

SUPREME COURT CLOSES BULRUSHES TO INDIANS

by

William B. Allen

Chairman, U. S. Commission on Civil Rights

The Supreme Court's *Choctaw Indian* decision, coupled with the carnage piled up by a decade of enforcement of the Indian Child "Welfare" Act, turned a classroom quiz into an urgent question of public policy. The question, simply put, is whether human beings can be used as means to achieve supposedly benign policy objectives? Or, must human beings always be treated as independent entities, with rights—as ends rather than means?

It used to be easy for Americans to answer this question, for they regarded the natural rights of human beings as their birthright, the natural result of their citizenship. No American, it was thought, could be subordinated to the interest of the state, because an American was guaranteed the promised protections of the Constitution, making good the claim of the Declaration of Independence, that no human being could be subordinated to the will of another—or even of all others altogether—without his consent. Because we depended on consent, we imagined we had no cause to worry about being brutalized, dehumanized, or otherwise abused in the name of "reason of state." Further, we thought we had offered the promise of such protections to any human being who had the moxie to pick himself up and get himself into this country.

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

Comes now the Choctaw tribe, pleading that the Mississippi court that supervised this adoption had no right to do so, because these tribal members, Ms B. and Mr. C, and any offspring of theirs, anywhere they might be, are subject to the exclusive jurisdiction of the tribe whereof they are members. The tribe's brief before the U. S. Supreme Court was explicit: "The right of Indian Tribes to regulate exclusively the domestic relations of their members upon tribal lands is established doctrine." This plea excludes not only the competing jurisdiction of any state government but also that of the domestic relatives themselves.

But, one may ask, is not the term "upon tribal lands" a limitation on this claim? Here Congress enters, with the ICWA, to describe as being "upon tribal land" any Indian,

no matter where he is physically located, who is an enrolled member of the tribe, eligible to be enrolled, and “domiciled” on the reservation. The reason for this, according to the *Choctaw* brief, is that the Supreme Court has always recognized that tribes are a “separate people.” Further, the Choctaws acknowledged, treating Indians as separate peoples may have the effect of denying to an Indian access to judicial processes otherwise available to non-Indians. But that is “justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.” In the eyes of the tribe, then, Congress’ affirmative action for Indian tribes (the race, not the individuals) trumps the rights of individual citizens—rights they presumably have because they are American citizens.

Now comes the U. S. Supreme Court, settling this matter for all concerned to all appearances. The Court confined itself to interpreting the intent of Congress in the ICWA. No constitutional claims were raised, and the Court addressed none. Not once did it discuss the rights Indians might have as Americans, nor whether Congress’ power over an American citizen might be limited. As a statutory matter, the Court held, Congress intended a uniform, national definition of “domicile,” although Congress did not define the term itself. Accordingly, no state definition can prevail over any uniform definition that would confirm the preferred jurisdiction of the tribe.

Although Congress entertained the possibility that Ms B or Mr. C might be able to object to the tribe’s move to transfer a case from a state court back to a tribal court, the Supreme Court now finds that this might frustrate Congress intent to “protect the rights of the Indian child as an Indian” and the “Federal policy that, where possible, an Indian child should remain in the Indian community.” As the dissent points out, this reads the ICWA as mandating intervention in voluntary proceedings as well as involuntary ones. The majority responded emphatically, “tribal jurisdiction under §1911(a) was not meant to be defeated by the actions of individual members of the tribe.” To recognize individual liberty, the Court held, would “nullify the purpose the ICWA was intended to accomplish.”

The Supreme Court recognized that such a rigid, racial rule might produce complex cases later on. In this case, for example, the twins have already lived three years with an adoptive family. If the tribe were to reclaim them, which the Court says it can, a simple case would have become complex by raising the question of trauma to the children. It would become a case much like that of the Altahas in Arizona—particularly if the adoptive parents were to do what the Desrochers did, namely to react from fear and run away with the children. But the Court reasoned that “it is not ours to say whether the trauma that might result... should outweigh the interest of the tribe—and perhaps the children themselves...”

As I read this case, then, it says there are no bulrushes for Indian Moseses. No parent can shield its child from state power, when that power is exercised by an Indian tribe. This is such an extraordinary anomaly in American law, that at least a few moments reflection should be devoted to understanding how differently the Court and Congress treat white parents and children and Indian parents and children.

This *Choctaw* ruling and the ICWA aim to deal with the quite legitimate problem of preventing the wholesale removal of Indian children from Indian communities. Even

Congress's comments about preserving a culture and heritage—though often sophomoric—are manifestly reasonable as general propositions. But these very objectives have been achieved with respect to white persons by protecting individual rights, not by submerging the rights of individuals in a group based preference. The language of former Chief Justice Burger's opinion for the majority in *Wisconsin v. Yoder*, some seventeen years ago is an ideal expression of the power of individual rights to safeguard communities.

The Amish were protected from Wisconsin's compulsory education laws for reasons that are hauntingly similar to Congress's reasons for passing the ICWA. The impact of high school on the Amish child in late adolescence; the Amish emphasis on separation from, rather than integration with contemporary society; the exposure of Amish children to influences conflicting with their culture and heritage; and the ultimate threat to the Amish community itself, which survives only through its offspring—all are statements in which we could literally substitute "Indian" for "Amish" and thereby reproduce the congressional testimony concerning the ICWA. In the case of the Amish, however, the Court did not create an exclusive jurisdiction in the community. Rather, it enforced the claims of the first amendment freedom of religion clause against the State of Wisconsin.

Relying on the 1925 decision, *Pierce v. Society of Sisters*, the Court reasoned that the function of the state must "yield to the right of parents," in a case that did not deal with Indians. Burger argued that "the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children... The child is not the mere creature of the state; those who nurture him and direct his destiny have the right ... to recognize and prepare him for additional obligations." Coupled with the language that the *Pierce* decision stands as "a charter of the rights of parents," this argument leaves us only to wonder whether Indian tribes are "governments in this Union," and, if they are not, what it can possibly mean, then, to say that Indians are American citizens?