One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy

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ONE STEP FORWARD, TWO GIANT STEPS BACK: HOW THE “EXISTING INDIAN FAMILY” EXCEPTION (RE)IMPOSES ANGLO AMERICAN LEGAL VALUES ON AMERICAN INDIAN TRIBES TO THE DETRIMENT OF CULTURAL AUTONOMY

Suzianne D. Painter-Thorne*

Abstract

This article describes the profound changes to American Indian kinship and social structures caused when European and Anglo American legal norms were imposed on American Indian tribes without respect for Indian culture or values. Although these sovereign nations were entitled to self-determination, they were for centuries subjected to laws crafted without their input or representation. This article takes the position that law should come from within a culture to ensure that it reflects that culture’s values and permits it to flourish in its own way. When law is imposed by outsiders, it becomes a means of colonization, forcing one group to conform to another culture’s expectations and beliefs. This process can be seen in the relationship of United States law to American Indian tribes—a relationship in which tribes were placed under the control of a legal system that all too often failed to incorporate or reflect tribal values.

Thirty years ago, Congress took one step forward to rectify this history. Recognizing the tribes’ right to cultural autonomy, Congress permitted American Indians to bring their own cultural norms to the table and have them

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recognized in laws such as the Indian Child Welfare Act. But that progress has been short-lived. State courts have thwarted ICWA’s full potential through the judicially created “existing Indian family exception,” which denies ICWA application in defiance of the Act’s plain language, Supreme Court precedent, and congressional intent. Under this exception, tribes are once again being subjected to laws that regulate and define Indian family and social life without benefit of the tribes’ input. To remedy this, I propose that Congress must act to halt the states’ grab, so that ICWA lives up to its promise to permit the tribes to control their own cultural futures.

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Introduction

In 1831, the Choctaw Indians were forced from their land in the eastern United States to lands in Oklahoma in what would later become known as the Trail of Tears. At the time of the tribe’s removal, Choctaw Chief George W. Harkins drafted a Farewell Letter to the American People to explain why the tribe had agreed to removal. In his letter, Harkins noted that the Choctaw viewed removal as the lesser of two evils. The greater evil, he explained, was the insistence of the State of Mississippi on legislating the affairs of the tribe

2. Letter from Choctaw Chief George W. Harkins to the American People, in GREAT DOCUMENTS IN AMERICAN INDIAN HISTORY 152 (1973). In his letter, Harkins noted why it was incorrect to characterize the Choctaw’s decision as a “choice.” See id.
3. Id.
and its citizens. According to Harkins, "[a]lthough the legislature of the state were qualified to make laws for their own citizens, that did not qualify them to become law makers to a people who were so dissimilar in manners and customs as the Choctaws are to the Mississippians." The Choctaw, Harkins wrote, "rather chose to suffer and be free, than live under the degrading influence of laws, which our voice could not be heard in their formation."

It is remarkable the tribe viewed removal from its ancestral lands—which divided the Choctaw tribe and ultimately resulted in the death of approximately twenty-five percent of its members—as preferable to being subject to laws drafted without their input. Harkins's words reflect the unfairness of one group imposing its laws on another without respect to that group's culture or values. As a consequence of that process, law becomes a colonizing tool, whereby one group subjects another to its values and norms, forcing the subjugated group to conform to another culture's expectations and beliefs.

This process can be seen in the relationship of United States law to American Indian tribes; a relationship in which tribes were placed under the control of a legal system that all too often failed to incorporate or reflect tribal values. Although removal was viewed as a means to escape rule by laws designed without their input, the history of the Choctaw, and of all American Indian tribes, belies that promise. Even after removal, American Indian tribes continued to be dominated by laws drafted without their input. Indeed, for much of the history between Anglo Americans and American Indians, tribal values were ignored either due to unfamiliarity with those values or in a willful attempt to bring the tribes into conformity with Anglo-American culture.

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4. Id.
5. Id.
6. Id.
8. In this article the terms "American Indian," "Native American," and "Indian" will be used interchangeably. "Indian" is used in most legal literature to describe persons who are members (or eligible for membership) of a federally-recognized tribe. Under the main act described in this paper—the Indian Child Welfare Act—the child of such a person is referred to as an Indian child. Most native people refer to themselves by tribal name. Where possible I will abide by this preference, using tribal affiliation when referring to incidents specific to one tribe.
9. See Rennard J. Strickland, Native Americans, in The Oxford Companion to the...
Consequently, these cultures changed as they came under pressure from culturally unfamiliar laws they were forced to either adapt to or resist. In this paper I will show how law—generally understood as reflecting the values and beliefs of a particular culture—can change an indigenous culture when it is imposed from without. Using the case of the Choctaw, I will describe the impact U.S. law had on their kinship and social system. In Part I, I compare the pre-contact social organization of the Choctaw with that of the present-day Choctaw of Mississippi. As a consequence of hundreds of years of imposition of laws designed by those who did not recognize or understand their culture, the Choctaw social and family structure has undergone profound changes. Part II then examines how U.S. laws changed the Choctaw kinship system. Specifically, it discusses how changes in federal Indian law and policy affected the family and social structure of the Choctaw.

In Part III, I discuss how the Indian Child Welfare Act represents a departure from the earlier imposition of law from without by providing for the inclusion of American Indian perspectives. ICWA’s break from the past provides the tribes with the ability to control their cultural futures. However, that potential has been thwarted by state courts that seek to avoid ICWA application by once again imposing laws designed by non-Indians to regulate and define Indian family and social life. In Part IV, I argue that the judicially created “existing Indian family exception” to ICWA flies in the face of congressional intent to have a law that reflects American Indian culture. The harm this exception engenders not only defies the plain language of the Act and Supreme Court precedent, it also threatens to once again place the tribes under the control of a law that does little to recognize their right to define who they are and to have laws that reflect their culture and values.

SUPREME COURT OF THE UNITED STATES 577 (Kermit L. Hall et al. eds., 1992).

10. Alexis de Tocqueville, in Democracy in America, charged that the United States was able to both exterminate much of the native population and deny rights to the survivors “with singular felicity, tranquilly, legally, philanthropically... and without violating a single great principle of morality in the eyes of the world.” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA: THE HENRY REEVE TEXT AS REVISED BY FRANCIS BOWEN 355 (Phillips Bradley ed., 1945) (1831). He concluded that “[i]t is impossible to destroy men with more respect for the laws of humanity.” Id.

11. See infra Part I.

12. See infra Part II.

13. See infra Part III.

14. See infra Part IV.
I. Background: Contact & Cultural Change

Law in the United States reflects a European legal tradition extending back at least as far as the legal systems of ancient Greece and Rome. Rejecting the Divine Right of Kings, John Locke envisioned government based on a social contract made by free individuals. In such a construction, the individual is of paramount importance. United States law reflects this approach through its emphasis on the individual "natural rights-bearing person" who possesses the capacity to exercise her rights as well as the freedom to exercise them against larger societal interests.

In contrast, American Indians typically conceive of legal relations as existing between groups, not individuals. This is not to suggest that American Indian tribes are a monolith. They surely are not. There are more

15. See Michael William Dowdle, Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China, 35 N.Y.U. J. INT'L L. & POL. 1, 188-89 (2002) (“Many of the defining normative procedures of modern U.S. constitutionalism were actually discovered by institutions that lacked any real resemblance to today's conceptions of democratic legitimacy—including not only those of Republican Rome and premodern England, but also those of ancient Greece, the medieval Papacy, Islamic law, and imperial China.”).

16. PAULINE MAIER, AMERICAN Scripture: MAKING THE DECLARATION OF INDEPENDENCE 87 (1997); see also ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 36 (7th ed. 1991). Although the issue is too complex to enter into at length here, it is important to point out that this idea was much debated prior to the Civil War. Opponents claimed that the Constitution more rightly represents a compact between the several states in which the people reside. Within those states, however, the individual would still be the rights-bearer. Proponents of this view—such as John C. Calhoun—offered this interpretation to bolster their belief that the states were free to exit the compact at any time. The Civil War resolved this ideological split in favor of the view that the Constitution represents the individuals of the United States who constitute a federal government, although this conclusion is not without conflict. See generally DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1988).


19. See Stuart Ford, OSCE National Minority Rights in the United States: The Limits of Conflict Prevention, 23 SUFFOLK TRANSNAT’L L. REV. 1, 44 (1999); see also Gavin Clarkson, Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the
than five hundred federally recognized tribes in the United States today, and each tribe has its own unique history and culture. American Indians speak more than one hundred different languages and exhibit a variety of religious beliefs. Nevertheless, some features are common to Indian cultures, including the greater value placed on the tribal group and the belief that the whole is necessary for the existence of the individual. This concept is passed on to each succeeding generation through tribal social structures and oral histories.

Despite the value tribes place on the group over the individual, the lives of American Indians are dominated by U.S. laws that emphasize the individual over the group. American Indians are subject to federal laws, congressional policies, and federal agencies. Separate and apart from the laws that affect all Americans, more than four thousand federal laws and treaties concern American Indians—laws that have been interpreted in thousands of court decisions. In addition, there are numerous tribal laws, state laws, administrative rulings, and Bureau of Indian Affairs directives that also impact tribes and their members. Many of these laws and regulations were implemented with little, if any, tribal input.

Understanding the impact these laws have on a culture that emphasizes group rights requires an understanding of the historical, economic, political, social, and moral problems in which those laws were conceived and implemented. Similarly, to fully understand the impact of these laws on the lives of American Indians, it is important to first understand the history of contact between Europeans and American Indian tribes. To facilitate that understanding, this paper will focus on the experience of one tribe, the Choctaw of Mississippi, and how the tribe changed after it was brought under the influence of Anglo-American laws.

20. Ford, supra note 19, at 44; see also Clarkson, supra note 19, at 400.
21. Ford, supra note 19, at 44; see also Clarkson, supra note 19, at 400.
23. Id.
25. Strickland, supra note 9, at 578.
26. Id. (quoting Justice Felix Frankfurter).
A. The Pre-Contact Kinship & Social Structure of the Choctaw

Before contact with Europeans, the Choctaw occupied the southeastern portion of North America, predominately in what is now eastern Mississippi. Although it would later change, the family, social, and political structure of the pre-contact Choctaw was organized along maternal lineages. Pre-contact Choctaw were matrilocal as well as being matrilineal. This meant that each household was centered on the mother’s family residence and consisted of an extended family that included three or four generations of the mother’s kin. This extended kin network was provided by the division of Choctaw society into two social categories called moieties. Descent and inheritance were traced through the matrilineage, with the mother’s moiety determining her child’s. The moieties also regulated marriage—individuals within the same moieties could not intermarry.


29. See Matthew J. Baker & Joyce P. Jacobsen, A Human Capital-Based Theory Of Postmarital Residence Rules, 23 J.L. Econ. & Org. 208, 209 (2007). “Matrilocal” indicates a kinship structure in which adult daughters remain with their families, including after marriage. Thus, a couple would reside in the vicinity of the wife’s family rather than with the husband’s family. Id.


31. Moieties “divide a society into two social categories determined by descent, each consisting of half that society’s clans.” Dictionary of Anthropology 327 (Thomas Barfield ed., 1997). Clans are “unilineal descent groups that unite a series of lineages descended from a theoretical common ancestor.” Id. at 62. In the case of the Choctaw, the clans were traditionally matriclans in which descent is traced by the matrilineage. Fred Egan, Historical Changes in the Choctaw Kinship System, Am. Anthropologist, Jan./Mar. 1937, at 35.

32. Clara Sue Kidwell, Choctaw, in Encyclopedia of North American Indians 119, 119 (Frederick E. Hoxie ed., 1996) (“Children belonged to their mother’s [clan], and people were required to marry into the opposite [clan].”); McKee & Schlenker, supra note 27, at 27; Egan, supra note 31, at 35.

In the Choctaw family, the mother’s brother was the source of family authority, and it was he who was generally responsible for the family’s welfare.\textsuperscript{34} For instance, the mother’s brother was the primary influence in marriage arrangements and in educating his sister’s children.\textsuperscript{35} Although they did participate in public ceremonies, fathers otherwise played minor roles in their children’s lives.\textsuperscript{36} Instead, a man’s responsibilities were to his sister’s children.\textsuperscript{37}

The matrilineage provided a kinship structure that would provide for the care of children in the event of any family disruption. For instance, following a divorce, children remained with their mother.\textsuperscript{38} If the mother died, her lineage had a priority claim over her children superior to that of the father, who had no authority over them.\textsuperscript{39} The extended kin network ensured that a relative, perhaps one more distant, could step in to fulfill family obligations if a more immediate relative was absent.\textsuperscript{40} Indeed, because the extended kin group was involved in raising the children, there was virtually no such thing as an orphaned child in pre-contact Choctaw culture.\textsuperscript{41} During this time period, adoption was common, even by families with many children.\textsuperscript{42} An adoption was formalized through the symbolic act of the child eating from the family bowl.\textsuperscript{43}

\textsuperscript{34} See Morris S. Arnold, The Tenth Annual Brendan F. Brown Lecture Loyola University School of Law Cultural Imperialism and the Legal System: The Application of European Law to Indians in Colonial Louisiana, 42 LOY. L. REV. 727, 735 n.29 (1997); Eggan, supra note 31, at 50.

\textsuperscript{35} 1 J.F.H. CLAIBORNE, MISSISSIPPI AS A PROVINCE, TERRITORY, AND STATE 516-17 (Jackson, Miss., Power & Barksdale 1880); ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 16 (2d ed. 1961); McKee & Schlenker, supra note 27, at 30.

\textsuperscript{36} Eggan, supra note 28, at 24 ("The father and his relatives played a relatively minor role in these activities but were particularly important at life crises and on public ceremonial occasions.").

\textsuperscript{37} Id.

\textsuperscript{38} Claiborne, supra note 35, at 517 ("The marriage endures only during the affection or inclination of the parties, and either may dissolve it at pleasure. This, of course, very often occurs, in which case the children follow the mother; the father has no control over them whatever.").


\textsuperscript{40} Spoehr, supra note 33, at 206.

\textsuperscript{41} Claiborne, supra note 35, at 523; Debo, supra note 35, at 16-17.

\textsuperscript{42} Claiborne, supra note 35, at 523.

\textsuperscript{43} McKee & Schlenker, supra note 27, at 28 (citing Debo, supra note 35, at 16-17).
The Choctaw lived in loosely formed villages on land held in common. Although individual homes were scattered, they were nonetheless concentrated enough to ensure daily personal contact among members of a lineage. Villages contained a number of matrilineages and clans and were organized around a ceremonial center, with individual houses surrounded by cornfields. Choctaw villages were organized by extended kin groups and governed by a chief and a council of elders. The Choctaw held their land in common, though the right to use certain parcels of land was granted to individuals.

The matrilineage also formed the underlying basis of the social structure of early Choctaw communities. The moieties that formed the backbone of the social structure were also the source of the political structure. Each moiety was divided into clans and the political and religious leaders came from the principal clan of each moiety. Political power was passed through the mother’s lineage, with chiefdoms descending from mother’s brother to mother’s son.

In the centuries since the pre-contact time period, the Choctaw have been increasingly influenced by the culture of Europeans. This contact started with Spanish conquistador Hernando de Soto’s travel into the southeast region of North America in the early sixteenth century, continued as waves of settlers moved into Choctaw territory, and reached its highest level after the end of the American Revolutionary War when U.S. law and custom most directly began to change the traditional Choctaw kinship system and social structure. As a consequence of contact and the imposition of laws drafted without respect

44. Id. at 17.
45. SPOEHR, supra note 33, at 210.
47. For a chart of the early Mississippi tribal organization, see McKee & Schlenker, supra note 27, at 16. The Choctaw’s territory was divided into three different districts led by its own chief. Kidwell, supra note 32, at 119. These geographical regions were represented in a general council that met with the principal chiefs of each district in a national tribal government governed jointly by the three district chiefs. Id. Villages were relatively independent of each other, despite the central district government. EGGAN, supra note 28, at 19.
48. McKee & Schlenker, supra note 27, at 41.
49. Id. at 27; SPOEHR, supra note 33, at 207.
50. McKee & Schlenker, supra note 27, at 16.
53. See Kidwell, supra note 32, at 120; Sturtevant, supra note 52, at 47-48.
to Choctaw culture, the Choctaw kinship and social structure of today is very different from what it was before European contact.

B. The Post-Contact Kinship & Social Structure of the Choctaw

In his 1966 study of the Five Civilized Tribes of the Southeast, anthropologist Fred Eggan found that in the current Choctaw kinship system, the family pattern had become almost completely reversed.\(^{54}\) Eggan found that, among the Choctaw, "there is a close correlation between the degree of acculturation and the degree of modification of the kinship pattern."\(^{55}\) Eggan concluded that the kinship system typical of tribes in the Southeast had changed as a result of contact with Europeans and acculturation.\(^{56}\)

This change was rather profound. Today, there are approximately nine thousand members of the Mississippi Band of Choctaw Indians, the majority of whom live on twenty-one thousand acres of reserved land in seven communities.\(^{57}\) Choctaw communities resemble Euro-American communities, with homes centered around churches and schools.\(^{58}\) Similarly, while many traditional practices continue, they have been altered by the Choctaws' contact and experiences with Anglo-America.\(^{59}\) For instance, despite the impact on their kinship system, the Choctaw continue to support "kin and locality-based sports."\(^{60}\)

Similarly, Choctaw family structure has come to resemble the patrilineal European model, with an increased emphasis on the nuclear family of parents

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\(^{54}\) See EGGAN, supra note 28, at 20.

\(^{55}\) Id. at 37.

\(^{56}\) Eggan's student, Alexander Spoehr, found similar changes in his 1947 study of Oklahoma Choctaw kinship. Spoehr noted that the Choctaw's aboriginal kinship practice had changed remarkably since contact with Europeans, shifting from a matrilineal emphasis to a patrilineal one in which descent is traced through father's sister. SPOEHR, supra note 33, at 197. He also noted that it had begun to shift away from a lineage system to a generational system. Spoehr found that the importance of moieties in Choctaw life had declined, so that few, if any, Choctaw remembered any distinction "between local groups, moieties, and clans." Id. at 209.


\(^{59}\) Denson, supra note 57.

\(^{60}\) Peterson, supra note 58, at 160. The selection of sports has also been influenced by contact, as more Choctaw play softball than stickball. Id.
and children. In arriving at this model, matrilineal descent was weakened as inheritance began to be reckoned patrilineally. The clan structure gave way to a territorial structure that did not rely on the clan to organize social or political life. The role of a father in raising his children has increased with a corresponding decrease in his role in raising his sister’s children. Simply put, the Choctaw social structure has shifted from a pre-contact model based on matrilineage to a patrilineal or generational model that more closely resembles the Anglo-European family model.

It is important to note that remnants of the traditional structure are still present, giving testimony to the Choctaws’ cultural heritage and unwillingness to be assimilated. For instance, the clan continues to support the social structure, albeit in different form. Although Choctaw families follow a nuclear family model, families in the communities are held together by extended kinship, “which is basically congruent with the clan.” Consequently, “[t]he clan thus holds the local group together, rather than tying together different communities as it did in the past.”

Nevertheless, Choctaw social and kinship structure has changed since its pre-contact model. One reason for that change is the influence of U.S. law imposed on the Choctaw without respect to the tribe’s culture, values, or beliefs. To understand why that change occurred, we must consider the laws that changed a culture, starting with the first contact of Europeans with the Choctaw.

61. MCKEE & SCHLENKER, supra note 27, at 189.
62. See id. at 73.
63. See id.; EGGAN, supra note 28, at 29.
64. MCKEE & SCHLENKER, supra note 27, at 73.
65. NORTH AMERICAN INDIAN ANTHROPOLOGY: ESSAYS ON SOCIETY AND CULTURE 8 (Raymond J. DeMallie & Alfonso Ortiz eds., 1994).
66. Indeed, the history of contact between the Choctaw and Euro-Americans altered—but did not destroy—the Choctaw kinship and social structure. Peterson, supra note 58, at 160. Further, Choctaw culture continues in the form of language, dress, dance, and various social activities. Denson, supra note 57. Most Choctaw continue to speak Choctaw at home and “the traditional Choctaw identity based on kinship groups, individual Choctaw communities, and the Choctaws as a language group is continuing.” Peterson, supra note 58, at 160.
67. Denson, supra note 57.
68. MCKEE & SCHLENKER, supra note 27, at 189.
69. Id. at 189-90.
II. Laws that Changed a Culture

Spanish conquistador Hernando de Soto was the first European to encounter the ancestors of the people later known to Europeans as Choctaw. In 1539, de Soto arrived on Florida’s western coast in search of treasure and gold. As he traveled into the southeast region of North America, he entered the Mississippi River region and encountered many sovereign Indian nations. This initial contact was somewhat limited—de Soto soon died of a fever and his body was thrown into the Mississippi—yet it likely allowed for the introduction of new diseases that affected the Choctaw population. De Soto’s foray into the Mississippi region foreshadowed a more sustained period of contact with Europeans—and their laws—that would dramatically change Choctaw culture.

A. Contact and Removal

The next period of contact occurred at the end of the seventeenth century when representatives of French and English colonial governments entered the Mississippi region. From this contact, trade relationships were developed in which Choctaws traded deerskins for European goods. Eventually a split occurred between those villages that traded with the English and those that traded with the French. Although the French traders won the initial dispute, the Treaty of Paris in 1763 gave the English control over trade with Southeast tribes. American colonists increasingly moved into the area, establishing

70. Kidwell, supra note 32, at 119.
72. See id.
73. Kidwell, supra note 32, at 119.
74. See id.
75. Id.
76. Id. ("These trade relationships and attempts by colonial agents to secure military alliances with the Choctaws ultimately led to a division within the tribe of those villages that traded with the French and those that traded with the English.").
77. In the late 1700s, the Spanish still controlled portions of the southeast in Florida as well as all the lands west of the Mississippi River. Id. The Choctaws signed treaties with both the Spanish government and with the newly established U.S. government, many of which guaranteed their right to “remain on their land and to hold lands in common.” ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 32, at 646. In 1801, France bought the Louisiana Territory from Spain, later selling it to the United States in 1803. Kidwell, supra note 32, at 120. The Louisiana Purchase effectively isolated the Choctaw from their Spanish allies. Id. To further ensure that Spain was cut off from any allies in the U.S. territory, the United States
trading posts and raising cattle.\textsuperscript{78} The increased contact also resulted in intermarriage between the Europeans and the Choctaw.\textsuperscript{79} These unions produced many mixed-blood children who would later have a profound impact on the future of the tribe by serving as intermediaries between the two cultures.\textsuperscript{80}

After the American Revolutionary War, the United States gave tacit recognition to the rights of tribes to self-government by entering into treaties with the Indians as distinct political communities.\textsuperscript{81} The Treaty of Hopewell, signed in 1786, was the first treaty between the Choctaw and the United States.\textsuperscript{82} That treaty established "perpetual peace and friendship" and gave the government the right to establish three trading posts within Choctaw territory.\textsuperscript{83} It also fixed the boundaries of native land and withdrew federal protection over any Europeans on tribal lands, purportedly to discourage European settlement on tribal lands.\textsuperscript{84}

By the early nineteenth century, the Choctaws—along with the Creek, Chickasaw, Cherokee, and Seminole tribes—had come to be considered one of the "Five Civilized Tribes."\textsuperscript{85} This distinction was given to those tribes that had adopted Anglo-American household, farming, and governing patterns,\textsuperscript{86} including adopting written constitutions, statutes, and courts.\textsuperscript{87} The Choctaw took these steps because they believed their survival depended both on

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\textsuperscript{78} Kidwell, supra note 32, at 119-20.

\textsuperscript{79} Id. at 119-20 ("They [American settlers] married Choctaw women and produced mixed-blood families. They also introduced domesticated cattle and established trading posts that attracted other white men into Choctaw country.").

\textsuperscript{80} DELORIA & LYTLE, supra note 18, at 90.

\textsuperscript{81} See Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 593-94 (1823) (noting that "[t]hese [Indian] nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens"); DELORIA & LYTLE, supra note 18, at 3; Phillip M. Kannan, Reinstating Treaty-Making with Native American Tribes, 16 WM. & MARY BILL RTS. J. 809, 813-14 (2008).

\textsuperscript{82} MCKEE & SCHLENKER, supra note 27, at 37.

\textsuperscript{83} DEBO, supra note 35, at 32.

\textsuperscript{84} Treaty of Hopewell with the Cherokees, Nov. 28, 1785, in DOCUMENTS OF UNITED STATES INDIAN POLICY 6-7 (Francis Paul Prucha ed., 3d ed. 1990).


\textsuperscript{86} KEHOE, supra note 1, at 201.

\textsuperscript{87} ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 32, at 201.
peaceful relationships with Anglo-Americans and on the adoption of Anglo lifeways. 88

Despite their designation as a “Civilized Tribe,” President Andrew Jackson sought to remove the Choctaws living on the eastern side of the Mississippi to the West. 89 It was believed that American Indians would better assimilate to European/American ways of life if they were secluded on reservations. 90

At the urging of the State of Mississippi, the United States negotiated the Treaty of Doak’s Stand. 91 In that treaty, the Choctaws agreed to cede their land east of the Mississippi in exchange for thirteen million acres of land in Oklahoma. 92 The remaining Choctaw land in Mississippi was to stay under Choctaw control until the Choctaw were to “become so civilized and enlightened to be made citizens of the United States.” 93 The tribe was to be provided with schools, 94 a police force, and individual pensions for its inhabitants. 95 Due to the presence of European settlers in the promised territory, this treaty was not finalized until 1825. By that time, the Choctaw had a government based on a constitution of their own design, a court system, and their own police force. 96

Although the Doak’s Treaty promised that the Choctaw would remain in control of their land, Mississippi passed several laws that conferred state citizenship to the Choctaw and placed Choctaw lands under state authority. 97

88. JOSEPHY, supra note 71, at 320.

89. KEHOE, supra note 1, at 189; ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 32, at 201.

90. KEHOE, supra note 1, at 186-87.


92. Treaty with the Choctaw, supra note 91, at arts. 1-2; ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 32, at 120.

93. Treaty with the Choctaw, supra note 91, at art. 4.

94. In 1816, the Choctaw ceded a parcel of land to the United States, the proceeds of which went to establish schools for Choctaw children. Kidwell, supra note 32, at 120; see MCKEE & SCHLENKER, supra note 27, at 52 (listing land cessions and acquisitions). The Choctaw opened their first school in 1824 in Blue Springs, Kentucky, followed by twelve local schools in 1838 and a series of boarding schools established in 1842. ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 32, at 202. Choctaw leaders believed the new schools would enhance the tribe’s ability to deal with the government as well as white settlers in the surrounding territory. Kidwell, supra note 32, at 120. In contrast, the government viewed the schools as a tool to assimilate Choctaw children into European culture. Id.

95. Treaty with the Choctaw, supra note 91, at art. 8.

96. ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 32, at 646.

97. MCKEE & SCHLENKER, supra note 27, at 68; see Treaty with the Choctaw, supra note
Further, Mississippi dissolved the Choctaw Nation's government and set penalties for anyone presuming to serve as a tribal official. The Choctaw appealed, believing the United States would uphold its treaty obligations. President Andrew Jackson, who was committed to removing all southeastern native peoples to west of the Mississippi River, rebuffed their pleas. What followed was a campaign to rid this territory of its native people.

Congress passed the Removal Act on May 28, 1830. Signed by President Jackson, the Act authorized Jackson to negotiate treaties with the tribes. Under the treaties, the tribes would exchange their lands east of the Mississippi for unclaimed lands in the West. Ultimately, the Removal Act forced Indians in the East to move to the western territories, culminating in the infamous Trail of Tears.

Under the 1830 Treaty of Dancing Rabbit Creek, the Choctaw agreed to cede their Alabama and Mississippi land and to relocate to Oklahoma. In return, the United States agreed to pay the cost of removal, including providing the Choctaw with the means of removal (including food and transportation) to Oklahoma, provisions once they arrived in their new home, and an annuity of $20,000 for twenty years.

The Choctaws were the first tribe to go on the Trail of Tears, most traveling during the winter of 1831 to 1832. Although the government spent more than $5 million on the removal, this sum was not reflected in the conditions the Choctaws endured. Due to inadequate planning, corruption on the part of contractors, disease, and bad weather, the removal period was

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91, at art. 9.
98. ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 32, at 646.
99. Id.
100. Id.
101. Kidwell, supra note 32, at 120.
103. See id. § 2, 4 Stat. at 412. For removal routes, see McKee & Schlenker, supra note 27, at 79.
104. See id. § 1, 4 Stat. at 411-12.
105. See Deloria & Lytle, supra note 18, at 6-8 (discussing removal).
106. Treaty with the Choctaw arts. 2, 3, Sept. 16, 1830, 7 Stat. 333; Josephy, supra note 71, at 326; Kidwell, supra note 32, at 121.
107. Treaty with the Choctaw, supra note 106, at arts. 16, 17; DOCUMENTS OF UNITED STATES INDIAN POLICY, supra note 84, at 56.
108. In fact, it was the Choctaw’s experience that resulted in the removal being named the “Trail of Tears.” ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 32, at 639.
109. Kehoe, supra note 1, at 200-01.
110. Id. at 188.
disastrous for those people forced to Oklahoma. In the four years it took to complete the removal, approximately twenty-five percent of the Choctaw died, predominately from hunger, disease, accidents, and exposure. Once the tribe arrived in Oklahoma, it faced further hardships such as inadequate supplies of food and medicine.

The removal period signifies the greatest change to the Choctaw kinship system. Although the majority of Choctaw relocated to Oklahoma, several thousand evaded removal and remained in Mississippi. Indeed, the many lives that were lost on the Trail of Tears and the conditions suffered by the Choctaw only deepened the resolve of those still in Mississippi not to be removed. Thus, the tribe was now geographically divided into two communities, the Choctaw Nation of Oklahoma and the Mississippi Band of Choctaw Indians, each with separate governments.

Under the Treaty of Dancing Rabbit Creek, those Choctaw who remained in Mississippi were to register with a government agent for an allotment of land, for which they were to receive title. Despite this provision, the

111. Id.
112. JOSEPHY, supra note 71, at 326.
113. Kidwell, supra note 32, at 121. Despite such hardships, the Choctaw were able to establish a community in the West, including a tribal government. Id. The Choctaw were the first to produce a written constitution to be adopted in Oklahoma. ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 32, at 202.
114. MCKEE & SCHLENKER, supra note 27, at 64, 145. In 1907, when Oklahoma became part of the United States, the Oklahoma Choctaw lost their right to govern themselves. Kidwell, supra note 32, at 121. The Mississippi Choctaw were also impacted by the shift of Oklahoma from the Indian Territory to a state in the early 1900s. Peterson, supra note 58, at 141. In preparation for this event, the Dawes Commission, established in 1893, began efforts to bring the tribe into conformity with the Act. Id. The Commission sought to induce those Choctaws still living in Mississippi to move to Oklahoma by allowing them to participate in the land-allocation agreement under the same terms as the Oklahoma Choctaw. Id. The resulting migration of entire communities of Choctaw—who sold their churches and moved as a group—completely disrupted Choctaw society in Mississippi and Oklahoma. Id. Arriving in Oklahoma, many did not receive their land as promised or were unable to keep the land they did receive. Id. Therefore many returned to Mississippi. Id. For those Choctaw who had chosen to remain in Mississippi, their communities were decimated by the disruption. Id. Indeed, those who returned faced communities in which many of their churches and schools had been abandoned. Id. A 1917 influenza epidemic further damaged the community. Id.
115. KEHOE, supra note 1, at 188.
116. See MCKEE & SCHLENKER, supra note 27, at 157 ("The traditional Choctaw social organization had become modified tremendously as the Choctaws separated into two distinct units, one in Mississippi and the other in Oklahoma."); Kidwell, supra note 32, at 121.
117. Treaty with the Choctaw, supra note 106, at arts. 13, 14; ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 32, at 121.

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Mississippi Choctaw were subjected to repeated attempts to persuade them to leave their land and move west. Indeed, such removal efforts continued until the 1850s. Moreover, while many Choctaws attempted to register as required, very few actually received their land titles. Instead, they became squatters on marginal land that was often owned by investors residing in other states.

More changes came as the tribe increasingly came under the control of the U.S. legal system. Indeed, the Treaty of Dancing Rabbit Creek stipulated the circumstances in which U.S. law extended over Choctaw territory. Although the treaty granted the Choctaw the “jurisdiction and government of all the persons and property . . . within their territory,” it also brought them under the authority of U.S. laws, by stipulating that criminal offenses perpetrated by Choctaw against non-Choctaw were to be tried under the jurisdiction and laws of the United States. These changes in legal structures affected Oklahoma Choctaw kinship systems. For instance, once tribal courts, instead of the deceased’s clan, became responsible for punishing murder, clan membership became less important than tribal membership, and the role of the moiety declined.

While the major changes appear to have occurred after the Choctaws’ forced migration to the West, some changes most likely occurred earlier. For instance, even before the 1831 removal, Christian missionaries migrating into the Choctaw region had begun to influence the Choctaw kinship system, particularly its matrilineal basis. While the clan-based system did continue, the traditional matrilineal system was under increasing pressure to change. For instance, missionaries promoted the notion that men, rather than women, were the head of the family. They also instigated the use of English

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118. Peterson, supra note 58, at 141; McKee & Schlenker, supra note 27, at 76, 157.
119. Peterson, supra note 58, at 140.
120. Kidwell, supra note 32, at 121; McKee & Schlenker, supra note 27, at 76.
121. Peterson, supra note 58, at 140.
122. See Treaty with the Choctaw, supra note 106, at arts. 4-10.
123. See id. at arts. 4, 6; Documents of United States Indian Policy, supra note 84, at 54.
124. Spoehr, supra note 33, at 209.
125. McKee & Schlenker, supra note 27, at 65-66 (“The early missionaries, who were particularly concerned about the fact that under the matrilineal system of inheritance the women worked in the fields and the father was not responsible for his children, introduced the idea that the man should be the head of the family.”).
126. Id. at 66, 73 (“[T]he push was on for a change from a matrilineal to a patrilineal society.”).
127. Id. at 73.
names. New schools were developed, which the United States hoped would help assimilate Choctaw children into Anglo culture. Consequently, fathers increasingly became responsible for their children's education, taking over the traditional role of the mother's brother. Nevertheless, the tribe's traditional kinship system was still being practiced by the Choctaw until the removal period.

Further, as more and more Europeans migrated into the Choctaw territory in the eighteenth century, they began to intermarry with Choctaws. The increase in intermarriage eroded the clan-based social system by disrupting the pre-contact system of family relationships and reducing the importance of the clan in social organization and selection of tribal leaders. By the end of the eighteenth century, the traditional clan system was being eroded; it was during this time period that the moieties of the pre-contact period disappeared.

Mixed-blood offspring also affected the political structure of the tribe. In the early 1800s a struggle for the leadership of the tribe occurred between a mixed-blood Choctaw, David Folsom, and a full-blooded Choctaw chief, Mushulatubbee. Leadership was eventually passed to Greenwood LeFlore, a mixed-blood Choctaw. A supporter of Christian missionaries and education, LeFlore instituted a number of changes to the political traditions of the Choctaw. Under his leadership, the Tribal Council adopted a written constitution and an elected, representative government. Most dramatic was the change in the form of government: LeFlore became sole leader of the tribe, replacing the traditional leadership pattern of a three-member chief council.

128. Id.
129. Kidwell, supra note 32, at 120.
130. See McKee & Schlenker, supra note 27, at 73 (“Parents also began to acquire more control over the rearing and education of the children, whereas the maternal uncle had assumed this responsibility in the past.”).
132. McKee & Schlenker, supra note 27, at 48.
134. McKee & Schlenker, supra note 27, at 47.
135. Kidwell, supra note 32, at 120 (“A power struggle broke out in the northeast district of the tribe between David Folsom, son of a Scotch Irish father and a Choctaw mother, and Mushulatubbee, the last of the full-blood chiefs of the tribe.”).
136. Kidwell, supra note 32, at 120.
137. Id.
138. Id.
139. McKee & Schlenker, supra note 27, at 61; Kidwell, supra note 32, at 120.
Moreover, it was in the midst of the disruption these changes engendered that the Treaty of Dancing Rabbit Creek was signed, in which the Choctaw agreed to relocate to Oklahoma. While it is true that this removal period represented "the most dramatic and dynamic [event] in Choctaw cultural and social history," it does not completely explain the dramatic change to Choctaw social structure found by anthropologist Fred Eggan in his study of the Five Civilized Tribes. Rather, the continued imposition of U.S. law on the Choctaw culture further altered the tribe's kinship and social structure.

B. Allotment and the End of Treaty Making

It was not just simply the disruption of removal and the geographic division of the tribe that brought about the changes to the Choctaw social structure. Rather, U.S. laws—imposed from without—caused further changes by seeking to end tribal practices such as holding land in common and matrilineal inheritance.

In 1871, Congress suspended treaty making between the United States and the various tribes. While treaty making had not always benefitted the tribes, it did at least recognize the tribes' right to some measure of input in their own governance by tacitly recognizing the tribes' authority to negotiate treaty terms that would govern U.S.-tribal relations. In contrast, under the new congressional policy, "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Consequently, Congress began to deal with tribes only by passing legislation, with or without tribal input.

140. Kidwell, supra note 32, at 121 (explaining that Treaty of Dancing Rabbit Creek provided that Choctaw who did not wish to relocate could remain in Mississippi provided they registered with a government agent for an allotment of land and received title to the land; they would be deemed citizens of Mississippi); KEHOE, supra note 1, at 201.
141. McKee & Schlenker, supra note 27, at 145.
142. Indian Appropriation Act, ch. 120, 16 Stat. 544, 545 (1871); see also Antoine v. Washington, 420 U.S. 194, 203 (1975) (explaining that after 1871 Act, relations between Indians and Congress would be governed by statutes, not treaties, and that the Act did not affect Congress's plenary power over tribes).
143. Indian Appropriation Act, ch. 120, 16 Stat. 544, 566 (1871); see also Note, Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right, 69 YALE L.J. 627, 628-29 (1960) (noting that after end of treaty making period, reservations were created by executive order until 1919, when Congress prohibited any further executive-order reservations).
144. Deloria & Lytle, supra note 18, at 5. This change was somewhat cosmetic: Treaty-making still continued until 1914, although these treaties "had to be called 'agreements' when being presented [to Congress] for ratification." Id.
In keeping with this new policy, Congress next sought to end the tribal practice of holding land in common. In 1887, Congress passed the General Allotment Act.\(^{145}\) Also known as the Dawes Act, it divided communally held lands into individual allotments and gave individuals title to a portion of the land as private property.\(^{146}\) This pattern of land holding was more in conformity with European and U.S. legal traditions and their emphasis on individual rights.\(^{147}\) However, the Act excluded the Choctaw (as well as the other Five Civilized Tribes) from its provisions, and the Choctaw continued communal ownership for a time.\(^{148}\)

To address this inconsistency, Congress authorized a commission to negotiate with each of these tribes to bring them into conformity with the allotment policy.\(^{149}\) The commission hoped to encourage the tribes to abandon self-government and to induce the Mississippi Choctaw to relocate to Oklahoma.\(^{150}\) A decade after the Dawes Act, the Atoka Agreement was signed providing for allotment of the Choctaw land.\(^{151}\)

The purpose of allotment was to consciously destroy tribalism and to assimilate American Indians by urging them to learn "proper" business practices and farming.\(^{152}\) It was also designed to eliminate the tradition of


\(^{147}\) See id. A further problem with the Act is that it provided that allotments were to pass by will, but Indians were deemed incompetent to create wills. Douglas Nash & Cecelia Burke, *Passing Title to Tribal Lands: Existing Federal and Emerging Tribal Probate Codes*, ADVOCATE, May 2007, at 26, 26, available at http://isb.idaho.gov/pdf/advocate/adv07may.pdf.

\(^{148}\) Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 273, 293 & n.143 (1997); see also Roy Gittinger, *The Formation of the State of Oklahoma, 1803-1906*, at 169 (1917) ("[The Dawes Act] was drawn so that it did not apply to . . . the Indians of the Five Civilized Tribes. These latter were the most advanced and most nearly ready of all for such a policy but they were known to be bitterly opposed to any change in their organization.").

\(^{149}\) McKee & Schlenker, *supra* note 27, at 93 (describing purpose of Dawes Act as "encourag[ing] the abandonment of Indian self-government among the Five Civilized Tribes in Oklahoma in order to clear the way for Oklahoma statehood").

\(^{150}\) *Id.* at 95.

\(^{151}\) The Curtis Act established the manner in which the lands of the Oklahoma Choctaw were to be divided and the eligibility for tribal membership and allotment. Curtis Act, ch. 517, 30 Stat. 495 (1898); McKee & Schlenker, *supra* note 27, at 95. The Atoka Agreement was incorporated into the Curtis Act. 30 Stat. at 495-96; see also Choate v. Trapp, 224 U.S. 665, 668 (1912).

\(^{152}\) Angela R. Riley, *Tribal Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 846-47
holding land in common. 153 It was hoped that allotment would "solve the problems of the Indians in one generation," as the effect of ownership of private property would impel the native person into a "'civilized' state." 154 This assimilation was to take place within the twenty-five year period set by the Dawes Act. 155 After an allottee demonstrated his capacity to fulfill the Act's assimilationist goals, the title to the land would be given to him. 156 Once this occurred, the allotted land lost its status as "Indian land" and, thus, could be bought or sold without the restrictions of the Trade and Intercourse Act. 157 Further, the allottee would become a citizen and would come under the jurisdiction of the state in which the allottee resided. 158 In situations where allottees refused to work their allotments, government agents were instructed to withhold rations and annuities provided for in the Act. 159

For the Choctaw, the allotment period further eroded the matrilineal kinship system by emphasizing the Anglo model of marriage and inheritance. 160


154. See DELORIA & LYTLE, supra note 18, at 9; see also Cobell v. Norton, 283 F. Supp. 2d 66, 75 (D.D.C. 2003) ("[A] key assumption of the government's allotment policy was that 'Indians wanted to become farmers and had the capacity to do so. This policy assumed that the routine work of agriculture would provide the necessary training in thrifty habits that all 'civilized' people possessed.'") (quoting DELORIA & LYTLE, supra note 18, at 9-10).

155. Dawes Act § 5, ch. 119, 24 Stat. 388, 389-90 (1887); see Cobell, 283 F. Supp. 2d at 74-75 ("'They were so confident in this assimilation policy that there was actually a sunset in most of the allotment agreements that said after 25 years the trust patents will be withdrawn, you'll be issued a fee patent, each individual who owned this land, and you will go forth and prosper. You will own the land outright, and may do with it what you wish.'"); History of the Allotment Policy: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 428-85 (1934) (statement of Delos Sacket Otis), reprinted in DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 166 (5th ed. 2005); DELORIA & LYTLE, supra note 18, at 9. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, supra note 24, at 81.

156. Dawes Act §§ 5-6, 24 Stat. at 389-90; see DELORIA & LYTLE, supra note 18, at 9; see also Cobell, 283 F. Supp. 2d at 75.


159. DELORIA & LYTLE, supra note 18, at 10.

Unlike the matrilineal Choctaw, U.S. laws echoed the patrilineal-focused ideology promoted by Christian missionaries by emphasizing patrilineal descent in inheritance. Specifically, the Dawes Act divided reservation land into parcels to be distributed to tribal members. The act spelled out a formula for this distribution, one in which "each head of a family" was given one-quarter section; orphans under age eighteen and each single person over eighteen years of age was given one-eighth of a section; and children under eighteen were given one-sixteenth of a section.

Inheritance of the land was to be based on the laws of descent and inheritance in the state or territory in which the land was located. For instance, under the General Allotment Act, Kansas's laws regulating descent—not the traditions of the tribes—were to apply to Indian Territory lands allotted under the Act. Although the Dawes Act did not apply to the Choctaw, its provisions were considered to apply to land allotted under specific provisions applying to the tribe. Because the Choctaw's traditional system did not convey property according to the European patrilineal model, that system had to adapt to the Act's constraints.

To bring the Choctaw into conformity with European values, "new regulations regarding the land were introduced that emphasized the position

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161. See supra text accompanying notes 125-31.
162. McKee & Schlenker, supra note 27, at 142.
165. 25 U.S.C. § 348; Jefferson v. Fink, 247 U.S. 288, 290 (1918). Initially, allotments to individuals permitted descent according to tribal tradition. Id. However, this approach was later rejected in favor of following state law. Id. The Supreme Court explained that this change was warranted "because the tribal laws and usages were generally crude and often difficult of ascertainment." Id. Presumably, following the vagaries of state laws of inheritance was equally as difficult for the tribes.
167. See Peoria Tribe Band of Indians v. Wea Townsite Co., 117 F.2d 940, 942 (10th Cir. 1941) (“The General Allotment Act, 25 U.S.C.A. § 348, provided that the laws of the state of Kansas regulating descent should apply to all lands in the Indian Territory allotted under the provisions thereof.”); see also Peter Nicholas, American Style Justice in No Man’s Land, GA. L. REV. 895, 1050-51 (2002).
168. See Jefferson, 247 U.S. at 290 (“True, that act has no direct application to the lands of the Five Civilized Tribes, . . . but it does throw much light on what was intended by the subsequent legislation relating to the descent of those lands when allotted.”)
of the man as head of the family. Marriage was regulated by law, widows were entitled to dower rights, and children could inherit their father’s estate." 169 While the law respected native marriage customs by conferring “legitimacy” on their offspring, it established a patrilineal model by asserting that the offspring were to be considered descendants of their father. 170 This model was at odds with Choctaw practice, in which kin was traced through the mother’s lineage, and the mother’s brother was responsible for the welfare of his sister’s children. 171

The emphasis on the father’s lineage in inheritance strengthened the relationship between a father and his children. Consequently, the relationship between a mother and her children was weakened, as was the relationship between her children and her brother. 172 As the responsibilities traditionally associated with mother’s brother were taken over by her children’s father, the role of mother’s brother in the matrilineage was diminished. 173 For instance, the emphasis on patrilineal inheritance eliminated a brother’s importance in supporting his sister’s children, while a reliance on mission schools diminished his importance in educating and in transmitting the tribe’s culture to these children. 174 Instead, his support and educational responsibility shifted to his patrilineal offspring, and the importance of the matrilineage declined. 175

Since matrilineage formed the basis of the clan system, the change to a patrilineal model also impacted the importance of the clan in the Choctaw social and political structure. 176 As inheritance came to be reckoned through the father, the traditional Choctaw matrilineal descent was weakened. 177 This change to a patrilineal inheritance transformed the clan structure into a territorial structure. 178 Selections of chiefs were no longer based on inheritance, but instead leaders were elected by the adult males of the community. 179

Allotment also changed the face of Choctaw communities. After the Civil War, the Choctaw emerged as sharecroppers on their former lands, “sustaining

169. EGGAN, supra note 28, at 29.
171. See MCKEE & SCHLENKER, supra note 27, at 29.
172. Id. at 73.
173. Eggan, supra note 31, at 34, 50.
174. MCKEE & SCHLENKER, supra note 27, at 100.
175. EGGAN, supra note 28, at 29.
176. See id.
177. See MCKEE & SCHLENKER, supra note 27, at 73.
178. Id.
179. EGGAN, supra note 28, at 29.
their communities through traditional stickball games, funeral ceremonies, and attendance at church ceremonies, where Choctaw ministers preached in their language and where they could sing their hymns in Choctaw. In addition, the rural Christian church emerged as an important component of the Choctaw community in the 1880s, and by the 1890s schools were established, most of which were housed in church buildings. The education of Choctaw children shifted from the extended family to church-based schools. As their communities came to be centered on churches and schools, the Choctaw community came to resemble the community patterns of other Anglo rural groups in the area. Moreover, as the importance of the church rose, its activities replaced traditional rituals.

C. The End of Allotment and Self-Determination

The allotment period ended in 1934 when Congress passed the Indian Reorganization Act (IRA). In addition to ending the allotment of tribal lands, the Act allowed the tribes to adopt their own constitutions and bylaws—which had to be submitted for federal approval—and to form tribal governments. The expectation was that the tribal government would take over governance of the tribe, performing duties previously performed by the federal Bureau of Indian Affairs. Although the Act contained many provisions for tribal self-governance, the new constitutions were based on a U.S. model of democracy that did not take into account traditional cultural methods. Further, the organization of tribal governments was subject to the

181. Peterson, supra note 58, at 140.
182. See id. at 140-41 ("By the 1880s the rural church was emerging as an important institution in the Choctaw communities . . . by the 1890s schools were established in most Choctaw communities . . . as rural communities centered around their own churches and schools.").
183. Id. at 141.
184. EGGAN, supra note 28, at 29.
187. See Id. § 476.
188. See id.; DELORIA & LYTLE, supra note 18, at 5 ("Familiar cultural groupings and methods of choosing leadership gave way to the more abstract principles of American democracy, which [view] people as interchangeable and communities as geographical marks on a map. . . . Although there were some variations, in general the new tribal constitutions and bylaws were standardized and largely followed the Anglo-American system of organizing people.").
approval of the U.S. Secretary of the Interior.\textsuperscript{189}

Many tribes resented the continued federal involvement in their local government and others challenged the Act's imposition of an Anglo-American governing model on the tribes at the expense of their traditional practices.\textsuperscript{190} Indeed, the new constitutions drafted in compliance with the IRA were, for many tribes, an unrecognizable form of government.\textsuperscript{191} Rather than reliance on kin and geography, the new constitutions were based on abstract principles of democracy preferred by Anglo-Americans.\textsuperscript{192} Further exacerbating the problem was that—after the disruption instigated by the allotment policies—many of the tribes had no experience with self-government according to their own traditions.\textsuperscript{193}

Although others opposed it, the Mississippi Choctaw supported IRA's passage.\textsuperscript{194} In 1945, the tribe was recognized as a tribal nation.\textsuperscript{195} With this recognition, the tribe reestablished its government and created a written constitution and bylaws, which were approved by the U.S. Secretary of the Interior on May 22, 1945.\textsuperscript{196} Under this constitution, the tribal government was comprised of a sixteen-member Tribal Council, representing each of the seven communities, and an elected chief.\textsuperscript{197} In the 1960s, the tribe took steps toward self-determination with programs aimed at increasing economic development, adult education and job training, tribal law enforcement, as well as building coalitions with neighboring tribes to advocate on behalf of tribal interests.\textsuperscript{198} Judicial recognition of the Mississippi Choctaw came in 1978.\textsuperscript{199}

\textsuperscript{190} DELORIA & LYTLE, supra note 18, at 15; see also Julie Ann Fishel, United States Called to Task on Indigenous Rights: The Western Shoshone Struggle and Success at the International Level, 31 AM. INDIAN L. REV. 619, 638 (2006-2007).
\textsuperscript{191} DELORIA & LYTLE, supra note 18, at 15.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
Unfortunately, the promise the Choctaw saw in the IRA had little time to fulfill itself. United States involvement in World War II meant a restriction of budgets during and after the conflict. Consequently, the United States sought to cut its expenditures. Further, it sought to rid itself of race laws that, in the aftermath of World War II, were considered too restrictive. From these dual efforts a new attitude toward Anglo-Native relations appeared, one which called for termination of federal assistance to native tribes. The termination period, which began in 1953, was designed to end the federal-tribal relationship. Instead, the United States sought to destroy tribes as separate political entities by abolishing tribal reservations and tribal rights, thereby scattering individual tribal members in an effort to assimilate them into broader society. Ultimately, more than one hundred tribes were terminated or stripped of their federally recognized tribal status.

While many tribes welcomed the idea of self-government, they did not want an end to the status of tribes as separate legal entities, and most viewed the termination actions of Congress as detrimental. However, American Indians did accrue some benefits during the termination period. For instance, the same Congress that passed Resolution 108 included reservation land in the newly created federal education programs of 1950 that targeted federal money for school construction and other assistance programs. Somewhat contrary to
Congress's stated aim of reducing federal involvement in American Indian affairs, the government became increasingly involved in Indian education.\textsuperscript{209}

The Choctaw had mixed success during the termination period. Though the tribe was not terminated, voluntary removal of Choctaw from Mississippi was taking place in the 1960s in response to the poor economic and educational conditions of the tribe.\textsuperscript{210} At that time, more than half the population lived on trust land; one-third of the heads of households were unemployed, and one-third worked as temporary day laborers.\textsuperscript{211} A high school for Choctaw teens was not completed until 1964, and few Choctaw were educated enough to compete for more than menial jobs.\textsuperscript{212} Individual members of the tribe began attempts at relocation, but most returned, unable to compete in the larger marketplace.\textsuperscript{213} The Bureau of Indian Affairs began a relocation training program in the late 1960s in which ten percent of the tribe's population enrolled.\textsuperscript{214} This program, paired with the unstructured relocation, meant that close to one-third of the tribe's members were leaving the reservation area.\textsuperscript{215}

This pattern began to change in the late 1960s as the first students began to graduate from the new high school.\textsuperscript{216} Especially important was the passage of the federal Civil Rights Act, which opened up jobs to Choctaws that had previously been denied them by segregation laws.\textsuperscript{217} Along with these changes, the Choctaw government began a massive economic renewal project.\textsuperscript{218} As a result of this project, the Choctaw were able to provide a variety of needed services to the community.\textsuperscript{219} As these improvements developed, the tribal government started seeking a more active role.\textsuperscript{220} Ultimately, the tribal government established control of tribal operations and

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\item \textsuperscript{209} See Peterson, supra note 58, at 143.
\item \textsuperscript{210} See id. ("It seemed as if a third Choctaw removal was underway, this time by individual choice and economic necessity.").
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Id. at 142.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id. at 142-43.
\item \textsuperscript{215} Id. at 143.
\item \textsuperscript{216} Id.
\item \textsuperscript{218} Peterson, supra note 58, at 144.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id.
\end{itemize}
formed a consolidated tribal government that provided the majority of services on the reservation.\footnote{221. Id. at 146. Under control of the tribal government, the Choctaw have undergone a rapid economic expansion. In 1979 the tribe began to focus on economic development. In the early to mid-1980s, this effort took the form of industrial production in which the tribe has "[built] an industrial enterprise based on centralized financial strength of a tribal government and related tribally owned enterprises." Id. at 157. Thirty years later, the Mississippi Band of Choctaw Indians was one of the largest employers in the State of Mississippi. Deborah Boykin, \textit{Choctaw Indians in the 21st Century}, MISS. HIST. NOW, http://mshistory.k12.ms.us/articles/10/choctaw-indians-in-the-21st-century (last visited July 21, 2009).}

In 1970, President Richard Nixon repudiated termination as "morally and legally unacceptable" and asked Congress to enact a concurrent resolution to "expressly renounce, repudiate and repeal the termination policy."\footnote{222. H.R. Doc. No. 91-363, at 3 (1970). Twelve years earlier, the Secretary of the Interior had announced that no federal tribe would be terminated without the Department's consent. \textit{Special Subcomm. on Indian Education, Comm. on Labor and Public Welfare, Indian Education: A National Tragedy—A National Challenge}, S. Rep. No. 91-501, at 14 (1969); \textit{see also} Daniel M. Rosenfelt, \textit{Indian Schools and Community Control}, 25 STAN. L. REV. 489, 501 (1973). That announcement, however, was not a formal end to House Resolution 108, which remained the official policy of Congress and continued to be cited by proponents of termination during the 1960s. \textit{Deloria & Lytle, supra} note 18, at 20. Despite the termination policy, the decade saw the passage of a variety of laws considered beneficial to the tribes. For example, in 1968, Congress passed the Indian Civil Rights Act (ICRA). 25 U.S.C. §§ 1301-1303 (2006). This act created a model code to govern judicial proceedings conducted by tribal courts, including extending federal constitutional protections to any individual tried for an offense by a tribal court. \textit{Id.} § 1311. In repudiation of Public Law 280, the Act also required tribal consent be given before any state claimed jurisdiction over tribal civil or criminal proceedings. \textit{See id.} § 1326. Nevertheless, the ICRA has also been viewed as another attempt to fit tribal governance into an Anglo model.}


One Step Forward: The Indian Child Welfare Act

From initial contact until the time of ICWA's passage, U.S. policy toward American Indians had stressed termination and assimilation. Laws concerning American Indian tribes not only reflected that policy, but they also helped put
it into practice as the United States began to apply laws designed by Euro-Americans to American Indian tribes. The tribes were rarely, if ever, consulted in the construction of such laws, despite the impact on their lives. In the case of the Choctaw, changes in their traditional kinship system—especially the change from a matrilineal to a patrilineal descent pattern—aptly demonstrates the effect of these laws on their culture.224

At the time of ICWA’s passage, however, Congress had begun to stress a policy of self-determination and economic expansion regarding American Indian tribes. Laws passed in that era incorporated this policy and afforded American Indian tribes a greater level of involvement in the creation of laws that concern them. Because it opened the way for tribes to live by their own cultural norms, ICWA has been described as “one of the few pro-Indian laws ever passed.”225 Rather than focus on an Anglo model, ICWA emphasizes the tribe’s competency to make adoption decisions with respect to tribal children.

When Congress began hearings on ICWA, it gave the Choctaw an opportunity to have input into legislation that would directly affect both the tribe and its families. Mississippi Choctaw Chief Calvin Isaac used this opportunity to testify to the impact U.S. policies have had on native tribes.

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously

224. While this change can be seen as an adaptation, there is also reason to believe that this was not necessarily complete acquiescence. Indeed, it is important to recognize that the culture of the Mississippi Choctaw remains dynamic and distinct. Although the Choctaw have been greatly affected—both politically and culturally—by their contact with Euro-Americans, the survival of their culture is proof of their perseverance in the face of laws at odds with, or ignorant of, their cultural traditions, values, and beliefs. The Choctaw continue to speak their own language and to practice their own unique cultural traditions. While their culture continues to change, the Choctaw “today are closer to establishing greater control over their own affairs since removal and dissolution of their nation.” McKee & Schlenker, supra note 27, at 194. For instance, although the Choctaw have adopted a nuclear family model, they have also shaped this model to fit their particular culture by augmenting the nuclear family with an extended kin network that holds the local community together in much the same way the clan system held communities together before European contact. Id. at 189-90. Moreover, more recent Choctaw history demonstrates that tribal sovereignty and self-determination is a pathway to tribal success. See Fergus M. Bordewich, Killing the White Man’s Indian 302-33 (1997) (describing economic success of Choctaw as example of how and why self-determination is critical to tribal survival).

undercut the tribe’s ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.226

When viewed within the context of the effect U.S. law has had on Choctaw kinship structures, it is understandable why ICWA is considered so important to the survival of the tribe. Chief Isaac’s testimony before Congress on the importance of ICWA to the integrity of native tribes is echoed in the text of ICWA and has been repeated in countless journal articles.

After four years of testimony and hearings, Congress passed ICWA in 1978, declaring that U.S. policy was “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”227 ICWA was to establish standards for the removal of Indian children that would “reflect the unique values of Indian culture” and provide “assistance to Indian tribes in the operation of child and family service programs.”228

In passing ICWA, Congress was reacting to a long history of forced removal of American Indian children from their families and tribes by non-tribal public and private agencies.229 Beginning in 1869, the United States had instituted a policy in which thousands of Indian children were removed from their homes, families, and tribes and sent to boarding schools run by missionaries and government officials.230 By 1887, more than two hundred such schools had been established.231 While in these boarding schools, Indian children were given European names and forbidden to speak their own language or to receive visits from their families.232 Their personal belongings and clothes were taken from them, and they were barred from practicing their

228. Id.
229. DOCUMENTS OF UNITED STATES INDIAN POLICY, supra note 84, at 294.
232. See Davis, supra note 230, at 438-39; DELORIA & LYTLE, supra note 18, at 240-44.
religion and culture. Effectively cut off from their culture, many of these children never returned to their families and were lost to their tribe.

The removal of children continued in one form or another until the 1978 passage of ICWA. Indeed, in the year before ICWA's passage, a minimum of twenty-five percent of American Indian children were in foster care, adoptive homes, or boarding schools, and this rate was five to twenty-five times higher than the average for non-native children. In some states, the rate of removal was much higher. For instance, in the State of Washington, native children were removed at a rate 1600% greater than non-native children. A 1969 survey of sixteen states found that eighty-five percent of native children living in foster care were living in non-native homes. Although specific statistics on the Mississippi Choctaw are not available, it is hard to imagine—given the high rates of removal in other tribes—they were not equally affected.

Given these rates of removal, Congress recognized that the future existence of American Indian tribes depended on keeping their children in the tribe and sought to establish minimum standards for any future removal of American Indian children and for their placement in foster or adoptive homes. ICWA established tribal court jurisdiction over child custody proceedings for any child domiciled on tribal lands and limited the ability of states to intervene. While the primary purpose of ICWA was to protect families from the involuntary removal of their children, ICWA also includes provisions for tribal

233. See Davis, supra note 230, at 438.
236. Id. at 16.
237. Id. at 15.
238. See H.R. REP. NO. 95-1386, at 11 (1978) (describing disproportionate removal of Indian children from their families and blaming state courts and "social workers, ignorant of Indian cultural values and social norms [for making] decisions that are wholly inappropriate in the context of Indian family life").
239. See 25 U.S.C § 1911 (2006). Although ICWA establishes a list of preference in placement, nothing in ICWA prevents inter-ethnic adoption, rather it assigns jurisdiction to tribal, not state, governments. Id. § 1915(a). Thus, ICWA's preferences for placement should be read as an effort to keep the child in the tribe, not of prohibiting non-tribal adoption. In other words, ICWA does not preclude the adoption of native children by non-native persons. Rather it protects tribal jurisdiction over the adoption by recognizing the tribal courts' competency to make custodial determinations based on their own culture and history. See Holyfield v. Mississippi Band of Choctaw Indians, 490 U.S. 30, 53 (1989).
jurisdiction over voluntary adoptions. The inclusion of such language indicates that Congress intended to have broader implications than stopping involuntary removal. Aside from providing these needed protections, Congress sought to incorporate the extended family concept and the group-centered values of the native tribes, balancing individual and collective rights against European and American Indian legal values.

American Indian children are traditionally raised within the context of the entire tribe and not limited to their immediate family. As noted above, one value common to most tribes is greater emphasis placed on the tribe over the individual members. Generally, "Indian cultures focus on the collective rights of the community, permitting individual rights to bow more readily to the needs of the community." The result is "a world view and a concept of group identity which create a culture within a culture, the values of which are unknown, unnoticed, or unrecognized by those who are unacquainted with tribal customs." From this tradition, American Indians are likely to identify themselves as "part of the larger cultural group, not as completely autonomous individuals." Such a holistic culture creates an extended familial obligation in which those tribal members with child-rearing obligations are responsible for all the tribes' children, not just their biological kin.

As Senator James Abourezk noted at the conclusion of the 1974 Senate hearings, it is because of the extended family concept that "in Indian

244. Id. at 7-8 ("[M]any American Indians perceive themselves as part of the larger cultural group, not as completely autonomous individuals. Every child belongs to both its 'nuclear' family and to the tribe. Prior to the arrival of Anglo-Europeans in North America, an orphaned child was virtually unheard of in Indian tribal societies.")
245. Id. at 1.
communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or a friend will take that child in.”249 Caretakers can include aunts, uncles, and grandparents as well as great-aunts, great-uncles, and cousins.250 For example, among the Choctaw, the words for mother and father are not used in reference only to one’s biological parents.251 These terms are also used to refer to a child’s father’s sisters, mother’s brothers, as well as other relatives.252 Despite changes to the Choctaw kinship system, remnants of the traditional structure are still present and extended kinship remains an important underlying structure of the local community.253

This extended kin concept was not always understood or accepted by state welfare workers.254 At the time of ICWA’s passage, few removals occurred as a result of physical abuse of the child.255 Rather, cultural differences and bias appear to have significantly influenced the removal of American Indian children.256 Many judges and social workers simply did not comprehend or appreciate the value American Indians placed on the holistic tribe and extended kin.257 Indeed, tribal leaders pointed out that removals occurred because a social worker or judge presumed neglect when childcare was performed by a member of the child’s extended family outside the child’s nuclear family.258 Neglect, social deprivation, and “vague allegations that


250. JONES, supra note 248, at 5-6.

251. Swanton, supra note 39, at 85.


253. MCKEE & SCHLENKER, supra note 27, at 189-90.

254. See H.R. REP. NO. 95-1386, supra note 238, at 11 (blaming disproportionate removal of Indian children from their families in part on state courts’ and social workers’ ignorance of Indian cultural values and social norms).

255. In two studies conducted at the time, abuse was cited as the reason for removal in one percent of the cases. See Wilson, supra note 252, at 846 n.5.

256. For example, social workers often cited alcohol abuse as a reason for removal, yet in those areas “where Indian and non-Indian alcoholism rates were equivalent, children were more often removed from the Indian parents.” Id.; see also H.R. REP. NO. 95-1386, supra note 238, at 11.

257. Goldsmith, supra note 243, at 7-8 (“[M]any American Indians perceive themselves as part of the larger cultural group, not as completely autonomous individuals. Every child belongs to both its ‘nuclear’ family and to the tribe. Prior to the arrival of Anglo-Europeans in North America, an orphaned child was virtually unheard of in Indian tribal societies.”).

258. See Annette Ruth Appell, Uneasy Tensions Between Children’s Rights and Civil Rights,
children suffered psychological damage as a result of living with their parents were also offered as a basis for removing children from their families and placing them outside the tribe.\textsuperscript{259} This "culture clash" is perhaps best exemplified by the surprised reaction elicited from tribal communities when non-tribal courts asserted that care givers the tribal community considered "adequate or even excellent" were unfit and cited that unfitness as justification for the removal.\textsuperscript{260}

ICWA addresses this problem by including language that incorporates the extended family concept.\textsuperscript{261} Specifically, the Act requires that notice of any custody proceeding be given to the child's tribe and parent(s) or "Indian custodian."\textsuperscript{262} ICWA defines an "Indian custodian [as] any Indian person who has legal custody of an Indian child under tribal law or custom or State law or to whom temporary physical care, custody and control has been transferred by the parent of such child."\textsuperscript{263} ICWA further defines "extended family member [to include one] defined by the law or custom of the Indian child's tribe or, in the absence of such a law or custom . . . a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or step-parent."\textsuperscript{264}

In further recognition of tribal values, Congress included language giving the tribe a separate interest and voice in adoption proceedings, asserting that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."\textsuperscript{265} Further, ICWA notes the states' failure to "recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."\textsuperscript{266} As a result, the tribe has the legal standing to intervene in or even oppose an adoption for

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\footnote{\textit{Nev. L.J.} 141, 145 (2004) ("In contrast to dominant mainstream cultural norms of nuclear families and individual rights, the ICWA was designed to protect Native American expansive conceptions of family, conceptions that did not include the notion of termination or transfer of parental rights.").}
\footnote{Wilson, \textit{supra} note 252, at 846.}
\footnote{Id.}
\footnote{Id. \textit{supra} note 258, at 145.}
\footnote{25 U.S.C. § 1913(a) (2006).}
\footnote{ld. § 1903(6).}
\footnote{ld. § 1903(2).}
\footnote{ld. § 1901(3); \textit{see also} Appell, \textit{supra} note 258, at 145 ("ICWA was a culturally sensitive attempt to preserve Native American cultures through their most important resource—Indian children.").}
\footnote{25 U.S.C. § 1901(5).}
\end{footnotes}
its own benefit. In fact, the Act’s dual purpose—protecting the “best interests of Indian children” and promoting “stability and security of Indian tribes and families”—means the best interests of the child include maintaining the stability of the tribe and, therefore, placing Indian children with tribal members is in the best interest of those children.267 This conception of “the best interests of the child” may be at odds with the view in “the non-native social work community” that “emphasizes the importance of a child’s psychological bonding with at least one adult who is perceived by that child as his or her psychological parent.”268 However, by including such language, Congress allowed ICWA to reflect American Indians’ valuation of tribal community over individual rights in making custody determinations that involve Indian children.

One area where ICWA has generated some confusion has been with respect to which children ICWA applies. ICWA grants tribal courts exclusive jurisdiction over “any child custody269 proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe.”270 When children are not domiciled on tribal land, tribal jurisdiction is concurrent with the state court.271 However, ICWA expresses a preference that state courts transfer the proceeding to the tribal court—absent any “good cause” for the state to retain jurisdiction and as long as the parents do not object to the transfer—regardless of the child’s place of residence.272 Although jurisdiction is determined by the American Indian child’s place of residence, or domicile, ICWA fails to define what is implied by the word “domicile.”273 For American Indians, “geographical limits of words like ‘domicile’ and ‘residence’ are not as important . . . as the child’s membership in the tribe.”274 The Supreme Court took up this issue in 1989 in Mississippi Band of Choctaw Indians v. Holyfield, the Court’s only decision to date directly addressing ICWA.275

267. Appell, supra note 258, at 145 (“ICWA, through its promotion of parental rights and tribal sovereignty, aims to protect the very civil existence of Native Americans and tribal governance.”); Wilson, supra note 252, at 848.
268. JONES, supra note 248, at 5-6.
269. “Child custody proceedings” are defined in the act to include foster care placements, terminations of parental rights, pre-adoption and adoption placements. 25 U.S.C. § 1903(1).
270. Id. § 1911(a).
271. Id. § 1911(b).
273. See Holyfield, 490 U.S. at 43.
274. Wilson, supra note 252, at 849.
275. See Holyfield, 490 U.S. at 43.
Holyfield involved the adoption of twins born to an unmarried couple, both of whom were enrolled members of the Choctaw Indian tribe. Although both parents lived on the Choctaw reservation, the twins were born two hundred miles from the reservation, the mother having traveled so as to evade tribal-court jurisdiction. Both parents gave their consent to an adoption by a non-native couple. The adoption was conducted without reference to ICWA or the children’s Choctaw status. Relying on ICWA, the tribe intervened to assert its jurisdiction over the adoption proceeding. The state court held that the tribal court lacked jurisdiction because the mother had given birth off-reservation and the children had never resided on the Choctaw reservation.

Ultimately, the Supreme Court reversed. The Court found that the children were domiciled on the Choctaw reservation and, thus, under ICWA, the tribe had exclusive jurisdiction over the adoption. According to the Court, one purpose of ICWA was to ensure "that Indian child welfare determinations are not based on 'a white, middle-class standard,' which, in many cases, forecloses placement with [an] Indian family." By way of explanation, the Supreme Court noted that congressional hearings had focused on the negative impact the removal of children had on the survival of tribes. It further noted that the high rates of removal of native children were the result of a lack of cultural understanding on the part of government agencies (i.e., social workers and judges). The Court quoted Choctaw Chief Isaac’s 1978 hearing testimony, which aptly described the cultural disconnect between state welfare workers and Indian tribes:

276. Id. at 37.
277. See id. at 39.
278. Id. at 37-38.
279. Id. at 38.
280. Id.
281. Id. at 38-39.
282. At the conclusion of the decision, the Court requested that the tribal court consider that the children had spent three years—their entire lives—with their adoptive family and that the issue was one of jurisdiction, not of placement. Id. at 53. The Court “deferred to the experience, wisdom and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy.” Id. at 54. The tribal court did allow the Holyfields’ adoption of the twins to be formalized to avoid any further disruption to their lives.
283. Id. at 53-54.
284. Id. at 37.
285. See id. at 49-51 & nn.24-25.
286. See id. at 34-35 & n.4.
One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by non-tribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.\footnote{287. \textit{Id.} at 34-35 (quoting \textit{Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior & Insular Affairs, 95th Cong.} 191-92 (1978)).}

With its ruling in \textit{Holyfield}, the Supreme Court sought to ensure that this history of cultural misunderstanding would come to an end and that the placement of Indian children would instead reflect the values and culture of the tribes.\footnote{288. \textit{Id.} at 53-54.}

The Court went even further, however, by incorporating a group-centered view of legal rights favored by American Indians into a ruling directly affecting American Indians. First, the Court confirmed an interpretation of ICWA as protective of tribal rights, noting that “the protection of [the tribe’s interest in its children] is at the core of ICWA, which recognizes that the tribe has an interest in the child that is distinct from but on a parity with the interest of the parents.”\footnote{289. \textit{Id.} at 52 (quoting \textit{In re Adoption of Halloway, 732 P.2d 962, 969-70 (Utah 1986)}; see also \textit{id.} at 49 (“The numerous prerogatives accorded the tribes through the ICWA’s substantive provisions, . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.”)).}

The Court went on to discuss the unique relationship between Indian tribes and Indian children, noting that it was “a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize.”\footnote{290. \textit{Id.} (quoting \textit{In re Adoption of Halloway, 732 P. 2d at 969-70}).}

Despite the dominant culture’s lack of understanding, however, the Court declared that what is in the best interests of the tribe is also in the best interests of the child: “The Act is based on the fundamental assumption that it is in the Indian child’s best interest that its relationship to the tribe be protected.”\footnote{291.\textit{Id.} at 50 (quoting \textit{In re Appeal in Pima County Juvenile Action, 635 P.2d 187, 189 (Ariz. Ct. App. 1981)).}} Arguably placing the tribe’s interest above that of the child’s parents, the Court held that ICWA would not permit an individual tribal member’s wishes to trump the tribe’s interest in the

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\footnote{287. \textit{Id.} at 34-35 (quoting \textit{Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior & Insular Affairs, 95th Cong.} 191-92 (1978)).}
\footnote{288. \textit{Id.} at 53-54.}
\footnote{289. \textit{Id.} at 52 (quoting \textit{In re Adoption of Halloway, 732 P.2d 962, 969-70 (Utah 1986)}; see also \textit{id.} at 49 (“The numerous prerogatives accorded the tribes through the ICWA’s substantive provisions, . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.”)).}
\footnote{290. \textit{Id.} (quoting \textit{In re Adoption of Halloway, 732 P. 2d at 969-70}).}
\end{footnotesize}
child. 292 As the Court explained, "tribal jurisdiction . . . was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." 293 Thus, a child's domicile was to be determined by the residence of the mother despite her voluntary surrender of her children. 294

_Holyfield_ remains the only Supreme Court decision directly construing ICWA. The Court's willingness to consider tribal values and culture in its decision making makes _Holyfield_ an historic decision. Nearly twenty years later, however, state court decisions threaten to undo this progress to the detriment of tribes such as the Choctaw.

*IV. Two Giant Steps Back: The Existing Indian Family Exception*

The inclusion of American Indian values and beliefs in the construction of laws that affect their lives is vital for the cultural survival of the tribes. Laws like ICWA and decisions such as _Holyfield_ are evidence that law can and should be reflective of the people they directly impact. The history of the Choctaw demonstrates why this is vital to the tribes' right to self-determination. 295 Nevertheless, in the thirty-one years since Congress passed ICWA, several state courts have circumvented its application through court-created exceptions. 296

292. _Id._ at 53.

293. _Id._ at 49.

294. The Court based this determination on its interpretation of congressional intent for a uniform, federal standard when it passed ICWA. _See id._ at 45. The Court stated that states did not have the authority to define "domicile" because the intent of Congress, in passing ICWA, had been to halt state actions detrimental to tribal interests. _Id._ Therefore, it was "most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law." _Id._ Allowing states to make such determinations could result in states applying their domicile law in such a way as to circumvent the intent of ICWA. _Id._ The Court also noted that if the child's domicile were not determined by the mother's domicile then few American Indian adoptions would qualify under ICWA as few reservations possessed hospital facilities for childbirth. _Id._

295. _See supra_ Part II.

296. Courts have also relied on other exceptions, such as using the "best interests" of the child standard, to deny transfer to tribal court. _See, e.g., In re Maricopa County Juvenile Action, 828 P.2d 1245 (Ariz. Ct. App. 1991)._ Courts' reliance on this exception has been soundly criticized. _See B.J. Jones, The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts, 73 N.D. L. REV. 395, 421-29 (1997)._
One exception is the so-called "existing Indian family" exception. Under this exception, courts refuse to apply ICWA in situations where a court deems the child is not part of a sufficiently Indian family. In relying on this exception, these state courts ignore ICWA's plain language and Supreme Court precedent. Moreover, they threaten a return to the pre-ICWA time when states removed children based on an outsider perspective of Indian identity and culture. They also jeopardize the progress ICWA represents in restoring control over cultural identity to the tribes.

It was just four years after ICWA's passage that the Kansas Supreme Court created the existing Indian family exception as a means of avoiding the application of ICWA. In In re Baby Boy L., a child was born to a non-Indian mother and to a father who was an enrolled member of the Kiowa Tribe of Oklahoma. When the mother attempted to voluntarily relinquish her parental rights to allow a non-Indian couple to adopt the child, the father and the Kiowa Tribe intervened. Arguing that ICWA applied, the father and tribe sought to place the child within the extended family or tribe as required by the Act. The Kansas court rejected the tribe's argument. According to the court, ICWA did not require "that an illegitimate infant who has never been a member of an Indian home or culture, and probably would never be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother." Rather, Congress had been primarily concerned with maintaining "family and tribal

298. See In re Adoption of S.S., 657 N.E.2d 935, 946 (Ill. 1995) (McMorrow, J., dissenting) ("The unfortunate effect of the majority's opinion is to revert to and perpetuate the regressive State policies and practices that led Congress to enact the ICWA.").
299. See id. at 951-52 (McMorrow, J., dissenting) ("The [existing Indian family] doctrine is actually a judicially created prerequisite to the applicability of the ICWA."). But see Rye v. Weasel, 934 S.W.2d 257, 261-62 (Ky. 1996) (holding that the "existing Indian family exception" was not judicially created, but in fact, reflected congressional intent).
301. See In re Baby Boy L., 643 P.2d at 172.
302. See id. at 173.
303. See id. at 173-74.
304. See id. at 176.
305. Id. at 175.
relationships existing in Indian homes” and setting “minimum standards for the removal of Indian children from their existing Indian environment.” Thus, if the court found that a family was not an “existing Indian family,” ICWA did not apply.

While the majority of states have rejected the existing Indian family exception, other states have opted to follow in Baby Boy L’s footsteps. In

306. Id. (citing 25 U.S.C. § 1902 (2006)).
307. Id. The tribe did not seek U.S. Supreme Court review of the Kansas Supreme Court decision. See Kiowa Tribe of Oklahoma v. Lewis, 777 F.2d 587, 590 (10th Cir. 1985). Rather, the tribe opted to collaterally challenge the decision by filing a suit in the U.S. District Court for the District of Kansas. The tribe’s suit sought to enjoin the adoption of Baby Boy L. Id. The district court dismissed, finding that res judicata and collateral estoppel precluded relitigating the ICWA’s applicability. Id. The Tenth Circuit upheld the dismissal, id. at 593, and the U.S. Supreme Court denied certiorari, 479 U.S. 872 (1986).
308. See e.g., In re Adoption of Baade, 462 N.W.2d 485, 489 (S.D. 1990) (holding that Holyfield invalidated prior decision relying on existing Indian family exception and holding that ICWA applied regardless of whether Indian child lived in Indian family). But see In re Adoption of Crews, 825 P.2d 305, 310-11 (Wash. 1992) (“Holyfield supports our conviction that ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting. . . . In such a situation, whether or when the child meets the definition of ‘Indian child’ under ICWA is not controlling.”).
309. E.g., In re Santos Y., 112 Cal. Rptr. 2d 692, 722-23 (Cal. Ct. App. 2002); In re Bridget R., 49 Cal. Rptr. 2d 507, 516 (Cal. Ct. App. 1996) (holding that existing Indian family exception must be applied where child resided with Indian persons court deemed lacked significant political, cultural, or social ties with tribe), superseded by statute, CAL. WELF. & INST. CODE § 360.6 (West 2007), as recognized in In re Santos Y., 112 Cal. Rptr. 2d 692, 722-23 (Cal. Ct. App. 2002)). Section 360.6 has been repealed. 2006 Cal. Legisl. Serv. ch. 838 (S.B. 678) (West); In re Alexandria Y., 53 Cal. Rptr. 2d 679 (Cal. Ct. App. 1996) (finding that ICWA did not apply to child who had resided only for short time with Indian persons); Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996) (refusing to apply ICWA where child had lived with her Indian uncle and his non-Indian wife almost her entire life on ground that child had never lived with Indian natural parents); Hampton v. J.A.L., 658 So. 2d 331, 335 (La. Ct. App. 1995); In re Adoption of Crews, 825 P.2d at 310 (finding child was not part of existing Indian family because neither she, nor her family, ever lived on the reservation and there were no ties to any Indian tribe or community); In re S.C. & J.C., 833 P.2d 1249 (Okla. Civ. App. 1992); In re T.S., 801 P.2d 77 (Mont. 1990); S.A. v. E.J.P., 571 So. 2d. 1187, 1189 (Ala. 1990) (holding that because the child was never part of an Indian family, never lived in an Indian home, never experienced the Indian social and cultural world, and was born to a non-Indian mother, the “existing Indian family exception” did not apply); In re Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988); In re Adoption of Baby Boy D., 742 P.2d 1059, 1064 (Okla. 1987) (holding ICWA inapplicable where child had not resided in Indian family and had non-Indian mother), superseded by statute, 10 OKLA. STAT. ANN. § 40.3(B) (West 2007); In re Adoption of T.R.M., 525 N.E.2d 298, 303 (Ind. 1988); In re B.B., 511 So. 2d 918, 921 (Miss. 1987), rev’d sub nom. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Claymore v. Serr, 405
some instances, these courts have held that ICWA was unconstitutional when applied to an Indian child not in the custody of an existing Indian family.\textsuperscript{310} In one such case, the California Court of Appeal held that application of ICWA would violate the Constitution's due process and equal protection clauses unless it was limited by the existing Indian family exception.\textsuperscript{311} \textit{In re Bridget R.} involved twin Indian children relinquished at birth by their parents.\textsuperscript{312} Three months after their adoption, the twins' grandmother sought to have the twins placed within their extended Indian family.\textsuperscript{313} The twins' father also sought to rescind the adoption.\textsuperscript{314} The Dry Creek Rancheria of Pomo Indians, of which the father was a member, moved to intervene.\textsuperscript{315} Seeking to invalidate the adoption, the twins' father and tribe argued that ICWA should have governed placement of the twins.\textsuperscript{316}
Recognizing ICWA's goal "of preserving Indian culture through the preservation of Indian families," the court nevertheless rejected the tribe's argument. According to the court, applying ICWA to the twins' adoption would deprive the twins of their constitutional rights of due process and equal protection of law. First, the court concluded that ICWA application would deprive the twins of a fundamental due process right with respect to family relationships. On that point, the court reasoned that the twins had a fundamental and constitutionally protected right to remain in the only family they had ever known. If applying ICWA would interfere with that right, then the government was required to establish a compelling interest.

Although the court agreed that preserving Indian culture qualified as a compelling interest, it found that interest was not implicated where neither the twins nor their parents had maintained significant social, political, or cultural ties with an Indian community. The court explained "that the unique values of 'Indian culture' will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture." According to the court, Holyfield did not require that ICWA "should apply when neither the child nor either natural parent has ever resided or been domiciled on a reservation or maintained any significant social, cultural or political relationship with an Indian tribe." Thus, the court found no compelling interest—or even a rational basis—to apply ICWA to "fully assimilated Indian parents" who had sought to voluntarily relinquish their child sufficient to overcome the twins' interest in remaining with their current family.

Similarly, the court held that application of ICWA would violate the twins' right to equal protection by treating them differently from non-Indian children absent a compelling interest. Having already found no such interest, the court concluded that ICWA could not constitutionally apply. Finally, the court also held that applying ICWA on these facts would violate the Tenth

317. Id. at 529-30.
318. Id.
319. Id. at 530.
320. Id. at 526.
321. Id.
322. Id.
323. Id.
324. Id. at 522.
325. Id. at 526-27.
326. Id. at 528.
327. Id.
Amendment because it would intrude upon powers ordinarily reserved to the states.\textsuperscript{328}

Without weighing in on the constitutional questions, other courts have simply held that ICWA did not apply if the court determined there was no existing Indian family.\textsuperscript{329} Contrary to \textit{Holyfield} and the Act’s plain text, these courts contend that the purpose of ICWA is to prevent the breakup of families and the removal of children from parents, not to protect the tribe as a community with its own separate, vested interest in its children.\textsuperscript{330} If there is no existing Indian family, the courts reason, then the Act’s purpose and rationale is not served.\textsuperscript{331} Thus, ICWA is held to apply only when a child is found by the court to be part of a recognizable Indian family or a family where the child has been exposed to Indian culture.\textsuperscript{332} Some states have gone even further, finding that ICWA only applies to those Indian children whose parents are of Indian heritage \textit{and} who have significant ties to the tribe.\textsuperscript{333}

\textsuperscript{328.} \textit{Id.} at 528-29.

\textsuperscript{329.} \textit{E.g.,} Rye v. Weasel, 934 S.W.2d 257, 264 (Ky. 1996) (refusing to apply ICWA where child had lived with her Indian uncle and his non-Indian wife almost her entire life on ground that child had never lived with Indian natural parents); Hampton v. J.A.L., 658 So. 2d 331, 335 (La. Ct. App. 1995); \textit{In re Adoption of Crews}, 825 P.2d 305, 310 (Wash. 1992) (finding child was not part of existing Indian family because neither she, nor her family, ever lived on the reservation and there were no ties to any Indian tribe or community); \textit{In re S.C. & J.C.}, 833 P.2d 1249 (Okla. Civ. App. 1992); \textit{In re T.S.}, 801 P.2d 77 (Mont. 1990); \textit{S.A. v. E.J.P.}, 571 So.2d 1187, 1189 (Ala. 1990) (holding that because the child was never part of an Indian family, never lived in an Indian home, never experienced the Indian social and cultural world, and was born to a non-Indian mother, the “existing Indian family exception” did apply); \textit{In re Adoption of T.R.M.}, 525 N.E.2d 298, 303 (Ind. 1988); \textit{In re Adoption of Baby Boy D.}, 742 P. 2d 1059, 1064 (Okla. 1987) (holding ICWA inapplicable where child had not resided in Indian family and had non-Indian mother), \textit{superseded by statute}, 10 OKLA. STAT. ANN. § 40.3(B) (West 2007); \textit{In re B.B.}, 511 So. 2d 918, 921 (Miss. 1987), \textit{rev'd sub nom.} Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Claymore v. Serr, 405 N.W.2d 650, 653 (S.D. 1987), \textit{overruled by} \textit{In re Adoption of Baade}, 462 N.W.2d 485, 489 (S.D. 1990); \textit{In re S.A.M.}, 703 S.W.2d 603, 603-08 (Mo. Ct. App. 1986); \textit{In re Appeal in Maricopa County}, 667 P.2d 228, 233 (Ariz. Ct. App. 1983); \textit{see also} \textit{In re Adoption of S.S.}, 657 N.E.2d 935, 952 (Ill. 1995) (McMorrow, J., dissenting) (citing Davis, \textit{supra} note 230, at 465).

\textsuperscript{330.} \textit{See} Holyfield, 490 U.S. at 49; \textit{In re Vincent M.}, 59 Cal. Rptr. 3d 321 (Cal. Ct. App. 2007) (rejecting arguments that existing Indian family exception is required as matter of constitutional law or policy).

\textsuperscript{331.} \textit{See} \textit{In re Adoption of S.S.}, 657 N.E.2d at 952 (McMorrow, J., dissenting) (citing Davis, \textit{supra} note 230, at 465).

\textsuperscript{332.} \textit{In re Baby Boy L.}, 643 P.2d 168, 175 (Kan. 1982); \textit{see also} Monguia, \textit{supra} note 300, at 302 (citing Jones, \textit{supra} note 248, at 15).

\textsuperscript{333.} \textit{E.g.,} \textit{In re Bridget R.}, 49 Cal. Rptr. 2d 507, 516 (Cal. Ct. App. 1996) (finding that application of ICWA would violate Fifth, Tenth, and Fourteenth Amendments if used “to
For instance, in *In re Crews*, the Washington Supreme Court concluded that a determination that a child meets ICWA’s definition of “Indian child” is not controlling on the issue of jurisdiction over that child’s custody determination. In that case, the child’s mother, Tammy Crews, had been uncertain of her Indian ancestry at the time of the birth of her child. A few days after she relinquished her parental rights, Crews attempted to invalidate the adoption after finding that she was in fact an eligible member of the Choctaw Nation of Oklahoma. Joined by the Choctaw, Crews argued that ICWA should have governed the adoption of her child.

The Washington Supreme Court disagreed. According to the court, even though Crews’s child was an “Indian child” under ICWA and the Choctaw...
Constitution, ICWA did not apply. Important to the court was its conclusion that the child’s mother had not resided on or near the Choctaw reservation and did not intend to do so in the future. Thus, the court found that because the mother had “shown no substantive interest in her Indian heritage in the past and has given no indication this will change in the future” application of ICWA would not further the Act’s policies or purposes. In so doing, the court not only avoided ICWA application, it denied the child her own Indian heritage.

In so ruling, the court disregarded the Choctaw’s interest in custody disputes involving Choctaw children as well as the Supreme Court precedent laid out in Holyfield. Indeed, despite the similar facts of both cases, the Washington court actually cited Holyfield in support of its conclusion that ICWA did not apply to the voluntary adoption of an Indian child by an Indian parent. Crews has been roundly criticized as having “endorsed the notion that [a state court] should be the ultimate arbiter of whether a person, irrespective of membership or qualification of membership in an Indian tribe, should be considered an Indian based upon the state court’s perception of whether that person had sufficient contacts with his or her Indian heritage.” In other words, a state court could avoid ICWA application to an Indian child based on the court’s determination that the child’s parent was not sufficiently “Indian.”

Fortunately, the majority of states have rejected the existing Indian family exception. Nevertheless, there is still cause for concern. First, state courts

339. See id.
340. See id.
341. Id.
342. Id. ("Holyfield supports our conviction that ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation."); Jones, supra note 296, at 411.
344. Id.
that rely on the existing Indian family exception to avoid application of ICWA do so by ignoring Congress's intent in enacting ICWA as well as the plain language of ICWA itself.\textsuperscript{346} Through ICWA, Congress sought to minimize state involvement in Indian custody cases.\textsuperscript{347} Such action was necessary because states had too "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."\textsuperscript{348} Congress vested tribal courts with jurisdiction to adjudicate child placement cases as a means to end state removal of Indian children and placement into non-Indian homes.\textsuperscript{349} Moreover, Congress explicitly rejected language that would have required "significant contacts" for ICWA to apply to a child not living on a reservation.\textsuperscript{350} Baby Boy L. and its progeny ignore this history.

Indeed, rather than focus on families \textit{and} the tribe, the existing Indian family exception ignores the relationship between the child and tribe to focus entirely on the family.\textsuperscript{351} But, Congress did not mean for ICWA to only

\footnotesize{(Ill. App. Ct. 1993), reversed on other grounds, 657 N.E.2d 935 (Ill. 1995); In re Adoption of Lindsay C., 280 Cal. Rptr. 194, 201 (.Ct. App. 1991); In re N.S., 474 N.W.2d 96, 100 n.8 (S.D. 1991) (Sabers, J., concurring); In re Oscar C. Jr., 559 N.Y.S. 2d 431 (N.Y. Fam. Ct. 1990); In re Adoption of Baade, 462 N.W.2d 485, 489 (S.D. 1990) (rejecting existing Indian family exception and holding ICWA applies when "Indian child" is subject of "child custody proceeding" as those terms are defined in ICWA); In re Adoption of T.N.F., 781 P.2d 973 (Alaska 1989); In re Coconino County, 741 P.2d 1218 (Ariz. 1987); In re Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988); In re T.J.J., 366 N.W.2d 651 (Minn. Ct. App. 1985); In re J.R.H., 358 N.W.2d 311 (Iowa 1984); In re Junious M., 144 Cal. App. 3d 786, 796 (Cal. Ct. App. 1983); see also Jennifer L. Walters, Comment, In Re Elliott: Michigan's Interpretation and Rejection of the Existing Indian Family Exception to the Indian Child Welfare Act, 14 T.M. COOLEY L. REV. 633, 639 (1997); see also CAL. FAM. CODE § 170 (requiring application of ICWA when child fits ICWA's definition of "Indian child" irrespective of significant ties to tribe); 10 OKLA. STAT. ANN. § 40.3(B) (West 2007) ("Except as provided for in subsection A of this section, the Oklahoma Indian Child Welfare Act applies to all state voluntary and involuntary child custody court proceedings involving Indian children, regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.").)

348. \textit{Id.; see also id.} § 1902 ("[ICWA is designed] to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.").
349. Carriere, \textit{supra} note 7, at 589.
351. Jaffke, \textit{supra} note 297, at 745. \textit{See e.g.,} Rye v. Weasel, 934 S.W.2d 257, 263 (Ky.)
protect Indian families. If it had, it would not have included provisions expressly protecting a tribe's interest in shielding Indian children from the vagaries of state-court decision making that disregarded and disrupted tribal culture. Congress did, however, include those protections.

Further, Holyfield makes clear that the focus of the ICWA analysis is not solely the individual Indian family, but also the tribe's legitimate interest in the adoption of Indian children. According to the Court, ICWA was crafted to serve tribal interests precisely because of the "impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." Thus, ICWA's protections were rightly viewed "as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." Indeed, in finding that ICWA applied, the Holyfield Court signaled that the tribe's interest would be protected even when it conflicted with the express desire of the child's parents. Even though the mother had sought to ensure that her twin children were born outside the reservation and voluntarily surrendered them to state custody, the Court found ICWA could not be avoided by the unilateral actions of the child's parents.

Perhaps even more important, Holyfield held that the tribe should rightfully decide the children's placement even though the children in that case had not been raised in an Indian household. By the time of the Court's decision, the

1996) ("The important part of the ICWA was the preservation of the existing Indian family.").

352. See Jones, supra note 296, at 429 ("The 'existing Indian family' exception ignores tribal interests in maintaining connections with its only means of survival: its children.").

353. See Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2006); see also Appell, supra note 258, at 145 ("ICWA was a culturally sensitive attempt to preserve Native American cultures through their most important resource—Indian children."); Wilson, supra note 252, at 848.

354. Holyfield v. Mississippi Band of Choctaw Indians, 490 U.S. 30, 49 (1989) ("The numerous prerogatives accorded the tribe through the ICWA's substantive provision . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.").

355. Id.

356. Id.

357. Id. at 48-49 (rejecting contention that ICWA jurisdiction was defeated by mother's voluntary surrender of her children to state authorities on ground that ICWA could not be avoided through actions of individual tribal members).

358. Id. at 53 ("[T]he law of domicile Congress used in the ICWA cannot be one that permits individual reservation-domiciled tribal members to defeat the tribe's exclusive jurisdiction by the simple expedient of giving birth and placing the child for adoption off the reservation.").

359. See id. ("We are not unaware that over three years have passed since the twin babies were born and placed in the Holyfield home, and that a court deciding their fate today is not
children had been living in a non-Indian household for their entire lives.\textsuperscript{360} During that time the twins had undoubtedly developed strong familial ties with their adoptive family.\textsuperscript{361} Moreover, they had apparently had no significant ties to the Choctaw tribe.\textsuperscript{362} Nevertheless, the Court concluded that ICWA applied and that jurisdiction belonged to the tribe.\textsuperscript{363} The Holyfield Court's repeated emphasis on tribal interests is inconsistent with the existing Indian family exception, which focuses entirely on the Indian family as the basis for determining ICWA applicability.\textsuperscript{364}

By requiring "substantial ties," state courts are imposing a requirement for ICWA application that goes beyond the Act's plain-language requirements. ICWA was intended to govern involuntary and voluntary child custody proceedings involving Indian children.\textsuperscript{365} By its own terms, ICWA requires two things to apply: (1) that the "Indian child" be either an enrolled member of an Indian tribe or eligible for membership and the biological child of a tribal member, and (2) that the child be involved in a child custody proceeding as that term is defined by ICWA.\textsuperscript{366} Under the existing Indian family exception, however, courts also ask whether the child's parent or parents have participated in tribal life or have significant political, social, or cultural ties to the tribe.\textsuperscript{367} This inquiry represents a return to the pre-ICWA era because it permits the courts to impose an outsider's set of standards on another culture as state courts, rather than the tribes, determine the adequacy of the tribal affiliation.\textsuperscript{368}

writing on a blank slate in the same way it would have in January 1986."\textsuperscript{360}).

\begin{itemize}
\item \textsuperscript{360} Id.
\item \textsuperscript{361} Id.
\item \textsuperscript{362} See id.
\item \textsuperscript{363} Id.
\item \textsuperscript{364} See Roger A. Tellinghuisen, The Indian Child Welfare Act of 1978: A Practical Guide With [Limited] Commentary, 34 S.D. L. Rev. 660, 671 (1989) ("After the decision in Holyfield, it appears that the Kansas court in Baby Boy L. may have given inappropriate weight to the wishes of the family.").
\item \textsuperscript{367} See In re Baby Boy L., 643 P.2d 168, 175 (Kan. 1982); In re Bridget R., 49 Cal. Rptr. 2d 507, 515-16 (Cal. Ct. App. 1996).
\item \textsuperscript{368} See Quinn v. Walters, 845 P.2d 206, 209 n.2 (Or. App. 1993) ("Engrafting a new requirement into ICWA that allows the dominant society to judge whether the parent's cultural background meets its view of what 'Indian culture' should be puts the state courts right back into the position from which Congress has removed them."); In re D.A.C., 933 P.2d 993, 999 (Utah App. 1997); see also Barbara Ann Atwood, Flashpoints Under the Indian Child Welfare
Such an approach flies in the face of Supreme Court precedent regarding a tribe’s right to determine its own membership. In searching for significant ties, these courts substitute their judgment in questions that reach the core of tribal identity—who is a tribal member. Seizing authority to determine whether a particular family has significant ties to the tribe in order to decide who is (or is not) sufficiently connected to be a member of that tribe makes states the final arbiter of who is sufficiently “Indian” for tribal membership. But, states are not the proper guardians of Indian identity. Rather, tribal membership is properly determined on the basis of tribal customs, values, and laws. Allowing states to determine membership eligibility places a limit on tribal sovereignty not contemplated by Congress and long rejected by the Supreme Court. Indeed, the Supreme Court has upheld the right of tribes to establish their own criteria for tribal membership, holding that the authority of a tribe to make these determinations is “central to its existence as an independent political community.”

Further, state courts’ perceptions of Indian culture can be just as misguided as the perceptions of the social workers and state officials who removed Indian children from their homes during the pre-ICWA era. Rejecting what they perceive as “token attestations of cultural identity” as inadequate to form a tribal relationship, these courts search the parents’ and child’s activities to discern connections sufficient to satisfy the court’s perceptions regarding Indian culture. Thus, for ICWA to apply, the parent or child must “adopt [Indian] culture as a day to day way of life.”

But the requirement that the parent or child adopt “Indian culture” is based on the flawed assumption that there is one “Indian culture.” The reality is that there are as many different tribal cultures as there are Indian tribes in the United States. Because of this diversity, there can be no one test for whether a particular child or parent is sufficiently Indian. This is precisely why such decisions are best left to the individual tribe. Nevertheless, in ascertaining...
whether a family is sufficiently "Indian," courts have required that the parent or child participate in a laundry list of tribal activities. Explained by one court, to find sufficient significant ties, the parents must have

privately identified themselves as Indians and privately observed tribal customs and, among other things, whether, despite their distance from the reservation, they participated in tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events which are held in their own locality, or maintained social contacts with other members of the Tribe.

It is unlikely, however, that any list can capture the hallmarks of cultural identity as most defy enumeration. Further, state courts should not be in the business of crafting lists of indicia of tribal affiliation that are devoid of any tribal input. In so doing, these states are substituting their judgment for that of the tribe and imposing an outsider view of Indian culture that may have little relevance to the tribe itself. Indeed, there is no suggestion by the court that activities listed are significant to the tribe's culture or to its determinations of tribal membership. Permitting a state to impose its view of "Indianness" permits a return to the pre-ICWA days when laws premised on Anglo-American cultural viewpoints were imposed without regard for tribal values. Finally, it is difficult to shake the notion that few people in any particular group would pass such a cultural litmus test.

Rather than concern for cultural participation, state court decisions to avoid ICWA application appear to be motivated at least in part by concern that the tribal court will not act in the best interests of the child. But, it is important to bear in mind that ICWA does not require a particular placement. Rather,

377. See In re Bridget R., 49 Cal. Rptr. 2d at 531.
378. See id.
379. See Carriere, supra note 7, at 629 ("[T]he assumption that tragic outcomes will more likely occur when jurisdiction lies with tribal courts rather than with state courts bespeaks a blindness both to the values and to the level of efficiency attained by the Euro-American child welfare system."); Yablon, supra note 310, at 706.
380. See Holyfield v. Mississippi Band of Choctaw Indians, 490 U.S. 30, 53 (1989) ("Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of who should make the custody determination concerning these children—not what the outcome of that determination should be."); In re Adoption of S.S., 657 N.E.2d 935, 953 (Ill. 1995)
it vests the tribal court with the authority to make the custody determination. Thus, the courts' concern over the ultimate placement decision is not a proper basis for determining jurisdiction. Moreover, the concern bespeaks of a distrust of tribal judicial decision making that is unwarranted.

As ICWA acknowledges, tribal courts are better positioned to respect tribal traditions and culture in cases involving adoption or involuntary termination of parental rights. But denying jurisdiction every time a state court is concerned that a tribal court might not reach the same result could pressure tribal courts to comport their decisions with non-Indian cultural values in an effort to stave off future state court refusals to apply ICWA.

For instance, as noted above, the traditional extended kinship structure remains an important part of Indian families. Despite this, state courts have focused on the nuclear family model of child rearing to the exclusion of other family members, denying ICWA application where a child was placed with extended kin. In a case reminiscent of the time when state court ignorance of the extended family concept resulted in the removal of Indian children from their tribes, the Kentucky Supreme Court refused to recognize the tribe's designation of an extended family member as the child's guardian. In Rye v. Weasel, the court held that a child raised by her uncle and his non-Indian spouse as a ward of the tribe had not been raised in an "Indian" home, even though her uncle was a tribal member and had been deemed an "Indian custodian" by the tribe, which placed the child in his care.

(McMorrow, J., dissenting).

381. See Holyfield, 490 U.S. at 53 ("The law places that decision in the hands of the Choctaw tribal court."); In re Adoption of S.S., 657 N.E.2d at 953 (McMorrow, J., dissenting).

382. Id. ("It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community. Rather, 'we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy.'") (quoting In re Adoption of Holloway, 732 P.2d 962, 972 (Utah 1986)).

383. See id. at 54; Atwood, supra note 7, at 647-49.

384. Jones, supra note 296, at 429 ("Tribal courts may eventually be compelled to conform their placement decisions to appease non-Indian judges, who often times have an archetype of a family setting that best meets the needs of all children, just to facilitate the exercise of their transfer jurisdiction.").

385. Rye v. Weasel, 934 S.W.2d 257, 263 (Ky. 1996); see also Jones, supra note 296, at 418-19.

386. See text accompanying supra notes 254-60.

387. Rye, 934 S.W.2d at 260.

388. Id. Under ICWA, an Indian custodian is to be treated as the child's parent. See 25
Ignoring the uncle’s tribal membership, the court held that the child had never lived in an Indian family because the child’s parents were unmarried and the child’s mother had lost contact with her child after placing her with the custodial parents. Although the tribe considered the uncle a tribal member, the court found him lacking for his failure to adopt what the court characterized as Indian “culture as a day to day way of life.” Thus, when the uncle divorced, the state court granted custody to his non-Indian spouse after concluding that it was in the child’s best interests under Kentucky’s custody statute.

As this case amply demonstrates, when state courts use the exiting Indian family exception to avoid ICWA, they perpetuate the very injustice ICWA sought to remedy by permitting nontribal members to determine the boundaries of Indian families. Such efforts may pressure tribal courts to conform to an outsider’s cultural perspective by minimizing extended kin roles to fit within the nuclear family framework so as to assuage state court concerns. Moreover, these decisions have the potential to further alter Indian kinship structures, such as the Choctaw’s, so that it even more closely resembles the Anglo-American model, not as a consequence of cultural choice, but as a means to avoid state usurpation of tribal jurisdiction.

The reluctance of some state courts to follow ICWA’s dictates is perhaps understandable when one considers that family law matters, such as child custody, have typically been a matter of state law. Nevertheless, ICWA divests states of jurisdiction over this traditional area of state law in matters involving Indian child custody. Moreover, the Supreme Court has made it clear that Congress has plenary power over tribes and that states have no authority to interfere with tribal affairs. Given the Court’s persistent rejection of state involvement over internal tribal matters, a state court’s reliance on the existing Indian family exception to avoid ICWA application is nothing short of a grab for power not rightly resting with the states.


389. Rye, 934 S.W.2d at 263.

390. Id. It was also important to the court that the child’s parents had little contact with her or the tribe, that the child had not lived on the reservation, and that the tribe had not paid for her support or medical care. Id. at 263-64. None of these is required for ICWA application.

391. Id. at 264.


It is unlikely that the Supreme Court will wade into the issue given that the Court has denied certiorari in at least eight cases involving application of the existing Indian exception. Thus, this problem calls out for an appropriate congressional response. Although the full Congress has not taken up ICWA since its passage, it has repeatedly refused to codify the existing Indian family exception. First, in passing ICWA, Congress rejected language that would have required "substantial ties" for ICWA to apply to a child not living on a reservation. Further, soon after the California Court of Appeal's decision in *Bridget R.*, that state's U.S. Representative sought to amend ICWA to codify the existing Indian family exception. The proposed change would have gone further than *Bridget R.* by excluding ICWA application when a child's parents were deemed to lack sufficient ties to an Indian tribe irrespective of whether the child was a member of the tribe. The proposed amendment was never given a full vote.

Rather than embrace the exception, Congress has increasingly moved in the opposite direction. More recent proposed changes to ICWA have sought to bolster tribal court competency to adjudicate custody matters. For instance, one amendment put forth would require that state courts give full faith and credit to "judicial proceedings, and tribal court judgments; and to such other proceedings, including divorce proceedings, as may involve the determination of an Indian child's custody." In another sign of progress, the latest round

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396. There have been fourteen attempts to amend ICWA since its passage. Only one of these amendments has come up for a full vote, and even in that instance, the vote was held only in the Senate. To date, ICWA has never been amended. Kirk Albertson, *Applying Twenty-Five Years of Experience: The Iowa Indian Child Welfare Act*, 29 *Am. Indian L. Rev.* 193, 196 & n.26 (2004-2005) (listing proposed amendments); *see also* Jones, *supra* note 296, at 413 n.90 (describing efforts of tribal leaders and critics of ICWA to revise the Act to stave off further judicial assaults).
400. Jones, *supra* note 296, at 413 n.89.
401. *See* Yablon, *supra* note 310, at 699 (quoting H.R. 2750, 108thCong. (2003)). Such a step is necessary because, in many cases, state courts have refused to accord full faith and credit to tribal court decisions that impact child custody proceedings.

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of proposed amendments to ICWA did not include a provision to codify the existing Indian family exception.\footnote{402}

While it is commendable that Congress has refused to codify the existing Indian family exception, clearly that is not enough to stop states from relying on the exception to avoid ICWA. Rather, Congress must explicitly reject this exception. In short, Congress should amend ICWA to make clear that the Act applies to Indian children regardless of their parents’ ties to their tribes. Permitting states to continue to avoid ICWA’s application by defining who is sufficiently Indian once again threatens to permit an outsider culture to regulate another from without by placing it within legal constraints not of its own creation. It also permits states to ignore Congress’s repeated refusal to incorporate the exception into the Act. Lest Congress appear to acquiesce, Congress needs to act.

In crafting the proposed change, Congress should follow the example set by California. After that state’s opinion in Bridget R., the legislature responded by making tribal interests more explicit and by requiring that ICWA govern custody proceedings involving Indian children regardless whether their parents are found to maintain “significant ties” with their tribe.\footnote{403} Rather, California courts considering Indian custody proceedings must “strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child.”\footnote{404} To facilitate this, courts are to presume that it is in the best interest of Indian children that their tribal membership “and connection to the tribal community be encouraged and protected, regardless . . . [w]ether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding[, w]ether the parental rights of the child’s parents have been terminated[, w]here the child has resided or been domiciled.”\footnote{405} Most importantly, a tribe’s determination that a child is a tribal member or eligible for membership is binding on the state court and requires ICWA application.\footnote{406}

\footnote{402. \textit{Id.} at 701.}
\footnote{403. \textit{See} \textit{CAL. FAM. CODE} §§ 170(d)(2), 175 (2007).}
\footnote{404. \textit{Id.} § 175(b).}
\footnote{405. \textit{Id.} § 175(a)(2).}
\footnote{406. \textit{Id.} § 175(c) (“A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings.”).}
By taking such an approach, Congress would strengthen ICWA’s protection of Indian tribes and families, ensuring that ICWA serves the purposes Congress intended by protecting the best interests of Indian children, promoting the stability and security of Indian tribes and families, and ensuring that the removal of Indian children from their homes would “reflect the unique values of Indian culture.” By rejecting a requirement of “significant ties,” it would also prevent state courts from applying an outsider’s criteria on what ties are culturally important to a particular tribe. Further, by making tribal membership determinations binding on state courts, such an amendment would solidify the tribes’ role in custody proceedings involving Indian children. Thus, Congress would send a clear message that state courts cannot continue to graft new requirements onto ICWA that thwart the Act’s goals and Congress’s intent to permit tribes to control their cultural future.

More important, Congress would also forestall further imposition of Anglo-American legal norms on Indian tribes. As the history of the Choctaw makes clear, when law is imposed without input or respect for American Indian values and beliefs, it can profoundly alter the culture of the tribe. At its essence, law should reflect and embody a culture’s values. To do that, law must come from the culture it is to govern. But, when law is imposed by one group on another without respect for the oppressed group’s values, it subjects that group to the values and norms of the dominant group. In that way, law becomes a colonizing tool that forces the subjugated group to conform to another culture’s expectations and beliefs. While the changes the Choctaw kinship structure experienced cannot be entirely explained by the imposition of U.S. law, it is difficult to ignore the profound effect such laws have had on the Choctaw and other tribes. The cost of not taking action is simply too great for Congress and the Supreme Court to continue to sidestep.

Conclusion

In the four centuries since de Soto first arrived in the southeast of North America, the Mississippi Choctaw have been increasingly influenced by the culture of European colonists and Anglo-Americans. Choctaw culture has undergone many changes, some of which were instigated by the need to adapt or resist laws that failed to account for or reflect their cultural values or beliefs.

408. Carriere, supra note 7, at 592 (noting that when law prescribes it “casts the shadow of the legal subject beyond its internal discursive confines by imposing it on other cultural artifacts.”); see also Atwood, supra note 7, at 578.
The shift from a matrilineal, clan-based society to a patrilineal, nuclear family model is one such change. While it may not be entirely a result of Anglo legal influence, U.S. law clearly had an effect on this cultural shift.

As a product of the shared history of American Indian and Euro-American culture, ICWA provided some relief from this history by permitting tribes to make legal decisions that go to the heart of tribal identity and survival. State court efforts to avoid application of ICWA through the existing Indian family exception signal a return to the pre-ICWA period, a time when U.S. law prescribed, rather than reflected, American Indian culture. For the continued vitality of the tribes, state courts must reject this incursion into ICWA's protections. More important, Congress must step in and explicitly reject court created exceptions to ICWA that would permit an outside culture to regulate another from without by placing it within legal constraints not of its own creation. By failing to act, Congress permits the states to continue to flout its intent in providing for a law that permits the tribes some measure of control over their cultural future.