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**BLOOD**

**STRUGGLE**

The Rise  
of Modern Indian Nations

Charles Wilkinson



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**COVER ART:** *The Singer*, by Oscar Howe (1915–1983). Howe, in the fore-  
front of modern Indian artists, was born on the Crow Creek Indian Reser-  
vation in South Dakota and attended the Pierre Indian School until 1933.  
A natural artist, he studied under Dorothy Dunn at the Santa Fe Indian  
School and has exhibited his traditional Yanktonai artwork across the  
United States, in London, and in Paris. "It is my greatest hope that my  
paintings may serve to bring the best things of Indian culture into the  
modern way of life," Howe wrote. "I have been labeled wrongfully a  
Cubist. The basic design is Tohokmu (spider web). From an all-Indian  
background I developed my own style."

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that it "without cause, undermines the authority of tribes to 'make their own laws and be ruled by them.' "

As one example of Scalia's crusade to denigrate tribal sovereignty and exalt state authority over the reservations, he asserted in *Nevada v. Hicks* that " 'ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the state.' " In support of this proposition—the exact reverse of the whole course of modern Supreme Court Indian law—he cited two roundly discredited sources, a remark in the 1962 *Kake v. Egan* case and the 1958 interior department revision of *Felix Cohen's Handbook of Federal Indian Law*. The comment in *Kake v. Egan* had no basis at the time it was made, nor was it relevant to the case, and the leading 1973 *McClanahan* opinion expressly disavowed it. The 1958 rewriting of the original 1942 Cohen treatise was as sorry an episode as one will find in American law, a raw political move by the termination-bent Department of the Interior to debase Cohen's heralded scholarship in order to promote extreme assimilationist policies.

No one can yet say how the revisionary Scalia-Rehnquist-Thomas view of tribal sovereignty will fare in the years to come. Scalia did manage to put together a majority in *Nevada v. Hicks*. Yet most of the opinion was dictum—unnecessary to the opinion—and courts often give little deference to dictum, particularly when it is overdrawn. This new approach may fundamentally change Indian law, or it may be an isolated aberration. Time will tell.

RECENT Supreme Court opinions have clearly departed from the Court's own modern rulings. These decisions also are discordant because they clash with the approach of Congress, which holds primary authority over Indian affairs under the Constitution. The Indian voice has been heard, and regularly heeded, on Capitol Hill as Congress has held remarkably steady in support of self-determination over the course of thirty years. While President Nixon's message in 1970 owed much to the efforts of non-Indian White House staffers, the pattern soon emerged of tribally driven legislation in the tradition of early work by the Taos Pueblo,

the Warm Springs and Menominee tribes, and Alaska Natives. A prime example involved the welfare of children.

In the fall of 1967, Louie and Janet Goodhouse of the Devil's Lake Sioux Tribe (now the Spirit Lake Tribe) contacted the Association on American Indian Affairs in New York about a child placement case. North Dakota county authorities wanted to remove Ivan Brown, a six-year-old boy, from his Indian home and place him with an adoptive white family. The boy was living with an elderly tribal member, Mrs. Alex Funey, a grandmother by tribal custom, though not by blood.

Bert Hirsch, a young lawyer with AAIA, went out to the reservation. After pinning down the facts, he brought suit to block the adoption proceedings. No one had alleged neglect. The county made only one argument for removing the boy from his Indian home: Mrs. Funey was 63 years old and therefore was unfit to care for the boy. The tribe saw nothing wrong in this—it was a tribal tradition. Eventually the county authorities backed off.

Hirsch and other staff members at AAIA, suspecting that the incident at Devil's Lake might be part of a larger problem, gathered statistics and learned that, astonishingly, no fewer than one-third of all Devil's Lake Sioux children had been removed from their families and placed in non-Indian homes. The data transformed Ivan Brown's individual circumstances into a cause. The Goodhouses traveled to New York for a summer 1968 press conference at the Overseas Press Club that received sympathetic coverage.

AAIA then began a national effort to assess the seriousness of the practice of removing children from Indian homes. Research showed that Devil's Lake was the norm, not the exception. The problem was nationwide, and its magnitude staggering: Of all Indian children across the country, 25 to 35 percent had been removed from their homes. Depending on the state, the ratio of adopted-out Indian children compared to non-Indian children was many times higher: 4-1 in several states, 10-1 in Wyoming, 15-1 or higher in Maine, Washington, Wisconsin, the Dakotas, and Utah.

organizations, took the lead in bringing the issue to Congress. Hirsch and other lawyers drafted corrective legislation to clarify the primary authority of tribal courts, limit the jurisdiction of state courts, and rein in overly zealous state and local child welfare workers. Senator James Abourezk of South Dakota introduced it in 1972.

Indian people offered their experiences to Congress. Valencia Thacker from Southern California related: "I can remember [the child welfare worker] coming and taking some of my cousins and friends. I didn't know why and I didn't question it. It was just done and it had always been done." "One of the most serious failings of the current system," Chief Calvin Isaac of the Mississippi Band of Choctaw testified, "is that Indian children are removed from the custody of their natural parents by non-tribal governmental authorities who have no basis for intelligently evaluating the cultural and social premises underlying the Indian home life and childrearing. . . . [C]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are raised in non-Indian homes and denied exposure to the ways of their people." Louis La Rose, tribal chairman of the Winnebago Tribe of Nebraska, expressed his despair:

I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that has a value system that is A-1 in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think . . . they destroy him. And if you have ever talked to an individual like that when he comes to a reservation . . . I get depressed.

The Church of Jesus Christ of Latter-day Saints, the Mormon Church, played a major role in this. Always active in proselytizing and converting Native Americans, the church initiated its Indian

aggressively recruited Indian parents in remote areas (recruitment was especially widespread at Navajo and Hopi) to send their children to live in Mormon homes during the school year. However well-meaning it may have been, the Mormon program not only took children from their homes and tribes but also imposed intense pressure to convert. By the early 1970s some five thousand Indian children from various tribes lived in Mormon homes.

Racism played its part in the drain of children, but much of the loss can be attributed to an unfamiliarity with Native culture. Many Indian children came from broken homes, often caused by problem drinking. State caseworkers and judges instinctively leaned toward neighborhoods with lawns and white picket fences. No doubt they honestly believed that the child would be better off in the suburbs. They failed to appreciate the extended family tradition, as with Ivan Brown living with an Indian grandmother at Devil's Lake; the value of growing up in a tribal culture; or the disorientation facing a child in bridging the gulf between his or her homeland and the foreign white world. In some cases, Indian children would benefit from being adopted out, but tribal alternatives needed to be evaluated knowledgeably and thoroughly. The system had spun way out of kilter.

The proposed Indian child welfare legislation faced concerted opposition. The Mormon Church of course objected; some states joined in to oppose the unprecedented federal intervention into family law, an area traditionally left to the states and coveted by them. After Congress passed the bill, which had been amended only slightly from the version proposed by the Indian organizations, it hit still more storms. Several cabinet officers urged President Jimmy Carter to veto it. In response, AAIA placed ads in the *Washington Post* and *New York Times*, and tribes enlisted church groups to support the bill. In the end, the central figure may have been Congressman Morris Udall, who had been moved by the Indians' cause and had shepherded the bill through the Interior Committee he chaired. The powerful Arizonan made his case directly to the president and let it be known that he would block a civil service bill, a White House favorite, unless the child wel-

Carter did sign the historic legislation in 1978. The Indian Child Welfare Act, perhaps the most far-ranging legislation ever enacted in favor of Indian rights, reaffirmed Supreme Court cases upholding exclusive tribal court jurisdiction over custody proceedings involving children who lived on the reservation. For off-reservation children, ICWA set liberal transfer rules mandating state court judges to shift many cases to tribal courts. For those cases that did remain in state court, ICWA required judges to give stringent presumptions in favor of Indian families before placing Indian children with non-Indian families. The statute allowed Public Law 280 tribes to petition the Interior Department so that their tribal courts could exercise ICWA jurisdiction, and most of those tribes have successfully done so.

State child welfare agencies initially resisted the implementation of ICWA, and state judges, accustomed to exclusive state jurisdiction over family matters, have narrowly interpreted some of the statute's provisions. Nonetheless, the Supreme Court has upheld the act, and the practice of adopting Indian children into white families has been greatly reduced. Tribal and state child welfare workers increasingly cooperate in the administration of Indian child placement. The Indian Child Welfare Act, which Indian people created and which fortifies the futures of tribes by giving them the tools to protect their children, stands as testament to how Indian leaders have mobilized in order to define and implement priorities.

TRIBAL LEADERS have pushed through an impressive array of federal legislation during the modern era. As noted, Congress dealt with the restoration of terminated tribes, the return of tribal lands, and the reform of the BIA through the self-determination policy. More than twenty water rights settlements have recognized tribal water rights and resolved complex, contentious western water disputes. Federal laws now address tribal forest management, agriculture, and fisheries management. The federal environmental laws, including the Clean Water Act and Clean Air Act, give tribes the option of being treated as states for regulatory