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MUSCOGEE CONSTITUTIONAL JURISPRUDENCE: VHAKV EM PVTAKV¹ (THE CARPET UNDER THE LAW)

Sarah Deer * and Cecilia Knapp **

PART I. INTRODUCTION

In 1974, a group of Mvskoke² citizens from Oklahoma sued the federal government in federal court.³ 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.⁴

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-

1. *Vhkv em pvtakv* is the Mvskoke phrase most often used to describe the written constitution. *See infra* note 20 and accompanying text.

* Associate Professor, William Mitchell College of Law, J.D., University of Kansas, 1999. Mvto (thank you) to Rosemary McCombs Maxey, Ted Isham, Marcus Briggs-Cloud, Colette Routel, Rachel Kowarski, Doug Heidenreich, Patrick Moore, Melissa Tatum, Frank Pommersheim, Mike Steenson, David Prince, Raleigh Levine, Niels Schaumann, Anna Light, Bethany Berger and Cal Bonde. While this co-author is a citizen of the Muscogee (Creek) Nation, the opinions expressed in this article are her own and do not necessarily reflect the views of the Nation or any of its officers or employers.

** J.D., 2013, William Mitchell College of Law.

2. “Creek,” “Muscogee,” and “Mvskoke” will be used interchangeably throughout this paper to refer to the same nation of people. Mvskoke (pronounced muhs-GO-ghee) is the traditional word used to describe the largest cultural group in the Creek Nation. There have been a variety of spellings of Mvskoke over the last two centuries, including Muscogee, Muskogee, Muskoke, Maskoki and Maskoke. *E.g.*, JACK B. MARTIN & MARGARET MCKANE MAULDIN, A DICTIONARY OF CREEK/MUSKOGEE xiii (2000). Mvskoke is the preferred spelling for many modern scholars and linguists. The spelling originates from a version of the alphabet adopted by the Muscogee (Creek) Tribe in the late 1800s. PAMELA INNES ET AL., BEGINNING CREEK: MVSOKOKE EMPONVKV 3 (2004). The official federally recognized name of the tribal government described in this article is Muscogee (Creek) Nation. However, some government offices are beginning to embrace the Mvskoke nomenclature in various significant publications (including the Supreme Court’s commissioned reporter). This return to early spelling is typical of tribal nations engaged in cultural and linguistic revitalization. The word “Creek” originated with the term the English used to identify the “Muskogean group with whom they were first in contact, the Indians who lived on or near the upper Ocmulgee, i.e., ‘Ochese on Creek.’” Verner W. Crane, *The Origin of the Name of the Creek Indians*, 5 MISS. VALLEY HIST. REV. 339, 342 (1918).

3. Harjo v. Kleppe, 420 F. Supp. 1110 (D.C. 1976). Harjo is a common Mvskoke surname (akin to the American “Smith” or “Jones”) and will appear frequently in this article. The name is sometimes translated into English as “crazy.” A more literal translation might be “recklessly brave.”

4. The United States argued that the Mvskoke right to self-government had been extinguished by federal statute during the “allotment” era of Federal Indian law, when the federal government decided to compartmentalize tribal lands, distribute individual fee deeds to tribal members, and dissolve the tribal governments. *Id.* at 1118.

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,⁵ which dates back at least 500 years. After reviewing this history, the court labeled the federal policies of the United States as “bureaucratic imperialism.”⁶ The court found that the “vigor and liveliness of Creek political life,”⁷ 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.⁸ 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.⁹ We focus on the history and structure of the constitutional government of the Muscogee (Creek) Nation of Oklahoma.¹⁰ 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,¹¹ 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.¹² 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.”¹³ 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

5. *Id.* at 1118-42.

6. *Id.* at 1130.

7. *Id.* at 1138.

8. *Harjo*, 420 F. Supp. at 1138.

9. While we have researched the archival record of early Mvskoke law extensively, it is important to be sensitive to the potential for observer bias, especially when relying on non-Native descriptions of tribal life.

10. Muscogee (Creek) Nation is the official name of the federally recognized tribal government headquartered in Okmulgee, Oklahoma. There are four other federally recognized tribal nations that share a common origin: The Poarch Band of Creek Indians (Alabama), the Seminole Nation of Oklahoma, the Seminole Nation of Florida, and the Miccosukee Tribe (Florida). There are also “unrecognized” tribal nations that share a common heritage with the Muscogee (Creek) Nation.

11. See discussion *infra* Part II.B.2 for a description of *etvlwv* structure.

12. TAIAlAKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 5 (1999).

13. *Id.* Many tribal nations are “looking to the revitalization of Indigenous common law.” Joseph Thomas Flies-Away et al., *Native Nation Courts: Key Players in Nation Rebuilding*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 115, 127 (Miriam Jorgensen ed., 2007).

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).

15. *Alexander v. Gouge*, 8 Okla. Trib. 1, 3 (Sup. Ct. of the Muscogee (Creek) Nation 2003).

16. Patrice Kunesh explains, "[a]s complex social systems, tribes have survived war, destitution, and denigration and have continually reconstructed their course and intention for the future." Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J.L. & PUB. POL'Y 8, 13 (2009).

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").

PART II: FOUNDATION: BCE-1832

The Mvskoke people ratified the first recorded *written* constitution in 1867.¹⁸ 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.”¹⁹ In the Mvskoke language, the constitution is called *vhakv em pvtakv* or “the carpet under the law.”²⁰ 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.²¹

Political values in many cultures can be traced to pre-written symbols and myths.²² 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.²³ 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.²⁴ In this creation

18. See *infra* Part IV.A for a discussion of 1867 Constitution.

19. Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 184, 187 (Eric D. Lemont ed., 2006).

20. The authors are indebted to Rosemary McCombs Maxey for helping us understand the literal translation of the phrase.

21. See Jane Pek, *Things Better Left Unwritten?: Constitutional Text and the Rule of Law*, 83 N.Y.U. L. REV. 1979, 2002–03 (2008) (“Core parts of the unwritten constitution are rooted in custom, tradition, and precedent. Conventions, which have a much more significant role to play in an unwritten constitution, are predicated upon obedience and obligation—qualities that only become apparent over time and with consistent application of the convention in question”).

22. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 6 (1988) (“Essentially a people share symbols and myths that provide meaning to their existence together and link them to some transcendent order. They can thus act together and answer . . . basic political questions”).

23. Eric D. Lemont, *Introduction*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 1, 4 (Eric D. Lemont ed., 2006).

24. 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. See, e.g., Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, TRIBAL L.J. (2009), <http://tlj.unm.edu/tribal-law->

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.²⁵ The more contemplative White Twin went one way, while the more aggressive and active Red Twin went another way.²⁶ Each twin met groups of people who became their followers.²⁷ After reuniting, the twins decided to bring the two groups, or worlds, together.²⁸ “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.”²⁹ “Together, they could be awesome.”³⁰

To join the peoples, Red Twin lobbied for a fight, whereas White Twin preferred to talk things through in a council-like setting.³¹ Ultimately, the twins decided to avoid war and instead have the peoples play the “little brother of war,” a stick ball game.³² 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.³³ 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.”³⁴ 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.”³⁵

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.

journal/articles/volume_1/zuni_cruz/index.php.

25. JEAN CHAUDHURI & JOYOTPAUL CHAUDHURI, A SACRED PATH: THE WAY OF THE MUSCOGEE CREEKS 31 (2001).

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.

Supreme Court



Muscogee (Creek) Nation

B. 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 *etvlwv* (town)

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.

39. George E. Lankford, *Red and White: Some Reflections on Southeastern Symbolism*, 50 *S. FOLKLORE* 53, 54 (1993).

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-

40. Ross Hassig, *Internal Conflict in the Creek War of 1813-1814*, 21 *ETHNOHISTORY* 251, 252 (1974).

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.

45. “Factionalism . . . was encouraged rather than discouraged.” STEVEN C. HAHN, *THE INVENTION OF THE CREEK NATION, 1670-1763*, at 95 (2004).

46. Corkran identifies three key factors in the power structure of this model—age/service; heredity; and service to the people. DAVID H. CORKRAN, *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.⁵¹ 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.⁵² The interrelationships and kinship networks established in the clan system served as an early form of political checks and balances in Mvskoke society.⁵³ The blood relationship that ties members of a clan together was stronger than any other form of affiliation or membership.⁵⁴ Traditionally, relationships between clans were strictly regulated.⁵⁵ Clans also created extended kin networks that would be recognized wherever an individual traveled.⁵⁶ 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.⁵⁷ The basic domestic unit was known as a *huti*, which included not only nuclear family members, but also extended kinship.⁵⁸ 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 (Hotvlkvke), Alligator (Hvlpvtvlke), Bear (Nokosvlke), Tiger (Kaccvlke), Deer (Ecovlke), Sweet Potato (Vhvlkvvlke), Raccoon (Wotkvvlke), 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 MUSKOGEEES’ 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*.

57. Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J.L. REFORM. 277, 297 (1993):

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.”

58. ROBBIE ETHRIDGE, CREEK COUNTRY: THE CREEK INDIANS AND THEIR WORLD 74 (2003).

pre-constitutional era.

2. *Etvlvw* (Town)

After clan identity, the *etvlwv*⁵⁹ was historically the most “potent political identifier” in Mvskoke culture.⁶⁰ Each *etvlwv* was made up of twenty-five to one hundred houses nearly always geographically placed near a river or a stream.⁶¹ “[H]ereditary and traditions” united the people of an *etvlwv*.⁶² 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.⁶³ These governments were not comprised of “insulated compartments”; nor did they have a “permanent, separate bureaucracy.”⁶⁴ 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*.⁶⁵ A typical *etvlwv* also has three tiers of male leaders or advisors, which traditionally performed more legislative functions.⁶⁶ Historically, the *mekko* would select a *tvstvvnke* (war chief) from one

59. Pronounced DULL-wah (leading e is silent). Alternate spelling includes *tvlvw*, *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. *Mvto* to Marcus Briggs-Cloud for providing more context for this word.

60. ANGELA PULLEY HUDSON, CREEK PATHS AND FEDERAL ROADS: INDIANS, SETTLERS, AND SLAVES IN THE MAKING OF THE AMERICAN SOUTH 3 (2010). See also Joel W. Martin, *Rebalancing the World in the Contradictions of History: Creek/Muskogee, in NATIVE RELIGIONS AND CULTURES OF NORTH AMERICA: ANTHROPOLOGY OF THE SACRED* 85, 94 (Lawrence E. Sullivan ed., 2000) [hereinafter Martin, *Rebalancing the World*]. MARTIN, SACRED REVOLT, *supra* note 54, at 50; WOMACK, *supra* note 17, at 35.

61. DeRosier, *supra* note 56, at 74; see DEBO, *supra* note 55, at 9; see also SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 22 (1989).

62. Morris Edward Opler, *The Creek “Town” and the Problem of Creek Indian Political Reorganization, in HUMAN PROBLEMS IN TECHNOLOGICAL CHANGE: A CASEBOOK* 165, 170 (Edward H. Spicer ed., 1952). A woman retained the tribal town affiliation of her mother and husbands took on the *etvlwv* identity of their wives. Bell, *supra* note 38, at 333.

63. WILLIAM BARTRAM, OBSERVATIONS ON THE CREEK AND CHEROKEE INDIANS 23 (1789); see also Ohland Morton, *The Government of the Creek Indians*, 8 CHRON. OF OKLA. 42, 42 (1930).

64. CHAUDHURI & CHAUDHURI, *supra* note 25, at 76, 92.

65. Also spelled *micco* or *miko*. 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 CHAUDHURI & 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 Poarch Creek’s Digging up of Remains*, INDIAN COUNTRY TODAY (Sept. 7, 2012), <http://indiancountrytodaymedianetwork.com/opinion/statement-from-hickory-ground-chief-george-thompson-regarding-poarch-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 vpoktv* 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.⁶⁷ From one of the white clans, the *mekko* would select one or more *hennehas* (spiritual leader), who exercised administrative domestic powers, such as building homes and farming.⁶⁸ Typically, one *henneha* served as the “speaker” for the *mekko*.⁶⁹ The *mekko* also selected a third group of advisors, known as *vcakvlke* (“beloved old men”), for their wisdom achieved through age and service.⁷⁰ The *etvlwv* leaders did not adjudicate inter-personal disputes, but focused on the administration of the local government, including food distribution, agricultural planning, and security.⁷¹

In traditional, pre-removal⁷² 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.⁷³ A system of councils, including the family, the clan, or the *etvlwv* oversaw inter-clan dispute resolution.⁷⁴ The Nation’s current Supreme Court explained that “[u]nder traditional Mvskoke law, controversies were resolved by clan *Vculvkvke* (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.”⁷⁵

Because Mvskoke people valued consensus, the most important skill a political leader could possess was oratory.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.⁷⁷ Election or appointment to political office was done by voting in public—not by secret ballot.⁷⁸ When disputes between members of an *etvlwv*, or between two different *etvlwv* could not be resolved

be as keenly watched. However, Mvskoke women were the actual owners of the land. Thus, they had significant political power that was exercised in that context. At the very least, there is evidence clan matriarchs did exercise political influence. The word “beloved” is used to describe these Creek matriarchs, and the word “beloved” generally was used to describe officials associated with the white moiety. Ethridge explains, “[a]lthough they had no official voice, southeastern Indian women influenced public opinion and councils by influencing their male kin through informal channels.” ETHRIDGE, *supra* note 58, at 105; *see also* CHAUDHURI & CHAUDHURI, *supra* note 25, at 50 (“While men had the edge in actual fighting, women had the edge in actual authority. Together they worked toward bringing harmony in the midst of the imperfections of life”); PERDUE & GREEN, *supra* note 65, at 48.

67. O’BRIEN, *supra* note 61, at 22.

68. *Id.*

69. *Id.*

70. *Id.* at 23; *see also* ETHRIDGE, *supra* note 58, at 102.

71. *See* Arrell M. Gibson, *Constitutional Experiences of the Five Civilized Tribes*, 2 AM. INDIAN L. REV. 17, 18-19 (1974).

72. Most Mvskoke people were forced to relocate to Indian Territory in the early nineteenth century. Thus, “pre-removal” refers to the government prior to the relocation. *See* discussion *infra* Part IV.

73. CHAUDHURI & CHAUDHURI, *supra* note 25, at 91.

74. *Id.* at 90-91.

75. *In re* The Practice of Law Before the Courts of the Muscogee (Creek) Nation, 9 Okla. Trib. 31, 33 (S. Ct. of the Muscogee (Creek) Nation 2005). This is a rare but important example of the contemporary court using Mvskoke language in its decision.

76. ETHRIDGE, *supra* note 58, at 105. Ethridge describes the Creek people as “famously argumentative.” *Id.* at 108.

77. *See id.* at 105. Consensus is a recurrent theme in tribal law. *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 319 (1998).

78. John H. Moore, *The Mvskoke National Question in Oklahoma*, 52 SCI. & SOC’Y 163, 166-67 (1988).

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.”⁸⁹ 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.⁹⁰

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.⁹¹ 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.⁹² 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.”⁹³ The earliest European contact with Mvskoke people happened in the early sixteenth century with the exploits of Hernando De Soto of Spain.⁹⁴ 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 CHRON. 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.”).

93. THOMAS M.N. LEWIS & MADELINE KNEBERG, TRIBES THAT SLUMBER: INDIANS OF THE TENNESSEE REGION 93 (1958).

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 MVSKOKE 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 *etvwlv* 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

REPORTER, at XI (Melissa L. Tatum & Michelle Grunstad eds., 2005) [hereinafter Moore, *Government Pre-Columbian*].

95. CHAUDHURI & CHAUDHURI, *supra* note 25, at 138; GREEN, THE CREEKS, *supra* note 49, at 17–18. Disease included smallpox, measles, and influenza. Martin, *Rebalancing the World*, *supra* note 60, at 92.

96. CORKRAN, *supra* note 46, at 48.

97. GREEN, THE CREEKS, *supra* note 49, at 27.

98. By 1789, Bartram, an English botanist, declared the Creeks to be “a very powerful Confederacy.” Bartram, *supra* note 63, at 11. Deloria and Lytle conclude that the formation of the Confederacy was necessarily colored by the contact with Europeans: “The Creeks . . . evolved toward the European style of political organization because it was simpler to do so and because the preservation of the peace with European powers made it necessary.” DELORIA & LYTLE, *supra* note 14, at 86.

99. “The confederacy united diverse [*etvwlvs* or towns] for larger objectives, including wars with other polities over contested territories and hunting grounds.” MARTIN, SACRED REVOLT, *supra* note 54, at 50.

100. Corkran, for example, explains, “Creeks had a genius for taking fragments of other tribes under their wing.” CORKRAN, *supra* note 46, at 4. More than five languages were spoken in the Confederacy as of the late 16th century. GREEN, THE CREEKS, *supra* note 49, at 20 (“[t]here were perhaps six distinct languages spoken among the Creeks”); see also ETHRIDGE, *supra* note 58, at 30. Scholars have suggested that the Confederacy is a bona fide political alliance (as opposed to a group of culturally affiliated sub-groups) because of linguistic diversity. See GREEN, THE CREEK PEOPLE, *supra* note 65, at 4-5. Allied towns did not always share a common language, but nonetheless agreed to partner in important military alliances. The Confederacy was more likely a blend of cultural and political authority (particularly since the Mvskoke cosmogony does not separate spiritual and secular authority).

101. *Muscogee (Creek) Nation History*, MUSCOGEE (CREEK) NATION, <http://www.muscogeenation-nsn.gov/Pages/History/history.html> (last visited June 8, 2013).

102. ETHRIDGE, *supra* note 58, at 93.

103. See, e.g., Lester Hargrett, *The Creek (or Muskogee) Nation*, in A BIBLIOGRAPHY OF THE CONSTITUTION AND LAWS OF THE AMERICAN INDIANS 78, 78 (1947).

in both war and peace with European governments.¹⁰⁴ Throughout the 1700s and 1800s, the Creek Confederacy made treaties with the British, Spanish, French, and American governments.¹⁰⁵

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 *etvlwv* 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.¹⁰⁶ Like the *etvlwv* 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.”¹⁰⁷

Each *etvlwv* 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.”¹⁰⁸ The Confederacy’s structure itself was set up in a similar manner to that of a typical *etvlwv* government.¹⁰⁹ Three categories of leaders made up the National Council: the *mekkos* (chiefs), the *vcakvlke* (beloved men), and the *henehas* (spiritual leaders).¹¹⁰ 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.”¹¹¹

The laws issued by the Grand Council were only binding insofar as the autonomous towns chose to honor them.¹¹² This pluralistic view of law and sovereignty estab-

104. Alexander v. Gouge, 8 Okla. Trib. 1, 3 (Sup. Ct. of the Muscogee (Creek) Nation 2003). The Court’s finding reflects most of the history on the matter. See, e.g., DEBO, *supra* note 55, at 6; Knight, *supra* note 92, at 386; Lester Eugene Robbins, The Persistence of Traditional Religious Practices Among Creek Indians 88-89 (1976) (unpublished Ph.D. dissertation, Southern Methodist University) (on file with Southern Methodist University). The Confederacy began meeting annually in the eighteenth century. Prior to that, there was little need for regular meetings. See also HUDSON, *supra* note 60, at 64.

105. INNES ET AL., *supra* note 2, at 28. Some of these treaties included: Oglethorpe’s Treaty with the Lower Creek Indians, 4 GA. HIST. Q. 3 (1920); Treaty with Spain (Oct. 28, 1793); Treaty of Pensacola with Spain (1784); Treaty of Coweta with the Creeks with British (1739); Treaty with the British (1733) (signed May 21, ratified by British colony of Georgia, Oct. 18). It is clear that various *etvlwv* governments individually approved of treaties before they were ratified. When it came to one particular agreement with England, a Creek chief named Tomochichi traveled to England in 1734, and gave a bundle of eagle feathers to King George II, explaining that “these feathers are a sign of peace in our land and have been carried from town to town there and we have brought them over to leave with you, O Great King, as a sign of everlasting peace.” O’BRIEN, *supra* note 61, at 120. See also CHAUDHURI & CHAUDHURI, *supra* note 25, at 140; CORKRAN, *supra* note 46, at 87.

106. See ETHRIDGE, *supra* note 58, at 96.

107. CHAUDHURI & CHAUDHURI, *supra* note 25, at 69.

108. MELISSA L. TATUM & MICHELLE GRUNSTED, 5 MVSKOKE LAW REPORTER vii (Melissa L. Tatum & Michelle Grunsted eds., 2005); J.N.B. Hewitt, *Notes on the Creek Indians*, 123 SMITHSONIAN INSTITUTION BUREAU OF AM. ETHNOLOGY BULL. 119, 139-41 (1939) (The “Kings” and “Warriors” nomenclature was used in the 1867 Constitution); See discussion *infra* Part IV.A.

109. GREEN, THE CREEK PEOPLE, *supra* note 65, at 17.

110. O’BRIEN, *supra* note 61, at 22-23.

111. See CHAUDHURI & CHAUDHURI, *supra* note 25, at 75. This position later became known as Principal Chief in the 1867 Constitution.

112. Tatum and Grunsted state:

lishes a different set of principles than that used in the American system. American federalism is non-negotiable once states join the union.¹¹³ 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.¹¹⁴

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 *etvlwv* of the presiding chief.¹¹⁵ 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.¹¹⁶

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 *etvlwv* 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

The pre-removal Grand Council met in the tribal towns periodically to discuss the many issues facing the Confederacy. Most often, the Houses met separately in one tribal square and then combined in an almost ritualistic ceremony to discuss what the Creek Nation should do in light of input from the Houses. Often, towards the end of the late 1700s, the Council would discuss Treaties offered by neighboring tribes and the Federal Government.

TATUM & GRUNSTED, *supra* note 108, at vii.

113. U.S. CONST. art. VI, cl. 2.

114. WICKMAN, *supra* note 82, at 16–17.

115. CHAUDHURI & CHAUDHURI, *supra* note 25, at 71; CORKRAN, *supra* note 46, at 4; DEBO, *supra* note 55, at 7; GREEN, THE CREEK PEOPLE, *supra* note 65, at 18–19; HEWITT, *supra* note 108, at 125; DeRosier, *supra* note 56, at 73.

116. H. THOMAS FOSTER II, ARCHAEOLOGY OF THE LOWER MUSCOGEE CREEK INDIANS, 1715-1836, at 16 (2007); *see also* Hewitt, *supra* note 108, at 139-41.

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. Moiety 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 CHRON. OF OKLA. 34 (1976).

126. DEBO, *supra* note 55, at 67; see also CHAMPAGNE, *supra* note 54, at 113–14.

trol.¹²⁷ Hawkins and McGillivray implemented radical changes, including “a unified foreign policy” and a “centralized administration”¹²⁸ 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.¹²⁹ For example, under the American-influenced Confederacy, a cultural and spiritual practice known as *busketa*,¹³⁰ 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.¹³¹ Hawkins also used McGillivray to manipulate the agenda of the National Council and prioritize activities that increased trade with Americans.¹³²

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.¹³³

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.¹³⁴ 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.¹³⁵ 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 CHRON. 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.

135. See, e.g., GREGORY A. WASELKOV, *A CONQUERING SPIRIT: FORT MIMS AND THE REDSTICK WAR OF 1813-1814* (2006).

ers of Tecumseh advocated the overthrow of leaders loyal to Benjamin Hawkins.¹³⁶ Many *etvhwv* 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).

140. Black chattel slavery was introduced to Mvskoke people in the mid eighteenth century by traders in South Carolina and Georgia. Kathryn E. Braund, *The Creek Indians, Blacks, and Slavery*, 57 J. S. HIST. 601 (1991).

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.

144. GREEN, THE CREEKS, *supra* note 49, at 59.

145. DEBO, *supra* note 55, at 88.

146. *See* Antonio J. Waring, *Introduction*, in LAWS OF THE CREEK NATION (Antonio J. Waring ed., 1960).

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.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ The Creek leaders deemed this treason, and McIntosh was executed on April 30, 1825.¹⁵¹ Followers of McIntosh who intended to abide by the terms of the 1825 treaty left for Indian Territory almost immediately.¹⁵² 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 1832.¹⁵³ 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.¹⁵⁴ Under the terms of the 1832 treaty, the Mvskoke leaders agreed to sell all remaining lands in Alabama and move west to Indian Territory.¹⁵⁵ 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.¹⁵⁶

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.

153. Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 366; Savage, *supra* note 125, at 39. The Indian Removal Act had been introduced in Congress in 1829 and signed into law by President Andrew Jackson in 1830. 25 U.S.C. § 72 (2012).

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.¹⁵⁷ 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.”¹⁵⁸ 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 befell 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.¹⁵⁹ 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.¹⁶⁰ Moreover, Upper and Lower Creeks antipathies persisted during and after removal.¹⁶¹ Lower Creeks arrived in Indian Territory several years before the Upper Creeks and re-established their *etv/wv* system, clustered around the Arkansas river valley. They became known as Arkansas Creeks.¹⁶² 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.

158. David E. Stannard, *Genocide in The Americas: Columbus's Legacy*, THE NATION 430 (1992); see also Milner S. Ball, *John Marshall and Indian Nations in the Beginning and Now*, 33 J. MARSHALL L. REV. 1183 (2000); Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49 (2008); Nathan Goetting, *The Marshall Trilogy and the Constitutional Dehumanization of American Indians*, 65 GUILD PRAC. 207 (2008).

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.

Savage, *supra* note 125, at 39. Atwood suggests that 15,000 Mvskoke members did not survive. Eleanor Patricia Atwood, *The Crazy Snake Rebellions: A Study in the Breakdown of Tribal Government*, 15 VASSAR J. OF UNDERGRADUATE STUDIES 44, 45 (1942).

160. Claudio Saunt, *Telling Stories: The Political Uses of Myth and History in the Cherokee and Creek Nations*, 93 J. OF AM. HIST. 673, 687 (2006). Perdue and Green note, “[v]irtually every family in all tribes had lost kin.” PERDUE & GREEN, *supra* note 65, at 101.

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 CHRON. 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.¹⁶³ 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.¹⁶⁴

B. Indian Territory

During the remainder of nineteenth century, Mvskoke national experience was fraught with internal disputes, sometimes culminating in armed conflict.¹⁶⁵ Mvskoke people engaged in at least three civil wars, between members favoring more progressive ways and those wanting to retain traditional culture and decentralized, *etvlwv* governments.¹⁶⁶ 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.¹⁶⁷

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 1840.¹⁶⁸ The Council established a place for meetings on a hill about midway between the Arkansas and Canadian settlements, called Wekiwa Hulwe.¹⁶⁹ 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.¹⁷⁰ The chiefs and one or two of the lawmakers represented the town in council.¹⁷¹

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. HARRING, 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.

169. DEBO, *supra* note 55, at 124.

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.¹⁷² 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.¹⁷³ Some of this national legislation was designed to enforce social norms and created uniform Mvskoke cultural expectations.¹⁷⁴ For example, an 1845 national law instituted a fine for failing to attend annual *etvlwv* ceremonies.¹⁷⁵ 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.¹⁷⁶ The Council created its own supremacy doctrine, declaring that an individual *etvlwv* was forbidden to suspend a law enacted by the Council.¹⁷⁷

In addition, the General Council took over “main judicial functions.”¹⁷⁸ 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.”¹⁷⁹ The Council also dealt with matters of foreign policy, in particular, concerns about neighboring tribes.¹⁸⁰ Meanwhile, American education continued to impress upon young Creeks the values of a centralized government.¹⁸¹ During this time period, the centralized government began to exercise unprecedented control over the *etvlwv* governments.¹⁸²

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.¹⁸³ That constitution was

172. HENRY R. SCHOOLCRAFT, HISTORICAL AND STATISTICAL INFORMATION RESPECTING THE HISTORY, CONDITION, AND PROSPECTS OF THE INDIAN TRIBES OF THE UNITED STATES COLLECTED AND PREPARED UNDER THE DIRECTION OF THE BUREAU OF INDIAN AFFAIRS PER ACT OF CONGRESS 265-77 (1851).

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 *etvɔwv* governments.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.¹⁸⁵ United States troops withdrew in 1861, and confederate officials quickly moved in to formally occupy Indian Territory.¹⁸⁶ Many Arkansas Creek leaders entered into treaties with the Confederacy, but Mvskoke people were not unified.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.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.¹⁸⁹ Powerful and influential Mvskoke leader Opothleyahola¹⁹⁰ advocated maintaining neutrality, but he was outnumbered by other leaders who wished to align with the Confederacy.¹⁹¹ Opothleyahola's people, known as the "Loyal Creeks," eventually fled to Kansas seeking Union troop protection.¹⁹² The "Southern Creeks," who signed a Confederate treaty, maintained their form of government throughout the war.¹⁹³ The Southern Creeks even sent a delegate to the Confederate

(1972); Hargrett, *supra* note 103, at 78; Morton, *supra* note 63; Opler, *supra* note 62, at 165. No written version of an 1859 or 1860 constitution survives, but Debo suggests that five officials were identified—a principal and second chief from both the Arkansas and Canadian groups, as well as a single national speaker. They would hold office for four years. The chiefs were to be elected by popular vote and the speaker was to be appointed by the chiefs. DEBO, *supra* note 55, at 124.

184. PERDUE & GREEN, *supra* note 65, at 102.

185. See Morton, *supra* note 63.

186. Atwood, *supra* note 159, at 46.

187. HARRING, *supra* note 165, at 76–77; see also Donald A. Wise, *The Founding of Tulsa*, 33 TULSA ANNALS 17 (1997).

188. Green notes that "scholars have wrongly surmised that the Civil War division was a simple continuation of an earlier conflict. . . . In reality, Creek politics was a complicated system of shifting alignments just like that of the United States." GREEN, THE CREEKS, *supra* note 49, at 96; see also John Bartlett Meserve, *Chief Samuel Checote, with Sketches of Chiefs Locher Harjo and Ward Coachman*, 16 CHRON. OF OKLA. 401, 403 (noting that "the long enduring cleavage created by the tribal division into the Upper and Lower Creeks, was augmented by the line up of its members during the Civil War").

189. At one point, pro-Confederate Creeks put a bounty on the heads of the pro-Union Creeks. THORNE, *supra* note 159, at 23.

190. Also spelled Opothle Yahola. This is the same Upper Creek leader who resisted removal to Indian Territory. CHAUDHURI & CHAUDHURI, *supra* note 25, at 62.

191. GREEN, THE CREEKS, *supra* note 49, at 90; PERDUE & GREEN, *supra* note 65, at 105.

192. The tragic story of Opothleyahola and his followers is chronicled in LELA J. MCBRIDE, OPOTHLEYAHOLO AND THE LOYAL MUSCOGEE: THEIR FLIGHT TO KANSAS IN THE CIVIL WAR (2000). On their way to Kansas, the group was attacked on three separate occasions by Confederate Cherokee troops. The few survivors made it to safety in Kansas in the middle of winter. The Union troops were not present to protect them as had been promised. Several hundred loyal Mvskoke people froze or starved to death in southern Kansas in 1862. See also PERDUE & GREEN, *supra* note 65, at 105–06.

193. Ohland Morton, *Early History of the Creek Indians*, 9 CHRON. OF OKLA. 1, 22–23 (1931). The treaty

Congress.¹⁹⁴

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.¹⁹⁵ After extended post-war negotiation, Mvskoke leaders signed a new treaty with the United States on June 14, 1866.¹⁹⁶ The treaty did not distinguish between Loyal and Confederate Creeks, and ultimately treated the entire tribe as rebels.¹⁹⁷ The treaty required the Creeks to cede half of their land and to allow a railroad through their remaining territory.¹⁹⁸ 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.¹⁹⁹ 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.”²⁰⁰ 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.²⁰¹ Meanwhile, the local governance structure continued to operate separately. *Etvhwv mekkos* and lawmakers met annually to regulate internal affairs.²⁰²

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.

195. Indian Appropriation Act of 1871 (codified at 25 U.S.C. § 71 (2012)).

196. Treaty with the Creeks, June 14, 1866, 14 Stat. 785 (1866). It took nearly a year for the Loyal and Confederate Creek factions to agree on a treaty. Negotiations began at Fort Smith (Arkansas) shortly after Robert E. Lee surrendered in 1865. The treaty was signed in Washington in January 1866. GREEN, THE CREEKS, *supra* note 49, at 92-94.

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 “Muscogee 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

203. *Id.* at 179. See generally GREEN, THE CREEKS, *supra* note 49, at 94.

204. DEBO, *supra* note 55, at 179. To this day, Republicans are still referred to as “[t]he cold ones” - probably because their origin is in the north. See MARTIN & MCKANE MAULDIN, *supra* note 2, at 34 (the Mvskoke word for “Republicans” is *este-kvsappv*). Rosemary McCombs Maxey provided a helpful interpretation of this word.

205. CONSTITUTION AND LAWS OF THE MUSCOGEE NATION, Oct. 12, 1867. A detailed description of the 1867 Constitution is also available in BAILEY, *supra* note 183, at 109-11 (1972).

206. DEBO, *supra* note 55, at 180. The Southern Creeks had several advantages in this process. Southern Creeks tended to be wealthier and more inclined to adopt American norms of behavior and law.

207. One commentator noted that the Southern Creeks, “after a somewhat stormy session, framed the constitution under which the affairs of the tribe were administered thereafter.” John Bartlett Meserve, *Chief Isparhecher*, 10 CHRON. OF OKLA. 52, 56 (1932). See also Moore, *supra* note 78, at 177 (explaining that that the 1867 Constitution “was altogether so brief (five pages) and so vague that the Tribal Towns recognized it immediately as a sham.”). The Mvskoke experience is not unique among tribal nations in the United States. Cornell explains that Americans often “introduced governing structures that were in direct conflict with the political traditions of the nations they were supposed to govern.” Stephen Cornell, *Remaking the Tools of Governance: Colonial Legacies, Indigenous Solutions*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 57, 60 (Miriam Jorgenson ed., 2007). But see Meserve, *supra* note 161, at 318 (“[t]he Creek constitution of 1867 may be said to be the initial gesture by the tribe toward intelligent, responsible government.”).

208. MORRIS E. OPLER, REPORT ON THE HISTORY AND CONTEMPORARY STATUS OF ASPECTS OF CREEK

legislature which honored the role of the *etvhw* governments as constituents.²⁰⁹ 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.”²¹⁰ 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.²¹¹ One leader of the more traditional Loyal Creeks, Oktanarsars 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.”²¹²

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.*”²¹³ Second, the Constitution created three separate branches of government. However, the Mvskoke Constitution provided very few enumerated powers.²¹⁴ The Executive Branch was formalized as a branch of government with elected positions.²¹⁵ The Principal Chief and Second Chief were to be popularly elected and hold office for four

SOCIAL ORGANIZATION AND GOVERNMENT 12 (1937).

209. See generally Robbins, *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.

[T]here can be no justification for having two distinct legislative bodies in a single tribe. The extra expense; the duplication of effort when two independent bodies have to consider the same matters separately; the consequent delay, friction, and inefficiency; the divided responsibility; the temptation of each house to blame the other for what goes wrong instead of trying to cure the wrong, all these consequences make a two-chambered legislature highly inadvisable for any Indian tribe.

FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 32 (1934). 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.

210. See, e.g., *The Creek Nation: A Settlement of their Troubles Effected—Samuel Checote Declared Chief*, N.Y. TIMES, Oct. 23, 1871, <http://query.nytimes.com/mem/archive-free/pdf?res=F10F13FF395515768FDDAA0A94D8415B818BF0D3>; see also *Creek Nation Advances*, MCINTOSH COUNTY DEMOCRAT 2 (1974).

211. 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.”).

212. DEBO, *supra* note 55, at 182.

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

214. Substantive enumerated powers were codified in statute (e.g., appointment power, Ch. 1., Sec. 5 (1880)). Separation of powers also manifested itself in the architecture for the new nation’s capitol building. When a new Council House was built in 1878, the building contained three separate chambers for the three branches of government—executive, legislative, and judicial. Brochure, *Creek Council House Museum* 10 (on file with the author). The Council House still stands today in downtown Okmulgee, Oklahoma. The structure was sold to the city of Okmulgee in 1919, and has served as a museum since that time. In 2010, the Muskogee (Creek) Nation repurchased this historical building for \$3.2 million. See Sara Plummer, *Tribe Regains Historic Council House*, TULSA WORLD, Nov. 15, 2010, http://www.tulsaworld.com/site.aspx?articleid=20101115_11_A13_CUTLIN80706.

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

years.²¹⁶ 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.²¹⁷ The members of the council were also elected for four-year terms.²¹⁸ 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.²¹⁹ All laws passed by the both houses of the Council were to be approved by the Principal Chief.²²⁰ The Principal Chief had veto power which could be overridden by a two-thirds vote of the Council.²²¹

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.²²² 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.²²³ Later that year, a Council House was completed and the new seat of the nation was called Okmulgee.²²⁴ 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.²²⁵ 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. I. 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 representational government.

218. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1120 (D.C. 1976).

219. The creation of new towns was prohibited by statutory law. CONST. AND LAWS OF THE MUSCOGEE 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 MUSCOGEE 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 *etvlwv* 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 compact agreements with other tribes. See, e.g., Ohland Morton, *Reconstruction in the Creek Nation*, 9 CHRON. OF OKLA 171, 173 (1931).

226. DEBO, *supra* note 55, at 185. For example, one of the Loyal Creeks, Cotchoche, 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 Haring 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. Haring, *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.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.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 *Marbury v. Madison*.²³³ However, that decision pre-dated the Creek Constitution and was not binding precedent, as it emanated from a foreign government.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.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.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.²³⁷ While it is possible that the justices were considering traditional Mvskoke government principles, none of the opinions mentions the role of the *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

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. *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)).

232. In fact, there was separate attorney admission for the district courts and the supreme courts. CONST. AND LAWS OF THE MUSCOGEE NATION chapter XII, art. VII.

233. *Marbury v. Madison*, 5 U.S. 137, 175 (1803).

234. *Talton v. Mayes*, 163 U.S. 376 (1896).

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. *Smith v. Adams*, 7 Mvs. L. Rep. 270 (Sup. Ct. of the Muscogee (Creek) Nation 1878).

236. While the United States Supreme Court does not issue so-called “advisory opinions” (*see, e.g.*, *Hayburn's Case*, 2 U.S. 408 (1792)), the nineteenth century Muscogee Supreme Court did offer constitutional opinions on matters that were not in active, adversarial litigation.

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:

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).

culture.²³⁸ 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.²³⁹ 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 of the court in the eyes of American lawyers and outside forces.²⁴⁰ 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.²⁴¹ The court found in favor of the assimilationist interests and against the more traditional factions within the tribe.²⁴² And in the preferred warrant case, the court demonstrated its independence from the members of the tribal council who were arguably the wealthy power-brokers of that era.²⁴³

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.²⁴⁴

The laws struck down by the Supreme Court were bans on most forms of white settlement and employment.²⁴⁵ Following the Civil War, illegal white settlers began flooding into Indian Territory, causing considerable anxiety for all tribal governments.²⁴⁶ It was difficult for tribal nations to control the behavior and settlement of squatters—

238. L.C. Perryman, Principal Chief of Muskogee Nation, Annual Message to National Council (Oct. 11, 1888) (“[w]e cannot make jurists of our judges in one nor in five years”).

239. DEBO, *supra* note 55, at 291.

240. *See generally*, HARRING, *supra* note 165, at 82, 100-05 (explaining that the constitutional legal order was an attempt to strike “accommodation with the United States, which respected only legal institutions resembling its own”).

241. *See generally id.*

242. *Id.*

243. See W.F. McIntosh, *Preferred Warrants Unlawful*, MUSKOGEE PHOENIX, June 12, 1895.

244. DEBO *supra* note 55, at 215-16. Debo describes the opinion as “labored” and “forced” and suggests that the Supreme Court was simply adopting the norms and values of the United States. *Id.*

245. *See infra* notes 247-77 and accompanying text.

246. Atwood, *supra* note 159, at 46. The Creek Council passed at least 20 statutes over a 30 year period to try to deal with illegal actions of white settlers. In 1937, a Mvskoke elder explained, “[t]here were too many white people coming into the Indian Territory to even think that the Indians could keep on with the tribal laws.” Interview with Daniel Starr, in Henryetta, Okla. (Oct. 18, 1937).

unscrupulous characters who sought to profit from perceived legal ambiguity in the settlement of tribal lands.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 1906.²⁴⁸ The Council initially established a permit system to ensure that any white settlers or laborers were of noble character and had local references.²⁴⁹ It appears that this permit system did not address the crisis of illegal settlement.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.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.²⁵²

However, many wealthier Mvskoke ranchers sought to re-establish plantation-style agriculture and needed white laborers.²⁵³ These plaintiffs usually complained to the executive branch that the acts of Council violated the 1867 Constitution.²⁵⁴ This tension resulted in an extended debate about legislative authority, which lasted nearly nine (9) years.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.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.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.²⁵⁸

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

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.

248. HARRING, *supra* note 165, at 91 (describing these measures as “sound and sensible measures promoted by traditional Creeks.”).

249. CONST. AND LAWS OF THE MUSCOGEE 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”).

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.”).

251. See generally Atwood, *supra* note 159.

252. CONST. AND LAWS OF THE MUSCOGEE 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.

253. HARRING, *supra* note 165, at 91-92.

254. *Id.*

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).

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.

257. Lochar Harjo, Principal Chief of the Muscogee Nation, Inaugural Address (Dec. 6, 1875).

258. DEBO, *supra* note 55, at 215.

tution preamble, which essentially mirrored that of the United States.²⁵⁹ 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.²⁶⁰ 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.²⁶¹

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.”²⁶² The permit legislation, which banned the employment of U.S. citizens, thus was “intruding upon this right.”²⁶³ Therefore, the court concluded that the legislation violated the second clause of the preamble (the Establishment of Justice Clause).²⁶⁴ 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.”²⁶⁵ 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.”²⁶⁶

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

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 CHERMINSKY, 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.²⁷⁶ 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."²⁷⁷ 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.²⁷⁸ 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 "Muscoogie Phoenix" newspaper.²⁷⁹

This controversy arose during a particularly vulnerable economic time for all Muskogee people. Oklahoma became a territory by act of Congress in 1890.²⁸⁰ 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.²⁸¹ 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.²⁸²

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

conomic due process cases decided by the United States Supreme Court in the late nineteenth century were influenced by "a belief in a laissez-faire, unregulated economy." *Id.*

276. *See, e.g.*, *Mugler v. Kansas*, 123 U.S. 623 (1887); *Railroad Commission Cases*, 116 U.S. 307 (1886); *Munn v. Illinois*, 94 U.S. 113 (1876). These cases are important "for articulating that due process was a limit on the government's regulatory power, even though in each of these cases the Court ruled in favor of the government." CHEMERINSKY, *supra* note 275, at 613.

277. CONST. AND LAWS OF THE MUSKOGEE NATION art. VIII, § 2 This is similar to the *ex post facto* language in the United States Constitution. U.S. CONST. art. I, §. 9, cl. 3.

278. W.F. McIntosh, *Preferred Warrants Unlawful*, MUSKOGEE PHOENIX (June 12, 1895).

279. *Id.*

280. Okla. Organic Act, May 2, 1890, 26 Stat. 81.

281. General Allotment Act, Feb. 8, 1887, 24 Stat. 388.

282. McIntosh, *supra*, note 278.

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.*

293. *See generally* FLETCHER, *supra* note 36, at 42; *see also* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

294. General Allotment Act, Feb. 8, 1887, 24 Stat. 388.

295. Royster, *supra* note 293, at 38-39.

eral Allotment Act “had disastrous effects on tribes and reservation life.”²⁹⁶ The initial allotment laws specifically exempt 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 Muskogee 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-

296. Kunes, *supra* note 16, at 18.

297. General Allotment Act, Feb. 8, 1887, 24 Stat. 388.

298. L. Susan Work, *Historical Perspective: The Exercise of Judicial Powers by the Five Tribes* 136 (1991) (on file with author).

299. *Id.* at 135.

300. Formally opposing allotment.

301. ACTS AND RESOLUTIONS OF THE NATIONAL COUNCIL OF THE MUSKOGEE NATION OF 1893 16 (1894) [hereinafter “ACTS AND RESOLUTIONS”] (reproducing the text of the Nov. 1, 1893 Act that ordered the drafting of a new Muskogee Constitution).

302. MUSKOGEE (CREEK) CONST OF 1894 art. I, §. 1.

303. See FIXICO, *supra* note 166, at 7; see also Meserve, *supra* note 161.

304. See ACTS AND RESOLUTIONS, *supra* note 301, at 64-66 (establishing in the Act of November 6, 1896 that “no permit shall be issued to any non-citizen to reside within the Muskogee Nation for any purpose whatever.”). Non-citizens and those who harbored them were subject to a criminal penalty. The law even made failure to prosecute and banishment an impeachable offense for prosecutors and judges employed by the Nation. *Id.*

305. *Id.* at 76 (Act of Mar. 27, 1897, § 254).

dian Territory tribes and passed the Curtis Act in 1898.³⁰⁶ “This law unilaterally abolished the tribal court systems of the Creek, Cherokee, Choctaw and Chickasaw nations” and mandated allotment of the tribal lands.³⁰⁷ To ensure the Tribes could not respond through legislative action, the Act required all tribal legislation to be approved by the President of the United States.³⁰⁸

The Curtis Act offered lip service to tribal self-determination by allowing tribal governments to “negotiate” agreements for the disposal of tribal lands.³⁰⁹ However, the Creek Nation refused to make any agreement, and the implementation of the Curtis Act began in 1900.³¹⁰ In 1901, principal Creek leaders caved under federal pressure and entered into an “agreement” which allowed the federal government to distribute Creek land.³¹¹ Other Creek leaders sought to prevent the destruction of tribal sovereignty and self-determination, but were stymied by federal opposition.³¹²

Meanwhile, the white population in Oklahoma Territory had been organizing its statehood petition for years.³¹³ Creek leaders collaborated with four other tribes in an effort to avoid white-controlled statehood.³¹⁴ The Creek Council had formally opposed statehood as early as 1893,³¹⁵ 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.”³¹⁶ 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-

306. The Curtis Act made allotment effective immediately. Tribes were ordered to cease operations as of March 4, 1906. Daniel F. Littlefield, Jr. & Lonnie E. Underhill, *The “Crazy Snake Uprising” of 1909: A Red, Black, or White Affair?*, 20 ARIZ. AND THE W. 307, 308 (1978).

307. *Id.*; see also Morton, *supra* note 193.

308. See Littlefield & Underhill, *supra* note 306, at 307-09.

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. This statute was likely unconstitutional under Muscogee constitutional law. No provision in the constitution authorized the tribal leaders to make this kind of decision.

312. The Creek Nation formally opposed Oklahoma statehood via resolution. See *The Creek Council Opposes Statehood*, MUSKOGEE 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.

okee syllabicist, Sequoyah.”³¹⁷

Congress refused to consider the statehood efforts of the Indian Territory tribal nations.³¹⁸ Instead, Oklahoma became the forty-sixth state of the United States in 1907.³¹⁹ 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).³²⁰ 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.³²¹ 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.³²²

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.³²³ They also refused to accept allotments.³²⁴ 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.³²⁵ 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.³²⁶

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.³²⁷

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.”).

319. Admission of New State: Oklahoma, June 16, 1906, 34 Stat. 267.

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.

323. Douglas A. Hurt, *Defining American Homelands: A Creek Nation Example, 1828-1907*, at 21 J. CULTURAL GEOGRAPHY 19, 34-35 (2003).

324. *Id.* (claiming that the “Snake” movement maintained *etvlwv* 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 SOC’Y’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 Haring 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. Haring, *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.³³⁵ 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.³³⁶

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.³³⁷ 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.³³⁸ 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.³³⁹ 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.³⁴⁰ 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.³⁴¹

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-

335. FIXICO, *supra* note 166, at 11.

336. Craig Womack, *Foreword*, in TOTKV MOCVSE: NEW FIRE, at xi (Jack B. Martin et al. eds., trans., 2004).

337. In 1978, the United States Court of Appeals noted that "the Creek National Council per se has not met in more than sixty years." *Harjo v. Andrus*, 581 F.2d 949, 952 (D.C. Cir. 1978).

338. Five Civilized Tribes Act, Mar. 2, 1906, 34 Stat. 822; *see also* Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, The First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5, 14-15 (1994).

339. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1129 (D.C. 1976).

340. *Id.*

341. Haring, *supra* note 229, at 379; *see also* Morton, *supra* note 225.

ated government. A group known as the “Creek Convention” began meeting in 1909.³⁴² The body was comprised of leaders from various *etvlwv* governments and continued to operate as a sovereign entity with domestic and foreign powers.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.”³⁴⁴ Local newspapers document periodic meetings,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”.³⁴⁶

Etvlvw governments continued to operate independently, but little documentation is publically available.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.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.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.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.”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.³⁵²

342. *Harjo*, 420 F. Supp. at 1135. A Convention committee headed by Samuel L. Haynes sent a letter to Chief Moty Tiger on October 26, 1909, requesting “an immediate session of the National Council.” Letter from Samuel L. Haynes, Chairman of the Creek National Council to Moty Tiger (Oct. 26, 1909).

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.

344. *Harjo*, 420 F. Supp. at 1135.

345. See, e.g., *Resolution: Mass Meeting*, CHECOTAH CHAUTAUQUA, June 14, 1918.

346. *Creek Indians Meet and Elect Chief of Tribe*, KOKOMO DAILY TRIBUNE, 1921.

347. Moore notes that:

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.

Moore, *supra* note 78, at 164.

348. Okla. Indian Welfare Act, 74th Cong. (2d Sess. 1936).

349. *Ratford is Chairman of Indian Committee*, THE INDIAN J., Sept. 3, 1936, at 1.

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.

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.

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-

In 1951, the newly-appointed Principal Chief, John Davis, drew a line the sand when it came to the National Council.³⁵³ 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.”³⁵⁴ 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.³⁵⁵ This act “caused a furor in the tribe.”³⁵⁶ Eventually the Council sued the Bureau of Indian Affairs in Oklahoma state court, seeking to set aside Chief Davis’ actions.³⁵⁷ 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.”³⁵⁸ 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.³⁵⁹ 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.”³⁶⁰ After Chief Davis’ victory in state court, subsequent Councils were appointed by the Principal Chiefs and served in an advisory capacity.³⁶¹

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.³⁶² As the court in *Harjo v. Kleppe* tersely wrote, “the affairs of the Creeks were administered without even a token of democracy.”³⁶³ Popular elections were reinstated by Congress in 1970, and Claude Cox was elected in September, 1971.³⁶⁴ By that time, the unofficial tribal Council was meeting every two months.³⁶⁵

representatives to the 1962 Council meeting. “The Creeks however did not regard Departmental approval as such necessary for the adoption of the constitution, and therefore continued to operate the Creek Indian Council and Creek government pursuant to its provisions . . .” *Harjo*, 420 F. Supp. at 1137. A 1937 report commissioned by the federal government suggests that many autonomous *etvlwv* governments withdrew from participation in the Council altogether. REPORT ON THE HISTORY AND CONTEMPORARY STATUS OF ASPECTS OF CREEK SOCIAL ORGANIZATION AND GOVERNMENT I (1937).

353. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1138 (D.C. 1976).

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.* at 1139.

358. *Harjo*, 420 F. Supp. at 1139.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Harjo*, 420 F. Supp. at 1139.

364. Principal Chiefs Act of 1970, Oct. 22, 1970, 84 Stat. 1091) (authorizing popular election for the Five Civilized Tribes).

365. *History of the Creek Nation*, MCINTOSH COUNTY DEMOCRAT, Dec. 20, 1973, at § 2.

C. Federal Litigation

Nearly twenty years after the lawsuit against Principal Chief Davis, several representatives from *etvlwv* 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.³⁶⁶ 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.”³⁶⁷ 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.³⁶⁸ *Harjo v. Kleppe* is notable for the court’s impressive analysis of Mvskokey history and government as affected by U.S. federal law.³⁶⁹

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.”³⁷⁰ The plaintiffs argued that the 1867 Constitution gave “lawmaking power” to the National Council and put financial affairs under their control.³⁷¹ 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.”³⁷² 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.”³⁷³ 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.”³⁷⁴

The *Kleppe* court noted that “factional rivalries do appear to have played a significant part in motivating plaintiffs to file the suit.”³⁷⁵ 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.³⁷⁶ 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.

369. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1119-41 (D.C. 1976).. Woven into the historical analysis was a review of the Curtis Act (June 28, 1898, 30 Stat. 495), the Five Tribes Act (Apr. 26, 1926, 34 Stat. 137), the Appropriations Acts of 1908 (Apr. 30, 1908, 35 Stat. 70) and 1909 (Mar. 3, 1909, 35 Stat. 781), and the Act of Oct. 22, 1970, (84 Stat. 1091). *See id.* at 1122, 1126, 1133, 1139-40.

370. *Harjo*, 420 F. Supp. at 1115.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Harjo*, 420 F. Supp. at 1117.

376. *Id.*

in dealing with only one branch of the tribal government.³⁷⁷ 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.”³⁷⁸

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.³⁷⁹ 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.³⁸⁰ 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.³⁸¹ Therefore, the opinion required the creation of a five-member commission to draft a fresh document with more democratic input.³⁸² 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.³⁸³ Chief Cox opposed the inclusion of *etvlwv* governments as part of the government structure.³⁸⁴ A draft

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).

381. *Harjo*, 420 F. Supp. at 1144-46.

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. Thlophlocco 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 1979.³⁸⁵ Two months later, the new Muscogee (Creek) Nation constitution was ratified by a slim majority.³⁸⁶ However, participation was low, and only 30 percent of the “qualified voters” actually voted for the new constitution.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.³⁸⁸ Second, it creates a unicameral legislature with no role for *etv/wv* governments.³⁸⁹ Third, it sets minimum “blood quantum” for government officials.³⁹⁰

Like the 1867 Constitution, the 1979 Constitution provides for three government branches. First, executive power rests with the Principal Chief.³⁹¹ The Chief has enumerated powers, including agency appointment power and preparation of an annual budget.³⁹² Yet, both of these functions require the Chief to act “[w]ith the advice and consent” of the Muscogee (Creek) National Council.³⁹³ The Muscogee (Creek) National Council is the tribe’s legislative body.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.³⁹⁵

The structure of the National Council, now popularly elected by geographic division, disenfranchised the *etv/wv* 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.”³⁹⁶ The 1979 Constitution allows for certain Creek “chartered communities” to be affiliated and recognized by the national government.³⁹⁷

Judicial power is vested in a tribal Supreme Court under Article VII, by far the shortest article in the Constitution.³⁹⁸ The six members of the Supreme Court are appointed by the Principal Chief and subject to majority approval by the Council.³⁹⁹ The

cil from all those towns would never agree on anything, never get anything done”).

385. MUSCOGEE (CREEK) CONST., Certificate of Results of Election.

386. *Id.* ¶ 2.

387. It was hardly an overwhelming majority—the new constitution was ratified by vote of 1,896 for and 1,694 against. *Id.* The Secretary of the Interior approved the 1979 Constitution.

388. *Id.* art. III, § 2.

389. *Id.* art. VI, § 2.

390. *Id.* art. III, § 4. The preamble is richer in both form and substance than the 1867 preamble, notably giving credit to “Almighty God, our Creator” which reflects the importance of Christianity for many Mvskoke people. *Id.* at pmb1.

391. *Id.* art. V, § 1, cl. a.

392. *Id.* art. V, § 3.

393. *Id.* art. V, §§ 2(b), 3.

394. *Id.* art. VI, § 2.

395. *Id.* art. VI, § 6(a), cl. c.

396. *Id.* art II, § 5.

397. MUSCOGEE (CREEK) NATION CODE ANN. tit. 11, § 1-101.

398. MUSCOGEE (CREEK) CONST. art. VII.

399. *Id.* art. VII, § 2.

judiciary also includes “such inferior courts as the National Council may from time to time ordain.”⁴⁰⁰ 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.⁴⁰¹ 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.”⁴⁰²

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.⁴⁰³ 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.⁴⁰⁴ Major power struggles between the Principal Chief

400. *Id.* art. VII, § 1. The National Council established the district court via resolution in 1981. *Thlophlocco Tribal Town v. Tomah*, 8 Okla. Trib. 451 (Muscogee (Creek) D. Ct. 2004).

401. Andrea C. Walker & Tim Thompson, *Muscogee Creek Spirituality and Meaning of Death*, 59 OMEGA 129, 135 (2009).

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.⁴⁰⁵

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.⁴⁰⁶

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, *Beaver v. National Council*, was decided in 1986.⁴⁰⁷ This decision was followed four years later by another case, *Preferred Management v. National Council*, in which the court continued to espouse American legal principles.⁴⁰⁸ These decisions used basic American constitutional rules to decide cases rather than Muscogee common law. For example, in *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.⁴⁰⁹ 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.*"⁴¹⁰

The court, in the space of a four-page opinion, essentially discounted any use of

tion"); *see also* Colville Confederated Tribes v. Marchand, 33 Indian L. Rep. 6036 (rejecting the *Crawford v. Washington* rule about confrontation of witnesses).

405. Pommersheim notes that such tribal court decisions "are fraught with possibilities for confrontation and government crisis." Pommersheim, *supra* note 404, at 14.

406. A Muscogee statute provides a hierarchy of reliance on external laws. MUSCOGEE (CREEK) NATION CODE ANN. tit. 27, § 1-103. Courts are to apply first Mvskoke law. *Id.* § 1-103(A). If Mvskoke law does not provide an answer to the legal question, the court may then apply federal law. *Id.* § 1-103(B). If neither Mvskoke law nor federal law contains the answer, then the court may rely on Oklahoma law. *Id.* § 1-103(C).

407. *Beaver v. Muscogee (Creek) Nation Council*, 1 Okla. Trib. 57 (S. Ct. of the Muscogee (Creek) Nation 1986). *Beaver* arose from a disputed election. *Id.* at 61. In 1985, Perry Beaver was elected Second Chief in a runoff election. *Id.* at 64. The Muscogee Creek National Council wanted to hold a new special election for the position, presumably because they were unhappy with Beaver's election. *Id.* at 64-66. The Council invalidated the initial election with legislation and initiated a new special election. *Id.* at 64. Beaver sued to enjoin the special election, lost in the tribal district court, and appealed to the Muscogee Supreme Court. *Id.*

408. *Preferred Mgmt. Corp. v. Nat'l Council of the Muscogee (Creek) Nation*, 2 Okla. Trib. 37 (S. Ct. of the Muscogee (Creek) Nation 1990).

409. *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." *Id.*

410. *Id.* at 62-63 (emphasis added).

traditional culture or justice as a basis for jurisprudence.⁴¹¹ 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.⁴¹²

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.⁴¹³ 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.⁴¹⁴ The court rejected this argument by relying on three sources of law—two U.S. Supreme Court cases and one tribal ordinance.⁴¹⁵ 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”).⁴¹⁶ As almost an afterthought, the Muscogee court mentioned tribal statutory law, which authorized jurisdiction over non-Indians under conditions expressed in the *Montana* decision.⁴¹⁷

The court did some independent tribal constitutional analysis, but relied almost ex-

411. Indeed, the opinion seems somewhat dismissive of any reference to Mvskoke traditions:

We too have dreams about our sacred campfires, bountiful forests and streams and roaming herds of buffalos, but we awaken in a vastly changed world. We put our Nation and people at a distinct disadvantage in competing with progressive society *unless we adopt the legal ways and means by which all business is conducted in America.*

Id. at 64 (emphasis added).

412. *Id.* at 63.

413. *Preferred Mgmt. Corp.*, 2 Okla. Trib. at 43-45. The dispute arose when the National Council refused to honor a purported contract with Preferred Management (a private company which provided management services for tribal health care facilities) that an executive officer had arranged. The case implicated separation of powers concerns about the national budget, since the executive branch allegedly entered into monetary obligations without full consent of the Council in violation of the constitution. The private company wanted to see the contract enforced; the Council argued that it was invalid as a matter of tribal law.

414. *Id.* at 43.

415. *Id.* at 43-45.

416. *Id.* *Montana v. United States* is a seminal *federal* case on tribal civil jurisdictional authority. In 1981, the U.S. Supreme Court held in *Montana* that a tribe has the authority to regulate “the activities of non-members who enter into consensual relationships with the tribe or its members through commercial dealings, contracts, leases or other arrangements.” *Montana v. United States*, 450 U.S. 544, 565 (1981). The Muscogee court relied on this holding as the basis for jurisdiction over the matter. *Preferred Mgmt. Corp.*, 2 Okla. Trib. at 43. The court also cited the “minimum contacts” doctrine in a U.S. Supreme Court opinion. *See Int'l Shoe Co. v. Wash. Office of Unemployment Comp. & Placement*, 326 U.S. 310 (1945).

417. *Preferred Mgmt. Corp.*, 2 Okla. Trib. at 44-45 (the statute “mandates assertion of jurisdiction over non-members when disputes involve either: 1. the political security of the Nation; 2. the economic security of the Nation and its members; or 3. the health, safety and welfare of tribal members”). After establishing jurisdiction, the court then determined that Article V, Section 3 of the Muscogee Constitution prohibited the executive branch from entering into a contract without the approval of the National Council. *Id.* at 46-47 (Article V, Section 3 states that “[t]he Principal Chief shall prepare the annual budget requests and supplements thereto and with the advice and consent of the National Council administer funds within the control of the Muscogee (Creek) Nation”). The court held that since the contract with Preferred Management had not been approved by the National Council, it was void ab initio. *Id.* at 47.

clusively on American legal authority.⁴¹⁸ 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.⁴¹⁹

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.⁴²⁰ 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.”⁴²¹ 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.⁴²² Justice Howe believed that the National Council did not have standing to bring the suit in the first place.⁴²³ 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.⁴²⁴

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 Muscogee legal analysis. The 1993 case, *Courtwright v. July*, implicated concerns about the vertical separation of

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.

419. *Preferred Mgmt. Corp.*, 2 Okla. Trib. at 45.

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.*

421. *Preferred Mgmt. Corp.*, 2 Okla. Trib. at 49 (Howe, J., dissenting).

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.⁴²⁵ The case involved a dispute over a voting amendment made to the Checotah Indian Community (“CIC”) Constitution.⁴²⁶ The voting amendment restricted CIC voters to those who had attended three or more community meetings.⁴²⁷

The Supreme Court ruled that the community constitutional amendment violated the laws of the Muscogee (Creek) Nation.⁴²⁸ The court found that voting was a “fundamental right” by citing Supreme Court precedent.⁴²⁹ 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.⁴³⁰ 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 *etvwlv* 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 *etvwlv* 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.⁴³¹ 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 Article V, Section 5 of the Checotah constitution offends the constitutional integrity of the Muscogee (Creek) Nation.⁴³²

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 contemporary 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.⁴³³ The Muscogee (Creek) Nation brought suit against various large tobacco companies in tribal court using the same principles that many states had used in similar suits.⁴³⁴ Not surprisingly, the tobacco companies argued that the Nation lacked personal jurisdiction over their companies.⁴³⁵ Once the Muscogee Supreme Court reviewed the constitutional question of standing, it dismissed the case.⁴³⁶

Ironically, in deciding that the tribal court did *not* have jurisdiction over the tobacco companies under Creek and federal law, the court began to carve out more constitutional independence, noting that “any federal authorities considered in this matter are limited to review of their *persuasive value*.”⁴³⁷ Still, there was very little Mvskoke (Creek) precedent upon which to rely, so nearly all of the cited law was federal.⁴³⁸

By the early 2000s, the Muscogee Supreme Court had fielded fundamental questions 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 Against Big Time Tobacco and the Battle of Subject Matter Jurisdiction*, 22 AM. INDIAN L. REV. 567 (1998).

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 engaged 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 Myskoke 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

439. *In re* Constitutionality of NCA-01-115, 7 Okla. Trib. 366 (S. Ct of Muscogee (Creek) Nation 2002).

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.*

442. *E.g.*, *Oliver v. Nat'l Council*, 9 Okla. Trib. 475 (S. Ct. of the Muscogee (Creek) Nation 2006).

443. *Ellis v. Nat'l Council*, 9 Okla. Trib. 190 (S. Ct of the Muscogee (Creek) Nation 2006) [hereinafter *Ellis I*] and *Ellis v. Muscogee (Creek) Nation National Council*, No. SC 06-07 (S. Ct. of the Muscogee (Creek) Nation 2007) (opinion and order of citation for contempt) [hereinafter *Ellis II*].

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.

451. *Ellis II*, at 1-2.

coming to an end.⁴⁵² The court found in favor of the Principal Chief and ruled that the National Council had overstepped its constitutional boundaries.⁴⁵³ In *Ellis II*, the court relied almost solely on the Muscogee Constitution and case law in reaching its decision.⁴⁵⁴

3. Progressive Period – The Emergence of Independent Constitutional Jurisprudence

Ongoing constitutional strife and internal disputes culminated in a 2008 constitutional amendment process.⁴⁵⁵ During the 2008 convention, over one hundred constitutional amendments were proposed.⁴⁵⁶ Less than fifteen received enough votes from the convention to proceed to the national ballot, and twelve amendments appeared on the 2009 ballot.⁴⁵⁷ On November 7, 2009, Mvskoke (Creek) citizens voted to ratify eleven amendments to the 1979 Constitution.⁴⁵⁸ 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.⁴⁵⁹

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.⁴⁶⁰ Amendment A114 required such suits to originate in district court.⁴⁶¹ 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.

452. The Court also had strong words for the continued political strife between the Chief and the Council and vowed that it will not be intimidated by either branch of government. *Id.*

456. *See Ellis II*, at 20-21.

454. There are a few passing mentions of U.S. court cases and governmental decisions, but these references are not relied upon, nor is the Muscogee Constitution compared to the United States Constitution. *See generally Ellis II.*

455. The convention was governed by Article IX, Section 2 of the 1979 Muscogee Constitution. MUSCOGEE (CREEK) CONST. art IX, § 2.

456. Clifton Adcock, *The Tribe Will Hold its First Constitutional Convention in at Least a Century This Weekend*, TULSA WORLD, Nov. 6, 2008, http://www.tulsaworld.com/article.aspx/Creeks_to_hold_historic_meeting/20081106_11_a11_hthetr244772.

457. George Tiger, *Creek Nation Votes Today on Proposed Amendments*, MUSKOGEE PHOENIX, Nov. 6, 2009, <http://muskogee phoenix.com/columns/x546267732/Creek-Nation-votes-today-on-proposed-amendments?start:int=15>.

458. *Trepp v. Muscogee (Creek) Election Bd.*, No. SC 09-10, at 2 (S. Ct. of the Muscogee (Creek) Nation 2010) (opinion and order). Two amendments were not presented: A78 and A99.

459. In 2012, the National Council passed 12-074, which declared that the 2009 Constitutional Amendment process was fraudulent. Sterling Cooper, *Huff Elected Second Speaker at Regular Session May 19*, 42 MUSKOGEE NATION NEWS, June 1, 2012, at 1-2 (on file with the author).

460. Thus, many of the constitutional decisions decided by the court since 1979 did not have the benefit of lower court inquiry or fact-finding. It may be that the drafters of the amendments were seeking to add another layer of court review in such important cases.

461. Amendment A114, *Proposed Amendments to the Muscogee (Creek) Nation Constitution 5* (on file with author).

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 further 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 A114.⁴⁶⁷ 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.

463. Codified at Art. VII, Sec. 6. MUSCOGEE (CREEK) CONST. art VII, § 6.

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.*

468. Trepp v. Muscogee (Creek) Election Board, No. SC 09-10, at 8 (S. Ct. of the Muscogee (Creek) Nation Dec. 3, 2010) (opinion and order).

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.⁴⁷⁰ The court ultimately dismissed Trepp's suit on standing grounds.⁴⁷¹

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.⁴⁷² 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."⁴⁷³ 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.⁴⁷⁴ 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.⁴⁷⁵ 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.⁴⁷⁶ Statutory law says that "a judgment or decision of the Supreme Court requires the approval of a minimum of four (4) justices."⁴⁷⁷ The majority in *Trepp* wrote a clarifying memo in order to explain that an abstaining judge is not automatically dissenting from the opinion.⁴⁷⁸ Therefore, from the court's perspective, the majority opinion stood and the amendments were ratified by the Nation.

Today, the Muscogee (Creek) Nation continues to struggle with fundamental constitutional questions. Recently, parties who are unsatisfied with decisions in tribal court

470. *Id.* at 2.

471. *Id.* at 24.

472. *Id.* at 14-15 (describing it as "a never-ending parade of litigation").

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).

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 stands and the amendments were ratified by the Nation.

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).

476. *Id.* (response to the Dec. 3rd filing by Justice Jonodev Chaudhuri, Justice Amos Mcnac, and Justice Houston Shirley).

477. MUSCOGEE (CREEK) NATION S. CT. R. APP. P. 22

478. *Trepp*, No. SC 09-10 (clarifying addendum to Dec. 3, 2010 majority opinion).

have begun to appeal intra-tribal matters to federal courts in Oklahoma.⁴⁷⁹ 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.”⁴⁸⁰ Federal court intervention has the potential to steer the Nation away from self-determination.⁴⁸¹

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 FUTURE OF 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.⁴⁸² 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.”⁴⁸³

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

479. *Fife v. Moore*, 808 F. Supp. 2d. 1310 (E.D. Okla. 2011) (enjoining the Muscogee District Court from exercising criminal jurisdiction over theft-related crimes involving former tribal officials).

480. MUSCOGEE (CREEK) CONST. pmbl.

481. Seneca scholar Robert B. Porter explains, “[i]n order for indigenous people to maintain and redevelop meaningful choices for their future, they must dedicate themselves to conducting their affairs in reliance upon their own traditions.” Robert B. Porter, *Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 297 (1997).

482. See Joseph P. Kalt, *The Role of Constitutions in Native Nation Building: Laying a Firm Foundation*, in REBUILDING NATIVE NATIONS 78, 95-96 (Miriam Jorgensen ed., 2007).

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.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.⁴⁸⁵ The government founded and now operates the College of the Muscogee Nation, which opened in 2004.⁴⁸⁶ 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.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.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.

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.

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”).

486. Clifton Adcock, *Tribal College Gaining Ground*, *TULSA WORLD*, Mar. 23, 2009, http://www.tulsaworld.com/article.aspx/Tribal_college_gaining_ground/20090323_11_a13_daniel661791.

487. *Tribal Colleges and Universities (TCUs) Profiles*, AIHEC, <http://www.aihec.org/colleges/TCUprofiles.cfm> (last visited June 9, 2013).

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 “[s]ponsor public input into a review and update of the Muscogee Nation Constitution”).