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# The Indian Child Welfare Act

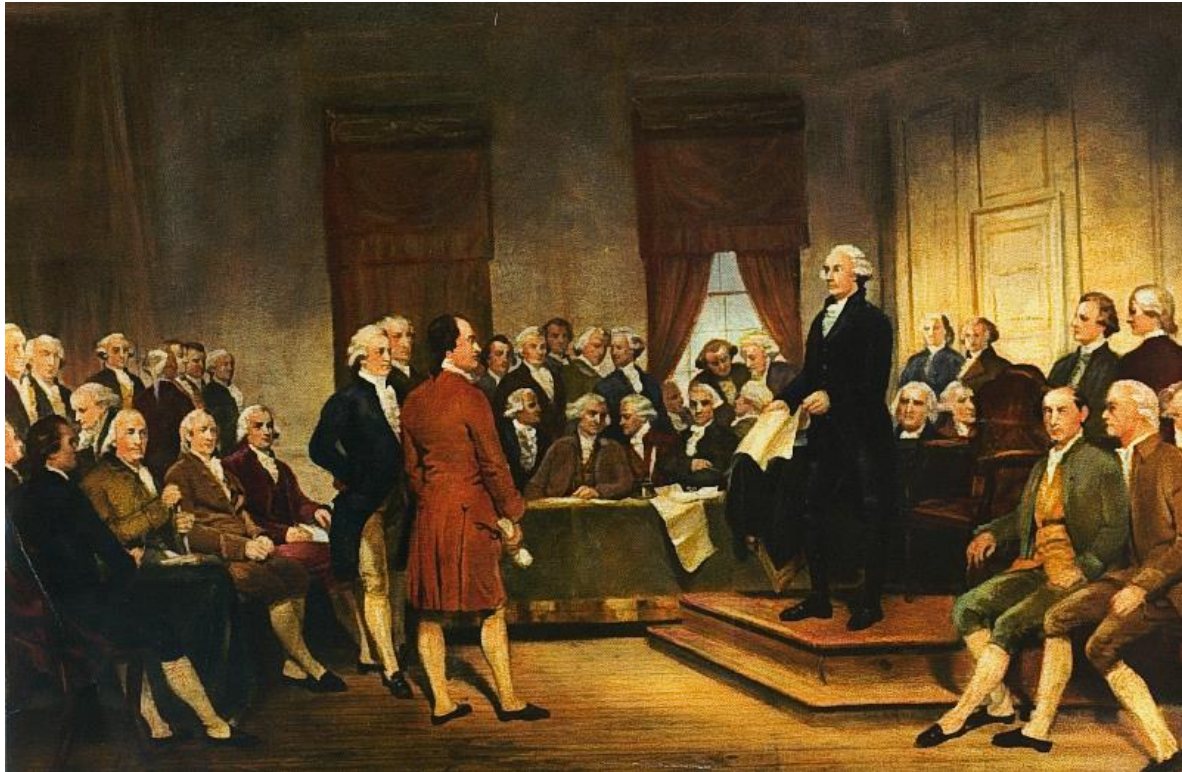Where it came from

What it is

Where it needs to go

# Two Centuries of Federal Indian Policy

- Constitution (1789)
- Removal / Treaty-Making (1789 – 1871)
- Allotment / Assimilation (1871 – 1928)
- Reorganization (1928 – 1945)
- Termination (1945 – 1961)
- Self-Determination (1961 – present)

# Indians and the Constitution

# Three References

Apportionment, U.S. House – Art. 1, § 2
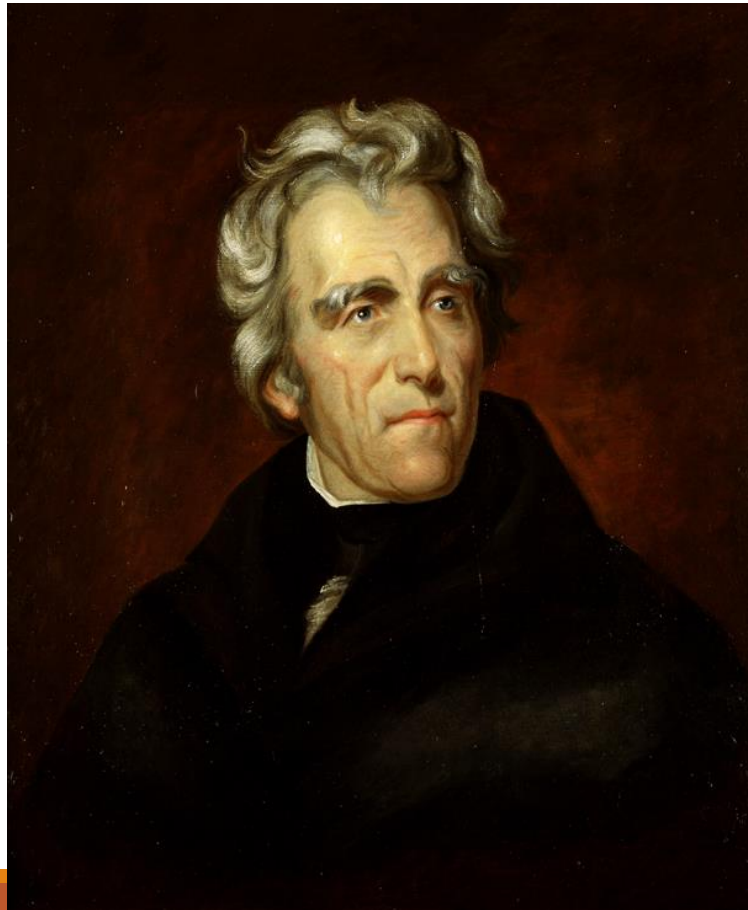"excluding Indians not taxed"

Indian Com. Cl. – Art. 1 § 8
"to regulate commerce … with the Indian tribes"

Apportionment, U.S. House. Amend. XIV, § 2
"excluding Indians not taxed"

# Old Hickory

# Trail of Tears

# Dawes Act

Allotted Reservation lands to tribal members
(180 acres to head of household, 80 acres to orphan over 18 y.o.)

Established membership rolls

Allotments Held in trust by United States for 25 years, then fee simple title delivered to tribal member

Tribal member became citizen, subject to state law, including real estate taxes

24 Stat. 388 (1887)

# Fee land vs. Parcel Land



Yakima County Land Ownership

- U.S. Government
- State Government
- Yakama Nation
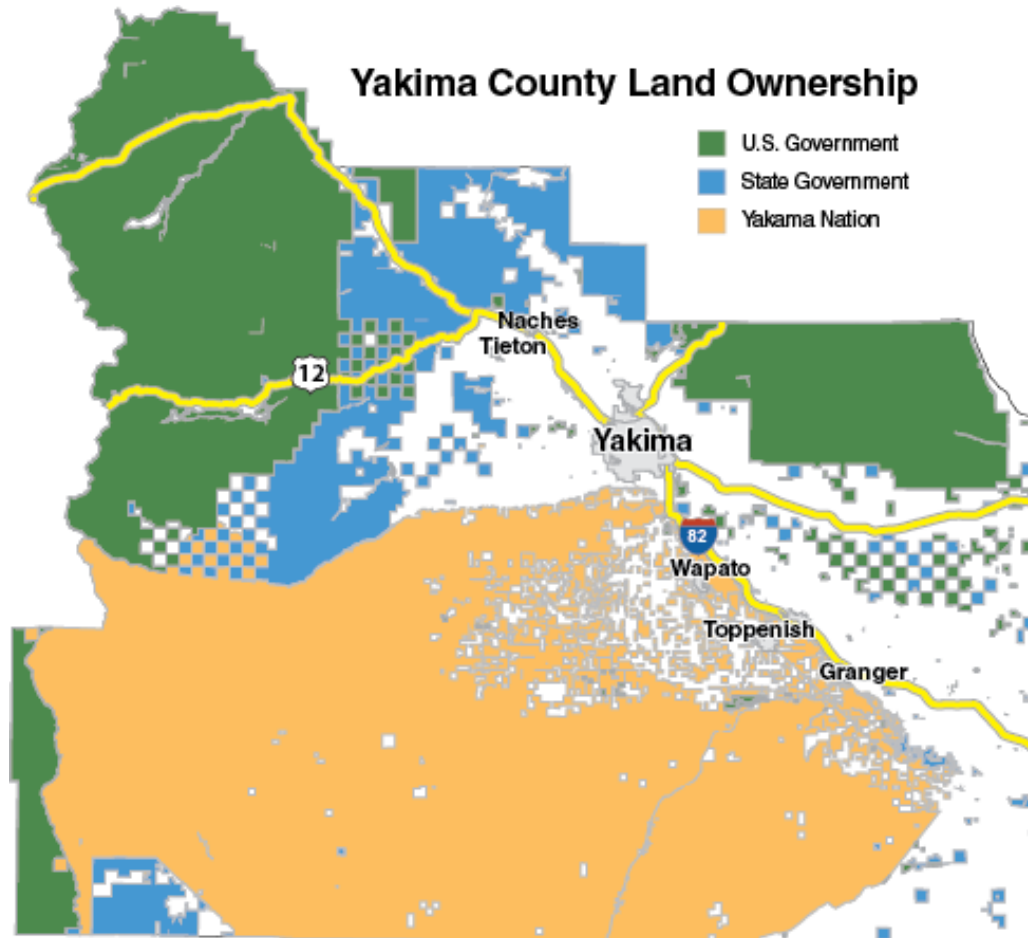
# Citizenship

## 14TH AMEND. NOT APPLY TO INDIANS

3/5ths compromise deleted, but not "Indians not taxed"

Citizenship for members of individual tribes if good behavior

## CITIZENSHIP ACT, 1924

Automatic citizenship to person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe

# Tulalip Boarding School



FIRST BASKET BALL TEAM 1912     BRADY

# Indian Reorganization Act

- Ended allotment era

- Restricted alienation of land

- Established revolving fund from BIA

- Established tribal governments

    48 Stat 984 (25 USC sec. 461 *et seq*.

# Commissioner of Indian Affairs & Blackfoot Tribe

# House Concurrent Resolution. # 108

All Indians should :

Be freed from Federal supervision and control;

Enjoy all rights and prerogatives pertaining to American citizenship; and

Assume full responsibilities as American citizens.

# Individual Bills

109 tribes / bands terminated

1.3 M acres alienated

Federal programs discontinued

State jurisdiction imposed

Tribal sovereignty effectively ended

# Self Determination

## MESSAGE FROM THE PRESIDENT

Indian future shall be determined
by Indian acts and Indian decisions

Federal funding, but tribal
planning and implementation

# Indian Child Welfare Act

National

25 – 35% all Indian children in foster care

1 in 4 Indian children adopted

Washington

Adoption rate of Indian children 19 times higher than non-Indian

Foster care rate 10 times higher

Hrgs Sub. Com. Indian Affairs, U.S. Sen. 93rd Cong., 2d. Ses. (1974)

# Morris Udall

# Findings

Congress:
- has plenary power over Indian affairs
- Trust relationship

Children are vital to Tribe's existence and integrity

"Alarmingly high" rate of break-up of Indian family

States fail to recognize essential tribal relations

25 USC 1901

# Policy

Promote:

Best interest of Indian children

Stability / security of Indian Tribes

By:

Establishing minimum Federal standards for removal and placement of Indian children

# Definitions: Child Custody Proceeding

Applies

Foster care placement

Termination of parental rights

Pre-adoptive placement

Adoptive placement

25 USC 1903

Doesn't Apply

Criminal proceedings

Parent v. parent custody proceedings

# More Definitions

Indian custodian: Indian person w/legal custody under tribal law/custom, state law, or temp. custody from parent

Indian tribe: Federally recognized

Extended Family:
◦ Defined by tribal law and custom; or
◦ Blood relations or stepparent

25 USC 1903

# Existing Indian Family (Wash former.)

ICWA not apply in an adoption if:

No removal from Indian cultural setting

Natural parents have no substantive ties to specific tribe

No residence on Reservation

*Adoption of Crewes*, 118 Wash. 2d 561 (1992)

# Existing Indian Family (Washington Current)

If the child is "Indian" as defined by ICWA, the provisions of the act shall apply.

RCW 26.33.040(1)(a) [2004]

"Washington no longer recognizes the "existing Indian family exception."

*Parenting and Support of Beach*, 246 P.3d 845 (Div. III, 2011)

# Jurisdiction

## TRIBE (EXCLUSIVE)

Domiciled on the Reservation

Ward of tribal court

## STATE & TRIBE (CONCURRENT)

Outside the Reservation

But

Presumptive transfer to tribal court

Unless

Objection by either parent, or

Good cause to the contrary

25 USC sec. 1911

# Exclusive Tribal Jurisdiction

# Transfer to Tribal Court

Transfer presumed

Exception: good cause to the contrary

Foster care placement

Termination of parental rights

25 USC 1911(b)

Presumption Not Apply

Preadoptive Placement

Adoptive Placement

# Good Cause to the Contrary

- No tribal court

- Proceeding is at an advanced stage

- Indian child is over the age of 12 and objects to transfer

- Forum *non-conveniens*

- Child over 5 years old & Parents not available

- Little or no contact with Tribe or tribal members

  BIA Guidelines, 44 FR 67584 – 67591 (1979)

# Good Cause May *Not* Include

1. Socio-economic conditions

2. Adequacy of tribal or BIA social services

3. Adequacy of tribal judicial system

4. Burden of proof on party asserting good cause

    44 FR 67584 – 67591 (1979)

# Intervention and Notice

Tribe and / or Indian custodian has right to:

- Notice of state court foster care or termination of parental rights proceedings

- Intervene at any time

# State Court Involuntary Proceedings

## DUE PROCESS & SERVICES

Notice

Right to counsel

Examination of reports

Remedial services / rehabilitative programs

## EVIDENCE

Beyond a reasonable doubt

Testimony of qualified expert witness

Continued custody by Indian likely to result in serious emotional or physical damage to child

# State Court Voluntary Proceedings

- Consent must be certified by a judge

- Consent to foster care may be withdrawn at any time

- Consent to termination of parental rights and adoption may be withdrawn at any time prior to entry of final orders

- Adoption may vacated up to two years post entry if fraud or duress

# Placement

ADOPTION

Extended family

Other tribal members

Other Indian families

FOSTER CARE

Extended family

Foster home specified by Tribe

Indian foster home licensed by State

Institution approved by Tribe

# Adoptive Couple v. Baby Girl

This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute at issue here do not demand this result.

570 U.S. _____ (2013), Slip Op. p. 1

# Adoptive Baby Girl (Cont.)

The South Carolina Supreme Court held that sec. 1912(d) mandated measures such as "attempting to stimulate [Biological] Father's desire to be a parent. 398 S.C. at 647, 731 S.E. 2d at 562. But if prospective adoptive parents were required to engage in the bizarre undertaking of "stimulat[ing" a biological father's "desire to be a parent," it would surely dissuade some of them from seeking to adopt Indian children. And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home.

Slip. Op. p. 14

# Codify Existing Indian Family Exception

State Court shall have exclusive jurisdiction over child custody proceeding where:

Parental rights terminated

No significant contacts with Tribe, and

Child has bonded with his / her caregiver

# Existing Indian Family Exception (Cont.)

- Placement: best interest of the child

- Best Interest includes:
  - Preservation of existing attachment bonds
  - Which parent can best perform parenting functions

- Burden of proof: preponderance

# Presumptive State Court Jurisdiction