

SUPREME COURT NARROWS RIGHTS OF INDIANS

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The most extraordinary angle in Justice Brennan's opinion for the majority of the U. S. Supreme Court in the recent Choctaw Indian case arose from the frankly racist fear Brennan expressed regarding Indian parents' attachment to their children. The passage came late in the case, after Brennan had noted that Congress sought, in the Indian Child Welfare Act (ICWA), to prevent having non-Indian courts decide Indian custody cases and, therefore, could not permit Indian parents to defeat the law merely by transporting their children across state lines.

The reason for such a move, according to Brennan, was that "a state-law definition of domicile would likely spur the development of an adoption brokerage business. Indian children, whose parents consented (with or without financial inducement) to give them up, could be transported for adoption to states like Mississippi where the law of domicile permitted the proceedings to take place in state court." Therefore, the Court reasoned, Congress confined these cases to tribal courts so as to defeat moves by parents to take advantage of the same laws in state courts under which everyone else lives. The racist presumption is apparent: the same laws which govern all non-Indians in Mississippi without creating a baby-selling business would, for Indians, create just such a business. The conclusion is inescapable: Indians are more likely to sell their babies than non-Indians!

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

This decision by the unmarried Indian parents was not directly overruled by the Supreme Court, which simply declared that only the tribe could approve or disapprove the adoption and not the State of Mississippi. The reason for the decision, however, is that the ICWA seeks to discourage the adoption of Indian children off the reservation,

despite the wishes of the parents. What the Court has added to, or made explicit about, Congress's intent is the fact that Indian parents are not regarded as capable of making the kind of decisions about their offspring that other citizens are expected to make. Further, Indian parents are thought to be more likely to sell or abandon their children than other parents, an assumption for which not only is there no evidence whatsoever but at which Americans ought to take considerable offense.

It is a reasonable policy goal to seek to preserve the integrity of Indian families and, thereby, Indian communities. To do that, however, Congress must begin with the families themselves, according them the same respect it accords other families as a matter of right. The Court's decision means that, in the name of protecting Indian communities Congress is perfectly at liberty to ignore Indian families, extended or otherwise. This Mississippi case was brought by the tribe against the adoptive parents. The natural parents wishes were never taken into account in the process. That, in turn, is a result of Congress's general attitude toward Indians. In this arena as in many others, Congress treats Indians (who are, after all, United States citizens) as if they were foreigners. The Supreme Court has unfortunately followed suit.