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MUSCOGEE CONSTITUTIONAL JURISPRUDENCE: VHAKV EM PVTAKV
( THE CARPET UNDER THE LAW )

Sarah Deer * and Cecilia Knapp **

PART I. INTRODUCTION

In 1974, a group of Mvskoke citizens from Oklahoma sued the federal government in federal court. Hanging in the balance was the future of Mvskoke self-determination. The plaintiffs insisted that their 1867 Constitution remained in full effect, and that they still governed themselves pursuant to it. The United States argued that the constitution had been nullified by federal law passed in the early 1900s.

To find in favor of the plaintiffs, the court would have to rule that the United States had been ignoring the most basic civil rights of Mvskoke citizens and flouting the law for over seventy years. It would also have to find that a tribal government had been operating legitimately in the shadows—that the Mvskoke people had continued to operate un-
der their constitution for most of the twentieth century despite official federal antagonism.

It was definitely a long shot, but they won.

How did this tribal government continue to persevere and operate in spite of generations of official anti-tribal policies? In resolving the existential dispute, the federal judge engaged the rich constitutional history of the Mvskoke people, which dates back at least 500 years. After reviewing this history, the court labeled the federal policies of the United States as “bureaucratic imperialism.” The court found that the “vigor and liveliness of Creek political life,” documented since the Revolutionary Era, had survived the destruction of the Creek National Council in the twentieth century, and continued uncowed in the decades since. The decision led to a resurgence of Mvskoke political identity and a new constitution in 1979.

This article explores factors that have helped the Mvskoke people create, nurture, and sustain a constitutional government under hostile circumstances for centuries. We focus on the history and structure of the constitutional government of the Muscogee (Creek) Nation of Oklahoma. We consider several aspects of Creek conceptions of government structure and balance, which are also evidenced in the constitutional jurisprudence of the Muscogee (Creek) Nation Supreme Court. At first glance, the contemporary Mvskoke government today bears little resemblance to the ancient etvlwv town-based system of governance, but a more penetrating analysis reveals common threads of political theory and cosmogony, or world view, that have continued unabated.

Despite the rapidly emerging field of tribal constitutional jurisprudence, there are very few in-depth studies of how tribal governments interpret their own constitutions and whether these interpretations have furthered the aim of tribal self-governance. Tribal constitutional jurisprudence is “a unique contribution to the history of ideas,” and an essential element in the continuing tribal struggle for self-determination. As explained by Mohawk scholar Taiaiake Alfred, “renewal of respect for traditional values is the only lasting solution to the political, economic, and social problems that beset our people.” This study does three things. It uncovers a distinctive constitutional tradition, chronicles the role of law in the history of a people who struggled and survived in the face of relentless pressure to disappear, and helps to strengthen the foundation on which Mvskoke...
people are building their future.

Mvskoke constitutional law can be characterized as relatively young, but only if the written form (which dates to the 1860s) is used as the standard.14 Mvskoke constitutional structure actually has a lengthy, complex history that dates back to at least the 1500s. While a great deal of the structure has been heavily influenced by Anglo-American law over the last 200 years, the Mvskoke philosophy of power balance is still evident in the constitutional law of the Nation today.

In traditional, pre-removal Mvskoke society, maintaining harmony and sharing and balancing power were central components of the Mvskoke cosmogony. These goals were both important governmental pursuits, encompassing the management of conflict and the prevention of abuse and manipulation of power and key elements in the structure of traditional government systems. The Mvskoke people have had intricate conceptions of vertical and horizontal power separation for centuries, and the Mvskoke government was characterized by checks and balances, democratic offices, and a vigorous marketplace of ideas long before the United States drafted the American Constitution.15

To survive, however, the Mvskoke people and their constitutional structure had to adapt. The resiliency of the government has been possible because of a series of adaptations and adjustments.16 Mvskoke law has exhibited exceptional resilience in the face of war, oppression, and coerced assimilation.17 Its power and legitimacy is driven by a traditional embrace of political dialogue that seeks to balance the desire for conflict with the necessity of finding balance and resolution in the midst of chaos and change.

Part II of this article begins with unwritten Mvskoke governance, showing the integration of the concept of balancing powers with Mvskoke cosmogony. Part III considers the development of the centralized Creek Confederacy, which developed as a response to European threats in present-day Alabama and Georgia. Part IV explores the removal and re-establishment of the Creek Confederacy in Indian Territory after removal. Part V explores the post-U.S. Civil War experience, including the development of the 1867 Constitution and subsequent Creek Supreme Court decisions interpreting the 1867 Constitution. Part VI considers the devastating twentieth century history of the Creek Nation and its re-emergence in the 1970s. Part VII reviews the decisions of the Muscogee (Creek) Supreme Court interpreting the 1979 Constitution. The article concludes with an assessment of the strength of independent Mvskoke constitutional jurisprudence.

14. Deloria and Lytle explain that “Indian tribes . . . had highly complicated forms of government that could be traced far back into precontact days and, according to some tribal traditions, back as far as their creation and migration stories told them intelligible life has existed.” VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 81 (1983).
17. CRAIG S. WOMACK, RED ON RED: NATIVE AMERICAN LITERARY SEPARATISM 31 (1999) (stating that “Creeks provide an interesting historical example in terms of the way an indigenous culture might actually flourish in the face of change”).
The Mvskoke people ratified the first recorded written constitution in 1867. However, that was not the first constitution that governed the Mvskoke people. We begin by exploring fundamental social and political values of the Mvskoke culture. In order to understand how the Mvskoke people may have conceived of, or responded to, the development of a written constitution, we must first understand the worldview of the drafters. This cultural backdrop will also allow for a better understanding of how legal hegemony may have affected constitutional principles identity over time.

A. Cultural Foundations of Mvskoke Governance

An exploration of Mvskoke constitutional law necessitates beginning with oral traditions that establish core political values. A “constitution” is “a society’s rules for making and enforcing its collective rules and decisions, including the legitimate allocation of power and authority over rule-making and decision-making.” In the Mvskoke language, the constitution is called vhakv em pvtakv or “the carpet under the law.” A constitution, in other words, is the foundation for the entire legal system. Constitutions may be written or unwritten; indeed, scholars have argued unwritten constitutional norms and values may be more powerful because they reflect and are expressed in everyday activities as well as high level conflicts.

Political values in many cultures can be traced to pre-written symbols and myths. Contemporary tribal governments have struggled to align these pre-written myths and legends with their constitutional jurisprudence, as “federal policies of termination, relocation, and assimilation” have weakened, romanticized, and marginalized the importance of the repositories of fundamental values. This section uncovers those Mvskoke early pre-written cultural norms, and shows how they help to form the “carpet under the law.”

Part of the cultural foundation for separate and decentralized powers in Mvskoke government is reflected in a legend about two powerful, rival twins. There are many different versions of this story. In addition, because of the nature of oral tradition, it is unlikely that a written English recounting of this Mvskoke story will be entirely accurate. Certainly much can be lost in translation. For many indigenous people, reducing oral tradition to writing is problematic because the codification process itself weakens the power and subtleties of the oral recitation.
story, these two twins struggled to balance their energies. After wrestling to the point of exhaustion, their spirits led them up to the mists and clouds. White Twin went one way, while the more aggressive and active Red Twin went another way. Each twin met groups of people who became their followers. After reuniting, the twins decided to bring the two groups, or worlds, together. “One world was full of active energy, but faced conflict without adequate ‘medicine,’ while the other had the medicinal resources but lacked the organization to deal with external conflicts and the extraction of medicine.” “Together, they could be awesome.”

To join the peoples, Red Twin lobbied for a fight, whereas White Twin preferred to talk things through in a council-like setting. Ultimately, the twins decided to avoid war and instead have the peoples play the “little brother of war,” a stick ball game. Much negotiation ensued: Red tried to get White to settle on what weapons could be used and the rules by which the game would be played, but White ended up leading the dialogue and advocating for the avoidance of as much pain and suffering as possible. In this back-and-forth dialogue, each twin exhibited certain characteristics embedded in Creek symbolism: “whites provide the long-term community-building and peace, while the reds provide the activism, the security, and the energies for battle.” When the symbolic war was over, “there was the coming together of a community based on reconciliation and love,” and the twins then descended from the mists back down to earth, “knowing the way of balancing and cooperation in human affairs.”

The red-white struggle and subsequent resolution explains a foundational tenet of Mvskoke law: the search for balance and consensus is a primary virtue in government and spiritual life. Appropriately, the seal of the Muscogee (Creek) Supreme Court is an artist’s depiction of that mythical stickball game.

26. Id. at 31–32.
27. Id. at 32–33.
28. Id. at 34.
29. Id.
30. Id. at 33.
31. Id. at 34.
32. Id. at 35, 41.
33. Id. at 34–35.
34. Id. at 38.
35. Id. at 40.
Structure and Function of Traditional Mvskoke Government

Long before the Mvskoke people had a written constitution, they had social and political structures which formed the foundation of their government. Taken as a whole, these structures can be considered a form of democracy, although “Creek democracy . . . was not mob rule—the process of consent included interlinked centers of decision-making, with checks and balances apparently intended to avoid the development of a permanent political elite.” 36 A key theme in Mvskoke governance, then, was not individualism but community balance. “The Creeks . . . depend[ed] on extensive notions of balance among different virtues, qualities, and functions.” 37 The traditional governing system of the Mvskoke people is complex. Perhaps the easiest starting point is to begin with the way the identity of an individual Mvskoke person is inherited and related to others. 38 A basic understanding of the layers of Mvskoke identity will help demonstrate the breadth of change and adaption over time, which provides a context to consider how the contemporary written constitution may or may not reflect Mvskoke belief systems.

Each Mvskoke person identifies as a clan member, e.g., deer clan or wind clan. 39 Traditionally, each Mvskoke person also identified as a member of an etvhwv (town)

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36. Id. at 73. Matthew L.M. Fletcher explains, “most Indian nations did not view government as a process of coercion of the masses by an enlightened few.” MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 1 (2011).
37. CHAUDHURI & CHAUDHURI, supra note 25, at 92.
38. We describe the Mvskoke clan identity in the present tense because this factor (and other traditions) continues to be relevant to many Mvskoke people today. See Amelia Rector Bell, Separate People: Speaking of Creek Men and Women, 92 AM. ANTHROPOLOGIST 332, 333 (1990). Womack and other indigenous theorists suggest that using present tense in descriptions of cultural identifiers is important, especially in light of the fact that “[t]he overwhelming majority of books written about Creeks are written by non-Native authors who write in the past tense and assume that the people whom they are writing about no longer exist.” WOMACK, supra note 17, at 28. In the Mvskoke language, there are four “past tenses,” which makes discussion about past/present more nuanced than English.
government. 40 The towns were self-governing, autonomous entities that would form the basis for the Creek Confederacy. 41 Clans and towns were classified as either “red” or “white”—a subdivision called “moiety” in Western anthropology. 42 Red towns were primarily responsible for war and the white towns were responsible for peace, but because of the overlapping citizenship of the towns, every town had red and white families who necessarily collaborated and competed for a role in the governance of the town. 43 This dynamic created a tradition of vigorous debate and is central to the resiliency of the Mvskoke people. These debates have sometimes led to factionalism, violence, and even civil war under the stress of occupation, removal, and civic disenfranchisement from the United States.

The Creek Confederacy has traditionally been composed of red towns and white towns, but members of red and white clans lived together within the towns. 44 Thus, clan and moiety cut across geographical boundaries. These intricate interconnections were inherent to the social system of the Mvskoke people. This created a system of overlapping alliances and loyalties that developed over centuries by the Mvskoke, ensuring a balance of power within local government and across the Confederacy.

Each Mvskoke person was born with multiple roles and duties within the family, the town, and potentially, within the confederacy, which encouraged vigorous civil engagement. 45 Many facets of identity are inherited, but heredity is not the only factor in determining responsibilities within the government. 46 Age, gender, training, ability, and military service are also considerations in identifying the unique, customized civic role. 47 Unlike modern constitutional legal systems, Mvskoke people carried their legal system within themselves. By understanding Mvskoke cosmogony and legendary stories, citizens understood why the system was structured the way it was and their role in it; “[citizens] performing their assigned roles and educated accordingly made the system work.” 48

1. Clan

A Mvskoke person inherits primary identity—clan membership—from her or his maternal family. 49 Clans, which form the foundation of identity and Mvskoke relationships, first appeared in Mvskoke genesis stories and have no true parallel in Anglo-American law. 50 Clan structure is closely intertwined with spiritual and civic (legal) du-

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41. WOMACK, supra note 17, at 31.
42. Lankford, supra note 39, at 68.
43. Hassig, supra note 40, at 253-54.
44. Id. at 252; Lankford, supra note 39, at 74-75.
46. Corkran identifies three key factors in the power structure of this model—age/service; heredity; and service to the people. DAVID H. CORKLAN, *THE CREEK FRONTIER*, 1540-1783, at 23 (1967).
47. See CHAUDHURI & CHAUDHURI, supra note 25, at 77-80.
48. Id. at 76.
49. INNES ET AL., supra note 2, at 72; see also MICHAEL D. GREEN, *INDIANS OF NORTH AMERICA: THE CREEKS* 23 (1990) [hereinafter GREEN, THE CREEKS].
50. Deloria and Lytle write:
ties. Thus, an individual learns her or his inherited civic responsibility from childhood. Today there are nine Mvskoke clans, but originally there were between twenty-five and twenty-seven clans. The interrelationships and kinship networks established in the clan system served as an early form of political checks and balances in Mvskoke society. The blood relationship that ties members of a clan together was stronger than any other form of affiliation or membership. Traditionally, relationships between clans were strictly regulated. Clans also created extended kin networks that would be recognized wherever an individual traveled. This familial interconnectedness often served to temper conflict between two or more political divisions.

The intricate kinship rules and regulations of clan membership provided the structure for domestic governance, including rules for marriage, divorce, child custody, and interpersonal crime. The basic domestic unit was known as a huti, which included not only nuclear family members, but also extended kinship. A group of huti created a political/social organization known as an etvlwv, the most important political unit in the

The primacy of the Creek clans, for example, could be traced back to an early condition of chaos in which humans and animals were lost in an immensely thick fog. In order to save themselves the people and the animals joined hands and wandered for many days. Finally, as the fog was clearing and open skies could be discerned, they agreed that henceforth the clans would rank in the order in which they had emerged from the dreadful fog. Such a tradition clearly ranks with the Exodus and other stories cherished by the Western peoples, extending significantly far into the past, as a revered explanation of the manner in which the Creek Nation organized itself.

DELORIA & LYTLE, supra note 14, at 81–82.

51. See CHAUDHURI & CHAUDHURI, supra note 25, at 76.
52. INNES ET AL., supra note 2, at 72. The contemporary clans are Wind (Hotvlvklke), Alligator (Hvlpvtvlke), Bear (Nokosvlke), Tiger (Kaccvlke), Deer (Ecovlke), Sweet Potato (Vhvlvkvlke), Raccoon (Wotkvlke), Beaver (Echaswvlke), and Bird (Foswvlke). Id. See also CHAUDHURI & CHAUDHURI, supra note 25, at 21 (“[t]welve clans were created at first”); John R. Swanton, A Foreword on the Social Organization of the Creek Indians, 14 AM. ANTHROPOLOGIST 593, 594 (1912) (naming 25 clans).
53. CHAUDHURI & CHAUDHURI, supra note 25, at 92.
54. “The strongest link in their political and social standing as a nation is in their clanship or families. By their observances of it they are so united that there is no part of the nation detached from the other, but are all linked harmonised [sic] and consolidated as one large connected family.” CAMERON BRAXTON WESSON, HOUSEHOLDS AND HEGEMONY: EARLY CREEK PRESTIGE GOODS, SYMBOLIC CAPITAL, AND SOCIAL POWER 24-25 (1997). Clans themselves were categorized as white or red. DUANE CHAMPAGNE, SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK 42 (1992). White clans generally performed domestic, internal governance. Red clans generally provided law enforcement and military protection. White clans and towns were authoritative in times of peace; red clans and red towns were authoritative in times of war. JOEL W. MARTIN, SACRED REVOLT: THE MUSKOGEES’ STRUGGLE FOR A NEW WORLD 82 (1991) [hereinafter MARTIN, SACRED REVOLT].
55. Intra-clan marriages, for example, were forbidden (and considered a form of incest). ANGIE DEBO, THE ROAD TO DISAPPEARANCE: A HISTORY OF THE CREEK INDIANS 16 (1941).
56. See Arthur H. DeRosier, Jr., The Destruction of the Creek Confederacy, in FORKED TONGUES AND BROKEN TREATIES 78 (Donald E. Worcester ed., 1975) (“Without a doubt, clan loyalty took precedence over town or even tribal loyalty”). For example, a bear clan member from one etvlwv would owe certain responsibilities and respect to bear clan members residing in any other etvlwv.

Political rights and responsibilities arise from genealogy and are highly differentiated. Kinship assigns fixed roles to individuals, as if they were species in an ecosystem. At the same time, each individual plays multiple roles in relation to others: as a father to one, uncle to another, cousin to still another. Thus, a tribal political system is a web of reciprocal relationships without a separately institutionalized “state.”
Muscogee Constitutional Jurisprudence: Vhakv Em Pvtakv (The Carpe pre-constitutional era.

2. Etvlwv (Town)

After clan identity, the etvlwv was historically the most “potent political identifier” in Mvskoke culture. Each etvlwv was made up of twenty-five to one hundred houses nearly always geographically placed near a river or a stream. “[H]ereditary and traditions united the people of an etvlwv. The Mvskoke people physically centered each etvlwv around a sacred fire, which they ceremonially extinguished and renewed each year.

Because there was no centralized government, each etvlwv operated an independent government, which usually met daily. These governments were not comprised of “insulated compartments”; nor did they have a “permanent, separate bureaucracy.” However, there were some consistent features including parallels to executive, legislative, and judicial functions.

For each etvlwv, there was a head executive known as a mekko. A typical etvlwv also has three tiers of male leaders or advisors, which traditionally performed more legislative functions. Historically, the mekko would select a tvstvnve (war chief) from one

59. Pronounced DULL-wah (leading e is silent). Alternate spelling includes tvlwv, talwa, etulwa, or etawla. English and Americans typically translated this term as town or village. A more accurate translation would be “nation.” Referring to the etvlwv as a town implies a degree of inferiority. Mito to Marcus Briggs-Cloud for providing more context for this word.


61. DeKosier, supra note 56, at 74; see Debo, supra note 55, at 9; see also Sharon O’Brien, American Indian Tribal Governments 22 (1989).


63. William Bartram, Observations on the Creek and Cherokee Indians 23 (1789); see also Ohland Morton, The Government of the Creek Indians, 8 Chrons. of Okla. 42, 42 (1930).

64. Chauburi & Chaudhuri, supra note 25, at 76, 92.

65. Also spelled micco or niko. See, e.g., Theda Perdue & Michael D. Green, The Columbia Guide to American Indians of the Southeast 48 (2001). A mekko (almost always male) often inherits his position from a maternal uncle, but the leadership position is not strictly hereditary. English speakers often used the word “king” to describe this position, but the mekko role was actually nothing like that of a European monarch. See Donald E. Green, The Creek People 5–6 (1973) [hereinafter Green, The Creek People]; see also Chauburi & Chaudhuri, supra note 25, at 76 (“community acceptance determined whether one became a micco”). Other English translations include “chief” and “mayor.” Today, a traditional mekko is a lifetime position. George Thompson, Statement From Hickory Ground Chief George Thompson Regarding Pach Creek’s Digging up of Remains, Indian Country Today (Sept. 7, 2012), http://indiancountrytodaymedianetwork.com/opinion/statement-from-hickory-ground-chief-george-thompson-regarding-pach-creeks-digging-up-of-remains-133259. A mekko is “a person who had achieved great honor and trust” who “ruled by persuasion, not command or coercion.” See, e.g., Perdue & Green, supra note 65, at 48 (“chiefs earned their positions by their accomplishments rather than inheriting rank by birth”). See also O’Brien, supra note 61, at 22. A mekko often worked with a second mekko (mekko spo’kev or “twin chief”). Ethridge, supra note 58, at 102. Thus, local town structure could be said to have a dual executive. This concept of dual executive later was incorporated into the Creek Confederacy. See discussion infra Part II.C.

66. Mvskoke women were often assumed to be politically powerless by early European observers. Euro-American observers came from a world in which women did not govern—so the activities of women would not
of the red clans, who served as chief advisor on military and law enforcement matters.\textsuperscript{67}
From one of the white clans, the \textit{mekko} would select one or more \textit{hennehas} (spiritual leader), who exercised administrative domestic powers, such as building homes and farming.\textsuperscript{68} Typically, one \textit{hennea} served as the “speaker” for the \textit{mekko}.\textsuperscript{69} The \textit{mekko} also selected a third group of advisors, known as \textit{veakvlke} (“beloved old men”), for their wisdom achieved through age and service.\textsuperscript{70} The \textit{etvlwv} leaders did not adjudicate interpersonal disputes, but focused on the administration of the local government, including food distribution, agricultural planning, and security.\textsuperscript{71}

In traditional, pre-removal\textsuperscript{72} Mvskoke government, there was no formal separate or neutral judiciary. Clan and household negotiations resolved inter-clan and intra-clan disputes involving matters of injury and personal property.\textsuperscript{73} A system of councils, including the family, the clan, or the \textit{etvlwv} oversaw inter-clan dispute resolution.\textsuperscript{74} The Nation’s current Supreme Court explained that “[u]nder traditional Mvskoke law, controversies were resolved by clan Vculvkvlke (elders). Their integrity was considered beyond reproach. “They were obligated by the responsibilities of their position to decide cases fairly, and honestly, regardless of clan or family affiliation.”\textsuperscript{75}

Because Mvskoke people valued consensus, the most important skill a political leader could possess was oratory.\textsuperscript{76} Lengthy speeches were the hallmark of an effective civic leader, and most decisions were not made until after all leaders had an opportunity to speak without time limits until consensus could be reached.\textsuperscript{77} Election or appointment to political office was done by voting in public—not by secret ballot.\textsuperscript{78} When disputes between members of an \textit{etvlwv}, or between two different \textit{etvlwv} could not be resolved
through consensus, a typical response was to withdraw and separate. 79 Sometimes members who withdrew would establish a new $etvlwv$. 80 Thus, historical records demonstrate the spontaneous creation of new $etvlwv$ as well as the merging of two more $etvlwv$.

3. Moieties—Semi-Divisions

As noted previously, the Mvskoke people traditionally classified both towns and clans as white or red. 81 Both white and red clans lived in each $etvlwv$, and the leading clan determined the color of the $etvlwv$. These colors symbolized the primary role of the town or clan—association with foreign powers or domestic powers. 82 The clans and towns affiliated with the color red performed external relations duties (including military defense, diplomacy, and commerce), whereas clans and towns affiliated with the color white performed domestic duties (including ceremonies, family law, crime, probate, and making of peace). 83

Mvskoke cosmogony stressed the importance of separation of powers between military and civilian leaders. 84 This division of military and treaty power was especially important for the balance of power. 85 While the military branch engaged in physical warfare, the peace-making branch worked toward ultimate resolution. “[R]eckless rashness” was expected of young warriors. 86 However, Mvskoke people were also expected to mature and develop “moderation and wisdom” later in life. 87 In the European construct of war, a military leader could accept a surrender or negotiate a truce. Not so for the Mvskoke. Normally, the mekkos from the white clans in white $etvlwv$ governments would draft peace agreements and terms of disengagement. The tension between the white and red towns, then, served a functional purpose. The rivalry resulted in vigorous debates about matters of national security and a role for cooler heads to prevail in negotiating terms of peace. Philosophically, Mvskoke governments did not seek to initiate or sustain war. Governing structures worked together for wholeness. Wholeness was conceived as a balance between red “war” spirit and white “peace” spirit. 88

79. ETHRIDGE, supra note 58, at 96.
80. Id.
81. See MARTIN, SACRED REVOLT, supra note 54, at 40 (“The distinguishing colors were painted on buildings and ceremonial articles and used in bodily decoration”); see also Opler, supra note 62, at 171-72.
82. O’BRIEN, supra note 61, at 22. Sometimes these colors are referred to as “war” or “peace” colors but in practice these divisions were not always so polarized. PATRICIA RILES WICKMAN, THE TREE THAT BENDS: DISCOURSE, POWER, AND THE SURVIVAL OF THE MASKOKI PEOPLE 48 (1999); see also CHAUDHURI & CHAUDHURI, supra note 25, at 38 (noting that “in Creek symbolism the white sticks provide the long-run community-building and peace, while the reds provide the activism, the security, and the energies for battle.”).
83. See, e.g., BARTRAM, supra note 63, at 61 (“Whenever the question of war or peace was discussed in the national council, it was the duty of the white towns to bring forward all the arguments which could be adduced in favor of peace.”). Within such domestic realms, it was unusual for a person affiliated with a red town to have a say in domestic matters. See DeRosier, supra note 56, at 73; see also Mary R. Haas, Creek Inter-Town Relations, 42 AM. ANTHROPOLOGIST 479, 484-85 (1940).
84. DELORIA & LYTLE, supra note 14, at 85-86.
85. CORKRAN, supra note 46, at 30.
86. Id. at 25.
87. Id. at 26.
88. Martin, Rebalancing the World, supra note 60, at 92.
C. Creek Confederacy

The colonial historical records refer to the predecessor of the contemporary Mvskoke governments as the “Creek Confederacy.” The autonomous etvlwv governments created this Confederacy in response to external threats. While there was no written constitution governing the activities of the early Confederacy, there were clear constitutional principles at play—including division of powers and organized law-making.

1. Early Period: 1500s-1776

Between the sixteenth and eighteenth centuries, Mvskoke etvlwv governments and allied tribal communities formalized a union which would ultimately come to be known as the Creek Confederacy. Historians disagree about exactly when the Creek Confederacy evolved into a political entity, but most surmise that the various etvlwv governments of the Creek Confederacy were loosely organized prior to the arrival of Europeans. Lewis and Kneberg claim that “[l]ong before Columbus, they organized a great confederacy that included more than a dozen Muskogean tribes, and others as well.” The earliest European contact with Mvskoke people happened in the early sixteenth century with the exploits of Hernando De Soto of Spain. Spanish Conquistadors devastated

89. See, e.g., HUDSON, supra note 60, at 8. Originally, Mvskoke cultural groups (understood as organized groups of matrilineal clans) occupied a significant portion of southeastern North America—today Alabama, Georgia, Florida, and South Carolina. Barbara Alice Mann, “A Man of Misery”: Chitto Harjo and the Senate Select Committee on Oklahoma Statehood, in NATIVE AMERICAN SPEAKERS OF THE EASTERN WOODLANDS: SELECTED SPEECHES AND CRITICAL ANALYSES 197, 197 (Barbara Alice Mann ed., 2001). Mvskoke people historically lived throughout at least a 62,000 square mile region, but by the 1600s had settled on an approximately 500 square mile area in present-day Alabama and Georgia. HUDSON, supra note 60, at 3. Because identification with the Creek confederacy was a fluid phenomenon, population estimates also vary. The estimates range from 7,000-35,000 people living in between sixty and ninety political units. The difficulty in defining the precise history of the Creek Confederacy is illustrated by the following examples. David Corkran claims that 7,000-9,000 Mvskoke people lived in approximately sixty towns. CORKRAN, supra note 46, at 6. Bolster claims 25,000-35,000 Mvskoke people were loosely organized in the 1780s. Mel H. Bolster, The Smoked Meat Rebellion, 31 CHRONS. OF OKLA. 37, 40 (1953). Duane Champagne asserts that there were originally eighty to ninety towns. CHAMPAGNE, supra note 54, at 37.

90. JOYOTPAUL CHAUDHURI, FOUNDING AMERICA: THE POLITICAL LEGACY OF RIGHTS, RELIGION, COMMERCE, AND DIVERSITY 13 (1992) (explaining that the Creek Confederacy “demonstrated a complex system of balanced authority”).

91. “Regardless of its precise origin, the Confederacy is considered the hallmark of the Creek strategy for cultural survival during the historic period.” WESSON, supra note 54, at 44. John H. Moore writes that the Mvskoke word for the confederacy may have been “etelaketa.” Moore, supra note 78, at 170. There is no precise English translation for this word, but a loose English translation would be “The People Sitting Together.” See e-mail from Rosemary McCombs Maxey, to author (Aug. 26, 2011) (on file with author).

92. See, e.g., INNES ET AL., supra note 2, at 28; see also William C. Sturtevant, Creek into Seminole, in NORTH AMERICAN INDIANS IN HISTORICAL PERSPECTIVE 92, 93 (Eleanor Burke Leacock & Nancy Oestreich Lurie eds., 1971). But see Vernon James Knight, Jr., The Formation of the Creeks, in THE FORGOTTEN CENTURIES: INDIANS AND EUROPEANS IN THE AMERICAN SOUTH, 1521-1704, at 373, 375 (Charles Hudson & Carmen Chaves Tesser eds., 1994) (claiming that “[t]here is no documentary evidence of any such political centralization prior to the eighteenth century.”).


94. Moore writes that “De Soto encountered at least three etvlwvs (towns) in 1540—Chiaha, Koasati and Tulsa.” Moore, supra note 78, at 164. Mvskoke jurist Patrick Moore writes, “[m]any of these towns visited by Hernando De Soto in the summer of 1539 were later abandoned or simply ceased to exist due to De Soto’s ruthless military exploitation or the effects of diseases brought to the ‘New World’ by his soldiers and servants.” Patrick Edward Moore, Muscogee (Creek) Government Pre-Columbian to 2005, in 1 MVSKOE LAW
Mvskoke populations through violence and disease in the sixteenth century.95 The surviving Mvskoke continued their etvwlv governments where possible, but many had to merge together for protection and survival.

Spanish tyranny continued to threaten the Mvskoke way of life throughout most of the seventeenth century.96 The newer English colonies on the east coast seemed less threatening, so Mvskoke leaders began to enter into agreements with the English. Charles Town, established in 1670 by English immigrants in the Carolina colony, was likely the first permanent European settlement in Mvskoke Territory.97 It was during this time period that the Confederacy first appeared as a legal entity in historical documents.98

The Confederacy was originally a cooperative agreement among several tribes with different languages and traditions.99 The Creek Confederacy included Mvskoke etvwlv governments, but also a variety of allied cultural groups.100 Today, the Muscogee (Creek) Nation government presents confederacy history, and explains that “the [C]onfederation was also expanded by the addition of tribes conquered by towns of the [C]onfederacy, and, in time, by the incorporation of tribes and fragments of tribes devastated by the European imperial powers.”101

A confederated government was seen as necessary for foreign relations once European settlement took hold. However, Mvskoke people remained more likely to identify with their etvlwv than with the Confederacy. Only in times of international crisis did Mvskoke people refer to themselves as “Creeks.”102 The early Confederacy did adopt some national legislation,103 but its primary purpose was to address foreign relationships...
in both war and peace with European governments. Throughout the 1700s and 1800s, the Creek Confederacy made treaties with the British, Spanish, French, and American governments.

The treaty decision-making body for the Confederacy was often referred to as “Grand Council” and the leaders came together annually (or more often if needed). The Creek Confederacy governed by consent. Each individual government retained independence and autonomy, and its leaders had the freedom to choose whether to send representatives to participate in the Grand Council each year. Like the governments, the Confederacy had constitutional elements, although the structure was never put to writing. But some Confederation-wide policies and protocols were widely followed, which led to comprehensive policies on diplomacy and war. The common cultural ideals “gave some substance to the central Creek set of governmental and normative umbrellas without a central bureaucracy.”

Each in the Confederacy could send representatives to the Grand Council. Representatives from red towns became known among Europeans as “Warriors” and representatives from the white towns were known as “Kings.” The Confederacy’s structure itself was set up in a similar manner to that of a typical government. Three categories of leaders made up the National Council: the mekkos (chiefs), the vcka vlke (beloved men), and the henehas (spiritual leaders). While it was not typical for the Creeks to recognize only a single chief, American and European leaders often singled out a particular mekko who was called mekko rakko, or “big chief.”

The laws issued by the Grand Council were only binding insofar as the autonomous towns chose to honor them. This pluralistic view of law and sovereignty estab-

104. See ETHRIDGE, supra note 58, at 96.
105. See CAUDHURI & CAUDHURI, supra note 25, at 69.
106. See CAUDHURI & CAUDHURI, supra note 25, at 69.
107. See ETHRIDGE, supra note 58, at 96.
108. See ETHRIDGE, supra note 58, at 96.
109. O’BRIEN, supra note 25, at 120. See also CHAUDHURI & CHAUDHURI, supra note 25, at 140; CORKRAN, supra note 46, at 87.
110. See CAUDHURI & CHAUDHURI, supra note 25, at 69.
111. See CAUDHURI & CHAUDHURI, supra note 25, at 69.
lishes a different set of principles than that used in the American system. American federalism is non-negotiable once states join the union. The centralized government does not allow constituent states to engage and disengage at will. Mvskoke cosmogony sees things differently:

The cosmogony of the [Mvskoke] peoples was and is a circular one that makes allies of humans and nature. Therefore, the natural propensity of all elements is movement in concert, but this movement implies no direction, linear or otherwise. In this world view, all creatures and events have an *ab initio* right to being, and a consequent right to acceptance.

The fluidity of this governmental structure was reflected in the functional structure of the confederacy. For example, there was no static geographic capital. The seat of the confederate governments rotated depending on the home *etvlww* of the presiding chief. Political power was largely decentralized, and local governments maintained authority over their own citizens.

The town councils held influence over the town’s inhabitants only. The National Council, in contrast, made decisions for the entire body of Creek towns. Like the town councils, its power was minimal. Nevertheless, the European governments used it to represent the decisions of all the Creek people. Clearly, in many cases, it did not represent the desires of the common Creek people.

It is difficult to draw any conclusions about the jurisprudence of judicial decision makers in this time period because there are no written records other than the treaties that the Mvskoke leaders signed. However, given the complexity of kinship and *etvlww* relationships, it is probable that those roles and duties provided some foundation for resolving structural disputes.

2. Middle Period: 1776-1811

By the end of the eighteenth century, trade and diplomacy were still exercised in
large part through autonomous etvlwv governments.117 After the American Revolution, the Creek Confederacy faced a number of new challenges.118 First, Mvskoke people had become increasingly reliant on trade with Europeans.119 In addition, American leaders began to negotiate and trade almost exclusively with red clans from red towns.120 Whether Europeans elevated red leaders above white leaders through ignorance or strategy, the practice disrupted the traditional power structure that distinguished between military and civilian duties.121 Giving red leaders a disproportionate stake in trade created conflicts of interest as traditional agents of national security, while marginalizing white leaders’ traditional role as agents of commerce.

This disregard for the delicate balance of powers exacerbated tensions between the red and white moieties.122 Disagreements among Mvskoke people about assimilation aggravated these tensions and stoked the threat of civil war. Moeity divisions, once a source of strength and diversity for Mvskoke people, paralyzed the council during the early part of the nineteenth century.123

In addition, early American government agents began to put immense pressure on the leaders of the Creek Confederacy to adopt the customs, economy, religion, and political structure of Euro-Americans. Benjamin Hawkins was the first full-time federal agent assigned to negotiate with the Creeks in 1796.124 Hawkins sought to change Mvskoke life by creating a centralized government.125 He set out by abolishing the distinction between red and white towns. Under his direction, all etvlwv governments were characterized as “red.”126 He also began the American tradition of ignoring Mvskoke chains-of-command in the Confederacy and negotiating with a few select leaders. One such select leader was Alexander McGillivray, who served as a puppet leader under Hawkins’ con-

117. HUDSON, supra note 60, at 12.
118. The original Articles of Confederation did not clearly establish the relationship between the federal government and Indian tribes. In 1781, when the Constitution was established, Congress was explicitly given the authority to “regulate Commerce . . . with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3.
119. Douglas Barber, Council Government and the Genesis of the Creek War, 38 Ala. Rev. 163, 164 (1985). Creek dependence on European goods such as firearms and cooking utensils began early in the seventeenth century and gradually weakened Creek economic power. GREEN, THE CREEKS, supra note 49, at 32–35. Dependency was intentionally introduced in order to leverage land claims.
120. CHAMPAGNE, supra note 54, at 113; CORKRAN, supra note 46, at 27.
121. See MARTIN, SACRED REVOLT, supra note 54, at 82.
122. For example, when red clans controlled the actions of an etvlwv, the white clans were not able to perform certain peacetime ceremonies. Martin, Rebalancing the World, supra note 60, at 95–96.
123. See generally Barber, supra note 119.
124. DEBO, supra note 55, at 66; see generally THE COLLECTED WORKS OF BENJAMIN HAWKINS, 1796-1810 (Thomas Foster ed., 2003). Hawkins’ office, like all Indian Affairs positions, was housed in the War Department. Hawkins was personally selected for the role by President George Washington with a clear objective to “civilize” the Creek Indians. MARTIN, SACRED REVOLT, supra note 54, at 87. Hawkins actually boasted that he created the National Council himself. ETHRIDGE, supra note 58, at 105. Under Hawkins’ authority, agricultural productivity, English language acquisition, and conversion to Christianity became priorities. Martin notes, “[i]t is clear that the aims and intents of the plan of civilization put into practice the expansionist policies officially promulgated by high government officials, including George Washington, Henry Knox, and Thomas Jefferson.” MARTIN, SACRED REVOLT, supra note 54, at 94.
125. Moore, supra note 78; see also ETHRIDGE, supra note 58, at 13 (“The plan for civilization was official policy, formulated by George Washington, Henry Knox, Thomas Jefferson, and other statesmen, to assimilate Indians into American society.”). The “hidden hand behind the plan for civilization was U.S. Expansion.” Id. at 15; see also William W. Savage, Creek Colonization in Oklahoma, 54 CHRONS. OF OKLA. 34 (1976).
126. DEBO, supra note 55, at 67; see also CHAMPAGNE, supra note 54, at 113–14.
Hawkins and McGillivray implemented radical changes, including “a unified foreign policy” and a “centralized administration” for the Creek Confederacy. As the central bureaucracy strengthened, so too did the power of the centralized government to enforce laws normally administered by etvlwv governments. For example, under the American-influenced Confederacy, a cultural and spiritual practice known as busketa, practiced for millennia at the etvlwv level, became a national event, with the central government as enforcer of attendance. This action was the first recorded domestic police power exercised by the Confederacy. Hawkins also used McGillivray to manipulate the agenda of the National Council and prioritize activities that increased trade with Americans.

Centralizing power in a single entity was troubling to many traditional Mvskoke people. One of the strengths of the Creek Confederacy had been the freedom and liberty that its fluid structure allowed. Concentrating power in the hands of a small number of people ran counter to the cultural beliefs of the Mvskoke people and threatened the very fabric of Mvskoke society. As relations among the Mvskoke people grew strained, a long-standing geographical schism took on greater political overtones. The etvlwv governments in the west (called Upper Creeks) generally advocated for a conservative perspective, maintaining traditional Mvskoke culture and practices, while the etvlwv governments in the east (called Lower Creeks) supported conversion to Christianity and the adoption of Anglo-American practices.

3. Late Period: 1811-1832

The Upper/Lower Creek factional division ultimately resulted in a civil war, the Red Stick War, which lasted from 1811-1814, and left tremendous divisions within the Creek Confederacy. As part of its prosecution of the War of 1812, the British stirred up anti-American sentiment among Creeks and encouraged them to defy the United States. Upper Creeks were also heavily influenced by the Shawnee/Creek leader Tecumseh, who urged all tribal governments to actively resist assimilation. Mvskoke follow-

127. Chaudhuri & Chaudhuri, supra note 25, at 140–41. “McGillivray was only one-quarter Creek, for his mother was half-Creek and his father was full-blood Scot . . . McGillivray was, in part, a creation of the English and used his English connections to gain prestige and power.” Id.
128. Debo, supra note 55, at 39; Perdue & Green, supra note 65, at 85.
129. Perdue & Green, supra note 65, at 85 (noting that in the late 1790s, “the Creeks reorganized their national council, announced laws against theft, and created a special police force to enforce them”).
130. Today, colloquially referred to as Green Corn ceremonies.
131. It would have been highly unusual (in most cases, forbidden) for a Mvskoke person to fail to participate in the annual busketa ceremony for his/her etvlwv (town). Thus, the national policy may have seemed to be “effective” in that people were already participating despite the national law. See John R Swanton, The Green Corn Dance, 10 CHRONS. OF OKLA. 170, 177–78 (1932).
132. Ethridge, supra note 58, at 105-07.
133. This description is over-simplistic. For example, there were also blood quantum differences. Chaudhuri and Chaudhuri also suggest that “lower creeks” included more mixed-bloods than the “upper creeks”. Chaudhuri & Chaudhuri, supra note 25, at 71.
134. Barber, supra note 119.
ers of Tecumseh advocated the overthrow of leaders loyal to Benjamin Hawkins.136 Many etvlwv governments were divided internally.137 In the end, the Lower Creeks aligned with the U.S. military, led by future President Andrew Jackson, and ended the war by slaughtering the rebellious Creeks at the Battle of Horseshoe Bend.138 The result was the 1814 Treaty of Fort Jackson, which included the cession of nearly two-thirds of Creek lands.139

The victorious Creeks aligned more directly with U.S. agents. Americans supported Lower Creek leaders, such as William McIntosh, whose father was Scottish, and who advocated for assimilation and acculturation. Lower Creeks also developed plantation economies and many became owners of African slaves.140 Despite these assimilation efforts, the United States continued to demand the cession of more territory “as restitution for damages made to American settlers” by the Upper Creeks.141 The division between Upper and Lower Creeks deepened, but the Upper Creeks gradually began to gain more power in the 1820s.

In 1824, the National Council began deliberations on formal national policy.142 Encouraged by Cherokee allies, the Council declared that they would not yield any additional land to the American government.143 In addition, they explicitly rejected the notion of individual title to land, emphasizing the importance of communal land holdings.144 Significantly, the Mvskoke leaders also committed laws and policies to writing, “in order that our chiefs may keep in mind what laws have been passed.”145 Soon, the first official written Mvskoke laws were hand-written in broken English by William McIntosh’s son, Chilly McIntosh.146

The state of Georgia’s desire for Creek lands was relentless, despite the Creek policy statement of 1824.147 Georgia leaders enlisted the support of the U.S. Secretary of

136. GREEN, THE CREEKS, supra note 49, at 49–51; see also ETHRIDGE, supra note 58, at 235–39.
137. See generally ETHRIDGE, supra note 58.
138. The final battle in 1814, known as the Battle of Horseshoe Bend, resulted in the loss of over 3,000 Mvskoke people (about 15 percent of the population). GREEN, THE CREEKS, supra note 49, at 53.
139. Treaty of Fort Jackson, Aug. 8, 1814, 7 Stat. 120 (1814).
141. INNES ET AL., supra note 2, at 28.
142. DEBO, supra note 55, at 88.
143. Id. (citing Niles’ Weekly Register, XXVIII, 225 (1824)); PERDUE & GREEN, supra note 65, at 85 (explaining that by 1824 “Georgia’s demands for the acquisition of all Creek land in the state became nearly hysterical.”); See also Savage, supra note 125.
145. DEBO, supra note 55, at 88.
147. In efforts to appropriate Creek lands, local non-Native officials began a public relations campaign which maligned the Mvskoke government. Governor Wright of Georgia declared that the Creeks “have no form of government or any coercive power among them.” CORKRAN, supra note 46, at 12. Other derogatory descriptions of early Creek government contain the same stereotypes of weak and ineffectual leadership. The outside observers, with a Eurocentric monarchy as their standard of governance, perceived a leader who acted in a specifically counselor or mediation capacity as being without power. Southern state courts also ruled in favor of removal. See, e.g., TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS (2002).
War in their efforts to acquire more Creek land. Most Mvskoke leaders refused to negotiate any additional land cessions, but the Georgia representatives approached William McIntosh and offered him a bribe in return for signing the treaty. McIntosh accepted the bribe on February 12, 1825, and signed the Treaty of Indian Springs, ceding all Creek lands in Alabama and Georgia in return for lands in Indian Territory. The Creek leaders deemed this treason, and McIntosh was executed on April 30, 1825. Followers of McIntosh who intended to abide by the terms of the 1825 treaty left for Indian Territory almost immediately. The majority of the Mvskoke people, however, remained on their ancestral lands.

The federal government, however, still expected all Mvskoke people to abide by the 1825 treaty regardless of the taint of confirmed bribery and deceit. In an effort to secure better terms, several chiefs traveled to Washington, D.C. to sign a superseding treaty in 1832. These leaders were under considerable pressure to sign another removal treaty, as Georgia and Alabama state officials were increasingly hostile to the continued presence of Indians. Under the terms of the 1832 treaty, the Mvskoke leaders agreed to sell all remaining lands in Alabama and move west to Indian Territory. The federal government promised to pay for removal and support in Indian Territory, but did not keep most of those promises. Significantly, the Removal Treaty did promise that the Mvskoke people would have the right to “perpetual self-government” in their new lands.

PART III: TRAGEDY: 1832-1867

A. Nene ‘Stemerketv–“The Road of Suffering”

The history of the Mvskoke Nene ‘Stemerketv (Road of Suffering) is critical to ap-

148. PERDUE & GREEN, supra note 65, at 85.
149. William McIntosh was to personally receive $25,000 to compensate him for ceded lands. Savage, supra note 125, at 39.
150. Treaty with the Creeks, Feb. 12, 1825, 7 Stat. 237; see also PERDUE & GREEN, supra note 65, at 85. The treaty was also signed by several other men who did not have the legal authority to sign such a treaty. Savage, supra note 125, at 39. The United States Senate ratified the treaty on March 7, 1825, despite Creek protests that McIntosh did not have the legal authority to sign the treaty. PERDUE & GREEN, supra note 66, at 85–86.
151. Governor Troup and the Georgia legislature threatened to invade the Creek Nation in response to McIntosh’s execution. President John Quincy Adams was instrumental in convincing Georgia not to attack the Creek Nation. PERDUE & GREEN, supra note 65, at 86. Tensions remained high with Alabama, as well. In 1832, the state of Alabama passed a law which prohibited the functioning of the Creek national government. Id.
152. “The first of the more than 700 Indians, Lower Creeks led by Roley McIntosh, reached Fort Gibson in Indian Territory in February, 1828, and by the following November the migration was complete.” Savage, supra note 125, at 40.
154. Removal of tribal people became a formal policy of most state governments throughout the south and particularly in Georgia, whose leaders wanted more land for a plantation-based economy. GARRISON, supra note 147, at 7. Eventually their policy was endorsed by federally elected officials.
155. Under the terms of the treaty, the federal government promised to pay for the costs of removal and one year of support in Indian Territory. However, another clause allowed some Creek citizens to remain in Alabama if they accepted an allotment in Alabama. Savage, supra note 125, at 41.
156. Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 366.
preciating the conditions under which Mvskoke people re-constituted their governments in Indian Territory in the 1830s. The forced removal of tribal nations from the southeastern United States has been described as a death march which “pales in comparison” to the “Bataan Death March.” The physical devastation has been well-documented; less so, the cultural and political extermination that the removal initiated. The series of events is known—inadequately—as “The Trail of Tears,” particularly the events that be-fell the neighboring Cherokee Nation. In all, there were dozens of trails, and while there were certainly tears, forced removal caused far more harm than mere sadness.

The removal, which was organized and executed by the U.S. military, resulted in major disruption to the Mvskoke government. Approximately 23,000 Mvskoke people were forced to travel to Indian Territory by foot and riverboats. Several thousand died along the way. Re-establishing Creek government in Indian Territory was complicated by many factors, not the least of which were the emotional, spiritual, and physical fatigue of dispossession and forced relocation. Moreover, Upper and Lower Creeks antipathies persisted during and after removal. Lower Creeks arrived in Indian Territory several years before the Upper Creeks and re-established their etvlwv system, clustered around the Arkansas river valley. They became known as Arkansas Creeks. In 1836,

157. We are grateful to Rosemary McCombs Maxey for explaining the Mvskoke terminology for the forced relocation that took place during this time period.


159. Some sources suggest that up to 40 percent of Mvskoke people died on the forced journey. See, e.g., TANIS C. THORNE, THE WORLD’S RICHEST INDIAN: THE SCANDAL OVER JACKSON BARNETT’S OIL FORTUNE 21 (2005) (asserting that 33-45 percent of Creek people died from disease, exposure, natural disasters, and starvation); see also ALEXANDER POSEY, CHINNUBBIE AND THE OWL 3 (2005). While many Mvskoke people stood their ground for several years, Jackson ordered the army to force remaining Mvskoke people to leave Alabama in 1836. GREEN, THE CREEKS, supra note 49, at 71-72, 81-83. William Savage contemplated:

Brigadier General Winfield Scott . . . with several thousand regular troops and volunteers, set out for Creek territory early in 1836. Scott’s army entrapped more than 14,500 Creeks. Approximately 2,500 were classified as hostiles, put in chains and marched overland to Indian Territory. The long march lasted through the winter of 1836-1837, and hundreds died along the way. The survivors reached Fort Gibson in the spring of 1837, but their arrival did not mark the end of hardship. Once in the territory, some 3,500 Creeks died of exposure or disease.


161. See Christopher D. Haveman, The Removal of the Creek Indians from the Southeast, 1825-1838 (Aug. 10, 2009) (dissertation, Auburn University), available at http://etd.auburn.edu/etd/handle/10415/2184; see also John Bartlett Meserve, Chief Pleasant Porter, 9 CHRONS. OF OKLA. 318 (1931). Indeed, many of the Lower Creeks had emigrated voluntarily and selected the best lands in Indian Territory for their settlements. When the Upper Creeks were forced to move by the military, they arrived to find the best lands already occupied. GREEN, THE CREEKS, supra note 49, at 44-47.

162. GREEN, THE CREEKS, supra note 49, at 86. We know that the Lower Creeks (now known as Arkansas Creeks) were functioning as a unified government, because its Chief petitioned the United States to remove missionaries in 1836. W. Edwin Derrick, Coweta Mission: Struggle for the Mind and Soul of the Creek Indians, RED RIVER VALLEY HIST. REV. 4 (Winter 1979).
the Upper Creeks arrived (largely involuntarily) in Indian Territory and began to try to piece together their society, settling in the Canadian river valley about fifty miles away from the Lower Creeks. They became known as Canadian Creeks. The Upper Creeks and Lower Creeks operated independently for several years. Because of the history of distrust and betrayal related to the bribery scandal and false treaty promises made by the U.S. government, the division between the two groups became even more volatile.

B. Indian Territory

During the remainder of nineteenth century, Mvskoke national experience was fraught with internal disputes, sometimes culminating in armed conflict. Mvskoke people engaged in at least three civil wars, between members favoring more progressive ways and those wanting to retain traditional culture and decentralized, evtvhv governments. It was only through perseverance that the Mvskoke people held on to political sovereignty. Mvskoke people managed to maintain their political identity, and yet adapt to changing circumstances that allowed Mvskoke self-governance to continue in spite of the profound trauma of removal. However, the split among the Creek people was profound, implicating existential questions about national identity and cultural assimilation.

Efforts to reunite a confederated government began in earnest within five years after removal, which was followed by the proposal of a written constitution. The Arkansas and Canadian Creeks formed a General Council via “pact” in 1840. The Council established a place for meetings on a hill about midway between the Arkansas and Canadian settlements, called Wekiwa Hulwe. The General Council met annually in a specially constructed council house to deliberate on national matters.

Chiefs, henehas [spiritual leaders], warriors, and medicine men, etc., still discharged their official duties according to the complicated system of precedents observed by each individual town. In their relations with the central government, they were loosely classified as (1) chiefs and (2) “lawmakers” or “councilors”. Each town had a chief, one or two second chiefs, and from four to forty-five lawmakers. The chiefs and one or two of the lawmakers represented the town in council.

163. Savage, supra note 125, at 42.
164. Id. at 41; see Fletcher, supra note 36, at 41–42 (explaining that “[f]ederal removal of Indian tribes to the west created horrific splits in tribal leadership systems”); see generally Gibson, supra note 71 (discussing how historic divisions were preserved); Moore, supra note 78.
165. Sidney L. Harrington, Crow Dog’s Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century 74, n.57 (1994) (noting that “no tribe fought internal wars as frequently as the Creeks did after contact with whites”).
166. See Donald L. Fixico, The Invasion of Indian Country in the Twentieth Century: American Capitalism and Tribal Natural Resources 5 (1998); see also Perdue & Green, supra note 65, at 102; Robbins, supra note 104.
167. Littlefield explains that “as the traditional red/white town division declined, it was replaced by one based on ethnic distinctions, though at times indistinctly defined.” Daniel F. Littlefield, Alex Posey: Creek Poet, Journalist, & Humorist 15 (1992).
168. Green, The Creek People, supra note 65, at 55; see also Perdue & Green, supra note 65, at 102.
170. Id. at 123.
171. Id.
The Council structure reflected an intentionally divided government, with a Principal Chief for the Arkansas Creeks and a Principal Chief for the Canadian Creeks, each chosen by the General Council. Most of the focus of the Council was on external relations, especially as it pertained to other neighboring tribal nations in Indian country.

However, this new Council also codified criminal laws into a national uniform code during this era. Some of this national legislation was designed to enforce social norms and created uniform Mvskoke cultural expectations. For example, an 1845 national law instituted a fine for failing to attend annual etvlwv ceremonies. In 1855, the Council established a national treasury which took control of most of the treaty annuities that had been distributed by mekkos of the various etvlwv governments. The Council created its own supremacy doctrine, declaring that an individual etvlwv was forbidden to suspend a law enacted by the Council.

In addition, the General Council took over “main judicial functions.” The Council set itself up as an appellate court, although most of the disputes were still resolved at the etvlwv level. The appellate process was separate from the legislative function. Debo explained, “[t]he creation of a separate ‘judicating commity’ illustrates a tendency the Council had shown since earliest times to divide according to the rank of its members into specialized functions.” The Council also dealt with matters of foreign policy, in particular, concerns about neighboring tribes. Meanwhile, American education continued to impress upon young Creeks the values of a centralized government. During this time period, the centralized government began to exercise unprecedented control over the etvlwv governments.

In 1859, the Arkansas Creek leaders actually proposed a written constitution that ignored the etvlwv governments as constituents, created a formal national court system, and required popular elections for national leadership positions. That constitution was


173. GREEN, THE CREEK PEOPLE, supra note 65, at 56. No written copies survive.

174. HARRING, supra note 165, at 76 (explaining that early Creek laws were “simple codifications of well-understood traditional laws”).

175. DEBO, supra note 55, at 126. The involvement of the national council in local, ceremonial matters was largely unprecedented. Traditionally, this kind of infraction would have been dealt with at the etvlwv level. Id. at 20–23.

176. Id. at 126.

177. Id.

178. Id. at 127.

179. Id. at 128.

180. Debo describes an 1842 event in which the Creeks met with Osage tribal leaders regarding horse stealing raids. The Osage leaders returned some stolen horses and promised to put an end to the raids. DEBO, supra note 55, at 134.

181. See generally Saunt, supra note 160.

182. Mvskoke people had adopted a fairly extensive criminal code by 1861. DEBO, supra note 55, at 125. In addition, civil laws were enacted to deal with increasingly complex legal disputes including horse sales, stray livestock, and crop damage. Id. Probate matters continued to be governed largely by traditional substantive law—for example, spouses did not inherit property, only children.

183. Id. at 124–25; Hargrett, supra note 103, at 78; Robbins, supra note 104. Several scholars reference an 1860 Constitution, although it is not clear that there were two separate documents. M. THOMAS BAILEY, RECONSTRUCTION IN INDIAN TERRITORY: A STORY OF AVARICE, DISCRIMINATION, AND OPPORTUNISM 14
never ratified. The Canadian Creeks (more traditional by nature) rejected the proposal because it did not provide for a role for the etvlwv governments.\footnote{184} A fundamental dispute about the future of the Creek Confederacy deepened, and it soon became entangled with the larger war beginning in the eastern United States.

C. United States Civil War

Mvskoke constitutional development stalled when all tribal nations in Indian Territory were swept up in the crisis of the U.S. Civil War.\footnote{185} United States troops withdrew in 1861, and confederate officials quickly moved in to formally occupy Indian Territory.\footnote{186} Many Arkansas Creek leaders entered into treaties with the Confederacy, but Mvskoke people were not unified.\footnote{187} The factionalism of the Arkansas and Canadian Creeks roughly mirrored the North and South factions of the United States, although clearly the differences preceded and transcended the conflict between the Union and Confederate states.\footnote{188} More assimilated Mvskoke people tended to align with the Confederacy, although a significant number of slave owners also sided with the Union.

The tension between the Loyal and Southern Creeks was as volatile and deadly as that between the Union and the Confederacy.\footnote{189} Powerful and influential Mvskoke leader Opothleyahola\footnote{190} advocated maintaining neutrality, but he was outnumbered by other leaders who wished to align with the Confederacy.\footnote{191} Opothleyahola’s people, known as the “Loyal Creeks,” eventually fled to Kansas seeking Union troop protection.\footnote{192} The “Southern Creeks,” who signed a Confederate treaty, maintained their form of government throughout the war.\footnote{193} The Southern Creeks even sent a delegate to the Confederate...
Congress.  

Meanwhile, Congress passed the Indian Appropriation Act of July 5, 1862, which authorized the President to unilaterally abrogate treaties with tribes who had rebelled against the United States. After extended post-war negotiation, Mvskoke leaders signed a new treaty with the United States on June 14, 1866. The treaty did not distinguish between Loyal and Confederate Creeks, and ultimately treated the entire tribe as rebels. The treaty required the Creeks to cede half of their land and to allow a railroad through their remaining territory. The treaty also approved the development of U.S. federal courts in Indian Territory, a provision which would later play a significant role in the near destruction of the Creek government. However, the United States reaffirmed some previous treaty obligations, including the promise that the United States “shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.” In short, the United States promised to respect the constitutional government of the Mvskoke people.

The cessions made in the 1866 treaty were the subject of bitter controversy among the Mvskoke people. As such, the political and cultural divisions between the Loyal Creeks and the Southern Creeks continued for many years. Meanwhile, the local governance structure continued to operate separately.  

signed by the Confederate Creeks is discussed in the Preamble of Treaty With the Creeks, June 14, 1866, 14 Stat. 785 (1866) (“[T]he Creeks made a treaty with the so-called Confederate States, on the tenth of July, one thousand eight hundred and sixty-one, whereby they ignored their allegiance to the United States”).

194.  DEBO, supra note 55, at 158.
197.  POSEY, supra note 159, at 5.
198.  Treaty with the Creeks, art. III, June 14, 1866, 14 Stat. 785 (“The Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain.”) (emphasis added). When white settlers began flooding into Indian Territory, the Creeks argued that this provision of the treaty had been violated.
199.  Treaty with the Creeks, art. X, ¶ 7, June 14, 1866, 14 Stat. 789; see infra Part VI.B.3 for a discussion of the destructive role of federal courts.
200.  Treaty with the Creeks, art. X, June 14, 1866, 14 Stat. 788 (1866). In 1878, Chief Coachman explained the typical Mvskoke perspective of the Treaty of 1866 during his annual address: We were also guaranteed the right of self Government, and full jurisdiction over all citizens [sic]—whether native or adopted; and with a solemn agreement; that no state or Territory should ever pass laws for our government, and that no portion of our Territory should ever be embraced or included within, or annexed to any Territory or State, nor should any part ever be erected into a Territory, without the full and free consent of the legislative authority of our nation.

Letter from Ward Coachman, Principal Chief of the Muskogee Nation, to the House of Kings and House of Warriors of The Muskogee Nation (Oct. 1878) (on file with the University of Oklahoma Library).
201.  MESERVE, supra note 188, at 401; W.W. Stuckey, Last Meeting of Creek Council, THE BIXBY BULLETIN (1907).
202.  DEBO, supra note 55, at 164.
PART IV: REBUILDING: 1867-1906

The Southern and Loyal Creeks began to work together to unify the nation, culminating in a February 1867 agreement to create a committee including representatives from both sides.203 This agreement laid the foundation for a unified national government. Indicative of the spirit of the times, a well-known Southern Creek leader, Samuel Checote, expressed his desire:

[T]hat the Muscogee people unite and live as one Nation and those who were North during the late war, were not to be called Northern peop[le] and those who were South, were not to be Southern people; in short there was to be no North and no South among the Muscogee people but peace and friendship.204

Other actions taken at the February 1867 meeting included a plan to elect a single principal chief in May and the appropriation of money for a new council house. Before the May election however, some foundational changes were made by a committee of reformists who sought to institute widespread assimilation through a written constitution.

A. 1867 Constitution

On October 12, 1867, a new constitution and code of laws for the “Muskogee Nation” was unanimously adopted.205 The 1867 Constitution has since been criticized and blamed for myriad later problems. The drafting appears to have been entirely controlled by the Southern Creeks, who generally favored assimilation with American laws.206 Poor drafting created some problems, but longstanding disputes between the Loyal Creeks and Southern Creeks stymied resolution of other tensions.207 Most problematic, the Constitution was modeled after the U.S. Constitution, “instead of being shaped out of Creek background or political consciousness.”208 The Constitution did provide for a bicameral...
legislature which honored the role of the etvlwv governments as constituents. White outsiders praised the 1867 Constitution as a hallmark of Creek civilization and frequently characterized opposition to the Constitution in racial terms as by “Full Bloods.” English speakers with American educations had the upper hand in drafting the 1867 Constitution and were sometimes accused of misleading the traditional people about the true nature of the legal changes. One leader of the more traditional Loyal Creeks, Oktarharsars Harjo (also known as Sands) stated, “I wanted to make a law and told them to fix the old Indian law, but they made another, and when we found it out, it was the same as the white man’s law.”

The 1867 Constitution in large part mirrored the language of the U.S. Constitution. First, the preamble was largely lifted from that of the United States: “In order to form a more perfect union, establish Justice, and secure to ourselves and our children the blessing of freedom and liberty, We the people of the Muskogee Nation do adopt this constitution.” Second, the Constitution created three separate branches of government. However, the Mvskoke Constitution provided very few enumerated powers. The Executive Branch was formalized as a branch of government with elected positions. The Principal Chief and Second Chief were to be popularly elected and hold office for four

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209. White, supra note 104. Felix Cohen, an Interior Department employee from 1933 to 1947 who has been referred to as the father of Federal Indian Law, dismissed such bicameral tribal legislatures as wasteful.

210. See generally Cohen, supra note 104. As a result, very few tribal constitutions adopted after 1934 had any kind of bicameral law-making entity. In Cohen’s haste to encourage the tribes to adopt unicameral legislatures as more efficient, the traditional role of the bicameral approach for many tribal cultures was overlooked.


212. A Constitution based on the U.S. model was an affront to Mvskoke people who maintained traditional value systems. Duane Champagne, Remaking Tribal Constitutions, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 11, 15 (Eric D. Lemont ed., 2006) ("the values underlying the U.S. Constitution often are at odds with the values and institutional relations of most Native traditions.").

213. DEBO, supra note 55, at 182.

214. See CONST. AND LAWS OF THE MUSKOGEE NATION (1867).

215. See generally CONST. AND LAWS OF THE MUSKOGEE NATION (1867).
years. Next, the Mvskoke Constitution vested “law-making” power in a National Council, a bi-cameral body in which each etvlwv was entitled to one delegate in the House of Kings and one delegate in the House of Warriors, with an additional delegate in the House of Warriors for every two hundred people. The members of the council were also elected for four-year terms. Although the Constitution called for these representatives to be elected by popular vote, the intent was that each etvlwv government would send its mekko to serve in the House of Kings. The House of Warriors was more of a typical representative government, with larger etvlwv governments being allowed more seats in the legislature than smaller etvlwv governments. All laws passed by the both houses of the Council were to be approved by the Principal Chief. The Principal Chief had veto power which could be overridden by a two-thirds vote of the Council.

The new structure was implemented swiftly. The first election governed by the new Constitution was held in November, less than one month after the Constitution was approved and most traditional people, largely made up of Loyal Creeks, were unable to attend and vote. The pro-assimilation movement, largely made up of Southern Creeks, was thus able to take political control of the new Nation. Samuel Checote, a primary architect of the constitution, became the first Principal Chief. In January 1868, the new court system was initiated in several districts. Later that year, a Council House was completed and the new seat of the nation was called Okmulgee. The first task of this legislative body was to work on criminal laws, civil and criminal procedure rules, the imposition of taxes on cattle drives through tribal lands, and the process for approving settlement by non-Natives. The final part of implementing the 1867 Constitution was

216. See id. at art. II, § 1. Voting was limited to male citizens over the age of 18. This was a change from earlier Mvskoke government schemes in which the Principal Chief would be selected by the Kings and Warriors.

217. See id. at art. I. Towns were also mentioned explicitly in the statutory law. For example, towns served as the polling places for national elections. See id. ch. IX, art. 1. Recall that the early “Grand Council” specified that Warriors would come from red clans and Kings would come from white clans. See supra note 108 and accompanying text. No specification of those roles was made in the text of the constitution. Thus it appears, at least from the text, that a traditional government structure was replaced by an American-style representative government.


219. The creation of new towns was prohibited by statutory law. CONST. AND LAWS OF THE MUSKOGEE NATION (1867) ch. 12. art. VIII.

220. Id. art. II, § 4.

221. Id.

222. Opler, supra note 62, at 166-70.

223. DEBO, supra note 55, at 184-85. Article III of the 1867 Constitution established the “high court” (a phrase that quickly fell into disuse in favor of “Supreme Court”). Section 1 provided the “supreme law-defining power in this nation shall be lodged in a high court.” CONST. AND LAWS OF THE MUSKOGEE NATION (1867) art. III, § 1. However, Section 2 limits the power of the high court to “all cases where the issue is for more than one hundred dollars ($100).” Id. § 2. The five judges of the Supreme Court were chosen by the National Council at its annual session. The judges had to be at least twenty-five years old and a “competent recognized citizen of the Muskogee [Creek] Nation.” Id. Article IV established six local judicial districts, each to be “furnished with a judge, a prosecuting attorney, and a company of light horsemen [law enforcement].” Id. art. IV, § 1. The constitution set forth the process for choosing judges, the power to summon juries, and other logistical matters. See id. art. IV. However, there was no codified appellate procedure. Indeed, a plain reading of the text would suggest that the Article IV trial courts had far more authority and power than the Article III high court. However, it appears that very few final decisions from these Article IV trial courts were appealed to the Supreme Court.

224. Okmulgee remains the capital of the Creek Nation today.

225. DEBO, supra note 55, at 188. The Council adopted both domestic and foreign laws. In addition to
the creation of the Supreme Court, which was also established without any participation from a majority of the Loyal Creek people.226

The Sands faction continued to work toward repealing the constitution and returning to the old laws:

[t]he Indians of the Anti-Government element looked upon the adoption of the white man’s institutions with disfavor. They seemed to desire the conditions of society and government that existed prior to the removal of the Creeks to Indian Territory, and this element followed those who would promise government of that nature.227

After an armed standoff, the two factions came together to resolve their differences under the guidance of the local Indian agent. In the end, most of the traditional people honored their promise to work within the auspices of the written Constitution of 1867.228

However, the truce was only temporary. The development of the 1867 Constitution and the subsequent schism was the first instance of what would become a recurring pattern over the next 150 years. Some elements of Mvskoke society have desired more cultural and political assimilation, while other elements of Mvskoke society retain their pre-colonial ways, operating a traditional etvlhsv government in the shadows.229 This shadow government became a key factor in the 1979 federal decision, upholding the 1867 Constitution. It is ironic that the shadow government of the traditional Creek would ultimately save the constitution written by the assimilationist Creeks. However, a “prolonged constitutional struggle” ensued.230 The Muscogee Supreme Court weighed in on several of these disputes.

B. Muscogee Supreme Court

This section examines three nineteenth century Muscogee Supreme Court opinions

providing appropriations for various government activities, such as education, the Council entered into international compacts agreements with other tribes. See, e.g., Ohland Morton, Reconstruction in the Creek Nation, 9 CHRONS. OF OKLA 171, 173 (1931).

226. DEBO, supra note 55, at 185. For example, one of the Loyal Creeks, Cotechoche, was offered a seat on the Supreme Court but declined to serve. Id.

227. BAILEY, supra note 183, at 118.

228. Green explains, “[a]fter every great civil conflict, it was characteristic of [Mvskoke] political maturity to reach some sort of agreement, to forgive one another and, to reunite.” GREEN, THE CREEK PEOPLE, supra note 65, at 76.

229. Sidney Harring explains, “[t]here can be no question that a traditional law, invisible to whites, functioned alongside the formal legal institutions of the Indian nations, a set of legal institutions adopted by the elected National Councils and based on American law.” Sidney L. Harring, Crazy Snake and the Creek Struggle for Sovereignty: The Native American Legal Culture and American Law, 34 AM. J. OF LEGAL HISTORY 365, 370 (1990).

230. See, e.g., 1870 REPORT OF THE COMM’R OF INDIAN AFFAIRS: CREEK AGENCY, INDIAN TERRITORY, at 2. There still exists some little trouble between the legal government and the Sands faction, which is being augmented by Sands visiting Washington and returning with long stories and promises, which are told as coining [sic] from the Government, and which create dissension and strife, resulting frequently in open rebellion against the constitutional authorities.
which helped to shape the constitutional structure of the nation.\textsuperscript{231} As noted earlier, the 1867 Constitution provided very few enumerated powers for the court systems. Two different articles established two separate court systems, and no appellate structure was articulated.\textsuperscript{232}

In addition to having no clear appellate authority, there was also no textual basis for judicial review, and thus no clear basis for overturning actions of the legislative and/or executive branches. The U.S. Supreme Court resolved this issue in 1803 when it decided \textit{Marbury v. Madison}.\textsuperscript{233} However, that decision pre-dated the Creek Constitution and was not binding precedent, as it emanated from a foreign government.\textsuperscript{234} Thus, the new Supreme Court encountered many of the same issues that arose in the early years of the United States, when inter-branch disputes threatened the constitutional structure. The major role of the Supreme Court in these disputes was to answer inquiries from the Principal Chief and/or the National Council on the constitutionality of existing or proposed legislation.\textsuperscript{235} Court records do not reveal any type of formal constitutional litigation—thus the constitutional jurisprudence from this time period emerges in the form of advisory opinions.\textsuperscript{236}

These three opinions analyzed below suggest that the Mvskoke judiciary, like the legislative and executive branches, was officially proceeding as an assimilated American-style government.\textsuperscript{237} While it is possible that the justices were considering traditional Mvskoke government principles, none of the opinions mentions the role of the \textit{etvwlv} governments, clans, or division of power between the red and white polities. The justices of the Supreme Court were clearly influenced by the dominant Anglo-American legal

\textsuperscript{231} The contemporary (post-1979) Muscogee (Creek) Nation Supreme Court sometimes cites to these opinions, even though they are cases interpreting the 1867 Constitution, which is no longer the governing document. \textit{See, e.g.,} Ellis v. Nat’l Council, 9 Okla. Trib. 190 (Sup. Ct. of the Muscogee (Creek) Nation 2006) (citing Muscogee Nation v. Tiger, 1 Mvs. L. Rep. 8 (1885)).

\textsuperscript{232} In fact, there was separate attorney admission for the district courts and the supreme courts. \textit{CONST. AND LAWS OF THE MUSKOGEE NATION} chapter XII, art. VII.

\textsuperscript{233} \textit{Marbury v. Madison}, 5 U.S. 137, 175 (1803).

\textsuperscript{234} \textit{Talton v. Mayes}, 163 U.S. 376 (1896).

\textsuperscript{235} In 1878, the Supreme Court ruled that it would not issue advisory opinions based on the petition of individuals, but only upon referral from the executive or legislative branch. \textit{Smith v. Adams}, 7 Mvs. L. Rep. 270 (Sup. Ct. of the Muskogee (Creek) Nation 1878).

\textsuperscript{236} While the United States Supreme Court does not issue so-called “advisory opinions” (\textit{see, e.g.}, \textit{Haysburg’s Case}, 2 U.S. 408 (1792)), the nineteenth century Muskogee Supreme Court did offer constitutional opinions on matters that were not in active, adversarial litigation.

\textsuperscript{237} Speeches given by Mvskoke (Creek) leaders in the same time period also reflect an understanding that the Mvskoke people were governed by an American-style three-branch government. For example, in 1883, Chief Perryman explained the limited role of the executive branch in his inaugural address, using language similar to that used to espouse the genius of the American Constitution:

\textit{If the genius of the Muskogee [Creek] government contemplated intrusting [sic] the care of their interests of the people to the Chief alone; if it were left to him alone to furnish the wisdom necessary to plan and develop the ways and means to secure the greatest good to the greatest number of [Creek] citizens, my case might indeed seem discouraging, but this is not so, and it is a matter for congratulation that we are all favored with a government republican in form, where no monarch rules, but where government is the immediate outgrowth of the people themselves.}

J.M. Perryman, Principal Chief of Muskogee Nation, Inaugural Message to the National Council (Dec. 5, 1883).
While the justices themselves did not have law degrees from American law schools, they probably interacted with Anglo-American lawyers and government agents frequently.

During the time period in which these decisions were written, the etvwlv governments continued to be the “most important unit of collective life” despite the fact that its power was not included in the written constitution and the Supreme Court never mentioned them in its constitutional law decisions from this era. Thus, the Supreme Court’s earliest opinions show a marked deviation between how Creek people traditionally governed themselves and how the new, assimilated Supreme Court was applying the American-style constitution. Arguably, the court sought to bolster its legitimacy in the eyes of American lawyers and outside forces. This poses the question of whether the court sacrificed its internal legitimacy and relevance of the court itself, or whether this was part of a more concerted effort to shield the internal politics of the Creek nation from outside interference. In these cases, the court demonstrated its independence from powerful interest groups within the tribe.

1. Permit cases (1875 and 1884)

The legislation which triggered the development of a Mvskoke judicial review principle relates to a set of facts implicating both cultural and legal assimilation. In handwritten advisory opinions, the Supreme Court twice declared acts of Council unconstitutional during the late nineteenth century. These opinions (one from 1875 and one from 1884) are the earliest examples of written Mvskoke constitutional jurisprudence.

The laws struck down by the Supreme Court were bans on most forms of white settlement and employment. Following the Civil War, illegal white settlers began flooding into Indian Territory, causing considerable anxiety for all tribal governments. It was difficult for tribal nations to control the behavior and settlement of squatters—
unscrupulous characters who sought to profit from perceived legal ambiguity in the settlement of tribal lands.\textsuperscript{247} Legislative efforts to protect Creek land from illegal settlement began in the first Council session, and remained a high priority in every recorded session of the National Council until 1906.\textsuperscript{248} The Council initially established a permit system to ensure that any white settlers or laborers were of noble character and had local references.\textsuperscript{249} It appears that this permit system did not address the crisis of illegal settlement.\textsuperscript{250} Because of continuous problems in controlling white men and a general distrust of the actions of white speculators and laborers, there was considerable pressure to completely outlaw all white labor.\textsuperscript{251} Thus, in 1875, the Council passed an act which repealed the permit system, and criminalized the employment of any “United States citizen” within Creek territory.\textsuperscript{252}

However, many wealthier Mvskoke ranchers sought to re-establish plantation-style agriculture and needed white laborers.\textsuperscript{253} These plaintiffs usually complained to the executive branch that the acts of Council violated the 1867 Constitution.\textsuperscript{254} This tension resulted in an extended debate about legislative authority, which lasted nearly nine (9) years.\textsuperscript{255} The debate began almost immediately. When Lochar Harjo was elected Principal Chief just a few months after the permit system was abolished (thus banning employment of U.S. citizens), he advocated for a reinstatement of the permit system.\textsuperscript{256} His inaugural address included strong language that the permit system should be re-established so that United States citizens could once again be employed in the nation.\textsuperscript{257} When the Council failed to act on Harjo’s proposal, he asked the Muscogee Supreme Court to review the constitutionality of the ban on white laborers.\textsuperscript{258}

The 1875 opinion is basically a line-by-line interpretation of the Muscogee Const-

\begin{itemize}
\item \textsuperscript{247} Atwood, supra note 159, at 46 (“[i]n twenty years, the white element composed two thirds of the population”); see also Bailey, supra note 183, at 124.
\item \textsuperscript{248} Harring, supra note 165, at 91 (describing these measures as “sound and sensible measures promoted by traditional Creeks.”).
\item \textsuperscript{249} Const. and Laws of the Muskogee Nation ch. 7, Art. 4, § 1 (1880). Even spouses and parents of Creek citizens were required to obtain a government permit to remain with their families. Id. at art. III, §§ 1-2 (statute indicates spouses and parents of Muskogee citizens would have a right to live in the nation, “provided that such person shall satisfy the Principal Chief as to their good character and honest intentions, and provided that the Principal Chief shall grant to such person permit to reside in the Nation during good behavior”).
\item \textsuperscript{250} Atwood, supra note 159, at 47 (describing an “era when men had only to pack up their belongings and move west to find free land waiting for them to cultivate.”).
\item \textsuperscript{251} See generally Atwood, supra note 159.
\item \textsuperscript{252} Const. and Laws of the Muskogee Nation ch. VII, art. VI, §§ 1-2. The penalty for violating this provision was a minimum five of fifty dollars. The law only applied to laborer or a herder. It did not apply to teachers, mechanics, physicians, or clerks. Id. at ch. VI, art. VI, § 3. This law would not have applied citizens of other tribes (such as neighboring Cherokee or Choctaw) unless they had become citizens of the United States.
\item \textsuperscript{253} Harring, supra note 165, at 91-92.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} On more than one occasion, the Council created an Inspector General position to investigate the status of all non-Creek citizens living or working on Creek lands. The Inspector General was authorized to banish those found to be in violation of the law. See, e.g., Kent Carter, The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914, at 42 (1999).
\item \textsuperscript{256} It doesn’t appear that anyone was arguing that the permit system itself should be abolished—even those who sought to employ white laborers were in agreement that registration was a necessity.
\item \textsuperscript{257} Lochar Harjo, Principal Chief of the Muskogee Nation, Inaugural Address (Dec. 6, 1875).
\item \textsuperscript{258} Debo, supra note 55, at 215.
\end{itemize}
tution preamble, which essentially mirrored that of the United States. From a modern perspective, it is curious that the opinion only reviews language from the preamble, and does not examine any other section of the constitution. There are at least two ways to interpret this choice. Perhaps, given the dearth of American-educated lawyers in the Creek nation, the Supreme Court focused on the concepts found in the more accessible language of the preamble rather than the legalistic language found in the body of the 1867 Constitution. Another possible reason that the court focused only on the preamble was that the Mvskoke approach to governance had been one that valued principles and philosophy over technicalities.

The court began by drawing a clear line between the word “justice” and the concept of “right” when it stated:

The first and second clauses of the preamble ‘In order to form a more perfect union and establish justice,’ asserts and proclaims civilization, and the privilege of exercising common right—[giving] rights and Justice to whom they are due—They speak of Justice, and what is Justice but an instrument commanding, extending and protecting that which is right.

Next, the court explained that an individual has a “common right” to say “who shall cultivate his soil or perform any kind of labor, for a fair compensation.” The permit legislation, which banned the employment of U.S. citizens, thus was “intruding upon this right.” Therefore, the court concluded that the legislation violated the second clause of the preamble (the Establishment of Justice Clause). The court did not stop with the Establishment of Justice Clause. Next, it considered the third clause: “Securing to ourselves and our children the blessings of freedom.” The court noted that “Freedom is liberty” and used the same logic it used in analyzing the word “Justice” to conclude that the Mvskoke people have liberty “to perform any duty that is our personal interest and advantage if the performance of such duty does not interfere with the rights and interests of others.”

This 1875 advisory opinion thus established individual liberties and rights as the

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259. See discussion of preamble, supra note 213 and accompanying text.
260. The preamble of the United States Constitution is typically not regarded as substantive law. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) (finding that “no power can be exerted to that end by the United States unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom.”); see also Milton Handler et al., A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation, 12 CARDOZO L. REV. 117 (1990); Dan Himmelfarb, The Preamble in Constitutional Interpretation, 2 SETON HALL CONST. L.J. 127 (1991). Other countries, however, do give some weight to the words in the preamble. See, e.g., Liav Orgad, The Preamble in Constitutional Interpretation, 8 INT’L J. CONST. L. 714 (2010).
261. DEBO, supra note 55, at 215.
262. Id.
263. Id.
264. Id. at 215-16.
265. Id. at 216.
266. Id.
centerpiece of the Muscogee Constitution. Concerns about the welfare of the Muscogee Nation as a collective is not apparent in this interpretive scheme. There is no mention of possible harm to the Nation as a result of intruders, even though that was what the debate really centered upon. In the end, the court referred to the rights of individuals to employ citizens of the United States as “sacred liberty” and found legislation to the contrary to be “unconstitutional, null [and] void and of no effect . . . .”267 The advisory opinion did not permanently halt the controversy over the employment of U.S. citizens. In 1878, a short civil war erupted within the Creek nation.268 Known as the “Green Peach” war, it was prompted by both political differences and frequent criminal acts committed by white men.269

A review of acts passed by the Council in the 1880s suggests that illegal settlers continued to use every mechanism—from brute force to fraud—to acquire land. The Council passed a multitude of laws to engage with the federal government to banish intruders permanently from Creek lands. As the situation became more desperate, the Creek Council again began to put new restrictions on white labor. A new permit system was passed in October 1884, and the Supreme Court was asked to weigh in on the controversial topic once again.270 However, the court offered the same analysis and ruling that had been established in the 1875 advisory opinion. The court began by exploring the genesis of the 1867 Constitution, which stated “[t]he Muscogees found that the rights of the people of other nations were carefully guarded by a paramount law called a constitution over which neither Chief nor council could pass and, which unlike everything the Muscogee [Creek] had, was an effective safeguard to the rights of the people.”271

Next, the court codified the doctrine of checks and balances by concluding that the constitution guarded against the violation of rights “by a reckless council or the usurpation of an ambitious Chief.”272 This is the doctrine of judicial review—the court can strike down unconstitutional laws and policies of the other two branches of government.273

Finally, the court definitely ruled that taxation and other laws which burdened Creek employers of U.S. citizens were unconstitutional: “Any law which prohibits our citizens from employing foreign laborers working and utilizing the natural resources of our country, or which by taxation or otherwise will so burden and obstruct the use of the same, must in the [judgment] of this court be [unconstitutional].”274

These permit opinions were also decided during the same period that the U.S. federal courts were beginning to establish the jurisprudence of substantive due process.275

267.  Id.
268.  Meserve, supra note 188, at 407-08.
269.  Id.
270.  Act of Oct. 24, 1884. The costs for obtaining a permit were steep. Permits could be granted for a maximum of one year, and the fee was $1.25 per month with a bond of $250.
271.  Advisory opinion on the 1884 Permit Law, 7 Mvskoke L. Rep. 320 (Sup. Ct. of the Muskogee Nation 1884).
272.  Id.
273.  Id.
274.  Id.
275.  ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 611 (2009). The line of eco-
While no American cases were cited by the Supreme Court, several significant American cases were issued in the same decade as the employment permit cases, and those cases emphasize the importance of keeping a check on government regulations that serve to limit activity of businesses. Neither of the opinions mentions nor endorses the role of etvlwv governments in making decisions about employment. It is possible that etvlwv leaders, who may not have considered the court opinion binding, continued to exercise decision-making about these kinds of issues at the local level.

2. Preferred Warrant Case (1895)

While the Supreme Court’s opinion in the 1895 Preferred Warrants case is not particularly complex, the underlying facts demonstrate how the internal struggles of the various government branches continued an internal struggle for power. This case implicated Article VIII, Section 2 of the 1867 Constitution, which stated, “[n]o laws taking effect upon things that occurred before the enactment of the law shall be passed.” The National Council passed an act in 1893 which gave its members holding warrants a priority, or preference in payments, thus making it more likely that council members would be paid if total funds were insufficient to make all investors whole. Acting Principal Chief, Edmond Bullet, referred the matter to the Supreme Court and in June 1895, Chief Justice W.F. Grayson issued an advisory opinion, which appeared in the “Muscogee Phoenix” newspaper.

This controversy arose during a particularly vulnerable economic time for all Mvskoke people. Oklahoma became a territory by act of Congress in 1890. The federal Indian policy of allotment was already underway in most of the United States, and the federal government was attempting to pass similar legislation to impact the Creek, Seminole, Chickasaw, Cherokee, and Choctaw Nations. Settlers and speculators understood that acquiring interest in large amounts of land would prove lucrative in the event of allotment. Wealthy Creek leaders, too, took advantage of this potential opportunity. Some council members apparently took advantage of this knowledge to pass a preferential law for themselves, but the executive and judicial branches managed to prevent its enforcement—the executive by querying the court, and the court by declaring the law unconstitutional.

The short opinion offers two different lines of analysis: First, the court said that the legislation was “violative of good faith” without mentioning a particular constitutional...
provision; 283 second, the law was found to contravene Article VIII, Section 2, because the preferred status of council members’ warrants was retroactive. 284 While there is no specific mention of traditional Mvskoke governing principles, the decision is likely consistent with traditional governance principles of fairness. 285 In the early days of the Creek Confederacy, etvwlv leaders would likely have been rebuked for an inequitable distribution of resources, especially if they kept wealth for themselves.

This era of constitutional jurisprudence came to an end with the Oklahoma Land Rush. 286 We will never know how the Creek Nation would have developed because the Supreme Court was abolished by the end of 1906, via federal law. 287 Despite the Creek Nation’s best efforts to maintain control over its treaty lands, the Nation fell victim to the power of the U.S. government and the economic power of industry. 288 United States expansion, bolstered by the manifest destiny philosophy, left the Creek Nation unable to sustain its resistance to exclusive authority over its land and people. 289

PART V: SURVIVAL: 1906-1976

As federal power intensified near the end of the nineteenth century, Mvskoke constitutional development stalled yet again. 290 The United States adopted a new policy in dealing with tribal governments that would see the Creek Nation’s reservation sold out from underneath them. 291 Allotment and statehood were new tools created by the United States to seize more land throughout the United States— with the ultimate goal to terminate collective land holdings and governments of tribal nations. 292 However, the 1867 Constitution never fully ceased to operate as a governing document for many Mvskoke people. This section explains how the 1867 Constitution survived this tumultuous period.

A. Allotment and Statehood

Allotment was a nationwide federal policy designed to extinguish tribal ties and create individual landowners of Indian people. 293 Unilateral legislation (which often abrogated clear treaty provisions) created various federal commissions, which assigned small, farm-sized plots of lands to individual Indians. 294 Whatever land remained after allotment was considered “surplus” and thus opened to non-Indian settlers. 295 The Gen-

283. Id.
284. Id.
285. Id.
286. “Indians in Indian Territory were already outnumbered nearly four to one in 1890; ten years later there were at least six non-Indians for every Indian.” SCOTT L. MALCOMSON, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 103-04 (2000).
287. Indian Territory Protection of the People Act, June 28, 1898, 30 Stat. 495.
288. See generally MALCOMSON, supra note 286.
289. Id.
290. See FIXICO, supra note 166, at 3.
291. See id.
292. Id.
The federal Allotment Act “had disastrous effects on tribes and reservation life.”296 The initial allotment laws specifically exempted the “Five Civilized Tribes” of Indian Territory.297 But only a few years passed before political pressure to dissolve the Five Civilized Tribes began.

Congress set the stage for usurpation of Indian Territory tribal lands and authority by establishing a new federal court in Indian Territory in 1889.298 Attorney Susan Work explains that congressional strategy took two forms: “First, threaten the tribes with abolition of their courts . . . or second, actually abolish the tribal governments, so that tribal consent to allotment would not be required.”299

The Muscogee Nation, along with the other southeastern tribal nations in Indian Territory, actively resisted this policy to prevent the tribal lands from being divided.300 In 1893, the National Council even ordered a new constitution to be drafted.301 The very first article of that draft constitution staked a strong constitutional claim against allotment:

The lands of the Muskogee [Creek] Nation shall remain the common property of the recognized citizens thereof share and share alike; and the national council may by law prescribe such regulations for the individual use thereof as it shall deem wise and proper; provided always, that no law or laws shall be enacted individualizing the fee in soil.302

For unknown reasons, the 1893 “New Constitution” was never ratified. However, the Creek Council formally opposed the policy of allotment through a series of resolutions.303 By 1896, the Council again completely banned white labor and non-Creek land ownership (despite two Supreme Court opinions finding that such laws were unconstitutional.)304 Clear desperation was evident by 1897, when Council passed a law requiring the Principal Chief to travel to Washington, D.C., and personally plead with the Secretary of Interior to remove “all intruders . . . at once.”305

In the meantime, Congress had grown impatient with the stalling actions of the In-
Creek and Chickasaw nations' and mandated allotment of the tribal lands. They required all tribal legislation to be approved by the President of the United States.

The Curtis Act offered lip service to tribal self-determination by allowing tribal governments to “negotiate” agreements for the disposal of tribal lands. However, the Creek Nation refused to make any agreement, and the implementation of the Curtis Act began in 1900. In 1901, principal Creek leaders caved under federal pressure and entered into an “agreement” which allowed the federal government to distribute Creek land. Other Creek leaders sought to prevent the destruction of tribal sovereignty and self-determination, but were stymied by federal opposition.

Meanwhile, the white population in Oklahoma Territory had been organizing its statehood petition for years. Creek leaders collaborated with four other tribes in an effort to avoid white-controlled statehood. The Creek Council had formally opposed statehood as early as 1893, but the last few months of effort involved a comprehensive attempt to petition for an Indian-controlled state.

The six months’ leeway between October 1905 and March 1906, did not, however, represent a bungled attempt at punctuality on their part. Instead, it was lead-time to coordinate the actions of four of the five “Civilized Tribes.” Further, “[j]oining together, the Muscogee, Cherokee, Choctaw, and Seminole undertook to form the Native State of Sequoyah, the name suggested by Chinnubbie Harjo in honor of the great Cher-

307. Id.; see also Morton, supra note 193.
309. See id. at 308.
310. At this point, the Department of Interior identified forty-four tribal towns and three freedman towns. SEVENTH ANNUAL REPORT OF THE COMM’N OF THE FIVE CIVILIZED TRIBES TO THE SEC’Y OF THE INTERIOR (1990), at 22-23.
311. Agreement of Dawes Comm’n with Muscogee or Creek Tribe of Indians, Mar. 1, 1901, 31 Stat. 861.
312. The Creek Nation formally opposed Oklahoma statehood via resolution. See The Creek Council Opposes Statehood, MUSCOGEE DEMOCRAT, Oct. 28, 1905.
313. See generally MALCOMSON, supra note 286.
314. Muscogee Chief Pleasant Porter was “chosen permanent chairman of the convention.” Meserve, supra note 161, at 332.
315. The November 1, 1893 Act was titled “Resolution to be Presented to the United States Commissioners” and read:

It is the sense of this body that any change to the present status of Indian Territory that would include the Muskogee Nation within the limits of an organized state of the American Union, would be contrary to the best interests of the citizens of the Nation, and any proposition of Congress to effect such a change or to include this Nation in any State or Territory wherein the present Territory of Oklahoma shall be a component part is greatly to be deprecated and resisted by all proper means.

ACTS AND RESOLUTIONS, supra note 301, at 12.
316. Mann, supra note 89, at 214.
beek syllabicist, Sequoyah.”

Congress refused to consider the statehood efforts of the Indian Territory tribal nations. Instead, Oklahoma became the forty-sixth state of the United States in 1907. The combination of the Curtis Act and Oklahoma statehood resulted in a wholesale liquidation of the Creek Nation (at least as recognized by the federal government). The demise of the “Five Tribes” was eulogized by sentimental journalists with headlines such as “The Five Civilized Tribes Passing Away”—thus solidifying the dominant society’s belief that the tribal governments had been dissolved. Indian people who cooperated with allotment were given 160 acres each, and the intent was for them to assimilate into mainstream American life, thus eliminating the need for a separate tribal government.

For at least a decade (one might argue longer), one faction of Mvskoke people openly defied the federal government and continued to operate as though the Curtis Act was non-binding. They also refused to accept allotments. This dissenting faction of traditional Mvskoke people, led by a man named Chitto Harjo (Crazy Snake), attempted to sustain the constitutional government despite the actions of the United States. Declaring the Curtis Act null and void for Creek people, since it violated the 1832 and 1866 treaties, the Snake faction simply reinstated the national Creek government.

The fact that the so-called “Snakes” adopted the same system of governance demonstrates that the 1832 and 1866 treaties, as well as the 1867 Constitution, continued to have value and meaning to many Mvskoke people. While popular press from the dominant culture characterized the Snake faction as typical violent Native outlaws, other historical sources suggest that the rebel government actually maintained peace and civility.

317. Id.
318. Stacy L. Leeds, Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah, 43 TULSA L. REV. 5, 6 (2007). See also MALCOMSON, supra note 286, at 105 (noting that “Sequoyah never really had a chance.”).
320. ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 31 (1968) (noting that “[t]he final surrender of the tribal institutions came only after prolonged negotiations, with the threat of force always in the background.”).
321. The Five Civilized Tribes Passing Away, FORT GIBSON DEMOCRAT, 1907.
322. Chief Porter explained: “Though our tribal organization is fading away, we will be transformed as a potent factor, an element within the body of Christian civilization. The philosophy of history of the future shall trace many principles of governments and institutions so dear to them, to those found among us.” Meserve, supra note 161, at 330.
324. Id. (claiming that the “Snake” movement maintained er/hwy governments for decades).
325. Atwood, supra note 159, at 48-49. Chitto Harjo had been a member of the House of Kings. He had fought for the Union during the Civil War. He also worked with an underground group known as the Four Mothers. Id. See also Kenneth W. McIntosh, Crazy Snake Uprising, OKLA. HISTORICAL SOCI'TY'S ENCYCLOPEDIA OF OKLA. HISTORY & CULTURE, available at http://digital.library.okstate.edu/encyclopedia/entries/C/CR004.html.
326. They “elected a principal chief, a second chief, a two-house legislature, and a court. They reenacted the old laws of the Creek Nation . . . and appointed a police force to enforce them.” Littlefield & Underhill, supra note 306, at 309.
327. Id. at 319-20.
As for the Snake faction in general, their meetings had been peaceful. They had never molested or intimidated any person who stopped or passed by during a council meeting. Chitto Harjo, while telling his people that their land would be restored to be held in common as in the old days of the Creek Nation, had nevertheless cautioned them not to violate the law.328

Harjo’s actions, of course, were in direct violation of the many agreements and concessions made by the elected Mvskoke leaders in the early twentieth century and his government officials were labeled traitors with Chief Porter requesting assistance from the U.S. military to quash the so-called rebellion.329 Many leaders of Harjo’s government were captured in 1901, and pled guilty in federal court to charges of seditious conspiracy.330 The pleading explains the perspective of Harjo’s group:

We state that as citizens of the Creek nation we have been opposed to the abolition of our courts by any act of congress and to any change in our tribal form of government, and that in October, 1900, we met together and agreed to form a government of our own, with a full complement of officers, including a judicial system, with a principal chief and a second chief and a cabinet composed of twelve members.331

After a sympathetic federal judge lectured the prisoners and then allowed them to return home (on condition that they abandon their efforts to organize), the Snakes simply continued to govern themselves.332 Harring explains “it is clear that the traditional councils simply moved from Hickory Ground and continued their government wherever they could meet.”333 Another armed stand-off occurred in 1909, which left the Harjo band scattered and weakened, although not altogether extinguished.334 Mvskoke people maintained their traditional town councils, even if they could not operate openly as a government.

Another allied group of people who resisted allotment, statehood, and the destruction of Creek government, was the Four Mothers Society, which included women from

328. Id. at 320.
329. D.C. Gideon, The Creeks, in HISTORY OF INDIAN TERRITORY 122-23 (1901) (reporting that “Governor Porter . . . appealed for protection to his people from these deluded Indians who were very threatening toward the members of the regular Porter council.”).
330. Chief Porter requested assistance from the U.S. military to squash the Crazy Snake uprising. “In response to this appeal, a troop of United States Cavalry arrived from Ft. Reno in January, 1901, and the leaders of the movement were placed under arrest.” Meserve, supra note 161, at 331.
331. Gideon, supra note 329, at 123.
332. Id. at 128-29.
333. Harring, supra note 229, at 378; see also Morton, supra note 225. Chitto Harjo also travelled to Washington, D.C. whenever possible, carrying tattered copies of the 1832 treaty, which he would present to U.S. Senators and even the President (to no avail). Atwood, supra note 159, at 52.
334. The “Snake Faction” continued to operate until as late as 1930. DEBO, supra note 320, at 295-96; see also Atwood, supra note 159, at 58.
the Creek, Cherokee, and Chickasaw nations. The Four Mothers Society continued to educate their community members about the nature of the governments of the tribal nations. Mvskoke literary scholar Craig Womack explains the significance of these efforts:

The Snake and Four Mothers position was that even if no one else on the face of the earth recognized Creek government, if, in fact, the only place Creek government was recognized was inside the imaginations of Creeks who refused the death of their dreams and the meaning of constitutional law in a civilized society, such an imagining was still of utmost importance to their future.

The successor groups of people sustained the 1867 Constitutional style government and local town councils throughout a tumultuous twentieth century during which their authority was challenged by both internal and external forces.

B. Twentieth Century Struggles

The Mvskoke constitutional system between 1906 and 1976 is not well-documented. Immediately before Oklahoma statehood, in 1906, Congress passed a law which acknowledged the continued existence of the five tribes (including the Creek Nation) until the allotment and property distribution process was completed. While the intent of Congress may have been to give Oklahoma authorities a few more years to complete the paperwork of termination, this law was the critical piece of evidence that led a federal court, sixty years later, to determine that the federal recognition of the 1867 Creek Constitution had never been extinguished. This was not the official position of the United States, however, and between 1906 and 1976, the U.S. government dealt with Mvskoke people as a former tribe without any constitutional authority or any right to self-determination. After statehood, the Creek Nation, like many tribes, continued to exist as a nation unto itself, although the United States only recognized the role of Principal Chief, who was appointed by the President of the United States.

Some documents exist in the Muscogee (Creek) Nation historical archives and various historical repositories throughout Oklahoma, but there are few formally-published Creek government documents from this time period. Local newspapers throughout Oklahoma document the story of a Creek Council which continued to function as a confeder-
ated government. A group known as the “Creek Convention” began meeting in 1909.\textsuperscript{342} The body was comprised of leaders from various etvlwv governments and continued to operate as a sovereign entity with domestic and foreign powers.\textsuperscript{343} Few records document the activities of this body, but the 1976 federal court decision describes the Convention as “the successor in function to the National Council.”\textsuperscript{344} Local newspapers document periodic meetings,\textsuperscript{345} but also reflect the dominant society’s view that the government had no legitimate power. The Council met in 1921 and elected a chief, although a regional newspaper declared the title to be “purely honorary”.\textsuperscript{346}

\textit{Etvlwv} governments continued to operate independently, but little documentation is publicly available.\textsuperscript{347} In 1936, Congress passed the Oklahoma Indian Welfare Act, which provided authorization for tribal governments in Oklahoma to establish constitutional governments, which would be recognized by the federal government.\textsuperscript{348} A local newspaper reported later that year that a constitutional committee of Creek people was meeting in Okmulgee, but it does not appear that a constitution was ultimately ratified.\textsuperscript{349} Three etvlwv governments (Thlopthlocco, Kialegee and Alabama-Quassarte) independently created constitutions in the 1930s and received the approval of the Secretary of the Interior.\textsuperscript{350} In recognizing these tribal towns, the federal government put its imprimatur on etvlwv rule, documenting the longevity of local governance among the Mvskoke people. Yet the larger Muscogee Nation itself remained essentially unrecognized by the federal government. In 1944, twenty-four town leaders convened to draft a new constitution, “but it was never approved by the Secretary of the Interior.”\textsuperscript{351} The Council continued to meet semi-regularly, although the federal government considered this Council as serving in a mere advisory capacity during the mid-twentieth century.\textsuperscript{352}

\begin{footnotes}
\item[343] For example, the Convention voted against war with Germany in World War I, and the tribal leaders encouraged Mvskoke men to avoid the draft. Moore, supra note 78, at 165. The New York Times reported that 1918 draft resistance in the Creek Nation was rooted in the “Crazy Snake” faction and “pro-German” propaganda. Creek Indians Rise Against the Draft: Three Whites Reported Killed in Oklahoma—Pro German Plot is Blamed, N.Y. TIMES, June 6, 1918.
\item[344] Harjo, 420 F. Supp. at 1135.
\item[345] See, e.g., Resolution: Mass Meeting, CHECOTAH CHAUTAUQUA, June 14, 1918.
\item[346] Creek Indians Meet and Elect Chief of Tribe, KOKOMO DAILY TRIBUNE, 1921.
\item[347] Moore notes that:
\begin{quote}
when the Creek Tribal Towns were queried in 1937 about whether they wished to be recognized and chartered by the United States government, the Mvskoke leaders responded that they considered it improper for a junior political entity to solicit a senior one, and offered instead to negotiate the recognition of the United States by the Tribal Towns.
\end{quote}
Moore, supra note 78, at 164.
\item[349] Raiford is Chairman of Indian Committee, THE INDIAN J., Sept. 3, 1936, at 1.
\item[350] The three tribal towns were able to use this status to secure farming leases from the United States in the 1940s. Indians Work on Big Farms, MIAMI DAILY NEWS RECORD, July 8, 1942, at 3.
\item[351] Phillip Deere, Notice!, THE INDIAN J., Mar. 2, 1972, at 1. This proposed constitution “essentially formalized the procedures which had evolved in the Convention for conducting the tribe’s business.” Harjo, 420 F. Supp. at 1137.
\item[352] Creek Indian Council Held at Okmulgee, 54 MCINTOSH COUNTY DEMOCRAT, Feb. 1, 1962, at 1. The Council was probably not recognized by all etvlwv governments. For example, only seventeen etvlwv sent rep-\
\end{footnotes}
In 1951, the newly-appointed Principal Chief, John Davis, drew a line in the sand when it came to the National Council. He refused to recognize the Council, declaring that “the credentials of the members of the newly-elected session of the Creek Indian Council or General Convention were improper or irregular.” Chief Davis denounced the 1944 Constitution and formed a new Creek Indian Council, filling positions with members he personally appointed from the various tribal towns. This act “caused a furor in the tribe.” Eventually the Council sued the Bureau of Indian Affairs in Oklahoma state court, seeking to set aside Chief Davis’ actions. The court sided with the Bureau of Indian Affairs (“BIA”) and found that the federally-appointed Principal Chief was “the sole embodiment of [tribal] authority.” The Oklahoma court declined to intervene on behalf of the Council, essentially ruling that Davis’ appointed body was federally authorized by virtue of Davis’ appointment. The implicit lesson to be drawn from these events is that the unofficial Council was the de facto government of the Creek towns, and the BIA and Davis went to great lengths to try to suppress it.

Despite the denouncements from the BIA and Davis, the elected Council continued to meet, holding regular sessions until sometime in the late 1950s, and “apparently consider[ing] itself the representative primarily of the full-blood and restricted Creeks.” After Chief Davis’ victory in state court, subsequent Councils were appointed by the Principal Chiefs and served in an advisory capacity.

At that point, the BIA decided to eliminate any further elections of the Principal Chief, leaving the position to be filled by appointment only at the will of the President of the United States. As the court in Harjo v. Kleppe tersely wrote, “the affairs of the Creeks were administered without even a token of democracy.” Popular elections were reinstated by Congress in 1970, and Claude Cox was elected in September, 1971. By that time, the unofficial tribal Council was meeting every two months.

354. Id.
355. Id.
356. Id.
357. Id. at 1139.
359. Id.
360. Id.
361. Id.
362. Id.
C. Federal Litigation

Nearly twenty years after the lawsuit against Principal Chief Davis, several representatives from various governments, unhappy that the federal government continued to treat Principal Chief Cox as the only leader of the Creek tribe, filed an action for declaratory and injunctive relief against the Secretary of the Interior, Thomas S. Kleppe, in federal district court. The members claimed that federal government officials were violating the 1867 Creek Constitution “by recognizing the Principal Chief as the sole embodiment of Creek government and allowing him to commit and spend tribal funds without the previous consent of the Creek National Council.” Resolution of the case necessarily required the federal court to declare whether the 1867 Constitution of the Creek Nation had been abolished by federal law. The case, therefore, was a critical turning point in constitutional history for the Creek Nation.

Harjo v. Kleppe is notable for the court’s impressive analysis of Mvskoke history and government as affected by U.S. federal law. The plaintiffs questioned “the legitimacy of Cox’s authority to disburse tribal funds and enter into contracts on behalf of the Creek Nation without the approval of the Council.” The plaintiffs argued that the 1867 Constitution gave “lawmaking power” to the National Council and put financial affairs under their control. Conclusively, “Congress, between 1866 and 1906, on several occasions specifically recognized the Creek National Council as the ultimate repository of power within the Creek national government.” Defendants argued that various statutes had “relieved the Creek Nation of sufficient authority that it has been rendered incompetent to handle the affairs of the tribe under the 1867 Constitution.” Furthermore, “Congress was aware of the fact that the affairs of the Five Civilized Tribes . . . were being administered by Principal Chiefs or Governors and therefore ratified this form of government when it enacted the Act of October 22, 1970, 84 Stat. 1091.”

The Kleppe court noted that “factional rivalries do appear to have played a significant part in motivating plaintiffs to file the suit.” Yet the “only relevant” issue for the court was whether the plaintiffs’ challenge consisted of “internal tribal issues” or if it arose under U.S. constitutional law. This case was not questioning “the propriety of tribal actions, but the legality of actions of federal officials pursuant to federal statutes,”

366. Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978) [hereinafter Andrus]. The initial lawsuit was filed against Secretary Kleppe, but by the end of the litigation, the named defendant was Secretary Andrus.
367. Id. at 950-51.
368. Id. at 953.
371. Id.
372. Id.
373. Id.
374. Id.
376. Id.
in dealing with only one branch of the tribal government. Ultimately the court agreed with the plaintiffs: the federal government had acted illegally through the “policy and practice of the Interior Department in recognizing and dealing with defendant Cox, Principal Chief of the Creek Nation, as the sole embodiment of the Creek tribal government, and “in refusing to recognize, facilitate or deal with a Creek National Council as a coordinate branch of the tribal government responsible for certain legislative and financial functions.”

The federal court provided historical examples of “factionalism,” or power struggles between rival parties, that were similar to what was at issue in that case and is at issue today. Thus, the Muscogee (Creek) Nation’s contemporary re-acknowledgement was rooted in the same kind of factionalism that had once served as the foundation for reciprocity and balance. The white and red sides of the Creek spirit were finally vindicated in the colonizer’s court. The Mvskoke people then had to re-establish a government structure that would meet the needs of a twentieth century tribal government, but philosophical differences made that very difficult.

PART VI: AUTONOMY: 1976–PRESENT

The opinion in Harjo v. Kleppe is unusual in that a federal judge mandated a tribal constitutional convention. Although the opinion recognized an ongoing effort on the part of Principal Chief Cox’s administration to draft a constitution for the Creek nation, the federal judge was concerned that the process had no input from the Creek political body as a whole. Therefore, the opinion required the creation of a five-member commission to draft a fresh document with more democratic input. During the next three years, Claude Cox’s administration advocated for a new constitution that would more closely mirror Oklahoma’s constitution as opposed to the 1867 model.

377. Id.
378. Id. at 1114 (emphasis added).
379. Id. at 1138.
380. The opinion is rather detailed in how the constitutional development process was to work. In addition to drafting the new constitution, the judge also ordered that the commission carry out “an educational program consisting at least of literature and public discussions held throughout the Creek nation, designed to make the vote a meaningful and fully informed one.” Harjo, 420 F. Supp. at 1146. A similar outcome played out for the Osage Nation twenty years later. Fletcher v. United States, 116 F.3d 1315 (10th Cir. 1997).
382. The irony of a federal judge ordering a tribal government to exercise certain kinds of self-governing authority was not lost on the judge. He noted that such an order “would be so similar to ordering the convening of a national council that the same problems discussed above in that regard are again applicable.” Id. at 1145. But Judge Bryant went on to explain that the federal court had a responsibility “to ensure that its order results in compliance with the law,” and that this order was the only way to do so. Id. at 1145-46.
383. Moore, supra note 78, at 184. One report said that the constitution “will be patterned after Oklahoma’s constitution.” Creek Chief Promoting Tribal Tourist Attraction Near City, McIntosh County Democrat, Dec. 14, 1972, at 1. Phillip Deere, a Mvskoke citizen who became nationally and internationally known as a spiritual leader for the American Indian Movement in the 1970s, was vocal in objecting to the further assimilation of Mvskoke national governing values that were proposed in the 1970s. In the debate about the 1970s Constitution, a report said that “Deer [sic] contends council members should represent the 44 ‘towns’ of the old nation.” Creek Tribal Constitution Draws Opposition, Joplin Globe, May 27, 1975, at B1.
384. Id. (quoting Claude Cox as saying “[t]he town setup is impractical. Thlopthlocco town owns property and is organized to some extent but it is torn like a wagon sheet by faction and strife. A big cumbersome coun-
constitution was approved by the commission in August 1979.\textsuperscript{385} Two months later, the new Muscogee (Creek) Nation constitution was ratified by a slim majority.\textsuperscript{386} However, participation was low, and only 30 percent of the “qualified voters” actually voted for the new constitution.\textsuperscript{387}

### A. 1979 Constitution

The 1979 Creek Constitution differs from the 1867 Muscogee Constitution in several significant ways. First, it defines citizenship based on federal government allotment rolls.\textsuperscript{388} Second, it creates a unicameral legislature with no role for etvlwv governments.\textsuperscript{389} Third, it sets minimum “blood quantums” for government officials.\textsuperscript{390}

Like the 1867 Constitution, the 1979 Constitution provides for three government branches. First, executive power rests with the Principal Chief.\textsuperscript{391} The Chief has enumerated powers, including agency appointment power and preparation of an annual budget.\textsuperscript{392} Yet, both of these functions require the Chief to act “[w]ith the advice and consent” of the Muscogee (Creek) National Council.\textsuperscript{393} The Muscogee (Creek) National Council is the tribe’s legislative body.\textsuperscript{394} This unicameral body makes policy, yet the Council must present each bill to the Chief for approval and signature or rejection, and “[e]very ordinance, order, resolution, or other act intended to reflect the policy” of the Nation must be signed by the Chief.\textsuperscript{395}

The structure of the National Council, now popularly elected by geographic division, disenfranchised the etvlwv governments as constitutional constituents, although Article II indicates that “[t]his Constitution shall not in any way abolish the rights and privileges of persons in the Muscogee (Creek) Nation to organize tribal towns or recognize its Muscogee (Creek) traditions.”\textsuperscript{396} The 1979 Constitution allows for certain Creek “chartered communities” to be affiliated and recognized by the national government.\textsuperscript{397}

Judicial power is vested in a tribal Supreme Court under Article VII, by far the shortest article in the Constitution.\textsuperscript{398} The six members of the Supreme Court are appointed by the Principal Chief and subject to majority approval by the Council.\textsuperscript{399} The
judiciary also includes “such inferior courts as the National Council may from time to time ordain.” The Muscogee Nation began developing its court system based on this constitution in 1982.

Meanwhile, many Mvskoke people continue to adhere to traditional etvlwv traditions, although the majority of Mvskoke people today identify as Christian. The etvlwv governments are now known as “ceremonial towns” in English, which would suggest that they lack any real political authority. However, individual etvlwv continue to exercise ceremonial and political authority today. “Each Ceremonial Ground has officers that correspond to a modern President or Governor, Legislator, Administrator, Judges and Soldiers or Policemen.”

B. Constitutional Litigation Post-1979

The current Muscogee (Creek) Supreme Court is creating its own body of constitutional jurisprudence, but has struggled to develop a jurisprudence which embraces traditional Mvskoke values. Some of the earliest decisions issued by the court show tremendous deference to the American legal system; the more recent cases show less reliance on American law and herald the emergence of a unique, twenty-first century Mvskoke constitutional jurisprudence. This time period also demonstrates the continuing internal struggles of Mvskoke (Creek) governance. Instead of Red/White, Upper/Lower or Canadian/Arkansas divisions, however, tension surfaces as inter-branch disputes.

The court has struggled with constitutional interpretation since the 1979 Constitution was ratified, issuing numerous decisions concerning power struggles between the other two branches of government. Major power struggles between the Principal Chief

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402. Moore, Government Pre-Columbian, supra note 94, at XII.
403. Because the Mvskoke (Creek) government is not an arm of the federal government, it is not bound by U.S. Supreme Court decisions. Talton v. Mayes, 163 U.S. 376, 383-85 (1896).
404. See, e.g., Alexander v. Gouge, 8 Okla. Trib. 1, 3 (Sup. Ct. of the Muscogee (Creek) Nation 2003); Burden v. Cox, 1 Okla. Trib. 247 (Muscogee (Creek) D. Ct. 1988). The 1979 Constitution allowed suits between tribal members to originate in the Supreme Court, which has meant that the justices are oftentimes making decisions that do not have the benefit of lower court review or jury trials. The Muscogee Supreme Court is certainly not the only tribal court to engage in judicial review of fundamental constitutional disputes over the past century. When constitutional cases are litigated in tribal court today, a tribal judiciary typically hears a case of first impression regarding the founding documents of the tribe. As such, they must necessarily engage in the interpretation of words or phrases in the tribal constitution that have never before been interpreted—there is no binding written precedent. Frank Pommersheim, Tribal Court Jurisprudence: A Snapshot from the Field, 21 VT. L. REV. 7, 9 (1996). Of course, any young court (including the early U.S. Supreme Court) struggles when there is no binding precedent. See, e.g., ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 5 (1968) (showing how Marshall cited little case precedent and focused his constitutional jurisprudence on the document’s common sense meanings). For example, many U.S. Supreme Court opinions have referenced English common law even though it has no binding authority on the United States. However, many tribal courts have applied American constitutional rulings as if they were binding precedent for the tribal government. This trend has raised concerns in the pro-sovereignty legal community, which seeks to connect tribal jurisprudence with a tribe’s history and traditions. Some tribal jurists have advanced the pro-sovereignty movement’s goals by explicitly rejecting Anglo-American cases when they conflict with tribal principles. See, e.g., Village of Mishongnovi v. Humeyestewa, 1 Am. Tribal L. 295, 301-02 (Hopi App. Ct. 1998) (finding that the “restrictive nature of Federal standing doctrine is antithetical to Hopi traditions of open dispute resolu-
and the National Council have arisen in the context of elections, procedural law-making, and contracts with private companies.\footnote{Pommersheim notes that such tribal court decisions “are fraught with possibilities for confrontation and government crisis.” Pommersheim, \textit{supra} note 404, at 14.}

Clearly, the court has a centuries-old system of tribal common law as a starting point in its journey to fashion a tribal-centric jurisprudence in harmony with its traditions and cosmogony. On one hand, many of the opinions mention traditional tribal governing principles. On the other hand, those same opinions tend to rely almost exclusively on federal substantive law in reaching its final decisions. In the following sections, we consider how the court is developing a constitutional jurisprudence blending these two worlds. In the earliest cases, the court exhibited tremendous deference to and admiration for the U.S. Supreme Court and federal law.\footnote{A Muscogee statute provides a hierarchy of reliance on external laws. \textit{MUSCOGEE (CREEK) NATION CODE ANN.} tit. 27, § 1-103. Courts are to apply first Mvskoke law. \textit{Id.} § 1-103(A). If Mvskoke law does not provide an answer to the legal question, the court may then apply federal law. \textit{Id.} § 1-103(B). If neither Mvskoke law nor federal law contains the answer, then the court may rely on Oklahoma law. \textit{Id.} § 1-103(C).}

1. Deference to American Law

In the first major constitutional decisions of its existence, the contemporary Muscogee Supreme Court relied almost exclusively on American constitutional legal principles. The first case, \textit{Beaver v. National Council}, was decided in 1986.\footnote{Beaver v. Muscogee (Creek) Nation Council, 1 Okla. Trib. 57 (S. Ct. of the Muscogee (Creek) Nation 1986).} This decision was followed four years later by another case, \textit{Preferred Management v. National Council}, in which the court continued to espouse American legal principles.\footnote{Preferred Mgmt. Corp. v. Nat’l Council of the Muscogee (Creek) Nation, 2 Okla. Trib. 37 (S. Ct. of the Muscogee (Creek) Nation 1990).} These decisions used basic American constitutional rules to decide cases rather than Muscogee common law. For example, in \textit{Beaver}, the court determined that a Council-ordered special election was unconstitutional, but did not rely on Mvskoke common law or history to reach that conclusion. The court lavished praise on American law and used the opinion to wax poetic about the superiority of the U.S. Constitution.\footnote{Beaver, 1 Okla. Trib. at 65. According to the court, the U.S. Constitution “is truly acclaimed to be the greatest literary achievement in civilized society; only the Holy Bible deserves status above it.” \textit{Id.} Id. at 62-63 (emphasis added).} Instead of looking to the Muscogee (Creek) Constitution and the tribe’s own historical government to determine whether the special election was constitutional, the court declared that the constitution was “patterned after the Constitution of the United States of America . . . [t]herefore, the decisions of the United States courts having to do with the historical separation of governmental powers shall apply with equal force to the government of the Muscogee (Creek) Nation.”\footnote{Id. at 62-63 (emphasis added).}
The ordinance allowing for a special election was invalid not because it was inconsistent with Muscogee traditional and governing philosophy, but because the U.S. Constitution and jurisprudence holds that the legislature may not act as a judiciary in matters of elections.

In 1990, the Muscogee Supreme Court went a step further in its deference to U.S. Supreme Court decisions. In Preferred Management Corp. v. National Council, the court was faced with a dispute that raised an important question about the court’s personal jurisdiction over non-tribal parties. As an initial matter, the defendant, Preferred Management, argued that the court did not have jurisdiction to hear the case because it was a non-tribal entity. The court rejected this argument by relying on three sources of law—two U.S. Supreme Court cases and one tribal ordinance. The emphasis on the Supreme Court opinions allowed the court to bypass crucial questions of inherent authority. Instead of using the opportunity to declare their inherent right to hear cases arising out of the tribal constitution, the court instead stated that its authority to hear the case originated from the U.S. Supreme Court decision in Montana v. United States, which was decided by the U.S. Supreme Court in 1981 (the Muscogee court refers to this decision as “controlling”). As almost an afterthought, the Muscogee court mentioned tribal statutory law, which authorized jurisdiction over non-Indians under conditions expressed in the Montana decision.

The court did some independent tribal constitutional analysis, but relied almost ex-
clusively on American legal authority. There was no discussion of whether an American conception of a checks and balances system was consistent with traditional government, though the court did note that maintaining three separate branches of government would be good for the Nation in the long run.

The dissenting opinion in *Preferred Management* is also worth mentioning for two reasons: First, it further demonstrates the deference the court was giving to the U.S. Constitution during this period. Dissenting Justice Howe noted that “[t]he Judicial Branch must not be made a political activist on either side of this conflict, for ours is only to faithfully adhere to the Constitution of the Creek Nation and Great American Constitution which governs us all.” The level of reverence given to the U.S. Constitution reflects the other decisions of this period. The second reason the dissent is worth noting is that Justice Howe accurately predicted future conflicts between the legislative and executive branches of the Muscogee government. Justice Howe believed that the National Council did not have standing to bring the suit in the first place. He wrote:

The National Council has the Constitutional right to hire independent counsel in the furtherance of its lawful duties, but that right is grossly abused and perverted when the National Council hires an attorney to bring lawsuits against members of its executive branch of government. To give legal standing to such an abuse is unconstitutional and invites chaos in tribal government.

His prediction of chaos in the tribal government would be borne out in the following years.

2. Transition Period: Less deference to American law

A series of decisions beginning in 1993 can be distinguished from the earlier period because the court provided some level of independent Mvskoke legal analysis. The 1993 case, *Courtwright v. July*, implicated concerns about the vertical separation of power.

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418. For example, one of Preferred Management’s arguments was that ruling in favor of the Council would eviscerate the power of the executive. *Id.* The court responded by noting that such a system works for other governing bodies, including the American government. *Id.* One practitioner journal article suggested that Preferred Management was the Muscogee Nation’s Marbury v. Madison moment. Ed Edmondson & June E. Edmondson, *The Creek Nation’s Marbury v. Madison: Preferred Management Corp. v. National Council of the Muscogee (Creek) Nation*, 38 Fed. B. News & J. 77 (1991). But, a closer reading of Preferred Mgmt. Corp. suggests otherwise. The court did not rely on inherent judicial review authority, but instead relied on federal case law to establish the authority of judicial review. See generally Preferred Mgmt. Corp., 2 Okla. Trib. 37.


420. It was not just the Muscogee (Creek) Supreme Court that was showing great esteem for federal law during this period. The Muskogee (Creek) District Court stated in one decision that “we are certainly more fortunate than the founders of the United States Constitution as we have their wisdom, knowledge, and experience to follow.” Cox v. Kamp, 5 Okla. Trib. 530, 535 (Muscogee (Creek) D. Ct. 1991). In addition, perhaps more telling, the district court stated, “[w]e cannot believe that the founders of this [Muscogee] Constitution intended it to be greatly different from the Constitution of the United States.” *Id.*


422. *Id.*

423. *Id.*

424. *Id.*
powers in the Creek Constitution, namely how the constitutions of statutorily-created “chartered communities” within the tribe would interact with the Muscogee Nation’s Constitution. The case involved a dispute over a voting amendment made to the Checotah Indian Community (“CIC”) Constitution. The voting amendment restricted CIC voters to those who had attended three or more community meetings. The Supreme Court ruled that the community constitutional amendment violated the laws of the Muscogee (Creek) Nation. Then, the court used what amounts to a strict scrutiny analysis of the amendment, holding that the Checotah Board of Directors did not have a compelling government interest in restricting the vote to persons who had attended three consecutive community meetings. There was no analysis of the Muscogee (Creek) Constitution, nor any mention of Muscogee (Creek) tradition. The decision largely follows similar analysis by federal courts and continues the pattern of using American law to interpret the Muscogee (Creek) Constitution. The decision does not include any reference to the traditional etvlwv structure, nor the history of the tribe as a confederated government.

However, there is an aspect of Courtwright that points to a new level of independent constitutional analysis by the court. Up until that point, the court had based its jurisdictional authority on outside rules and reasoning from federal law. In Courtwright, the court turned away from this jurisdictional reasoning and instead relied on its status as the

425. While the traditional etvlwv governments are not formal constitutional constituents under the 1979 Constitution, smaller groups of Mvskoke people have organized local entities until Title XI, Chapter 1 of the Muscogee Code. These “chartered communities” can then receive grants and other resources to establish local community centers and cultural meeting places. MUSCOGEE (CREEK) NATION CODE ANN. tit. 11, §§ 3-101-3-204. Chartered communities can draft constitutions, which must be approved by the Principal Chief. Id. at § 1-101.

426. Courtwright v. July, 3 Okla. Trib. 132, 138-40 (S. Ct. of the Muscogee (Creek) Nation 1993). In 1987, the CIC Constitution was amended by the Checotah Board of Directors to limit participation in community elections to members who attended three consecutive community meetings. Id. at 139-40. Vernon Courtwright, a member of CIC who was ineligible to vote under the amendment, brought suit in district court, claiming that the amendment was improperly passed and that the new law violated the Muscogee Constitution. Id. at 141. Courtwright lost his case in the Muscogee District Court, but the decision triggered enough concerns about constitutional order that the Supreme Court allowed the Attorney General to intervene and appeal the decision. Id.

427. Id. at 139-40.

428. Courtwright, 3 Okla. Trib. at 141. The court determined that the CIC amendment violated the Muscogee Constitution because it denied citizens their “inalienable rights to equal protection and due process of the laws.” Id. The court’s reasoning is a bit confusing. The court held first, that since the CIC Constitution required that amendments be passed by a majority vote of members and that no such vote had taken place, the amendment was invalid. Id. at 143. That holding is fairly straightforward, but the court expanded the holding to say that charter community constitutions could provide “more rights and liberties than the Creek Nation’s Constitution, but in no event may [they] grant less.” Id. at 143. Since the CIC constitutional amendment process only required a pure majority, it was more “restrictive” than the Muscogee Constitution which requires amendments to pass by a two-thirds vote. Id. at 143. The court also held that requiring a citizen to attend a certain number of meetings in order to have the right to vote denied Checotah members equal protection under the law. Id. at 146-47.

429. Id. at 146 (citing Reynolds v. Sims, 377 U.S. 533, 560 (1964)).

430. Id. at 144-45. Checotah’s vice chairman apparently testified that the purpose behind the CIC amendment was to “prevent a group of individuals from attending a community meeting and swaying the vote in the direction of the group.” Id. The court found such reasoning wholly unpersuasive, and also noted that “mandating attendance at a meeting . . . potentially interferes with other requirements of daily life such as attendance at one’s job, and attention to one’s family.” Id. at 146.
judicial branch of the government. The court stated:

A constitution, by its very nature, serves as a limitation on the power of
the government. Without judicial interpretation, however, it may be
construed to have as many different meanings as it has readers. Thus,
once a case or controversy concerning the meaning of a constitutional
provision reaches the courts, then the courts become the final arbiter as
to the constitutionality of governmental actions as they relate to the
constitution which empowers them. In other words, if the legislature
does not provide for firm constraints on official action, then courts
must do so. The question becomes, then, whether the amendment to Ar-
ticle V, Section 5 of the Checotah constitution offends the constitution-
al integrity of the Muscogee (Creek) Nation.

That was the first indication by the court that its power was established by the
1979 Constitution and the inherent authority of the tribe, not simply because the United
States conferred or recognized such power. Thus, 1993 marks the emergence of a con-
temporary Mvskoke-specific jurisprudence.

Five years after Courtwright, the Muscogee Supreme Court again distanced itself
from the early deference to U.S. opinions in what may be the only “Big Tobacco” tribal
case. The Muscogee (Creek) Nation brought suit against various large tobacco compa-
ies in tribal court using the same principles that many states had used in similar suits.
Not surprisingly, the tobacco companies argued that the Nation lacked personal jurisdic-
tion over their companies. Once the Muscogee Supreme Court reviewed the constitu-
tional question of standing, it dismissed the case.

Ironically, in deciding that the tribal court did not have jurisdiction over the toba-
cco companies under Creek and federal law, the court began to carve out more constituti-
onal independence, noting that “any federal authorities considered in this matter are
limited to review of their persuasive value.” Still, there was very little Mvskoke
(Creek) precedent upon which to rely, so nearly all of the cited law was federal.

By the early 2000s, the Muscogee Supreme Court had fielded fundamental que-
stions of separation of powers, jurisdiction over non-Mvskoke companies, and the rela-

431. Id. at 142-43.
432. Id.
433. See Shelly Grunsted, An Effective Smoke Screen?—The Muscogee (Creek) Nation’s Civil Complaint
434. Complaint, Muscogee (Creek) Nation v. Am. Tobacco Co., 5 Okla. Trib. 401 (D. Ct. of the Muscogee
(Creek) Nation 1998) (No. CV-97-27). Namely, the tribe alleged that the major tobacco companies had en-
gaged in numerous torts which resulted in harm to tribal citizens. Id. at 108-14.
435. See Brown & Williamson Tobacco Corp. v. Dist. Court, 5 Okla. Trib. 447 (Sup. Ct. of the Muscogee
(Creek) Nation 1998).
436. See id.
437. See id.
438. The court’s citations included: Mallard v. United States Dist. Court., 490 U.S. 296 (1989); Allied
Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980); United States v. Roberts, 88 F.3d 872 (10th Cir. 1996); In re
Kaiser Steel Corp., 911 F.2d. 380 (10th Cir. 1990).
tionship between the national government and chartered communities. Constitutional disagreements continued. A 2002 case involved an equal protection challenge to the tribal election laws.\(^{439}\) It was here that the court began to distinguish its view of jurisdiction from previous decisions, the first instance of the court really building on its own constitutional precedent.\(^{440}\) The court rejected the constitutional challenge, ruling that the statute met the rational basis standard.\(^{441}\)

Throughout the next few years, the court continued to incrementally turn to Mvskoke law in place of American law as internal constitutional disputes intensified.\(^{442}\) Two significant cases, *Ellis I* and *Ellis II*, involved disputes between the executive branch and the legislative branch.\(^{443}\) In both cases, the court ruled in favor of the executive branch, citing separation of powers as a crucial test of constitutionality.\(^{444}\) *Ellis I* began as a contract dispute.\(^{445}\) Essentially, the case was a question of whether or not the National Council could, through legislation, mandate that the Principal Chief act in a certain way with regard to gaming contracts.\(^{446}\) For the first time, the court analyzed only the Muscogee (Creek) Constitution language in coming to a decision.\(^{447}\) The court laid out a constitutional tenet: The Muscogee (Creek) Constitution must be strictly construed when the language is plain.\(^{448}\) In addition, the court made numerous references to its own previous decisions, recognizing tribal court precedent as the preeminent binding authority.\(^{449}\) Finally, the court made special note that the Muscogee (Creek) people have had a long history of practicing separation of powers.\(^{450}\)

One year after *Ellis I* was decided, the same parties were once again before the Supreme Court, this time because of salary changes instituted by the National Council.\(^{451}\) *Ellis II* suggests that the era of the court’s deference to American jurisprudence may be

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440. NCA-01-115 required that employees of the Nation take a leave of absence from work if they wanted to run for office within the Muscogee government. *Id.*
441. *Id.* While the Muscogee Constitution was determined to be the controlling law, there was no more mention of how a rational basis review was required by the constitution, or why the law violated it. The court only noted that the Muscogee Constitution was fashioned after the U.S. Constitution and has always supported the separation of powers. *Id.*
444. See *Ellis I*, at 196-99; *Ellis II*, at 5-11.
445. See *Ellis I*.
446. *Id.*
447. *Id.*
448. *Id.* at 198-99. Plain language is a fairly standard method of interpretation. An earlier district court opinion in an unrelated case had also adopted the “plain language” standard. *Burden v. Cox*, 1 Okla. Trib. 247, 254 (Muscogee (Creek) D. Ct. 1988); see also *Cox v. Kamp*, 5 Okla. Trib. 530, 534 (Muscogee (Creek) D. Ct. 1991 (agreeing that “the Constitution of the Muscogee (Creek) Nation must be strictly construed and interpreted”).
449. See *Ellis I*, at 196-202.
450. *Id.* At the same time, however, the court still relied heavily on federal law in coming to its decisions. Specifically, the court used a U.S. Supreme Court case to establish the plain language standard. *Id.* at 198 (citing *Mistretta v. United States*, 488 U.S. 361, 382 (1989)). The court also pointed out, once again, that the Muscogee Constitution was modeled after the U.S. Constitution and, therefore, the Muscogee courts should be consistent with the U.S. courts. See *Ellis I*, at 197-98.
coming to an end. The court found in favor of the Principal Chief and ruled that the National Council had overstepped its constitutional boundaries. In Ellis II, the court relied almost solely on the Muscogee Constitution and case law in reaching its decision.

3. Progressive Period – The Emergence of Independent Constitutional Jurisprudence

Ongoing constitutional strife and internal disputes culminated in a 2008 constitutional amendment process. During the 2008 convention, over one hundred constitutional amendments were proposed. Less than fifteen received enough votes from the convention to proceed to the national ballot, and twelve amendments appeared on the 2009 ballot. On November 7, 2009, Mvskoke (Creek) citizens voted to ratify eleven amendments to the 1979 Constitution. A significant dispute has arisen regarding both the substance of some of the amendments, as well as the procedural process used by the Constitutional Commission and the election board to circulate and certify the amendments.

The proposed amendments were controversial for a variety of reasons—but two in particular have become the subject of litigation in tribal courts. First, one amendment changed the original jurisdiction of the Supreme Court. The 1979 language allowed suits between tribal officials to originate in the Supreme Court. Amendment A114 required such suits to originate in district court. Second, amendment A67 reduced the size of the National Council—a controversial move that would necessarily mean that some council members may no longer have a seat in the government. Moreover, A67 changed the structure for voting for representatives to an “at-large” system as opposed to voting by geographic district.
After the constitutional amendment election, council member Robert Trepp (along with other members of the National Council) filed suit in the Supreme Court to enjoin implementation of the amendments, alleging that the certification of the amendments amounted to illegal changes to the constitution. 462 At first, the Supreme Court declined to hear the case, stating that it did not have original jurisdiction over the matter (pursuant to the new amendment) 463 and ordered Trepp to file his lawsuit in District Court. The Supreme Court furthered ordered the National Council to appoint a special judge to hear the case. 464

Over the next year, the National Council declined to confirm any of the Chief’s nominated special judges. 465 By December 2010, with the fate of the amendments hanging in the balances, the Supreme Court decided it had to rule on the matter. 466 The significance of this case is not only the fact that the court used the Muscogee (Creek) Constitution and court precedent to justify all its holdings, but that the Court also makes a point of distinguishing the Muscogee (Creek) Constitution from the U.S. Constitution.

In order to resolve the dispute, the court claimed original jurisdiction over the case, even though they had denied it previously in spite of Article XI. 467 Ultimately, the court determined that the Muscogee (Creek) Constitution and previous decisions by the court allowed a claim of original jurisdiction in the case, even though the district court had not had an opportunity to rule on the matter. 468 The court distinguished the Creek Constitution, explaining:

By way of comparison, the United States Supreme Court is limited in its exercise of original jurisdiction. (citation omitted). No such limitation on Supreme Court jurisdiction exists in this Nation’s Constitution. As such, the appropriate exercise of original jurisdiction is a matter of prudent judicial policy within the Muscogee (Creek) Nation framework. This Nation’s Constitution vests all judicial power within the Supreme Court and other inferior courts. As the Supreme Court is the ultimate authority within this Nation’s judiciary, this Court must be the final arbiter of when the exercise of original jurisdiction is proper. 469

462. Trepp v. Muscogee (Creek) Election Bd., No. SC 09-10 (S. Ct. of the Muscogee (Creek) Nation Dec. 3, 2010) (opinion and order). Amendment procedures for the constitution are outlined in Article XI. Muscogee (Creek) Const. art. XI.
464. Trepp v. Muscogee (Creek) Election Bd., No. SC 09-10, at 2 (Muscogee (Creek) Dec. 3, 2010) (opinion and order). District Court Judge Patrick Moore had been one of the Constitution Commission members, so he recused himself from hearing the case. Id. at 9 n.14. The court also issued a restraining order, preventing the Election Board from certifying the amendments until the matter was settled in court. Id. at 3.
465. Perhaps the council members believed that appointing a special judge to hear the case would be an acknowledgement of the district court’s authority, which in turn would mean acknowledging that the amendment process itself was legitimate.
466. Id. at 2.
467. Id.
469. Id. at 6 n.8.
The court in *Trepp* established that public policy concerns (such as confusion about the constitution) can create original jurisdiction.\footnote{470. *Id.* at 2.} The court ultimately dismissed Trepp’s suit on standing grounds.\footnote{471. *Id.* at 24.}

This is an important decision because it reflects the court’s official disapproval of the seemingly endless series of lawsuits between the legislative and executive branches.\footnote{472. *Id.* at 14-15 (describing it as “a never-ending parade of litigation”).} The court in *Trepp* referred to Justice Howe’s dissent in *Preferred Management* and held that the other branches of government only have limited ability to sue in court, and that “[t]he ultimate source of authority in Mvskoke government is the people.”\footnote{473. *Trepp* v. Muscogee (Creek) Election Board, No. SC 09-10, at 15 (S. Ct. of the Muscogee (Creek) Nation Dec. 3, 2010) (opinion and order).} That holding not only provides the court with a way to prevent further litigation, but also shows an analysis with an eye towards tribal tradition and values.\footnote{474. Codified Court rules indicate that “[a] judgment or decision of the Supreme Court requires the approval of a minimum of four (4) justices.” *MUSCOGEE (CREEK) NATION S. CT. R. APP. P. 22*. The majority in *Trepp* wrote a clarifying memo in order to explain that an abstaining judge is not automatically dissenting from the opinion. *Trepp* v. Muscogee (Creek) Election Board, No. SC 09-10 (S. Ct. of the Muscogee (Creek) Nation Dec. 3, 2010) (clarifying addendum to Dec. 3, 2010 majority opinion). Therefore, from the court’s perspective, the majority opinion stood and the amendments were ratified by the Nation.} Only three non-Mvskoke cases are cited in the opinion.

*Trepp*, then, is not so much a turning point in Mvskoke constitutional jurisprudence as it is the culmination of a movement by the court towards self-determination. In particular, the analysis throughout the clarifying memo relies on the Mvskoke Constitution and the court’s own precedent. The court went from going out of its way to defer to the U.S. Constitution to explaining why the Mvskoke Constitution provides the court with different roles and powers. It is a significant change in court policy and provides a new foundation from which a unique Mvskoke jurisprudence can continue to grow.

The *Trepp* decision also raised a significant procedural question for the court. Only five justices participated in the opinion (with three writing for the majority and two dissenting); there was one abstaining justice.\footnote{475. *See Trepp* v. Muscogee (Creek) Election Board, No. SC 09-10 (S. Ct. of the Muscogee (Creek) Nation Dec. 3, 2010) (clarifying addendum to Dec. 3, 2010 majority opinion).} The dissenters issued a memorandum which claimed that the abstaining judge should be considered a dissenter and therefore the judgment was tied three to three.\footnote{476. *Id.* (response to the Dec. 3rd filing by Justice Jonodev Chaudhuri, Justice Amos Mcnac, and Justice Houston Shirley).} Statutory law says that “a judgment or decision of the Supreme Court requires the approval of a minimum of four (4) justices.”\footnote{477. *MUSCOGEE (CREEK) NATION S. CT. R. APP. P. 22*.} The majority in *Trepp* wrote a clarifying memo in order to explain that an abstaining judge is not automatically dissenting from the opinion.\footnote{478. *Trepp*, No. SC 09-10 (clarifying addendum to Dec. 3, 2010 majority opinion).}

Today, the Muscogee (Creek) Nation continues to struggle with fundamental constitutional questions. Recently, parties who are unsatisfied with decisions in tribal court
have begun to appeal intra-tribal matters to federal courts in Oklahoma. This is a troubling development, as federal oversight has historically been a grossly ineffective means of furthering Mvskoke self-governance. One of the founding principles of Muscogee self-governance is enshrined in the 1979 Preamble—namely, the people shall aspire to “strengthen and preserve self and local Government.” Federal court intervention has the potential to steer the Nation away from self-determination.

One of the virtues that is often mentioned when American-style separation of powers is praised is that it makes government more insulated from tyranny. It must be remembered that the American Constitution was drafted in the aftermath of a revolution, and so independence was the primary motivation. Many tribal constitutions were drafted in the aftermath of removal and allotment, so survival was the primary motivation. If the Mvskoke government is arguably insulating itself from tyranny through the development of constitutional law, the tyranny largely originates from the United States. Thus, turning to the federal courts to resolve Mvskoke disputes can be said to be a fundamentally unconstitutional strategy. The better strategy, one more consistent with self-determination, is to cultivate Mvskoke-centric jurisprudence.

CONCLUSION: THE CONSTITUTIONAL FUTUREOF THE MUSCOGEE (CREEK) NATION

A perfect replication of the intricate, interconnected governments found in pre-removal, traditional Mvskoke government is unlikely to emerge from this twenty-first body politic. Such a pure restoration would be impractical; only a few tribal towns remain intact, and most of those towns exercise only ceremonial authority in their respective communities. Moreover, many of the specific governmental styles of the pre-1500s era would likely not be well-adapted for contemporary culture and technology. Even had the Mvskoke not been forced to change its governing bodies and legal structures, it would have gone through its own internal structural changes to respond to changing times. However, many themes and tenets of core traditional Mvskoke values remain and must continue to be cultivated in the jurisprudence of the Court. The Court itself has acknowledged as much: “For our tribal society to function properly, we must honor and respect the respective roles of others. Our Constitution is based on our societal values, as a people, and that interconnectedness lays out the separate powers and duties of the various branches of government.”

Cultivating and nurturing Mvskoke jurisprudence can be done in a variety of ways. For example, where relevant, acknowledging and exploring the painful twentieth century

480. MUSCOGEE (CREEK) CONST. pmbl.
486. Ellis II, at 19.
history of the Nation might establish more credibility among both the litigants and the citizens at large. More references to Mvskoke language and culture would amplify efforts to revitalize the language and instill pride in the youth.\textsuperscript{484} The legal history of the Nation should be documented, taught, and analyzed by citizen-scholars. Collaborations between language, culture, and law have been promising developments for many tribal nations in recent years.\textsuperscript{485} The government founded and now operates the College of the Muscogee Nation, which opened in 2004.\textsuperscript{486} One of the missions of the College is to “strengthen the sovereignty of the Muscogee Nation,” a mission consistent with the very essence of tribal court development.\textsuperscript{487} The College will continue to be an ideal forum for continuing and formalizing Mvskoke-centric intellectual dialogue about politics, law, and sovereignty.

The fact that Mvskoke governance continues today in spite of many attempts by European and American forces to annihilate it is a testament to the strength and adaptability of Mvskoke political thought and constitutional principles. The history of Mvskoke leadership demonstrates the ability of Mvskoke people to advance fundamental principles even in times of great chaos and change. Moving forward, then, the independence of the court from both local politics and federal oversight is vital. The line of cases decided by the court in the coming decades will no doubt have a profound impact on the future of the Nation.\textsuperscript{488} As the court presses forward, it will continue to add to the body of case law that is Mvskoke jurisprudence, a contribution to what U.S. Supreme Court Justice Louis Brandeis called “laboratories of democracy.” Most important, these cases will both reflect and stimulate an ever-evolving conversation about the way Mvskoke people govern themselves and relate to one another.

\textsuperscript{487} Title 27, Section 1-104 explicitly authorizes Mvskoke judges to request the advice of counselors "familiar with . . . [Mvskoke] customs and usages" when deciding issues of Mvskoke common law. MUSCOGEE (CREEK) NATION CODE ANN. tit. 27, § 1-104.

\textsuperscript{488} See, e.g., Gerald Vizenor, Constitutional Consent: Native Traditions and Parchment Rights, in THE WHITE EARTH NATION: RATIFICATION OF A NATIVE DEMOCRATIC CONSTITUTION 9, 62 (2012) (noting that, “political resistance to the power of executive councils has inspired many Natives to renounce federal corporate constitutions and create by formal conventions more enlightened democratic systems of Native governance”).


\textsuperscript{488} A new constitutional reform effort may be initiated. See MUSCOGEE (CREEK) NATION STRATEGIC PLAN 36-37 (2012) (listing one of the objectives for “Exhibiting Sovereignty” as “[x]ponsor public input into a review and update of the Muscogee Nation Constitution”).