ANALYZING THE SUPREME COURT'S CHOCTAW DECISION

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This is a great case for analysis, precisely because its facts are uncomplicated. Ms B, mother of twins, with the consent of Mr. C, their natural father, elected to give birth to her children two hundred miles away from the reservation where she lives. The reason: she preferred to have her children adopted off the reservation. She found willing adoptive parents, of whom she and Mr. C approved, in the Holyfields. Acting in concert they arranged for the births, respected the prescribed procedures of the law as far as they were known and effectuated the adoption. The case makes no suggestion of any exchange of money or other kind of consideration. Ms B and Mr. C were not bribed, the children were not sold. Apparently Ms B and Mr. C. were acting on their judgment about the best interests of their children. Think of the matter as analogous to the Mexican who exerts herself to give birth on American soil in order to give her child the advantage of United States citizenship!

To the untrained eye there would be nothing here to go to court about. Though unmarried, the mother and natural father agreed. They found willing adoptive parents. And they followed the laws applicable to U. S. citizens. The mere fact of their being Indians, however, changes the case.

Standing between the wishes of the parents and the interests of the twins is the Indian Child Welfare Act (ICWA). Congress's aim in the ICWA is to preserve the racial integrity of Indian tribes in general and the cultural integrity of particular tribes. Congress responded to a legitimate problem—namely, how to halt the wholesale removal—especially the involuntary removal—of Indian children from tribes. But the problem Congress finally undertook to resolve was bigger still, and the solution came at the cost of closing state courthouses—and even federal courts if the majority is to be believed—to Indian parents and children.

The operation of the ICWA in the Court's interpretation gives a tribe veto power over parent's and children's wishes in custody cases. Although Congress mandated that the wishes of parents and children should be considered, and that decisions be made in the best interests of children, the lodging of final authority in tribal courts, which are not even reviewable in federal courts, means that those mandates of Congress are rather prayers than orders. Congress arrived at this conclusion through a decision that the Choctaw tribe, in its brief to the Supreme Court, described in the familiar language of affirmative action reasoning: "... if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member."

Group benefits; individual penalties—that is the recurring lesson of state-sanctioned racial preferences, benign or malignant. The question is, why does the Supreme Court extend to Congress a benefit of the doubt on its affirmative action ICWA program in the first place? That is where the ambiguities of Indian law come into play.

To start, Indian law is a sub-category of American law, treated neither by the Court nor by Congress as fully comprehended within American law. Indian tribes are called "dependent sovereigns," meaning that Congress can deal with them in their corporate capacities without regard to the effects of its actions on Indian individuals.

Further, to the extent the tribes are sovereign, they are "like" foreign nations, with whom the United States maintains treaty relations and toward whom, in addition, there is a trust relation whereby the United States purportedly undertakes to nurture and preserve the tribes.

The ambiguity enters when one notes that Indian persons, as opposed to tribes, are also citizens of the United States—paying our taxes, participating in our elections, and defending our freedom. When, therefore, Congress and the Court abandon these brothers and sisters of our equal liberty to the rule of their tribes, Congress and the Court (and we through them) are actually withdrawing certain of the guarantees we otherwise promise and certainly expect for ourselves.

In the Mississippi case these questions of constitutional status did not arise, for the Court rightly limited itself to statutory interpretation. No constitutional questions were raised in the arguments for the case, although that may only reflect the fact that the parents were not represented in this case! The ironic consequence of this legal necessity is that constitutional interpretation may well have produced a "Yoder"-like decision, reaffirming a "charter of rights for parents."

"Yoder," of course, was the 1972 case that defended the right of the Amish community to be different by defending the Amish people's (parents especially) rights to religious liberty. Where a statutory decision is contingent, a constitutional decision would establish permanent safeguards. The power Congress has granted to tribes at the expense of parents, may as easily be taken away by congressional enactment.

Following the constitutional path, we are enabled to preserve people's distinct cultures and ways of life by means of defending the individual rights of parents and children. The only restriction to which this guarantee is subject is that of equal protection—the fundamental rights enjoyed by any are the same rights enjoyed by all. This leads, for example, to recognizing that parents and children can not be sacrificed to "reason of state." If Indians had the same rights as white citizens, in other words, they could defend their traditions without abusing the rights of parents. Because Congress treats Indians as not having the same rights as white citizens, however, tribes then must rely on Congress's authorization of a power to deny the rights of parents.

These consequences of Indian law create problems for more than Indians. The Holyfields are only the most recent example of United States citizens victimized by the oddities of this law. More important, however, is the fact that the rights of all Americans are implicated in the denial of rights to Indians. The notion of truly sovereign tribes connected to the United States by treaty rights became untenable from the moment Indians became citizens. The granting of citizenship to Indians interested every other American in the limitations and privileges of Indian citizenship.

For the powers Congress could exercise vis-a-vis Indians, though citizens, could form the pretext of powers to be exercised other all citizens, no matter how illegitimate.

If American citizenship per se poses no limitation on the power of Congress *vis-à-vis* Indians, we must sooner or later expect other citizens to be brought no less surely under the so-called "plenary power" of Congress. Our Indian brothers and sisters cannot defer to the "great white father" without making the rest of us equally vulnerable. The problem highlighted by enforcement of the ICWA illustrates the stupidity of preserving "independent" tribes within "subordinate" states**.** We were better off if the tribes were entirely and truly sovereign.