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Citation: 95 Neb. L. Rev. 885 2016-2017



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Matthew L.M. Fletcher and Wenona T. Singel\*

## Indian Children and the Federal–Tribal Trust Relationship

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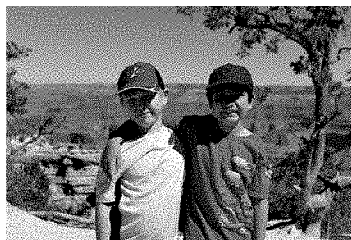
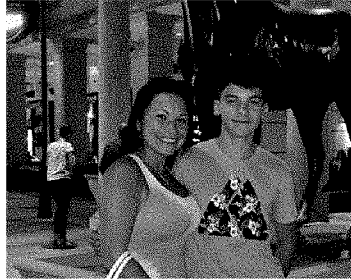
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\* The authors are professors at the Michigan State University College of Law, directors of the Indigenous Law and Policy Center, and Reporters for the *Restatement of the Law of American Indians* (American Law Institute). They are visiting professors at Rogers College of Law at the University of Arizona for the Spring 2017 semester. Professor Fletcher is a citizen of the Grand Traverse Band of Ottawa and Chippewa Indians, and an appellate judge for Grand Traverse Band and several other tribes. Professor Singel is a citizen of the Little Traverse Bay Bands of Odawa Indians and an appellate judge for Little Traverse Bay

*For Owen and Emmett, Derek & Nolan, Ben, and Laura*

## I. INTRODUCTION



The first photo above is of Professor Wenona Singel's sister, Christina, and her son. In the last picture, you can see Professor Singel and Fletcher's two young sons. In Wenona and Christina's family, their children are the first generation to not experience the loss of adoption or Indian boarding schools. Both their lives and their mother's life have been irreparably changed by people who worked in the 1950s and 1970s to encourage the adoption of Indian children be-

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Bands. The authors thank Kristen Carpenter, Kate Fort, Catherine Grosso, Leah Jurss, Angela Riley, and Rebecca Tsosie for comments. Professor Fletcher thanks the participants at a faculty workshop at the Case Western Reserve Law School.

cause they believed that Indian children would be better off in the long run in white, middle-class homes. Their mother and her sister, the middle picture, were taken by Catholic Social Services in Detroit in the early 1950s and placed with their adoptive parents in an adoption in 1958, without any written documentation whatsoever. When their mother and her sister were brought to their adoptive parents' home, no one was home, so the two young girls were left at a neighbor's house to await the arrival of their new parents. In the middle photo, you can see their mother and her sister in a picture taken after the adoption.

Less than two decades later, Christina was taken from their mother immediately after her birth by members of her church community in Detroit and placed in an informal foster home identified by the church, despite the fact there was no evidence of abuse, neglect, or inability to provide for Christina. After their mother was successful in getting Christina returned to her four months later, a woman from the church offered to babysit Christina for the day. The woman took Christina to the services of another church in Flint. There, she offered Christina as an adoptive placement to a couple that admired the beautiful one-year-old Indian girl. The members of their mother's church pressured their mother to give up Christina to a white, middle-class family because they believed she would be better off. Again, there was no evidence of abuse, neglect, or inability to provide for Christina. A representative from the church, the same woman who offered Christina to the family in Flint, took their mother to the Wayne County courthouse to ensure that she would not back out from the placement and expose her true feelings of confusion and uncertainty. After the judge finalized the adoption, their mother cried the entire trip home.

Wenona felt her mother's enduring pain and shame throughout her entire childhood. She always grieved the loss of her sister. Since she was four at the time of her sister's adoption, she has few memories of their time together, other than remembering that her sister had a joyful smile, a closet of pretty infant dresses that Wenona adored and envied, and the habit of laughing whenever Wenona laughed, and crying whenever Wenona cried.

Before these experiences, many grandparents and great-grandparents and other relatives of Michigan Indians—including Professor Fletcher's relatives<sup>1</sup>—experienced their own family losses when they

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1. Professor Fletcher's grandfather, David Mamagona, and his siblings Gladys and Mark, went to Mt. Pleasant Indian School. *Mt. Pleasant Indian School and Agency Student Case Files, 1893–1946 (RG 75)*, NATIONAL ARCHIVES, <https://www.archives.gov/chicago/finding-aids/mt-pleasant-student-case-files.html> [https://perma.unl.edu/533L-R5B8]. His grandmother Laura Stevens's siblings, Andrew, Joseph, Jennie, Robert, Mary, Phoebe, and Lucy Stevens also attended the

were sent to Indian boarding schools in Mt. Pleasant<sup>2</sup> and Harbor Springs, Michigan.<sup>3</sup> These boarding schools attempted to strip them of their language, culture, and family relationships in exchange for training for menial jobs in adulthood. Professor Fletcher's grandmother, Laura Mamagona (née Pokagon and Stevens), would not speak Anishinaabemowin, the language she spoke as a child in addition to English, until the last years of her life. Our relatives are still healing from the wounds of multiple generations of our families being ripped apart.

In 1978, the United States recognized the nationwide practice of the wholesale removal of Indian children from their families necessitated greater procedural protections for Indian families. The solution was the adoption of ICWA, the Indian Child Welfare Act. ICWA's first section states Congress's finding that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."<sup>4</sup>

ICWA is not a complete solution. The child welfare system in many states is in deep disrepair, with injustices and inefficiencies beyond most people's understanding or knowledge.<sup>5</sup> However, if ICWA had

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school. *Id.* Laura was quarantined in Kalamazoo, suspected of harboring tuberculosis (she never manifested symptoms and was later released). Laura's mother, Angeline Stevens (née Marks), also attended the school, along with her siblings. *Id.*

2. BRENDA J. CHILD, HOLDING OUR WORLD TOGETHER: OJIBWE WOMEN AND THE SURVIVAL OF COMMUNITY 121–38 (2012).

3. BILL DUNLOP & MARCIA FOUNTAIN-BLACKLIDGE, THE INDIANS OF HUNGRY HOLLOW 131–40 (2004).

4. 25 U.S.C. § 1901(4) (2012).

5. *E.g.*, Emily Palmer & Campbell Robertson, *Mississippi Fights to Keep Control of Its Beleaguered Child Welfare System*, N.Y. TIMES (Jan. 17, 2016), [http://www.nytimes.com/2016/01/18/us/mississippi-fights-to-keep-control-of-itsbeleaguered-child-welfare-system.html?\\_r=1](http://www.nytimes.com/2016/01/18/us/mississippi-fights-to-keep-control-of-itsbeleaguered-child-welfare-system.html?_r=1) [<https://perma.unl.edu/663Q-ZE8N>] ("A child was placed with a convicted rapist. Another ended up with a foster mother who threw the toddler to a pair of snarling dogs. In other instances, the division failed to put homeless or neglected children in custody. In one case this failure led to the rape and impregnation of a 14-year-old girl."); Rick Rojas, *As Arizona Struggles to Fix Foster System, Children Suffer the Consequences*, N.Y. TIMES (Mar. 24, 2015), <http://www.nytimes.com/2015/03/25/us/as-arizona-struggles-to-fix-foster-system-children-suffer-the-consequences.html> [<https://perma.unl.edu/5DQQ-EG29>] ("The girl, identified only by the initials B. K., is one of several child plaintiffs named in a lawsuit filed last month by two advocacy groups, which assert that Arizona pulls children from tumultuous family lives only to place them in more turbulent circumstances in the care of the state's child welfare system. Although that system was overhauled last year, after the disclosure by a whistleblower that more than 6,500 complaints about child neglect and mistreatment were reported but completely ignored, the lawsuit asserts that only negligible progress has been made.").

been in place before the adoptions of Professor Singel's mother and sister two decades apart, they may have been spared the trauma of losing their families and their connections to their tribe.

What happened to Professor Singel's family continues to happen deep into the twenty-first century. In 2015, a federal court held that Rapid City judges had a pattern and practice of depriving Indian families of basic due process rights when removing their children during emergency hearings.<sup>6</sup> In far too many cases, the state procedure did not allow Indian parents adequate notice of these so-called 48-hour hearings, did not allow Indian families to review the evidence of child endangerment or neglect, and did not allow Indian families to be represented by counsel.<sup>7</sup> The court held the Rapid City judges' procedures violated the Fourteenth Amendment and the Indian Child Welfare Act (ICWA).<sup>8</sup>

It is bitterly ironic that ICWA and its state law siblings are currently subject to multiple attacks throughout the country.<sup>9</sup> These suits characterize ICWA as a constitutional outlier—in short, that ICWA provides too much procedural protection to Indian children and Indian nations, and the federal government does not have authority to enact family law. These claims are based on historical assumptions about the limited role of the federal government in family law and in protecting Indian child welfare.

Those assumptions are wrong.

American Indian children were a terrible focus of the Founding Generation that ratified the Constitution and the Bill of Rights. American military strategists, empowered by the foreign affairs and war powers, targeted Indian children for kidnapping and imprison-

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6. *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015).

7. *Id.* at 768. The court's description of the process is chilling:

Judge Davis does not conduct any inquiry during the 48-hour hearings to determine whether emergency removal remains necessary. He permits no testimony by the Indian parents or presentation of testimony by the tribal attorney to determine whether the risk of imminent physical harm has passed. Contrary to the clear intent of ICWA, the DOI Guidelines and the SD Guidelines, all of which contemplate evidence will be presented on the record in open court, Judge Davis relies on the ICWA affidavit and petition for temporary custody which routinely are disclosed only to him and not to the Indian parents, their attorney or custodians. These undisclosed documents are not subject to cross-examination or challenge by the presentation of contradictory evidence.

*Id.*

8. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–63 (2012)).

9. For details on these cases, see Kathryn E. Fort, *ICWA Appellate Project & ICWA Defense Project*, TURTLE TALK, <https://turtletalk.wordpress.com/fort/icwa/> [<https://perma.ul.edu/2KPK-3882>].

ment as a means to undermine tribal resistance.<sup>10</sup> Those children the Americans did not capture remained vulnerable to the military strategy to deny food and shelter to Indian nations. Many Indian children became orphans.<sup>11</sup> American diplomats negotiating Indian treaties under the Treaty Power made thinly-veiled threats about the welfare of Indian children if Indian nations continued to resist. Tribal treaty negotiators acknowledged the vulnerability of their people and negotiated with an eye toward their children, and notably, orphans. Ultimately, the United States in the late-eighteenth and early nineteenth centuries agreed in numerous ratified treaties to guarantee the safety, education, welfare, and land rights of Indian children. These agreements form the earliest basis of a robust federal government trust relationship with Indian children. Numerous federal statutes enacted in accordance with what is now termed the general trust relationship served as the implementation of the federal government's authority under the Indian Commerce Clause, other Constitutional provisions, and the structure of the Constitution.

Indian children remained a focus of American Indian law and policy for the next century and a half, an era we call the Coercive Period, borrowing the phrase from George D. Harmon, a mid-twentieth century historian.<sup>12</sup> This is the period in which the United States asserted a guardianship-type power over Indian nations and people, virtually immune from accountability to anyone, and in which federal law and policy thoroughly became untethered from the Constitution. Despite no constitutional provision authorizing the federal government to exercise plenary power over tribal domestic and internal affairs,<sup>13</sup> American policy shifted away from using Indian children as targets of military and diplomatic strategy toward the policy of stripping Indian children from their families and cultures.<sup>14</sup> This era, usu-

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10. See generally JOHN GRENIER, *THE FIRST WAY OF WAR: AMERICAN WAR MAKING ON THE FRONTIER, 1607–1814* (2005).

11. MARILYN IRVIN HOLT, *INDIAN ORPHANAGES* (2001).

12. GEORGE DEWEY HARMON, *SIXTY YEARS OF INDIAN AFFAIRS: POLITICAL, ECONOMIC, AND DIPLOMATIC, 1789–1850*, at 167–325 (1941) [hereinafter HARMON, *SIXTY YEARS OF INDIAN AFFAIRS*]; see also Frederick E. Hoxie, *Searching for Structure: Reconstructing Crow Family Life during the Reservation Era*, 15 AM. INDIAN Q. 287, 287 (1991) (“[T]here was a coercive period during which Europeans established military, economic and cultural control over the Indians.”). Harmon was no friend to Indian people, occasionally referring to them as a “race of an inferior character,” George D. Harmon, *The Indian Trust Funds, 1795–1865*, 21 MISS. VALLEY HIST. REV. 23, 30 (1934) [hereinafter Harmon, *The Indian Trust Funds*], and so his acknowledgment of the intense coercion and even violence against Indian people perpetrated by the United States is especially important.

13. Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

14. See generally MARGARET D. JACOBS, *A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD* (2014).

ally called the assimilation era, is a far darker and abysmal period than even the early era of warfare and land dispossession.<sup>15</sup>

In the beginning of the Coercive Period, Indian nations continued to negotiate treaties and other agreements designed to preserve the safety, welfare, education, and land rights of their children, and for a time the United States honored those obligations. But after the Civil War, federal actions turned toward undermining Indian cultures, languages, and religions through the same tools Indian nations negotiated for during the treaty era. Federal, state, and religious officials again turned to kidnapping and imprisoning Indian children in oppressive boarding schools, isolating them from their families, nations, and lands.<sup>16</sup> These educational abuses continued into the mid-twentieth century. The boarding school system would eventually be supplemented by state child protective agencies, state courts, and private adoption agencies in the twentieth century. Again, there were reports of kidnapping of Indian children into the 1960s and 1970s, but the focus then was the abuse of the legal system to remove Indian children from their families, terminate the parental rights of their parents, and relocate them to off-reservation, non-Indian foster and adoptive parents.<sup>17</sup>

The modern era of the federal government's trust relationship with Indian children began in the 1970s with the enactment of the Indian Child Welfare Act,<sup>18</sup> the Indian Self-Determination and Education Assistance Act (ISDEAA),<sup>19</sup> and related statutes.<sup>20</sup> As of the enactment of these statutes, federal law and policy is once again focused on the trust relationship between the United States and Indian children, and again is grounded in the treaty-based obligations and the federal government's constitutional powers. In particular, the ISDEAA is a man-

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15. *See generally* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN", 1880-1900 (Francis Paul Prucha ed., 1973) [hereinafter AMERICANIZING THE AMERICAN INDIANS].

16. *See generally* BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES (Clifford E. Trafzer et al. eds., 2006).

17. 25 U.S.C. § 1901(4) (2012) ("Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds . . . that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . .").

18. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-63 (2012)).

19. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered sections of 5 U.S.C., 20 U.S.C., 25 U.S.C., 40 U.S.C., 42 U.S.C., 43 U.S.C., 50 U.S.C.).

20. *E.g.*, Native American Housing Assistance and Self Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4017 (codified as amended at 25 U.S.C. §§ 4101-4243 (2012) & scattered sections of 42 U.S.C.).



ifestation of the federal government's treaty- and international law-based obligations to guarantee health, education, housing, safety, welfare, and other government services. ICWA is a manifestation of the United States' acknowledgment that the federal government overstepped its authority under the Constitution to manage internal tribal matters at the expense of individual Indians' rights to due process and freedom of religion. These statutes represent a return of federal Indian law to fidelity to the Constitution.

## II. INDIAN CHILDREN AND THE FOUNDING GENERATION

Great Lakes Anishinaabek (or Anishinaabeg) Indian children<sup>21</sup> in the decades surrounding the founding of the United States would have known their own families and clans as the sources of their law and governments. For Anishinaabek children, their clan was their family, their family was their village, and their village was their government.<sup>22</sup> In the summer, they likely worked in the fields near the beaches of the Great Lakes growing the Three Sisters of corn, beans, and squash. They may have learned how to hunt and trap in the wooded areas and fish in the lakes and rivers. They may have helped in the preservation of food for the winter. In the winter, lodging inland away from the harsh cold of the lakes, they listened to the stories and lessons of their elders. In the spring, they went with their families to the sugar bush and began to harvest maple sugar. And then they would return to the lakeshore to start the process all over again.

Federal Indian law and policy in the earliest decades of the American Republic forms the basis of the federal-tribal relationship to this day. Following the lead of the French, Spanish, and English, the Americans quickly began dealing with Indian nations on a nation-to-nation basis as a matter of foreign affairs.<sup>23</sup> Through a series of military, economic, and diplomatic alliances, usually memorialized in ratified treaties,<sup>24</sup> the United States assumed a duty of protection over Indian nations in which tribes divested much of their external sover-

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21. In each section, we endeavor to include the point of view of Indian children, and we focus on the Great Lakes Anishinaabek, the Odawa, Bodewadmi, and Ojibwe people, also known as the Three Fires Confederacy. JAMES A. CLIFTON ET AL., *PEOPLE OF THE THREE FIRES: THE OTTAWA, POTAWATOMI, AND OJIBWAY OF MICHIGAN* (1986).

22. *See generally* M. INEZ HILGER, *CHIPPEWA CHILD LIFE AND ITS CULTURAL BACKGROUND* (1951); *see also* EDWARD BENTON-BANAI, *THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY* 74-78 (1979) (describing the clan system); RUTH LANDES, *OJIBWA SOCIOLOGY* 1-4 (AMS Press 1969) (describing the political organization).

23. *See generally* WALTER H. MOHR, *FEDERAL INDIAN RELATIONS, 1774-1788* (1933).

24. *See generally* FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 41-66 (1994).

eignty to the federal government in exchange for the preservation of tribal internal sovereignty.<sup>25</sup>

Early Indian law and policy did not always feature honorable dealings. The military often horrifically used Indian children as pawns in their conflicts with Indian nations. Diplomats brought in to clean up the mess caused by warfare usually did respond to tribal requests for protections of their children in the aftermath of war and dispossession. Those requests found their way into treaties and federal statutes. Additional federal statutes enacted to implement treaties and advance Indian policy further cemented the general trust relationship, especially in relation to Indian children and orphans.<sup>26</sup>

#### A. The Treaty and International Law Basis of the Federal-Tribal Trust Relationship

The modern understanding of the federal-tribal relationship is that the relationship involves federal trust obligations and duties to Indian nations and Indian people.<sup>27</sup> Centuries of federal statutory and judicial precedents provide deep context and specificity to that relationship. However, the Founding Generation understood the federal-tribal relationship more in terms of international law principles, most notably the duty of protection that superior sovereigns owe to consenting inferior sovereigns. The Constitution's provisions and structure relating to Indian affairs makes sense in this context.

The deep political theory behind the origins of the federal-tribal relationship and the origins of the modern trust relationship is best encapsulated in Justice Thompson's dissenting opinion in *Cherokee Nation v. Georgia*,<sup>28</sup> an opinion that formed the theoretical basis for Chief Justice Marshall's groundbreaking opinion recognizing tribal sovereignty in *Worcester v. Georgia* the next year.<sup>29</sup> In *Worcester*, the Court held the relationship of Indian tribes to the United States is founded on "the settled doctrine of the law of nations"—that when a

25. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552 (1832) ("The [United States] receive the Cherokee nation into their favour and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected."); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 50–80 (1831) (Thompson, J., dissenting) (describing the international law theories behind the use of the word "protection" in Indian treaties).

26. Even state legislatures enacted statutes protecting the welfare of Indian children. At least one state government funded and operated a school to educate Indian children—an "orphan asylum" to educate, house, and tend to the welfare of Indian children. HOLT, *supra* note 11, at 49–83 (describing the history of the "Thomas Asylum for Orphan and Destitute Indian Children," operated by New York State).

27. See generally MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 5.2 (2016).

28. 30 U.S. 1 (1831).

29. *Worcester*, 31 U.S. 515.

stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one; the weaker nation does not surrender its right to self-government.<sup>30</sup> "Protection" was a term of art under international law that meant that the United States agreed to a legal duty of preserving Indian and tribal property and autonomy to the maximum extent allowable in the national interest. In numerous treaties with Indian tribes, the United States agreed to take Indians and tribes under the "protection" of the federal government.<sup>31</sup>

The United States Constitution's provisions relating to federal Indian affairs—including without limitation the Commerce Clause and the Necessary and Proper Clause, the Treaty Power, the Property and Territory Clause, the Foreign Affairs and War Powers, the Indians Not Taxed Clause, and the Supremacy Clause—all point to the conclusion that federal authority over affairs with Indian nations was a nation-to-nation exercise. The Founding Generation's Indian affairs program, exemplified in the Northwest Ordinance,<sup>32</sup> Trade and Intercourse Acts,<sup>33</sup> and early treaties, most notably the Treaty of Greenville, confirms that federal authority largely stopped at Indian

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30. *Id.* at 551–56, 560–61; *see also* *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (Congress "was but continuing a policy which prior governments had deemed essential to the protection of such Indians.").

31. *See, e.g.*, Treaty with the Chippewa, etc. art. 5, Nov. 25, 1808, 7 Stat. 112 ("The several nations of Indians aforesaid, do again acknowledge themselves to be under the protection of the United States, and of no other sovereign; and the United States on their part do renew their covenant, to extend protection to them according to the intent and meaning of stipulations in former treaties."); Treaty with the Chickasaws, Chickasaw Tribe–U.S., Jan. 10, 1786, 7 Stat. 24 ("The Commissioners Plenipotentiary of the United States of America give peace to the Chickasaw Nation, and receive them into the favor and protection of the said States . . ."); *id.* art. 2 ("The Commissioners Plenipotentiary of the Chickasaws, do hereby acknowledge the tribes and the towns of the Chickasaw nation, to be under the protection of the United States of America, and of no other sovereign whosoever."); Treaty with the Wyandots, etc. art. 5, Aug. 3, 1795, 7 Stat. 49 ("[T]he United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever."); Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15 ("The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection . . .").

32. Northwest Ordinance § 14, art. 3, 32 JOURNALS OF CONTINENTAL CONGRESS 334, 340–41 (1787) ("The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and, in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.").

33. *See generally* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834 (1962).

country's borders absent a compelling national interest in intervening. This is what Professor Charles Wilkinson referred to as "measured separatism."<sup>34</sup> The details of early federal-tribal interaction included matters of military and economic alliance, criminal jurisdiction, trade with Indians, and Indian children.

## B. Federal Military and Diplomatic Actions

Anishinaabek children in the colonial period leading up to the American Revolution and in the era of the Founding Generation lived with their extended families in accordance with their tribal cultures and traditions. They would learn to rely upon specific family members and even those who were not family for specific experiences and support. But like many Indian children in what is now the eastern half of the United States, their homelands were threatened by the presence of outsiders and by the potential for total warfare.<sup>35</sup> An Indian child who was part of an Indian nation at war with a non-Indian military faced the possibility of violent death at any time and would likely be forced to relocate as their villages and crops were burned by the enemies. Some Indian children would even be captured or kidnapped by enemy militaries to be held as hostages to force negotiations or surrender.

Federal Indian law and policy at the Founding was governed by the foreign affairs, war, and treaty powers contained in the Constitution. Most Indian affairs during the Revolution concerned diplomacy, warfare, trade, and treaty making. In the earliest post-Revolution decades, the federal-tribal relationship dealt with land cessions, the establishment of reservations, law and order, trade, and Indian children.

The Founders were military men and diplomats, slave owners and land speculators.<sup>36</sup> They made enemies, and those enemies included Great Britain and its loyal American subjects, and dozens of Indian nations within the thirteen colonies and in the so-called "Western

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34. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14–19 (1987).

35. *See generally* JANET E. CHUTE, *THE LEGACY OF SHINGWAUKONSE: A CENTURY OF NATIVE LEADERSHIP* (1998); GREGORY EVANS DOWD, *WAR UNDER HEAVEN: PONTIAC, THE INDIAN NATIONS, AND THE BRITISH EMPIRE* (2002); GREGORY EVANS DOWD, *A SPIRITED RESISTANCE: THE NORTH AMERICAN INDIAN STRUGGLE FOR UNITY, 1745–1815* (1992); MICHAEL WITGEN, *AN INFINITY OF NATIONS: HOW THE NATIVE NEW WORLD SHAPED EARLY NORTH AMERICA* (2012).

36. For details on land speculation in the colonial era and after the American Revolution, *see generally* STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005) and LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005).

lands.”<sup>37</sup> The revolutionary period saw the colonists worrying deeply about Indian nations. Indian nations were competitors for lands and resources. They were potentially military threats to the new Republic. Many Indian nations had allied economically and militarily with Great Britain.<sup>38</sup> For many Indian nations, the hated British were more preferable to the Americans. American people and states had demonstrated a hunger for Indian lands and resources that far exceeded that of the British Empire.<sup>39</sup> While the Crown had barred land transactions between Indian nations and the Americans in 1763,<sup>40</sup> the Americans pursued an enormous, and largely illegal, speculation in western land titles that would skew American politics for decades into the history of the Republic.<sup>41</sup>

### 1. Colonial Era

We begin with the colonial era. In wars before the American Revolution, Indian nations and the American colonists typically did not discriminate between military personnel and civilians, combatants and noncombatants.<sup>42</sup> “[B]oth Americans and Indians had over the course of the previous 150 years ranged across the frontier, killed enemy civilians, and burned enemy towns with devastating regularity.”<sup>43</sup> It was standard practice for non-Indians to strategically attack Indian villages and families, targeting children and their food source.<sup>44</sup> This warfare was quite horrific, and became a template for violence between Indians and non-Indians for centuries.

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37. See generally Peter Onuf, *Toward Federalism: Virginia, Congress, and the Western Lands*, 34 WM. & MARY Q. 353 (1977).

38. See generally RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815* (1991).

39. THE FEDERALIST NO. 24, at 151 (Alexander Hamilton) (Random House ed., 1941) (“The savage tribes on our Western frontier ought to be regarded as our natural enemies, their [the British] natural allies, because they have most to fear from us, and most to hope from them.”).

40. ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 236–39 (1990); D’Arcy McNickle, *Indian and European: Indian-White Relations from Discovery to 1887*, 311 ANNALS AM. ACAD. POL. & SOC. SCI., May 1957, at 1, 6.

41. Merrill Jensen, *The Idea of a National Government During the American Revolution*, 58 POL. SCI. Q. 356, 362 (1943); Onuf, *supra* note 37, at 358.

42. GRENIER, *supra* note 10, at 19.

43. *Id.*

44. John K. Mahon, *Anglo-American Methods of Indian Warfare, 1676–1794*, 45 MISS. VALLEY HIST. REV. 254, 264 (1958) (emphasis added) (“When the whites took the offensive they resorted to a method of warfare which had been developed to cope with the unwillingness of the Indians to stand and fight in European fashion. They found that the most effective way to bring about a direct encounter with an Indian fighting force was to threaten the foundations upon which it stood—that is, the native fields and families. The technique was fairly simple and changed little throughout the colonial period. . . . Unable to use their favorite tactics of ambush and encirclement when thus attacked, and forced to defend

American Indian wars became wars of “extirpation” early in colonial history.<sup>45</sup> By 1646, English colonists in Virginia “made the killing of Indian noncombatants their preferred strategy and tactic.”<sup>46</sup> In the Jamestown colony’s conflict with the Powhatan nation, the colonists focused their attacks on Indian families, especially women and children: “[John] Smith warned ‘King’ Powhatan that if his subjects attacked English foragers, the colonists would seek ghastly retribution against the Indians’ wives and children.”<sup>47</sup> The war in which the Pequot nation was almost exterminated began when the English settlers kidnapped Indian women and children “to stand as hostages for the Indians’ good behavior.”<sup>48</sup> As the war raged, one English military leader chose to attack a Pequot fort housing women and children rather than the fort where the Pequot warriors were.<sup>49</sup> Another military leader executed the Pequot men, but enslaved the women and children.<sup>50</sup>

The leading military historian on this topic argued the Indian nations themselves turned to wars of extirpation in response to these early colonial strategies.<sup>51</sup> Prior to being exposed to these strategies, the Haudenosaunee nations, for example, did attempt to capture enemy families, but more often than not incorporated the women and children to replace family members lost in other conflicts.<sup>52</sup> In wars with colonists, Indians began to abandon their traditional (even ceremonial) ways of warfare.

In response to this new form of Indian warfare, colonials then turned to scalping Indian noncombatant family members, and created a market for scalps. By turn of the eighteenth century, Massachusetts began offering a bounty for scalps. Bounties for Indian men capable of bearing arms were very high, but Massachusetts would pay a bounty for women and children over the age of ten and would sell into slavery

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their families and food supplies, the Indians had no alternative but to stand and fight, and when faced by trained soldiers usually to suffer defeat.”).

45. GRENIER, *supra* note 10, at 21.

46. *Id.*

47. *Id.* at 22.

48. *Id.* at 26.

49. *Id.* at 27.

50. *Id.* at 28.

51. *Id.* at 30–36.

52. *Id.* at 27–28 (“The precontact Indian culture of war making among the Eastern Woodland Indians often was a mix of a highly evolved and ritualized system of limited war and the quest for individual glory. Within the Indian conceptualization of ‘mourning war,’ particularly among Iroquoian peoples, vanquished foes and captives often “replaced” losses in native communities. Indian raiding parties would venture forth, take captives, return to the war party’s home village with those captives, and apportion them among grieving clans. At that point, the elder women of the clan determined the fate of the captive: males usually suffered death by excruciating torture; the captors most often incorporated women and children into their society.”).

children under ten.<sup>53</sup> “By embracing scalp hunting, American society . . . had made the killing of noncombatants a legitimate act of war.”<sup>54</sup> North Carolina’s early eighteenth century war against the Tuscarora nation was perpetrated by English and Indian scalp hunters motivated by the bounties paid for Tuscarora scalps.<sup>55</sup> The English indiscriminately killed Indian families: “[T]ime spent killing noncombatants could even distract them from seizing the material goods of Indian villages. Upon seizing one village, for instance [the] Indian allies quickly set about plundering it while the colonists killed indiscriminately.”<sup>56</sup>

In the French and Indian War, colonial targeting of Indian families continued. British military leader Jeffrey Amherst ordered an attack on Abenaki Indians, and specifically ordered the American attackers not to kill or harm women or children.<sup>57</sup> Instead, the attackers killed nearly all of the Indian people, capturing twenty Indian women and children; their leader ultimately enslaved five Indian children.<sup>58</sup> In later years, Amherst himself ordered the killing of Indian and Canadian noncombatants.<sup>59</sup>

The Cherokee War beginning in 1759 was no different. There, the North Carolina governor argued that American military personnel should “enter into and destroy all the Towns of those at War with us, and make as many of them as we should take their Wives and Children Slaves . . . .”<sup>60</sup> In 1760, the colonists burned as many Cherokee villages as they could.<sup>61</sup> In 1761, the colonists burned or confiscated Cherokee crops.<sup>62</sup>

Burning villages and crops was a direct effort to enfeeble Indian families, and usually a successful one. On the cusp of the Revolution, the colonists warred with the Shawnee nation, again focusing on burning Indian towns and seeking to fully exterminate the Indians.<sup>63</sup> The Shawnees eventually capitulated: “Given the choice between seeing their villages burned and their women and children killed or remaining aloof from the British, the Shawnees chose the latter.”<sup>64</sup>

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53. *Id.* at 42.

54. *Id.* at 43.

55. *Id.* at 43–44.

56. *Id.* at 44.

57. *Id.* at 115.

58. *Id.* at 116.

59. *Id.* at 139–144.

60. *Id.* at 141 (quoting Governor Arthur Dobbs).

61. *Id.* at 142.

62. *Id.* at 142–43.

63. *Id.* at 148–50.

64. *Id.* at 151.

## 2. *Revolutionary War*

As enemies, Indian nations terrified Americans. They did not march in straight lines. They did not wear bright colors. They did not train methodically. They attacked suddenly, with surprise, and often at night. They took prisoners and tortured them ritualistically. They attacked nonmilitary personnel. They attacked families. Chief Justice Marshall once wrote in a private letter to Justice Story that “[t]he Indians were a fierce and dangerous enemy whose love of war made them sometimes the aggressors, whose numbers and habits made them formidable, and whose cruel system of warfare seemed to justify every endeavor to remove them to a distance from civilized settlements.”<sup>65</sup> Of course, the British and Americans had done all this as well.<sup>66</sup> George Washington remains known to the Haudenosaunee people as the “Town Destroyer” for his terrible pillaging of Indian villages.<sup>67</sup> Later, Andrew Jackson would achieve renown as an “Indian fighter” for viciously and illegally attacking Creek and Seminole villages in the southeast.<sup>68</sup>

During the Revolution, the United States focused on maintaining peace with Indian nations.<sup>69</sup> The first American treaty with Indian nations, the 1778 Treaty with the Delawares that established a military alliance, provided for the protection of Indian women and children by the Americans while Indian men were away at war against the British.<sup>70</sup> This may be the first explicit assumption of a duty of

65. RICHARD C. BROWN, *ILLUSTRIOUS AMERICANS: JOHN MARSHALL* 213 (Sam Welles ed., 1968) (quoting an 1828 letter from Chief Justice Marshall to Justice Story).

66. See generally GRENIER, *supra* note 10.

67. Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 900 n.1 (1998); see also Michael Yellow Bird, *Cowboys and Indians: Toys of Genocide, Icons of American Colonialism*, WICAZO SA REV., Fall 2004, at 33, 37.

68. Letter from John H. Dossett, Gen. Counsel, Nat’l Cong. of Am. Indians, to U.S. Court of Military Comm’n Review (Mar. 17, 2011), <http://turtletalk.files.wordpress.com/2011/03/ncai-amicus-letter-in-al-bahlul.pdf> [https://perma.unl.edu/E4SV-849R] (“General Jackson was ordered by President Monroe to lead a campaign against Seminole and Creek Indians in Georgia. The politically ambitious Jackson used these orders as an excuse to invade Spanish-held Florida and begin an illegal war, burning entire Indian villages in a campaign of extermination. The Seminole efforts to defend themselves from an invading genocidal army could be termed an ‘unlawful belligerency’ only by the most jingoistic military historian. General Jackson narrowly escaped censure in the U.S. Congress, was condemned in the international community, and his historical reputation was stained with dishonor.”).

69. Andrew McFarland Davis, *The Employment of Indian Auxiliaries in the American War*, 2 ENG. HIST. REV. 709, 709–10, 713 (1887). See generally MOHR, *supra* note 23, at 37–39 (discussing the debates of the Continental Congress on “[w]hether the Indian was to participate in the impending war”).

70. Treaty with the Delawares, 1778, Delaware Nation–U.S., Sept. 17, 1778, 7 Stat. 13, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES 3 (Charles J. Kappler ed., 1904). Article III provides in part:



protection to Indian children in American history. Even so, American military personnel indiscriminately murdered handfults of Delaware women and children in 1778 when they could not reach their destination at Lake Erie because of the weather.<sup>71</sup> In 1781, the American military again attacked the Delaware nation, murdering Indian men and taking twenty Indian old men, woman, and children as prisoners.<sup>72</sup> They eventually scalped the prisoners.<sup>73</sup> In the same theater of war, the Americans ritualistically executed one hundred Indian non-combatants in a Protestant church.<sup>74</sup>

During the Revolution, the American military repeatedly embarked on plans to attack Indian food sources. They attacked villages populated by old men, non-fighting women, the sick, and children. They burned Indian villages. Military reports of attacks on Cherokee villages during the Revolution detailed the number of Indian women and children captured.<sup>75</sup> The Americans brutally responded to the Cherokee Nation's declaration of war against the United States in 1776 by again burning Cherokee towns and crops and "caught Indian women and children, many of whom they killed and scalped rather than make prisoners."<sup>76</sup>

George Rogers Clark's famed 1778 expedition to the Illinois country began with threats that his army would inflict vicious murder on Indian families.<sup>77</sup> He sent a message to the Indians at Detroit: "This is the last Speech you may ever expect from the Big Knives . . . . [T]he

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And the said deputies, on the behalf of their nation, engage to join the troops of the United States aforesaid, with such a number of their best and most expert warriors as they can spare, consistent with their own safety, and act in concert with them; and for the better security of the old men, women and *children* of the aforesaid nation, whilst their warriors are engaged against the common enemy, it is agreed on the part of the United States, that a fort of sufficient strength and capacity be built at the expense of the said States, with such assistance as it may be in the power of the said Delaware Nation to give, in the most convenient place, and advantageous situation, as shall be agreed on by the commanding officer of the troops aforesaid, with the advice and concurrence of the deputies of the aforesaid Delaware Nation, which fort shall be garrisoned by such a number of the troops of the United States, as the commanding officer can spare for the present, and hereafter by such numbers, as the wise men of the United States in council, shall think most conducive to the common good.

*Id.* at 3–4 (emphasis added).

71. GRENIER, *supra* note 10, at 153–54 ("The American offensives of 1778 became a slaughter of innocents.").

72. *Id.* at 160–61.

73. *Id.* at 161.

74. *Id.*

75. *See, e.g., id.* at 18.

76. *Id.* at 152.

77. *Id.* at 156.

next thing will be the Tomahawk. And You may expect in Four Moons to see Your Women and Children given to the Dogs to eat . . .”<sup>78</sup>

The colonial strategy to attack Indian families was far ranging. In 1779, the Americans once again targeted “[Haudenosaunee] crops and villages.”<sup>79</sup> In 1780, Pennsylvania offered substantial bounties for scalps from Indian women and children.<sup>80</sup> In 1781, southern colonials “burned Indian towns and massacred entire Indian families” in Tennessee.<sup>81</sup> In 1782, a year after Yorktown, George Rogers Clark’s army group “razed six Indian villages and killed dozens of Indian women and children.”<sup>82</sup>

### 3. *Post-Revolutionary War Era*

After the Revolution, the newly independent United States turned to Indian country. At the forefront of the federal government’s economic and political concerns were Indian nations, their lands, and their resources. Conflicts naturally arose. American military strategy to deal with Indian hostilities focused on burning Indian villages and crops and killing, capturing, or enslaving Indian women and children after the Revolution. For example, in 1792, one American general wrote to the governor of South Carolina the way to defeat Indians was to “march light into Creek [and Cherokee] country . . . and destroy the disaffected . . . towns.”<sup>83</sup> Indian women and children remained the weak link for Indian nations engaged in warfare with the United States. They required food and shelter, they travelled slowly, and, most importantly, they would not be left behind. Indian leaders would not sacrifice their children. In fact, Indian leaders invoked their children as a primary reason for their actions in resisting American encroachment.<sup>84</sup>

78. *Id.*

79. Mahon, *supra* note 44, at 271 (“General Sullivan did it in his skillful campaign of 1779 against the Iroquois. By destroying Indian crops and villages he at length forced the natives to make a stand.”) (footnote omitted).

80. GRENIER, *supra* note 10, at 158.

81. *Id.* at 160.

82. *Id.* at 162.

83. Letter from Robert Anderson to the Governor of South Carolina (Sept. 20, 1792), reprinted in 4 AMERICAN STATE PAPERS 317, 318 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832); see also GRENIER, *supra* note 10, at 170–71 (“Victories over the Indians were won by marching directly against their villages, burning their homes, destroying their fields, and killing and capturing their old men, women, and children.”).

84. *E.g.*, Benjamin Ramirez-Shkwegnaabi, *The Dynamics of American Indian Diplomacy in the Great Lakes Region*, 27 AM. INDIAN CULTURE & RES. J., no. 4, 2003, at 53, 59 (“The *ogimaa* not only was concerned with keeping the people protected, but understood his responsibility to care for and to ensure the well-being of future generations. This perception was undoubtedly reinforced by the frequent presence of entire communities at treaty councils throughout the nineteenth century.”).

The federal government's focus on the acquisition of Indian lands and resources from the borders of the newly formed States to the Mississippi River required a nation-to-nation relationship with Indian nations. George Washington wrote, "[T]he [settlement] of the Western Country and making a Peace with the Indians [were] so analogous that there [could] be no definition of the one without involving considerations of the other."<sup>85</sup> While the Americans preferred purchase, trade, and diplomacy to be the focus of this acquisition, this early era was punctuated with horrific wars and concluded with brutal human rights violations perpetrated during Indian removal.<sup>86</sup>

In some instances, the United States regular military stepped aside and allowed "frontiersmen" to attack Indian villages and perpetrate abuses on Indian families. In the festering conflict with the Chickamagua Cherokee nation, the Americans allowed citizens to organize and inflict terrible killings on Indian women and children.<sup>87</sup> "Frontier communities had no shortage of men . . . who held little compunction about sacking Indian villages and leaving Indian women and children to perish from disease, starvation, and the elements."<sup>88</sup> In the 1813–1814 wars with the Creek Nation, General Jackson employed irregular militias to eradicate Creek villages from the land.<sup>89</sup> In the 1816–1818 wars with the Seminole Nation, the American military was "employed to murder women and children."<sup>90</sup>

Military goals included kidnapping as many Indian children as possible, incarcerating them, and holding them hostage until an Indian nation capitulated to American demands. Early American state papers make note of military plans to capture children, hold them in military jails, and use them as bargaining chips with tribal leaders. The *American State Papers* reprinted a speech from Cornplanter, the Seneca leader, who recounted the terror that American soldiers focused on attacking Indian women and children inflicted:

The voice of the Seneca nation speaks to you, the great councillor, in whose heart the wise men of all the Thirteen Fires have placed their wisdom. . . . When your army entered the country of the Six Nations, we called you the

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85. PRUCHA, *supra* note 33, at 28 (quoting Letter from George Washington to James Duane (Sept. 7, 1783) (on file with the Library of Congress)).

86. On war, see generally GRENIER, *supra* note 10, at 170–220. On Indian removal, see Russell Thornton, *Cherokee Population Losses During the Trail of Tears: A New Perspective and a New Estimate*, 31 ETHNOHISTORY 289, 298 (1984) (estimating that as many as 8,000 Cherokee citizens may have lost their lives due to their forced removal) and W. Ben Secunda, *To Cede or Seed? Risk and Identity Among the Woodland Potawatomi During the Removal Period*, 31 MIDCONTINENTAL J. ARCHAEOLOGY 57 (2006) (referencing the Potawatomi "Trail of Death").

87. GRENIER, *supra* note 10, at 171–78.

88. *Id.* at 181.

89. *Id.* at 214–20.

90. Patrick Mingos, *Beneath the Underdog: Race, Religion, and the Trail of Tears*, 25 AM. INDIAN Q. 453, 461 (2001) (citation omitted).

town destroyer; and to this day, when that name is heard, our women look behind them and turn pale, and our children cling close to the necks of their mothers. Our councillors and warriors are men, and cannot be afraid; but their hearts are grieved with the fears of our women and children, and desire it may be buried so deep as to be heard no more.<sup>91</sup>

Federal treaty negotiators used the threat of frontier violence to initiate, negotiate, and conclude treaty negotiations with Indian nations.<sup>92</sup> On the cusp of open war in Creek country, President Washington reached out to the Creek leadership, notably Alexander McGillivray, to conclude a treaty.<sup>93</sup> Peace did not materialize on the ground, however, and in 1783 frontiersmen attacked a Creek town, killed several Indian men, and took eight Indian women as prisoners.<sup>94</sup>

American diplomats and military treaty commissioners exploited the vulnerability of Indian children, even the ones not being directly held hostage by the government. They also exploited the salience of tribal leaders to protect their children, their futures. The focus on Indian children by both the American and the tribal sides accounts for the hundreds of treaties and even federal statutes that provide for the health, welfare, safety, and land rights of Indian children. This combination of strategies was best exemplified by the Northwest Indian War, the first large-scale war prosecuted by the nascent United States, and the resulting Treaty of Greenville.

#### 4. *The Northwest Indian War*

The war in the Old Northwest in Ohio country, prosecuted by the American General “Mad” Anthony Wayne, began in the 1780s and led to the 1794 Battle of Fallen Timbers, a defeat for the Ohio River Valley Indian nations that led the British to stop backing the Indian war effort. The 1795 Treaty of Greenville exemplifies how the American military used Indian children as pawns to achieve American aims.

91. The Speech of the Cornplanter, Half-Town, and the Great-Tree, Chiefs and Councillors of the Seneca Nation, to the Great Councillor of the Thirteen Fires (n.d.), reprinted in 4 AMERICAN STATE PAPERS, *supra* note 83, at 140, 140; see also GRENIER, *supra* note 10, at 197.

92. State actors also threatened Indian nations with American military action, likely as a means to force negotiations over grievances, further demonstrating the states presumed the federal government would deal with their grievances with Indian nations. In 1794, a representative of the State of Georgia wrote to the leaders of the Creek Nation complaining about trespasses and threatening to seek the military assistance of the United States to enforce reservation boundaries. Letter from J. Meriwether, S.E.D., to the Head-men and Warriors of the Creek Nation (Aug. 11, 1794), reprinted in 4 AMERICAN STATE PAPERS, *supra* note 83, at 496. In the early decades, the United States was forced to mediate between States and Indian nations, all the while pursuing strategies to liberate Indian lands from tribal control east of the Mississippi River.

93. GRENIER, *supra* note 10, at 184.

94. *Id.* at 190.

This was the first American war after the American Revolution, and highlights the original public understanding of the federal government's Indian affairs powers in action.

The Northwest Indian War began as the American Revolution wound down. The federal government turned to the Ohio River Valley, where Indian nations stood in the way of American expansion. George Rogers Clark's expedition into the Old Northwest in the 1780s was the opening volley in this long war.<sup>95</sup> By 1790, the American government had decided upon a war of extirpation against the Ohio River Indians. Secretary of War Henry Knox ordered Brigadier General Josiah Harmar to go to Fort Washington, now the Cincinnati area, and prosecute this war: "To extend a defensive and efficient protection to so extensive a frontier, against solitary, or small parties of enterprising savages, seems altogether impossible. No other remedy remains, but to extirpate, utterly, if possible, the said banditti."<sup>96</sup> That first expedition was disastrous for the American military.<sup>97</sup>

After that failure, the United States turned to capturing Indian families in order to force a negotiated conclusion to the war.<sup>98</sup> In 1791, Secretary of War Henry Knox gave chilling instructions to Brigadier General Charles Scott to focus guerrilla-style attacks on women and children for the purpose of capturing them.<sup>99</sup> The women and children were not to be harmed, and Knox ordered that Scott should capture more Indian families if Indian resistance continued.<sup>100</sup> General Scott's group captured forty-one Indian women and children in the ensuing campaign.<sup>101</sup>

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95. *Id.* at 195.

96. Letter from the Secretary of War to General Harmar (June 7, 1790), *reprinted in* 4 AMERICAN STATE PAPERS, *supra* note 83, at 97; *see also* GRENIER, *supra* note 10, at 195.

97. GRENIER, *supra* note 10, at 195–96.

98. *Id.* at 197.

99. Letter from H. Knox, Sec'y of War, to Brigadier General Charles Scott (March 9, 1791), *reprinted in* 4 AMERICAN STATE PAPERS, *supra* note 83, at 129, 129 ("It is the result of information, from men of reputation in Indian affairs, that a body of five hundred picked men, mounted on good horses, by rapid incursions, would be equal to the assault of any of the Indian towns lying on the Wabash River, and that the probability would be highly in favor of surprising and capturing at least a considerable number of woman and children.").

100. *Id.* at 130 ("[M]ounted volunteers, or militia, are to proceed to the Wea, or Ouiatanon towns of Indians, there to assault the said towns, and the Indians therein, either by surprise, or otherwise, as the nature of the circumstances may admit, sparing all who may cease to resist, and capturing as many as possible, particularly women and children. And on this point it is the positive orders of the President of the United States, that all such captives be treated with humanity; and that they be carried and delivered to the commanding officer of some post of the United States upon the Ohio.").

101. GRENIER, *supra* note 10, at 197 (citing Paul David Nelson, *General Charles Scott, the Kentucky Mounted Volunteers, and the Northwest Indian Wars, 1784–1794*, 6 J. EARLY REPUBLIC 219 (1986)).

Those Indian women and children became hostages in efforts to force compliance from Indian nations and conclude the war on the United States' terms. That June, General Scott wrote the Piankeshaw Indians on the Wabash after attacking Indian villages and capturing Indian women and children, demanding they make peace or lose their children forever. The letter offers additional threats to continue to attack villages, capture women and children, and to hold them hostages until the Indian nations capitulated:

The United States have no desire to destroy the red people, although they have the power; but, should you decline this invitation, and pursue your unprovoked hostilities, their strength will again be exerted against you; your warriors will be slaughtered, *your towns and villages ransacked and destroyed, your wives and children carried into captivity*, and you may be assured that those who escape the fury of our mighty chiefs, shall find no resting place on this side [of] the great lakes. The warriors of the United States wish not to *distress or destroy women and children*, or old men, and, although *policy obliges them to retain some in captivity*, yet compassion and humanity have induced them to set others at liberty, who will deliver you this talk. Those who are carried off will be left in the care of our great chief and warrior, General St. Clair, near the mouth of the Miami and opposite the Licking river, where they will be treated with humanity and tenderness. *If you wish to recover them*, repair to that place by the first day of July next, determined, with true hearts, to bury the hatchet, and smoke the pipe of peace; *they will then be restored to you*, and you may again set down in security at your old towns . . . But, should you foolishly persist in your warfare, the sons of war will be let loose against you, and the hatchet will never be buried until your country is desolated, and *your people humbled to the dust*.<sup>102</sup>

The letter was accompanied by a list of Indian people captured at "Ouiatanon town," including four-year-old Nepahkequah, and several other sons and daughters of the community, plainly being used as hostages.<sup>103</sup>

In August 1791, American military officials again sent a letter to the Indians on the Wabash offering to return Indian families to the tribe in exchange for surrender. Importantly, the letter specifically references the "protection" of the United States, acknowledging the federal government's standard practice to comport with international law principles that allow for Indian nations to retain internal sovereignty in exchange for divesting external sovereignties:

The arms of the United States are again exerted against you, and again your towns are in flames, and *your wives and children made captives*; again you are cautioned to listen to the voice of reason, to sue for peace, and *submit to the protection of the United States*, who are willing to become your friends and fathers, but, at the same time, are determined to punish you for every injury you may offer to their children. Regard not those evil counsellors who, to se-

102. Letter from Charles Scott, Brigadier General, to the Various Tribes of the Piankeshaws, and All the Nations of the Red People, Lying on the Waters of the Wabash River (June 4, 1791), *reprinted in* 4 AMERICAN STATE PAPERS *supra* note 83, at 132–33 (emphasis added).

103. *Id.* at 133.

cure to themselves the benefits of your trade, advise you to measures which involve you, *your women and children, in trouble and distress*. The United States wish to give you peace . . . ; but, if you foolishly prefer war, their warriors are ready to meet you in battle, and will be not the first to lay down the hatchet. *You may find your squaws and your children under the protection of our great chief and warrior General St. Clair, at fort Washington*. To him you will make all applications for an exchange of prisoners or for peace.<sup>104</sup>

Another failed American military incursion—the Battle of the Wabash—followed.<sup>105</sup> Still, the federal government's utilization of Indian children as hostages and political pawns continued. In 1792, Secretary Knox wrote to the Indian leaders and again invoked veiled threats about the “future” and the “happiness of your children.”<sup>106</sup> He insisted the tribe was mistaken in carrying out hostilities against the United States, which only wished to “civilize” the Indians and “educate [their] children.”<sup>107</sup>

In 1793, as the Americans continued to attempt to draw the Indian nations in for a treaty council, the collected tribal leaders again declined to appear. The tribes did not believe the United States would respect their retained lands after a sale, and tied their concern for the future of their lands to the future of their tribes and especially their children: “Money, to us, is of no value, and to most of us unknown; and as no consideration whatsoever can induce us to sell the lands on which we get sustenance for our women and children . . . .”<sup>108</sup> This round of failed treaty making apparently compelled the Americans to seek a final military solution.<sup>109</sup>

President Washington gave General “Mad” Anthony Wayne command of the American Army, and he used General Scott's “rangers”—

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104. Letter from Jas. Wilkinson, Lieutenant Colonel Commandant, to the Indian Nations Living on the River Wabash, and its Waters (Aug. 9, 1791), *reprinted in* 4 AMERICAN STATE PAPERS, *supra* note 83, at 135 (emphasis added).

105. GRENIER, *supra* note 10, at 198–99.

106. Speech from H. Knox, Sec'y for the Dep't of War and Dir. of Indian Affairs, to All the Sachems and Warriors of the Tribes Inhabiting the Miami River of Lake Erie, and the Waters of the Wabash River, the Wyandots, Delawares, Ottawas, Chipewas, Pottawatamies, and All Other Tribes Residing to the Southward of the Lakes East of the Mississippi, and to the Northward of the River Ohio (Apr. 4, 1792), *reprinted in* 4 AMERICAN STATE PAPERS, *supra* note 83, at 230, 230 (“The President of the United States, General Washington, the Great Chief of the nation, speaks to you by this address. Summon, therefore, your utmost powers of attention, and hear the important things which shall be spoken to you concerning your future welfare; and after having heard and well understood all things . . . to decide upon a line of conduct that shall best promote your happiness, and the happiness of your children, and perpetuate you and them on the land of your forefathers.”).

107. *Id.*

108. Letter from Confederated Indian Nations to the Commissioners of the United States (July 31, 1793), *reprinted in* 4 AMERICAN STATE PAPERS, *supra* note 83, at 356, 356.

109. HARMON, SIXTY YEARS OF INDIAN AFFAIRS, *supra* note 12, at 32.

the group that had kidnapped forty-one Indian women and children—as a vanguard.<sup>110</sup> After attacking Indian villages and families, and a week before the Battle of Fallen Timbers, General Wayne threatened more war against families: “[I]n pity to your innocent women and children, come and prevent the further effusion of your blood; let them experience kindness and friendship of the United States of America, and the invaluable blessings of peace and tranquility.”<sup>111</sup> He warned of the approaching winter and the potential starvation Indian people could face. General Wayne acknowledged and focused on the tribal leaders’ concerns relating to their “distressed and hapless women and children [subject to] danger and famine, during the present fall and ensuing winter.”<sup>112</sup> The war concluded with the Battle of Fallen Timbers, which once again featured American burning of villages and crops.<sup>113</sup>

After the Battle of Fallen Timbers, the British closed off its own forts to the retreating Indian nations,<sup>114</sup> forcing a negotiated settlement between the tribes and the United States via treaty. The Indian women and children held hostage by the Americans would become a critical diplomatic factor in that treaty’s negotiations and terms. The treaty text demonstrates the close linkage between the guarantee of peace and those being held hostage by both sides. Recall the Americans targeted Indian women and children for capture. Article I is the declaration of peace. Article II of the treaty provided for the release of the Indians held prisoner: “All prisoners shall on both sides be restored. The Indians, prisoners to the United States, shall be immediately set at liberty.”<sup>115</sup> This provision allowed for the return of Indian families to their tribal communities.

### 5. *The Treaty of Greenville and the Founding Generation*

Executed and ratified in 1795, a mere six years after the ratification of the Constitution, the Treaty of Greenville was the first comprehensive, large-scale Indian treaty negotiated under the new government. The treaty exemplifies the line of sovereignty between the federal government and Indian nations. The federal government

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110. GRENIER, *supra* note 10, at 200–01.

111. Letter from Anthony Wayne to the Delawares, Shawanese, Miamies, and Wyandots (Aug. 13, 1794), *reprinted in* 4 AMERICAN STATE PAPERS, *supra* note 83, at 490; *see also* GRENIER, *supra* note 10, at 201.

112. Letter from Anthony Wayne to the Delawares, Shawanese, Miamis, and Wyandots, *supra* note 111.

113. Mahon, *supra* note 44, at 271 (“General Anthony Wayne used a variation of this technique at Fallen Timbers. Like Sullivan, having first destroyed Indian crops and villages, he forced the Miamis and their allies to make a stand.”).

114. WHITE, *supra* note 38, at 486.

115. Treaty with the Wyandots, etc., *supra* note 31, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 39.



accepted a duty of protection over the dozen or more Indian nations that executed the treaty. Within Indian country, however, Indian nations would assert plenary control over their lands, their people, and non-Indians that entered onto their lands without federal or tribal authorization.

Article V of the treaty defines the federal-tribal relationship, six years removed from the ratification of the Constitution, in terms of the duty of protection, and of internal and external tribal sovereign authority.<sup>116</sup> According to the treaty, the duty of protection required the tribes to promise they would not sell lands to anyone except the United States. But tribal use of the land until sale was preserved, as was tribal governance. This is a dramatic difference from the Supreme Court's later description of unceded, unreserved Indian lands as being subject to mere sufferance of the federal government in *Johnson v. McIntosh*,<sup>117</sup> and far more robust as a property right than the Court would later hold to be noncompensable if condemned by the government in *Tee-Hit-Ton Indians v. United States*.<sup>118</sup> These cases exemplify instances where the Supreme Court's jurisprudence became unmoored from the Constitution and from the Founding Generation's understanding.

Several other provisions in the treaty offer excellent descriptions of how the Founding Generation understood federal-tribal relations. Article VI left law and order within these lands to tribal authorities, even over non-Indian American citizens.<sup>119</sup> Article VII reserved hunt-

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116. Article V provides:

To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.

*Id.* at 52, 2 INDIAN AFFAIRS: LAWS & TREATIES at 42.

117. 21 U.S. (8 Wheat.) 543 (1823).

118. 348 U.S. 272 (1955).

119. Article VI provides:

If any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit; and because such settlements made without the consent of the United States, will be injurious to them as well as to the Indians, the United States shall be at liberty to break them up, and re-

ing and fishing rights on ceded lands to Indian people so long as they “offer no injury to the people of the United States.”<sup>120</sup> Article VIII provided for the introduction and regulation of Indian traders.<sup>121</sup> Tribal jurisdiction over non-Indians is hotly contested now,<sup>122</sup> and off-reservation hunting and fishing has been controversial in recent decades. But these articles show the Founding Generation was apparently willing to acknowledge robust tribal authority over internal tribal affairs, and nonmembers that enter Indian country were under tribal jurisdiction.

Federal Indian law and policy in the early decades of the American Republic, almost by definition, was grounded in the Constitution, for good or bad. The federal government fought wars, negotiated peace, recognized reservation lands and property rights, and entered into and regulated a robust trade with Indian nations. The Founding Generation understood the duty of protection as the theoretical core of the federal-tribal relationship. And yet, for all the formal, external relations between the tribes and the federal government, Indian children were at the heart of the government-to-government relationship.

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move and punish the settlers as they shall think proper, and so effect that protection of the Indian lands herein before stipulated.

Treaty with the Wyandots, etc., *supra* note 31, 7 Stat. at 52, 2 INDIAN AFFAIRS: LAWS & TREATIES at 42.

120. Article VII provides, “The said tribes of Indians, parties to this treaty, shall be at liberty to hunt within the territory and lands which they have now ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States.” *Id.*

121. Article VIII provides:

Trade shall be opened with the said Indian tribes; and they do hereby respectively engage to afford protection to such persons, with their property, as shall be duly licensed to reside among them for the purpose of trade, and to their agents and servants; but no person shall be permitted to reside at any of their towns or hunting camps as a trader, who is not furnished with a license for that purpose, under the hand and seal of the superintendent of the department north-west of the Ohio, or such other person as the President of the United States shall authorise to grant such licences; to the end, that the said Indians may not be imposed on in their trade. And if any licensed trader shall abuse his privilege by unfair dealing, upon complaint and proof thereof, his license shall be taken from him, and he shall be further punished according to the laws of the United States. And if any person shall intrude himself as a trader, without such license, the said Indians shall take and bring him before the superintendant or his deputy, to be dealt with according to law. And to prevent impositions by forged licenses, the said Indians shall at least once a year give information to the superintendant or his deputies, of the names of the traders residing among them.

*Id.* at 52, 2 INDIAN AFFAIRS: LAWS & TREATIES at 42–43.

122. *E.g.*, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff’d by equally divided Court*, 136 S. Ct. 2159 (2016). See generally Matthew L.M. Fletcher & Leah Jurss, *Tribal Jurisdiction—A Historical Bargain*, 76 MD. L. REV. (forthcoming 2017).

### C. Federal Treaty and Statutory Law

Anishinaabek children in the first century of the United States still lived in their traditional villages under the governance of their families and clans. They might have a sibling who came to the village from another community through adoption or capture.<sup>123</sup> And they likely traveled with their families to trading centers at places like Detroit and the Straits of Mackinac.<sup>124</sup> Some Anishinaabek children would have been mixed-blood descendants of non-Indian traders and Anishinaabek women.<sup>125</sup> These children might have attended a missionary boarding school for a time, but overlapping conflicts between Protestant and Catholic missionaries and between the American and British governments might have forced the closure of those schools.<sup>126</sup> In any event, they would likely learn to speak English and a few would learn to write in English. A very select few might even travel to schools far from the Great Lakes, or even overseas.<sup>127</sup>

Indian treaties and related federal statutes routinely included provisions to protect the land rights and education of Indian children that implement the federal government's trust obligation toward Indian tribes and Indian people. The implementation of the federal trust obligation to Indian children came in three core subject areas: land rights, education, and trust fund management.

#### 1. Education and Schools

An enormous piece of federal Indian law and policy involves—to this day—the education of Indian children. The Founding Generation quickly turned to Indian education as a means of assisting Indian people in their continued existence and development, just as the prior European nations had done before the Americans. However, like their predecessors, the Americans intertwined western religions and religious entities with federal programs designed to educate—or “civi-

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123. *E.g.*, JOHN TANNER, *THE FALCON: A NARRATIVE OF THE CAPTIVITY & ADVENTURES OF JOHN TANNER DURING THIRTY YEARS RESIDENCE AMONG THE INDIANS OF THE INTERIOR OF NORTH AMERICA* (1994).

124. *See generally* MICHAEL A. McDONNELL, *MASTERS OF EMPIRE: GREAT LAKES INDIANS AND THE MAKING OF AMERICA* (2015).

125. *See generally* SUSAN SLEEPER-SMITH, *INDIAN WOMEN AND FRENCH MEN: RETHINKING CULTURAL ENCOUNTER IN THE WESTERN GREAT LAKES* (2001).

126. *E.g.*, James M. McClurken, *Augustin Hamlin, Jr.: Ottawa Identity and the Politics of Persistence*, in *BEING AND BECOMING INDIAN: BIOGRAPHICAL STUDIES OF NORTH AMERICAN FRONTIERS* 82, 87–88 (James A. Clifton ed., 1989) (describing conflicts over Indian schools in northern Michigan).

127. *E.g.*, ANDREW J. BLACKBIRD, *HISTORY OF THE OTTAWA AND CHIPPEWA INDIANS OF MICHIGAN* 31–44 (1887) (describing his brother William's education abroad); McClurken, *supra* note 126, at 89 (describing the education of Augustin Hamlin and William Blackbird).

lize”—Indian nations.<sup>128</sup> Indian treaties, federal laws, and federal statements of policy continually mention education of Indian children as a key to Indian affairs.

Colonial policy supporting and linking Indian education and religious conversion dates back to the early seventeenth century when King James I issued a mandate in establishing the Virginia Company to convert Indians to Christianity.<sup>129</sup> Colonial leaders expressly linked the conversion of Indian people to their “civilization” and their education.<sup>130</sup> In 1650, the formal Harvard Charter required the college provide for the “education of the English and Indian [y]outh of this country in knowledge: and Godlines[s].”<sup>131</sup>

The first United States action to support Indian education came in the early months of the American Revolution and was candidly designed to keep Indian students at Dartmouth College in Hanover, New Hampshire, to preempt a military attack on the town from the British and their Indian allies.<sup>132</sup> On July 12, 1775, the Continental Congress appropriated \$500 to educate Indians at Dartmouth at the request of Eleazar Wheelock, head of the school.<sup>133</sup> The grant to Dartmouth College was more about using Indian students as shields or a buffer against a possible Indian attack on Hanover.<sup>134</sup> Connecticut River valley delegates to the Continental Congress suggested that “some Advantage may be taken” of the fact that Dartmouth was educating Indian students in Hanover.<sup>135</sup> The Connecticut River valley never became a significant battleground of the Revolution; Eleazar Wheelock attributed their relative safety to the presence of the Indian students at his school.<sup>136</sup> Wheelock even referred to his Indian students as “Hostages.”<sup>137</sup> The United States’ support of Dartmouth College’s efforts to maintain an Indian school to deter an attack by Indians hostile to the Americans during the Revolution is somewhat of an anomaly in the context of the history of American Indian education policy, but consistent with the American and colonial military strategy to use Indian children and families as shields or hostages.

128. See generally R. Pierce Beaver, *Church, State, and the Indians: Indian Missions in the New Nation*, 4 J. CHURCH & ST. 11 (1962).

129. Bobby Wright, “For the Children of Infidels?": *American Indian Education in the Colonial Colleges*, 12 AM. INDIAN CULTURE & RES. J., no. 3, 1988, at 1, 2.

130. *Id.* at 3.

131. *Id.* at 6.

132. COLIN G. CALLOWAY, *THE INDIAN HISTORY OF AN AMERICAN INSTITUTION: NATIVE AMERICANS AND DARTMOUTH* 38 (2010).

133. HOLT, *supra* note 11, at 87.

134. CALLOWAY, *supra* note 132, at 38.

135. Letter from Connecticut Delegates to Jonathan Trumbull, Sr. (June 26, 1775), reprinted in 1 LETTERS OF DELEGATES TO CONGRESS, AUGUST 1774–AUGUST 1775, at 542, 542–43 (Paul H. Smith ed., 1976).

136. CALLOWAY, *supra* note 132, 40–41.

137. *Id.* at 41.

After the Revolution, the federal government returned to Indian education policy as a means of securing Indians as allies, using religion and education combined to "civilize" Indian people.<sup>138</sup> That program of education merged with tribal requests for educational assistance; the first such request came from the Seneca Nation to President Washington in 1791.<sup>139</sup>

That policy, which would govern Indian education policy for more than a century, began in the very first year of the United States under the Constitution. Secretary of War Henry Knox's detailed recommendations in 1789 for federal Indian affairs policy delivered to President Washington included a recommendation that religious missionaries be sent to live among the Indians.<sup>140</sup> Weeks later, President Washington instructed American treaty commissioners dealing with Indian nations in the south to "endeavor to obtain a stipulation for certain missionaries . . . to reside in the nation."<sup>141</sup> In 1796, still following President Washington's instructions, the American negotiators suggested to the Creek Indian nation that a treaty should provide for the establishment of schools.<sup>142</sup> The Creek nation brusquely refused to incorporate federal education provisions in their treaty, arguing that "Indians, when educated, turned out very worthless."<sup>143</sup> The commissioners argued that federal education would be beneficial, since Indian children would be "educated in their towns, would be under the eye,

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138. K. Tsianina Lomawaima, *The Unnatural History of American Indian Education*, in NEXT STEPS: RESEARCH AND PRACTICE TO ADVANCE AMERICAN INDIAN EDUCATION 1, 1-6 (Karen Gayton Swisher & John W. Tippeconnic III eds., 1999); Frank Anthony Ryan, *The Federal Role in American Indian Education*, 52 HARV. EDUC. REV. 423, 424-25 (1982).

139. Ronald Rayman, *Joseph Lancaster's Monitorial System of Instruction and American Indian Education, 1815-1838*, 21 HIST. EDUC. Q. 395, 396 (1981).

140. Letter from Gen. Knox, Sec'y of War, to George Washington, President of the United States (July 7, 1789), reprinted in 4 AMERICAN STATE PAPERS, *supra* note 83, at 52, 54. He wrote:

[Civilization of the Indians] might be brought about by making presents, from time to time, to the chiefs or their wives, of sheep and other domestic animals; and if, in the first instance, persons were appointed to take charge, and teach the use of them, a considerable part of the difficulty would be surmounted. . . . Missionaries, of excellent moral character, should be appointed to reside in their nation . . . .

141. Letter from George Washington, President of the United States, to Benjamin Lincoln, Cyrus Griffin, and David Humphreys, Esq's (August 29, 1789), reprinted in 4 AMERICAN STATE PAPERS, *supra* note 83, at 65, 66.

142. Creek Treaty Commissioners' Address to Kings, Chiefs, and Warriors, of the Whole Creek Nation (June 23, 1796), reprinted in 4 AMERICAN STATE PAPERS, *supra* note 83, at 601, 602. The notes state, "[The commissioners] then adverted to the establishment of schools . . . . They explained fully the advantages; among others, that the sons of those present, when they became old men, and chiefs, and warriors, they could transact the affairs of the nation like the white people . . . ." *Id.*

143. *Id.*; HARMON, SIXTY YEARS OF INDIAN AFFAIRS, *supra* note 12, at 158.

and receive the directions of their fathers and mothers.”<sup>144</sup> Even so, the Creek treaty negotiators refused.<sup>145</sup>

The juxtaposition of education and religion would be a continuing hallmark of Indian affairs for nearly two centuries after this treaty. All told, there would 120 Indian treaties that made some provision for Indian education.<sup>146</sup> The first Indian treaty providing for the education of Indian people is the 1794 Treaty with the Oneida.<sup>147</sup> This treaty came about after the Revolutionary War and was intended to benefit the Haudenosaunee nations that had sided with the Americans<sup>148</sup> and to conclusively secure peace with the Haudenosaunee nations that had sided with the British.<sup>149</sup> Article III of the treaty provided for the instruction of “young men” in the trade of milling.<sup>150</sup> Article IV provided funds for the building of a church burned during the war.<sup>151</sup> The 1803 Treaty with the Kaskaskia,<sup>152</sup> the “second treaty for education,”<sup>153</sup> provided for a Catholic priest to be paid for by the federal government to educate Indian children.<sup>154</sup>

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144. Creek Treaty Commissioners’ Address to Kings, Chiefs, and Warriors, of the Whole Creek Nation, *supra* note 142, at 601.

145. *Id.*

146. JON REYHNER & JEANNE EDER, *AMERICAN INDIAN EDUCATION: A HISTORY* 42 (2004); see also Raymond Cross, *American Indian Education: The Terror of History and the Nation’s Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 950 (1999) (“Over 110 Indian treaties stipulated that the federal government shall provide an education to the members of the signatory tribes.”).

147. Treaty with the Oneida, etc., Dec. 2, 1794, 7 Stat. 47, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 37.

148. HARMON, SIXTY YEARS OF INDIAN AFFAIRS, *supra* note 12, at 157–58.

149. Jack Campisi & William A. Starna, *On the Road to Canandaigua: The Treaty of 1794*, 19 AM. INDIAN Q. 467, 467 (1995).

150. Article III provides:

The United States will provide, during three years after the mills shall be completed, for the expense of employing one or two suitable persons to manage the mills, to keep them in repair, to instruct some young men of the three nations in the arts of the miller and sawyer, and to provide teams and utensils for carrying on the work of the mills.

Treaty with the Oneida, etc., *supra* note 147, at 38.

151. Article IV provides, “The United States will pay one thousand dollars, to be applied in building a convenient church at Oneida, in the place of the one which was there burnt by the enemy in the late war.” *Id.*

152. Treaty with the Kaskaskia, Kaskaskia Tribe–U.S., Aug. 13, 1803, 7 Stat. 78, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 67.

153. HARMON, SIXTY YEARS OF INDIAN AFFAIRS, *supra* note 12, at 158.

154. Article 3 provides in relevant part:

The greater part of the said tribe have been baptised and received into the Catholic church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature.

Treaty with the Kaskaskia, *supra* note 152, at 67–68.

In 1819, the United States established the "Civilization Fund," a pool of federal money designed to support the "civilization" of Indian people through religious education. In 1818, the House Committee on Indian Affairs reported support for a bill to provide for the education of Indian children.<sup>155</sup> Rep. Southard stated, "[The] committee [is] induced to believe that nothing in the power of Government . . . would have a more direct tendency to produce this desirable object [civilization of the Indians] than the establishment of schools at convenient and safe places . . . ."<sup>156</sup> In 1819, the federal government made permanent its role in Indian education by establishing the "Civilization Fund."<sup>157</sup> The purpose of the Fund was to "provid[e] against the further decline and final extinction" of Indian nations and people.<sup>158</sup> The Act authorized the President to provide "the means of instruction [to] be introduced with their own consent."<sup>159</sup> By 1824, there were thirty-two Indian schools; by 1825, there were thirty-eight Indian schools.<sup>160</sup>

The early decades of American Indian education were infused with religious instruction, but these schools generally were not compulsory. During the removal era, which began officially in 1830 with the enactment of the Removal Act,<sup>161</sup> federal funding for education was used as an enticement to removal.

The 1832 and 1833 Potawatomi treaties<sup>162</sup> provided significant funds for Indian education. These were land cession and removal treaties primarily focused on the Potawatomi Indian bands of southwestern Michigan and northern Indiana.<sup>163</sup> The 1832 treaty provided \$2000 a year for Indian education.<sup>164</sup> The 1833 treaty established a \$70,000 payment for educational purposes.<sup>165</sup> The text of the 1833

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155. 31 ANNALS OF CONG. 801 (1818) (Statement of Rep. Southard).

156. *Id.* at 802.

157. HARMON, SIXTY YEARS OF INDIAN AFFAIRS, *supra* note 12, at 161; HOLT, *supra* note 11, at 88.

158. Act of Mar. 3, 1819, ch. 85, 3 Stat. 516.

159. *Id.*

160. HARMON, SIXTY YEARS OF INDIAN AFFAIRS, *supra* note 12, at 163–65.

161. The Indian Removal Act of 1830, ch. 148, 4 Stat. 411–12. *See generally* GRANT FOREMAN, INDIAN REMOVAL (1932); RONALD N. SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA (1975).

162. Treaty with the Potawatomi, Potawatomies–U.S., Oct. 27, 1832, 7 Stat. 399, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 372; Treaty with the Chippewa, etc., Sept. 26, 1832, 7 Stat. 431, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 402.

163. *See generally* JAMES A. CLIFTON, THE POKAGONS, 1683–1983: CATHOLIC POTAWATOMI INDIANS OF THE ST. JOSEPH RIVER VALLEY (1984); *Secunda*, *supra* note 86.

164. Article IV of the 1832 treaty provides, "The United States agree to appropriate, for the purpose of educating Indian youths, the annual sum of two thousand dollars, as long as the Congress of the United States may think proper, to be expended as the President may direct." Treaty with the Potawatomi, *supra* note 162, at 374.

165. Article 3 of the 1833 treaty provides in relevant part:

treaty helpfully reports the request for education money came from the tribal treaty negotiators:

The wish of the Indians being expressed to the Commissioners as follows: The united nation of Chippewa, Ottawa and Potawatamie Indians being desirous to create a perpetual fund for the purposes of education and the encouragement of the domestic arts, wish to invest the sum of seventy thousand dollars in some safe stock, the interest of which only is to be applied as may be necessary for the above purposes.<sup>166</sup>

One historical source reported the War Department invested the education money and other funds promised in the treaty in “State of Maryland six per cent stock.”<sup>167</sup> At the request of the Commissioner of Indian Affairs, the government re-invested the money and created a perpetual fund.<sup>168</sup>

The 1835 Treaty with the Cherokee,<sup>169</sup> an otherwise notoriously controversial removal treaty that led to the Trail of Tears,<sup>170</sup> established an orphans’ fund.<sup>171</sup> The treaty also established a fund for the education of Indian children, including orphans.<sup>172</sup> Along with money set aside as “school money” by the United States in 1819, the 1835 treaty established a \$600,000 investment “for the orphans, for the na-

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And in further consideration of the above cession, it is agreed, that there shall be paid by the United States the sums of money hereinafter mentioned: to wit. . . . Seventy thousand dollars for purposes of education and the encouragement of the domestic arts, to be applied in such manner, as the President of the United States may direct.

Treaty with the Chippewa, etc., *supra* note 162, at 402–03.

166. *Id.* at 403.

167. HARMON, SIXTY YEARS OF INDIAN AFFAIRS, *supra* note 12, at 332.

168. *Id.* at 333.

169. Treaty with the Cherokee, Cherokee Tribe–U.S., Dec. 29, 1835, 7 Stat. 478, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 439.

170. *See generally* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 65–67 (1975).

171. Article 10 of the 1835 treaty provides in relevant part: “The sum of fifty thousand dollars to constitute an orphans’ fund the annual income of which shall be expended towards the support and education of such orphan children as are destitute of the means of subsistence.” Treaty with the Cherokee, *supra* note 169, at 443.

172. Article 10 further provides in relevant part:

The sum of one hundred and fifty thousand dollars in addition to the present school fund of the nation shall constitute a permanent school fund, the interest of which shall be applied annually by the council of the nation for the support of common schools and such a literary institution of a higher order as may be established in the Indian country And in order to secure as far as possible the true and beneficial application of the orphans’ and school fund the council of the Cherokee nation when required by the President of the United States shall make a report of the application of those funds and he shall at all times have the right if the funds have been misapplied to correct any abuses of them and direct the manner of their application for the purposes for which they were intended.

*Id.* at 443–44.



tion, and for the advancement of education.”<sup>173</sup> The large sums of federal money invested in the Cherokee Nation as it moved to Oklahoma provided the basics for the establishment of a social services bureaucracy and administration.<sup>174</sup>

The following treaties covering each decade from the removal era to the end of the treaty era in 1871 exemplify the plethora of Indian treaty educational rights. The 1836 Treaty with the Ottawa and Chippewa<sup>175</sup> provided money for teachers and schools.<sup>176</sup> The 1845 Treaty with the Creeks and Seminoles<sup>177</sup> provided for the federal funding of Indian education administered by the federal government.<sup>178</sup> The 1846 Treaty with the Comanche<sup>179</sup> authorized the President to send teachers to the tribe.<sup>180</sup> The 1855–1856 Stevens treaties made provision for Indian education as well.<sup>181</sup> The 1855 Treaty with the Makah<sup>182</sup> provided for the creation of an industrial school.<sup>183</sup> The

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173. HARMON, SIXTY YEARS OF INDIAN AFFAIRS, *supra* note 12, at 335.

174. *See generally* Julie L. Reed, A Nation's Charge: Cherokee Social Services, 1835–1907 (2011) (unpublished Ph.D. dissertation, University of North Carolina, Chapel Hill).

175. Treaty with the Ottawa, etc., Mar. 28, 1836, 7 Stat. 491, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 450.

176. Article 4 provides: “Five thousand dollars per annum, for the purpose of education, teachers, school-houses, and books in their own language, to be continued twenty years, and as long thereafter as Congress may appropriate for the object.” *Id.* at 452.

177. Treaty with the Creeks and Seminole, Jan. 4, 1845, 9 Stat. 821, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 550.

178. Article 4 provides:

The United States in consideration of these circumstances, agree that an additional annuity of three thousand dollars for purposes of education shall be allowed for the term of twenty years; that the annuity of three thousand dollars provided in the treaty of 1832 for like purposes shall be continued until the determination of the additional annuity above mentioned. It is further agreed that all the education funds of the Creeks, including the annuities above named, the annual allowance of one thousand dollars, provided in the treaty of 1833, and also all balances of appropriations for education annuities that may be due from the United States, shall be expended under the direction of President of the United States, for the purpose of education aforesaid.

*Id.* at 551.

179. Treaty with the Comanche, Aionai, Anadarko, Caddo, etc., May 15, 1846, 9 Stat. 844, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 554.

180. Article 13 provides, “It is further agreed that school-teachers, at the discretion of the President, shall be sent among the said tribes or nations for the purpose of instructing them . . . .” *Id.* at 556.

181. *See generally* Symposium, *The Isaac I. Stevens and Joel Palmer Treaties, 1855–2005*, 106 OR. HIST. Q. 352 (2005).

182. Treaty with the Quinaielt, etc., July 1, 1855, 12 Stat. 971, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 719.

183. Article 10 provides in relevant part:

The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and

1867 Treaty with the Seneca, Mixed Seneca, and Shawnee, Quapaw, etc.<sup>184</sup> referenced a school fund established for the Quapaw Indian nation.<sup>185</sup> The same treaty provides for the education of the Ottawa Indians removed to the west.<sup>186</sup>

After the end of the treaty era in 1871, and in some instances before, the United States continued to provide Indian education services by statute. For example, the federal government funded education for Alaska Natives, who had never entered into a treaty with the Americans.<sup>187</sup>

Indian leaders considered the education of Indian children to be one of the most critically important means by which Indian nations would survive the dramatic changes brought to them by the arrival of non-Indians and the United States government. Indian children would learn English as a second language. Indian children would

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industrial school, to be free to children of the said tribe and bands in common with those of the other tribes of said district, and to provide . . . a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for a term of twenty years, to instruct the Indians in their respective occupations.

*Id.* at 721.

184. Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, etc., Feb. 23, 1867, 15 Stat. 513, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 960.

185. Article 10 provides:

If the Osage mission school should be closed, so that the school fund of the Quapaws cannot be used for them to advantage at that institution, the said fund shall remain in the Treasury of the United States until such time as it can, under the direction of the Secretary of the Interior with the consent of the chiefs, be used to advantage in establishing a school upon their reservation.

*Id.* at 962.

186. Article 19 provides:

The children of the tribe between the ages of six and eighteen (6 and 18) shall be entitled to be received at said institution, and to be subsisted, clothed, educated, and attended in sickness, where the sickness is of such a nature that the patient promises a return to study within a reasonable period; the children to be taught and practised in industrial pursuits, suitable to their age and sex, and both sexes in such branches of learning, and to receive such advantages as the means of the institution will permit; these rights and privileges to continue so long as any children of the tribe shall present themselves for their exercise. And the Secretary of the Interior and the senior corresponding secretary of the American Baptist Home Mission Society shall be members *ex officio* of the board of trustees, with power to vote in person or by proxy, it being the special intention of this provision to furnish additional supervision of the institution, so that the provisions of this article may be carried into effect in their full spirit and intent.

*Id.* at 964.

187. Aleut Community of St. Paul Island v. United States, 42 Indian Cl. Comm. 1, 21 (1978) (noting two statutes, 16 Stat. 180 and 36 Stat. 326, that obligated the federal government to educate the tribal children); *see also id.* at 108 n.73 (declaring the "the quality of the education provided" to be "extremely low").

learn western math and science. And Indian leaders intended that their children would retain their languages, beliefs, and traditional knowledge. For a time, the United States accepted and implemented those obligations as part of the duty of protection it owed to Indian nations.

## 2. *Land Rights*

Another critical component of the federal duty of protection was the protection of Indian land rights. Indian treaties are most well-known for establishing reservations for Indian nations and Indian people, reservations to be held communally by the tribe and intended to be extant forever. Other Indian treaties created alternative forms of land rights respecting individual property rights, most notably allotments.<sup>188</sup> Importantly for the purposes of this paper, Indian children expressly shared those land rights. Indian leaders routinely negotiated on behalf of the unborn and minors, and especially children without parents. This subsection details several Indian treaties which are examples of treaties that included provisions allowing families of Indian children to select lands on behalf of their children. This list of treaties, however, is by no means exhaustive.

Some of the worst Indian treaties from the perspective of Indian nations and Indian people are the removal treaties largely imposed on the southeastern tribes.<sup>189</sup> Even these treaties made express provision for the land rights of Indian children. For example, in the October 22, 1832 supplement to the 1832 Treaty with the Chickasaw,<sup>190</sup> the treaty provided for “reserves” to be selected for the benefit of the young men, the orphans, and the widows.<sup>191</sup> The 1830 Treaty with

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188. In the nineteenth century, many Indian treaties and federal statutes provided for the allotment of Indian reservation lands. For example, in the 1850s, Indian affairs commissioner George Manypenny negotiated several treaties that included allotment provisions. PRUCHA, *supra* note 24, at 241–42. In many instances, treaties and statutes would allow for lands to be selected or reserved for Indian children as well.

189. *See generally* FOREMAN, *supra* note 161.

190. Treaty with the Chickasaw, Chickasaw Nation–U.S., Oct. 22, 1832, 7 Stat. 388, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 362.

191. Paragraph 6 of the treaty provided:

In the provisions of the fourth article of the treaty to which this is a supplement, for reserves to young men who have no families, it expresses that each young man, who is twenty-one years of age, shall have a reserve. But as the Indians mature earlier than white men, and generally marry younger, it is determined to extend a reserve, to each young man who is seventeen years of age. And as there are some orphan girls in the nation or whose families do not provide for them, and also some widows in the same situation, it is determined to allow to each of them a reservation of one section, on the same terms and conditions in all respects, with the other reservations for the nation generally and to be allowed to the same ages, as to young men.

the Choctaws, primarily a removal treaty with devastating consequences, included terms governing the Choctaw Indians that chose to stay in Mississippi, including provisions for children.<sup>192</sup> The treaty provided for forty acres to be reserved for head of a family, plus an additional ten or twenty acres for each unmarried child depending on their age.<sup>193</sup> The treaty also provided that Choctaw “orphans” could be eligible for lands.<sup>194</sup>

The story of the Creek orphans’ trust funds is likely one of the worst examples of a federal government trust breach. The 1832 Treaty with the Creeks,<sup>195</sup> yet another removal treaty that is known by one historian as “disgraceful[,] and . . . the most fraudulent and shameful in Indian history,”<sup>196</sup> authorized the President to select allotments for Creek orphans.<sup>197</sup> Apparently, the government sold the

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*Id.* at 363.

192. Treaty with the Choctaw, Choctaw Nation–U.S., Sept. 27, 1830, 7 Stat. 333, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 310.

193. Article XIV provided:

Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey in like manner *shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age*; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity.

*Id.* at 313 (emphasis added).

194. Article XIX provided:

[L]ikewise *children of the Choctaw Nation residing in the Nation*, who have neither father nor mother a list of which, with satisfactory proof of Parentage and orphanage being filed with Agent in six months to be forwarded to the War Department, shall be entitled to a quarter section of Land, to be located under the direction of the President, and with his consent the same may be sold and the proceeds applied to some beneficial purpose for the benefit of said *orphans*.

*Id.* at 315 (emphasis added).

195. Treaty with the Creeks, Creek Tribe–U.S., Mar. 24, 1832, 7 Stat. 366, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 341.

196. HARMON, SIXTY YEARS OF INDIAN AFFAIRS, *supra* note 12, at 335.

197. Article II provided in relevant part: “And twenty sections shall be selected, under the direction of the President for the orphan children of the Creeks, and divided and retained or sold for their benefit as the President may direct.” Treaty with the Creeks, *supra* note 195, at 341.

promised land interests and invested the money in "state stocks."<sup>198</sup> As early as 1840, the federal government acknowledged that Creek orphans had never been paid, and many were dead or grown up.<sup>199</sup> Three decades later, the Creek Nation filed a memorial with Congress again asking for an accounting and payment of the trust funds.<sup>200</sup> Leading historian Angie Debo stated the Creek orphans did not receive any money from these investments until 1883.<sup>201</sup> Even in the year 1900, the United States was still addressing its failure to account for the trust funds.<sup>202</sup>

The treaties with the Michigan Indians that paved the way for Michigan statehood in 1837 are perhaps the best examples of Indian leaders (there, *ogimaag* or *ogemuk*) stridently negotiating for the land rights of Indian children. In the 1836 Treaty with the Ottawas and Chippewas,<sup>203</sup> the lower peninsula Ottawa Indian nations and several of the upper peninsula Chippewa Indian nations of Michigan ceded their interests to the lands of about one-third the state of Michigan.<sup>204</sup> The treaty provided land rights to Indian children and "half-breeds," the children of mixed marriages. The treaty allowed the leaders of the tribal bands and communities to determine their own procedures for distributing lands and annuities to their children.<sup>205</sup> The 1855 Treaty

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198. HARMON, SIXTY YEARS OF INDIAN AFFAIRS, *supra* note 12, at 335; OFFICE OF INDIAN AFFAIRS, DEP'T OF INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 280 (1840).

199. OFFICE OF INDIAN AFFAIRS, DEP'T OF INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 280-81 (1840).

200. MEMORIAL OF THE CREEK DELEGATION IN RELATION TO FUNDS DUE THE "CREEK ORPHANS" UNDER THE CREEK TREATY OF 1832 AND THE ACT OF MARCH 3, 1837, S. MISC. DOC. NO. 44-103 (1876).

201. Angie Debo, Book Review, 218 ANNALS AM. ACAD. POL. & SOC. SCI. 246, 246 (1941) ("[A]lthough 573 orphans were hunted out and enrolled, the payment of the interest to them was completely forgotten. . . . [T]he full distribution was finally made in 1883, only twenty-five gray-haired 'orphans' remained to participate.").

202. CHOCTAW ORPHAN FUND, H. DOC. NO. 56-335 (1900) (accounting for the sale of Creek orphan land interests).

203. Treaty with the Ottawa, etc., *supra* note 175.

204. See generally MATTHEW L.M. FLETCHER, THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS 2-33 (2012).

205. Article 6 provides:

The said Indians being desirous of making provision for their half-breed relatives, and the President having determined, that individual reservations shall not be granted, it is agreed, that in lieu thereof, the sum of one hundred and fifty thousand dollars shall be set apart as a fund for said half-breeds. No person shall be entitled to any part of said fund, unless he is of Indian descent and actually resident within the boundaries described in the first article of this treaty nor shall anything be allowed to any such person, who may have received any allowance at any previous Indian treaty. The following principles, shall regulate the distribution. *A census shall be taken of all the men, women, and chil-*

with the Ottawas and Chippewas,<sup>206</sup> a treaty amending the 1836 treaty,<sup>207</sup> continued to provide for the land rights of Indian children and “orphans.” The guardians of “orphan” children would receive forty acres.<sup>208</sup> The 1855 Treaty with the Chippewa of Saginaw provides almost identical rights for children and “orphans.”<sup>209</sup> These Great Lakes tribes were fortunate enough not to be removed from their homelands.<sup>210</sup> Other tribes were not so fortunate.

The treaties of other Great Lakes Indians unfortunately removed by the United States to the western lands also include provisions for

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*dren, coming within this article. As the Indians hold in higher consideration, some of their half-breeds than others, and as there is much difference in their capacity to use and take care of property and, consequently in their power to aid their Indian connexions, which furnishes a strong ground for this claim, it is, therefore, agreed, that at the council to be held upon this subject, the commissioner shall call upon the Indian chiefs to designate, if they require it, three classes of these claimants, the first of which, shall receive one-half more than the second, and the second, double the third. Each man woman and child shall be enumerated, and an equal share, in the respective classes, shall be allowed to each. If the father is living with the family he shall receive the shares of himself, his wife and children. If the father is dead, or separated from the family, and the mother is living with the family she shall have her own share, and that of the children. If the father and mother are neither living with the family or if the children are orphans, their share shall be retained till they are twenty-one years of age; provided, that such portions of it as may be necessary may under the direction of the President, be from time to time applied for their support. All other persons at the age of twenty-one years, shall receive their shares agreeably to the proper class. Out of the said fund of one hundred and fifty thousand dollars, the sum of five thousand dollars shall be reserved to be applied, under the direction of the President, to the support of such of the poor half breeds, as may require assistance, to be expended in annual instalments for the term of ten years, commencing with the second year. Such of the half-breeds, as may be judged incapable of making a proper use of the money allowed them by the commissioner, shall receive the same in instalments, as the President may direct.*

Treaty with the Ottawa, etc., *supra* note 175, at 452–53 (emphasis added).

206. Treaty with the Ottawa and Chippewa, July 31, 1855, 11 Stat. 621, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 725.

207. *See generally* FLETCHER, *supra* note 204, at 34–55.

208. Article 1, paragraph 8 provides:

The United States will give to each Ottawa and Chippewa Indian being the head of a family 80 acres of land, and to each single person over twenty-one years of age, 40 acres of land, and to each family of *orphan children* under twenty-one years of age containing two or more persons, 80 acres of land, and to each single *orphan child* under twenty-one years of age, 40 acres of land to be selected and located within the several tracts of land hereinbefore described . . . .

Treaty with the Ottawa and Chippewa, *supra* note 206, at 726 (emphasis added).

209. Treaty with the Chippewa of Saginaw, etc., Chippewa–U.S., art. 1, ¶ 2, Aug. 2, 1855, 11 Stat. 633, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 733.

210. *See generally* James M. McClurken, *Ottawa Adaptive Strategies to Indian Removal*, 12 MICH. HIST. REV., Spring 1986, at 29.

Indian children. The 1854 Treaty with the Shawnee<sup>211</sup> allowed “minor orphan children” to select lands.<sup>212</sup> The 1856 Treaty with the Stockbridge–Munsee Indian Community also provided for allotment acreage to be reserved for “orphans” and the “rising generation.”<sup>213</sup> The 1859 Treaty with the Chippewa,<sup>214</sup> namely the Swan Creek and Black River Ojibwe, and Munsee Indians removed from Michigan and the northeast respectively to Kansas, allowed forty acres to be allotted

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211. Treaty with the Shawnee, Shawnee–U.S., May 10, 1854, 10 Stat. 1053, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 618.

212. Article 2 provided in relevant part:

The privilege of selecting lands, under this provision, shall extend to every head of a family who, although not a Shawnee, may have been legally married to a Shawnee, according to the customs of that people, and adopted by them; and to all minor orphan children of Shawnees, and of persons who have been adopted as Shawnees, who shall not have received their shares with any family and all incompetent persons shall have selections made for them adjacent, or as near as practicable, to their friends or relatives, which selections shall be made by some disinterested person or persons, appointed by the Shawnee council, and approved by the United States agent. . . . [I]t is therefore agreed that all Shawnees, including the persons adopted as aforesaid, and incompetent persons, and minor orphan children, who reside in said settlements respectively and all who shall, within sixty days after the approval of the surveys hereinafter provided for, signify to the United States agent their election to join either of said communities and reside with them, shall have a quantity of land assigned and set off to them, in a compact body at each of the settlements aforesaid, equal to two hundred acres to every individual in each of said communities. A census of the Shawnees residing at each of these settlements, and of the minor orphan children of their kindred, and of those electing to reside in said communities, shall be taken by the United States agent for the Shawnees, in order that a quantity of land equal to two hundred acres for each person may be set off and allotted them, to hold in common as aforesaid.

*Id.* at 619–20.

213. Treaty with the Stockbridge and Munsee, Feb. 5, 1856, 11 Stat. 663, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 742. Article 3 provides:

As soon as practicable after the selection of the lands and set aside for these Indians by the preceding article, the United States shall cause the same to be surveyed into sections, half and quarter sections, to correspond with the public surveys, and the council of the Stockbridges and Munsees shall under the direction of the superintendent of Indian affairs for the northern superintendency, make a fair and just allotment among the individuals and families of their tribes. Each head of a family shall be entitled to eighty acres of land, and in case his or her family consists of more than four members, if thought expedient by the said council, eighty acres more may be allotted to him or her; each single male person above eighteen years of age shall be entitled to eighty acres; and each female person above eighteen years of age, not belonging to any family and *each orphan child*, to forty acres; and *sufficient land shall be reserved for the rising generation.*

*Id.* at 744 (emphasis added).

214. Treaty with the Chippewa, etc., July 16, 1859, 12 Stat. 1105, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 792.

to each orphan child.<sup>215</sup> The 1867 Treaty with the Potawatomi provided that orphans of Indian allottees would be subject to the guardianship of the local state court, and their property interests protected in that forum.<sup>216</sup> The provisions relating to the Wyandotte Nation in the 1867 Treaty with the Seneca, Mixed Seneca, and Shawnee, etc. protect the property interests of “orphans” from sale absent the approval of the Interior Secretary.<sup>217</sup> In the provisions for the Peorias, Kaskaskias, Weas, and Piankeshaws in the same treaty, the property rights of “minors” and “orphan children” are to be protected by the tribal leaders and, again, the Interior Secretary.<sup>218</sup>

The 1866 treaty governing the reintroduction of the Cherokee Nation of Oklahoma into the United States after the Civil War<sup>219</sup> also

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215. Article 1 provided in relevant part:

And within said reservation there shall be assigned, in severalty to the members of said united bands, not exceeding forty acres of land to each head of a family and not exceeding forty acres to each child or other member of said family; forty acres to each orphan child, and eighty acres for each unmarried person of the age of twenty-one years and upwards, not connected with any family to include in each case, so far as practicable, a reasonable proportion of timber . . . .

*Id.* at 793.

216. Treaty with the Potawatomi art. 8, Potawatomi Tribe–U.S., Feb. 27, 1867, 15 Stat. 531, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 970, 973 (“[I]n cases where there are children of allottees left orphans, guardians for such orphans may be appointed by the probate court of the county in which such orphans may reside, and such guardians shall give bonds, to be approved by the said court, for the proper care of the person and estate of such orphans, as provided by law.”).

217. Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, etc., *supra* note 184. Article 15 provides:

All restrictions upon the sale of lands assigned and patented to “incompetent” Wyandott[els] under the fourth article of the treaty of one thousand eight hundred and fifty-five, shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to *orphans* or incompetents shall be made, under decree of any court, or otherwise, for or on account of any claim, judgment, execution, or order, or for taxes, until voluntarily sold by the patentee or his or her heirs, with the approval of the Secretary of the Interior . . . .

*Id.* at 963 (alteration in original) (emphasis added).

218. *Id.* at 965. Article 23 provides:

[T]he lands of *minors* and incompetents may be sold by the chiefs, with the consent of the agent, certified to the Secretary of the Interior and approved by him. And if there should be any allotments for which no owner or heir thereof survives, the chiefs may convey the same by deed, the purchase-money thereof to be applied, under the direction of the Secretary, to the benefit of the tribe; and the guardianship of *orphan* children shall remain in the hands of the chiefs of the tribe, and the said chiefs shall have the exclusive right to determine who are members of the tribe and entitled to be placed upon the pay-rolls.

*Id.* (emphasis added).

219. *See generally* ANNIE HELOISE ABEL, THE AMERICAN INDIAN AND THE END OF THE CONFEDERACY, 1863–1866 (1993) (documenting the state of Indian tribes after the end of the Civil War).



provided for Indian children.<sup>220</sup> Treaty terms with the Cherokees provided for the education of Indian children in an “asylum” under the control of the Cherokee government.<sup>221</sup> The Cherokee treaty terms also provided for the allotment of the Delaware Indians’ lands, located within the Cherokee reservation, and specifically provided that Indian children would receive a share of the allotted land.<sup>222</sup>

After the formal treaty era ended in 1871, federal statutes memorializing treaty-like agreements between tribes and the United States continued to provide for the land rights of Indian children. In the 1880 Agreement with the Crows, the United States agreed to provide

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220. Treaty with the Cherokee, Cherokee Nation–U.S., July 19, 1866, 14 Stat. 799, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 942.

221. *Id.* at 949. Article 25 of the Treaty with the Cherokee provided for “the foundation and support of an asylum for the education of orphan children, which asylum shall be under the control of the national council, or of such benevolent society as said council may designate, subject to the approval of the Secretary of the Interior.” *Id.*

222. Article 3 of the Treaty with the Delawares provides:

It shall be the duty of the Secretary of the Interior to give each of all the adult Delaware Indians who have received their reserved their proportion of land in severalty an opportunity free from all restraint, to elect whether they will dissolve their relations with their tribe and become citizens of the United States: and the lands of all such Indians as may elect so to become citizens, *together with those of their minor children*, held by them in severalty shall be reserved from the sale hereinbefore provided for. And the Secretary of the Interior shall cause any and all improvements made on any of the said lands, the sale of which is provided for, whether held in common or in severalty to be appraised, and the value thereof added to the price of said lands, to be paid for when payment is made for the lands upon which said improvements exist; and the money received for the improvements on the land of each Indian held in severalty shall be paid to him at any time after its payment to the Secretary of the Interior, when the Department shall be notified that said Indian is ready to remove to the Indian country to provide for his removal to, and to enable him to make improvements on his new home therein: *Provided*, That whenever it shall be ascertained under the registry above provided for what lands will be vacated, there shall be set apart from the lands held in common, *for each child of Delaware blood*, born since the allotment of land to said tribe in severalty was made under previous treaties, a quantity of land equal to the amount to which they would have been entitled had they been born before said allotment, provided that selections for children belonging to families whose head may elect to remain may be made from lands which are to be vacated by those who elect to remove: *And provided further* That in case there shall be improvements upon any heretofore allotted lands, *so selected for children of the Delawares*, payment shall be made for such improvements, at their appraised value, by the parents or guardians of said children, at the same time as if the said lands had been sold to the railroad company or other parties.

Treaty with the Delawares art. 3, Delaware Tribe–U.S., July 4, 1866, 14 Stat. 793, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 937, 938 (emphasis added).

allotments to “minor children” and “orphans.”<sup>223</sup> An 1882 Agreement with the Sioux Indians provided for allotments to children as well.<sup>224</sup>

Finally, the 1887 General Allotment Act specifically provides for allotments to be distributed to Indian children: “The head of a family was to be allotted 80 acres of agricultural land or 160 acres of grazing land; and a single person over eighteen or an orphan child under eighteen, one-half of this amount.”<sup>225</sup> A 1908 federal statute, a statute implementing the 1887 policy for a specific tribe, authorized the sale by the Interior Secretary of allotments held by Indian minors on the Yakima Indian Reservation, specifically creating a federal trust obligation and trust accounts for the proceeds of the sale.<sup>226</sup>

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223. Agreement with the Crows, Crow Tribe–U.S., May 14, 1880, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 1063 (unratified). The relevant provision allows:

Allotments in severalty of said surveyed lands shall be made as follows: To each head of a family not more than one-quarter of a section, with an additional quantity of grazing-land, not exceeding one-quarter of a section. To each single person over eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing-land not exceeding one-eighth of a section. *To each orphan child under eighteen years of age not more than one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section,* and to each other person, under eighteen years, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land. All allotments to be made with the advice of the Agent for said Indians, or such other person as the Secretary of the Interior may designate for that purpose, upon the selection of the Indians, *heads of families selecting for their minor children, and the agent making the allotment for each orphan child.*

*Id.* at 1064 (emphasis added).

224. Agreement with the Sioux of Various Tribes art. 3, Oct. 17, 1882 to Jan. 3, 1883, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 1065 (unratified). Article III provides:

In consideration of the cession of territory and rights, as herein made, and upon compliance with each and every obligation assumed by the said Indians, the United States hereby agrees that each head of a family entitled to select three hundred and twenty acres of land, under Article 6, of the treaty of 1868, may, in the manner and form therein prescribed, select and secure for purposes of cultivation, in addition to said three hundred and twenty acres, a tract of land not exceeding eighty (80) acres within his reservation, *for each of his children*, living at the ratification of this agreement, under the age of eighteen (18) years; and such child, upon arriving at the age of eighteen years shall have such selection certified to him or her in lieu of the selection granted in the second clause of said Article 6; but no right of alienation or encumbrance is acquired by such selection and occupation; unless hereafter authorized by act of Congress.

*Id.* (emphasis added).

225. Theodore H. Haas, *The Legal Aspects of Indian Affairs from 1887 to 1957*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 13 (1957).

226. Act of March 27, 1908, Pub. L. No. 60-70, 35 Stat. 49, *reprinted in* 3 INDIAN AFFAIRS: LAWS & TREATIES 316 (Charles J. Kappler ed., 1913). Section 1 provided:

As this collection of Indian treaties and federal statutes relating to land rights attests, the United States agreed to preserve, set aside, and protect land rights for Indian children at the request of tribal treaty negotiators, who often viewed these rights as critical to the survival of their tribes. The federal government almost always failed miserably in implementing its duty of protection in this context, often by selling off the protected lands before the children even grew up, but the consistent provision of land rights for Indian children is well-established here.

### 3. *Other Provisions for Indian Orphans*

In some circumstances, treaty and statutory provisions protecting the land rights of Indian children merged with the funds generated by the sales of their land rights to form alternative structures by which the United States implemented its duty of protection to Indian children. Most notably, federal, state, and religious entities formed and operated residential schools (often called asylums) for Indian children. The federal government also administered trust funds funded by Indian children's land sales or other federally created trust accounts for Indian children.

The Civil War created innumerable orphans. New York Haudenosaunee Indians served in the military, and their children frequently became orphans.<sup>227</sup> Even those that returned did so with physical and psychological limitations that effectively made their children orphans.<sup>228</sup> In 1875, the State of New York took control over the pri-

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the interests of *any Indian minor* in any lands of the Yakima Indian Reservation, State of Washington, whether by direct allotment or by inheritance, may be sold on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe; but such sale shall be only on approved petition of the natural guardian of such minor, if living, or if such natural guardian be dead, on the petition of a person designated by the Secretary of the Interior. All sales hereunder shall be subject to the approval of the Secretary of the Interior, and when so approved he shall cause patent to issue to the purchaser, passing unconditional fee by the United States as trustee for such *minor* to the interest of such *minor* in such lands, and such patent shall be considered, to the extent of the interest so conveyed, as a cancellation of any previous trust patent or patent containing restrictions on alienation issued to such minor or to any Indian allottee of whom such *minor* is an heir. Proceeds from sales hereunder shall be cared for under the direction of the Commissioner of Indian Affairs, and he may, in his discretion, cause shares of *minors* to be deposited in the Treasury of the United States to the individual credit of the said *minors*, to be withdrawn on the authority of the Secretary of the Interior.

*Id.* (emphasis added).

227. HOLT, *supra* note 11, at 60–61.

228. *Id.* at 61.

vately-operated Thomas Asylum for Orphan and Destitute Indian Children, which was established in 1855 as a private charity but quickly began to fail financially.<sup>229</sup> That same year, the state had enacted a Children's Law that authorized far more state control over the "placement of destitute and orphaned children."<sup>230</sup> The state expanded its intervention into the lives of Indian children: "The legislation expanded state intervention into the lives of poverty-stricken Indian families. By theorizing that these families, if they lived off the reservation, were likely candidates for the poorhouse, the state made the children prospective Thomas inmates."<sup>231</sup> The state was also of the view the federal government had no authority to regulate the school, claiming that "U.S. laws concerning Indian relations did not apply to those states that had been among the original thirteen colonies."<sup>232</sup> Of course, that view has long since been discredited, and was not the case in the nineteenth century, either. In any event, New York took the lead among states in establishing, funding, and administering programs for Indian children.

Most Indian orphanages, however, were established by federal, tribal, and religious entities. Throughout the nineteenth century, the United States and Indian nations established pools of funds for Indian education and for Indian orphans.<sup>233</sup> Numerous Indian treaties established federal trust funds for orphans and for educational purposes.<sup>234</sup> For example, the 1854 Treaty with the Shawnee<sup>235</sup> allowed treaty annuities to be paid into a trust fund established for Indian orphans and administered by the federal government.<sup>236</sup> The 1858 Treaty with the Yankton Sioux obligated and authorized the President to expend funds for the benefit of the "helpless orphans."<sup>237</sup> That

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229. *Id.* at 49, 61.

230. *Id.* at 62.

231. *Id.*

232. *Id.*

233. See generally Harmon, *The Indian Trust Funds*, *supra* note 12 (detailing the establishment and use of the Indian trust funds).

234. *Id.* at 24 ("All trust funds came into existence by means of treaty agreements.").

235. Treaty with the Shawnee, *supra* note 211.

236. Article 8 provides:

Such of the Shawnees as are competent to manage their affairs shall receive their portions of the aforementioned annual instalments in money But the portions of such as shall be found incompetent to manage their affairs, whether from drunkenness, depravity or other cause, shall be disposed of by the President in that manner deemed by him best calculated to promote their interests and the comfort of their families, the Shawnee council being first consulted with respect to such persons, whom it is expected they will designate to their agent. The portions of *orphan children* shall be appropriated by the President in the manner deemed by him best for their interests.

*Id.* at 622.

237. Treaty with the Yankton Sioux art. 4, ¶ 2, Apr. 19, 1858, 11 Stat. 743, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 776, 777 ("He shall

treaty also provided for “minors” to receive allotments of land for when they reach the age of majority.<sup>238</sup> The federal government held the funds in trust.

Using a combination of tribal and federal funds, the so-called Five Civilized Tribes established orphanages for Indian children. After the Civil War, the Chickasaw Nation of Oklahoma established the Chickasaw Orphan Home and Manual Labor School.<sup>239</sup> The Cherokee Nation of Oklahoma established the Cherokee Orphan Asylum in the 1870s.<sup>240</sup> In 1882, the Choctaw Nation of Oklahoma formally designated an existing institution as the Choctaw Orphan Home.<sup>241</sup> In the early twentieth century, at the request of the Choctaw and Chickasaw Indian nations, the federal government set aside land to allow for the creation of the Murrow Indian Orphans’ Home.<sup>242</sup> The proceeds of the Indian orphan allotments would cover the expenses of the home, with leftover money remaining in a trust fund released at the age of maturity.<sup>243</sup>

In sum, the backbone of federal statutory law originating in the first century of federal Indian affairs involved Indian children. Indian children’s role in Indian affairs began as diplomatic and military pawns, and that status placed Indian children in a unique position as it related to the federal government. Tribal leaders persuaded the United States to undertake a robust duty of protection specifically geared toward Indian children, who are the future of Indian nations then and now. As such, the United States turned to guaranteeing education and land rights to Indian children, especially the most vulnerable children, orphans. Thus, Indian children form the backbone of the original understanding of the federal-tribal trust relationship, from the Founding Generation to the early decades of the Coercive Period.

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likewise exercise the power to make such provision out of said sums as he may deem to be necessary and proper for the support and comfort of the aged or infirm, and helpless orphans of the said Indians.”).

238. Treaty with the Sioux, June 19, 1858, 12 Stat. 1031, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 781. Article 1 provided:

That eighty acres, as near as may be, shall, in like manner as above provided for, be allotted to each of the minors of said bands on his or her attaining their majority or on becoming heads of families by contracting marriage, if neither of the parties shall have previously received land.

*Id.*

239. HOLT, *supra* note 11, at 120–21.

240. *Id.* at 85.

241. *Id.* at 156–57.

242. *Id.* at 171.

243. *Id.*

## III. INDIAN CHILDREN IN THE COERCIVE PERIOD

Great Lakes Anishinaabek children experienced incredible upheaval during the next century. All around them, their woodlands environment was changing dramatically as nearly all of the vast wooded areas they depended upon for food and shelter were logged by American commercial interests. Federal and religious officials strongly encouraged Indian villages to stop moving with the seasons and choose a single location for their villages.<sup>244</sup> State officials began to prosecute tribal members for fishing and hunting out of season. Anishinaabek children's families would no longer be able to access traditional sugar bush territories, engage in subsistence hunting and fishing, or enjoy adequate land holdings to continue their agricultural practices. Many children traveled with their families that joined logging camps or other forms of wage labor to survive.<sup>245</sup> Worse, government or religious leaders would appear at their homes and demand that one or more of the children and their siblings must be taken away to be enrolled at the Indian boarding schools at Holy Childhood in Harbor Springs, Michigan,<sup>246</sup> or the Mount Pleasant Indian School operated by the federal government.<sup>247</sup> Many of these children would never see their families again. Some would die from the poor sanitation and health care at the schools, or from violent abuse, and be buried on the grounds in unmarked graves, their parents and families told that they had run away. Most would never speak Anishinaabemowin again, after being ordered to speak only English and punished with violence if they spoke their language.<sup>248</sup>

After the boarding schools began to close, as the Mount Pleasant school did in 1934, state officials and religious groups took Indian children from their parents and families. These children would be placed in non-Indian foster homes, with an eye toward adoption into a non-

244. E.g., Virgil J. Vogel, *The Missionary as Acculturation Agent: Peter Dougherty and the Indians of Grand Traverse*, 51 MICH. HIST., Spring 1967, at 185 (describing Protestant missionary's efforts to persuade Indians to keep to one village year-round).

245. E.g., James M. McClurken, *Wage Labor in Two Michigan Ottawa Communities*, in NATIVE AMERICANS AND WAGE LABOR: ETHNOHISTORICAL PERSPECTIVES 66 (Alice Littlefield & Martha C. Knack eds., 1996).

246. DUNLOP & FOUNTAIN-BLACKLIDGE, *supra* note 3, at 131–40 (2004); Matthew L.M. Fletcher, *The Indian Child Welfare Act: Implications for American Indian and Alaska Native Children, Families, and Communities*, in AMERICAN INDIAN AND ALASKA NATIVE CHILDREN AND MENTAL HEALTH 269, 275–77 (Michelle C. Sarche et al. eds., 2011).

247. CHILD, *supra* note 2, at 121–37.

248. ZIIBIWING CENTER OF ANISHINABE CULTURE & LIFEWAYS, AMERICAN INDIAN BOARDING SCHOOLS: AN EXPLORATION OF GLOBAL ETHNIC & CULTURAL CLEANSING 6–15 (2011), <http://www.sagchip.org/ziibiwing/planyourvisit/pdf/AIBSCurrGuide.pdf> [https://perma.unl.edu/Y3NL-BREC].

Indian family,<sup>249</sup> and would never see their families until they became adults, if at all. These children might be or might not be placed in a loving home, but they would never speak their language or see their families again. Many of them would feel isolated and alienated and turn to alcohol and other drugs, crime, and all too often suicide.

The Coercive Period, a period of time that virtually every Indian nation has had to survive, is the time in which the federal government entered into reservation governance and dominated or destroyed tribal governments. For many tribes, that meant allotment of communally owned reservation lands and federal agency control of reservation life. For other tribes, that meant complete dispossession of Indian lands and, often, termination of the federal-tribal trust relationship. Indian people suffered through oppressive educational and cultural federal programs like compulsory boarding school education and criminal prosecution for the exercise of Indian religions. This is also the period of time in which the federal government's Indian affairs laws and policies became unmoored from their constitutional bases.

The most effective and impactful federal assimilative programs during the Coercive Period were the establishment of the Indian boarding school system and the allotment of Indian reservations. While it is well-established the Indian boarding school system targeted Indian children, it is now apparent that allotment targeted Indian families in deeply disruptive ways as well. Frankly, it is because federal coercion targeted Indian families and children that they were so impactful, even devastating, on Indian nations.

#### **A. Interference in Internal Tribal Matters**

Here, we survey an overarching feature of the Coercive Period—federal interference with reservation governance. Federal bureaucratic control over Indian leadership and governments ran parallel to the government's control over Indian children during the latter half of the nineteenth century and well into the mid- to late-twentieth century. Many federal officials asserted the de facto power to even decide whether and where Indian children would go to school. In fact, federal education programs and related allotment of lands that so deeply impacted Indian children and families could not have been implemented without federal control of reservation governance.

The rise of federal control over Indian country governance took place gradually over many decades. Each Indian reservation has its

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249. One of every 7.4 Indian children in Michigan in the early 1970s was either in foster care or was adopted out, 3.9 times more often than non-Indian children. *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 569 (1977).

own story about the federal government's interventions, and those histories are considerable. Here, we just briefly survey federal government control more generally.

The United States adopted the guardian-ward metaphor as an operating public policy in the 1850s and 1860s. Indian Affairs Commissioner George Manypenny, writing in 1855, may have been the first high level federal official to use the term "wards" in relating to Indian people.<sup>250</sup> Other officials made similar public statements, including Ely Parker, a Seneca tribal member and former aide to General Grant.<sup>251</sup> Though these statements did not translate immediately into federal policy, lower level federal bureaucrats charged with distributing annuities in cash took those statements seriously, and began to intervene in internal tribal matters, for example, in how Indian people spent their treaty annuity money.<sup>252</sup> Federal officials charged with distributing goods guaranteed by treaty began to demand that Indian people work for the goods before receiving them.<sup>253</sup> Throughout the latter half of the nineteenth century, federal Indian affairs officials received their appointments as a matter of political patronage rather than merit, which led to "dishonesty, inefficiency, and other corrupt practices" within the Bureau of Indian Affairs.<sup>254</sup>

More specifically, on many Indian reservations, federal officials used boilerplate law and order codes, Indian police, and Indian courts to subvert Indian cultures and religions as a means of control.<sup>255</sup> In 1878, the United States first authorized the use of Indian police to enforce law and order on reservations.<sup>256</sup> By 1884, nearly fifty Indian police departments existed.<sup>257</sup> In 1882, federal officials began instituting Courts of Indian Offenses on reservations.<sup>258</sup> These courts were designed to prosecute tribal ceremonies such as the Sun Dance, the Scalp Dance, and the War Dance, to eliminate plural marriage, to undermine "medicine men," and to prosecute other offenses.<sup>259</sup> Indians themselves served as police and judges. From their inception, federal officials intended these courts to serve as tools for the

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250. CURTIS E. JACKSON & MARCIA J. GALLI, A HISTORY OF THE BUREAU OF INDIAN AFFAIRS AND ITS ACTIVITIES AMONG INDIANS 59 (1977).

251. *Id.* at 60.

252. *Id.* at 61-62.

253. *Id.* at 62; *see also id.* at 62-65 (describing abuses within the BIA political patronage system, failed efforts at reform, and the establishment of the federal Civil Service rules).

254. *Id.* at 63-64.

255. *See generally* WILLIAM T. HAGEN, INDIAN POLICE AND JUDGES 25-81 (Bison Books 1980) (1966).

256. ALICE C. FLETCHER, INDIAN EDUCATION AND CIVILIZATION, S. EXEC. DOC. NO. 48-95, at 117 (1885).

257. *Id.*

258. *Id.*

259. *Id.*



“civilization” of Indian people and specifically directed the courts work to eliminating tribal religious and cultural activities.<sup>260</sup> The Interior Secretary, in announcing the rules governing these courts, pointed to “medicine men” as a bar to Indian civilization in general and specifically to their roles in persuading Indian children not to attend public schools.<sup>261</sup> No act of Congress explicitly authorized the Interior Department to interfere in tribal religious activities, or to establish courts in Indian country, but the federal government of the 1880s did so anyway. Congress did appropriate funds to cover the expenses of these courts in later years, effectively ratifying the existence of the courts.<sup>262</sup> But no federal law, other than the government’s disturbing interpretation of the duty of protection, authorized federal control over religion. Still, in *United States v. Clapox*,<sup>263</sup> the court rejected constitutional challenges to the system brought by Indians subjected to prosecution, reasoning the reservation was a kind of school.<sup>264</sup>

On some reservations, federal bureaucrats dominated reservation life by controlling tribal trust annuities and federal resources. In addition to the generalized federal paternalism associated with the distribution of annuities and goods guaranteed by treaty, federal officials occasionally played politics with tribal governments. One foundational federal Indian law decision, *Seminole Nation v. United States*,<sup>265</sup> arose from the failure of the federal government to properly disburse funds to the tribe guaranteed by treaty for educational and other purposes.<sup>266</sup> The United States enacted a special jurisdictional

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260. OFFICE OF INDIAN AFFAIRS, DEPT. OF INTERIOR, RULES GOVERNING THE COURT OF INDIAN OFFENSES 3 (1883) (statement of H.M. Teller, Secretary of the Interior) (“I desire to call your attention to what I regard as a great hindrance to the civilization of the Indians, viz, the continuance of the old heathenish dances, such as the sun-dance, scalp-dance, &c. These dances, or feasts, as they are sometimes called, ought, in my judgment, to be discontinued, and if the Indians now supported by the Government are not willing to discontinue them, the agents should be instructed to compel such discontinuance.”).

261. *Id.* at 4 (“Another great hindrance to the civilization of the Indians is the influence of the medicine men, who . . . are especially active in preventing the attendance of the children at the public schools, using their conjurers’ arts to prevent the people from abandoning their heathenish rites and customs.”).

262. HAGEN, *supra* note 255, at 111–12.

263. 35 F. 575 (D. Or. 1888).

264. *Id.* at 577 (“These ‘courts of Indian offenses’ are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to ‘ordain and establish,’ but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.”).

265. 316 U.S. 286 (1942).

266. *Id.* at 290–95.

statute to allow the tribe to bring these breach of trust claims.<sup>267</sup> One of the claims alleged the tribal council was “corrupt,” the federal government was aware of that corruption, and the government improperly continued to disburse trust funds to the tribal council.<sup>268</sup> The Supreme Court noted the record largely supported the allegation.<sup>269</sup> The Court announced a rule of law that required federal officials to be held accountable under “the most exacting fiduciary standards” when handling tribal trust funds.<sup>270</sup>

The allotment era that began in full force in 1887 compelled the intense growth of the Bureau of Indian Affairs and further triggered the near-dominant control of federal officials over reservation govern-

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267. Act of May 20, 1924, ch. 162, 43 Stat. 133.

268. *Seminole Nation*, 316 U.S. at 295–96 (“That since the passage of the Act of April 15, 1874, it was reported by the officers of the defendant [the United States] that the Seminole tribal officials were misappropriating the Seminole tribal funds entrusted to them, and robbing the members of the tribe of an equal share of the tribal income. That the reports of the Dawes Commission show conclusively that the governments of the Five Civilized Tribes were notoriously and incurably corrupt, that every branch of the service was infested with favoritism, graft and crookedness, and that by such methods the tribal officers acquired large fortunes, while the other members entitled to share in the tribal income received little benefit therefrom.”).

269. *Id.* at 298–300 (footnotes omitted) (“There are ample indications in the record before us that the Seminole General Council was mulcting the Nation and that the proper Government officials may well have had knowledge thereof at the time some, at least, of the payments were made. For about this time the Commissioner of Indian Affairs received several warnings from his subordinates that ‘injustice to the majority’ of the Seminoles existed, that the chiefs were in the habit ‘of taking out what amount they chose’ from the annuities, that the Seminoles were ‘in bad hands’, and that the chiefs intended ‘to ‘gobble’ the next money for the purpose of keeping up their government’. And the Acting Commissioner of Indian affairs was evidently aware in 1872 of the possibility that the Council was faithless for he declined to change the method of payment at the request of the Seminole Chiefs ‘until the Department shall be fully satisfied that a proper disposition will be made of the funds if paid in the manner proposed by the Chiefs’.”).

270. *Id.* at 296–97 (emphasis added) (footnotes omitted) (“*Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.*” Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government’s fiduciary obligation. If those were the circumstances, either historically notorious so as to be judicially noticed or otherwise open to proof, when the \$66,422.64 was paid over at the request of the Seminole General Council during the period from 1870 to 1874, the Seminole Nation is entitled to recover that sum, minus such amounts as were actually expended for the benefit of the Nation by the Council.”).

ance and Indian lives.<sup>271</sup> Federal officials wrote approvingly of tribes that began to “rapidly accept[] the Government of the United States” instead of traditional governance.<sup>272</sup> In 1901, the Indian Affairs Commissioner issued the “short-hair order,” complaining that Indian men returned to the reservation after boarding school only to allow their hair to grow long again, and therefore his “old custom[s].”<sup>273</sup> In California, by 1910, the Bureau of Indian Affairs had taken over control of tribal governments.<sup>274</sup>

In Oklahoma, the United States effectively abolished the tribal governments of the Five Civilized Tribes around the turn of the twentieth century through 1898<sup>275</sup> and 1906<sup>276</sup> statutes that eliminated tribal courts and tribal governments, respectively. “The April 1906 Act abolished the elected functions of tribal government and . . . *only* permitted the elected governments of the Five Tribes to adjourn without federal approval of their actions. Indian governments could do virtually nothing without federal authorization.”<sup>277</sup> The President of the United States selected the principal chief of the various tribes, the lead executive officer, effectively handing control over the entire tribal government to one person at the whim of the United States.<sup>278</sup> The 1898 Act authorized the allotment of Oklahoma reservation lands, forcing a steep increase in the number of federal government officials administering allotment and tribal governance issues from a few dozen in the 1890s to hundreds by the 1920s.<sup>279</sup>

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271. See JACKSON & GALLI, *supra* note 250, at 88–96; see also *id.* at 89 (“In carrying out the provisions of the General Allotment Act, the BIA became eventually the manager of Indian lands, attending to all the details stemming directly from the act and all the offshoots springing from operation of the act.”).

272. *Id.* at 91.

273. *Id.* (quoting OFFICE OF INDIAN AFFAIRS, DEP’T OF INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 13–14 (1902)).

274. C. Blue Clark, *How Bad It Really Was Before World War II: Sovereignty*, 23 OKLA. CITY U.L. REV. 175, 178 (1998) (citing FLORENCE CONNOLLY SHIPEK, PUSHED INTO THE ROCKS: SOUTHERN CALIFORNIA INDIAN LAND TENURE 1769–1986, at 143 (1987)).

275. Act of June 28, 1898, ch. 517, 30 Stat. 495.

276. Act of April 26, 1906, Pub. L. No. 59-130, 34 Stat. 148.

277. Clark, *supra* note 274, at 181.

278. *Id.* at 182 (“The federal government appointed the principal chief of the Five Tribes until 1969, and, in effect, appointed the entire tribal government, since the principal chief also appointed the tribal legislature. The federal government, in reality, made the principal chief the sole government, and encouraged him to pick his own national legislature, as opposed to encouraging the lawful election of tribal representatives.”).

279. *Id.* at 183 (“With the rise in workload for federal agents as a direct result of allotment, federal interference and paternalism grew apace. The BIA staff increased along with the rise in paternalism. The Union Agency staff, in the 1890s, had been only about thirty strong. By 1906, with allotment underway, the staff had ballooned fourfold to over 120. By the even busier 1920s, the overall Muskogee office staff had risen to over 250.”).

The Indian New Deal, embodied in the Indian Reorganization Act of 1934,<sup>280</sup> ended allotment but, despite its promise, did little to end federal control over reservation affairs. Section 16 of the Act encouraged tribes to establish constitutional democracies,<sup>281</sup> but allowed the Interior Department to retain approval authority over the tribe's first written constitution.<sup>282</sup> Since federal officials retained final approval authority, they usually required Indian nations to include additional Secretarial approval choke points within the tribal constitutions themselves.<sup>283</sup> This approval authority allowed the Interior Department to interfere directly with tribal membership criteria, for example.<sup>284</sup> Many of these approval provisions remain in tribal constitutions eighty years after their ratification in the 1930s, even though the modern Interior Department no longer engages in an approval process.<sup>285</sup>

Felix S. Cohen's *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*,<sup>286</sup> and similar works,<sup>287</sup> described federal government abuses after the enactment of the 1934 Act, relying on the annual reports submitted to Congress by the federal officials themselves. Cohen characterized the government's control as military style: "Administrators accustomed to exercising the powers of a military government were impatient of legal restraints as they undertook to govern all aspects of the lives of their subject peoples."<sup>288</sup> These officials interfered with tribal elections to prevent the amendment of tribal constitutions;<sup>289</sup> denied Indian nations the right to retain coun-

280. Wheeler-Howard Act, Pub. L. No. 73-383, 48 Stat. 984 (1943) (codified at 25 U.S.C. §§ 461-95 (2012)).

281. 25 U.S.C. § 476 (2012).

282. *Id.* § 476(a)(2).

283. See generally Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81 (1993).

284. *E.g.*, Snowden v. Saginaw Chippewa Indian Tribe, 32 Indian L. Rptr. 6047, 6048-49 (Saginaw Chippewa Tribal App. Ct. 2005) (detailing how the BIA coerced the Saginaw Chippewa Indian Tribe into adopting a constitution that excluded tribe members living off the reservation from membership).

285. *E.g.*, CONSTITUTION & BY-LAWS OF THE KEWEENAW BAY INDIAN COMMUNITY Dec. 17, 1936, art. VI, § 2.

286. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348 (1953).

287. Congressional reports at the time of the enactment of the American Indian Religious Freedom Act, 42 U.S.C. § 1996, recognized deprivations of Indian freedoms ongoing as of 1978. AMERICAN INDIAN RELIGIOUS FREEDOM, H.R. REP. NO. 95-1308 (1978); NATIVE AMERICANS' RIGHT TO BELIEVE AND EXERCISE THEIR TRADITIONAL NATIVE RELIGIONS FREE OF FEDERAL GOVERNMENT INTERFERENCE, S. REP. NO. 95-709 (1978).

288. Cohen, *supra* note 286, at 352.

289. *Id.* at 354 ("When the Blackfeet Tribe held a referendum election on May 9, 1952, on a proposed amendment to the tribal constitution, the Interior Department ran a rival election, managed by Indian Bureau employees; called out its special Bu-

sel of their own choosing;<sup>290</sup> denied Indian nations the ability to petition Congress;<sup>291</sup> and attacked Indians' freedom of religion.<sup>292</sup> On that last point, a 1978 report that accompanied the American Indian Religious Freedom Act<sup>293</sup> detailed widespread federal agency violations of Indian religious freedom on federal public lands.<sup>294</sup>

The federal government's control over internal tribal affairs is a far cry from the negotiated measured separatism of the earlier treaty era where the United States focused its attention on the external affairs of Indian nations within its boundaries and territories. As noted above, the political theory of the Constitution as creating a government of limited and enumerated powers, the Treaty Power, the Commerce Clause, and the structure of the Constitution all weighed heavily against the federal government's assertion of control over internal tribal matters.

That does not mean the United States did not acquire some authority over internal tribal matters. The duty of protection did not create an impenetrable wall of sovereignty around reservation affairs. Instead, there were specific overriding national interests that would justify federal interference in Indian country. For example, the Cherokee Nation of Oklahoma technically became an enemy of the United States after the southern states forced the Cherokees to join the Con-

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reau police force; closed down one or more tribal polling places; seized tribal funds, without tribal consent, to pay some of the expenses of the Bureau election (notwithstanding Secretary Chapman's assurance that no such action was contemplated); and, in order to validate its own election results, tried to strike more than 1,000 Blackfeet names from the list of eligible voters.").

290. *Id.* at 355–56 ("[D]uring more than a decade before [Indian Affairs Commissioner Dillon S.] Myer took office no Indian tribe had ever been denied the right to retain as its attorney any lawyer in good standing at the bar. Since Mr. Myer took office more than forty Indian tribes have complained of Bureau interference in the exercise of this right. The Secretary on January 24, 1952, announced appointment of a committee to look into this problem. At last reports, the committee had never met.").

291. *Id.* at 356 ("Yet when the Oglala Sioux Tribe on September 28, 1950, petitioned Congress to cut wasteful expenditures of the Indian Bureau in its so-called 'extension service' in South Dakota, the Indians were advised that \$140,000 of credit funds allocated to the tribe several months earlier would be 'frozen' until the tribe withdrew its criticisms.").

292. *Id.* at 359 ("Where native religious customs interfere with administrative convenience, Commissioner Myer has taken the position that Indian Bureau officials regularly maintained in the 1880's and 1890's: native custom must give way. For example, at one of the Rio Grande Pueblos, where ancient custom requires that no white person remain within the Pueblo at certain ceremonies, the Indian Bureau now insists that its employees will remain on the Pueblo grounds notwithstanding the objection of the Indian landowners to their presence.").

293. American Indian Religious Freedom, Pub. L. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (2012)).

294. *See generally* AMERICAN INDIAN RELIGIOUS FREEDOM, H.R. REP. NO. 95-1308 (1978).

federate States of American during the Civil War, leading to a post-war treaty in 1866 dealing with that arrangement.<sup>295</sup> Moreover, many Cherokee citizens were slave owners, and the treaty also dealt with the implications of federal law barring slave ownership in the United States.<sup>296</sup> In that instance, the United States was asserting authority under the duty of protection, the Foreign Affairs Power, and likely the Thirteenth Amendment to settle post-Civil War issues and the slavery issue.

But those areas of overriding national interests were rare and narrow. Federal interventions into reservation governance usually did not involve national concerns. Instead, federal Indian law and policy advanced the interests of economic and religious favorites of national and local federal officials. In telling instances, federal officials ostensibly carrying out their federal mandate felt both authorized and justified to intervene repeatedly in the marriage customs of Indian people.<sup>297</sup> Standing Rock reservation Indian agent James McLaughlin, in his work overseeing Indian schools, was “not averse to dismantling tribal marriage customs and *arranging their own matches*.”<sup>298</sup> From 1877 to 1881, he arranged marriages amongst his students fifteen times.<sup>299</sup> When it comes to the federal government’s intervention into Indian families’ lives through mandatory Indian education, arranged marriages were merely a small subset of federal control over Indian children.

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295. Treaty with the Cherokee, *supra* note 220.

296. See generally Lydia Edwards, Note, *Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin to Securing Equal Rights Within Indian Country?*, 8 BERKELEY J. AFR.-AM. L. & POL’Y 122 (2006) (arguing that actions by some Indian tribes to disenfranchise and disenroll their black members is a violation of the Thirteenth Amendment); S. Alan Ray, *A Race or A Nation? Cherokee National Identity and the Status of Freedmen’s Descendants*, 12 MICH. J. RACE & L. 387 (2007) (examining the legal and social history of the Cherokee Freedmen in order to criticize definitions of Cherokee political identity); Terrion L. Williamson, Note, *The Plight of “Nappy-Headed” Indians: The Role of Tribal Sovereignty in the Systematic Discrimination Against Black Freedmen by the Federal Government and Native American Tribes*, 10 MICH. J. RACE & L. 233 (2004) (examining the role the government has played in the exclusion of Black Freedmen from Native American nations).

297. W. Roger Buffalohead & Paulette Fairbanks Molin, “A Nucleus of Civilization”: American Indian Families at Hampton Institute in the Late Nineteenth Century, 35 J. AM. INDIAN EDUC., Spring 1996, at 59, 64–66.

298. *Id.* at 65 (emphasis added).

299. *Id.* (“McLaughlin indicated that the first marriage arranged in this manner at Devils Lake occurred in 1877 and that when he left in 1881, there were fifteen such couples, with the number increasing.”).

## B. The Perversion of Indian Education

The most damaging federal initiatives during the Coercive Period involved Indian children.<sup>300</sup> Recall that throughout the treaty era, tribal negotiators sought federal guarantees toward educating Indian children.<sup>301</sup> Treaties included provisions for teachers, schoolhouses, trust funds, and other resources for education. The goal for tribal negotiators, who anticipated more and more non-Indians to enter Indian country, was to help prepare the next generations to speak and read English and to take advantage of western math and science teachers. But the promise of Indian education during the treaty period was not fulfilled. American Indian education became compulsory on most reservations, with boarding schools predominating to distance Indian children literally and figuratively from their families and their cultures. It is now well-documented that the damage to Indian families and Indian nations as a result of these coercive educational practices is intergenerational and continuing.<sup>302</sup>

Indian treaties providing for education starting in the 1850s stopped being enticements but obligations. For example, the 1857 Treaty with the Pawnees authorized the establishment of two federal schools and a concomitant obligation of the Pawnees to send their children there upon the pain of losing portions of their annuities.<sup>303</sup> In

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300. BARBARA PERRY, SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS 32 (2008) ("The history of the 'lost generation' of Native American children, shuffled off to BIA boarding schools, is itself a history of violence, intimidation, and repression.").

301. See *supra* section II.C.

302. E.g., Aaron R. Denham, *Rethinking Historical Trauma: Narratives of Resilience*, 45 *TRANSCULTURAL PSYCHIATRY* 391 (2008); Teresa Evans-Campbell, *Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*, 23 *J. INTERPERSONAL VIOLENCE* 316 (2008); Joseph P. Gone, *A Community-Based Treatment for Native American Historical Trauma: Prospects for Evidence-Based Practice*, 1 *SPIRITUALITY IN CLINICAL PRAC.*, Aug. 2013, at 78; Maria Yellow Horse Brave Heart, *The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration*, 35 *J. PSYCHOACTIVE DRUGS* 7 (2003).

303. Treaty with the Pawnee, Pawnee Tribe–U.S., Sept. 24, 1837, 11 Stat. 729, reprinted in 2 *INDIAN AFFAIRS: LAWS & TREATIES*, *supra* note 70, at 764. Article 3 provides:

In order to improve the condition of the Pawnees, and teach them the arts of civilized life, the United States agree to establish among them, and for their use and benefit, two manual-labor schools, to be governed by such rules and regulations as may be prescribed by the President of the United States, who shall also appoint the teachers, and, if he deems it necessary may increase the number of schools to four. In these schools, there shall be taught the various branches of a common-school education, and, in addition, the arts of agriculture, the most useful mechanical arts, and whatever else the President may direct. The Pawnees, on their part, agree that each and every one of their children,

1889, the Commissioner of Indian Affairs, a former military leader, argued that Indian education should be structured to eliminate “the irregularities of camp life, which is the type of all tribal life, [to force Indian youth to] give way to the methodical regularity of daily routine.”<sup>304</sup>

The United States eventually funneled federal education resources into ethnocentric religious organizations and military boot camp-style boarding schools.<sup>305</sup> The coercive aspects of Indian education in this period were driven by President Grant’s Peace Policy, which sought recommendations for federal Indian agents from religious organizations.<sup>306</sup> After the Grant Administration’s injection of religious leaders into positions of power within federal Indian affairs, Indian education became tyrannical, infused with military discipline, rigidity, and brutality coupled with religious education.

One religious leader’s candid statement about the goals of late nineteenth century Indian education is telling: “The girls will need the training more than the boys [and] they will wield a greater influence on the future. *If we get the girls, we get the race.*”<sup>307</sup> Captain Richard H. Pratt, head of the Carlisle Indian School from 1879 to 1904, is better known for asserting, “A great general has said that the only good Indian is a dead one. . . . In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead.

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between the ages of seven and eighteen years, shall be kept constantly at these schools for, at least, nine months in each year- and if any parent or guardian shall fail, neglect, or refuse to so keep the child or children under his or her control at such school, then, and in that case, there shall be deducted from the annuities to which such parent or guardian would be entitled, either individually or as parent or guardian, an amount equal to the value, in time, of the tuition thus lost; but the President may at any time change or modify this clause as he may think proper. The chiefs shall be held responsible for the attendance of orphans who have no other guardians; and the United States agree to furnish suitable houses and farms for said schools, and whatever else may be necessary to put them in successful operation; and a sum not less than five thousand dollars per annum shall be applied to the support of each school, so long as the Pawnees shall, in good faith, comply with the provisions of this article; but if, at any time, the President is satisfied they are not doing so, he may at his discretion, discontinue the schools in whole or in part.

*Id.* at 764–65.

304. THOMAS J. MORGAN, OFFICE OF INDIAN AFFAIRS, DEP’T OF INTERIOR, SUPPLEMENTAL REPORT ON INDIAN EDUCATION (1889), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 15, at 221, 231.
305. Jill E. Martin, *Constitutional Rights and Indian Rites: An Uneasy Balance*, 3 W. LEGAL HIST. 245, 248 (1990).
306. Robert L. Whitner, *Grant’s Indian Peace Policy on the Yakima Reservation*, 1870–82, 50 PAC. NW. Q. 135, 135 (1959).
307. CAROL DEVENS, COUNTERING COLONIZATION: NATIVE AMERICAN WOMEN AND GREAT LAKES MISSIONS, 1630–1900, at 98 (1992) (quoting Isaac Baird of the Presbyterian Board of Foreign Missions) (emphasis added).



Kill the Indian in him, and save the man.”<sup>308</sup> In 1880, the Board of Indian Commissioners wrote in their annual report, “As a savage we cannot tolerate him [the Indian] any more than as a half-civilized parasite, wanderer, or vagabond. The only alternative left is to fit him by education for civilized life.”<sup>309</sup> Meanwhile, “[i]n 1892 and 1904, federal regulations outlawed the practice of tribal religions entirely, and punished Indian practitioners by either confinement in agency prisons or by withholding rations.”<sup>310</sup> Christianity also became “mandatory.”<sup>311</sup>

Indian education was not only compulsory, but federal and religious officials demanded that Indian children be removed from their homes and families. Captain Richard Pratt stated in relation to compulsory education, “The old ones are not irredeemable, as is alleged. It is harder to bend the tree than the bush; but *force enough will bend anything*.”<sup>312</sup> Professor Ray Cross concluded in his powerful study of Indian education the goal of compulsory boarding schools was to strip Indian children of their culture, language, traditions, and ties to their homes as a means of saving their lives:

This educational philosophy was shared by those countless Indian agents, teachers, and matrons who ran Indian schools. They reasoned that to leave Indian children within the confines of their Indian camps would be to condemn them to a short, nasty and brutish life. Reservation Indian life was deemed so inherently destructive of the Indian children so as to mandate their physical removal from its debilitating influences.<sup>313</sup>

Implementing this theory, though absent the request or consent of tribal leaders, the 1864 Treaty with the Chippewa of Saginaw provided

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308. Richard H. Pratt, *The Advantages of Mingling Indians with Whites* (1892), reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 15, at 260, 260–61 (emphasis added).

309. BOARD OF INDIAN COMMISSIONERS, TWELFTH ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS: INDIAN EDUCATION (1880), reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 15, at 193, 194.

310. Senator Daniel K. Inouye, *Discrimination and Native American Religious Rights*, 23 U.W.L.A. L. REV. 3, 12–13 (1992).

311. AMELIA V. KATANSKI, LEARNING TO WRITE “INDIAN”: THE BOARDING-SCHOOL EXPERIENCE AND AMERICAN INDIAN LITERATURE 33 (2005) (“Though the schools were run by the federal government, Christianity was mandatory . . . . For most secular as well as missionary educators, “civilization” was inconceivable if not grounded in Christian—especially Protestant—values’ . . .”).

312. Helen N. Bannan, *The Idea of Civilization and American Indian Policy Reformers in the 1880s*, 1 J. AM. CULTURE 787, 789 (1978) (emphasis added) (quoting OFFICE OF INDIAN AFFAIRS, DEPT’ OF INTERIOR, FIFTY-EIGHTH ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 82 (1889)).

313. Cross, *supra* note 146, at 944 (footnotes omitted); see also John W. Ragsdale, Jr., *The Movement to Assimilate the American Indians: A Jurisprudential Study*, 57 UMKC L. REV. 399, 409 (1989) (“The federal government correctly assumed that the young are the life blood of a culture and that the molding and transformation of the children and their values might prove an effective way of destroying Indian heritage at its roots.”).

for the establishment of an Indian school, granting control of the school to the "Missionary Society of the Methodist Episcopal Church."<sup>314</sup>

Just as the colonists and the American military kidnapped Indian families during the worst of the Indian wars, federal officials again

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314. Treaty with the Chippewa of Saginaw Swan Creek, and Black River, Chippewa-U.S., Oct. 18, 1864, 14 Stat. 657, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 868. Article 4 provides:

The United States agrees to expend the sum of twenty thousand dollars for the support and maintenance of a manual-labor school upon said reservation: *Provided*, That the Missionary Society of the Methodist Episcopal Church shall, within three years after the ratification of this treaty at its own expense, erect suitable buildings for school and boarding-house purposes, of a value of not less than three thousand dollars, upon the southeast quarter of section nine, township fourteen north, of range four west, which is hereby set apart for that purpose.

The superintendent of public instruction, the lieutenant governor of the State of Michigan, and one person, to be designated by said missionary society shall constitute a board of visitors, whose duty it shall be to visit said school once during each year, and examine the same, and investigate the character and qualifications of its teachers and all other persons connected therewith, and report thereon to the Commissioner of Indian Affairs.

The said Missionary Society of the Methodist Episcopal Church shall have full and undisputed control of the management of said school and the farm attached thereto. Upon the approval and acceptance of the school and boarding-house buildings by the board of visitors, the United States will pay to the authorized agent of said missionary society for the support and maintenance of the school, the sum of two thousand dollars, and a like sum annually thereafter, until the whole sum of twenty thousand dollars shall have been expended.

The United States reserves the right to suspend the annual appropriation of two thousand dollars for said school, in part or in whole, whenever it shall appear that said missionary society neglects or fails to manage the affairs of said school and farm in a manner acceptable to the board of visitors aforesaid; and if, at any time within a period of ten years after the establishment of said school, said missionary society shall abandon said school or farm for the purposes intended in this treaty then, and in such case, said society shall forfeit all of its rights in the lands, buildings, and franchises under this treaty and it shall then be competent for the Secretary of the Interior to sell or dispose of the land hereinbefore designated, together with the buildings and improvements thereon and expend the proceeds of the same for the educational interests of the Indians in such manner as he may deem advisable.

At the expiration of ten years after the establishment of said school, if said missionary society shall have conducted such school and farm in a manner acceptable to the board of visitors during said ten years, the United States will convey to said society the land before mentioned by patent in trust for the benefit of said Indians.

In case said missionary society shall fail to accept the trust herein accept trust, etc. named within one year after the ratification of this treaty then, and in that case, the said twenty thousand dollars shall be placed to the credit of the educational fund of said Indians, to be expended for their benefit in such manner as the Secretary of the Interior may deem advisable.

*Id.* at 870.

resorted to kidnapping Indian children during the worst of the assimilation era. One federal official suggested “tak[ing Indian children] in their infancy and plac[ing] them in its fostering schools; surrounding them with an atmosphere of civilization, maturing them in all that is good, and developing them into men and women instead of allowing them to grow up as barbarians and savages.”<sup>315</sup> A federal Indian agent at the Hopi Indian community described hunting down Indian children who had escaped to caves or cellars, sometimes defended by their parents, who would have to be restrained by force to prevent the kidnapping of their children.<sup>316</sup> These Indian parents and extended families faced criminal prosecution.<sup>317</sup>

The federal government’s compulsory education policy took many forms. In 1893, the United States authorized the Interior Secretary to withhold rations and subsistence support to Indian families who did not comply with the compulsory education requirements.<sup>318</sup> The next year, the government limited compulsory school attendance to schools within the Indian child’s state.<sup>319</sup> One federal court held that an Indian girl could not be compelled to attend an Indian boarding school absent the consent of her parents, though that holding may have been driven by the fact the government could not prove she was under the age of eighteen.<sup>320</sup> The rations statute (and another statute specifically targeted at the Osage Nation<sup>321</sup>) remains law.<sup>322</sup>

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315. Thomas J. Morgan, A Plea for the Papoose, Address at Albany, N.Y. (n.d.), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 15, at 239, 243; *see also* Thomas J. Morgan, *Compulsory Education* (1892), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 15, at 252, 255–56.

316. LEO CRANE, INDIANS OF THE ENCHANTED DESERT 172–73 (The Rio Grande Press, Inc. 1972).

317. INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 91-501, at 151 (1969).

318. Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 635 (codified at 25 U.S.C. § 283 (2012)).

319. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 313 (codified as amended at 25 U.S.C. § 286 (2012)).

320. *In re Lelah-puc-ka-chee*, 98 F. 429, 436–37 (N.D. Iowa 1899) (“The conclusion reached upon the questions submitted to the court is that the respondents, as the agent and school superintendent at the Tama county reservation, cannot by force or compulsion take the Indian children from the reservation proper, and keep them at the Indian training school, without the consent of the parents, or those who may stand in that relation to them; that, if Lelah-puc-ka-chee has in fact been married to Ta-ta-pi-cha according to the recognized tribal custom, and, if she wishes to leave the school, she cannot be lawfully prevented from so doing, but if she, although married, wishes to continue in attendance at the school, she has the right so to do; that if she is not in fact married to Ta-ta-pi-cha, and her parents desire to have her remain in the school, she being less than 18 years of age, the respondents have the right to require her attendance, but, if her attendance can only be secured by compulsion, that compulsion must be exercised by the parents, and not by the respondents.”).

321. Act of June 30, 1913, ch. 4, 38 Stat. 77, 96 (codified at 25 U.S.C. § 285 (2012)).

Perhaps most relevant to the modern-day debate over the Indian Child Welfare Act is the federal policy of “outing.” “Outing” involved sending Indian boarding schools’ students to non-Indian, Christian families to serve as manual workers on farms and in households.<sup>323</sup> The “outing” system took Indian children even further from their homes, families, and cultures by immersing them in non-Indian cultures, and school officials did so intentionally.<sup>324</sup> The leading scholar on the allotment policy, linking allotment to this system, noted: “A program of assimilation, called the ‘outing system,’ was developed at Carlisle [Indian School]. It was a scheme of sending Indian children out to live in white homes. Captain Pratt . . . said that the system should be extended until every Indian child was in a white home . . . .”<sup>325</sup> Schools’ officials sent hundreds of Indian children to non-Indian families to be “civilized.”

Coercive Indian education continued well into the mid-twentieth century. The 1928 Meriam Report commissioned by the Interior Secretary and prepared to assess the state of Indian people and Indian nations under decades of assimilation and allotment concluded that American Indian education policy had imposed decades of terrible harm onto Indian people by undermining their cultures and religions.<sup>326</sup> In 1969, Senator Edward Kennedy’s committee published a report detailing, in many instances, how coercive and ethnocentric Indian education policy and practices introduced in the nineteenth century continued well into the twentieth century. As late as 1952, federal officials continued to send Indian children to boarding schools far from their homes: “Navajo children in Oregon, Northwest Indians in Oklahoma.”<sup>327</sup> Educators refused to incorporate American Indian history into their curricula on the theory that “their culture was going to be lost anyway and they would be better off in the long run if they knew less of it.”<sup>328</sup> Some instructors believed that Indian children

322. In 1973, a federal court held that 25 U.S.C. § 286 could be a source of a federal cause of action by individual Indians to force the Bureau of Indian Affairs to locate a boarding school for Navajo children in the state in which the children resided. *Nat’l Indian Youth Council v. Bruce*, 366 F. Supp. 313, 324–25 (D. Utah 1973).

323. DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928*, at 155–63 (1995); Bannan, *supra* note 312, at 789–90.

324. *E.g.*, Robert A. Trennert, *From Carlisle to Phoenix: The Rise and Fall of the Indian Outing System, 1878–1930*, 52 PAC. HIST. REV. 267 (1983).

325. D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 68 (Francis Paul Prucha ed., University of Oklahoma Press 1973) (1934).

326. LEWIS MERIAM, INST. FOR GOV’T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* 11 (1928); *see also* INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 91-501, at 152–56 (1969).

327. S. REP. NO. 91-501, at 14.

328. *Id.* at 26 (citation omitted); *see also id.* at 61 (“Apparently, many [Bureau of Indian Affairs] teachers still see their role as that of ‘civilizing the native.’”).

would either choose a life of “total ‘Indianness’—whatever that is—and complete assimilation into the dominant society.”<sup>329</sup>

The anti-Indian attitudes extended into the late twentieth century, reappearing as public school efforts to control Indian student appearance. Justice Douglas wrote in an opinion dissenting from a denial of a petition from certiorari from an Indian student who wanted to wear long hair at school:

In the late 1800's . . . the Bureau of Indian Affairs (BIA) began operating a system of boarding schools with the express policy of stripping the Indian child of his cultural heritage and identity: “Such schools were run in a rigid military fashion, with heavy emphasis on rustic vocational education. They were designed to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returning to his people.” Again in 1944, a House Select Committee on Indian Affairs offered the same recommendation for achieving the “final solution of the Indian problem” . . . .<sup>330</sup>

That a congressional Indian affairs committee favorably describing Indian education policy would use the same phrase the Nazis used to describe their efforts to exterminate millions—at the same time as the European genocide of the 1940s—should speak for itself.

### C. Allotment and Indian Families

Recall that we established that federal treaties and statutes providing for the allotment of Indian reservation also carved out provisions for Indian children, especially orphans.<sup>331</sup> The paper rights negotiated by the United States and Indian nations robustly acknowledged the importance of Indian children to tribal leaders. That the federal government agreed in these treaties to allow for the set aside, and implicitly acknowledge a trust obligation to ensure Indian children would inure to their property rights at the age of majority, is strong evidence of the existence of the federal trust relationship with Indian children.

In this section, we will show that the allotment policy reestablished by the United States as national policy from 1887 to 1928 targeted Indian families directly, seeking a paradigm shift changing Indian extended family and traditional kinship relationships to American style nuclear families. In short, federal policy during this period was intended to undo extended Indian family relationships and force Indian people to conform to American family structures.

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329. *Id.* at 61–62.

330. *New Rider v. Bd. of Educ. of Indep. Sch. Dist. No. 1, Pawnee County*, 414 U.S. 1097, 1101 (1973) (Douglas, J., dissenting from denial of certiorari).

331. *See supra* section II.C.

In 1887, the United States enacted the General Allotment Act, making it national policy to allot reservation lands.<sup>332</sup> The allotment era was a terrible debacle for Indian nations and Indian property holdings. While allotment of Indian lands had been the subject of numerous Indian treaties, especially in the 1850s, it was not the primary focus of national policy until 1887. In the next few decades, the federal government enacted numerous statutes intending to implement allotment on various tribal reservations.<sup>333</sup> President Theodore Roosevelt referred to the allotment policy in 1901 as “a mighty pulverizing engine to break up the tribal mass.”<sup>334</sup> Allotment forced a vast transfer of land from Indian to non-Indian ownership. From 1887, when Congress adopted this policy, until 1934, when it ended the policy, two-thirds of tribal land holdings moved into non-Indian ownership.<sup>335</sup>

The political theory behind the national legislation adopting allotment as national policy had Indian families, especially children, as its primary target.<sup>336</sup> In general, Indian nations sought to preserve com-

332. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended, 25 U.S.C. §§ 331–58); *see also* United States v. Jicarilla Apache Nation, 564 U.S. 162, 180 n.8 (2011) (“[T]he Indian General Allotment Act of 1887, 24 Stat. 388, was ‘a comprehensive congressional attempt to change the role of Indians in American society.’”) (quoting COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 77 (2005 ed.)); *supra* subsection II.C.2.

333. *See generally* N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 656 (1976) (“[P]rior to 1925 allotment Acts had been enacted for nearly all Indian reservations . . . .”); *see also* Bd. of Cty. Comm’rs of Creek County v. Seber, 318 U.S. 705, 716 (1943) (“[T]his legislative program commenced with the General Allotment Act of 1887, 24 Stat. 388, followed by various other allotment acts dealing with specific tribes . . . .”).

334. ROBERT F. BERKHOFER, JR., *THE WHITE MAN’S INDIAN* 175 (1978). Merrill Gates, chairman of the Board of Indian Commissioners, first referred to the allotment policy in 1901 as “a mighty pulverizing engine to break up the tribal mass.” Kenneth H. Bobroff, *Retelling Allotment: Indian Property and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1610 (2001). President Theodore Roosevelt borrowed the phrase in his first annual message to Congress. *See id.* at 1610 n.272.

335. Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. REV. 827, 831–32 (2004) (“In addition to highly fractionated estates, the allotment process resulted in a catastrophic loss in tribal land base. Estimates suggest that by 1934, the allotment process resulted in the loss of 86 million acres of Indian-owned land. Other estimates suggest that by the end of the allotment era, two-thirds of all the land allotted passed into non-Indian ownership.”).

336. Rose Stremlau, *“To Domesticate and Civilize Wild Indians”: Allotment and the Campaign to Reform Indian Families, 1875–1887*, 30 J. FAM. HIST. 265, 266 (2005) (“The late nineteenth century campaign to assimilate the Indians targeted Native families, and while reformers did not anticipate their policies to materially impoverish Indian people, they did conspire to rob them of the values and behaviors associated with the kinship systems that so thoroughly permeated their cultures.”).

munal ownership of their land bases as a means of preserving their kinship-based community and governmental structure.<sup>337</sup> Child welfare was a community concern, with children's status tied to their place in the kinship or clan structure.<sup>338</sup>

Advocates of assimilation through allotment frequently critiqued the communal tribal land ownership patterns foreclosing "civilization" of Indian people, linking land to families. Allotment, like the "outing" system established at several Indian boarding schools, exposed Indian people, especially men, to agricultural labor as a means of civilizing them.<sup>339</sup> A nineteenth-century Indian rights organization, the Women's National Indian Association, supportive of assimilation and allotment, advocated for national policy that would encourage Indian women to accept non-Indian roles:

The members of the Women's National Indian Association (WNIA), the maternal arm of the Indian reform movement, involved Anglo-American housewives in the problems of American Indian families by using women's social and familial networks for the household-to-household dissemination of information about Indian reform. Subtly critiquing male authority, they asserted that a shared, universal female morality united them with all women, regardless of race, class, or culture. The biological determinism of female reformers, rooted in motherhood, justified their uplift of Indian women into their supposedly rightful role as the makers of homes for their nuclear families.<sup>340</sup>

A more important group (perhaps), the Friends of the Indian, is credited by historians (and by its members) with the push to enact the 1887 Allotment Act.<sup>341</sup> These reformers directly attacked Indian kinship relationships, arguing that communal land ownership and extended families were the root cause of Indian poverty and misery because these values were not consistent with the American values of

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337. *Id.* at 268 ("Communal resource ownership enabled this fluid social system. In most Native societies, members shared land and resources. Everyone belonging to a kin group had access to the resources needed to fulfill their obligations to other members. Women had land on which to farm and gather. Men obtained game from shared hunting grounds. While men and women owned personal property reflecting their work and social responsibilities, Native people valued redistribution and generosity among kin and between kin groups rather than the accumulation of surplus food and goods. Native people received status from giving and being good kin rather than from keeping for themselves.").

338. *Id.* ("Because children clearly belonged to either the mother or father's clan, custody was not a concern.").

339. Bannan, *supra* note 312, at 790 (footnotes omitted) ("In reformist theory, allotment promised to insure Indian assimilation by producing an ideal environment for the 'civilizing' process: Indians, settled on separate farms and 'intermingling with the right kind of civilized men,' white farmers who would buy the 'surplus' reservation land, would be exposed to 'the contagion of our warm on rushing life.' Indians taught to use their allotments for farming would, in the reformers' hopes, be forced by their situation to adopt all the traits that reformers deemed essential to achieve the status of 'civilized.'").

340. Stremlau, *supra* note 336, at 269.

341. *Id.* at 268-70.

individualism and the accumulation of assets.<sup>342</sup> In particular, they charged Indian people of polygamy, bigamy, and sexual liberation; allotment would counter those notions.<sup>343</sup>

In particular, assimilation and allotment supporters harshly criticized Indian people for their childrearing traditions.<sup>344</sup> Reformers apparently viewed the extended family relationship as child neglect,<sup>345</sup> a view that prevailed throughout the twentieth century, and prevails even now in some quarters, well into the twenty-first century. Reformers demanded that Indian families send their children to federal religious or industrial boarding schools.<sup>346</sup> Merrill Gates, who would later describe allotment as a “pulverizing engine” designed to break

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342. *Id.* at 271 (“Reformers did not differentiate among the different ways that Native people defined *family* and ordered their domestic lives. They believed that all Native people prioritized relationships with their kin over the biological and marital relationships that formed the basis of civilized families, and they criticized both the behaviors and the values associated with extended Indian families. They thought that the obligations of kinship, including living communally, visiting, redistributing goods and food, feasting, and sharing labor, prevented Indian people from working appropriately and accumulating individual wealth. They believed that these behaviors fostered degrading dependency among Indian people by accustoming them to relying on each other, their tribal leaders, and the federal government for their subsistence.”).

343. Bannan, *supra* note 312, at 793 (emphasis added) (“[T]he reformers deemed Indian acceptance of the key values and institutions of American society as the only acceptable proof of their achievement of ‘civilized’ status. The elements of civilization reformers emphasized as most essential were: individualism, private property, self-support, *monogamous family homes*, Christianity and citizenship.”); *id.* at 795 (footnotes omitted) (“Reformers matched their concern for externals with interest in the family pattern of the Indian occupants. Believing that the monogamous family was ‘God’s unit of society,’ the reformers sought to pass laws ‘to protect virtue, punish offenses against purity, and to abolish polygamy’ on the reservations. As Amelia Stone Quinton, leader of the Women’s National Indian Association, wrote, ‘as surely as . . . no true home life can exist where polygamy is, so surely does monogamy, sacredly protected by law for the Indian, create for him the true home.’”).

344. Stremlau, *supra* note 336, at 274.

345. *Id.* (“The Friends of the Indian complained that deficiencies in Native parenting thwarted their efforts to teach morality to rising generations of Native youth. Most saw little value in Native methods of child rearing, if they acknowledged a system at all, because they believed that tribal customs endangered the physical and moral well-being of children and that Native mothers abused their children out of ignorance.”).

346. *Id.* (“In particular, the Friends of the Indian characterized Native parents as negligent for refusing to send their children to missionary or government boarding schools and instead raising them in ‘the demoralization and degradation of the Indian home.’”) (quoting OFFICE OF INDIAN AFFAIRS, DEP’T OF INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 3 (1877)).



up tribal landownership,<sup>347</sup> drew a connection between the extended Indian family and the perceived “anarchy” in tribal affairs.<sup>348</sup>

Given this deep interest and critique of Indian families, Indian child-rearing, and Indian lifestyles, one scholar persuasively argues the 1887 General Allotment Act is more about Indian families than about Indian lands:

At its heart then, reformers believed that the Indian problem was a crisis of Indian families. Common title to land and resources enabled Indians’ dysfunctional familial behavior, and allotment promised to replace the chaos of Indian communities with the order of nuclear families. Allotment, then, was a means to an end. The allotment debates were not about land; they were about the kind of societies created by different systems of property ownership. Reformers clearly asserted that private property created superior families and better citizens. By the early 1880s, most believed that other efforts toward assimilation, such as education, proved less effective until communal title was destroyed by legislative force.<sup>349</sup>

Allotment supporters wanted to impose non-Indian male sensibilities on Indian men.<sup>350</sup> Allotment specifically granted land to male members of Indian nations and left Indian women out completely. The supporters of allotment hoped that Indian women would no longer retain their traditional roles as property owners and leaders.<sup>351</sup>

Ultimately, reformers intended for allotment to directly implicate the relationship of Indian children to their families and their tribe, eliminating their connection to the tribe and forcing them into nuclear families. Only then would assimilation be complete:

*The Friends of the Indian believed allotted Native parents raised their children properly. As [Merrill] Gates remarked about the homes of allotted Indians, “Family affections and care for the education and virtue of the young are pro-*

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347. Bobroff, *supra* note 334, at 1610.

348. Stremlau, *supra* note 336, at 275 (“The Friends of the Indian concluded that because Indians lacked nuclear families, their societies were in anarchy. As reformer Merrill E. Gates . . . commented, ‘The family is God’s unit of society. On the integrity of the family depends that of the state.’”) (quoting Merrill E. Gates, *Land and Law as Agents in Educating Indians*, in OFFICE OF INDIAN AFFAIRS, DEP’T OF INTERIOR, SEVENTEENTH ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONER 13, 27 (1885)).

349. *Id.* at 276.

350. Bannan, *supra* note 312, at 790 (footnote omitted) (“In reformist theory, allotment promised to insure Indian assimilation by producing an ideal environment for the ‘civilizing’ process: Indians, settled on separate farms and ‘intermingling with the right kind of civilized men,’ white farmers who would buy the ‘surplus’ reservation land, would be exposed to ‘the contagion of our warm on rushing life.’”).

351. Stremlau, *supra* note 336, at 277 (“The specific goal of allotment, then, was to create the gender inequalities that characterized civilized society by creating male-dominant, nuclear families. The Friends of the Indian designed the Dawes Act to do so, simply, by denying land to married women. While they were aware that women owned households and governed domestic affairs in many Native societies, legislators wrote the Dawes Act to eliminate married Indian women’s customary property rights and means to economic independence from men.”).

moted.” Simply put, *reformers believed that allotment freed Indian parents to love their children*. But the policy served a more practical purpose because reformers assumed that *allotted parents raised their children to be citizens with respect for the law of the land rather than the customs of kinship*. Senator George Vest of Missouri, a supporter of allotment although unaffiliated with the reform movement, called the home the “germ of civilization,” and *reformers believed that allotment created stable, permanent parental homes that infected Native youth with the desire to assimilate*. Children accustomed to modeling the behavior of adults had appropriate role models in allotted homes.<sup>352</sup>

For the reformers, there was still a role for Indian boarding schools: “Many Friends of the Indian still did not wholly trust Native parents, however, and they continued to advocate for the education of Native children in mission and boarding schools, where they taught Indian children their new gender roles directly.”<sup>353</sup>

Congress debated allotment in these very terms. In 1880, in one of the more interesting and candid pieces of legislative history leading up to the 1887 Act, the House of Representatives published a report supporting a general allotment policy, but with a minority report included.<sup>354</sup> The majority report, authored by Senator Scales, the Chairman of the Senate Indian Affairs Committee, asserted that Indian people in general were mere “hunters,” whose lifestyle based on the communal ownership of lands was dying out due to the “encroachment” of non-Indians and the failure of the Indians to adapt to an American lifestyle.<sup>355</sup> The majority asserted the Indians were already dependent in large part on the federal government, and that dependence would become total in time.<sup>356</sup> The majority, like the Friends of the Indian, asserted that a communal landownership pattern “creates idleness, inefficiency, and dependency.”<sup>357</sup> Allotment, for the majority, was preferable because agriculture was the only way for Indians

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352. *Id.* at 279 (emphasis added) (footnotes omitted).

353. *Id.*

354. LANDS IN SEVERALTY TO INDIANS, H.R. REP. NO. 46-1576 (1880).

355. *Id.* at 2 (“The Indians in the United States have been a race of hunters, and the larger proportion of them, until the last twenty-five years, lived principally upon game and what was contributed to them by the United States. The system of holding lands in common was well adapted to the condition of the Indians, so long as they were isolated from the whites and followed no other pursuit for a living than that of hunting, but their reservations now are small, white men are encroaching upon them on all sides, and the game has almost entirely disappeared. The Indians have shown no capacity or inclination to engage in mercantile or any other pursuit, except that of agriculture, and if laws are not made to encourage and enable them to make their living in this way, they will soon be entirely dependent upon the government for support.”).

356. *Id.*

357. *Id.*

to avoid extinction or total dependency upon the federal government.<sup>358</sup>

Senator Errett, writing for three Senators, painted a much different picture of the impacts of allotment and the goals of the allotment supporters in the minority report.<sup>359</sup> The minority report calls out the idea of allotment as a mere “experiment” driven by “speculative philanthropists” whose goal was to make Indians into farmers and, therefore, “self-sustaining citizen[s].”<sup>360</sup> The minority noted that in 1862, Congress established a national policy in favor of voluntary allotment, and that “few” Indian nations had agreed to go down that path.<sup>361</sup> The minority report flatly rejected the majority’s view that allotment would be successful: “[T]his bill has no practical basis and is a mere legislative speculation; but it may be added that the experiment it proposes *has* been partially tried, and has always resulted in failure.”<sup>362</sup> The minority also noted the logical fallacy of believing that granting a parcel of land to Indian people would work to make them successful farmers, arguing that many non-Indians had failed as farmers and that Indians without a tradition of American-style agriculture were likely to fail as well.<sup>363</sup>

Importantly for our purposes, the minority report specifically reference the connection between land ownership patterns and Indian families: “The tribal system [of communal land ownership] kept bands and tribes together as families, each member of which was dependent on the other.”<sup>364</sup> The minority argued the real purpose of allotment was to open Indian lands up for settlement, and to hasten the “extermination” of Indian nations.<sup>365</sup> The majority pointed to some tribes, such

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358. *Id.* at 6 (“[T]he Indians must perish, depend solely upon the government for support, or make their living by farming; that the holding of lands in common retards their progress in agricultural pursuits; that the granting of land in severalty stimulates them to work, makes them self-reliant, and aids them in obtaining practical knowledge of the laws of property . . .”).

359. *Id.* at 7–10.

360. *Id.* at 7 (“The bill is confessedly in the nature of an experiment. It is formed solely upon a theory, and it has no practical basis to stand upon. For many years, it has been the hobby of speculative philanthropists that the true plan to civilize the Indian was to assign him lands in severalty, and thereby make a farmer and a self-sustaining citizen of him . . .”).

361. *Id.* (“That law has been on the statute book for nearly eighteen years, and how many Indians have availed themselves of its provisions? Manifestly, very few; and yet we are told, with great pertinacity, that the Indians are strongly in favor of that policy, and will adopt it if they get a chance. It is surpassing strange, if this be true, that so few have availed themselves of the privileges opened to them by the act of 1862.”).

362. *Id.* at 8.

363. *Id.*

364. *Id.*

365. *Id.* at 10 (“The main purpose of this bill is not to help the Indian, or solve the Indian problem, or to provide a method for getting out of our Indian troubles, so

as the so-called Five Civilized Tribes and some Sioux and Chippewa bands, as examples of allowing Indian nations to develop in their own way.<sup>366</sup>

Indian nations frequently opposed federal bills proposing to allot their reservations.<sup>367</sup> For example, the Stockbridge Nation of Indians, now known as the Stockbridge-Munsee Community, fiercely challenged an 1884 bill.<sup>368</sup> The Creek Nation in Oklahoma complained that prior allotment of their lands had shrunk their communal land base considerably to their detriment.<sup>369</sup> The Seneca Nation also opposed allotment of their reservations.<sup>370</sup> Other tribes supported allotment, most notably the Omaha Tribe.<sup>371</sup> D.S. Otis, the leading historian on allotment, argued that Indian tribal and individual views fractured on many fault lines in supporting and opposing allotment.<sup>372</sup>

But allotment did occur on a wide scale. And like the reformers and Congressmen supposed, it did effectively dispossess Indian nations of the vast majority of their lands, and wreak great havoc on Indian nations and Indian families. Allotment was inextricably tied to the Indian education.<sup>373</sup>

Related to the jurisdictional and land dispossession problems created by allotment, federal trust funds established concomitant to allotment for the benefit of Indian children were poorly, if not corruptly, administered by the government. The 1852 Treaty with the Chickasaw Nation addressed the allegation by the tribe that federal officials had improperly paid funds out of a trust account established for “orphans and incompetents.”<sup>374</sup> The United States refused to accept lia-

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much as it is to provide a method for getting at the valuable Indian lands and opening them up for white settlement.”).

366. *Id.*

367. *See generally* OTIS, *supra* note 325, at 40–56.

368. PROTEST OF A. MILLER, DELEGATE OF THE STOCKBRIDGE NATION OF INDIANS, S. MISC. DOC. NO. 48-119 (1884).

369. MEMORIAL OF THE CREEK NATION, H.R. MISC. DOC. NO. 47-18 (1883).

370. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A COMMUNICATION FROM THE SECRETARY OF THE INTERIOR AND A MEMORIAL OF THE COUNCIL OF THE SENECA NATION OF NEW YORK INDIANS AGAINST THE PASSAGE OF SENATE BILL NO. 19, H.R. EX. DOC. NO. 47-83 (1882).

371. *E.g.*, MEMORIAL OF THE MEMBERS OF THE OMAHA TRIBE OF INDIANS, S. MISC. DOC. NO. 47-31 (1882). *See generally* Buffalohead & Molin, *supra* note 297.

372. OTIS, *supra* note 325, at 45–46.

373. *See generally id.* at 64–81.

374. Treaty with the Chickasaw, Chickasaw Tribe–U.S., June 22, 1852, 10 Stat. 974, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES, *supra* note 70, at 596. Article 4 provides in relevant part:

It is also alleged by the Chickasaws that there are numerous cases in which moneys held in trust by the United States for the benefit of *orphans* and incompetent Chickasaws, have been wrongfully paid out to persons having no right to receive the same. It is therefore further

bility, but did agree to investigate the allegations, presumably to allow the tribe to seek redress in Congress.<sup>375</sup>

#### D. Indian Children and Indian Parents

The assimilation movement, driven by allotment and compulsory religious education, eventually infected state child protection laws and policies. Many states began to systematically remove Indian children from their reservation homes in the mid-twentieth century to “save” them from reservation life, intentionally placing the children in non-Indian homes as far as away from their families as possible. The removal of Indian children by states has much in common with Indian boarding schools and even involved kidnapping akin to the early Indian wars. Efforts to separate Indian children from their families and nations continued throughout the entire twentieth century. Though the federal government has finally stopped encouraging the separation of Indian children from their families and nations, private adoption interests continue to target Indian children on behalf of non-Indian adoptive families.<sup>376</sup>

Prior to the 1920s, few state governments assumed a comprehensive role in the regulation of child welfare generally.<sup>377</sup> Most child welfare agencies were nongovernmental charities until the 1930s, when the Great Depression forced the closure of many of these entities for lack of funds.<sup>378</sup> The federal government took a greater role dur-

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agreed, that all such cases shall be investigated by the Agent of the United States under the direction of the Secretary of the Interior. And if it shall appear to the satisfaction of said Secretary that any of the *orphans* and incompetents have been defrauded by such wrongful payments, the amount thus misapplied shall be accounted for by the United States, as if no such payment had been made: *Provided*, That the provisions of this article shall not be so construed as to impose any obligations on the United States to reimburse any expenditures heretofore made in conformity with the stipulations contained in the treaties of 1832 and 1834. *And provided further* That the United States shall not be liable to repay moneys held in trust for the benefit of *orphans* and incompetent Chickasaws, in any case in which payment of such moneys has been made upon the recommendation or certificate of the persons appointed for that purpose in the Fourth Article of the Treaty of 1834, or of their successors. and in other respects in conformity with the provisions of that article: *And provided further* That the United States shall not be held responsible for any reservation of land or of any sale, lease, or other disposition of the same, made, sold, leased, or otherwise disposed of, in conformity with the several provisions of said treaties of 1832 and 1834.

*Id.* at 597 (emphasis added).

375. *Id.*

376. Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 353–56 (2015).

377. John E.B. Meyers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 452 (2008) (“[I]n the nineteenth and early twentieth centuries, child protection agencies were nongovernmental.”).

378. *Id.* at 453.

ing the Depression, creating Aid to Dependent Children in the Social Security Act of 1935.<sup>379</sup> State governments slowly began to develop statewide programs to deal with child protection over the next four decades.<sup>380</sup> Still, “for the first six decades of the twentieth century, protective services in most communities were inadequate and in some places nonexistent.”<sup>381</sup> The federal government’s intervention during the Great Depression flowered into the much more significant intervention during the 1970s.<sup>382</sup> In the 1970s, the United States took a “leadership role” in child welfare,<sup>383</sup> enacting the Child Abuse Prevention and Treatment Act of 1974<sup>384</sup> and the Indian Child Welfare Act of 1978.<sup>385</sup>

The replacement of Indian boarding schools with state social services in Indian child welfare often came hand in hand with the closure of boarding schools.<sup>386</sup> As an Indian boarding school would close, usually the state in which the school was located would accept the Indian children in state public schools. Take, for example, the so-called Comstock Agreement in Michigan, in which Governor Comstock agreed to accept the federal government’s trust obligation to educate Indian children in 1934 partially in exchange for the deed to the Mount Pleasant Indian School.<sup>387</sup> Of course, once a state took over the duty to educate Indian children, those children became the wards of the state. But often the state obligation amounted to an unfunded mandate, and states and the federal government wrangled over the cost.<sup>388</sup>

According to Margaret Jacobs, a leading scholar on the history of the Indian Child Welfare Act, mid-twentieth century federal programs contributed directly to the removal of Indian children from their

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379. *Id.*

380. *Id.* at 453–54.

381. *Id.* at 454.

382. *Id.* at 453 (footnote omitted) (“Tucked away in the Social Security Act was an obscure provision that authorized the Children’s Bureau ‘to cooperate with state public-welfare agencies in establishing, extending, and strengthening, especially in predominantly rural areas, [child welfare services] for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent.’ This provision was an important shot in the arm for the nascent social work specialty of child welfare, and a modest step toward what in the 1970s became a central role for the federal government in efforts to protect children from abuse and neglect.”).

383. *Id.* at 456.

384. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 601, 620, 5101–06 (2012)).

385. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–63 (2012)).

386. JACOBS, *supra* note 14, at 5–6.

387. PAUL G. CONNORS, MICH. LEGISLATIVE SERV. BUREAU, INDIAN TUITION WAIVER PROGRAM 1–2 (2000), [https://turtletalk.files.wordpress.com/2009/03/2000\\_mileg-servicebureau\\_tutionwavier00011.pdf](https://turtletalk.files.wordpress.com/2009/03/2000_mileg-servicebureau_tutionwavier00011.pdf) [<https://perma.unl.edu/5R6F-UZJC>].

388. JACOBS, *supra* note 14, at 6.

homes, families, and nations in incredible numbers, driven in part by the closing of several boarding schools. In 1958, the federal government attempted to solve these issues with the Indian Adoption Project (IAP).<sup>389</sup> The IAP was not designed to serve the best interests of Indian children, but was designed to reduce costs for both the federal and state governments.<sup>390</sup> At that time, “[m]ost government officials deemed Indian families inherently and irreparably unfit . . . .”<sup>391</sup> The IAP worked in tandem with the Bureau of Indian Affairs’ “Operation Relocation,” also known as urban relocation, in which the federal government encouraged Indian adults and families to leave the reservation,<sup>392</sup> and with Public Law 280, in which the United States allowed states to assert criminal jurisdiction and a limited form of civil jurisdiction in Indian country.<sup>393</sup> State governments sometimes refused to accept responsibility for Indian children, or resisted their obligations.<sup>394</sup> And when they acted, they relied on “foster care and adoption into non-Indian families as the best solution for dependent Indian children.”<sup>395</sup>

IAP, urban relocation, and Public Law 280 were hallmarks of the termination era of federal Indian policy, an approximately two-decade era in which the federal government attempted to “terminate” the trust relationship between the United States and Indian nations and Indian people.<sup>396</sup> These three federal programs worked to transfer the federal trust responsibility to state governments, all of which directly impacted Indian children and families.

In the two decades between the formal establishment of the IAP and the enactment of the Indian Child Welfare Act, state and federal bureaucrats and officials engaged in the systematic and widespread practice of removing Indian children from their Indian homes. In enacting ICWA, Congress made a finding that state and county social service agencies and workers and private organizations working toward the adoption of Indian children, with state court approval, had removed thousands of children from their homes to non-Indian foster homes and adoption placements outside of Indian country.<sup>397</sup> The voluminous facts on the ground roundly supported the finding. It was

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389. *Id.*

390. *Id.* at 6–7.

391. *Id.* at 7.

392. *Id.* at 9.

393. Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588, 588–89 (codified in relevant part at 18 U.S.C. § 1162 (2012) (criminal jurisdiction) and 28 U.S.C. § 1360(a) (2012) (parallel civil provision))

394. JACOBS, *supra* note 14, at 15–16.

395. *Id.* at 16.

396. *Id.* at 5–32.

397. 25 U.S.C. § 1901(4) (2012) (finding “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high per-

estimated that state governments removed between 25% and 30% of all Indian children nationwide from their families, placing about 90% of those removed children in non-Indian homes.<sup>398</sup> No one will ever know the exact numbers; far too many removals were paperless and lacked even rudimentary process. William Byler, executive director of the Association on American Indian Affairs, testified the “[r]emoval of [Indian] children is so often the most casual kind of operation . . .”<sup>399</sup> Indian parents rarely received adequate notice, almost never received paid counsel, and generally had no meaningful opportunity to respond.

At the Rosebud Sioux Reservation, state social workers implemented state policy that held the reservation was, by definition, an unacceptable environment for children and would remove Indian children on that basis alone.<sup>400</sup> State actors removed Indian children with “few standards and no systematic review of judgments” by impartial tribunals.<sup>401</sup> South Dakota had taken Indian children at the Sisseton-Wahpeton Reservation without even providing notice to Indian families, with state courts then placing the burden on the Indian parent to prove suitability to retain custody.<sup>402</sup> Senator Abourezk, chairman of the Subcommittee on Indian Affairs, concluded after hearing much of this testimony:

[W]elfare workers and social workers who are handling child welfare caseloads use any means available, whether legal or illegal, coercive or conjoining or whatever, to get the children away from mothers that they think are not fit. In many cases they were lied to, they were given documents to sign and they were deceived about the contents of the documents.<sup>403</sup>

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centage of such children are placed in non-Indian foster and adoptive homes and institutions”).

398. *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 3 (1974) (statement of William Byler, Executive Director, Association on American Indian Affairs); TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION ON FEDERAL, STATE, AND TRIBAL JURISDICTION 79 (July 1976).

399. *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 5 (1974) (statement of William Byler, Executive Director, Association on American Indian Affairs).

400. *Id.* at 21–23.

401. *Id.* at 62 (statement of Dr. Carl Mindell and Dr. Alan Gurwitt, child psychiatrists).

402. *Id.* at 67–69 (statement of Cheryl DeCoteau).

403. *Id.* at 463 (statement of Sen. Abourezk).



#### IV. THE MODERN ERA: A RETURN TO CONSTITUTIONAL FIDELITY

The United States now readily acknowledges the federal-tribal trust relationship,<sup>404</sup> and the Supreme Court acknowledges that federal actions taken in accordance with that relationship is consistent with the Constitution.<sup>405</sup> Federal statutes have returned local control of reservation governance to Indian nations, especially in relation to matters involving Indian children and families. Federal affairs programs that respect the trust relationship are also indicative of the United States' fidelity to the Constitution. Finally, the United States has focused its Indian affairs policy on the treaty- and international law-based obligations toward Indian nations grounded in the Treaty Power, the Commerce Clause, the structure of the Constitution, and perhaps other constitutional provisions.

##### A. Indian Self Determination and Education Assistance Act

A Michigan Indian child growing up on his or her reservation during the Self-Determination Era likely views the tribal government as the main source of governmental presence. Schools, courts, health clinics, police stations, fire departments, housing developments, forestry stations, fish hatcheries, and most other visible government buildings on a twenty-first century Indian child's homelands are almost exclusively tribal. A twenty-first century Indian child probably knows about the Bureau of Indian Affairs or the Indian Health Service, and certainly the state and county governments, but the presence of those governments is overshadowed by tribal government.<sup>406</sup>

The United States and Indian nations are now four decades into an era of federal Indian law and policy known as the tribal self-determination era.<sup>407</sup> For the first significant period of time since the ante-

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404. See generally RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 4 (AM. LAW INST., Tentative Draft No. 1, 2015) (collecting statutes and cases).

405. E.g., *Morton v. Mancari*, 417 U.S. 535 (1974).

406. See generally HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION (2008); DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 83–120, 135–64 (3d ed. 2011). For materials more specific to Michigan Indian tribes, see, for example, Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709 (1999) (describing tribal court cooperation with state courts); Zeke Fletcher, *Indian Gaming and Tribal Self-Determination: Reconsidering the 1993 Tribal-State Gaming Compacts*, 89 MICH. B.J., Feb. 2010, at 38 (describing tribal gaming operations).

407. See generally Philip S. Deloria, The Era of Indian Self-Determination: An Overview, in INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 191 (Kenneth R. Philp ed., 1986); Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Gov-*

bellum period, federal Indian law and policy is firmly grounded in the Constitution. The self-determination era has seen the federal government slowly step away from the day-to-day governance of Indian nations. No longer does the federal government impose non-Indian religious organizations on Indian country. No longer does the federal government dominate reservation governance with unelected, unaccountable federal officials. No longer does the federal government encourage and enable state and private actors to strip Indian nations of their children.

In the 1970s, the United States dramatically shifted federal Indian law and policy toward tribal self-determination.<sup>408</sup> The Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA)<sup>409</sup> allowed Indian nations to contract for the provision of their own services, shifting the primary administration of federal government programs in Indian country from the Bureau of Indian Affairs and the Indian Health Service to Indian nations themselves. The shift did not happen overnight, but now billions of dollars of federal appropriations are funneled by federal agencies into tribal agencies, supplemented by billions more generated by tribal economic development activities. The number of employees at the Bureau of Indian Affairs has declined dramatically since the 1970s. Meanwhile, Indian nations are now substantial and efficient administrators of federal programs involving education, social services, employment services, land use planning, housing, law enforcement and public safety, environmental regulations, and many, many other areas.

The federal government's enactment of ISDEAA and later legislation has allowed Indian tribes to "gain[] greater control over the primary and secondary education of their children."<sup>410</sup> The Act authorized Indian tribes to contract with the federal government to provide their own educational services, funded by federal dollars with tribal supplements.<sup>411</sup> Indian nations operate their own schools, in-

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*ernance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1 (2014–2015).

408. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 30–35 (6th ed. 2015); N. BRUCE DUTHU, *SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM* 165–70 (2013).

409. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered sections of 5 U.S.C., 20 U.S.C., 25 U.S.C., 40 U.S.C., 42 U.S.C., 43 U.S.C., 50 U.S.C.).

410. HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, *supra* note 406, at 199.

411. 25 U.S.C. § 450f (2012); *see also* Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 840 (1982) (citations omitted) ("The Self-Determination Act declares that a 'major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.'")

cluding language immersion schools.<sup>412</sup> Indian nations operate their own social services departments, advised by child welfare commissions, most especially in Michigan, to provide community input on child welfare decisions.<sup>413</sup> These schools, and others, are moving toward deep respect and understanding of tribal cultures and traditions.<sup>414</sup>

At first glance, the self-determination era may seem to be at odds with the trust relationship between the United States and Indian nations.<sup>415</sup> In fact, the trust relationship is designed to preserve tribal lands and resources, Indian cultures and languages, and tribal governance in Indian country. The trust relationship requires the United States to enable tribal governments to self-govern, and the self-determination statutes are the most successful federal efforts in that regard in American history. In other words, the self-determination era is the fullest realization of the federal government's trust obligations, that is, the duty of protection as theorized in the early decades of the United States.

## B. The Indian Child Welfare Act

A twenty-first century Michigan Indian child living in poverty or difficult family circumstances faces the same challenges as any of the millions of American children in similar terrible circumstances. If the Indian child lives in or near Indian country and is subjected to abuse or neglect, the child's tribal social services programs will be the first governmental responders. A tribal presenting officer may seek an emergency hearing before a tribal judge, with tribal employees and family members testifying. That child likely will be placed with family members or friends that live nearby. If the child's parents cannot rehabilitate themselves with the tribe's assistance, those family members might adopt the child in accordance with a cultural ceremony.

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In achieving this goal, Congress expressly recognized that 'parental and community control of the educational process is of crucial importance to the Indian people.'").

412. Mary Hermes, *Moving Toward the Language: Reflections on Teaching in an Indigenous-Immersion School*, 46 J. AM. INDIAN EDUC., no. 3, 2007, at 54; Jon Reyhner, *Indigenous Language Immersion Schools for Strong Indigenous Identities*, 7 HERITAGE LANGUAGE J. 138 (2010); e.g., Kathryn Manuelito, *The Role of Education in American Indian Self-Determination: Lessons from the Ramah Navajo Community School*, 36 ANTHROPOLOGY & EDUC. Q. 73 (2005).

413. E.g., WAGANAKISING ODAWA TRIBAL CODE OF LAW tit. 5, §§ 5.201–206 (2016) (creating the Little Traverse Bay Bands of Odawa Indians Child Welfare Commission); SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE §§ 30.1201–1219 (creating the Child Welfare Committee).

414. See generally Bryan McKinley Jones Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37 URB. REV. 425 (2005).

415. Cf. generally Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317 (2006).

Even after the adoption, the child might even maintain a carefully supervised relationship with his or her parents. After all, one or both of them probably live just down the road. They might see each other at ceremonies, at the grocery store, at family gatherings, and elsewhere. Tribal law and policy often favors open adoptions and leaves open the possibility that an Indian family might one day be reunited formally.

If the Indian child lives elsewhere, federal and, frequently, state law will require the state to notify the child's tribe, and the tribe can participate in the care of the child. If the law is followed, the child likely will be placed with relatives, Indian or non-Indian, on or off the reservation, with the state and tribal governments working together to maintain a healthy environment for the child. The formal intervention of a tribe in an off-reservation Indian child welfare matter means the child will always have a place in Indian country with friends, relatives, and a nation, even if that child stays with relatives elsewhere. The child's case might even be transferred to tribal court, which makes access to tribal services more efficient. Above all, the child's well-being is the primary consideration.

If the law is not followed, the state court will place the Indian child with a family the child does not know, likely far from the child's relatives. The state may fail to properly notify the tribe their child is in need of care, perhaps not aware of the law or because they just do not believe the child is an Indian child. Assuming the tribe is notified, advocates for the foster family, and sometimes the state or the guardian ad litem, will fight to prevent the tribe from intervening, or to prevent the tribe from transferring the case to tribal court. Time will pass, and the Indian child will bond with the foster parent, likely never meeting Indian relatives. If the foster family's advocates are especially aggressive, they will reveal the child's name, the foster family's name, and information about the tribe's efforts to the media, all in an effort to attack the law politically. These statements will likely be in violation of state law or a court order that prohibits the distribution of the details of the case. Even more time will pass as litigation proceeds into the appellate realm, and an appellate order will be issued. No one will be satisfied with the outcome, and the injury to the Indian child will continue for years and years.

The law in question is the Indian Child Welfare Act (ICWA).<sup>416</sup> The law is a remedial statute designed to slow down the mass exodus of Indian children from their Indian parents, their homes, their extended families, their reservations, and their culture and language.<sup>417</sup>

416. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-63 (2012)).

417. 25 U.S.C. § 1901 ("Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds . . . (3) that there is no resource that is more

ICWA's key substantive thrusts are procedural and jurisdiction, although there is much more to the statute. The procedural aspects are intended to guarantee due process to Indian parents, such as notice<sup>418</sup> and right to counsel,<sup>419</sup> that were absent in thousands of Indian child removals before ICWA. Linked to these procedural rights are substantive requirements, most notably heightened burdens of proof<sup>420</sup> and

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vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe; (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”).

418. *Id.* § 1912(a) (“In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.”).
419. *Id.* § 1912(b) (“In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.”).
420. *Id.* § 1912(e) (“No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”); § 1912(f) (“No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”).

placement preferences.<sup>421</sup> Indian nations have procedural rights, too, most importantly the absolute right to intervene.<sup>422</sup>

The jurisdictional requirements include mandating exclusive tribal jurisdiction over an Indian child that is the subject of the termination of parental rights or placement in a foster or adoptive home when that child is domiciled in Indian country.<sup>423</sup> Tribal jurisdiction is presumed even over Indian children domiciled elsewhere, and state courts are obligated to transfer subject to good cause to the contrary.<sup>424</sup>

The jurisdictional theory of ICWA derives from federal cases such as *Fisher v. District Court*,<sup>425</sup> *In re the Adoption of Buehl*,<sup>426</sup> and *Wisconsin Potowatomies of the Hannahville Indian Community v. Houston*.<sup>427</sup> These decisions all supplied federal Indian law theories that later became incorporated into ICWA: exclusive tribal court jurisdiction, primacy of tribal law, full faith and credit to tribal court decisions, and respect for the preservation of Indian families.

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421. *Id.* § 1915(a) (“In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”); § 1915(b) (“Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with . . . (i) a member of the Indian child’s extended family; (ii) a foster home licensed, approved, or specified by the Indian child’s tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs.”).

422. *Id.* § 1911(c) (“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.”).

423. *Id.* § 1911(a) (“An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.”).

424. *Id.* § 1911(b) (“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.”).

425. 424 U.S. 382 (1976).

426. 555 P.2d 1334 (Wash. 1976).

427. 393 F. Supp. 719 (W.D. Mich. 1973).

As the foregoing history throughout this Article suggests, the federal government had been interfering in the lives of Indian children and their families since the American Revolution. On occasion, that interference had come at the request of tribal leaders, most notably early Indian education efforts, and may have done some good.<sup>428</sup> But the federal government's efforts during the Coercive Era destroyed those early efforts. ICWA represents, finally, a return to the federal government's Constitution- and treaty-based duty of protection to Indian children and families.

### C. Trust and the Constitution

The Constitution, treaties, and the original public understanding of federal Indian affairs powers does not envision or authorize a significant role for the United States in the internal governance matters of Indian country.<sup>429</sup> Instead, these documents require the federal government to assume obligations relating to the external sovereignty of tribal governments in exchange for serving as a protector or a trustee to preserve internal tribal matters, including governance, culture, and language.

The text and structure of the Constitution pointed the Founding Generation to Indian affairs law and policy as a uniquely national concern. The Indian Commerce Clause, along with the Necessary and Proper Clause, resides in the Constitution with the Interstate and Foreign Commerce Clauses, subjects over which Congress has plenary and exclusive authority, subject to limitations contained elsewhere in the Constitution. The Supreme Court's consideration of the scope of this power came early in American jurisprudence, and the Court concluded that Indian tribes are domestic nations, inferior to the national sovereign, but remaining sovereign.<sup>430</sup>

The next core Constitutional power is the Treaty Power, exercised primarily by the President and secondarily by the Senate as the treaty ratification body. Here, the federal government had concluded before, during, and immediately after the Ratification of the Constitution and the Bill of Rights that Indian nations are entities with which the United States may enter into treaties. The mere fact of Indian treaties—over 400 of them—confirms the sovereign status of Indian nations and the outsider status of Indian nations from the main of the Constitutional polity of the federal and state governments. These treaties further announced the political theory of Indian affairs, that the federal government undertook a duty of protection to Indian na-

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428. For example, in Michigan, "literacy rates were high among Michigan Indians at the beginning of the boarding school era." CHILD, *supra* note 2, at 123–24.

429. Clinton, *supra* note 13.

430. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

tions and Indian people. That duty of protection also serves as an independent authorization for the federal government to make Indian affairs law and policy. On occasion, that duty of protection authorized the United States to intervene in internal tribal governance affairs.

The other relevant Constitutional provisions, including the Territory and Property Clause, the Supremacy Clause, and the so-called Indians Not Taxed Clause complete the federalization of Indian law and policy and the federal Indian affairs powers.

In short, the federal government's Indian affairs authority is strongest when the United States is regulating federal, state, and tribal relations, and weakest when regulating the internal affairs of Indian nations.

The modern understanding of the federal duty of protection, usually known as the federal general trust relationship, is consistent with the origins of federal Indian law and policy embodied by the Constitution. The state of the relationship between the United States and Indian nations at the Founding and in the modern era stands in deep contrast to the Coercive Period.

- Compare tribal governance at the Founding and in the self-determination era to the Coercive Period: Indian nations serve as the primary governance authority on Indian lands with federal financial and logistical support as needed versus federal control over all aspects of reservation government and Indian life.
- Compare Indian childhood education at the Founding and in the self-determination era to the Coercive Period: tribally controlled schools and curriculum with federal financial and logistical support as needed versus federally mandated compulsory education in boarding schools operated by military or religious entities.
- Compare Indian child welfare matters at the Founding and in the self-determination era to the Coercive Period: plenary tribal authority over internal matters of domestic tribal life with federal financial and logistical support as needed versus federal, state, and religious control over Indian child welfare.

Statutes like the Self-Determination Acts and the Indian Child Welfare Act are squarely within the federal Indian affairs wheelhouse under the Constitution. They restore and reaffirm considerable internal tribal sovereignty by largely excluding federal and state interventions, and ICWA in particular regulates federal, state, and tribal relations involving a core subject area of Indian affairs, Indian children. These statutes can and should be juxtaposed with federal interventions during the Coercive Period of doubtful constitutional validity, such as the Major Crimes Act, the General Allotment Act and related statutes, and federal bureaucratic control over internal tribal matters.



## V. CONCLUSION

American history began with kidnapping and captivity of Indian children for military and political reasons, and the exploitation by federal officials of Indian children's welfare for diplomatic purposes. Indian nations were able to negotiate a measured separatism in those early American decades, but the United States undid the promise of those agreements by acting in an unlawful and unconstitutional manner for over a century. Generations of Indian children became the focus of American Indian law and policy and suffered appalling abuses that continue to reverberate in Indian people to this day. Professor Singel's family history attests to that terrible history.

Only in recent decades has the United States returned to the roots of lawful federal Indian law and policy. Once again, the federal government has restored internal tribal governance to tribal leadership, and once again the United States administers Indian affairs according to the limited authority prescribed by the Constitution and the trust relationship. The federal-tribal trust relationship has deep roots in the Founding Generation, the text and structure of the Constitution, and the history of federal Indian law and policy. The modern tribal self-determination era of federal Indian law and policy is thoroughly grounded in the Constitution. Our children's generation, hopefully, can attest to the success of the self-determination era.

To recap the history of the United States' intervention into the lives of Indian children, federal officials, and private entities often with federal authority:

- Kidnapped and held Indian children and families hostage for military purposes,
- Kidnapped Indian children to force compliance with compulsory boarding school attendance,
- Sent Indian children to non-Indian families to serve as workers in accordance with the policy known as "outing,"
- Removed Indian children from their Indian families on and off reservation, and occasionally resorting to kidnapping, to place them in non-Indian homes.

The United States no longer captures and holds hostage Indian children for military and diplomatic purposes. But Indian children were then and remain a primary focus of the federal government's duty of protection, now known as the federal general trust relationship. Federal officials continue to operate on-reservation schools with tribal input and, through the self-determination process, tribal control. Federal law now bars state officials from removing Indian children from Indian families without substantial improvements in process and without tribal intervention. These are examples of a better-realized federal duty of protection to Indian nations and to Indian people.