ARE INDIANS PROTECTED BY THE CONSTITUTION? REFLECTIONS ON THE CHOCTAW DECISION[1]

by
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In a major decision delivered earlier this month, the Supreme Court held that Indian parents have no rights over their offspring that the federal courts will protect. The case was Mississippi *Band of Choctaw Indians v. Holyfield,* and considering its significance, it is shocking how few people have paid attention to it.

The facts of the case are uncomplicated. The mother of twins, with the consent of their natural father, elected to give birth to her children two hundred miles away from the Indian reservation where she lives. The reason: She preferred to have her children adopted off the reservation. She found willing adoptive parents in Orrey and Vivian Holyfield. Acting in concert, the natural parents arranged for the birth of the twins, 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. The natural parents were not bribed, the children were not sold. Apparently the natural mother and father were acting on their judgment about the best interests of their children. The matter is analogous to the Mexican mother who exerts herself to give birth on American soil in order to give her child the advantage of United States citizenship.

To the untrained eye there would be nothing here to go to court about. Though unmarried, the mother and father agreed. They found willing adoptive parents. And they followed the laws applicable to U.S. citizens.

The mere fact that they were Indians, however, robbed the parents of their rights.

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

In the Court's interpretation, the Indian Child Welfare Act gives a tribe veto power over the wishes of both parents and children in custody cases.

Although Congress mandated in the law that the wishes of parents and children should be considered, and that decisions be made in the best interests of children, the act's lodging of final authority in tribal courts, which are not even reviewable in federal courts, means that those mandates of Congress are rather prayers than orders.

How could Congress justify this closure of the federal courts to Indians? The Choctaw tribe, in its brief to the Supreme Court, sought to couch the denial of court access in the familiar language of affirmative action: ". . . . if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member."

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

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

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

In the Mississippi case these questions of constitutional status did not arise, for the Court rightly limited itself to statutory interpretation. No constitutional questions were raised in the arguments for the case, although that may only reflect the fact that the parents were not represented there. If the Supreme Court *had* considered the constitutional questions involved, the decision might have been very different. A consideration of the constitutional questions involved may well have produced a Yoder-like decision, reaffirming a "charter of rights for parents."

Yoder, of course, was the 1972 case that defended the right of the Amish community to be different by defending the right of Amish parents to guide the religious upbringing of their children. There the Court ruled that Amish parents could not be compelled to send their children to high schools because of the devastating effects such a practice would have on Amish culture. *Yoder* shows us how we can preserve people's distinct cultures and ways of life by means of defending the individual rights of parents and children.

The rights of all Americans are implicated in the denial of rights to Indian parents sanctioned in *Choctaw.* The notion of truly sovereign tribes connected to the United States by treaty rights became untenable from the moment Indians became citizens. The granting of citizenship to Indians interested every other American in the limitations and privileges of Indian citizenship.

If American citizenship *per se* poses no limitation on the power of Congress to legislate away the rights of Indians, we must sooner or later expect other citizens to be brought no less

surely under the so-called "plenary power" of Congress. Our Indian brothers and sisters cannot defer to the "great white father" without making the rest of us equally vulnerable. The problem highlighted by enforcement of the Indian Child Welfare Act illustrates the foolishness of preserving "independent" tribes within "subordinate" states. We were better off when the tribes were entirely and truly sovereign.

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EDITOR'S NOTE: On April 8, the Supreme Court handed down an important decision bearing on the matter of American Indians' civil rights. The case involved two Indian parents who wanted to give up their children to a white couple for adoption. The Supreme Court upheld the tribe's right to veto the parents' decision.

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