminate the agent's post after the initial five years.

¹⁶⁷ Treaty with the Cherokee, *supra* note 1, at 482 (emphasis added); *see also* Agreement with the Cherokee, Art. 8, U.S.-Cherokee, Mar. 14, 1835, Senate Doc. No. 120, 25th Congress, 2d session, p. 459. However, the Mar. 14, 1835 agreement is not a ratified treaty, and therefore the New Echota Treaty is the text on which the promise rests.

delegates; the most closely analogous case is that of the Confederate States. On October 7, 1861 the Confederate States of America and the Cherokees signed a treaty at Tahlequah that included a delegate right.¹⁶⁸ When drafted, Article XLIV thereof granted the Cherokee delegate the full rights of a territorial delegate, but when ratified it read:

In order to enable the Cherokee Nation to claim its rights and secure its interest without the intervention of counsel or agents, *it shall be entitled to a Delegate to the House of Representatives of the Confederate States of America*, who shall serve for a term of two years, and be a native-born citizen of the Cherokee Nation, over twenty-one years of age, and laboring under no legal disability by the law of the said nation; and each Delegate shall be entitled to a seat in the hall of the House of Representatives, to propose and introduce measures for the benefit of the said nation, and to be heard in regard thereto, and no other questions in which the nation is particularly interested, with such other rights and privileges as may be determined by the House of Representatives¹⁶⁹

As the text of the final version demonstrates, the ratified Cherokee-Confederate Treaty limited the Cherokee delegate role. This limitation reflected President Davis' concern that the delegate and statehood provisions might be "both impolitic and unconstitutional."¹⁷⁰ The Confederate Congress responded by excising the statehood provision and altering the delegate provision.¹⁷¹ However, the right to a delegate was still included in the ratified treaty and was recognized. When Elias C. Boudinot presented the Confederate Committee on Indian Affairs with his credentials, they came to the conclusion "that he has been duly elected Delegate from the Cherokee Nation in conformity with the treaty between the Confederate States of America and the Cherokee Nation, and is therefore *entitled to his seat as Delegate*."¹⁷²

¹⁶⁸ Treaty with the Cherokees, Oct. 7, 1861, Between the Confederate States of America and the Cherokee Nation of Indians, *in* The Statutes at Large of the Provisional Government of the Confederate States of America, from the Institution of the Government, February 8, 1861, to its Termination, February 18, 1862, Inclusive. Arranged in Chronological Order. Together with the Constitution for the Provisional Government, and the Permanent Constitution of the Confederate States, and the Treaties Concluded by the Confederate States with Indian Tribes: (uniform) Laws, etc. (Statutes at large of the provisional government of the Confederate States of America) 394-411 (James M. Matthews ed., R. M. Smith, Printer to Congress 1864), <http://docsouth.unc.edu/imls/19conf/19conf.html> (last visited Nov. 29, 2005) (part of the Documenting of the American South project of the University of North Carolina at Chapel Hill).

¹⁶⁹ *Id.* at 403-404.

¹⁷⁰ Kenneth McNeil, *Confederate Treaties with the Tribes of Indian Territory*, 42 CHRONICLES OF OKLAHOMA 408, 417 (1964-1965).

¹⁷¹ *Id.*

¹⁷² *Journal of the Senate* (45th day, Oct. 9, 1862), 2 JOURNALS OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, 1861-1865, S. Doc. No. 234, 58th Cong. 2nd Sess., at 450 *available at* <http://memory.loc.gov/ammem/amlaw/lwcc.html> (follow

The Confederate Treaty's repetition of the delegate provision is significant because of the new role the Cherokees played in the negotiations leading up to the Treaty. The Cherokees for the first time had sufficient power to help determine the shape of the Treaty:

Never before had they been in a position to do anything more than accept what was offered them. Their services were sorely needed by the Confederacy and the diplomatic Cherokees were not slow to take advantage of their opportunity and make the best of the situation. The treaty seems to represent what they considered an ideal relationship.¹⁷³

With the Confederate Treaty negotiations, "[f]or a brief period the white man had thrown aside the role of superiority which he had assumed in his previous relations with the Indians."¹⁷⁴

John Ross's discussion of the Confederate Treaty's delegate right in his 1861 Annual Message raises more questions than it answers. In Ross's words, "[the Treaty] gives us a Delegate in Congress on the same footing with the Delegates from the Territories by which our interests can be represented, a right which has long been withheld from the Nation and which has imposed upon it a large expense and great injustice."¹⁷⁵ It is not clear, however, from the remaining records between 1835-1861, including Ross's own writings, why Ross described the delegate right as having been "withheld."¹⁷⁶

The delegate promise contained in Article 7 of the Treaty of New Echota deserves the importance and permanence that was intended to accompany it and that is contained in the Confederate acceptance of a delegate.¹⁷⁷ When Mason gave his

"Volume 2" hyperlink, then "Page image" hyperlink, then enter image 450 and click "Turn to image").

¹⁷³ MORRIS L. WARDELL, *A POLITICAL HISTORY OF THE CHEROKEE NATION 1838-1907*, at 139 (Univ. of Okla. Press 1977) (1938).

¹⁷⁴ McNeil, *supra* note 170, at 420.

¹⁷⁵ John Ross, *Annual Message to Friends and Fellow Citizens* (Oct. 9, 1861), in 2 *THE PAPERS OF CHIEF JOHN ROSS*, *supra* note 14, at 494-95.

¹⁷⁶ For Ross, the most significant provision had to be one defining who was authorized to negotiate on behalf of the Cherokees:

The Confederacy agreed never to enter any compact, treaty, or agreement with the Cherokees except with the constitutional authorities of the Nation. Had such provision been placed in their first treaties with the United States, the Treaty of 1835 would not have been made and the Ridge-Boudinot murders probably would not have occurred.

WARDELL, *supra* note 173, at 139.

¹⁷⁷ For a contrary reading suggesting Congress has the right to refuse the delegate and is not obligated, see *Delegate from Indian Territory: Hearing Before the H. Comm. on Territories*, 58th Cong. (1905) (Kansas Representative, Charles Curtis, suggesting that the House is not obligated by the treaty but instead, "upon the request of the Cherokees alone you would have a right to give [a delegate from Indian Territory—Oklahoma] a seat.") For different opinions about Congressional right or

speech to the general counsel of the Cherokee Nation in 1837 urging the acceptance of removal and the New Echota Treaty on behalf of the U.S. government, he told the gathered counsel, "the Government will faithfully fulfill all the stipulations and engagements which it has contracted with you; and its earnest desire is to see you prosperous and happy."¹⁷⁸ Mason placed particular importance on the delegate promise as a mechanism for Cherokee survival, concluding his talk with a discussion of the delegate right:

There, finally, Cherokees, to give permanency to your institution, and to secure the peace and prosperity of your nation, you will be entitled to a delegate in the House of Representatives of the United States, and thus be constituted a member of this great confederacy, with full right to its protection, and a full participation in all its advantages and blessings.

Brothers: I have done. May the Great Spirit guide your steps in the paths of peace; and, under his divine protection, may you and your children enjoy long life and happiness.¹⁷⁹

Mason's talk highlights the connection between the delegate entitlement and Cherokee institutional and cultural vitality, and his points bear repeating should the Cherokee nation undertake efforts to have their delegate right recognized.

D. Cherokee Delegate in Context

The delegate promise can be understood broadly or narrowly. Understood broadly it is a right to a regular representative, equal in power to a state representative; understood narrowly it is a right to a non-voting delegate, with powers in line with those possessed by the non-voting delegates from the District of Columbia, Guam, American Samoa, the Virgin Islands, and the Resident Commissioner from Puerto Rico.¹⁸⁰ For strategic reasons, even academics and

obligation to recognize delegates, see Asher Crosby Hinds, *Hinds' Precedents of the House of Representatives of the United States* I § 473, at 508, 514 (1907) (recounting that in 1882, the House Elections Committee considered the case of a delegate from the territory of Utah who was accused of polygamy. In the debate on qualification, Representative F. E. Beltzhoover put forth that "each Congress can wholly repudiate all such acts [establishing territorial delegates] with entire propriety," adding that the delegate "right or permission is subject to the merest will and caprice of Congress. It can be utterly wiped out or modified or changed just as Congress may see proper at any time." The committee voted to disqualify the Utah delegate, but the minority position in its argument disagreed with Beltzhoover by faulting the idea that the "House may seat or unseat a delegate at will," because as a consequence, "the right of a Delegate would be wholly uncertain.").

¹⁷⁸ J. Mason, Jr., Address to the Cherokee nation in general counsel assembled, *supra* note 96, at 7.

¹⁷⁹ *Id.*

¹⁸⁰ Non-voting delegates and the Resident Commissioner enjoy virtually the same rights. See 2 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 38 (1978). For

Cherokees most interested in obtaining representation in the House have been urging the narrow reading of the delegate promise.¹⁸¹ Such a representative is a delegate with "a seat in the House of Representatives, with the right of debate, but not of voting."¹⁸²

The House created non-voting delegates "on the theory that it might admit to the floor of debate merely anybody whom it might choose." Over time, the meanings and qualifications of the non-voting delegates grew more defined.¹⁸³ The rights and powers possessed by non-voting delegates are numerous and wide ranging: "[R]egular office space in House office buildings . . . , [the] right to speak on the floor of the House as well as in standing committees . . . , [and the] right to vote in committee and in subcommittee."¹⁸⁴ Congress can even grant delegates the right to votes in the Committee of the Whole, where much of the house business is conducted, so long as the votes are not decisive through the operation of a "savings clause." The Judicial branch upheld this right on review.¹⁸⁵

Differences exist between non-voting delegates and full delegates both in terms of the requirements for the individual representative and the nature of the population represented. The age, residency, and citizenship rules on full delegate qualifications do not explicitly apply to the non-voting delegates.¹⁸⁶ Nevertheless, "most recent

a list of delegates and a description of their powers, *See Michel v. Anderson*, 817 F. Supp. 126 (D.D.C. 1993).

¹⁸¹ This was the conclusion of the participants at the Cherokee Delegate Strategic Planning Summit in Tahlequah, Oklahoma, Aug. 2002 (notes on file with the author). *See, e.g.*, 137 Cong. Rec. H2464 (daily ed. Apr. 23, 1991) (statement of delegate Mr. Faleomavaega from the American Samoa) ("I submit, Mr. Speaker, that by establishing native American representation in Congress we could perhaps be salvaging the only promise ever made to the native Americans that can still be kept.")

¹⁸² *See* Northwest Ordinance of 1787, 1 Stat. 50, 52 (creating the post of territorial delegate); *see e.g.*, 2 U.S.C. § 25(a) (2000) (wording of the power and qualifications for the District of Columbia delegate); Our American Government, H.R. Doc. No. 106-216, at 21 (2000) ("Delegates and Resident Commissioners may participate in House debate but they are not permitted to vote on the floor. All serve on committees of the House and possess powers and privileges equal to other Members in committee, including the right to vote in committee.")

¹⁸³ Hinds, *supra* note 177, at I § 400.

¹⁸⁴ Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 Harv. C.R.-C.L. L. Rev. 39, 82-83 (1999). *See also*, 2 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, *supra* note 180, at ch. 7 § 3, for a full account of delegates' authority and rights, including the right to an equal salary as members.

¹⁸⁵ *See Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994) (*aff'g Michel*, 817 F. Supp. 126).

¹⁸⁶ *Id.* Each non-voting delegate is subject to individual eligibility qualifications. *See* 48 USCS § 1733 (2001). American Samoa qualifications: a person must be 25 years old, must "owe allegiance to the United States," must be an inhabitant of American Samoa, and must not be not a candidate for other office. *See, e.g.*, Hinds, *supra* note 177, I § 421 (stating that the laws of the United States do not impose qualifications for

acts creating office of Delegates contain within their provisions explicit qualifications similar to those constitutionally defined for members.”¹⁸⁷ Furthermore, the groups represented by non-voting delegates can differ in ways not permitted for full delegates:

These five [non-voting delegates] represent areas and constituents with vastly different political, cultural, geographic, and economic ties to the rest of the United States. The populations of these areas range from 47,000 in American Samoa to 3.6 million in Puerto Rico. By comparison the average population of the congressional districts represented by the thirteen Member plaintiffs here is approximately 569,864.¹⁸⁸

The non-voting delegates also differ from one another. The variation between peoples having a right to a non-voting delegate, including the Cherokee people, is shown in the following chart:

territorial delegates).

¹⁸⁷ 2 DESCHLER’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, *supra* note 180, at 39.

¹⁸⁸ *Id.* at 134 (noting in a footnote that under *Wesberry v. Sanders*, 376 U.S. 1, 8-9 (1964), congressional districts must possess equal number of people “as nearly as [is] practicable”).

Location of Non-Voting Delegate	(a) Year Congress established/ authorized	(b) Population near Time of Authorization	(c) Current Population
Puerto Rico	1900 ¹⁸⁹	953,243 ¹⁹⁰	3,808,610 ¹⁹¹
District of Columbia	1970 ¹⁹²	756,510 ¹⁹³	572,059 ¹⁹⁴
Guam	1972 ¹⁹⁵	86,000 (1970) ¹⁹⁶	154,805 ¹⁹⁷
The Virgin Islands	1972 ¹⁹⁸	63,000 (1970) ¹⁹⁹	108,612 ²⁰⁰
American Samoa	1978 ²⁰¹	32,000 (1980) ²⁰²	57,291 ²⁰³
Cherokee People	1835 ²⁰⁴	16,000+ ²⁰⁵	280,000 ²⁰⁶

¹⁸⁹ Act of Apr. 12, 1900, 31 Stat. 86.

¹⁹⁰ 1 HUBERT BANCROFT, *THE GREAT REPUBLIC BY THE MASTER HISTORIANS*, http://www.publicbookshelf.com/public_html/The_Great_Republic_By_the_Master_Historians_Vol_I/ (last visited Nov. 1, 2005).

¹⁹¹ U.S. Census Bureau, <http://www.census.gov/> (last visited Nov. 1, 2005).

¹⁹² District of Columbia Delegate Act, Sept. 22, 1970, 84 Stat. 848.

¹⁹³ County Population Census Counts 1900-90, <http://www.census.gov/population/www/censusdata/cencounts.html> (last visited Nov. 1, 2005).

¹⁹⁴ U.S. Census Bureau, *supra* note 191.

¹⁹⁵ 48 U.S.C. § 1711 (2000).

¹⁹⁶ Statistical Abstract of the U.S., <http://www.census.gov/prod/2002pubs/01statab/outlying.pdf>.

¹⁹⁷ United States Census 2000, The Island Areas, <http://www.census.gov/population/www/cen2000/islandareas.html> (last visited Nov. 1, 2005).

¹⁹⁸ 48 U.S.C. § 1711 (2000).

¹⁹⁹ Statistical Abstract, *supra* note 196.

²⁰⁰ U.S. Census Bureau, *supra* note 191.

²⁰¹ 48 U.S.C. § 1731 (2000).

²⁰² Statistical Abstract, *supra* note 196.

²⁰³ U.S. Census Bureau, *supra* note 191.

²⁰⁴ Treaty with the Cherokee, *supra* note 1.

²⁰⁵ There exists a wide range of estimates of the Cherokee population around 1835 and all such estimates likely fall short of the true numbers. The Secretary of War acknowledged this when he reported: "It is of course impracticable to furnish any thing like accurate information, concerning the number of the Indians . . . a census recently taken, of the eastern Cherokees and which shows the population of those Indians to be about eighteen thousand." Report of the Secretary of War in compliance with a resolution of the Senate, (Mar. 8, 1836), S. Doc. No. 228, 24th Cong., 1st Sess., 1-2. Similarly, Ross wrote that a census was done at the time "of only a fractional part" of the nation. Letter From John Ross to Col. Nathaniel Smith (June 18, 1835), in *MEMORIAL AND PROTEST OF THE CHEROKEE NATION*, 24th Cong., 1st Sess., 98-99. Sample estimates from various sources include:

1) "From the census, it appears that 9,096 Indians, and whites intermarried with them, reside in Georgia—that is, more than one-half of the whole Cherokee nation." Letter from John F. Schermerhorn, to Lewis Cass (Mar. 3, 1836), in *TREATY WITH THE CHEROKEE*

As this chart shows, the Cherokee delegate would represent a population in line with that of the other non-voting delegates.

IV. CHALLENGES TO THE DELEGATE RIGHT

This Section examines the three principal arguments against Cherokee exercise of their treaty-based right to a Congressional Delegate. First, that the right has been lost; second, that there is a definitional problem regarding whom the delegate represents; and finally, that exercising the delegate right would infringe on the constitutional rights of non-Cherokees.²⁰⁷ The purpose of examining these criticisms is both practical—to present the challenges facing the Cherokee Nation should it pursue its treaty right—and intellectual—to use the possibility of the Cherokee delegate as a vehicle for exploring the nature of American democratic representation. While the history of removal and of the Treaty of New Echota negotiations are important for understanding the basis for the Cherokee delegate

INDIANS, 24th Cong., 1st Sess., 54-61.

2) “The number of the Cherokee tribe of Indians yet remaining east of the Mississippi river is supposed to be fourteen thousand, and the number of those who have emigrated west of that river, in conformity with the late treaty between that tribe and the United States, is two thousand one hundred and three.” Letter from Joel R. Poinsett, Sec. of War, to James K. Polk, Speaker of the House (Jan. 8, 1838), *microformed on* CIS House 325 H.doc. 82, 1 (Cong. Info. Serv.).

3) Schermerhorn also had a higher estimate in a chart with 16,542 total Cherokees in North Carolina, Tennessee, Alabama, and Georgia; and 201 Whites connected by marriage. Letter from John F. Schermerhorn to Lewis Cass (Mar. 3, 1836), *in* TREATY WITH THE CHEROKEE INDIANS, 24th Cong., 1st Sess., 54-61.

4) According to a Cherokee population historian in 1835 there were 21,542 including 5,000 already emigrated West. RUSSELL THORNTON, *THE CHEROKEES: A POPULATION HISTORY* 51 (1990).

5) John Ross, arguably the person with the best sense at the time, wrote, “The population of the Cherokee Nation East of the Mississippi is between 16 & 17,000 . . . [and with the Western Cherokees] the whole population would then be about 20000 souls.” Letter from John Ross to Joaquin Maria del Castillo y Lanzas (Mar. 22, 1835), *in* 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 335.

²⁰⁶ This is the population of the Cherokee Nation of Oklahoma, not the number of all Cherokees. Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe*, 26 AM. INDIAN L. REV. 147, 156 (2001/2002). Additionally, there were 2,475,956, or 0.9% of the U.S. Population in 2000 identified as “American Indian and Alaska Native.” Population by Race and Hispanic or Latino Origin, for All Ages and for 18 Years and Over, for the United States: 2000, <http://www.census.gov/population/cen2000/phc-t1/tab01.pdf>.

²⁰⁷ The examination of these three arguments is not meant to foreclose or deny the existence of other arguments against the Cherokee delegate.

right, the full significance of the delegate right depends on how this right is viewed today by politicians and citizens, Cherokees and non-Cherokees, as well as scholars of all stripes.²⁰⁸

Prior to examining the separate delegate right challenges, the interpretative baseline concerning Indian treaties and treaty provisions must be established. Doing so requires looking at how treaties were seen during removal and how they are generally regarded today.

In 1829, John Ross wrote, "[t]he General government has too much respect for the Treaties to let them be violated."²⁰⁹ By 1836, Ross's tone had darkened, yet a hint of the earlier esteem in which he held treaties could still be found in his writing: "It was at one time thought that the United States never could declare she was unable to keep the Treaties of former days."²¹⁰ In contrast, Wilson Lumpkin viewed treaties less favorably: "Look at your large volume of Indian Treaties! What do you there see? One recorded farce after another, couched in language of high official and formal mockery!"²¹¹ Jackson expressed similar sentiments, stating, "I have long viewed treaties with the Indians as an absurdity."²¹² The Cherokees' failed resistance to removal arguably supports their more pessimistic perspective. Jackson and Lumpkin's dismal take on Indian treaties defined the removal era rhetorically. Yet, the fact that the U.S. continued to deal with Indians even during this period through treaties, suggests that in practice and policy some of Ross's early esteem continued to be justified.

Indian treaties played a significant role in U.S. expansion and continue to define many of the characteristics of the U.S. relationship with Indian tribes. Between the first US treaty (with the Delawares in 1778 under the Continental Congress) and the end of the treaty period in 1871, "the federal government made over 370

²⁰⁸ When thinking about the possibility of a Cherokee delegate, it is important not to jump to conclusions about who will materialize in support or in opposition to the Cherokee nation. For example, while Republicans have, in the past, limited the role of non-voting delegates generally (where such territorial or DC delegates tend to be Democrats), the fact that Cherokees vote Republican could mean that Republicans push for a Cherokee delegate.

²⁰⁹ Letter from John Ross and George Lowrey to the Cherokee People (July 1, 1829), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 166.

²¹⁰ Memorial from Cherokee Delegation headed by John Ross to the U.S. Senate and House of Representatives (Jun. 21, 1836), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 447.

²¹¹ Wilson Lumpkin, Senate Speech (Apr. 30, 1838), in PRUCHA, *supra* note 17, at 162. Lumpkin expressed similar critiques of treaties as mere expediencies and not meaningful agreements on many occasions. See, e.g., Wilson Lumpkin, Speech at Committee of the Whole House (May 1830), in 1 LUMPKIN, *supra* note 3, at 83 ("The practice of buying Indian lands is nothing more than the substitute of humanity and benevolence, and has been resorted to in preference to the sword [for getting rid of Indians] . . .").

²¹² Letter from Andrew Jackson to then President Monroe (1837), in NORGREN, *supra* note 40, at 80.

treaties, each negotiated by legally appointed commissioners, and each ratified by the Senate.”²¹³ In interpreting treaty provisions such as Article 7, “[i]f the terms . . . are clear, the courts will not resort to outside factors but will assign the terms of the agreement their natural meanings and arrive at the parties’ intent from the agreement itself.”²¹⁴ Charles F. Wilkinson and John M. Volkman provide a summary of the canons of construction that govern treaty interpretation:

Three primary rules have been developed: ambiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians. . . . The goal is to achieve the reasonable expectations of the weaker party.²¹⁵

The canons of construction are critical in aiding Indian tribes seeking to have their rights recognized. John Ross’s words still resonate for those tribes and tribal members, like the Cherokee, who continue to have an interest in Indian treaties and laws, “for it is on [the treaties] solely that [the Cherokees’] security of protection hang.”²¹⁶

A. *Loss of the Treaty Right*

The first challenge facing the Cherokee delegate right is the argument that, while the Cherokees did gain such a right by the Treaty of New Echota,²¹⁷ they have since lost that right. If the Cherokee Nation acted or failed to act in politically appropriate ways or otherwise conceded the delegate right through its actions, the Cherokee Nation would no longer have a valid claim based on the delegate provision. This section explores the arguments that the Cherokees lost the delegate right through: (1) allegiance with the Confederacy and subsequent treaties, (2) inaction in exercising their right and Congressional power not to seat delegates, and (3) dissolution of the tribal government causing the delegate right to expire. Though presented separately here, these arguments could be used in conjunction to say that the Cherokees have lost any rights they might have had under Article 7 of the Treaty of New Echota.

1. Alliance with Confederacy and Subsequent Treaties

The Cherokee Nation sided with the Confederacy during the Civil War, an alliance in violation of treaties with, and of general faith to, the United States.

²¹³ DeMallie, *supra* note 18, at 2.

²¹⁴ Craig A. Decker, *The Construction of Indian Treaties, Agreements, and Statutes*, 5 AM. INDIAN L. REV. 299, 308 (1977).

²¹⁵ Wilkinson & Volkman, *supra* note 151, at 617.

²¹⁶ Letter from John Ross, Daniel McCoy, R. Taylor, Hair Conrad, and John Timson to Andrew Jackson (Mar. 28, 1834), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 282.

²¹⁷ See *supra* Section III.

Though Cherokee "writings depicted the war as a phenomenon almost completely external to the Cherokees, a scourge emanating from the United States," Cherokee treachery arguably voids the earlier treaty delegate provision.²¹⁸ Ross lived in Washington, D.C. for most of the Civil War where he attempted to limit the effect within the U.S. government of the Cherokees' having earlier signed a treaty with the Confederates while he was the Cherokee leader.²¹⁹ A speech John Ross gave in 1861 helps explain the Cherokee allegiance: "Our Geographical position and domestic institutions allied us to the South while the developments daily made in our vicinity and as to the purposes of the war waged against the Confederate States clearly pointed out the path of interest."²²⁰

Cherokees and their advocates become apologists when discussing the Cherokee role in the Civil War. Relying upon Ross's reluctance to join the Confederacy and the divisions among the Cherokees between those who supported the Union and those who did not, they attempt to deflect attention from the official Cherokee nation's allegiance with the Southern states. Doing so requires downplaying the fact that Ross himself was a slave owner and the "domestic institutions" he euphemistically referred to in his speech were tied to slavery.²²¹

Following the Civil War, Cooley, the U.S. agent assigned to negotiate new treaties with the rebelling tribes, "declared that those tribes or bands which had made treaties with the Confederacy had by that action forfeited 'all rights to annuities, lands, and protection, by the United States.'"²²² However, Ross, from his deathbed, succeeded in signing a treaty that he supported and which, significantly, "provided that all previous treaties would be in force, except as abrogated by the present treaty. This repudiated Cooley's declaration at Fort Smith that the Cherokees had forfeited all previous rights due to their connection with the Confederacy."²²³

Ross's political maneuvering during the Civil War seems to have paid dividends. According to Cherokee memorials and as witnessed by the then Commissioner of Indian Affairs, W. P. Dole, in December, 1862, and the summer of 1863, President Lincoln pledged to Chief Ross that the Confederate treaty of alliance "should never rise up in a judgment against the Cherokees, nor stand in the way of perfect justice being done under their treaties with the United States."²²⁴ Though Cooley initially repudiated all clauses and obligations arising under pre-Civil War treaties, the final reconstruction treaty, while stripping the Cherokees of additional land, reaffirmed prior Cherokee rights, including the delegate

²¹⁸ DENSON, *supra* note 8, at 87.

²¹⁹ *Id.*

²²⁰ John Ross, Annual Message (Oct. 9, 1861), in 2 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 493.

²²¹ See discussion *supra* note 21.

²²² Paul F. Lambert, *The Cherokee Reconstruction Treaty of 1866*, 12 JOURNAL OF THE WEST 471, 472 (July 1973).

²²³ *Id.* at 477.

²²⁴ WARDELL, *supra* note 173, at 196.

provision.²²⁵

2. Cherokee Inaction and Congressional Power to Deny Delegates

Though on its face Article 7 of the Treaty of New Echota does not contain an expiration date, the Cherokee Nation's long delay in seeking to seat their Congressional delegate arguably allows for a claim that the right is no longer valid. Recently, the Supreme Court, in *City of Sherill v. Oneida Indian Nation of New York*, held that in part because of "the Oneidas' long delay in seeking judicial relief . . . the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part."²²⁶ Though the Court was examining the Oneida Tribe's ability to place reacquired land within original reservation boundaries into trust, the Court's focus on the Oneida delay is similar to the Cherokee delay exercising their delegate right. "The Oneidas long ago relinquished the reins of government and cannot regain them,"²²⁷ and the Cherokee delegate claim might be viewed similarly.

The Cherokees have not made a concerted, politically primary effort to exercise their delegate right. Part of this can be explained by observing that throughout this 170-year history the Cherokees have been subject to U.S. policies and politics that made it difficult for the Cherokee Nation to actively pursue all the Nation's rights. Even in a hostile environment that makes tribal leadership a challenge, Cherokee inaction on as powerful a right as that to a Congressional delegate is remarkable. Although a prolific writer, John Ross never discussed seating a Cherokee delegate in his writings.²²⁸ Lewis Downing urged Ross to work on the delegate right, but did so late in Ross's life, and nearly 29 years after the Treaty of New Echota:

In my opinion the time has come when it is proper, and highly desirable, that the Government of the U.S. make immediate provision for carrying into effect the 7th Article of Treaty of 1835 by allowing us a Delegation to Congress of our own choice, To be paid by the Government, in the same manner, and at the same rate as delegates from the organized Territories.²²⁹

Lewis Downing's call for action did not lead to the protracted Cherokee national efforts merited by the potential significance of the delegate right.

²²⁵ Chadwick Smith & Faye Teague, *The Response of the Cherokee Nation to the Cherokee Outlet Centennial Celebration: A Legal and Historical Analysis*, 29 TULSA L.J. 263, 275 (1993) ("Article 31 of the treaty reaffirmed all previous treaties not inconsistent with the 1866 treaty. Therefore, the provisions and covenants of the treaties of 1828, 1833, 1835, and 1846, were all reaffirmed and continued as binding on the Cherokee Nation and the federal government.").

²²⁶ 125 S. Ct. 1478, 1483 (2005).

²²⁷ *Id.*

²²⁸ THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14.

²²⁹ Letter from Lewis Downing to John Ross and Evan Jones (Oct. 18, 1864), in 2 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 614.

3. Cherokee Rejection of Delegate Right

Cherokee denials, post-removal, of the Treaty of New Echota's validity arguably undercut current Cherokee efforts to make the U.S. government respect particular Treaty provisions, including Article 7. Allowing the Cherokee Nation to simultaneously deny the Treaty and make claims on it would on first blush seem perverse. Prior to removal, Ross wrote, "the Cherokee Nation, never have recognized and never can recognize any moral obligation in the instrument *purporting to be a treaty* between them and the United States dated in December 1835."²³⁰ Cherokee leaders used a variety of descriptions of the same document, all undermining the idea that the Cherokee Nation and the United States had signed a treaty in 1835: "the late *Christmas trick* at New Echota,"²³¹ "the (so called) treaty of December 1835,"²³² "the instrument of December 1835,"²³³ "the false treaty,"²³⁴ "the pretended treaty,"²³⁵ "New Echota arrangement,"²³⁶ and "the Schermerhorn instrument."²³⁷

If "the fraudulent and invalid instrument purporting to be a treaty"²³⁸ put no obligations upon the Cherokees, why should there have been obligations put upon the U.S.? Part III of this Article gave a partial answer: the advantages the U.S. received and continue to receive from the Treaty prevent the U.S. from arguing the non-existence of the Treaty. But according to the Cherokee's own John Ross: "*How can it be material what are the stipulations of an instrument professing to be a treaty* if the fatal the conclusive objection exists that no authority was ever given to negotiate it."²³⁹ In the same letter, Ross noted that as far as he was

²³⁰ Letter from John Ross and Edward Gunter to John Mason, Jr. (Nov. 14, 1837), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 548 (emphasis added).

²³¹ Letter from James J. Trott to the Cherokee Delegation headed by John Ross (Jan. 6, 1836), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 379.

²³² Letter from John Ross and Edward Gunter to John Mason, Jr. (Dec. 6, 1837), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 560.

²³³ *Id.*

²³⁴ Letter from Lewis Ross to John Ross (Jan. 4, 1838), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 577.

²³⁵ Letter from John Howard Payne [signed by John Ross] to Joseph Gales and William W. Seaton, editors of the *National Intelligencer* (Mar. 29, 1838), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 619.

²³⁶ John Ross, Annual Message (Nov. 14, 1842), in 2 THE PAPERS OF JOHN ROSS, *supra* note 14, at 152.

²³⁷ John Ross, Annual Message (Oct. 3, 1843), in 2 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 179.

²³⁸ Memorial from John Ross, R. Taylor, Edward Gunter, James Brown, Elijah Hicks, Samuel Gunter, Situwakee, and White Path to the Senate and House of Representatives (Dec. 15, 1837), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 568.

²³⁹ Letter from John Ross and Edward Gunter to John Mason, Jr. (Dec. 6, 1837), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 562 (emphasis added).

concerned, "if it was unauthorized, any inquiry into its terms was unnecessary."²⁴⁰

An argument relying on Cherokee criticism of the Treaty of New Echota alone would probably not be fatal for the delegate right. Elias Boudinot's biographer accurately explained Cherokee criticism in the immediate removal era: "The Cherokees could not believe that the United States would enforce against them a treaty which they had never made and against which they had never ceased to protest."²⁴¹ Ross's stance against the Treaty and criticisms of the Treaty must be understood as coming out of this high stakes and emotional period. By 1842, after the trauma of removal, Ross was careful to state that the Cherokees did not seek to annul the Treaty of New Echota:

However, it will be proper as you have referred to the "New Echota treaty of 1835" in a manner seemingly to justify an inference that No New Treaty would be acceptable to us unless that of 1835 should be specially "annulled" or "declared void." We must remind you that in all our conferences we have not asked that this should be done. We have not proposed the *repudiation* in terms of that instrument as one of the conditions of this Negotiation. We spoke of our grievances and complained of wrongs, and much of these it is most true had their origin in that "treaty," but we have only sought that these evils be properly remedied by a new arrangement without any invidious or repudiating reference to that or any other treaty or past public transaction.²⁴²

Ross's 1842 position broke from his earlier stance that the Cherokees "reject[ed] all [the Treaty's] terms [and] . . . will receive none of its benefits."²⁴³

A position backing even a "false" treaty, especially where one party thereto later accepts the treaty, can make such a treaty the law of the land. Federal Indian law is based upon a series of rules denying Indians an equal place among the Anglo humanity based on racist ideas and legalized oppression.²⁴⁴ Yet, these rules are law. Arguably a similar thing has occurred with the Treaty of New Echota. Though protested and even denied by Cherokee leaders, after Senate ratification Cherokee efforts at denial did not *de-obligate* the U.S. from the terms of the Treaty. Thus, without being perverse, one can simultaneously state that the delegate right exists still today and that "[t]he treaty was no treaty. The evidence is conclusive."²⁴⁵

²⁴⁰ *Id.*

²⁴¹ GABRIEL, *supra* note 13, at 155.

²⁴² Letter from John Ross, W. Shorey Coodey, John Benge, D. Carter, and Jesse Bushyhead to John C. Spencer (Aug. 12, 1842), in 2 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 145.

²⁴³ Memorial from John Ross, R. Taylor, Edward Gunter, James Brown, Elijah Hicks, Samuel Gunter, Situwakee, and White Path to the U.S. Senate and House of Representatives (Dec. 15, 1837), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 569.

²⁴⁴ See e.g., ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

²⁴⁵ THOMAS VALENTINE PARKER, CHEROKEE INDIANS WITH SPECIAL REFERENCE TO THEIR

The words of Massachusetts Representative Isaac C. Bates spoken during the removal debates highlight the United States' duty to respect Indian treaty obligations:

The treaties between the United States and the Cherokees were negotiated as treaties. . . . They were ratified as treaties. They were called treaties, not only by us, but by the French, Spanish and English, before our time. . . . How, then, can we say to the Indians nations, that what we called treaties, and ratified as treaties, were not in fact treaties.²⁴⁶

Cherokee claims for a delegate and Cherokee denials of the treaty providing for a delegate initially seem inconsistent; however, the position that must be taken in order to deny the Treaty of New Echota's right is fatally opportunistic.

B. Representational Issues

Who is and is not represented by the Cherokee delegate is a complex question that could prevent the Cherokee nation from moving forward on their delegate right and/or getting their own delegate. The major challenges are (1) defining which Cherokee people have a delegate right, (2) handling other tribes' opposition, (3) downside risks of delegate representation, and (4) deciding whether the delegate represents the Cherokee Nation or the Cherokee people.

1. Defining the Cherokees Represented by the Delegate

The Cherokee right to a delegate raises questions about the nature of representation in the United States, particularly because the Cherokees no longer exist as one unified tribe. Today, there are three federally recognized Cherokee Bands and even more non-federally recognized bands claiming to be Cherokee.²⁴⁷ The differences in geography and governance illustrate the difficulty in determining whom the Cherokee delegate would represent.

Unlike traditional congressional representatives, the Cherokee delegate would represent the Cherokees as a people or nation, not as a geographic region. According to their tribal governments, the Cherokees are divided into three distinct federally recognized tribes: the Eastern Band of Cherokee Indians of North Carolina, the United Keetoowah Band of Cherokee Indians in Oklahoma, and the Cherokee Nation of Oklahoma.²⁴⁸ The Cherokee Nation of Oklahoma was the tribe that

RELATIONS WITH THE UNITED STATES GOVERNMENT 35 (1907).

²⁴⁶ PRUCHA, *supra* note 17, at 164.

²⁴⁷ Non-federally recognized Cherokee Bands include, but are not limited to, the Cherokee of North Eastern Alabama, Cherokee of South Eastern Alabama, Cherokee of Georgia, Echota Cherokee, Georgia Tribe of Eastern Cherokee, Four Winds Band of Cherokee, and Tallige Cherokee Nation. See, e.g., Native Data Network, *State Recognized Tribes*, <http://www.nativedata.com/statetribe.htm> (last visited Oct. 21, 2005).

²⁴⁸ Indian Entities Recognized and Eligible To Receive Services From the United

emigrated under John Ross's leadership, while the Eastern Band in North Carolina avoided removal. The Keetoowah Band left Georgia earlier than the main group of Cherokees, expecting the other Cherokees to be forced to follow them. This Band is also known as the "Old Settlers" or "Western Cherokees."

Sorting through three separate Cherokee tribes appears to be challenging. Arguably, the Cherokees deserving of a delegate right are the members of the Cherokee Nation of Oklahoma since they were the only Cherokees whose ancestors emigrated under the 1835 treaty. If the delegate right is understood as part of a bargained-for exchange, the Eastern Band Cherokees were not removed and the Old Settlers left without inducement from the treaty. Arguably, these tribes have less of a claim to the delegate right because they were not parties to the Treaty of New Echota. Limiting the delegate right to the Cherokee Nation of Oklahoma makes sense legally, but also conflicts with the ideal of treating the Cherokee as a single people.

For a tribe whose leader at the time of removal was only 1/8th Cherokee, it is not surprising that issues of race and blood quantum might complicate the definition of who would be represented by the Cherokee delegate. An additional complication arises from the fact that "[a]mong Native-American tribes, the Cherokee nation is not unusual in requiring some Cherokee blood for membership, but it is remarkable for having no minimum biogenic standard, no minimum degree of blood, for citizenship."²⁴⁹ During the removal era, U.S. officials accused Cherokee leaders of being white men in order to discredit them and deny the significance of their protests against removal.²⁵⁰ In *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma*, Circe Sturm writes about "a growing fear among Cherokees that they might lose their political status as a result of their increasingly phenotypically white population."²⁵¹ Discussing the challenges that race presents for exercising Cherokee political rights Sturm continues, "as the Cherokee Nation progressively 'whitens,' it runs the risk of losing its distinct racial and cultural identity, the primordial substance of its national identity. In the eyes of the general public, the Cherokee Nation would no longer be a 'real' Indian tribe."²⁵²

As the history of removal and Sturm's writing indicates, the Cherokee racial challenge is largely tied to the difficulties non-Cherokees²⁵³ have accepting 'white-looking' or low percentage Indian blood Cherokees as Indians with rights not shared by non-Indians. A Cherokee delegate would dramatize and nationalize the

States Bureau of Indian Affairs; Notice, 68 Fed. Reg. 234 (Dec. 5, 2003).

²⁴⁹ STURM, *supra* note 20, at 89.

²⁵⁰ See *supra*, Section III (3)(b).

²⁵¹ STURM, *supra* note 20, at 99.

²⁵² *Id.* at 99-100.

²⁵³ "Non-Cherokees" is chosen over more narrowly focusing on whites, because other Indians who are members of tribes whose rules require a larger blood quantum for membership (the Navajos require 1/4th Indian blood for membership, for example) often share some of the same views as whites do on light-skinned or low blood quantum Cherokees.

fact that "in the Cherokee Nation, having a little Indian blood is a valuable commodity, the stuff of power that ensures a political identity, voting rights as a Cherokee citizen, and access to a variety of economic resources."²⁵⁴ But it is also an overstatement to suggest that, among Cherokees, the racial characteristics of those who are defined as having a right to a delegate are unimportant since they have the potential to cause disputes.²⁵⁵

2. Opposition from Other Tribes

The Cherokee nation will probably face opposition from many other Indian tribes if it attempts to seat its Congressional delegate. A delegate representing only the Cherokees would likely seem unfair to other tribes who, like the Cherokees, were pushed from their homelands but were not afforded a delegate right in their removal treaties (if they signed a treaty at all). Even for tribes never forced off their homelands, a Cherokee delegate arguably threatens the interests of all non-Cherokee tribes. Such a delegate would be the *de facto* voice of the Indian community in Washington, D.C., and non-Cherokee tribes would rightly be concerned that such a delegate might favor the Cherokee Nation at the expense of non-Cherokee tribal nations.

The Cherokee response to non-Cherokee tribal opposition must be twofold. First, the Cherokee Nation must educate other tribes on the legal and historical reasons why the Cherokees have a unique delegate right. Second, the Cherokee Nation must be willing to consider non-Cherokee suggestions regarding the Cherokee delegate. Non-Cherokees will likely highlight the Cherokee delegate's *de facto* role as representative for all Indians to argue that the delegate *should* be a pan-Indian delegate rather than a Cherokee delegate. The Cherokee Nation's seemingly unique right, under this view, reflects the shared trauma of Indian oppression and the efforts of many tribes to resist that oppression.²⁵⁶

The practical and political challenges of Indian approval of a Pan-Indian delegate are perhaps as daunting as the non-Cherokee tribal opposition to a solely Cherokee delegate. As holders of the delegate right, the Cherokees would probably object to such an arrangement based both upon principle, since it is their historical right, and upon the likely effect on the Cherokee Nation. In 1866, the Cherokee nation "strenuously objected" to a territorial Indian council with equal tribal

²⁵⁴ STURM, *supra* note 20, at 105.

²⁵⁵ See Eric Lemont, *Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitutional Convention*, 28 AM. INDIAN L. REV. 1, 25-28 (2003/2004) (describing the recent debate on Cherokee blood quantum in the context of the Cherokees' recent efforts to form a new Constitution).

²⁵⁶ Resistance is the crucial trait, for it was U.S. desire that the Cherokees accept the "liberal" treaty terms that led to New Echota's Article 7, but perhaps the U.S. would not have been so "liberal" had the U.S. government been able to fully focus on the Cherokee Nation instead of being partly tied down by having to deal with other tribes.

representation.²⁵⁷ As a relatively larger and more powerful tribe, the Cherokees felt that a Pan-Indian territorial government would, according to a Cherokee Memorial of Jan. 24, 1866, "crush us as a people, and destroy us as a nation."²⁵⁸ It is impossible to generalize regarding the nature of Indian tribes. "The sheer number of tribes—well over 500 by any count—invites chaos," especially for the interests of particular tribes.²⁵⁹ The number and diversity of tribes makes unified action difficult because of the standard enemies of large groups: free-riders and hold-outs. Consequently, even a proposal for a Pan-Indian delegate would get bogged down in inter-tribal conflict.

The representational challenges faced by a Cherokee and a Pan-Indian delegate are distinct, but neither delegate type would be immune from internal Indian criticism and neither proposal would necessarily be an easier sale within the Indian community. Rather than dooming the push for a solely Cherokee delegate, this observation cautions against seeking political solutions that disregard the specific nature of the Cherokee right to deal with Indian opposition. The Cherokee Nation might be able to head off some non-Cherokee opposition to the Cherokee Nation's unique representation. A clear and careful proclamation that the delegate does not speak for non-Cherokee Indians but rather, only for Cherokees, could limit challenges by non-Cherokee tribes.

3. Downside Risks of Pursuing a Delegate Form of Representation

The most important representational issue raised by the Cherokee delegate right is whether the benefits of Congressional representation for the Cherokees outweigh the costs. Indian sovereignty and nationhood arguably require a degree of separation and independence from the U.S. government that would be destroyed by direct incorporation of a Cherokee, politically defined representative in the U.S. House of Representatives. The act of calling for a Cherokee delegate, if done by the Cherokee Nation, would signal to U.S. officials that the Cherokees wanted to be more, not less, involved in the U.S. government. Therefore, Cherokee leaders must fully consider all implications, including negative ones, of the delegate right before pushing for recognition of this right.

Given the general indifference of the U.S. government to Indian tribes, the right to a Congressional delegate seems inherently preferable to the currently curtailed ability of the Cherokee Nation to participate in legislation affecting the Cherokees, let alone in general U.S. legislation. The limitations of the Cherokee Nation's current Washington, D.C. office can be contrasted with the power of Congressional delegates: rather than being constrained to the mere lobbying of lawmakers, Cherokees in D.C. could be lawmakers. But the price of having a key to Congress might be a loss of tribal sovereignty. Tribes that have chosen or been forced to

²⁵⁷ SATZ, *supra* note 85, at 219.

²⁵⁸ Lambert, *supra* note 222, at 475.

²⁵⁹ CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 7 (1987).

sacrifice some degree of sovereignty for greater direct involvement in U.S. governance have a mixed record.²⁶⁰ Perceived advantages of government incorporation can fail to materialize while the diminished sovereignty might affect the range of options open to tribal governments and limit their control over tribal resources indefinitely.²⁶¹

Pursuing a Cherokee delegate could also undermine non-Cherokee sympathy for Cherokees based upon the sense of historical injustice that removal stories continue to carry with them. For some non-Cherokees, if the tribe were to "benefit" from removal through the delegate right, the tribe might be implicated in their own removal, or at least be viewed as accepting removal. Essentially, if the Cherokees get a delegate out of the New Echota Treaty, they will be less able to play on or have claim to the sympathies of non-Cherokees.

The view that pushing for a Cherokee delegate indicates acceptance of the New Echota Treaty raises the possibility that the delegate push might also foreclose future legal remedies for the wrongful removal. The U.S. has benefited and continues to benefit from the land taken from the Cherokee Nation east of the Mississippi. Given the questionable legality of the process of securing the Treaty of New Echota, the Cherokees conceivably could sue for either the original land or monetary recompense. The probability of such a suit being successful is limited by the Cherokee alliance with the Confederacy and the resulting Treaty of 1866, which reaffirmed all prior Treaties.²⁶² Disregarding the low probability of success from such a suit,²⁶³ the Cherokees could be denied legal relief if they challenge their

²⁶⁰ In Alaska and in Maine, Indian tribes have become more akin to state municipalities; a different situation than that for sovereign Indian tribes elsewhere.

The Alaska Native Claims Settlement Act "extinguished all the reservations in Alaska, with the exception of the Annette Islands Reserve of the Metlakatla Indian Community." Geoffrey D. Strommer & Stephen D. Osborne, *"Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska*, 22 ALASKA L. REV. 1, 5 (2005). Since then, Alaskan villages have had to defend themselves against the charge that ANCSA eliminated tribal jurisdiction over tribal members. See Heather Kendall-Miller, *ANCSA and Sovereignty Litigation*, 24 J. LAND RESOURCES & ENVTL. L. 465 (2004).

Similarly, the Maine Indian Claims Settlement Act, 25 U.S.C. § 1721 (1982), provided compensation to Maine tribes (\$27 million in settlement money and \$54 million for land purchases) but "also extinguished the Maine Indians' land claims, largely eliminated the Indian nations' sovereign immunity, and provided for state jurisdiction over the Indians' land." Paul Brodeur, Book Note, *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England*, 99 HARV. L. REV. 703, 707 (1986).

²⁶¹ Arguably Ross's decision to indirectly relinquish sovereignty by turning over the question of compensation and the outcome of removal to the Senate is an example of this.

²⁶² As noted earlier, by 1842 even John Ross had begun to accept the Treaty of New Echota.

²⁶³ The Supreme Court has relied on a tribe's delay in making their claim over land and the interests of the non-Indians in the land they have long occupied in the recent

removal specifically because they exercised their delegate right under the Treaty, essentially blaming the victim for attempting to make the best out of an oppressive situation.²⁶⁴

Finally, given today's political environment asserting delegate representation could limit Cherokee future claims for more meaningful representation. The Cherokee Nation is moving forward on the Article 7 provision, for the new Cherokee Constitution approved by referendum calls for such a delegate.²⁶⁵ While Article 7 does not facially limit the Cherokees to a non-voting delegate, the choice is strategic: a non-voting delegate is less threatening and more likely to receive political support. Additionally, the circumstances surrounding removal support the belief that the Cherokee right originally stipulated a non-voting delegate because the Cherokees were moving to territory whose other residents would at most be entitled to a non-voting delegate.²⁶⁶ Thus, the Cherokee Nation's choice should not be dismissed as solely tactical.

Given the Supreme Court's reframing of the earlier deputy promise to be a mere agent in *Cherokee Nation v. Georgia*,²⁶⁷ the Cherokee Nation probably correctly understands that, when seeking to exercise their delegate right, the Court is more likely to support a narrow rather than a broad interpretation of the delegate right. Even if the Court were to follow the Marshall based canons of construction for Indian treaties providing that "Indian treaties must be liberally construed in favor of the Indians,"²⁶⁸ the Cherokees would still not be entitled to a voting delegate. Their "reasonable expectations" likely extend only to the right of a non-voting delegate, of the sort that would represent an area beyond the boundaries of the then existing states. The risk is therefore not so much that by pushing for a non-voting delegate they are sacrificing any rights the Cherokees might have to a voting delegate; instead, the Cherokees risk that a future, more enlightened polity that

decision to not allow a tribe to put land into trust. The Court's approach also suggests that a suit based on the wrongs of removal would not be very successful. *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478 (2005).

²⁶⁴ Borrowing from contract law, Cherokee attempts to secure rights contained in the removal treaty could be viewed as the Cherokees simply acting on their duty to mitigate the damages from the U.S. violation of the treaties preceding removal.

²⁶⁵ Constitution of the Cherokee Nation, Article VI, Section 12, <http://www.cherokee.org/> (follow "Commissions" then "Constitution Conv" hyperlinks in side bar; then follow "1975 – Constitution of the Cherokee Nation of Oklahoma" hyperlink) (last visited Dec. 3, 2005). Having been approved by the Cherokees, the Cherokee Constitution is awaiting BIA sign-off. See Eric Lemont, *Overcoming the Politics of Reform*, *supra* note 255 (discussing the Constitution and the efforts of the Cherokees at their Constitutional Convention); see also Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform*, *supra* note 206.

²⁶⁶ The Cherokees were removed west of the Mississippi, beyond the leading edge of the westward expansion of areas that had reached statehood.

²⁶⁷ 30 U.S. (5 Pet.) 1 (1831).

²⁶⁸ *Wilkinson & Volkman*, *supra* note 151, at 617.

otherwise might provide for additional representation rights for Indians would feel that the non-voting Cherokee delegate satisfies the moral and political claims Indians have as the "original inhabitants" for unique representational rights.²⁶⁹

4. Selecting the Cherokee Representative

Assuming the right passes the representational challenges, the question becomes how should the Cherokee people select their delegate. History informs deliberation on this question. In 1905, the House Committee on Territories considered the possibility of a delegate from Indian Territory, prior to Oklahoma becoming a state. Several committee members expressed concern that the proposed delegate was not elected in a manner they deemed proper, despite the fact that a general convention had selected him and the principal chiefs of five tribes, including the Cherokees, endorsed him.²⁷⁰ In rejecting the delegate, the committee on elections "came to the conclusion that Delegates admitted by the House had in every case been chosen in accordance with laws enacted by Congress."²⁷¹ But this conclusion demonstrated an ignorance of history; in 1794 a delegate elected by a territorial legislature was seated, despite not being elected directly by the people.²⁷²

The delegate process within the Cherokee government should not be determined purely in reference to practices of other non-voting delegates, for certainly even the right is a reflection of the unique place of Cherokees in U.S. history and practice. However, the Cherokee government should select the particular delegate in the manner that Congress recognizes makes the most strategic sense. Such a strategy will necessarily need to reflect the history of the Cherokee people, the New Echota Treaty, and to some degree the expectations non-Cherokees have regarding the selection process.

C. Unconstitutional Cherokee Super-Vote

The greatest obstacle to realization of the Cherokee delegate right is a predictable constitutional claim that seating the delegate would infringe upon the rights of non-

²⁶⁹ In an 1824 letter, John Ross felt compelled to call attention to the fact "that the Cherokees are not foreigners, but original inhabitants of America." Letter from John Ross, Major Ridge, George Lowrey, and Elijah Hicks to John C. Calhoun (Feb. 11, 1824), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 66.

²⁷⁰ Statement of Hon. Charles Curtis, A Representative from the State of Kansas, Delegate from Indian Territory, The Published Hearing of the House Committee on Territories (1905), HT 58-E, *microformed on CIS* (Cong. Info. Serv.). See e.g., Letter from J.W. Ellis and E.A. Newman to the Congress of the United States (Nov. 5, 1903), *microformed on CIS* (Cong. Info. Serv.); Proposed Delegate from Indian Territory, The Published Hearing of the House Committee on Territories (1903), HT 58-O, at 3-5, *microformed on CIS* (Cong. Info. Serv.) (certifying the election of C.E. Foley by the "delegate convention of the Indian Territory.").

²⁷¹ HINDS, *supra* note 177, at I § 405, 410.

²⁷² *Id.* at I § 400.

Cherokees. The Cherokee delegate would simultaneously increase the Cherokee voice in Congress and reduce that of all other Americans. Cherokees would get to vote in the general elections, primarily to select Oklahoma representatives, and would also get to vote²⁷³ for a Cherokee representative. With a Cherokee delegate, the Cherokees would, relative to other Americans, have a super-vote.

The problem of the Cherokee super-vote must be confronted, for solutions seeking to equalize the power of Cherokee and non-Cherokee votes fail. Disallowing Cherokees the right to vote in the general election would prevent them from having a super-vote, but doing so would disenfranchise Cherokees, denying them their rights as American citizens. Alternatively, if Cherokees directly voted for the Cherokee delegate, they could choose whether they would vote in either the general or the Cherokee election.²⁷⁴ But this would not solve the super-vote problem. Cherokees could shop for the election in which their vote would be most powerful by calculating the probabilities of their favorite candidates winning in both elections. The choice of which election to vote in allows Cherokees a right to a greater voice relative to non-Cherokees.

Proposals for limiting the Cherokee super-vote by allowing Cherokees to vote only for a single candidate would create two problems. First, they would either limit Cherokee citizenship rights or fail to solve the super-vote problem. Second, these proposals would deny Cherokees their rights under the Treaty of New Echota. Forcing Cherokees to vote only for the Cherokee delegate would serve to strip the delegate right of part of its significance, denying the uniqueness of Cherokee removal and history.²⁷⁵ Efforts to "solve" the super-vote problem require viewing the super-vote as a problem according to either non-Cherokee perspectives or constitutional/legal claims. Since Cherokees have both Cherokee and American citizenship, the delegate right is meaningful only with a super-vote.

In seeking a super-vote, Cherokees must confront the popular, and legal, belief epitomized in the saying, "one person, one vote." While Lani Guinier once wrote,

²⁷³ Their vote could be indirect if the Cherokee Nation decided that the Cherokee Principal Chief should select the delegate. Then Cherokees would be selecting their delegate through their votes for Cherokee Principal Chief. Or it could be direct if Cherokees directly voted for the delegate. However, the effect would be the same: Cherokees would get to vote for the "normal" delegate and the Cherokee delegate.

²⁷⁴ Such a selection would be similar to the selection allowed for New Zealand's indigenous group, the Maoris. "Maoris are given the option of registering on the general roll or the Maori roll." Mina Matlon, *Fulfilling Obligations Under International Human Rights Law: Contemporary Indigenous Participation in Decision-Making Under Comparative Regimes*, Project for Harvard Law School's Indigenous Rights clinical (Spring 2002) (on file with the author and originally written to accompany the author's research on the New Echota negotiations that became the basis of this article).

²⁷⁵ The right would not be entirely insignificant because it would guarantee Cherokee representation and prevent the Cherokee vote from being diluted through an open election for a general delegate.

"democratic representation cannot be understood purely and exclusively in terms of one person, one vote," this idea was in part what was behind Clinton's withdrawal of Guinier's nomination to head the Department of Justice's Civil Rights Division.²⁷⁶ The Supreme Court has only tangentially considered the issues raised by a tribal representative. Although the Supreme Court in *Cherokee Nation v. Georgia* re-characterized the deputy promise as an agent promise, it did not discuss or rule on the constitutionality of a tribal representative. Popularly, "equal protection" is equated with equal voting rights, an idea to which Justice Harlan responded in a dissenting opinion to a state legislative districting case:

[T]he Court's argument boils down to the assertion that appellees' right to vote has been invidiously "debased" or "diluted" by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that "equal" means "equal."²⁷⁷

The assertion that dilution of voting rights amounts to a denial of equal protection is particularly relevant for the Cherokees, for through the Cherokee delegate, non-Cherokees would see their representational rights diluted.

The U.S. Constitution as originally passed explicitly allowed racial and geographic super-votes. Article I, § 2 of the U.S. Constitution reads:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

According to the Constitution only whites mattered, Indians were not included, and African-Americans, euphemistically called "all other Persons," were counted as 3/5ths persons. This system gave whites a super-vote relative to the electoral exclusion of Indians and African-Americans.²⁷⁸ Additionally, through this apportionment scheme, Southern whites, as a group, enjoyed a super-vote relative to Northern whites.²⁷⁹ Thus, historically, the US has given certain groups super-votes in the past and this should be kept in mind when considering the Cherokee delegate right.

²⁷⁶ Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1, 7 (1995).

²⁷⁷ *Reynolds v. Sims*, 377 U.S. 533, 590 (1964) (Harlan, J., dissenting).

²⁷⁸ See, JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 583-584 (2000) (discussing the idea that whites were the only group worthy of citizenship).

²⁷⁹ To illustrate this, consider the apportionment of representatives given the following hypothetical populations: Southern states have 10,000 whites and 5,000 African-Americans; Northern states have 13,000 whites. Taking into account the effect of Article I, § 2 apportionment, 10,000 Southern whites would have as many representatives as the 13,000 Northern whites. Of course, individual Southern whites would still be voting for only a single representative in each election.

The Fourteenth Amendment partially undid the Constitution's discriminatory system of House representation. Amendment XIV, § 2 of the Constitution reads:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Thus, while African-Americans became "whole" persons under the Constitution, Indians were still excluded. Critically for the Cherokee super-vote, denying or "in any way" abridging a male inhabitant "the right to vote at *any* election for the choice of . . . Representatives in Congress," proportionately reduces the basis of representation. Because restricting the class of persons who can vote for the Cherokee delegate to Cherokees does not fall into the exceptions for participation in rebellion, or other crime enumerated in the Amendment, Oklahoma's basis for representation should decrease by this section.

The Constitution prohibits abridgment or denial of the right to vote according to specific classifications. Section One of the Fifteenth Amendment reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Nineteenth Amendment expands this to include denial on the basis of sex and the Twenty-Sixth Amendment does the same on the basis of age. The Fifteenth Amendment's prohibition of denial of rights on the basis of race implicates the Cherokee delegate only for those who view the Cherokees as being defined racially.

If the right to a Cherokee delegate is defined as being associated with a political group, limiting the vote for the Cherokee representative to Cherokees would not necessarily violate either the Fourteenth or Fifteenth Amendment. In *Morton v. Mancari*, a unanimous Court permitted an Indian preference program favoring federally recognized Indians for jobs within the BIA, holding that "the preference is political rather than racial in nature."²⁸⁰ The *Mancari* Court highlighted its "long standing" history of upholding "legislation that singles out Indians for . . . special treatment."²⁸¹ The Court went on to say, "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."²⁸² Such expansive language

²⁸⁰ 417 U.S. 535, 553 n.24 (1974).

²⁸¹ *Id.* at 554-555.

²⁸² *Id.* at 555.

arguably includes the special treatment inherent in the right to select a special Cherokee delegate.

The fact that three amendments were required to give all citizens the right to vote demonstrates that voting has and continues to be limited along a number of lines. Why is there not a single Amendment in place of the Twenty-Sixth,²⁸³ Nineteenth, and Fifteenth Amendments? It is because the U.S. continues to limit who has a right to vote; illegal aliens, permanent residents, and some criminals cannot vote. The separate development of voter protections and the exclusion of some people within the U.S. from elections suggest that the Constitution does permit politically-based distinctions between those allowed and those not allowed to participate in elections. As a political rather than racial group per *Mancari*, Cherokees perhaps fit within a new allowable political distinction.

The preceding paragraphs present a Constitutionally based argument that the Cherokees could make in favor of special treatment with respect to voting rights. However, the Cherokees will have to distinguish *Rice v. Cayetano*²⁸⁴ if they are to assert successfully that the delegate right would not infringe upon the Constitutional voting and representational rights of non-Cherokees.²⁸⁵ In *Rice v. Cayetano*, the Supreme Court considered whether a Hawaii state constitutional provision that limited the right to vote for the trustees of the Office of Hawaiian Affairs to Native Hawaiians violated the Fifteenth Amendment.²⁸⁶ The Court ruled that such a limitation on who could vote was unconstitutional.²⁸⁷ The Court found the Fifteenth Amendment controlling and explained that "[t]he design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise."²⁸⁸ "Ancestry can be a proxy for race," the Court continued, and as far as Native Hawaiians were concerned, the Court found this to be true; consequently, their special voting rights were held unconstitutional.²⁸⁹

In *Rice v. Cayetano*, the Court explicitly rejected the idea that *Mancari*'s

²⁸³ The Twenty-Sixth Amendment states, in relevant part: "The right of citizens of the United States, who are eighteen years of age or older, to vote, shall not be denied or abridged. . . ." U.S. CONST. amend. XXVI § 1.

²⁸⁴ 528 U.S. 495 (2000).

²⁸⁵ The discussion in the remainder of this section benefited in part from the ideas and presentation of the law found in two papers written by Professor Viet Dinh: Viet Dinh & H. Christopher Bartolomucci, *The Authority of Congress to Establish a Process for Recognizing a Reconstituted Native Hawaiian Governing Entity*, Prepared for Office of Hawaiian Affairs, State of Hawaii, May 16, 2005 (on file with the author); Viet Dinh & Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives*, (Nov. 2004), <http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf>.

²⁸⁶ 528 U.S. 495 (2000).

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 512.

²⁸⁹ *Id.* at 514.

acceptance of preferential political treatment in Bureau of Indian Affairs (BIA) hiring could be brought into the voting context. The Court asserted, "It does not follow from *Mancari*, however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."²⁹⁰ While the Court did acknowledge that non-Indians might be allowed not to vote in tribal elections, "for the reason that such elections are the internal affair of a quasi-sovereign," when the election involved the affairs of the State of Hawaii, the elections must not exclude non-Indians.²⁹¹ The Court stated:

There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others.²⁹²

While the *Cayetano* Court continued to use the language of race, by explicitly distinguishing *Mancari* on the grounds that BIA hiring could not be analogized to voting, the *Cayetano* Court appears to have conclusively foreclosed the possibility of the Cherokee delegate from a Constitutional standpoint.

For the Cherokees, aside from the general need to distinguish *Cayetano* and analogize to *Mancari*, the best response to these Constitutional challenges is to attempt to place the delegate right outside of the ordinary Constitutional constraints. The *Mancari* decision was based in part on the *sui generis* "legal status of the BIA."²⁹³ However, as Indian scholars note, as a category "Indian law is *sui generis*."²⁹⁴ Francis Paul Prucha's title, *American Indian Treaties: The History of a Political Anomaly*, makes clear that the same is true for the treaties between the U.S. government and the Indian tribes. In order for the Cherokees to escape Constitutional rejection of the delegate right, they must refocus the debate on the unique moral obligation owed to the Cherokees under Article 7.²⁹⁵ By characterizing U.S. historical worth as dependent in part on how the U.S. incorporates the voice of a prior sovereign into the shared national government, the Cherokees might transcend the limitations they face in trying to effect their super-vote.

²⁹⁰ *Id.* at 520.

²⁹¹ *Id.*

²⁹² *Id.* at 523.

²⁹³ *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

²⁹⁴ Erik M. Jensen, *Book Review: American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, By Charles F. Wilkinson, 38 CASE. W. RES. L. REV. 318, 319 (1987).

²⁹⁵ One writer explains, "from the Indian point of view treaties were, most importantly, *moral agreements*." DeMallie, *supra* note 18, at 8.

V. CONCLUSION

The push for a Cherokee delegate should be a catalyst for greater U.S. support for the Cherokees if Constitutional challenges to the Cherokee delegate right prevent the Cherokees from realizing their treaty-based right to a delegate. Cherokees could lose their right, but if they do, the Cherokees deserve to be compensated for such a loss.

A Cherokee delegate in Congress would fundamentally alter the relationship between the U.S. government and the Cherokee Nation, and, as a practical matter, between the U.S. and all tribes. Presently, the U.S. and Indian tribes relate on a government-to-government basis.²⁹⁶ A Cherokee delegate would incorporate the Cherokees into the U.S. government, resulting in a switch to a tribal government-in-the-government relationship.²⁹⁷ Some tribal leaders have stated that sometime in the future a tribe should work towards greater incorporation. For example, former Navajo President Peterson Zah said the Navajo Nation should consider pushing for statehood.²⁹⁸ The Cherokees, however, already have a treaty-based right to instant incorporation. With the Cherokee Nation seated in the U.S. legislature, the division between ward and guardian would be broken down through the merger of the two sovereigns in a single delegate. Non-Cherokee leaders justifiably could fear that this overlapping governance structure would lead not only to a relative primacy of the Cherokee nation, but also to a diminution of the government-to-government relationship for all tribes.

There are many political and ideological reasons why a Cherokee delegate would be opposed by non-Indians and Indians alike, should the Cherokees push for their delegate. Many Indian scholars and Cherokees would argue that as an absolute matter the Cherokees have a right to the full realization of their delegate. But if the U.S. government rejects the Cherokee advocates' position, the inquiry into the Cherokee delegate will not end, nor must Article 7 necessarily become yet another U.S. violation of an Indian treaty.

The Supreme Court has repeatedly upheld legislative action that infringed upon

²⁹⁶ Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

²⁹⁷ In 1878, when an Indian Territory delegate was being considered, the Cherokees opposed such a delegate, but *The Cherokee Advocate* included a quotation from the *Missouri Republican* that highlights the power of a delegate to incorporate tribes into the U.S. government:

The theory of our treatment heretofore has been that they are independent nations. But this is a fiction. There are not independent powers, and we do not regard them in that light. We subject them to our laws, break our treaties with them whenever they become irksome to us, and move them from one place to another to suit our convenience. We might as well incorporate them into the body politic at once, and give them the privilege of being represented in the national council by a delegate of their own choosing.

The Cherokee Advocate, Jan. 5, 1878, at 2.

²⁹⁸ Keynote speech, 15th Navajo Studies Conference (Oct. 2004).

prior Indian treaties. Joseph Singer explains, "The plenary power doctrine of *Lone Wolf v. Hitchcock* is often invoked to defend the proposition that the United States has absolute power over Indian nations."²⁹⁹ In writing about the trust doctrine, Mary Christina Wood tried to separate the trust doctrine from plenary power because "the 'plenary power' doctrine . . . affords Congress almost unfettered latitude in dealing with tribes"³⁰⁰ In *United States v. Lara*, the Supreme Court wrote, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"³⁰¹ Writing about a distinct dispute, Singer notes that the abrogation of a treaty "by the unilateral act of the Congress is of no consequence—it is an irrelevant, but mildly interesting fact."³⁰² The delegate right could simply be done away with by a Congress that chooses to ignore the New Echota Treaty obligation, as is true of almost every right held by Indian tribes.³⁰³

Yet, if the Cherokees do not push for their right to a Congressional delegate, they, through their own inaction, will have already lost the most important right of the removal treaty. On the other hand, for the Cherokees, who "under any circumstances, have no weapon to use but argument,"³⁰⁴ the push for a Cherokee delegate would be a powerful way to call attention to removal. Furthermore, this would point out the possibility that the U.S. still could honor, either specifically or through substitute means, an important treaty right. Although the push for the specific right may fail, it would highlight the needs of the Cherokee Nation and the ways in which Americans continue to benefit from Cherokee removal.

Article 7 of the Treaty of New Echota is a reminder that the U.S. would be indebted to the Cherokees and under a moral obligation to them if a delegate uniquely representing the Cherokee Nation were not allowed.³⁰⁵ The Cherokees

²⁹⁹ Joseph William Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U.L. REV. 1, 14 (1991) (citation omitted).

³⁰⁰ Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm For Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 112 (1995).

³⁰¹ 541 U.S. 193, 200 (2004).

³⁰² Singer, *supra* note 299, at 26 (observing as well that there is a single exception, that equivalent value must be given for land taken by Congress).

³⁰³ As noted in the *super-vote* section, *supra* Section IV.C., the Cherokee delegate right also might be brought down by a court challenge, regardless of the desires of Congress. Deloria and Wilkins explain, "[t]he bottom line for American Indians is that ultimately the federal courts determine the federal relationship with Indians." VINE DELORIA, JR. & DAVID E. WILKINS, *TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS* 57 (1999).

³⁰⁴ Memorial from the Cherokee Delegation headed by John Ross to the U.S. Senate and House of Representatives (Jun. 21, 1836), in 1 THE PAPERS OF CHIEF JOHN ROSS, *supra* note 14, at 455.

³⁰⁵ In 1839, John Ross tellingly wrote, "[t]he injuries and losses sustained by the Nation from the whites in violation of treaty stipulations, holds a strong claim on the justice of the people and Govt. of the U. States which it is to be hoped will in the end be

moved west of the Mississippi and in consideration for this a Congressional delegate was afforded to them. What are the Cherokees entitled to if the U.S. defaults on its part of the removal bargain? Under black letter Contracts law, the Cherokees would be entitled to compensation.

Restitution damages, the most common way of resolving a breach of contract, involve the "return or restoration of some specific thing or condition."³⁰⁶ Recalling Mason's speech to the Cherokees in which he explained that the delegate right was the most important treaty provision the Cherokees received in return for removing west, restitution of eastern Cherokee land makes intuitive sense should the delegate right be denied. Independent of the uproar created and the political impossibility of such a form of restitution, the holding of *City of Sherill v. Oneida Indian Nation of New York* arguably does not authorize this form of remedy for disallowing a Cherokee delegate,³⁰⁷ but the removal era negotiations suggest alternatives.

In various speeches, Arizona Professor Robert A. Williams, Jr. surprised Indian and non-Indian audiences by disproving the popular idea that Indians did not understand what they were giving up and what they were getting in land cession treaties. Williams dramatically shows that despite the later Indian rights rallying cry "The Black Hills are not for Sale" the Black Hills were indeed for sale but the U.S. was just not willing to pay the full sale price that the Sioux set.³⁰⁸

Similarly, John Ross, the elected Cherokee leader during the removal era, offered to sell eastern Cherokee land at a price of \$20 million. Should the U.S. Government dishonor the delegate provision's terms on political or Constitutional grounds, one possible way of compensating the Cherokees would be to pay the Cherokees the difference between the Cherokee price for their removal, \$20 million, and what they were actually paid, \$5 million. Of course, the money should be paid according to the present value of \$15 million in 1835.

remunerated." Letter from John Ross to Lewis Ross (Jun. 1, 1839), in 1 THE PAPERS OF JOHN ROSS, *supra* note 14, at 713.

³⁰⁶ BLACK'S LAW DICTIONARY 1339 (8th ed. 2004).

³⁰⁷ 125 S. Ct. 1478 (2005).

³⁰⁸ Speech of Robert A. Williams, Jr. at Loyola University New Orleans School of Law (Mar. 14, 2005).