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## Escaping The ICWA Penalty Box: In Defense of Equal Protection for Indian Children

By Timothy Sandefur\*

*“And finally this, when the sun was falling down so beautiful we didn’t have time to give it a name, she held the child born of white mother and red father and said, ‘Both sides of this baby are beautiful.’”*  
—Sherman Alexie<sup>1</sup>

### INTRODUCTION

In early 2016, a six-year-old Californian child named “Lexi” was taken from the arms of her weeping foster parents, Rusty and Summer Page,<sup>2</sup> and sent to live with her step-second-cousin in Utah instead. She had lived with the Pages for four of her six years of life, after Los Angeles child welfare officials removed her from her drug-addicted mother and incarcerated father.<sup>3</sup> She was strongly bonded to the Pages, called them “mommy” and “daddy,” and regarded the Pages’ other children as her siblings.<sup>4</sup> Nobody alleged that the Pages had mistreated Lexi. She had found love and stability in their home. Had this been an ordinary case, they would almost certainly have adopted her, as they wanted to do.

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<sup>1</sup> SHERMAN ALEXIE, *THE LONE RANGER AND TONTO FISTFIGHT IN HEAVEN* 148 (2d ed. 2013).

<sup>2</sup> See, e.g., Charlotte Alter, *Inside the Agonizing Custody Fight Over Six-Year-Old Lexi*, TIME (Mar. 27, 2016), <http://time.com/4269542/inside-the-agonizing-custody-fight-over-lexi-page/>.

<sup>3</sup> Brenda Gazzar, *Santa Clarita Family Won't Give up on Lexi Despite Legal Setback*, L.A. DAILY NEWS (July 12, 2016), <http://www.dailynews.com/social-affairs/20160712/santa-clarita-foster-family-wont-give-up-on-lexi-despite-legal-setback>; Lindsey Bever, *“Keep Lexi Home”: A Foster Family’s Wrenching Fight for A 6-Year-Old Choctaw Girl*, WASH. POST (Mar. 24, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/03/24/keep-lexi-home-a-foster-familys-wrenching-fight-for-a-6-year-old-choctaw-girl/>.

<sup>4</sup> Petition for Writ of Certiorari at 6, *R.P. & S.P. v. L.A. Dep’t of Child. & Fam. Svcs., et al.*, (No. 16-500).

But Lexi was not like other children. Her great, great, great, great-grandparent was a full-blooded Choctaw Indian.<sup>5</sup> That meant that foster-care and adoption proceedings in her case were governed by the Indian Child Welfare Act of 1978 (ICWA).<sup>6</sup> ICWA defines “Indian children” as tribal “resources,”<sup>7</sup> and gives tribal governments extraordinary power to control the fate of abused, neglected, or abandoned Indian children. It mandates that Indian children in foster care or eligible for adoption be placed with other Indians or with families chosen by tribal governments. These and other provisions of ICWA override the “best interests of the child” standard that applies to all other children. Indeed, guidelines recently promulgated by the Bureau of Indian Affairs (BIA) make the point clear: for courts to engage in “an independent consideration of the best interest of the Indian child” is *improper*, according to the BIA, “because the [dictated] preferences reflect the best interests of an Indian child in light of the purposes of the Act.”<sup>8</sup>

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<sup>5</sup> The Choctaw Constitution accords citizenship to the “lineal descendants” of “all Choctaw Indians by blood whose names appear on the final rolls of the Choctaw Nation” approved in 1906. CHOCTAW CONST. art. II, § 1.

<sup>6</sup> 25 U.S.C. §§ 1901–1963 (2012).

<sup>7</sup> *Id.* § 1901(2), (3).

<sup>8</sup> Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10158 F.4(c)(3) (Feb. 25, 2015) [hereinafter *Guidelines*]. See also *In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) (“while the best interests of the child is an appropriate and significant factor in custody cases under state law, it is improper” in ICWA cases because “ICWA expresses the presumption that it is in an Indian child’s best interests to be placed in conformance with the preferences.”). The BIA recently published new final ICWA regulations. Indian Welfare Act Proceedings, 25 C.F.R. § 23 (2016). These regulations include no explicit reference to the best interests standard, and do not specify what constitutes “good cause” for deviating from ICWA, although they do provide that a good cause finding “should” be based on factors such as the wishes of the parents, the unavailability of a suitable ICWA-compliant placement, and the “extraordinary” needs of the child—but *not* “ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.” *Id.* §23.132(e)(c)(3). They do forbid courts from considering various factors in the good cause determination, however, including whether the foster-care proceeding is at an advanced stage, or the “negative perception of Tribal . . . social services or judicial systems.” *Id.* §23.118(c)(1), (5). The comments accompanying the regulations definitively reject “a free-ranging ‘best interests’ determination,” 81 Fed. Reg. 38777, 38847 (June 14, 2016), and emphasize that “[t]he final rule does not include a ‘best interests’ consideration.” *Id.* at 38827.

ICWA was originally designed to prevent the breakup of Indian families and to protect children and parents from abusive state government officials.<sup>9</sup> Laudable goals, to be sure. But in practice, ICWA often harms children, by delaying or denying them placement in stable and loving homes, compelling their reunification with abusive birth parents, and mandating procedures that deprive them of the legal protections they need.<sup>10</sup> In the most extreme cases, such as Lexi's, children who lack any cultural or political affiliation with a tribe, and do not live on a reservation, are subject to ICWA's burdens solely because their ethnic ancestry renders them "eligible" for tribal membership.<sup>11</sup> As the Supreme Court recently observed in *Adoptive Couple v. Baby Girl*—one of only two Supreme Court decisions addressing ICWA—the Act's mandates can "override . . . the child's best interests" and dissuade willing and caring families from adopting Indian children—thereby imposing on these children "a unique disadvantage in finding . . . permanent and loving home[s]," and burdening their futures "solely because an ancestor—even a remote one—was an Indian."<sup>12</sup>

How is it possible that more than half a century after *Brown v. Board of Education*,<sup>13</sup> the United States government still maintains a *de jure* "separate but equal"—or, more precisely, separate and *substandard*—legal system for one particular racial group? What does it say about the basic principles of our Constitution *vis-à-vis* our Native American population? And how can

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<sup>9</sup> See generally Matthew L. M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship* (Apr. 28, 2016), <http://ssrn.com/abstract=2772139>.

<sup>10</sup> See Joan Heifetz Hollinger, *Beyond the Best Interests of The Tribe: The Indian Child Welfare Act and The Adoption of Indian Children*, 66 U. DET. MERCY L. REV. 451, 453 (1989) ("For non-Indians who wish to adopt an Indian child, the risks are often considerably greater than in adoptions of other children . . . . For the Indian children who may become involved in protracted controversies about their adoptive placement, the ICWA goal of promoting their best interests may be undermined by the ICWA's other goal of ensuring tribal survival."). See also Elizabeth Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, PHOENIX NEW TIMES (Sept. 7, 2016), <http://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832>.

<sup>11</sup> 25 U.S.C. § 1903(4) (2012).

<sup>12</sup> 133 S. Ct. 2552, 2564–65 (2013).

<sup>13</sup> 347 U.S. 483 (1954).

this be fixed in a way that respects the legitimate interests of Indian citizens while protecting the most vulnerable Americans?

Part I of this article provides a brief overview of the origin and structure of ICWA. Part II focuses on six provisions of the Act that place Indian children in what we term “the ICWA Penalty Box,” depriving them of critical legal protections. Part III addresses the question of whether ICWA’s differential treatment of Indian children qualifies as unconstitutional racial discrimination, and the “Existing Indian Family Doctrine”—a legal theory that state courts developed in an effort to avoid the equal protection problems that arise from an undiluted application of ICWA’s literal language.<sup>14</sup> Because this article focuses primarily on cases involving children who are not domiciled on reservations, and have no cultural connection to tribes—but who are eligible for membership solely on account of their ancestry—not every argument presented here will necessarily be relevant to all ICWA proceedings. But Part IV does address a basic question of constitutional principle that applies to all cases: is equal treatment before the law appropriate for Indian children?

The answer to that question is *yes*. But before beginning, a disclaimer is warranted. American Indian law is fraught with a bloody, tragic, often plainly disgusting history of racism, violence, and even genocide. That history—which played a prominent role in ICWA’s origin<sup>15</sup>—must not and cannot be ignored or treated euphemistically. This article is written in full recognition of the deplorable legacy of abuse and betrayal, mutual incomprehension and prejudice, which has plagued relations between Indians and non-Indians in North America. It is tragic that these problems persist to this day—and that ICWA is partly to blame.

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<sup>14</sup> See *infra* Part III.

<sup>15</sup> For an especially thorough and powerful explanation of the history of abuse that led to the adoption of ICWA, see Fletcher & Singel, *supra* note 9.

One common theme of this shameful history is that Indians have often suffered from undertakings that were advertised at the time as “helping.”<sup>16</sup> The infamous boarding school system, with its policy of “kill the Indian to save the man,”<sup>17</sup> or the self-serving myth that Indians had no concept of private property rights—which functioned as a handy excuse to deprive them of their homelands—are obvious examples.<sup>18</sup> In these and other ways, Indians have frequently been betrayed under promises that the government would “benefit” and “protect” them.

So, too, with ICWA. Though enacted with good intentions, the provisions of ICWA critiqued below harm Indian children, deprive them of the protection of the “best interests of the child” standard, move them beyond the reach of state protective services, curtail their rights to due process and equal protection, subordinate their interests to those of tribal governments, and cripple efforts to rescue them from abuse and find them stable homes. The “ICWA Penalty Box” obstructs the ability of American Indian children to realize the benefits of their American citizenship.

This last point is worth emphasizing. All Indian children are citizens of the United States<sup>19</sup> and entitled to the equal protection of the laws. That they are denied such protection today is a disgrace. However noble the intentions behind ICWA’s passage, it is today often a *cause* of abuse. All children, regardless of their ancestry, deserve to be regarded as individuals,

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<sup>16</sup> See generally NAOMI SCHAEFER RILEY, *THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS* (2016) (describing how paternalistic policies such as the “trust” relationship—that bars private ownership of land on reservations—BIA regulations on businesses on reservations—which make it harder to engage in trades—and other allegedly helpful policies harm Native Americans).

<sup>17</sup> See generally Ann Piccard, *Death by Boarding School: The “Last Acceptable Racism” And the United States’ Genocide of Native Americans*, 49 GONZ. L. REV. 137, 140 (2014).

<sup>18</sup> See generally TERRY L. ANDERSON, *SOVEREIGN NATIONS OR RESERVATIONS? INDIAN ECONOMIES: AN ECONOMIC HISTORY OF AMERICAN INDIANS* (1995); TOM FLANAGAN ET AL., *BEYOND THE INDIAN ACT: RESTORING ABORIGINAL PROPERTY RIGHTS* (2010); Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 764–80 (2001).

<sup>19</sup> 8 U.S.C. § 1401(b) (2012).

and their best interests should be the overriding consideration in cases involving their welfare.

The United States owes American Indian children nothing less.

## I. ICWA'S BACKGROUND

*“We never have objected to become citizens of the United States and to conform to her laws; but in the event of conforming to her laws, we have required the protection and the privileges of her laws to accompany that conformity on our part.”*

—John Ross<sup>20</sup>

### A. The History of ICWA

To understand ICWA, one must keep in mind the precarious, often inconsistent, legal regime that governs American Indians. Federal Indian policy has wavered between efforts to eradicate tribal power and to strengthen it. These conflicting goals have left the field of Indian law strewn with confusion, contradiction, and sometimes cynicism.

In 1934, the Indian Reorganization Act<sup>21</sup> announced a retreat from the federal government's previous policy of seeking to eradicate tribes.<sup>22</sup> Yet in the 1950s, Congress again moved toward ending tribal authority, and under the banner of “termination,” passed laws that aimed to close the tribes down, and to extend state criminal jurisdiction over reservation lands.<sup>23</sup> Then the federal government reversed course again.<sup>24</sup> The Civil Rights era led to the formation

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<sup>20</sup> JOHN ROSS, LETTER FROM JOHN ROSS, PRINCIPAL CHIEF OF THE CHEROKEE NATION OF INDIANS IN ANSWER TO INQUIRIES FROM A FRIEND REGARDING THE CHEROKEE AFFAIRS WITH THE UNITED STATES 12 (1836).

<sup>21</sup> Indian Reorganization Act, 25 U.S.C. § 461 (1934) (current version at 25 U.S.C. § 5101 (2012)).

<sup>22</sup> See CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 60–63 (2005) (Although the Act imposed “a top-down, paternalistic approach” on tribes, it ended the “allotment” policy that sought to divide and sell reservation land and created a framework for tribes to establish formal governments).

<sup>23</sup> These included House Concurrent Resolution 108 (H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953)); Pub. Law 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360); and the Indian Relocation Act of 1956, Pub. L. No. 84-959, 70 Stat. 986. The record, however, is not unmixed. Although not often mentioned, the termination policy was enacted alongside other laws that also sought to end the policy of paternalism that deprived Indians of much of their freedom. Thus, Public Law 281, 67 Stat. 590, repealed prohibitions on Indians buying and selling various goods, including farming tools, guns, and clothes, and Public Law 277, 67 Stat. 586, allowed tribes to decide for themselves whether to allow or prohibit alcohol on reservations.

<sup>24</sup> WILKINSON, *supra* note 22, at 77–78.

of the American Indian Policy Review Commission, which in 1977 issued a report calling for significant changes to federal Indian policy.<sup>25</sup> Among the fruits of this renewed commitment to self-government were the Indian Self-Determination and Education Assistance Act of 1975,<sup>26</sup> federal regulations governing recognition of tribes,<sup>27</sup> and Supreme Court decisions that recognized, but limited, tribal sovereignty.<sup>28</sup> Among the capstones of this era was ICWA.

ICWA was enacted in response to efforts during the termination era to assimilate Indian children into American society. At that time, federal policy consciously sought to separate Indian children from their parents<sup>29</sup> and to place them in boarding schools, where many children were abused and were punished for speaking Indian languages or practicing traditional religions.<sup>30</sup> Children were also removed from Indian families under local standards that failed to account for traditional Indian cultural practices, and were adopted by non-Indian families, with a view to assimilating Indians into white society and terminating the existence of tribes.<sup>31</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> 25 U.S.C. § 450 (1975) (current version at 25 U.S.C. § 5301 (2016)).

<sup>27</sup> See generally 25 C.F.R. § 83.

<sup>28</sup> See N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 16–34 (2008).

<sup>29</sup> Randall Kennedy provides a powerful critique of the allegations of abuse that led to the passage of ICWA. RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 484–99 (2003). On the other hand, as Kennedy acknowledges, hard evidence on such subjects is difficult to come by. *Id.* at 489–502. As recently as March, 2015, a federal district court in South Dakota found that local child welfare officers were failing to comply with ICWA and were engaging in abusive practices that “failed to protect Indian parents’ fundamental rights to a fair hearing.” *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 772 (D.S.D. 2015).

<sup>30</sup> Until enactment of the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2012), in 1978, various federal directives essentially outlawed many native religious practices. This was often done not by statute but by executive order. See generally JACQUELINE SHEA MURPHY, THE PEOPLE HAVE NEVER STOPPED DANCING: NATIVE AMERICAN MODERN DANCE HISTORIES (2007). This is just one of the many examples of the way Indians have often suffered because they have been governed not by law but by administrative decree. In her classic *Origins of Totalitarianism*, Hannah Arendt explored the ways nineteenth century administrative rule served as a precursor to totalitarian government. See generally HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM, 123–304 (1976). Administrative rule “has conspicuous advantages for the domination of far-flung territories with heterogeneous populations, and for a policy of oppression,” wrote Arendt. “It can easily overcome the variety of local customs and need not rely on the necessarily slow process of development of general law.” *Id.* at 244. Such rule, Arendt argues, encourages lawlessness generally and destabilizes the political culture in such a way as to hinder the growth of freedom.

<sup>31</sup> See generally Fletcher & Singel, *supra* note 9.

In passing ICWA, Congress sought to preserve and strengthen Indian families and tribes by preempting state child welfare laws that led to family breakup. Among other things, it gives tribal courts exclusive jurisdiction over child custody cases involving tribal members on reservations,<sup>32</sup> orders state and federal courts to give full faith and credit to the child custody decisions of tribal courts,<sup>33</sup> requires notification of parents and tribes regarding involuntary proceedings such as the severance of parental rights,<sup>34</sup> mandates procedures to ensure that tribal members know their rights when asked to sign papers to terminate a parent-child relationship,<sup>35</sup> and employs the “prevailing social and cultural standards of the Indian community” in child welfare cases.<sup>36</sup>

Had ICWA stopped there, it would hardly be controversial. But it goes further—and falls short—in many other ways.

## **B. ICWA’s Basic Presumptions: The Rights of Parents, Tribes, and Children**

The problems begin with the definition of an “Indian child.” Congress, understandably reluctant to interfere with the authority of tribes to determine their own membership, deferred wholesale to tribal authorities on the question of who does and does not qualify as Indian for purposes of ICWA. The Act defines an “Indian child” as any child who is a member of a tribe,

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<sup>32</sup> 25 U.S.C. § 1911(a) (2012). Divorce proceedings do not, however, qualify as child custody proceedings under ICWA. *Id.* § 1903(1).

<sup>33</sup> *Id.* § 1911(d). It does not, however, require tribal courts to accord full faith and credit to state proceedings. *See generally* B. J. Jones, *Tribal Considerations in Comity and Full Faith and Credit Issues*, 68 N.D. L. REV. 689 (1992) (while state courts are often obligated to give full faith and credit to tribal court judgments, tribal courts are not required to do the same to state court decisions). As Ivy N. Voss observes, “Tribal courts are not subject to provisions of the ICWA, presumably because they are expected to act in harmony with Indian priorities.” *In the Best Interest: The Adoption of F.H., an Indian Child*, 8 BYU J. PUB. L. 151, 164 (1993).

<sup>34</sup> 25 U.S.C. § 1912(a) (2012).

<sup>35</sup> *Id.* § 1913(a).

<sup>36</sup> *Id.* § 1915(d).

or who is *eligible* for membership and is the biological child of a tribal member.<sup>37</sup> Meanwhile, virtually all Indian tribes define eligibility for membership in terms of ethnic heritage or ancestry.<sup>38</sup> Federal regulations impose no minimum blood quantum.<sup>39</sup> This means that tribal determinations as to whether a child is Indian are determinative—and a child can qualify as an Indian child for purposes of ICWA based on one drop of Indian blood.

The Cherokee Constitution, for example, defines eligibility solely based on whether a person has a direct ancestor on the Dawes Rolls.<sup>40</sup> Other tribes define membership by blood quantum. Under Navajo law, for instance, a person is eligible for membership if he or she “is at least one-fourth degree Navajo blood.”<sup>41</sup> Still other tribes require blood quantum, but not *tribal* affiliation. Thus, the Gila River Indian Community entitles “[a]ll children of members . . . [who] are of at least one-fourth *Indian* blood” to membership.<sup>42</sup> This means that a child who is, say, the child of a tribal member, but who has only one percent Gila River ancestry, and twenty-four percent Navajo ancestry, is eligible for membership in the Gila River Indian Community (but

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<sup>37</sup> *Id.* § 1903(4).

<sup>38</sup> See generally Kirsty Gover, *Genealogy As Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243 (2009).

<sup>39</sup> *Guidelines*, 80 Fed. Reg. at 10153, B.3(c)(1).

<sup>40</sup> CHEROKEE CONST. art. IV § 1. The Dawes Rolls, or Final Rolls of Citizens and Freemen of the Five Civilized Tribes, was an attempted census of tribal membership overseen by the Dawes Commission in 1898. The rolls were closed in 1907, although some names were added in 1914. The rolls are problematic evidence of Indian ancestry for several reasons. First, many Indians refused to sign the rolls. ERIK M. ZISSU, *BLOOD MATTERS: THE FIVE CIVILIZED TRIBES AND THE SEARCH FOR UNITY IN THE TWENTIETH CENTURY* 26 (2001). Thus, even full-blooded Cherokee are today ineligible for tribal membership if a direct ancestor did not sign. Also, the Dawes Commission mandated that Indians identify with a single tribe when signing, even though tribal membership and ancestry often overlapped. As a result, non-Indian enrollment agents often arbitrarily assigned enrollees to one tribe or another. See generally S. Alan Ray, *A Race or A Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387 (2007) (discussing how the Dawes era's “reliance on nineteenth-century race science” distorted tribal consciousness and channeled it into a racial or biological construct). The Cherokee National Citizenship Act purports to make all eligible children automatic members of the tribe for a period of 240 days after birth in order to expand tribal authority under ICWA. The Tenth Circuit Court of Appeals has rejected “this sort of gamesmanship on the part of a tribe.” *Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011), *cert. denied*, 132 S.Ct. 2429 (2012).

<sup>41</sup> NAVAJO NATION CODE ANN. tit. i, § 701(B) (2016).

<sup>42</sup> GILA RIVER INDIAN COMM. CONST. art. III § 1(b) (emphasis added).

would not be eligible for Navajo citizenship) and is subject to ICWA.<sup>43</sup> It also means that a child who is fully connected to a tribe's culture—say, the adopted child of a tribal member—is *not* subject to ICWA, while a child whose connection to a tribe is only genetic *is*, even if that child has no cultural or social ties to the tribe.

Once a child qualifies as “an Indian child” under ICWA, the tribe's authority with regard to that child is in many ways elevated to a parity with the rights of the parents.<sup>44</sup> Even if the parents wish to block application of ICWA, they are often unable to do so, and tribes can even override their expressed wishes.<sup>45</sup> In *Mississippi Band of Choctaw Indians v. Holyfield*, Indian parents chose to leave the reservation before giving birth, and signed voluntary consent forms agreeing to have their child adopted by a non-Indian couple.<sup>46</sup> Nevertheless, the tribe successfully moved to have the adoption order vacated for non-compliance with ICWA.<sup>47</sup> The Supreme Court concluded that ICWA “was not meant to be defeated by the actions of individual members,” because the statute protects “not solely . . . Indian children and families, but also . . . tribes themselves.”<sup>48</sup>

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<sup>43</sup> *Id.* Even Cherokee whose ancestors did sign might be denied membership. Consider the ongoing controversy over the status of the “Cherokee Freedmen”—descendants of slaves owned by the Cherokee prior to the Civil War. Ray, *supra* note 40, at 437–46; Jeremiah Chin, *Red Law, White Supremacy: Cherokee Freedmen, Tribal Sovereignty, and the Colonial Feedback Loop*, 47 J. MARSHALL L. REV. 1227, 1267–68 (2014).

<sup>44</sup> *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989).

<sup>45</sup> ICWA does allow parents to object when a tribe seeks to transfer jurisdiction over a foster care or termination of parental rights proceeding to its own courts, in cases involving children not domiciled or residing within the tribe's reservation. 25 U.S.C. § 1911(b) (2012). But parents do not have similar rights in cases involving children domiciled on a reservation, as in *Holyfield*. Nor can parents bar a tribe's authority to intervene in a state court proceeding, or block application of ICWA's adoption or foster care placement preferences, or block other applications of ICWA. *See also In re S.B.*, 130 Cal. App. 4th 1148, 1159 (2005) (ICWA “serve[s] the interests of the Indian tribes irrespective of the position of the parents and cannot be waived by the parent.” (citations and quotation marks omitted)).

<sup>46</sup> *Holyfield*, 490 U.S. at 37–38.

<sup>47</sup> *Id.* at 38.

<sup>48</sup> *Id.* at 49.

In another case, a Cherokee father tried to relinquish his tribal membership in an effort to block application of ICWA and to “take the matter out of—out of the Tribe’s hands” and “help keep . . . [the child] where she’s at.”<sup>49</sup> But the tribe intervened and defeated the father’s efforts to avoid application of ICWA.<sup>50</sup> In short, ICWA empowers tribal governments in ways that supersede the judgment of parents when the two come into conflict. As one Indian law expert puts it, “[t]he purpose of ICWA . . . is ultimately to maintain the survival of the tribe through the retention of its members.”<sup>51</sup>

The idea of government elevating any third party to “parity” with the rights of parents is disturbing, and contradicts constitutional protections for parental rights.<sup>52</sup> In *Troxel v. Granville*,<sup>53</sup> the Supreme Court struck down a Washington State law that forced parents to let “any person” visit with their children whenever a court determined that this would be “in the best interest of the child,” even if it ran contrary to the parents’ preferences.<sup>54</sup> Six justices found that parental rights, being fundamental rights, could only be infringed for extraordinarily important reasons, and that the Washington statute overrode those rights on too light a basis.<sup>55</sup> Worse, the Court suspected that Washington judges were applying a presumption *against* parental choices: “In effect, the judge placed on . . . the fit custodial parent, the burden of disproving that visitation

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<sup>49</sup> *In re M.K.T.*, 368 P.3d 771, 776 (Okla. 2016).

<sup>50</sup> *Id.* at 800.

<sup>51</sup> Lorinda Mall, *Keeping it In The Family: The Legal and Social Evolution of ICWA in State and Tribal Jurisprudence*, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT* 30 165 (Matthew L. M. Fletcher, et al., eds., 2009). This is not entirely accurate. Provisions of ICWA depend not on tribal affiliation, but on Indian ancestry. Thus, ICWA declares that if extended family or members of the child’s tribe are unable to adopt an Indian child, that child must be placed with “other Indian families,” *regardless* of tribe, instead of non-Indian families. 25 U.S.C. § 1915(a) (2012). Thus, the Act prioritizes Indianness as a racial classification over the survival of the tribe as a cultural entity.

<sup>52</sup> See Philip McCarthy, Jr., *The Oncoming Storm: State Indian Child Welfare Act Laws and The Clash of Tribal, Parental, and Child Rights*, 4 J. L. & FAM. STUD. 1027, 1029–35 (2013).

<sup>53</sup> 530 U.S. 57 (2000).

<sup>54</sup> *Id.* at 60.

<sup>55</sup> See *id.* at 66 (plurality); *id.* at 78–79 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring).

would be in the best interest of her daughters.”<sup>56</sup> Given the fundamental status of parental rights, the Supreme Court ruled that parents’ decisions must be accorded “special weight,” over and above the quotidian “best interests” standard.<sup>57</sup>

But ICWA goes even further than the Washington visitation statute. It involves not mere visitation rights, but the far more intrusive matter of tribal jurisdiction to make operative decisions about child foster care, adoption, and other matters, even where those children are not domiciled on a reservation and are not members of tribes (but are only eligible for membership). It allows tribes to block adoption indefinitely while they seek foster and adoptive families of Native American ancestry, and to obstruct it by mandating that children be placed in accordance with the preferences laid out in the Act.<sup>58</sup> ICWA thus promotes the interests of tribal governments—non-family members—above the choices of parents, and does so *not* on the basis of a “best interests” determination—which, however unclear or “free-ranging”<sup>59</sup> it might have been in the *Troxel* case, at least it involved an assessment of a child’s unique needs.

For centuries, the best interests of the child standard has been viewed as the essential lodestar for child welfare litigation.<sup>60</sup> A judge must, in the words of Justice Benjamin Cardozo, “put himself in the position of a ‘wise affectionate and careful parent’ and make provision for the

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<sup>56</sup> *Id.* at 69 (plurality).

<sup>57</sup> *Id.* at 70 (plurality); *See also* Santosky v. Kramer, 455 U.S. 745, 758 (1982) (parental rights are so important that it is unconstitutional for the state to authorize termination of those rights on a “preponderance of the evidence” basis).

<sup>58</sup> *See infra*, section II.D.

<sup>59</sup> *Troxel*, 530 U.S. at 76 (Souter, J.).

<sup>60</sup> *See* 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 675–77 (13th ed. 1886) (tracing the origins of the best interests of the child standard to the English *parens patriae* doctrine); Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L. J. 113, 160–61 (2009) (The best interest standard has “exist[ed] from time immemorial and has become the bedrock of our state custody statutory law.” It is a “right that is ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental or implicit in the concept of ordered liberty.’” (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989)).

child accordingly.”<sup>61</sup> Courts have called the best interests standard the “touchstone”<sup>62</sup> and the “linchpin”<sup>63</sup> of the law of child welfare. This standard is inherently individualized, meaning that it focuses on the particular interests of the specific child under his or her unique circumstances.<sup>64</sup>

ICWA deprives children whose ancestry is Indian of the protection of that rule and substitutes a uniform, often insurmountable, presumption that it is in an Indian child’s best interests to have her future determined by tribal authorities. Some courts—and the BIA—have taken the position that this presumption overrides individualized consideration of the child’s personal best interests, except in the rarest circumstances.<sup>65</sup> And this presumption does not depend on existing social or cultural links between child and tribe; it depends on biology. BIA regulations even impose a presumption that ICWA applies when a child is merely *suspected* of having Indian ancestry.<sup>66</sup>

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<sup>61</sup> *Finlay v. Finlay*, 240 N.Y. 429, 433 (1925) (citation omitted). The best interests standard is also the paramount consideration in much Indian tribal law. *See, e.g., Lente v. Notah*, 3 Navajo Rptr. 72, 78–80 (1982) (child’s best interest takes precedence over tribal custom).

<sup>62</sup> *In re Marriage of Wellman*, 104 Cal. App. 3d 992, 998 (1980).

<sup>63</sup> *In re Robert L.*, 21 Cal. App. 4th 1057, 1068 (1993).

<sup>64</sup> *See In re Adoption of Kelsey S.*, 1 Cal. 4th 816, 845–50 (1992) (“best interests” standard focuses on the child’s individual circumstances); *cf. In re Adoption of Abel*, 931 N.Y.S.2d 829, 834–35 (N.Y. Fam. Ct. 2011) (children have a “due process right to an individualized determination of whether this adoption is in [the child’s] best interest”); *Dawn D. v. Superior Court (Jerry K.)*, 17 Cal. 4th 932, 965 (1998) (“a court must make an individualized determination of the child’s best interest in determining the extent, if any, of [a father’s] parental rights”); *People v. McCoy*, 9 Cal. App. 4th 1578, 1583 (1992) (state law “requires the court to individually assess each child’s best interests in fashioning [custody] orders”). California mandates an individualized best-interest determination by statute. *See CAL. FAM. CODE* § 3011 (2012).

<sup>65</sup> *See, e.g., In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) (“while the best interests of the child is an appropriate and significant factor in custody cases under state law, it is improper” in ICWA cases because “ICWA expresses the presumption that it is in an Indian child’s best interests to be placed in conformance with the preferences”); *In re Zylena R.*, 284 Neb. 834, 852 (2012) (“Permitting a state court to deny a motion to transfer [to tribal court] based upon its perception of the best interests of the child negates the concept of ‘presumptively tribal jurisdiction’”); *contra, In re Alexandria P.*, 228 Cal. App. 4th 1322, 1353–54 (2014); *Navajo Nation v. Arizona Dep’t of Econ. Sec.*, 230 Ariz. 339, 348 (Ct. App. 2012).

<sup>66</sup> 25 C.F.R. § 23.111(e). The regulations require that ICWA be applied when there is “reason to know” a child is an “Indian child” under ICWA. But “reason to know” is defined in remarkably loose ways. It occurs when “[a]ny participant in the proceeding . . . informs the court that the child is an Indian child,” or if “[a]ny participant . . . informs the court that it has discovered information indicating that the child is an Indian child,” or if “[t]he child . . . gives the court reason to know he or she is an Indian child,” among other things. *Id.* § 23.107(c). While a child may later prove not to be an Indian child—due to ineligibility for tribal membership, for instance—ICWA’s provisions may have caused substantial delay in the proceedings by the time eligibility is disproven.

ICWA's presumptions also implicate the rights of parents. The rights of birth parents, particularly their fundamental right to direct the upbringing of their children—are violated when the government gives a third party rights over the child equal to or greater than their own.<sup>67</sup> ICWA also deprives non-Indian foster and adoptive parents of their right to a legal process that takes no regard of their race or nationality. Non-Native adults seeking to adopt Indian children face a far greater burden in court, requiring a greater investment of time and money for legal representation. They are also more likely to lose their cases for reasons unrelated to their fitness as adoptive parents—simply because ICWA presumes, as Indian law expert N. Bruce Duthu expresses it, “that the [Indian] child’s best interests are served by maintaining his or her actual *or even potential* cultural and social links with his or her Indian tribe.”<sup>68</sup>

Blanket presumptions of this sort—even if rebuttable—raise significant due process concerns.<sup>69</sup> In *Stanley v. Illinois*,<sup>70</sup> the Supreme Court struck down a state law under which children of unmarried parents were taken into state custody upon the death of the mother, without any proof of neglect on the father’s part. “It may be . . . that most unmarried fathers are unsuitable and neglectful parents,” the Court noted, “[b]ut all unmarried fathers are not in this category,” and a father should have a genuine opportunity to make his case based on his individual circumstances.<sup>71</sup> “Procedure by presumption is always cheaper and easier than individualized determination,” declared the Court, but when a legal presumption “forecloses the determinative issues of competence and care, when it explicitly disdains present realities in

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<sup>67</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality); *In re N.N.E.*, 752 N.W.2d 1, 9 (Iowa 2008) (ICWA violates substantive due process to the extent that it “makes the rights of a tribe paramount to the rights of an Indian parent.”).

<sup>68</sup> DUTHU, *supra* note 28, at 154–55 (emphasis added).

<sup>69</sup> See, e.g., *In re Adoption of Abel*, 931 N.Y.S.2d 829, 834–35 (N.Y. Fam. Ct. 2011) (children have a “due process right to an individualized determination of whether this adoption is in [the child’s] best interest”).

<sup>70</sup> 405 U.S. 645 (1972).

<sup>71</sup> *Id.* at 654–55.

deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.”<sup>72</sup>

The California Supreme Court likewise warned against using blanket presumptions in *In re Adoption of Kelsey S.*,<sup>73</sup> which involved a group of laws that allowed birth mothers and their husbands to object to adoptions, but did not allow unmarried fathers to do so. The court found this irrational, because although the “constitutionally valid objective [was] the protection of the child’s well-being,” the state could not simply presume that “a child is inherently better served by adoptive parents than by a single, biological father.”<sup>74</sup> That crude presumption “bears no substantial relationship to protecting the well-being of children.”<sup>75</sup> The court gave an example: “[a] father who is indisputably ready, willing, and able to exercise the full measure of his parental responsibilities can have his rights terminated merely on a showing that his child’s best interest would be served by adoption,” whereas the mother’s rights were far more protected, even if she were “unready, unwilling, and unable” to care for the child.<sup>76</sup> The statutory distinction therefore “largely ignored” the “child’s best interest.”<sup>77</sup>

Of course, a presumption in *favor* of a father can also run afoul of the “best interests standard.” In *Dickason v. Sturdavan*,<sup>78</sup> the Arizona Supreme Court recognized that while a father may ordinarily be presumed to be the best caretaker of his child (because the “voice of nature, which declares that the father is the natural guardian of the minor child, cannot be silenced”),<sup>79</sup> there may be cases in which fathers are unsuitable. Because the child’s welfare is

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<sup>72</sup> *Id.* at 656–57.

<sup>73</sup> 1 Cal. 4th 816 (1992).

<sup>74</sup> *Id.* at 845–46.

<sup>75</sup> *Id.* at 847.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 848.

<sup>78</sup> 50 Ariz. 382 (1937).

<sup>79</sup> *Id.* at 386 (quoting *Harper v. Tipple*, 21 Ariz 41, 44 (1919)).

the “paramount consideration,” a parent’s “prima facie right to . . . custody is not . . . unconditional.”<sup>80</sup>

ICWA’s presumptions are at least as powerful as those rejected in *Stanley, Kelsey S.*, and *Dickason*. They categorically presume that Indian children are better off in Indian families, or in families selected by tribal governments, than with non-Indian families. That presumption compromises, and often forsakes, the welfare of children, by subordinating their interests to those of tribal collectives. This fact is plain from ICWA’s very first words: the Act itself defines children as “resources” that should be managed to achieve “the continued existence and integrity of Indian tribes.”<sup>81</sup> But Indian children are not resources. They are persons—citizens of the United States—and it is improper for government to treat any individual, or group of citizens defined by their ethnicity, as a means to achieve some third party’s ends.<sup>82</sup>

Of course, there are cases in which the interests of tribes as corporate institutions conflict with the interests of children. Where ICWA goes wrong is in its failure, when such conflicts occur, to unequivocally prioritize the latter. In *Holyfield*, the Supreme Court quoted the Utah Supreme Court’s rationale for ICWA’s equivocation between tribal interests and the interests of children: “[the] relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures,” it declared. “It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize.”<sup>83</sup> But

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<sup>80</sup> *Id.*

<sup>81</sup> 25 U.S.C. §1901(3).

<sup>82</sup> See, e.g., *In re Jasmon O.*, 8 Cal.4th 398, 419 (1994) (“Children . . . have fundamental rights—including the fundamental right to . . . ‘have a placement that is stable [and] permanent.’ Children are not simply chattels . . . but have fundamental interests of their own”) (citations omitted); *Sullivan v. Sullivan*, 249 Neb. 573, 581 (1996) (“Children are not chattels”).

<sup>83</sup> *Holyfield*, 490 U.S. at 32 (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986)). Note that the *Holyfield* Court confined this romanticized conception to children domiciled on reservations. ICWA goes far beyond that, and applies off-reservation children as well.

the Utah court supported that assertion, not by reference to any unique needs of Indian children, but by reference to the tribal government's interest in exercising its sovereignty.<sup>84</sup> Specifically, it cited two cases that emphasized the importance of tribal jurisdiction in child custody cases to the autonomy of tribes: "if tribal sovereignty is to have any meaning at all," it concluded, "it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity."<sup>85</sup>

All of that may be true, but it is also irrelevant to the question of whether Indian children *as individual persons* have special needs that justify ICWA's legal presumption that they are *themselves* better off in the hands of tribal authorities. It may be the case that the authority to adjudicate custody disputes on reservations is a *sine qua non* of tribal sovereignty, but it simply does not follow that this is in the *children's* best interests—or that ICWA's means of serving the interests of tribes is compatible with their due process rights or those of their parents or would-be adoptive parents. *Holyfield* simply never addressed that subject.

While the United States has a trust obligation to respect and protect tribal sovereignty,<sup>86</sup> it does not follow that an American citizen may be legally segregated based on her Indian ancestry, or may be regarded as a member of a separate legal class based on her national origin, or that she may be subordinated to the federal government's goal of benefitting another government entity.<sup>87</sup> Indeed, such a proposition is fundamentally incompatible with the proposition that all men are

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<sup>84</sup> See *Halloway*, 732 P.2d at 969 n.5.

<sup>85</sup> *Id.* (quoting *Wisconsin Potawatomies of the Hannahville Indian Community v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973) (quotation marks omitted)).

<sup>86</sup> See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

<sup>87</sup> *Cf. Reid v. Covert*, 354 U.S. 1, 5–6, 16 (1957) ("no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution," or allow Congress to "strip[] away" the "shield which the Bill of Rights and other parts of the Constitution provide . . . just because [the citizen] happens to be in another land.").

created equal. The preservation of tribes as political and cultural units is simply not adequate justification for imposing legal presumptions that deprive children of their constitutional rights.

### C. ICWA and Social Science

ICWA's powerful presumptions are often defended on the grounds that Indian children suffer unique psychological damage when they are placed in non-Indian households,<sup>88</sup> or even that the feelings of attachment that Indian children experience is qualitatively different from those that non-Indian children experience.<sup>89</sup> Support for such claims is dubious at best.

For instance, one well-known report entitled *Split Feathers* argued that Indian children adopted into non-Indian homes face a higher risk of alcoholism, social disability, and other psychological problems, and are likely to express feelings of alienation and a loss of identity.<sup>90</sup> Perhaps there are such cases, but *Split Feathers* cannot withstand scholarly scrutiny.<sup>91</sup> It was confessedly unscientific, based on only twenty informal interviews of adults, and it drew untenable causal conclusions based on correlation.<sup>92</sup> For instance, it did not seek to determine whether the problems it identified might have resulted from abuses the subjects experienced *before* they were removed from their birth families, or from the discrimination that Indians may face in white society, as opposed to the fact of adoption itself.<sup>93</sup> It is impossible to know for sure what role these factors played, because the report indicated no control group, was not peer-

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<sup>88</sup> See, e.g., Catherine M. Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future*, 27 CREIGHTON L. REV. 661, 668 (1994).

<sup>89</sup> See, e.g., B.J. Jones, *Differing Concepts of "Permanency,"* in FLETCHER, ET AL., *supra* note 51, at 131.

<sup>90</sup> Carol Locust, *Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children*, 44 ONTARIO ASS'N OF CHILDREN'S AID SOC. J. 11 (2000), <https://splitfeathers.blogspot.com/p/split-feathers-study-by-carol-locust.html>.

<sup>91</sup> The shortcomings of the *Split Feathers* study are detailed in Bonnie Cleaveland, *Split Feather: An Untested Construct* (Mar. 2015), <http://www.icwa.co/split-feather-scientific-analysis/>

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

reviewed, and the author did not disclose her methodology. Other surveys suffer from similar flaws.<sup>94</sup> More reliable evidence supports the proposition that cross-ethnic adoption is good for children, or at least does not harm them.<sup>95</sup>

Even if there were scientific support for the proposition that Indian children are better off when placed with other Indians, it is doubtful that ICWA properly addresses that problem. For one thing, neither the Act nor its implementing regulations apply to tribal court proceedings.<sup>96</sup> This means that tribal courts can, and do, approve foster and adoption placements with non-Indian households.<sup>97</sup> If ICWA is intended to protect Indian children from the allegedly unique injury of being placed with families of other ethnicities, it would make no sense to allow such placements simply because tribal courts order them.<sup>98</sup> Nor does ICWA apply to divorce proceedings, even though divorces frequently involve child custody.<sup>99</sup> State courts can therefore award custody of an Indian child to a non-Indian parent in a divorce proceeding without

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<sup>94</sup> See KENNEDY, *supra* note 29, at 499–503 (critiquing other “junk social science” cited by ICWA advocates).

<sup>95</sup> See, e.g., DAVID FANSHL, *FAR FROM THE RESERVATION* 322 (1972) (“My overall impression is that the children are doing remarkably well as a group”); RITA J. SIMON & SARAH HERNANDEZ, *NATIVE AMERICAN TRANSRACIAL ADOPTEES TELL THEIR STORIES* 13–14 (2008) (non-scientific series of interviews with subjects in which 16 of 20 Indians adopted into non-Indian families reported positive experiences); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1221–24 (1991); See also Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 543, 548–49 (1996) (listing research that shows “that although leaving a child with his or her natural parents is normally preferable, Indian children can develop normally in non-Indian homes.”).

<sup>96</sup> Notice of Proposed Rulemaking, *Regulations for State Courts and Agencies in Indian Child Custody Proceedings*, 25 C.F.R. § 23.103(e) (2015) (to be codified at 25 C.F.R. pt. 23); Michael C. Snyder, *An Overview of the Indian Child Welfare Act*, 7 ST. THOMAS L. REV. 815, 820 (1995).

<sup>97</sup> See Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 422 (1998) (complaining that tribal courts allow Indian children to remain with non-Indian adoptive parents, thus “reward[ing] the non-Indian parents” and “mak[ing] bad law.”).

<sup>98</sup> See also Catherine M. Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future*, 27 CREIGHTON L. REV. 661, 707–08 (1994) (“If the placement parent is willing to learn how to prepare the child for adult life as a member of a racial minority and to instill in the child a racial identity in which he or she takes pride, what interest is served by making the child wait for placement in a race matched home? If it is purely the preservation of the racial culture, the infant or child who has had no connection to that culture is not the best bearer of that burden.”).

<sup>99</sup> 25 U.S.C. § 1903(1).

triggering ICWA—which, again, would be irrational if the Act were aimed at preventing an alleged psychological harm suffered by Indian children being raised by non-Indians.

Some writers have argued that the psychological needs of Indian children are qualitatively different from those of non-Indian children. One argues that household stability and permanency “is a malleable concept,” and that Indian children experience permanency “in [their] tie to the native community and the cultural practices of that community,” as opposed to permanency in a stable, loving home.<sup>100</sup> Thus, placing an Indian child in the custody of a family of another race “is not the type of ‘permanency’” they need.<sup>101</sup>

It is doubtful that Indian children inherently have a qualitatively different psychological experience of permanency than do children with different genes—one that inherently turns on tribal links. But even if it were true, ICWA does not rationally address such concerns. Its adoption and foster placement preferences do not depend on culture or tribe, but prioritize the adoption of Indian children by “other Indian families”<sup>102</sup> even if they are from different tribal and cultural backgrounds. These preferences can also be invoked to override the wishes of Native parents, and by non-Indian birth parents to bar adoptions of which tribal member birthparents approve.<sup>103</sup> And the fact that ICWA does not apply in tribal court means that tribal judges can, and sometimes do, supersede children’s “ties to the native community” and place those children with non-Indian families. Moreover, even if Indian children do suffer uniquely when they are placed with adoptive families of non-Indian cultural backgrounds, that cannot justify applying ICWA to *off-reservation* children who have *no* pre-existing cultural connection

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<sup>100</sup> Jones, *Differing Concepts*, *supra* note 92, at 131.

<sup>101</sup> *Id.* at 129.

<sup>102</sup> 25 U.S.C. § 1915(a)(3).

<sup>103</sup> See, e.g., *In re Adoption of T.A.W.*, 383 P.3d 492, 500-01 (2016) (Non-Indian birth father invoked ICWA to bar adoption when custodial parent—an Indian mother—remarried and her new husband sought to adopt her child).

to a tribe. A child like Lexi,<sup>104</sup> whose only connection to a tribe is biological, has no tribal cultural ties to preserve—unless, of course, she is to be regarded as *biologically* different, and consequently destined for a segregated legal regime due to her genetics.

A more realistic concern is that Indian children adopted into non-Indian households may experience discrimination as a consequence of living in a mix-raced household. But this, too, is not an acceptable foundation for barring trans-racial adoption. In *Palmore v. Sidoti*, the Supreme Court ruled that, however strong the effects of social prejudice may be with regard to interracial adoptions, the government cannot give those prejudices legal effect.<sup>105</sup> In that case, a Florida court awarded custody of a child to a white father instead of the white mother, because the mother was living with a black man.<sup>106</sup> To live with an inter-racial couple, the trial court declared, would not be in the child’s best interests because the child would suffer from “peer pressures” and “social stigmatization.”<sup>107</sup> In reversing, the Supreme Court admitted that “[t]here is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin,”<sup>108</sup> but declared that “however real” the effects of prejudice may be, they “cannot justify a racial classification removing an infant child from the custody of its natural mother [who has been] found to be an appropriate person to have such custody.”<sup>109</sup> While race can be a consideration in child custody determinations, under *Palmore* it may not be the operative factor.<sup>110</sup>

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<sup>104</sup> See *infra* Part II.D.1.

<sup>105</sup> 466 U.S. 429 (1984).

<sup>106</sup> *Id.* at 430–31.

<sup>107</sup> *Id.* at 431.

<sup>108</sup> *Id.* at 433.

<sup>109</sup> *Id.* at 434.

<sup>110</sup> See, e.g., *J.H.H. v. O’Hara*, 878 F.2d 240, 245 (8th Cir.1989); *Drummond v. Fulton City Dep’t of Fam. & Child. Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977) (en banc).

## II. HOW THE ICWA PENALTY BOX WORKS

*“[A]ll men must operate under one general law. And while you ask yourselves, what do they, the Indians, want? you have only to look at the unjust laws made for them, and say they want what I want, in order to make men of them, good and wholesome citizens.”*

—William Apess<sup>111</sup>

Among its many other provisions, ICWA includes six provisions that diverge significantly from the rules that apply to non-Indian children in foster care and adoption proceedings. These are: (1) jurisdictional rules that mandate transfer of child welfare cases to tribal court and give tribes rights as parties to these cases on a par with the rights of parents<sup>112</sup>; (2) the “active efforts” requirement that essentially requires child welfare workers to return children to the custody of unfit birth parents<sup>113</sup>; (3) the “clear and convincing evidence” standard applicable in foster care cases<sup>114</sup>; (4) the “beyond a reasonable doubt” standard that states must apply in termination of parental rights cases<sup>115</sup>; (5) race-based foster and pre-adoptive placement preferences<sup>116</sup>; and (6) race-based adoptive placement preferences.<sup>117</sup> Together, these provisions create “the ICWA penalty box”—a set of legal disadvantages that make it harder to protect Indian children from abuse, and to find them permanent adoptive homes.<sup>118</sup>

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<sup>111</sup> WILLIAM APPESS, A PEQUOT, A SON OF THE FOREST AND OTHER WRITINGS 138 (Barry O’Connell, University of Massachusetts Amherst Press, 1997) (1836).

<sup>112</sup> 25 U.S.C. § 1911(b), (c).

<sup>113</sup> *Id.* § 1912(d).

<sup>114</sup> *Id.* § 1912(e).

<sup>115</sup> *Id.* § 1912(f).

<sup>116</sup> *Id.* § 1915(b).

<sup>117</sup> *Id.* § 1915(a).

<sup>118</sup> *See, e.g.*, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563–64 (2013) (noting that ICWA’s mandates can “unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home”); *In re Bridget R.*, 41 Cal. App. 4th 1483, 1508 (1996) (“ICWA requires Indian children . . . to be treated differently from non-Indian children . . . . As a result . . . the number and variety of adoptive homes that are potentially available to an Indian child are more limited than those available to non-Indian children, and an Indian child who has been placed in an adoptive or potential adoptive home has a greater risk . . . of being taken from that home and placed with strangers.”).

## A. Tribal Jurisdiction and Intervention Powers

ICWA gives tribal governments extensive power over cases involving children who are not tribal members and are not domiciled on reservations. Specifically, it requires state courts (in the absence of either parental objection or “good cause” to deviate from ICWA’s mandates) to transfer foster-care and termination-of-parental-rights proceedings to the courts of the child’s tribe, to be determined there.<sup>119</sup> The 2015 BIA Guidelines apply this rule to *all stages* of custody proceedings, including pre-adoption (guardianship) and adoption proceedings.<sup>120</sup> Parents can block the transfer of foster or termination cases to tribal court, but ICWA also gives tribal governments power to intervene as parties in such proceedings anywhere in the nation if they involve Indian children.<sup>121</sup> Also, if a tribe learns after the fact that a state court decided an adoption matter without tribal involvement, the tribe is entitled to reopen the proceedings and have them nullified.<sup>122</sup> ICWA’s jurisdictional rules, however, violate the requirements of due process, particularly the “minimum contacts” rule.

### 1. Due Process and Minimum Contacts

Tribal jurisdiction over children of Indian parents on reservations seems an unremarkable example of *in personam* and territorial jurisdiction.<sup>123</sup> *Holyfield* read this authority broadly, to

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<sup>119</sup> 25 U.S.C. § 1911(b). “Good cause” is not defined in ICWA, and dispute over its meaning is among the greatest sources of controversy over ICWA.

<sup>120</sup> *Guidelines*, 80 Fed. Reg. at 10153–54, B.6.

<sup>121</sup> 25 U.S.C. § 1911(c).

<sup>122</sup> *Id.* § 1914. *Cf. In re S.L.*, 2006 WL 477772, \*1 (Cal. Ct. App. 2006) (remanding termination proceeding of 15-year-old twins on grounds that ICWA notice requirements had not been followed *seven years* earlier).

<sup>123</sup> *See Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana, in & for Rosebud Cty.*, 424 U.S. 382, 387–89 (1976) (per curiam). In this regard, ICWA simply reinforced the Supreme Court’s holding that tribal court determinations of *on-reservation* child custody proceedings were a routine application of tribal sovereignty.

encompass children born to tribal members who left the reservation to give birth, and found that such an act does not change the domicile of a person who is, in all other respects, domiciled on the reservation.<sup>124</sup> This, too, was unremarkable; the law of domicile is commonplace in personal jurisdiction law, and immigration law for children born to expatriate parents employs this rule.<sup>125</sup>

But ICWA's jurisdictional provisions go much further. Its jurisdiction-transfer provision applies to any case *anywhere in the country* that involves a child eligible for tribal membership, even if *not* domiciled on a reservation, and even where no party to the case has any significant contact with the tribe other than biology. This conflicts with basic jurisdictional principles required by due process of law.<sup>126</sup>

Due process limits personal jurisdiction by requiring that before a court adjudicates a dispute, there must be "contacts" between the forum jurisdiction and the defendant "such that [the defendant] should reasonably anticipate being haled into court there."<sup>127</sup> Due process of law simply "does not contemplate" that a court "may make binding a judgment *in personam* against an individual" who has "no contacts, ties, or relations" to that court's jurisdiction.<sup>128</sup> Where a person has "carr[ied] on no activity whatsoever" in the forum, and has "avail[ed] [himself] of none of the privileges and benefits of [the forum's] law," then the forum state cannot exercise jurisdiction because there are no "affiliating circumstances"<sup>129</sup> that would satisfy the

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<sup>124</sup> *Holyfield*, 490 U.S. at 48–49.

<sup>125</sup> *See, e.g., Gaudin v. Remis*, 379 F.3d 631, 636–38 (9th Cir. 2004).

<sup>126</sup> *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (personal jurisdiction requirement is part of due process).

<sup>127</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Personal jurisdiction requirements also apply to plaintiffs, of course, but plaintiffs typically submit themselves to a court's personal jurisdiction by filing a complaint. *Threlkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir. 1974).

<sup>128</sup> *Int'l Shoe Co. v. Washington, Office of Unemployment Comp. & Placement*, 326 U.S. 310, 319 (1945).

<sup>129</sup> *World-Wide Volkswagen*, 444 U.S. at 295.

requirements of “fair play and substantial justice.”<sup>130</sup> And the requirements for personal jurisdiction in state and federal courts also apply to tribal courts.<sup>131</sup>

ICWA plainly exceeds these due process limits by purporting to grant to tribal courts nationwide jurisdiction over cases involving children with only a biological connection to that tribe. A child who is merely born eligible for tribal membership—that is, who has the requisite genetic ancestry—has not thereby purposefully availed herself of any privileges of tribal law. One cannot “purposefully avail” oneself of one’s ethnicity. One could hardly imagine, say, a Virginia court asserting personal jurisdiction over a child welfare proceeding in California on the grounds that the child’s ancestors came from Virginia, or parents came from Virginia, or that the child was conceived in Virginia. Yet that is essentially the nationwide jurisdiction ICWA gives to tribes. The minimum contacts requirement is certainly satisfied when a tribal court exercises jurisdiction over tribal members domiciled *on* the reservation, but it is not satisfied in cases involving *off*-reservation children whose only connection to a tribe is their biological ancestry. (Nor have a child’s foster or would-be adoptive parents engaged in conduct in connection with the tribal forum such that tribal jurisdiction satisfies fair play and substantial justice simply because they foster a child or file an adoption petition in state court.)

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<sup>130</sup> *Id.* at 292 (quoting *Int’l Shoe*, 326 U.S. at 316).

<sup>131</sup> *See, e.g.,* *Red Fox v. Hettich*, 494 N.W.2d 638, 645 (S.D. 1993) (“the same due process standards which govern state court assertions of jurisdiction over nonresident defendants apply to tribal courts.”). *Contra, In re Interest of Armell*, 550 N.E.2d 1060, 1068 (Ill. App. Ct. 1990) (holding that Congress’s powers with regard to tribes overrides the minimum contacts analysis). David Castleman, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1268 (2006), contends that these limitations on personal jurisdiction are “based on Western values, not tribal ones,” but sovereignty itself is a “Western concept.” DAVID EUGENE WILKINS & HEIDI KIIWETNEPINESKIIK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 312 (3d ed. 2011). Given that all American Indians are citizens of the United States, it is appropriate (indeed, mandatory) that Congress protect their due process rights. In any event, Castleman acknowledges that tribal courts themselves employ the minimum contacts / purposeful availment analysis. *Supra* at 1268–77. *See also* *Nelson v. Pfizer*, 8 Navajo Rptr. 369, 374 (2003) (employing minimum contacts test); *In re Estate of Tasunke Witko v. G. Heileman Brewing Co* (Rosebud Sioux Tr. Ct., 1994), *rev’d* 23 Indian L. Rep. 6104 (Rosebud Sioux Sup. Ct. 1996) (same). *See further* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 322–26 (1998) (describing application of personal jurisdiction doctrine by tribal courts).

Congress's trust obligation to preserve tribal sovereignty cannot excuse ICWA from the mandates of due process and equal protection. However "plenary" Congress's powers with regard to Indians may be, those powers are "not absolute" and cannot trump the Constitution.<sup>132</sup> Nobody would contend, for example, that the trust obligation to preserve tribal sovereignty would entitle Congress to, say, forbid Indians from relinquishing tribal membership, or leaving reservations, or marrying non-Indians, or obtaining abortions.<sup>133</sup> All these things would help increase and strengthen tribal membership, but Congress's powers with regard to its trust obligation are limited by the Constitution, and particularly by constitutional protections for the rights of American citizens.<sup>134</sup> Likewise, Congress has no constitutional authority to order that cases involving children within a biologically defined category be transferred to the jurisdiction of tribal courts in the absence of minimum contacts.

As in all cases, personal jurisdiction in ICWA cases must satisfy the requirements of due process, including the "minimum contacts/purposeful availment" analysis. Yet while the minimum contacts requirement is certainly satisfied when a tribal court exercises jurisdiction over tribal members domiciled on the reservation, that requirement is not satisfied in cases involving *off*-reservation children whose sole connection to a tribe is their ancestry.

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<sup>132</sup> Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977) (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) (plurality)).

<sup>133</sup> Cf. KENNEDY, *supra* note 29, at 513 ("I see little virtue in burdening the living, particularly youngsters who have no choice in the matter, for the sake of preserving—freezing—group identities as they are presently constituted.").

<sup>134</sup> The term "plenary" is misleading. As Justice Thomas has convincingly shown, Congress has no "plenary" power with regard to Indians. United States v. Lara, 541 U.S. 193, 214–26 (2004) (Thomas, J., concurring). Certainly the Indian Commerce Clause cannot authorize such power. See Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 265 (2007) ("The Indian Commerce Clause was adopted to grant Congress power to regulate Indian trade between people under state or federal jurisdiction and the tribes . . . . It did not grant to Congress a police power over the Indians, nor a general power to otherwise intervene in tribal affairs."). It is hard to see how, if Congress lacks power under the Interstate Commerce Clause to compel individuals to engage in commerce, *see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012), it could have power under the Indian Commerce Clause to essentially compel tribal membership.

*In re Armell* is a distressing example of the impact that ICWA's jurisdiction transfer provisions can have on child welfare cases.<sup>135</sup> That case involved a three-and-a-half-year-old child named Eleanor who was found rummaging through a dumpster in Chicago in 1985.<sup>136</sup> She was suffering from tuberculosis.<sup>137</sup> When her mother was finally located, state child services workers determined that she was a member of the Winnebago tribe.<sup>138</sup> It was later discovered that she was not Winnebago, but was eligible for membership in the Potawatomi tribe—though she was not actually a member.<sup>139</sup> Transfer of jurisdiction to tribal court was twice denied because Eleanor's mother objected.<sup>140</sup> In the meantime, Eleanor was placed, first with her aunt, and a month later, when the aunt asked that she be removed, with a foster family.<sup>141</sup> The foster mother was a member of the Menominee tribe.<sup>142</sup> Two years later, when the case reached trial, the Winnebago tribe appeared and objected to the foster placement on the grounds that the foster mother was not Winnebago or Potawatomi.<sup>143</sup> The court stayed proceedings to allow the Potawatomi tribe to make an appearance, and during that delay, Eleanor was enrolled in the Potawatomi tribe, without her guardian being made aware of the fact.<sup>144</sup> In April of 1988, three years after she had been taken into protective custody, the court transferred Eleanor's case to Potawatomi tribal court.<sup>145</sup>

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<sup>135</sup> 550 N.E.2d 1060 (Ill. App. Ct. 1990).

<sup>136</sup> *Id.* at 1062

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1063.

The Illinois Court of Appeals affirmed the transfer order and concluded that “Congress expressed a preference for the tribal court to determine these matters regardless of any psychological impact upon the child.”<sup>146</sup> Therefore, “‘best interests of the child’ considerations do not provide sufficient bases to deny transfer of jurisdiction.”<sup>147</sup> The fact that Eleanor’s mother did not inform authorities she was Potawatomi until two years into the case also made no difference.<sup>148</sup> Nor did the fact that Eleanor lacked the “minimum contacts” required to satisfy due process.<sup>149</sup> The court ruled that Congress’s Indian Commerce Clause power entitled it to “legislate even with respect to custody litigation concerning off-reservation Indian children,” and because ICWA was “enacted by Congress to ensure that Indian tribal members are protected, regardless of the lack of present tribal contacts,” the ordinary due process rules of personal jurisdiction did not apply.<sup>150</sup> The fact that Eleanor would be removed from a stable, loving foster family with whom she had lived for half of her eight years of life was tossed aside because “even in instances where there is a *total lack of contact* with a child, an Indian tribe has a very real and substantive interest in each child.”<sup>151</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* The Iowa Supreme Court has held that the children themselves must be given the opportunity—not provided by ICWA—to object to jurisdiction transfer in their own cases. In *In re J.L.*, 779 N.W.2d 481 (Iowa 2009), that court found that although parties “are not allowed to object to a transfer motion based upon the best interests of the children,” the children must be free to object because a transfer determination would affect their interests in familial relationships and physical safety. *Id.* at 490 (quoting *In the Interest of N.V. & P.V.*, 744 N.W.2d 634, 630 (Iowa 2008)). The state’s blanket prohibition on the children asserting their own best interests deprived them of individualized determinations of their own cases, and “place[d] the rights of the tribe above the rights of an Indian child.” *Id.* at 491. This was not narrowly tailored to accomplish the compelling interest in ensuring the survival of Indian tribes. *Id.* at 490.

<sup>148</sup> See *Armell*, 550 N.E.2d at 1068.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* The court cited *Holyfield* to support this conclusion, but this was a misreading of *Holyfield*. That case involved Indian tribal members who were domiciled on a reservation. If Congress could dispense with the minimum-contacts requirement with respect to *off-reservation* Indian children, the Court would not have had to address the interpretation of the word “domicile.” Yet that is what makes up most of the *Holyfield* decision.

<sup>151</sup> *Id.* at 1069 (emphasis added).

This cannot be correct. The fact that Congress acts under its Indian Commerce Clause power, or that it intended to protect tribes, cannot override the requirements of due process.<sup>152</sup>

One might argue that ICWA's jurisdictional rules fall within a long-recognized exception to the minimum contacts requirement called the "status" rule, which allows state courts to hear certain actions to determine the status of citizens—such as divorce or custody matters—even if the defendants to those actions are beyond the state courts' jurisdiction.<sup>153</sup> But this argument would fail because the status exception only allows a court to hear a case where the *child is present* in the forum, while the parent is not.<sup>154</sup> That is not what happens in ICWA cases in which children who lack minimum contacts to the tribal forum, do not live on reservations, and may never have even visited a reservation, have their fates decided by tribal courts.<sup>155</sup> Also, the purposes of the status exception are to prevent jurisdictional conflicts and to ensure that a custody matter is decided by courts in the state where the child has the closest connection.<sup>156</sup> But ICWA does not prevent jurisdictional conflicts; it causes them. State court adjudication is already available in these off-reservation cases, so there is no risk that, absent tribal adjudication,

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<sup>152</sup> Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83–85 (1977) (Congress's "plenary" power to legislate with regard to Indian tribes does not trump due process); cf. Reid v. Covert, 354 U.S. 1, 17 (1957) (Congress could not subject civilian U.S. citizens to military court jurisdiction pursuant to its authority to regulate the military forces); Walden v. Fiore, 134 S. Ct. 1115 (2014) (applying purposeful availment / minimum contacts analysis in drug trafficking case even though Congress can prohibit drug trafficking under the Interstate Commerce Clause). While jurisdictional limits may be looser in criminal law, see, e.g., United States v. Ali, 718 F.3d 929, 944 (D.C. Cir. 2013), domestic child welfare cases are civil law matters quintessentially subject to state court jurisdiction—and to its limits.

<sup>153</sup> See Pennoyer v. Neff, 95 U.S. 714, 734 (1877); Schaffer v. Heitner, 433 U.S. 186, 208 n.30 (1977).

<sup>154</sup> See *In re J.D.M.C.*, 739 N.W.2d 796, 813 (S.D. 2007); *State ex rel. W.A.*, 63 P.3d 607, 616 (Utah 2002) (status exception enables state courts to determine interests of children residing in that state, and in order to prevent putting children in legal limbo); McCaffery v. Green, 931 P.2d 407, 411 (Alaska 1997) ("the ties and relations between a parent and child create ties and relations between the parent and the state in which the child lives sufficient to satisfy notions of fairness in exercising personal jurisdiction.").

<sup>155</sup> Consider, for instance, *Renteria v. Shingle Springs Band of Miwok Indians*, No. 2:16-CV-1685-MCE-AC, 2016 WL 4597612 (E.D. Cal. Sept. 2, 2016). That case involved three children whose parents were killed in a car accident, and whose custody then was disputed by surviving family members. Neither the children nor the parents ever lived on reservation, or even in the same county as the reservation, yet the Miwok tribal court asserted jurisdiction to order the children placed with a tribal member.

<sup>156</sup> *State ex rel. W.A.*, 63 P.3d at 616; *In re Thomas J.R.*, 663 N.W.2d 736, 747 (2003).

the parties might lack a forum. Nor does tribal court jurisdiction over off-reservation children ensure that their cases are decided by the court closest to the child. On the contrary, it requires that their cases—which would ordinarily be decided by state courts under non-discriminatory state law—be decided instead by an entity, perhaps geographically distant, which is connected to the child solely by race. The resulting jurisdictional clashes, with lengthy disputes over whether “good cause” exists to deny transfer, and often with time-consuming appeals and remands, frequently disrupt what would otherwise be a routine matter. Finally, the status exception is applicable only where the exercise of jurisdiction “is in the child’s interest, not merely the interest or convenience of the feuding parties.”<sup>157</sup> But many courts have deemed the child’s best interest to be an *improper* consideration with regard to ICWA’s jurisdiction transfer requirements.<sup>158</sup>

The South Dakota Supreme Court has approached something like a status-exception theory in ICWA cases. In one case, it declared that tribal jurisdiction depends “on whether the matter demands exercise of the tribe’s responsibility of self-government. There can be no greater threat to essential tribal relations and to the tribal power of self-government than to interfere in questions of custody of tribal members.”<sup>159</sup> But the self-government question is relevant to the question of retained sovereignty, and thus ultimately relevant to *subject-matter* jurisdiction—it simply does not address the due process requirements of *personal* jurisdiction. The importance of a subject matter to tribal self-government is a factor in the determination of

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<sup>157</sup> *In re* Thomas J.R., 663 N.W.2d at 741–42.

<sup>158</sup> See *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 (Tex. App. 1995); *In re* Armell, 194 Ill. App. 3d 31, 39 (1990); *C.E.H. v. L.M.W.*, 837 S.W.2d 947, 954 (Mo. Ct. App. 1992); *In re* Interest of Zylena R., 284 Neb. 834, 851–52 (2012); *Contra*, *In re* Appeal in Maricopa County Juvenile Action No. JS–8287, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991); *In re* Robert T., 200 Cal. App. 3d 657, 665 (1988); *In re* T.R.M., 525 N.E.2d 298, 308 (1988); *In re* N.L., 754 P.2d 863, 869 (Okla. 1988); *In re* J.J., 454 N.W.2d 317, 331 (S.D. 1990).

<sup>159</sup> *People ex. rel. G.R.F.*, 569 N.W.2d 29, 33 (S.D. 1997) (quoting *In re* D.L.L. and C.L.L., 291 N.W.2d 278, 281 (S.D. 1980)).

whether a tribe retains inherent sovereignty to govern that subject.<sup>160</sup> It does *not* resolve the additional question of whether a tribe has personal jurisdiction over parties who are beyond tribal limits,<sup>161</sup> let alone over off-reservation children who have no cultural affiliation with that tribe and are only eligible for membership on account of their ancestry. The South Dakota Supreme Court seemed to recognize that fact when it noted that the basis of tribal jurisdiction in ICWA cases is “the child’s relationship with the tribe *through residency, domicile, or as a ward of the tribal court.*”<sup>162</sup> In short, the importance of child welfare matters to the longevity of the tribe does not override the ordinary requirements of personal jurisdiction, or justify employing the status exception where it would not ordinarily apply.

In *In re J.D.M.C.*, the same court found that tribal judges lacked personal jurisdiction over a non-Indian father in a child abuse matter that occurred off-reservation, and where neither he, nor the mother, nor the children, were ever residents of, or domiciled on, the reservation.<sup>163</sup> Given that the father was “a nonresident, non-tribal member who never resided or domiciled on the reservation,” and who had “not purposefully availed himself to the benefits and protections of the laws of the . . . reservation,” the court found that the father’s “connections” with the tribe were “too attenuated to constitute minimum contacts,” and thus the tribe could not exercise personal jurisdiction consistently with due process of law.<sup>164</sup> This common-sense application of

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<sup>160</sup> See, e.g., *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425–26 (1989);

<sup>161</sup> See *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 809 (9th Cir. 2011) (“To exercise its inherent civil authority over a defendant, a tribal court must have both subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction—and personal jurisdiction.”).

<sup>162</sup> The South Dakota Supreme Court seemed to recognize that fact when it noted that the basis of tribal jurisdiction in ICWA cases is “the child’s relationship with the tribe *through residency, domicile, or as a ward of the tribal court.*” *G.R.F.*, 569 N.W.2d at 33 (emphasis added).

<sup>163</sup> 739 N.W.2d 796 (S.D. 2007).

<sup>164</sup> *Id.* at 812. See also *Merrill v. Altman*, 807 N.W.2d 821 (S.D. 2011) (tribal court lacked exclusive jurisdiction under ICWA in custody case involving children who were members of tribe but were not domiciled on reservation).

the minimum contacts test should govern ICWA cases, too. People with no minimum contacts to the tribal court should not be haled into tribal court solely on account of their biological ancestry.

## 2. Federalism

ICWA's interference with state court jurisdiction also collides with principles of federalism. There is typically no disputing the federal government's power to preempt states with regard to Indian law, but such preemption is problematic when it is stretched to include off-reservation matters involving children who are not members of a tribe, but only eligible for membership for biological reasons. Family law is quintessentially a subject of state concern, left to the purview of the states by the Tenth Amendment.<sup>165</sup> So great is the role of states in this area that federal courts even lack authority to decide divorce or child custody cases in diversity jurisdiction.<sup>166</sup> Primary responsibility for family law is with the states, subject to the limits of federal constitutional protections.<sup>167</sup>

But ICWA overrides state jurisdiction over family law, and—as explained below—dictates substantive law that state officials must implement in family law adjudications. In doing so, it disrupts what would otherwise be the uniform application of state law relating to foster care, custody, or adoption, without regard to race, ethnicity, or national origin. ICWA overrides this nondiscriminatory state law, and segregates “Indian children” into a special category subject to different rules, solely as a consequence of their ethnicity.

In *United States v. Windsor*, the Supreme Court held the federal Defense of Marriage Act unconstitutional in part because it interfered with state family law and mandated discrimination

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<sup>165</sup> *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

<sup>166</sup> *Ankenbrandt v. Richards*, 504 U.S. 689, 703–07 (1992).

<sup>167</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013).

where none would have applied otherwise.<sup>168</sup> Many states had chosen to broaden the definition of marriage to include same-sex couples, the Court noted, but the Defense of Marriage Act “intrude[d] on state power” and forced states to discriminate against same-sex couples.<sup>169</sup> By imposing separate legal treatment where state law would ordinarily have applied a non-discriminatory rule, the Act “disrupt[ed] the federal balance.”<sup>170</sup> The same is true of ICWA. It subjects children whose ethnic ancestry renders them eligible for tribal membership to unequal treatment, and overrides non-discriminatory state law in a way that makes it harder to ensure their safety and to find them adoptive homes.

True, ICWA was intended in part to remedy past discrimination, and Congress has power to override state law when necessary for this purpose.<sup>171</sup> But such intervention imposes *current* burdens and must be justified by *current* needs.<sup>172</sup> Whatever need there may have been a generation ago for federal intervention to protect American Indians from abuse at the hands of state child protection agencies, that cannot justify the continued intrusion on state law matters without some showing that those abuses remain, and that ICWA resolves them in a constitutionally acceptable manner.<sup>173</sup>

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<sup>168</sup> *See id.* at 2692.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See generally* Nevada v. Hibbs, 538 U.S. 721 (2003).

<sup>172</sup> *Cf.* Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2619 (2013). *See also* Williams v. Babbitt, 115 F.3d 657, 665–66 (9th Cir. 1997) (where social and economic conditions of indigenous population have changed, legislation that addresses their interests may be rendered unconstitutional).

<sup>173</sup> Indian children are still removed from Indian homes and placed in non-Indian homes at a disproportionately high rate, but as the problems of poverty, alcoholism, drug abuse, and domestic violence are disproportionately higher in Indian country, this fact alone cannot show that the problems ICWA was enacted to redress still remain. *See* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 306 (4th ed. 2012) (“The extent to which these disparities are due to persistent bias and prejudice as opposed to legitimate responses to child abuse and neglect cannot be determined with any degree of certainty.”). Of course, there are still abuses, including the shocking case of *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015). But the abuses involved there were sufficiently addressed by due process protections. *See id.* at 769–72.

ICWA violates another essential protection for federalism: the anti-commandeering rule. The federal government may not force state officers or state legislatures to enforce federal law.<sup>174</sup> In *Printz v. United States*,<sup>175</sup> the Supreme Court found the Brady Act of 1993 unconstitutional because it “direct[ed] state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.”<sup>176</sup> People selling firearms were required to submit information forms to these officers so that background checks could be performed.<sup>177</sup> Notably, the Act instructed officers to “make a reasonable effort” to determine whether a proposed firearm purchase was legal.<sup>178</sup> If an officer determined that a sale would violate the law, the Act required the officer to give the would-be buyer a written explanation. If the purchase was legal, the officer was instructed to destroy the paperwork.<sup>179</sup>

Like the Brady Act, ICWA commands not only state judges but also state executive officers to participate in the administration of a federal regulatory program—one that overrides the quintessential state-law realm of family law. Among other things, it orders state child welfare officers to place children in foster care or adoptive families in conformity with its preferences,<sup>180</sup> mandates state record-keeping and inspection practices,<sup>181</sup> and requires that state officers make “active efforts” to reunite Indian families—which includes “provid[ing] remedial services and rehabilitative programs” to abusive parents.<sup>182</sup> In striking down the Brady Act, the *Printz* Court was particularly troubled by the Act’s “reasonable efforts” provision, noting that it

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<sup>174</sup> See *New York v. United States*, 505 U.S. 144, 161–66 (1992).

<sup>175</sup> 521 U.S. 898 (1997).

<sup>176</sup> *Id.* at 904.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 903–04.

<sup>180</sup> 25 U.S.C. § 1915(b).

<sup>181</sup> *Id.* § 1915(e).

<sup>182</sup> *Id.* § 1912(d).

essentially compelled states to adopt compliant policies, and ““dragooned”” state officers “into administering federal law.”<sup>183</sup> ICWA does precisely this—commanding not only that states adopt and implement “active efforts” policies, but also that they comply with the administration of a federally-mandated body of family law.

The recent BIA Guidelines are even more express in directly commanding state courts. They use the word “must” 101 times while instructing state agencies and officers. The Guidelines are meant to “clarify the minimum Federal standards, and best practices . . . to ensure that ICWA *is applied in all States* consistent with the Act’s express language,”<sup>184</sup> and include instructions such as: “The agency seeking a[n] . . . adoptive . . . placement of an Indian child *must always* follow the placement preferences.”<sup>185</sup> State courts often insist that the Guidelines are not mandatory,<sup>186</sup> but they are certainly phrased in mandatory language.

In *The Federalist*, Alexander Hamilton found it so hard to imagine the federal government trying “by some forced constructions of its authority” to “vary the [state] law” relating to inheritance or other domestic matters that only the “imprudent zeal” of the Constitution’s opponents could envision such a thing.<sup>187</sup> Yet with ICWA, Congress has not only varied the law of child welfare for one specific ethnic group, but has compelled state officials to develop and implement a special set of standards that deviates from the state-law norm—often in ways that harm children.

## **B. “Active Efforts” to Reunify Families**

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<sup>183</sup> *Printz*, 521 U.S. at 927–28.

<sup>184</sup> *Guidelines*, 80 Fed. Reg. 10146, 10150 A.1 (Feb. 25, 2015) (emphasis added).

<sup>185</sup> *Id.* at 10157, F.1(b) (emphasis added).

<sup>186</sup> *See, e.g., In re M.K.T.*, 368 P.3d 771, 783–84; (Okla. 2016); *Brenda O. v. Arizona Dep’t. of Econ. Sec.*, 226 Ariz. 137, 140 (Ct. App. 2010); *In re Interest of Tavian B.*, 292 Neb. 804, 815 (2016) (Stacy, J., concurring and dissenting) (“we are under no obligation to follow the guidelines.”).

<sup>187</sup> THE FEDERALIST No. 33 at 206 (J. Cooke ed., 1961) (Alexander Hamilton).

ICWA differs from state law in many ways, with the result that Indian children are treated differently than children of other ethnicities in cases that are otherwise the same. Given that this law deals with the welfare of abused or neglected children, these differences can have a profound impact on the lives of America's most vulnerable citizens.

The most significant of these differences involve efforts to reunify families after children have been taken into state custody. State law, as well as the federal Adoption and Safe Families Act,<sup>188</sup> requires that child-welfare officials make "reasonable efforts" to reunify families in such cases.<sup>189</sup> But the rules are different for Indian children: in their cases, state officials must make "active efforts" toward reunification.<sup>190</sup> Although some state courts regard these terms as synonymous,<sup>191</sup> most have concluded that "active efforts" imposes a greater obligation on the government to reunite children with families after a removal than does the "reasonable efforts" standard.<sup>192</sup> The BIA's Guidelines also take this position,<sup>193</sup> although its new regulations make no explicit determination.<sup>194</sup>

As a practical matter, the difference can be enormous. "Active efforts" is typically distinguished from "passive efforts," such as making counseling services or similar opportunities

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<sup>188</sup> Pub. Law. 105-89, § 111 Stat. 2129 (1997).

<sup>189</sup> See, e.g., 42 U.S.C. § 671(a)(15); ALASKA STAT. § 47.10.086 (2016); IOWA CODE § 232.102(5)(b); MINN. STAT. § 260.012(a).

<sup>190</sup> 25 U.S.C. § 1912(d) (2012) (emphasis added).

<sup>191</sup> See, e.g., *In re Adoption of Hannah S.*, 142 Cal. App. 4th 988, 998 (2006) ("Active efforts are essentially equivalent to reasonable efforts to provide or offer reunification services in a non-ICWA case and must likewise be tailored to the circumstances of the case.").

<sup>192</sup> See, e.g., *In re Shayla H.*, 22 Neb. App. 8 (Neb. Ct. App. 2014), *aff'd*, 289 Neb. 473 (2014); *People ex rel. A.R.*, 310 P.3d 1007, 1015 (Colo. Ct. App. 2012); *In re JL*, 770 N.W.2d 853, 865 (Mich. 2009); *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. Ct. App. 2007); *In re A.N.*, 106 P.3d 556, 560–61 (Mont. 2005); *In re Interest of Walter W.*, 274 Neb. 859, 865 (2008); *In re J.S.*, 177 P.3d 590, 593 (Okla. Civ. App. 2008); *Dep't of Human Services v. K.C.J.*, 228 Or. App. 70, 74 (2009); *State ex rel. C.D.*, 200 P.3d 194, 205 (Utah. Ct. App. 2008). See also Megan Scanlon, *From Theory to Practice: Incorporating the "Active Efforts" Requirement in Indian Child Welfare Act Proceedings*, 43 ARIZ. ST. L. J. 629, 646–54 (2011).

<sup>193</sup> *Guidelines*, 80 Fed. Reg. at 10150–51, A.2(15).

<sup>194</sup> The regulations chose simply to omit reference to "reasonable efforts," rather than to compare "active" and "reasonable" efforts. 81 Fed. Reg. at 38791.

available for parents who wish to reunify their families. While passive efforts might satisfy the “reasonable efforts” standard, it is insufficient to discharge a state’s duties under ICWA’s *active* efforts mandate.<sup>195</sup> Instead, ICWA requires state social services workers to positively assist in developing parenting skills, obtaining employment, or whatever else the parent must have to retain custody, even if the parent shows little progress or even demonstrates a lack of interest.<sup>196</sup>

“Reunification” of the family requires a delicate balance, because it might mean the restoration of normal relationships after a bad episode in the family’s history—or it can mean returning a child to a known abusive family where the child will suffer repeated instances of abuse or neglect. ICWA’s “active efforts” provision is so poorly designed that it often has the perverse effect of exposing Indian children to a greater risk of abuse or neglect, and frequently results in delaying or denying protection children need.

Most courts have ruled that because ICWA’s active efforts requirement is more stringent than “reasonable efforts,” the circumstances that would ordinarily relieve the state of the obligation to reunite the family under the “reasonable efforts” standard do *not* relieve the state of the obligation to make *active* efforts.<sup>197</sup> This means that while officials are not required to reunify a *non*-Indian child with a family after she is removed due to parental substance-abuse problems, or physical or sexual abuse,<sup>198</sup> such a duty *does* exist with regard to Indian children. Even incarceration of the parent does not relieve state child welfare workers of their duty to

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<sup>195</sup> See, e.g., *A.A. v. State, Dep’t of Family & Youth Servs.*, 982 P.2d 256, 261 (Alaska 1999).

<sup>196</sup> ICWA requires that “remedial services” be provided to parents, up to and including “the bizarre undertaking of ‘stimulat[ing]’ a biological father’s ‘desire to be a parent,’” *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013). Only after such efforts prove fruitless, and it is shown beyond a reasonable doubt that the parent lacks interest in caring for the child, can parental rights be terminated under ICWA. See, e.g., *Loren R. v. Arizona Dep’t of Econ. Sec.*, No. 1 CA-JV 12-0158, 2013 WL 119664, at \*4 (Ariz. Ct. App. Jan. 10, 2013); *In re Noah B.*, No. CP00013544A, 2005 WL 648058, at \*18 (Conn. Super. Ct. Feb. 16, 2005).

<sup>197</sup> See, e.g., *In re. People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 618 (S.D. 2005).

<sup>198</sup> See, e.g., 42 U.S.C. § 671(a)(15)(D) (2012); *In re Interest of Ethan M.*, 723 N.W.2d 363, 372–74 (Neb. Ct. App. 2006); *New Jersey Div. of Youth & Fam. Servs. v. A.R.G.*, 179 N.J. 264, 283–85 (2004).

actively seek reunification of Indian children and birth parents.<sup>199</sup> The BIA's recently announced Guidelines expand the active efforts requirement, mandating that state officials prove *beyond a reasonable doubt* that active efforts have been unsuccessful, and prove this through the testimony of an expert witness who is an expert in the culture and customs of the child's tribe (as opposed to an expert on child welfare or child psychology).<sup>200</sup> And the BIA's 2016 regulations provide that the "active efforts" requirement must apply as soon as state officers have "reason to know"—often merely a suspicion—that a child is subject to ICWA.<sup>201</sup>

The Supreme Court held in 2013 that "active efforts" are not required in cases where the birth parent has never had contact with the child, in which case there is no Indian family threatened with breakup.<sup>202</sup> But the "active efforts" requirement may be more problematic in cases where the birth parent *has* had contact, because in such cases, that requirement can force state officials to return children to the very parents who have abused them in the first place.

One example of this is *In re Interest of Shayla H.*,<sup>203</sup> in which Nebraska child welfare officials removed three children, Shayla (12), Shania (11), and Tanya (9) from their birth father, David, due to allegations of physical abuse.<sup>204</sup> Specifically, Shayla had been beaten by David's girlfriend, Danielle (not the children's mother), and child welfare officials found that all three were suffering from neglect. Shania and Tanya were enrolled members of the Sioux tribe, and

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<sup>199</sup> *A.M. v. State*, 891 P.2d 815, 827 (Alaska 1995).

<sup>200</sup> *Guidelines*, 80 Fed. Reg. at 10156, D.2 & D.3. The 2016 regulations "decline[d] to establish a uniform standard of proof" with regard to active efforts, but promised further evaluation for "future rulemakings." 81 Fed. Reg. at 38816.

<sup>201</sup> BIA Regulations § 23.107, 81 Fed. Reg. at 38869-70. California Rules of Court also require that ICWA be applied whenever there is "reason to know" the child is an Indian child. Cal. R. Ct. 5.481. *Guidelines*, 80 Fed. Reg. at 10156, D.2 & D.3. The 2016 regulations "decline[d] to establish a uniform standard of proof" with regard to active efforts, but promised further evaluation for "future rulemakings." 81 Fed. Reg. at 38816.

<sup>202</sup> *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2562 (2013).

<sup>203</sup> 846 N.W.2d 668 (Neb. App. 2014), *aff'd* 855 N.W.2d 774 (Neb. 2014).

<sup>204</sup> *Id.* at 672.

although Shayla was not, she was eligible for membership. The children were returned to the family, and over the next seven months, David and Danielle participated in counseling services geared toward reunification.<sup>205</sup> However, the children showed signs of continuing problems. The trial court concluded that it was in their best interests that custody remain with state social services, although they were physically returned to the couple.<sup>206</sup> The court also required David to cooperate with state child welfare investigations, to desist from physical discipline of the children, to provide them with therapy, etc.<sup>207</sup>

The Appellate Court reversed, on the grounds that although the state had employed “reasonable” efforts at reunifying the children with David, it had not employed *active* efforts.<sup>208</sup> The trial court’s finding that the children’s best interests would be best served by the state retaining legal custody was therefore insufficient.<sup>209</sup> The Nebraska Supreme Court agreed, holding that even though the children remained in the birth parent’s physical custody, the decision to withhold legal custody fell short of the active efforts requirement.<sup>210</sup> Only briefly noted in the court’s opinion was the fact that “the children were subsequently removed from David’s physical custody.”<sup>211</sup> That was because by the time the court ruled, David had once again abused the three, as well as other children.<sup>212</sup> In May, 2015, the Juvenile Court found him “unfit by reason of debauchery or repeated lewd and lascivious behavior”<sup>213</sup> and “callous

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 673.

<sup>208</sup> *Id.* at 677–78.

<sup>209</sup> See *In re Interest of Shayla H.*, 846 N.W.2d at 678.

<sup>210</sup> *State of Nebraska v. Daphne Hansen*, 855 N.W.2d, 777. (Neb. 2014).

<sup>211</sup> *Id.* at 776.

<sup>212</sup> *Id.*

<sup>213</sup> *In re Interest of Shayla H., et al.*, Doc. JV13 (Juvenile Court of Lancaster County, May 1, 2015) at 3 (on file with Goldwater Institute).

disregard for those children's emotional well-being."<sup>214</sup> David, a methamphetamine addict, had molested Danielle's son and daughter as well as his own youngest daughter, and had failed to protect his three daughters from sexual molestation by Danielle's sons.<sup>215</sup> The court concluded that all three girls had "experienced lifetimes of trauma."<sup>216</sup> Had the courts applied the best interests standard as the overriding consideration from the outset—and had state officials not been required to make "active efforts" to reunite Shayla, Shania, and Tanya with their abusive father—much needless suffering could have been avoided.

Even more disturbing is the case of Declan Stewart, an Oklahoma Cherokee boy who was beaten to death in 2007 at the age of five by his mother's boyfriend.<sup>217</sup> Declan had been removed from his mother's custody eighteen months earlier when he appeared with signs of severe physical abuse, including a fractured skull and a bruised rectum.<sup>218</sup> But when state social services workers sought to terminate the mother's rights, the Cherokee tribe objected, insisting upon "reunification."<sup>219</sup> Five weeks after Declan was returned to his mother's physical custody, he died in unimaginable agony.<sup>220</sup>

Even in less extreme circumstances, ICWA's "active efforts" provision inflicts unnecessary psychological harm on children. In *Department of Human Services v. J.M.*,<sup>221</sup> the Oregon Court of Appeals affirmed a trial court's decision to clear a child, referred to as L, for

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<sup>214</sup> *Id.* at 19.

<sup>215</sup> *Id.* at 18.

<sup>216</sup> *Id.*

<sup>217</sup> Nolan Clay & Randy Ellis, *U.S. Law Pushed Boy Home before He Died—Tribal Statute Advocates Reunifying Split Families*, NEWS OK (Oct. 4, 2007), <http://newsok.com/article/3140271/1191472787>. See also Alice Collinsworth, *Report Details Child's Abuse, Death*, EDMONDSUN.COM (Oct. 4, 2007), [http://www.edmondsun.com/news/local\\_news/report-details-child-s-abuse-death/article\\_9f84660f-6a42-5a24-a4d7-9b39451418fa.html](http://www.edmondsun.com/news/local_news/report-details-child-s-abuse-death/article_9f84660f-6a42-5a24-a4d7-9b39451418fa.html).

<sup>218</sup> Mark Flatten, *Death on A Reservation 25* (Goldwater Institute, 2015), [https://goldwater-media.s3.amazonaws.com/cms\\_page\\_media/2015/8/14/Final%20Epic%20pamphlet.pdf](https://goldwater-media.s3.amazonaws.com/cms_page_media/2015/8/14/Final%20Epic%20pamphlet.pdf).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 25–26; Collinsworth, *supra* note 222.

<sup>221</sup> 266 Or. App. 453, 455 (2014).

adoption.<sup>222</sup> The case began in 2009, when state officials removed L’s sibling from the birth parents on the basis of neglect.<sup>223</sup> That sibling was eventually adopted.<sup>224</sup> Three years later, L was born, and child welfare workers sought to take him into custody two days after his birth.<sup>225</sup> The parents were diagnosed with mental and emotional problems, as well as anger management and aggression problems,<sup>226</sup> but because L was an Indian child, ICWA’s “active efforts” mandate applied.<sup>227</sup>

Thus, in late 2012, the state presented the parents with rehabilitation and treatment plans requiring counseling, parenting classes, and regular visits with L.<sup>228</sup> But the parents skipped sessions, paid little attention to the classes, and had repeated emotional outbursts, including storming out of an anger management session.<sup>229</sup> Nevertheless, the state persisted in its efforts throughout 2013. The parents were frequently uncooperative, and the counseling sessions, conducted with L present, often ended in tension and frustration.<sup>230</sup> “At a June session,” the court later found, “father used abusive language and behavior towards [the counselor] in L’s presence; neither parent recognized how such behavior could be frightening for L.”<sup>231</sup> The father’s “explosive behavior and inappropriate language” had led the counselor to terminate other sessions, all leading to greater anxiety and delay,<sup>232</sup> but the state continued its efforts.<sup>233</sup> Only after eighteen months of persistent failures of this sort did the trial court rule that L could

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<sup>222</sup> *Id.* at 456.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *J.M.*, 266 Or. App. at 456–57.

<sup>227</sup> *Id.* at 464–66.

<sup>228</sup> *Id.* at 464.

<sup>229</sup> *Id.* at 464–66.

<sup>230</sup> *Id.* at 466.

<sup>231</sup> *Id.* at 467.

<sup>232</sup> *J.M.*, 266 Or. App. at 466–67.

<sup>233</sup> *Id.*

be removed from the parents and placed in foster care.<sup>234</sup> The parents then appealed, and the court of appeals rendered its decision ten months later, in October of 2014.<sup>235</sup> A petition to the state Supreme Court followed, and was not denied until February 2015, when L was four years old.<sup>236</sup>

ICWA's "active efforts" requirement returns abused children to the custody of abusive adults, forces children to experience the strain of parents' psychological or social problems to a greater degree than other children must experience under the "reasonable efforts" rule, increases the stress on foster families, prolongs the adoption process, and encourages unnecessary technical appeals.<sup>237</sup> Courts in California—one of only two states to embrace the proposition that "active efforts" does not apply when parents prove unfit—have observed that ICWA "was not intended as a shield to permit abusive treatment of Indian children by their parents."<sup>238</sup> But in practice, that frequently happens.

### **C. Different Burdens of Proof for Foster Care and Termination of Parental Rights**

In cases involving non-Indian children, the decision to place a child in foster care is made by employing such burdens of proof as "reasonable grounds," or "probable cause," or "preponderance of the evidence." These standards have been carefully chosen to strike a balance between the rights of parents not to lose custody on too light a basis, and the rights of children not to be left in an abusive household simply because state officers have been unable to gather

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 453.

<sup>236</sup> *Dep't of Hum. Serv. v. J.M.*, 356 Or. 689 (2015).

<sup>237</sup> Ashley E. Brennan, *Child Abuse Is Color Blind: Why the Involuntary Termination of Parental Rights Provision of the Indian Child Welfare Act Should Be Reformed*, 89 U. DET. MERCY L. REV. 257, 278 (2012).

<sup>238</sup> *In re K.B.*, 173 Cal. App. 4th 1275, 1285 (2009) (citations and quotation marks omitted). *See also In re T.S.*, 315 P.3d 1030, 1049 (Okla. 2014) ("The Indian Child Welfare Act was not intended as a shield to permit abusive treatment of Indian children by their parents or to allow Indian children to be abused, neglected, or forlorned under the guise of cultural identity." (citations and quotation marks omitted.))

definitive evidence. Arizona law, for example, allows state officials to remove a child from an abusive home in an emergency and place that child in temporary foster care on a showing that “reasonable grounds exist to believe that temporary custody is clearly necessary to protect the child,” and that “probable cause exists to believe” that the child is suffering or will imminently suffer abuse, neglect, or serious emotional injury.<sup>239</sup> Arizona law also uses a “preponderance of evidence” standard in determining dependency—*i.e.*, placing children in long-term foster care.<sup>240</sup>

In *Santosky v. Kramer*,<sup>241</sup> the Supreme Court employed the “clear and convincing evidence” standard, finding that anything less demanding would violate the due process rights of parents—their interests are too significant to be disposed of on a mere preponderance-of-the-evidence basis.<sup>242</sup> But the Court also declined to adopt the more demanding “beyond-a-reasonable-doubt” requirement, because the type of psychological evidence relied upon in family law cases is not usually susceptible of proof beyond a reasonable doubt,<sup>243</sup> and such a demanding rule might “erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.”<sup>244</sup> This latter point is important because termination is often necessary to clear the way for permanent adoption and allow a child from a troubled home to find a new, permanent, loving family.<sup>245</sup>

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<sup>239</sup> A.R.S. § 8-821(A)-(B).

<sup>240</sup> *In re Appeal In Cochise Cty. Juvenile Action No. 5666-J*, 133 Ariz. 157, 159 (1982); A.R.S. § 8-844(C).

<sup>241</sup> 455 U.S. 745 (1982).

<sup>242</sup> *Id.* at 758.

<sup>243</sup> *Id.* at 769.

<sup>244</sup> *Id.* The Court observed in passing that ICWA was the “only analogous federal statute of which we are aware” that “permits termination of parental rights solely upon ‘evidence beyond a reasonable doubt.’” *Id.* at 749–50. Although it did not address the constitutionality of that requirement, it did note that in passing ICWA “Congress did not consider . . . the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all state-initiated parental rights termination hearings.”

<sup>245</sup> Termination is not a legal prerequisite to voluntary adoption, but it is for involuntary adoption cases, and it ensures that adoptive families are not forced to allow visitation with unfit birth parents.

ICWA disregards this warning, however, and imposes heavier burdens of proof in cases involving Indian children than apply to children of other races. In order to place an Indian child in *foster* care, the state must prove by *clear and convincing* evidence—as opposed to reasonable grounds or probable cause—that allowing the child to remain in the parent's custody “is likely to result in serious emotional or physical damage to the child,” and such a finding must be based on expert testimony.<sup>246</sup> And in cases involving *termination of parental rights*, ICWA imposes the *beyond a reasonable doubt* standard that the *Santosky* Court rejected.<sup>247</sup> These different burdens mean that “caseworkers and attorneys are sometimes reluctant to accept surrenders of, or terminate parental rights to, an Indian child,”<sup>248</sup> even where that would be in the child's best interest. Obtaining expert testimony is costly for social services agencies operating on limited budgets and staff.<sup>249</sup> Requiring proof of serious physical damage is also likely to delay the removal of children from dangerous situations.

One distressingly common fact pattern in cases involving termination (as well as “active efforts”) occurs when the parents of an Indian child separate, and the mother remarries. When her new husband seeks to adopt her child as his own, the ex-husband is then empowered to use ICWA to block what would otherwise be the formation of a stable new family.<sup>250</sup> This is often not only contrary to the child's best interests, but to the wishes of Indian parents themselves.<sup>251</sup>

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<sup>246</sup> 25 U.S.C. § 1912(e).

<sup>247</sup> *Id.* § 1915(f).

<sup>248</sup> Debra Ratterman Baker, *Indian Child Welfare Act*, 15 CHILD. LEGAL RTS. J. 28, 28 (1995).

<sup>249</sup> See Hollinger, *supra* note 10, at 500 (“Congressional funding for the remedial services authorized by the ICWA has consistently been lower than the \$12 million per annum recommended by the Senate Select Committee. State welfare programs are often unavailable for reservation domiciliaries.”).

<sup>250</sup> See, e.g., *In re N.B.*, 199 P.3d 16 (Colo. App. 2007); *State ex. rel. D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997); *Adoption of Lindsay C.*, 229 Cal. App. 3d 404 (1991); *In re Crystal K.* 226 Cal.App.3d 655 (1990).

<sup>251</sup> One example of the kinds of delays imposed by ordinary application of ICWA is *In re Adoption of Josiah P.*, 2016 WL 245200 (Cal. Ct. App. Jan. 21, 2016). A young unmarried couple, Jessica and Tyler, ended their relationship after about six months. *Id.* at \*\*1–2. Tyler was a habitual drug abuser, unfaithful, and often verbally abusive to Jessica. *Id.* at \*1. He provided her no financial support for her, despite having plenty of expendable income. *Id.* at \*5. He admitted repeatedly that he was uninterested in parenting a child, and showed no interest in

For example, *In re Adoption of T.A.W.*<sup>252</sup> involved a child born in 2007 to C.B., a member of the Shoalwater Bay Tribe, and a non-Indian birth father, C.W.<sup>253</sup> C.W. was a methamphetamine addict, and in 2009, after an incident of domestic violence, C.B. obtained a temporary protection order against him.<sup>254</sup> C.W. had what the trial court later called a “significant criminal history,” including convictions for drug possession, car theft, fleeing the police, and burglary.<sup>255</sup> At some point in 2009, he stopped visiting T.A.W.<sup>256</sup> When, in 2012, he was released from prison, C.B. obtained a protective order against him from the Shoalwater tribal court.<sup>257</sup> It ordered C.W. to undergo six months of domestic violence classes before he could visit with the child.<sup>258</sup>

In the meantime, C.B. met and married another man, R.B.—an Indian—in June, 2013. C.W. was back in prison by then, this time to serve two years for robbery.<sup>259</sup> C.B. and R.B. then asked a state court to terminate his parental rights, preparatory to R.B. adopting the child as his own. The tribe supported this move, and the trial court found beyond a reasonable doubt that the

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providing for Jessica. *Id.* She volunteered her child for adoption, and the day after the child’s birth, in August, 2014, signed the adoption placement agreement. *Id.* at \*\*1–3, 4–7. Two days later, the adoptive parents filed a motion to terminate Tyler’s rights. *Id.* at \*3. Jessica was unaware of any Indian ancestry. *Id.* But Tyler never received the form asking if he had any Indian ancestry. *Id.* As a result, in January, 2016, the California Court of Appeal ordered that the case be remanded to the trial court to determine whether Tyler had Indian ancestry. *Id.* at \*\*8–9. If he were to answer yes, the adoption proceeding would be subject to vacatur and tribal intervention, and the child’s adoptive parents—who have taken care of the child for more than two years—could lose custody to a family chosen by the tribe. *See also In re S.L.*, 2006 WL 477772, \*1 (Cal. Ct. App. 2006) (remanding termination case for non-compliance with ICWA seven years previously).

<sup>252</sup> 383 P.3d 492 (2016).

<sup>253</sup> *Id.* at 494.

<sup>254</sup> *Id.* at 494–95.

<sup>255</sup> Findings of Fact, Conclusions of Law, and Order of Termination, *In re Adoption of T.A.W.*, No. 13-5-00015-9 (Aug. 21, 2014) (on file with Goldwater Institute); Memorandum Opinion, *In re Adoption of T.A.W.*, No. 13-5-00015-9 (July 24, 2014) at 3–5 (on file with Goldwater Institute).

<sup>256</sup> 383 P.3d at 495.

<sup>257</sup> *Id.*

<sup>258</sup> *In re Adoption of T.A.W.*, 188 Wash. App. 799, 804–05 (2015).

<sup>259</sup> Supplemental Brief of Respondent, *In re Adoption of T.A.W.*, (Wash. Sup. Ct. No. 92127-0) at 2 (on file with Goldwater Institute).

requirements of ICWA were satisfied.<sup>260</sup> But the Court of Appeals disagreed.<sup>261</sup> It found insufficient evidence in the record “that active efforts were made to provide C.W. with remedial services and rehabilitative programs to prevent the breakup of the Indian family.”<sup>262</sup> The fact that C.W. *was not an Indian* was irrelevant, the court found, because “the plain language of ICWA states that its provisions apply to the termination of parental rights to an Indian child without regard to a parent’s status.”<sup>263</sup> In short, despite plentiful reason for concluding that C.W. was an unfit parent, despite the fact that he chose to absent himself from his child’s life, despite the best judgment of both the Indian mother and her tribe, and despite the fact that ICWA was operating in this case to interfere with the Indian parent’s choices, contrary to the wishes of the tribe, and in service to the desires of the *non*-Indian birth parent, the court barred the termination (and consequent adoption) because the parties had not made “timely and diligent efforts” to “engag[e] [C.W.] . . . in reasonably available and culturally appropriate preventive, remedial, or rehabilitative services.”<sup>264</sup>

The Washington Supreme Court affirmed. “[W]hether the parent whose rights are being terminated is non-Indian is immaterial,” it found.<sup>265</sup> Consequently the “active efforts” provision of ICWA—which requires the state to prove that “active efforts have been made to . . . to prevent the breakup of the Indian family”<sup>266</sup>—meant the state must provide remedial services to a non-

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<sup>260</sup> *In re Adoption of T.A.W.*, 188 Wash. App. at 806.

<sup>261</sup> *Id.* at 799.

<sup>262</sup> *Id.* at 806–07.

<sup>263</sup> *Id.* at 808–09.

<sup>264</sup> WASH. REV. CODE § 13.38.040. In *Adoptive Couple v. Baby Girl*, the South Carolina Supreme Court observed that the “active efforts” provision “requires that remedial services be offered to . . . attempt[] to stimulate Father’s desire to be a parent.” 398 S.C. 625, 647 (2012). The United States Supreme Court, in reversing this decision, observed that “if prospective adoptive parents were required to engage in the bizarre undertaking of ‘stimulat[ing]’ a biological father’s ‘desire to be a parent,’ it would surely dissuade some of them from seeking to adopt Indian children.” *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563–64 (2013).

<sup>265</sup> 2016 WL 6330589, at \*8 (Wash. Oct. 27, 2016)

<sup>266</sup> 25 U.S.C. § 1912(d).

Indian birth parent—“culturally appropriate” services, no less. One dissenting justice pointed out the absurdity of this outcome: “Indian child T.A.W. is in an Indian home with his Indian natural mother and with an Indian stepfather with whom T.A.W. has bonded.”<sup>267</sup> To allow a non-Indian to bar that adoption under a statute intended to prevent the breakup of Indian families is nonsensical.

In *In re D.S.*, the Indiana Supreme Court reversed a decision terminating the parental rights of an Indian mother not residing on a reservation.<sup>268</sup> The child, born prematurely to alcohol-abusing parents, was removed and placed in foster care while the parents underwent treatment programs. Two years later, when the birth mother had failed to complete program, a state trial court, wrongly concluding that ICWA did not apply, found by clear and convincing evidence that the termination of her parental rights was in the child’s best interests.<sup>269</sup> It based its conclusion on the testimony of expert witnesses, but the state high court remanded for application of “federal law, which imposes a greater evidentiary burden of proof,”<sup>270</sup> and noted that the expert witnesses must be “specific[ally] qualif[ied] related to the placement of Native American Indian children.”<sup>271</sup>

In *In re Custody of S.E.G.*, the Minnesota Supreme Court reversed a trial court’s finding that three Indian children were better off in the custody of their non-Indian foster parents.<sup>272</sup> Social services removed the children from the birth parents when one was four, another three, and another one year old, and were placed in foster care.<sup>273</sup> Over the three years that followed,

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<sup>267</sup> 2016 WL 6330589, at \*18 (Madsen, C.J., dissenting).

<sup>268</sup> 577 N.E.2d 572 (Ind. 1991).

<sup>269</sup> *Id.* at 573.

<sup>270</sup> *Id.* at 575.

<sup>271</sup> *Id.* at 576. The decision made no mention of the parental rights of the birth father, who, being Caucasian, would not be entitled to the “greater evidentiary burden” that preserved the birth mother’s parental rights.

<sup>272</sup> 521 N.W.2d 357 (Minn. 1994).

<sup>273</sup> *Id.* at 59.

they were moved six times before being placed with the non-Indian couple, E.C. and C.C., in 1991.<sup>274</sup> A year later, the children were placed with an Indian family, but that only lasted nine days before they were returned to E.C. and C.C.<sup>275</sup> Therapists who met with the children emphasized their need for permanent family bonds, particularly one special-needs child.<sup>276</sup> After another year of searching, the tribe was unable to locate an Indian family willing to adopt the three, but E.C. and C.C. were willing, and nobody disputed their fitness.<sup>277</sup>

In its adoption proceeding, the trial court received evidence from both lay and expert witnesses, all of whom testified that the couple were providing for the children's physical, emotional, and intellectual needs, but who disagreed as to whether they were providing for the children's "cultural needs."<sup>278</sup> E.C. and C.C. attended powwows and tribal story-tellings, and even arranged a Chippewa naming ceremony for one child,<sup>279</sup> and the court found that, in any event, the most important thing was for the children to find stable and secure homes.<sup>280</sup> In affirming the trial court, the court of appeal noted that the Indian foster home in which the children had previously been placed "was unwilling to make any long-term commitment to the children," whereas E.C. and C.C. "have a successful track record with the children and are at present both willing to assume and capable of meeting the children's needs for a permanent and stable home."<sup>281</sup>

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<sup>274</sup> *Id.* at 359.

<sup>275</sup> *Id.* at 359–60.

<sup>276</sup> *Id.* at 365.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 365.

<sup>279</sup> *Id.* at 361.

<sup>280</sup> *Matter of Custody of S.E.G.*, 507 N.W.2d 872, 883 (Minn. Ct. App. 1993)..

<sup>281</sup> *Id.*

Nevertheless, the Minnesota Supreme Court overruled this concern and reversed the trial court's adoption order.<sup>282</sup> It found that the expert witnesses E.C. and C.C. offered were not qualified experts specifically on Indian tribal culture and childrearing practices, which meant their testimony was insufficient to support a beyond-a-reasonable-doubt finding that the children's "cultural needs" were being met.<sup>283</sup> Thus, although nobody disputed that adoption by E.C. and C.C. was in the children's best interests, the court subordinated the children's individual needs to other matters; indeed, it found that the best interests standard was improper under ICWA because it is "imbued with the values of majority culture," as opposed to Indian culture.<sup>284</sup>

In a South Dakota case, *In re N.S.*, a non-Indian mother with recurrent psychiatric problems and alcoholism volunteered her child for adoption, then withdrew the request, then requested it again, then withdrew her request again.<sup>285</sup> Twice more, she offered the child for adoption and changed her mind.<sup>286</sup> Social services workers reported a "lack of bonding between N.S. and his mother and that N.S. was extremely out of control."<sup>287</sup> After two foster placements, the child was returned to the mother, who then volunteered the child for adoption yet again.<sup>288</sup> Then the child was placed in his grandmother's care, but less than a month later, she asked social services to take the child away.<sup>289</sup> Finally, when the child was a little more than two years old, the court terminated parental rights.<sup>290</sup> It found beyond a reasonable doubt that termination was

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<sup>282</sup> *In re Custody of S.E.G.*, 521 N.W.2d 357, 365 (Minn. 1994).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 363.

<sup>285</sup> 474 N.W.2d 96 (S.D. 1991).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 98.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 97–98.

<sup>290</sup> *Id.*

in the child's best interest, but also found by clear and convincing evidence that it was "necessary for the child's physical and mental well-being."<sup>291</sup> Only after termination was N.S.'s paternity confirmed, and the father was found to be a member of the Cheyenne River Sioux tribe.<sup>292</sup> The South Dakota Supreme Court therefore concluded that the trial court had erred, and remanded for still more proceedings under the "beyond a reasonable doubt" standard—proceedings that the concurring opinion called "pointless."<sup>293</sup>

Whether or not *D.S.*, *S.E.G.*, or *N.S.* correctly interpreted ICWA, these cases demonstrate how the Act's "beyond a reasonable doubt" test delays the removal of children from abusive or neglectful families, and can even force the return of abused children to the very people who abused them—simply because the evidence of abuse is "only" clear and convincing. As Christine D. Bakeis observes, in a classic example of understatement, "[s]uch a result is clearly not beneficial to children with Indian ancestry."<sup>294</sup>

## **D. Foster, Pre-adoptive and Adoption Placement Preferences**

### **1. Racial Categorization Harms Indian Children**

When state courts review potential adoptions of Indian children, or consider placing them in foster care (or what ICWA calls "pre-adoptive placement"), those courts must abide by a hierarchy of race-based placement preferences set forth in the Act. In a foster or pre-adoptive placement, a state court must place the child with members of the extended family (as defined by

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<sup>291</sup> *Id.* at 99.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 100 (Sabers, J., concurring).

<sup>294</sup> Bakeis, *supra* note 98, at 551. *See also* KENNEDY, *supra* note 29, at 517 (the beyond-a-reasonable-doubt requirement of ICWA "on balance harms [Indian children] by making it too difficult to remove them from the hellish conditions that confront all too many youngsters who languish helplessly behind the closed doors of their homes.").

tribal custom<sup>295</sup>); if none are available, with a foster home approved or specified by the tribe; if none are available, with an Indian foster home approved by a non-Indian authority; and, again, if none are available, with an institution approved by an Indian tribe or an Indian organization.<sup>296</sup> In adoption cases, the court must give preference first to a member of the child's extended family (as defined by the tribe); second, to other members of the child's tribe; and, lastly, to "other Indian families."<sup>297</sup>

These placement preferences are based on race, not on political or tribal affiliation.<sup>298</sup> The foster care preferences mandate that a child be sent to "*an* Indian" foster facility approved by "*an* Indian tribe"—not the child's own tribe—and the adoption preference hierarchy gives preference to "other Indian families" over non-Indians who wish to adopt, even if those families are of a different tribe.<sup>299</sup> It is thus not tribal membership that matters, but generic Indianness. As if that were not enough, the federal Multi-Ethnic Placement Act forbids the denial or delay of an adoption or custody proceeding on the basis of race—but it specifically excludes one group of children from this protection: Indian children.<sup>300</sup>

Ranking would-be foster and adoptive families in terms of ancestry rather than in terms of the children's best interests is bound to cause problems, and severe problems have indeed

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<sup>295</sup> 25 U.S.C. § 1903(2) (2012).

<sup>296</sup> *Id.* § 1915(b).

<sup>297</sup> *Id.* § 1915(a).

<sup>298</sup> Even if they did break down on tribal lines, they would likely constitute national-origin discrimination. *See generally* Dawavendewa v. Salt River Project Agr. Imp. & Power Dist., 154 F.3d 1117 (9th Cir. 1998).

<sup>299</sup> *See, e.g., In re K.B.*, 173 Cal. App. 4th 1275, 1290 (2009) (approving custody despite the fact that children were Choctaw and adoptive father was Cherokee); *Dep't. of Hum. Servs. v. W.H.F.*, 254 Or. App. 298, 300–01 (2012) (approving adoption because "[t]he potential adoptive father is an Indian tribal member, although not of the same tribe."). In *In re T.S.*, 801 P.2d 77, 81 (Mont. 1990), the Montana Supreme Court upheld a trial court's finding that good cause existed to deviate from ICWA, but concluded that the state had "made a good faith attempt to comply with the recommended preferential treatment" by placing the child "with an Indian foster mother," even though she was of Plains Indian heritage—an entirely different tribe. The dissenting justice found it "improper and somewhat patronizing" to assume that one tribe was essentially as good as another. *Id.* at 83 (Sheehy, J., dissenting).

<sup>300</sup> 42 U.S.C. § 1996(b)(3) (2012).

resulted. Shortly after their birth in 2010, Laurynn Whiteshield and her twin sister Michaela were removed from their parents and placed with a non-Indian foster family in Bismarck, North Dakota.<sup>301</sup> When county officials sought to terminate parental rights, however, the Spirit Lake Sioux tribe invoked ICWA and had the case transferred to tribal court, which ordered that the children be placed with their grandfather, Freeman Whiteshield, on the Spirit Lake Reservation, despite the fact that Freeman's wife, Hope Whiteshield, had a record of child neglect charges.<sup>302</sup> A month later, Hope grew angry at the twins while they were playing outside, and threw them down an embankment.<sup>303</sup> Laurynn died from the head trauma, and Hope was sentenced to thirty years in prison.<sup>304</sup> Michaela was returned to the custody of the non-Indian family from whom she had originally been taken.<sup>305</sup>

Even where there is no such abuse, ICWA's foster and adoption preference scheme imposes unnecessary suffering on children who are denied stability and sometimes taken away from homes where they feel safe and loved. This often happens in ways that do not even preserve tribal cultural integrity.

That was true in the case involving Lexi, the six-year-old Choctaw girl in California who was removed from the foster family where she had lived for four years and sent to live with her father's step-second cousins in Utah.<sup>306</sup> Lexi (short for Alexandria) was born in December, 2009, to a mother addicted to methamphetamine, who had lost custody of at least six children

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<sup>301</sup> See Flatten, *supra* note 223, at 3.

<sup>302</sup> *Id.* at 29.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* On June 3, 2016, President Obama signed the Native American Children's Safety Act, Pub. Law No. 114-165, which requires criminal background checks for foster parents in cases involving tribal social services agencies.

<sup>306</sup> To be precise, the Utah family consisted of distant cousins by marriage: Ginger R., whose uncle had been married to Lexi's late grandmother, and Ginger R.'s husband. Neither were related by blood to Lexi. *In re Alexandria P.*, 1 Cal. App. 5th 331, 340 (2016).

before Lexi's birth.<sup>307</sup> Her father had an extensive criminal history.<sup>308</sup> He had no cultural ties to the Choctaw tribe and was not aware that he was an enrolled member of the tribe until after Lexi's placement in foster care.<sup>309</sup> Nevertheless, Lexi was subject to ICWA. For four years, she thrived in the Pages' care, came to call them "mommy" and "daddy," and to regard their other children as her siblings. California courts deemed the Pages her "*de facto* parents."<sup>310</sup> The "active efforts" to reunify Lexi with her father collapsed in 2012 when the father, having been released from prison, decided he was no longer interested in reunification.<sup>311</sup> At that point, the tribe deemed Lexi's step-second cousins to be "extended family" thanks to their relationship to Lexi's deceased grandmother.<sup>312</sup> The step-second cousins, however, had no Native ancestry, and were not tribal members. Nor was there any evidence that they were culturally Choctaw or that placing Lexi with them would ensure that she was exposed to Choctaw tradition.<sup>313</sup>

The Pages, wishing to adopt Lexi, urged the court to find "good cause" to deviate from ICWA's placement preferences. Nobody disputed that the Pages were outstanding parents. Rather, the "good cause" hearing focused on the psychological trauma Lexi would experience if she were removed from their care. Although witnesses testified that she had a strong bond with the Pages and would suffer great distress at being separated from them, the trial court nevertheless ordered her removal because the testimony "did not reach to the level of certainty

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<sup>307</sup> *In re Alexandria P.*, 228 Cal.App.4th at 1329–30.

<sup>308</sup> *Id.* at 1328.

<sup>309</sup> Petition for Certiorari, R.P. & S.P. v. Los Angeles Dep't of Child Welfare, et al. (No. 16-500) at 4-514 (on file with Goldwater Institute).

<sup>310</sup> *In re Alexandria P.*, 228 Cal. App. 4th at 1330–34.

<sup>311</sup> *Id.* at 1331.

<sup>312</sup> *Id.* at 1331–32.

<sup>313</sup> To be precise, the court of appeal concluded that because Lexi's late grandmother had "shar[ed] stories" with her step-niece, and because that step-niece had grown up "in a community with many ties to Native American culture," there was "sufficient [evidence] to support a reasonable inference" that Lexi would have "access to her cultural identity" in the custody of that step-niece. *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 639 (Ct. App. 2016).

that Alexandria would suffer extreme detriment.”<sup>314</sup> It found that Lexi would likely recover from the trauma of being removed from the Pages, and that the extent of her bond with them did not supersede ICWA’s placement mandates.<sup>315</sup>

The Court of Appeal reversed, admonishing the trial court for requiring definitive certainty of psychological damage before deviating from ICWA,<sup>316</sup> and instructing the trial court to consider Lexi’s individual best interests<sup>317</sup> and the extent of her bond with the Pages.<sup>318</sup> After contentious efforts to obtain evidence, the trial court, in November of 2015, ordered Lexi removed and placed with the Utah family.<sup>319</sup> The Court of Appeal promptly vacated that order on the grounds that the trial court had not complied with the terms of remand.<sup>320</sup> Four months later, the trial court held another hearing—although it refused to receive new evidence—and again ruled against the Pages.<sup>321</sup> On the morning of Sunday, March 20, 2016, Lexi was taken from Pages and driven away to Utah. The suffering inflicted by separating Lexi from the Pages’ stable and loving home after four years can only have been extreme.<sup>322</sup>

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<sup>314</sup> 228 Cal. App. 4th at 1336, 1352.

<sup>315</sup> *Id.* at 1354.

<sup>316</sup> *Id.* at 1353–54.

<sup>317</sup> *Id.* at 1355–57.

<sup>318</sup> *Id.* at 1337.

<sup>319</sup> R.P. v. Superior Court, No. B268111, 2015 WL 7572569 (Cal. Ct. App. Nov. 25, 2015).

<sup>320</sup> *Id.* at \*1.

<sup>321</sup> *In re Alexandria P.*, 204 Cal. Rptr. 3d 617, 623 (Ct. App. 2016).

<sup>322</sup> Fewer than 10 percent of foster children remain in foster care for four years. See Child Welfare Information Gateway, *Foster Care Statistics 2014* at 7, <https://www.childwelfare.gov/pubPDFs/foster.pdf>. It goes without saying that children in foster care who experience repeated separations often suffer emotional and psychological strain, leading to problems with identity, stability, and fears of intimacy, and are at greater risk for delinquency. See generally BENJAMIN KERMAN, ET AL., EDS., *ACHIEVING PERMANENCE FOR OLDER CHILDREN AND YOUTH IN FOSTER CARE* (2009); Gina Miranda Samuels, *Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds*, 31 CHILDREN & YOUTH SERV. REV. 1229 (2009); Mark E. Courtney & Darcy Hughes Heuring, *The Transition to Adulthood for Youth “Aging Out” of the Foster Care System*, in D.W. OSGOOD, ET AL., EDS., *ON YOUR OWN WITHOUT A NET* 68–91 (2005); Jimmy Mosqueda & Jennifer Rodriguez, *Voices Carry: Recommendations of Young People in the Foster Care System* 10–12 (California Youth Connection Policy Conference Report 2005); Joseph P. Ryan & Mark F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability* 27 CHILDREN & YOUTH SERVS. REV. 227 (2005); Virginia L. Colin, *Infant Attachment: What We Know Now* at ii (U.S. Dep’t of Health & Human Servs.,

The Pages appealed, arguing that the removal was contrary to Lexi’s best interests, but the California Court of Appeal affirmed.<sup>323</sup> It did not refuse outright to apply the best interests standard, but purported to apply a different *kind* of best interests standard. “When the best interests of an Indian child are being considered,” it declared, courts “should take an Indian child’s best interests into account as *one of the constellation of factors*.”<sup>324</sup> For children of other races, of course, the child’s best interest is the *overriding* consideration, and in cases in which children have spent long periods in foster care, California courts typically regard the child’s need for stability as the deciding factor.<sup>325</sup> Not so for Indian children. “When the best interests of an Indian child are being considered,” the court declared, “the importance of preserving the child’s . . . *cultural connections* often cannot be separated from other factors.”<sup>326</sup> This statement makes no sense. Lexi had no *cultural* connection to the Choctaw tribe; her only connection to the tribe was *biological*. It was on account of her biological ancestry that she was classified as an “Indian child” under ICWA and, consequently, the court viewed her individual interests as only one of a “constellation” of factors by which her future would be determined.

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1991) (“The importance of early infant attachment cannot be overstated. It is at the heart of healthy child development and lays the foundation for relating intimately with others, including spouses and children.”).

“Given the potential long-term effects that lack of attachment can have on a child, it is crucial that the foster care system respond in ways that help the child develop attachments with their primary caregivers whomever they may be. No matter if the plan for a child in interim care is reunification . . . or a move into an adoptive home . . . the development of an attachment to foster parents should be encouraged. Children need ongoing relationships to continue their growth and change.” VERA FAHLBERG, *A CHILD’S JOURNEY THROUGH PLACEMENT* 23–24 (1991).

<sup>323</sup> *In re Alexandria P.*, 1 Cal. App. 5th 331 (2016), *cert. denied*, 2017 WL 69720 (Jan 09, 2017) (No. 16-500).

<sup>324</sup> *Id.* at 351 (emphasis added).

<sup>325</sup> See, e.g., *In re Nia A.*, 246 Cal. App. 4th 1241, 1248 (2016) (“the law indisputably directs that the paramount consideration is whether the proposed transfer will serve the child’s best interest.”); *In re Guardianship of Ann S.*, 45 Cal. 4th 1110, 1136 n.19 (2009) (“the child’s best interest becomes the paramount consideration after an extended period of foster care.”); *In re Stephanie M.*, 7 Cal. 4th 295, 317 (1994) (“In any custody determination, a primary consideration in determining the child’s best interest is the goal of assuring stability and continuity. When custody continues over a significant period, the child’s need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.”) (citation and quotation marks omitted).

<sup>326</sup> *In re Alexandria P.*, 1 Cal. App. 5th at 351 (emphasis added).

As the Whiteshield and Lexi cases, and countless others, demonstrate, ICWA prioritizes ethnic criteria above the individualized consideration of a child's best interests—to the detriment of children and the adults who love them.

## **2. ICWA's Foster And Adoption Preferences Deprive Indian Children of Due Process, Equal Protection, And Freedom of Association Rights**

ICWA's placement preferences deprive Indian children of their rights to due process, equal protection, and freedom of association. One of the most basic elements of due process of law<sup>327</sup> is that courts must address the specific facts of a case,<sup>328</sup> and issue individualized judgments rather than impose blanket assumptions premised on a person's race, national origin, or other "immutable characteristic[s] determined solely by the accident of birth."<sup>329</sup> Yet in an ICWA case, the most crucial factor—virtually the deciding factor—is the child's biologically-determined Indian status. ICWA's race-based foster and adoption preferences deprive children of the individualized consideration inherent in due process, and because these preferences result in treating them differently than other children exclusively on account of their racial or national origin, these preferences also deprive Indian children of the equal protection of the law.

ICWA's preferences also violate the freedom of association. Tribal membership and family relationships are both forms of association protected by the First Amendment.<sup>330</sup> The

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<sup>327</sup> Minors have the right under the Due Process Clause to fundamentally fair judicial proceedings. *In re Application of Gault*, 387 U.S. 1, 19–22 (1967).

<sup>328</sup> See, e.g., *Abdulai v. Ashcroft*, 239 F.3d 542, 549–50 (3d Cir. 2001); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644–45 (1974); *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972).

<sup>329</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>330</sup> *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984) (freedom of association especially protects family association, because the "choices to enter into and maintain certain intimate human relationships" are an essential "individual freedom . . . [and] central to our constitutional scheme."); *United States v. Crook*, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) ("the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it.").

right to associate includes the right not to associate.<sup>331</sup> Minors have First Amendment rights, including the right not to associate.<sup>332</sup> Yet ICWA tries to force the formation of tribal and even familial bonds by essentially compelling children to join Indian families based on their biological ancestry, irrespective of their individual best interests. BIA regulations even require state officers to enroll children in tribes if they are not already enrolled.<sup>333</sup> Thus even putting aside the question of whether ICWA establishes a political or a racial classification,<sup>334</sup> the Act's placement preferences are unconstitutional.

The First Amendment forbids government from forcing people to join political associations,<sup>335</sup> make political statements,<sup>336</sup> or pledge allegiance to the government.<sup>337</sup> But ICWA seeks to force one specific class of American citizens to obtain formal membership in a political unit that enjoys attributes of sovereignty. Tribal membership is not ordinary dual citizenship, of course, given the “unique and limited”<sup>338</sup> nature of tribal sovereignty, but tribal membership significantly changes the legal regime that applies to a person,<sup>339</sup> because it “denotes an association with the [tribal] polity” and imposes an “unequivocal legal bond.”<sup>340</sup> A

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<sup>331</sup> *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

<sup>332</sup> *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>333</sup> *Guidelines*, 80 Fed. Reg. at 10153, B.4(d)(iii).

<sup>334</sup> *See infra*, Section III.A.

<sup>335</sup> *See, e.g.*, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 233–36 (1977); *Elrod v. Burns*, 427 U.S. 347, 355–57 (1976).

<sup>336</sup> *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 20–21 (1986). In addition to compulsory membership intruding on the First Amendment, being forced to join an Indian tribe also interferes with the First Amendment right against compulsory speech. Unlike unions or bar associations, tribes are not prohibited from using their resources for political lobbying, and unlike states, they are not barred from using resources to endorse official religions. *See, e.g.*, *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 135 (10th Cir. 1959). Being compelled to join a tribe therefore inherently includes being compelled to engage in speech, including religious speech, and association.

<sup>337</sup> *Barnette*, 319 U.S. at 642.

<sup>338</sup> *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

<sup>339</sup> *See DUTHU, supra* note 28, at 138 (“As domestic dual citizens, American Indian members of federally recognized tribes are heirs to the American legal tradition . . . as well as their own tribal systems . . . . [T]here is clearly a tension between the two.”).

<sup>340</sup> *Ambach v. Norwick*, 441 U.S. 68, 75 (1979).

person with dual nationality can be “subject to claims from both nations, claims which at times may be competing or conflicting.”<sup>341</sup> The government may not force one group of citizens, defined by ancestry, to obtain citizenship from another sovereign and thereby submit to a change in their legal rights and obligations.

Even more intrusively, ICWA seeks to create Indian families through its preferences as well as through its “active efforts” provision. Freedom of association, a fundamental aspect of individual liberty, includes family relationships, because these are intimate and “involve deep attachments and commitments” to those “few” others with whom one shares “a special community of thoughts, experiences, and beliefs” and the “distinctively personal aspects of one’s life.”<sup>342</sup> Yet ICWA tries to force the formation of family bonds by mandating adoption of Indian children by “other Indian families,” and also *obstructs* the formation of consensual family bonds between Indian children and *non*-Indian adoptive families. The decision to form a family is entitled to legal protection,<sup>343</sup> yet ICWA can negate that choice even where birth parents and fit adoptive families (and even children themselves<sup>344</sup>) would prefer to form an adoptive family outside the racial categories ICWA imposes.

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<sup>341</sup> *Kawakita v. United States*, 343 U.S. 717, 733 (1952). Tribal members are subject to tribal criminal jurisdiction in ways that non-members are not, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978), and can be taxed by tribes in ways non-members cannot be. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649–51 (2001). Tribal governments are exempt from many of the constitutional rules that protect people against other forms of government in the United States. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978) (Indian Civil Rights Act “does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases.”). And the legal remedies available when tribes deprive members of their federal constitutional rights are far narrower than those available when states violate the rights of citizens. *Shenandoah v. Halbritter*, 366 F.3d 89, 92–93 (2d Cir. 2004).

<sup>342</sup> *Roberts*, 468 U.S. at 620.

<sup>343</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015).

<sup>344</sup> *See Barbara Atwood, The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127, 137 (2008) (although ICWA includes consideration of the child’s wishes in placement determinations, “[t]he opaque statutory reference and the [BIA] Guidelines together leave courts to decide on a case-by-case basis whether a particular Indian child’s request should be a significant factor in the placement decision.”). *Cf. In re S.L.*, 2006 WL 477772, \*\*5, 15 (Cal. Ct. App. 2006) (remanding a termination case for compliance with ICWA despite child’s expressed wishes to the contrary).

Consider, for instance, *In re Adoption of J.R.D.*,<sup>345</sup> which involved a Cherokee mother and a non-Indian father who separated in 2006 after two years of marriage. In 2008, the mother ended visits between the father and child because of the father's drug use.<sup>346</sup> Two years after that, she remarried, again to a non-Indian, who sought to adopt her child legally—whereupon the tribe intervened pursuant to ICWA to block the adoption.<sup>347</sup> Against the will of the Indian mother, and despite evidence that the birth father “did not want a parental relationship with [the] Child,”<sup>348</sup> the Oklahoma Court of Appeals denied the adoption and ordered that the birth father be granted custody.<sup>349</sup> For the state to interfere with people's decision to create families through adoption—simply because of their race—violates their First Amendment freedom of association rights.

### III. RACIAL OR POLITICAL IDENTITY

“*Really, a baby elephant should be raised by elephants.*”  
“*She isn't an elephant. She's a little girl.*”  
—Barbara Kingsolver<sup>350</sup>

“*Is a cat a man, Huck?*”  
“*No.*” . . .  
“*Is a cow a man?—er is a cow a cat?*”  
“*No, she ain't either of them*” . . . .”  
“*Is a Frenchman a man?*”  
“*Yes.*”  
—Mark Twain<sup>351</sup>

#### A. Is ICWA's Differential Treatment Based on Race or Politics?

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<sup>345</sup> (Okla. Civ. App. No. 113,228) (unpublished) (Apr. 21, 2015) (on file with Goldwater Institute).

<sup>346</sup> *Id.* at 3.

<sup>347</sup> *Id.* at 4.

<sup>348</sup> *Id.* at 11.

<sup>349</sup> *Id.* at 12.

<sup>350</sup> BARBARA KINGSOLVER, PIGS IN HEAVEN 279 (1993).

<sup>351</sup> MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 114 (Clayton, Del.: Prestwick House, 2005) (1884).

ICWA obviously treats Indian children and families differently from non-Indian children and families. Whether this is constitutional or not depends on whether it is regarded as race-based or as based on the nature of tribes as political units. In the former case, the distinction would be regarded as suspect, and subjected to strict judicial scrutiny, which it certainly could not survive. But if the distinction is based on political identity rather than race, it is only subject to lenient rational basis review.

In *Morton v. Mancari*, the Supreme Court upheld the constitutionality of a law that gave preference to Indian tribal members in hiring for positions with the BIA.<sup>352</sup> That preference was “political rather than racial in nature,” the Court held, and therefore did not trigger strict scrutiny, because it “applie[d] only to members of ‘federally recognized’ tribes,” and was “not directed towards a ‘racial’ group consisting of ‘Indians.’”<sup>353</sup> Three years later, in *United States v. Antelope*,<sup>354</sup> the Court relied on *Mancari* when it upheld a conviction under a criminal statute that differentiated between Indians and non-Indians. As before, the Court ruled that the statute was not based on the fact that a person was “racially to be classified as ‘Indian[].’”<sup>355</sup> Instead, the parties involved were enrolled members of a tribe, and had committed a crime in Indian country. Thus although *Mancari* is frequently cited as standing for the proposition that *all* laws that treat Indians differently from non-Indians are subject to the forgiving standard of rational basis scrutiny—an argument Justice Sonya Sotomayor made in her dissent in *Adoptive Couple*<sup>356</sup>—*Mancari* is actually far narrower than that.

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<sup>352</sup> 417 U.S. 535 (1974).

<sup>353</sup> *Id.* at 553 n.24.

<sup>354</sup> 430 U.S. 641, 646–47 (1977).

<sup>355</sup> *Id.* at 647 n.7.

<sup>356</sup> *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2554, 2584 (2013) (Sotomayor, J., dissenting).

The Ninth Circuit examined *Mancari*'s limits in *Williams v. Babbitt*, which involved an Alaska statute that, according to a state administrative interpretation, forbade the sale of reindeer to anyone other than a Native Alaskan.<sup>357</sup> When business owners seeking to import reindeer for husbandry and sale challenged the constitutionality of this restriction, the state argued that it was subject only to rational basis scrutiny under *Mancari*.<sup>358</sup> The court disagreed. Where the preference in *Mancari* was limited to the BIA—which is uniquely tasked with serving the needs of Indians—Alaska's restriction on reindeer sales “provides a preference in an industry that is not uniquely native . . . [and which] in no way relates to native land, tribal or communal status, or culture.”<sup>359</sup> Instead, it simply established a business monopoly for Native Alaskans, without regard to “whether the beneficiaries live in a remote native village on the Seward Peninsula or in downtown Anchorage.”<sup>360</sup> When a law “relates to Indian land, tribal status, self-government or culture,” it is subject to rational-basis scrutiny under *Mancari* because it relates to the “unique status of Indians as a separate people . . . [with] a right to expect some special protection for their land, political institutions . . . and culture.”<sup>361</sup> But when a law does not relate exclusively to “uniquely Indian interests,”<sup>362</sup> a distinction between Indian and non-Indian implicates the Constitution's ban on racial discrimination.

Not long after the Ninth Circuit's ruling, the Supreme Court applied a similarly narrow reading of *Mancari* in *Rice v. Cayetano*.<sup>363</sup> That case involved a Hawaii law whereby only

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<sup>357</sup> 115 F.3d 657 (1997). *See also* Malabed v. North Slope Borough, 335 F.3d 864, 868 n.5 (9th Cir. 2003); Kahawaiolaa v. Norton, 386 F.3d 1271, 1279 (9th Cir. 2004) (rejecting broad reading of *Mancari*).

<sup>358</sup> *Babbitt*, 115 F.3d at 663–65.

<sup>359</sup> *Id.* at 664.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* (citations and quotation marks omitted).

<sup>362</sup> *Id.* at 665.

<sup>363</sup> 528 U.S. 495 (2000).

Native Hawaiians could vote for officials of the state's Office of Native Hawaiian Affairs.<sup>364</sup> It employed a blood quantum requirement among other factors to determine eligibility.<sup>365</sup> The state relied on *Mancari* to argue that this distinction was political, instead of racial, but the Court disagreed.<sup>366</sup> *Mancari* and its progeny involved laws that singled out “a constituency of tribal Indians,” not “a ‘racial’ group consisting of ‘Indians,’” said the Court.<sup>367</sup> The Hawaii law, by contrast, “single[d] out ‘identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.’”<sup>368</sup> State law even defined the term “Native Hawaiian” as “any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to [European contact] . . . [or] to the descendants of such blood quantum of such aboriginal peoples.”<sup>369</sup> This definition involved factors other than race, but that did not mean it was not a racial classification.<sup>370</sup>

ICWA plainly falls outside the bounds of *Mancari*.<sup>371</sup> It applies not to members of tribes, but to children who are both eligible for membership and biological children of members.<sup>372</sup> Eligibility for tribal membership universally depends on biological ancestry.<sup>373</sup> It follows

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<sup>364</sup> *Id.* at 498–99.

<sup>365</sup> *Id.* at 510.

<sup>366</sup> *Id.* at 518–22.

<sup>367</sup> *Id.* at 519 (quoting *Mancari*, 417 U.S. at 553 n.4).

<sup>368</sup> *Id.* at 515 (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)).

<sup>369</sup> *Id.* at 516 (quoting HAW. REV. STAT. § 10-2 (1993)).

<sup>370</sup> *Id.* at 516–17.

<sup>371</sup> Courts addressing ICWA's constitutionality of often been content simply to cite *Mancari* or similar cases, without seriously weighing its applicability. For instance, in *In re D.L.L. and C.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980), the South Dakota Supreme Court summarily rejected an equal protection challenge to ICWA with the conclusory assertion that ICWA is “based solely upon the political status of the parents and children and the quasi-sovereign nature of the tribe.” That case, however, involved children who were both tribal members and domiciliaries of the reservation.

<sup>372</sup> 25 U.S.C. § 1903(3), (4) (2012). ICWA does apply to children who are tribal members, but as membership requires eligibility, the determinative factor is still eligibility, which is based on biology.

<sup>373</sup> Even tribes like the Cherokee or Choctaw that impose no specific blood quantum still require lineal biological descent from signers of Native censuses. *See, e.g.*, CHEROKEE CONST. art. IV § 1; CHOCTAW CONST. art. II, § 1.

sylogistically that ICWA applies to a racial group consisting of Indians.<sup>374</sup> True, factors other than biology also count, so that not all children of Native American ancestry are included within the class, but that was also true of the law at issue in *Rice*. “Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral.”<sup>375</sup>

ICWA’s racial nature is reinforced in various other ways. For example, recent BIA regulations and some state laws apply ICWA based on a child being *suspected* of Indian ancestry, even before tribal status is determined,<sup>376</sup> and require state officials to register children for tribal membership if they are eligible.<sup>377</sup> ICWA also applies only to children who are both eligible for tribal membership and who are the biological children of members, meaning that a non-Native child adopted by a tribal member is not subject to ICWA, regardless of cultural or political affiliation. Thus, for instance, Sam Houston—an adopted member of the Cherokee tribe<sup>378</sup>—or Linda Wishkob—the fictional adoptee who plays a critical role in Louise Erdrich’s

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<sup>374</sup> Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 23 (2008).

<sup>375</sup> *Rice*, 528 U.S. at 516–17. A racial category does not cease to be a racial category just because factors other than race play a role in defining the class. After all, the executive order forcing Japanese Americans into detention centers in World War II applied only to persons with more than one-sixteenth Japanese ancestry. See WENDY NG, *JAPANESE INTERNMENT DURING WORLD WAR II: A HISTORY AND REFERENCE GUIDE* 37 (2002). Even persons with more than this amount of Japanese ancestry could leave detention centers if they enlisted in the military or obtained sponsorship. See BENSON TONG, *ASIAN-AMERICAN CHILDREN: A HISTORICAL HANDBOOK AND GUIDE* 95 (2004). But the fact that not all persons of Japanese heritage were subject to the order did not make that order anything other than a race-based rule subject to strict scrutiny. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). The law is clear: if race is a but-for factor in the calculus, that calculus is race-based, regardless of the role other factors may play.

<sup>376</sup> See *Guidelines*, 80 Fed. Reg. at 14887, 23.103(d) (ICWA applies “[i]f there is any reason to believe the child is an Indian child . . . unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe.”); *In re Jack C.*, III, 192 Cal. App. 4th 967, 981 (2011) (upholding state court rule requiring courts to proceed under ICWA before a child’s tribal membership is determined).

<sup>377</sup> *Guidelines*, 80 Fed. Reg. at 14893, 23.134(b), (c).

<sup>378</sup> See MARQUIS JAMES, *THE RAVEN: A BIOGRAPHY OF SAM HOUSTON* 20 (Austin: University of Texas Press, 2004) (1929). Houston, adopted at the age of 16 in 1809 by Chief Oo-loo-te-ka, was named Colonneh, or The Raven, in Cherokee. Under today’s Cherokee Constitution, Houston would be ineligible for membership in the tribe, since he obviously had no ancestor who signed the Dawes Rolls. Nor was he the biological child of a tribal member. He therefore could not qualify as an “Indian child” under ICWA despite his cultural affiliation with the tribe.

novel *The Round House*<sup>379</sup>—would not have been subject to ICWA despite their complete cultural and social affiliation with their tribes, whereas Lexi was subject to ICWA, despite lacking *any* cultural or social connections to a tribe. The deciding factor is genetic. Also, other provisions of ICWA, such as the adoption preference granted to “other Indian families” and the foster-care preferences for “*an* Indian foster home,” expressly apply to the “Indian” race in the abstract, rather than to tribes as specific political entities. Thanks to these provisions, an Alaskan child of Eskimo heritage could be placed with an unrelated member of a Plains Indian tribe in Montana, rather than with a fit, or even fitter, adoptive family of a different race—again, not because of political affiliation, but because of their “Indianness.”<sup>380</sup> The ICWA Penalty Box depends not on membership in a political organization, but on the ethnic quality of being Indian.<sup>381</sup>

Race was at the forefront of the Supreme Court’s recent decision in *Adoptive Couple*, which involved a child (known as “Baby Veronica”) whose Cherokee father had surrendered his parental rights before her birth and who had never even met her.<sup>382</sup> The mother volunteered

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<sup>379</sup> See LOUISE ERDRICH, *THE ROUND HOUSE* 114 (2012). In the novel, Linda, a white child born with birth defects, is abandoned by her birth parents and taken in by members of the Ojibwe tribe. Under that tribe’s Constitution, Linda would not be eligible for membership, because membership requires biological Chippewa ancestry. See MINN. CHIPPEWA TRIBE CONST. art. II (1964). Nor is she a biological child of a tribal member, as required by 25 U.S.C. § 1903(4)(b).

<sup>380</sup> Cf. *In re T.S.*, 801 P.2d 77, 83 (Mont. 1990) (Sheehy, J., dissenting) (criticizing majority for the “patronizing” assumption that ICWA was satisfied by placing Eskimo child with family of Plains ancestry).

<sup>381</sup> See also Maldonado, *supra* note 380, at 25 (“Under ICWA, all Indian families, other than members of the child’s tribe, are treated equally regardless of cultural, political, economic, or religious differences between the tribes, or the fact that there are over 250 different tribal languages. Further, ICWA makes no distinction between ‘local’ tribes and those located thousands of miles from the child’s tribe.”); Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1381–82 (2002) (acknowledging that these provisions of ICWA establish “racialized preferences.”); Shawn L. Murphy, *The Supreme Court’s Revitalization of the Dying “Existing Indian Family” Exception*, 46 MCGEORGE L. REV. 629, 640 (2014) (“The legal fiction that ‘Indian’ is a political affiliation and not a racial category is further discredited in that Indian tribes do not enroll members on the basis of member agreement with the politics of the tribe, but on the basis of blood quantum and familial ancestry.”).

<sup>382</sup> *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558–59 (2013).

Veronica for adoption by a non-Indian family.<sup>383</sup> After her birth, the father withdrew his consent, and two years later, the South Carolina Supreme Court awarded him custody—all based solely on the fact that Veronica had Cherokee blood in her veins.<sup>384</sup> The Supreme Court found this improper. Although it resolved the case on statutory rather than constitutional grounds, it observed that allowing the father to “play his ICWA trump card at the eleventh hour to override the mother’s decision and the child’s best interests . . . solely because an ancestor—even a remote one—was an Indian . . . would raise equal protection concerns.”<sup>385</sup>

In one ongoing case, attorneys for the federal government have argued that ICWA does not establish a racial category, but rather that the law uses blood descent “as a shorthand for the social, cultural, and communal ties a person has with a sovereign tribal entity.”<sup>386</sup> But using a person’s ethnic heritage as a “shorthand” for her cultural and political affiliations is the very definition of racial discrimination. That, after all, is precisely what occurred when the federal government ordered Americans of Japanese ancestry to report to detention centers during World War II.<sup>387</sup> That was nevertheless a racial categorization subject to strict scrutiny.<sup>388</sup>

## **B. The Existing Indian Family Doctrine**

State courts, wary of the equal protection problems caused by applying a different set of laws to children based solely on their biological ancestry, have sometimes declined to apply

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<sup>383</sup> *Id.*

<sup>384</sup> *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 655 (2012) (“in transferring custody to Father . . . Baby Girl’s familial and tribal ties may be *established* . . . in furtherance of the clear purpose of the ICWA, which is to preserve American Indian culture by retaining its children within the tribe.” (emphasis added)).

<sup>385</sup> *Id.* at 2565.

<sup>386</sup> Defendants’ Motion to Dismiss, A.D., et al., v. Washburn, et al. (D. Ariz. No. 2:15-cv-01259) (Oct. 16, 2015) at 23 (on file with Goldwater Institute).

<sup>387</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>388</sup> *Id.* at 216. *Korematsu* was the first case in which the Supreme Court employed strict scrutiny for racial classifications.

ICWA in cases involving children whose only connection to a tribe is biological. In doing so, they have fashioned an exception to ICWA known as the Existing Indian Family Doctrine.<sup>389</sup>

The Doctrine, however, has been heavily criticized, and the current trend is to abandon it.

The Doctrine was first employed by the Kansas Supreme Court in *In re Baby Boy L.*,<sup>390</sup> which involved a child born to an unmarried non-Indian mother and a father who was a member of the Kiowa tribe and was incarcerated when the child was born. The mother consented to having him adopted.<sup>391</sup> But after he was born, the father asserted rights under ICWA, and—over the mother's objection—the child was enrolled in the tribe.<sup>392</sup> The trial court found that ICWA did not apply, and the state Supreme Court agreed. ICWA was intended to maintain “the family and tribal relationships existing in Indian homes,” the Court held, “not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.”<sup>393</sup> To apply ICWA in such a case “would be to violate the policy and intent of Congress rather than uphold them.”<sup>394</sup>

After *Baby Boy L.*, several other state courts adopted the Existing Indian Family Doctrine, holding that ICWA simply did not apply to cases in which the child's only connection to a tribe was biological.<sup>395</sup> Among the most prominent decisions applying the Doctrine were *In re Bridget R.* and *In re Santos Y.*, from the California Court of Appeal. In *Bridget R.*, the court

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<sup>389</sup> See generally Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465 (1993).

<sup>390</sup> 643 P.2d 168 (Kan. 1982).

<sup>391</sup> *Id.* at 173.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.* at 175.

<sup>394</sup> *Id.*

<sup>395</sup> See, e.g., *In re Santos Y.*, 92 Cal. App. 4th 1274 (2001); *Rye v. Weasel*, 934 S.W.2d 257, 263 (Ky. 1996); *In re S.A.M.*, 703 S.W.2d 603, 609 (Mo. Ct. App. 1986); *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1985).

declined to apply ICWA to a case involving two-year-old Indian twins who had been relinquished for adoption at birth.<sup>396</sup> The birth parents later tried to rescind consent, which ICWA allows, but the court refused, holding that ICWA did not apply.<sup>397</sup> “[T]here are significant constitutional impediments,” it found, to using ICWA in cases involving “persons who are not residents or domiciliaries of an Indian reservation, are not socially or culturally connected with an Indian community, and, in all respects *except genetic heritage*, are indistinguishable from other residents of the state.”<sup>398</sup> To do so would be to impose an unconstitutional racial distinction. Instead, there must be “social, cultural or political relationships between Indian children and their tribes” before ICWA’s differential treatment of Indian children could qualify as a *Mancari*-type political distinction.<sup>399</sup>

Writers harshly criticized *Bridget R.* on the grounds that the court was “determin[ing] if the member acts American Indian enough to appease their perception of what an American Indian should do or be,” and was putting courts in charge of deciding who is and is not an Indian.<sup>400</sup> Such criticism is misguided. First, it fails to distinguish between Indian tribal membership, which is solely a matter of tribal law, and “Indian child” status under ICWA—

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<sup>396</sup> 41 Cal. App. 4th 1483, 1523 (1996).

<sup>397</sup> *Id.* at 1521–22.

<sup>398</sup> *Id.* at 1501.

<sup>399</sup> *Id.* at 1508.

<sup>400</sup> Cheyaña L. Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 748 (2006). See also Marcia A. Zug, *The Real Impact of Adoptive Couple v. Baby Girl: The Existing Indian Family Doctrine Is Not Affirmed, but the Future of the ICWA’s Placement Preferences Is Jeopardized*, 42 CAP. U. L. REV. 327, 329–38 (2014); Lorie M. Graham, *“The Past Never Vanishes”: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 39–43 (1998); Aliza G. Organick, *Holding Back The Tide: The Existing Indian Family Doctrine and Its Continued Denial of the Right to Culture for Indigenous Children*, in FLETCHER, ET AL., *supra* note 51, at 221; Dan Lewerenz & Padraic McCoy, *The End of “Existing Indian Family” Jurisprudence: Holyfield at 20, In the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 715–17 (2010); Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the “Existing Indian Family” Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 376 (2009); Annette Ruth Appell, *Uneasy Tensions Between Children’s Rights and Civil Rights*, 5 NEV. L.J. 141, 161–66 (2004).

which is a matter of federal and state law, and thus subject to the requirement of equal protection.<sup>401</sup> While it is correct that federal and state courts generally have no role to play in tribal determinations of membership criteria,<sup>402</sup> they *are* responsible for applying constitutional standards to state and federal governments. Second, critics are right to detect a clash between “liberal conceptions of parents’ and children’s individual rights, ideals of color-blind equality, and a peculiarly American kind of liberty” on one hand,<sup>403</sup> and, on the other hand, the racist assumption that children can be subjected to a separate legal regime exclusively as a consequence of their biological ancestry. But there is nothing paternalistic or demeaning in the way the Doctrine resolves that conflict. The Doctrine is premised on the notion that Indian children, like all other American citizens, are individuals, entitled to equal treatment before the law, and that political and legal status cannot be predicated on ethnic origin.

Critics are correct, however, in pointing out that the Doctrine has no basis in the text of ICWA, which makes no mention of cultural affiliation in its definition of “Indian child.” And while courts are correct that something like the Doctrine is necessary if the application of ICWA is to avoid conflict with equal protection, it is also true that inviting courts to determine how much and what kind of cultural connection must exist does risk intrusion into questions of tribal self-determination that ICWA sought to avoid.<sup>404</sup> Critics are right that genuine sovereignty must include the right to determine citizenship. But how that principle works in the ICWA context is the problem.

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<sup>401</sup> Cf. *In re Abigail A.*, 1 Cal. 5th 83, 95 (2016) (noting this distinction).

<sup>402</sup> *But see Vann v. U.S. Dep’t of Interior*, 701 F.3d 927 (D.C. Cir. 2013) (allowing lawsuit challenging Cherokee exclusion of “Cherokee Freedmen” from tribal membership to proceed).

<sup>403</sup> Barbara Bennett Woodhouse, “*Are You My Mother?*”: *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL’Y 107, 108 (1995).

<sup>404</sup> *See, e.g., Graham, supra note 406*, at 36 (“The Doctrine . . . violates basic principles of tribal sovereignty. Native American nations, as distinct political communities, have the authority to determine their own membership.”).

The California Legislature responded to *Bridget R.* by amending state law to define the term “Indian child.”<sup>405</sup> But while the new statutory language evidently disapproved of the *Bridget R.* decision, that language was identical to the language in ICWA itself—language the *Bridget R.* court was interpreting. This meant that when the court was called upon to address the subject again in *Santos Y.*, it reiterated its holding in support of the Existing Indian Family Doctrine.<sup>406</sup> Today, the status of the Doctrine in California remains unsettled. Some Courts of Appeal have rejected it,<sup>407</sup> and the state Supreme Court has not resolved the conflict.<sup>408</sup> Many other state courts have now abandoned the Doctrine, however, including the Kansas Supreme Court.<sup>409</sup>

Yet in the long run, debate over the Doctrine misses the essential point. The Doctrine is not an assault on ICWA. It is a saving construction designed to preserve a statute that would otherwise run afoul of the Constitution’s ban on racial discrimination.<sup>410</sup> To abandon the Doctrine would only force courts to confront that prohibition directly, and that would involve further conflict in high profile cases involving children whose sole connection to tribes is biological. ICWA cannot survive that confrontation. The Constitution simply cannot abide a

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<sup>405</sup> CAL. WELF. & INST. CODE § 360.6. This provision was later re-codified in CAL. FAM. CODE § 170.

<sup>406</sup> *In re Santos Y.*, 92 Cal. App. 4th 1274, 1316–17 (2001).

<sup>407</sup> *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1344 (2014); *In re Vincent M.*, 150 Cal. App. 4th 1247, 1264 (2007); *In re Adoption of Hannah S.*, 142 Cal. App. 4th 988, 995 (2006); *In re Alicia S.*, 65 Cal. App. 4th 79, 88 (1998).

<sup>408</sup> In 2006, the California Legislature adopted CAL. WELF. & INST. CODE § 224, again purporting to negate the Doctrine. That statute, however, declares only that “[i]t is in the interest of an Indian child that the child’s membership in the child’s Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding. . . .” One Court of Appeal has declared that “there is no question” that this put an end to the Doctrine in California, *In re Autumn K.*, 221 Cal. App. 4th 674, 716 (2013), but the California Supreme Court has not addressed the question.

<sup>409</sup> *In re A.J.S.*, 204 P.3d 543, 549–50 (Kan. 2009). See also *In re Baby Boy L.*, 103 P.3d 1099, 1103–06 (Okla. 2004); *Thompson v. Fairfax Cty Dep’t of Family Servs.*, 747 S.E.2d 838, 846–48 (Va. Ct. App. 2013); *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989).

<sup>410</sup> See, e.g., *In re Bridget R.*, 41 Cal. App. 4th 1483, 1492 (1996) (“[T]he existing Indian family doctrine is necessary in a case such as this in order to preserve ICWA’s constitutionality.”)

separate legal track for American citizens of a particular ethnicity. Nor can it empower another sovereign, no matter how friendly, to assert unreviewable power to pluck American citizen children out of state judicial systems and adjudicate their foster and adoption placements, entirely on account of their biological ancestry.<sup>411</sup> Certainly no foreign power could do so. One can hardly imagine, say, Japan granting Japanese citizenship to all Americans of Japanese ancestry, and then ordering that civil or criminal proceedings involving them be transferred to courts there.<sup>412</sup>

Commentators debate whether *Adoptive Couple* incorporated the Existing Indian Family Doctrine.<sup>413</sup> Certainly its refusal to apply ICWA's "active efforts" provision where there is no existing Indian family to be broken up suggests that the decision employs some version of the Doctrine. But even if the Doctrine's critics prevail, abolishing it would only unveil ICWA's racially discriminatory aspects.

#### IV. THE BEST INTERESTS OF THE INDIVIDUAL CHILD

“ . . . *all men are created equal.* ”  
—Declaration of Independence<sup>414</sup>

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<sup>411</sup> Such a prospect hearkens back to the doctrine of “natural allegiance” which held that a person born subject to the crown had no power to give up his allegiance and become a citizen of another nation. 1 WILLIAM BLACKSTONE, COMMENTARIES \*357. This doctrine has long been considered anathema to the U.S. Constitution. *Perez*, 356 U.S. at 66–67. It even formed the basis of the British policy of “impressment” in the nineteenth century, one of the leading causes of the War of 1812. See generally David W. Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALB. L. REV. 151, 154, 160 (1962).

<sup>412</sup> One early commentator analogized ICWA's jurisdictional provisions to the Soldier's and Sailor's Relief Act of 1940, 50 U.S.C. § 501, which suspended enforcement of civil proceedings against persons in active military service. See Mary Lou Vanderpan, Note, In re D.L.L. & C.L.L., *Minors: Ruling on the Constitutionality of the Indian Child Welfare Act*, 26 S.D. L. REV. 67, 77 (1981). But that Act was an ordinary exercise of federal preemption, and contained no racial or ethnic component.

<sup>413</sup> Murphy, *The Supreme Court's Revitalization*, *supra* note 387, at 643.

<sup>414</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

*“To be citizens on a par with others is to be de facto whites, to engage in a process not of [Indigenous people’s] making, and so to have indigenous voices silenced and replaced by voices borrowed from the other.”*

—Steven Curry<sup>415</sup>

In *American Indians and The Law*, Professor N. Bruce Duthu acknowledges that ICWA cases “may appear on the social radar as instances in which group rights unfairly trump individual rights.”<sup>416</sup> But, he contends, viewing them this way would only demonstrate “ignorance” or “hostility” toward tribal sovereignty and toward Indian culture and values.<sup>417</sup> The principle of individual sovereignty that ultimately undergirds the best interests of the child standard is only a “Western legal theory” that should not be foisted upon Native Americans.<sup>418</sup>

Many other commentators on ICWA share this perspective. In their view, the idea that the law should treat Indian children as individual citizens with basic rights antecedent to tribal affiliation is a kind of cultural bias or even a form of racism. “A rights-focused analysis,” writes Jennifer Nutt Carleton, “is contrary to the provisions of ICWA.”<sup>419</sup> Professor Michael Dale describes the best interest of the child test as an “Anglo middle-class standard,” which is “decidedly different” from Indian values.<sup>420</sup> “[T]he inclusion of the child’s ‘best interests’” in ICWA cases, writes Professor Annett Ruth Appell, “reveal[s] the tenacity of cultural hegemony.”<sup>421</sup> Professor Lorie Graham calls the principle underlying the Existing Indian Family Doctrine—that judges should regard children as individuals with rights, rather than as fungible members of a separate class—“offensive” because it disregards both the child’s “unique

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<sup>415</sup> STEVEN CURRY, *INDIGENOUS SOVEREIGNTY AND THE DEMOCRATIC PROJECT* 99 (2004).

<sup>416</sup> DUTHU, *supra* note 28, at 155.

<sup>417</sup> *Id.*

<sup>418</sup> *Id.* at 140.

<sup>419</sup> Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21, 37 (1997).

<sup>420</sup> Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 370, 372 (1991).

<sup>421</sup> Appell, *supra* note 406 at 161–66.

symbiotic relationship” with the tribe and the child’s “potential relationship . . . to the kinship community.”<sup>422</sup> Perhaps most succinctly, the Texas Court of Appeals declared in 1995 that using the best interest of the child standard in ICWA cases “defeats the [law’s] very purpose,” because it “allows Anglo cultural biases into the picture.”<sup>423</sup>

This is dangerously wrongheaded. It is true, as these critics claim, that the best interests of the child standard, as well as the Existing Indian Family Doctrine, reflect a cultural norm. That cultural norm is the proposition that all people deserve equal treatment before the law, regardless of race. This principle lies at the heart of the American constitutional order. It forms the basis of the Declaration of Independence and of the Fifth and Fourteenth Amendments, with their protections for due process of law and equal protection of the laws.<sup>424</sup> The best interests standard and Existing Indian Family Doctrine manifest this principle because they are inherently individualized, focus on the specific needs of the particular child whose welfare is at issue in the case at hand, and treat the child as a person first, and as an Indian only secondarily.

This cultural norm is in no sense a distinctively “Anglo” or white cultural attitude. On the contrary, it is a universal principle based on human values.<sup>425</sup> The propositions that all people—including Indians—are born free and equal, and that their fundamental rights must take precedence over the claims of any collective or state, do not depend on the culture of the person involved. They are true of all people, everywhere, at all times. In fact, these propositions did

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<sup>422</sup> Graham, *supra* note 406, at 39–40.

<sup>423</sup> *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. App. 1995).

<sup>424</sup> See generally TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY* (2014).

<sup>425</sup> See generally HARRY V. JAFFA, *HOW TO THINK ABOUT THE AMERICAN REVOLUTION* (Claremont, CA: Claremont Institute Press, 1999) (1978); *INDIVIDUAL RIGHTS RECONSIDERED: ARE THE TRUTHS OF THE U.S. DECLARATION OF INDEPENDENCE LASTING?* (Tibor R. Machan, ed., 2001); DANIELLE ALLEN, *OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY* (2014).

not originate with Anglo-Americans. Their first appearance in the modern west<sup>426</sup> came, fittingly enough, in relation to the Indians of the Western Hemisphere, more than two centuries before the American Revolution, in the writings and activism of the Spanish priest Bartolomé de Las Casas.<sup>427</sup> He argued—most notably in his 1550 debates in Valladolid—against the enslavement and brutality meted out by Spanish imperialists in the New World, and insisted that Indians were equal human beings entitled to justice. “They are inferior to none,” he proclaimed. “Those they equal are the Greeks and Romans.”<sup>428</sup> Indians were rational beings, with a lively civilization, fully as capable of arts and sciences as other people, and possessed of individual rights that ought to be respected. “[T]here is no natural difference in the creation of men,” he wrote—and thus no basis for according Indians lesser legal protections than those that apply to non-Indians.<sup>429</sup>

It is the universality of the principles of individualism and equality that makes these ideas so revolutionary. That is why these principles could be deployed in defense of women,<sup>430</sup> of African slaves,<sup>431</sup> of Chinese and Japanese immigrants,<sup>432</sup> and, of course, in defense of Indians.<sup>433</sup> And it is why enemies of human rights have so often tried to characterize these

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<sup>426</sup> The principle of universal human equality can, of course, be found in the Hebrew Bible, the writings of ancient Roman philosophers, and even the Greeks. None of these were “Anglos.”

<sup>427</sup> See generally LAWRENCE A. CLAYTON, *BARTOLOMÉ DE LAS CASAS: A BIOGRAPHY* (2012); LEWIS HANKE, *ALL MANKIND IS ONE* (1974).

<sup>428</sup> INDIAN FREEDOM: THE CAUSE OF BARTOLOMÉ DE LAS CASAS 203–04 (Francis Patrick Sullivan, S.J., trans., 1995).

<sup>429</sup> HANKE, *supra* note 433, at 96.

<sup>430</sup> See *Modern History Sourcebook: The Declaration of Sentiments, Seneca Falls Conference, 1848*, FORDHAM UNIV. (1997), <http://legacy.fordham.edu/halsall/mod/senecafalls.asp>.

<sup>431</sup> See, e.g., Frederick Douglass, *The Meaning of The Fourth of July for The Negro* (1852), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 188, 203 (Philip Foner & Yuval Taylor, eds., 1999).

<sup>432</sup> See JOSEPH HAWLEY, *Speech on the Chinese Exclusion Act*, in RACE AND LIBERTY IN AMERICA: THE ESSENTIAL READER 83 (Jonathan Bean, ed., 2009); Masuji Miyakawa, *Rights of Aliens in America*, in 1 N.Y. JAPAN REV. 91, 96 (1913).

<sup>433</sup> See, e.g., John Ross et al., *Indian Lands in Georgia*, NILES WEEKLY REGISTER, May 1, 1824, at 139 (“We appeal to the magnanimity of the American congress for justice and the protection of the rights, liberties and lives of the Cherokee people . . . and we expect it from them under that *memorable* declaration ‘that all men are created

principles as mere cultural prejudices—most notably the *Dred Scott* Court, which ruled that they applied only to white men, not to all humanity.<sup>434</sup>

The United States repudiated that falsehood long ago. “The equality declared by our fathers in 1776,” said Charles Sumner in a courtroom argument challenging school segregation in 1849,

was *Equality before the Law*. Its object was to efface all political or civil distinctions, and to abolish all institutions founded upon *birth* . . . Here is the Great Charter of every human being drawing vital breath upon this soil, whatever may be his condition, and whoever may be his parents. He may be poor, weak, humble, or black,—he may be of Caucasian, Jewish, Indian, or Ethiopian race . . . but before the Constitution . . . all these distinctions disappear. He is not poor, weak, humble, or black; nor is he Caucasian, Jew, Indian, or Ethiopian . . . he is a MAN, the equal of all his fellow men.<sup>435</sup>

In vanquishing slavery and ratifying the Thirteenth and Fourteenth Amendments,<sup>436</sup> the United States renewed its commitment to the principle that *all* people are entitled to equal treatment as individuals before the law—a principle Martin Luther King later called the “promissory note” of the American Dream.<sup>437</sup> It is simply not true that being citizens on a par

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equal.”); “WILLIAM PENN” [JEREMIAH EVARTS], No. XXII, in *ESSAYS ON THE PRESENT CRISIS IN THE CONDITION OF THE AMERICAN INDIANS* 89–90 (1829) (“[The Cherokee] are to be made outlaws on the land of their fathers . . . [under] a government which sprung into existence with the declaration ‘that all men are created equal . . . .’”).

<sup>434</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 407–11 (1856). The *Dred Scott* Court claimed that “[n]o one supposed” at the time of the Declaration of Independence, “that any Indian . . . was capable of enjoying, the privileges of an American citizen,” *id.* at 420, although it did observe that Indians —“altogether unlike” black Americans—could be made citizens. *Id.* at 403–04. Still, it was “necessary, for their sake as well as our own, to regard [Indians] as in a state of pupilage.” *Id.* at 404.

<sup>435</sup> Charles Sumner, *Equality Before the Law* (1849), in 3 *CHARLES SUMNER: HIS COMPLETE WORKS* 51, 65–66 (1900).

<sup>436</sup> The Thirteenth Amendment directly applies to Indian tribes. *Vann v. Kempthorne*, 534 F.3d 741, 747 (D.C. Cir. 2008). Although the Fourteenth does not, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), the Indian Civil Rights Act forbids tribes from denying to any person within their jurisdiction the equal protection of the laws or due process of law. 25 U.S.C. § 1302(8) (2012).

<sup>437</sup> Martin Luther King, Jr., *I Have A Dream* (1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 217 (James M. Washington, ed., 1986).

with others makes Indians “*de facto* whites.”<sup>438</sup> What it makes them is *fellow citizens*—equal participants in American democracy, whose rights the government must defend.

Incidentally, the idea that tribal membership is a function of genetics is also not original to Indians. It is a legacy of racist doctrines introduced by whites in the nineteenth and twentieth centuries, in contradiction of the Declaration’s principle of equality. The very concept of generic “Indian” was “an arbitrary collectivization” imposed by Europeans in disregard of the cultural differences between aboriginal inhabitants of the Western hemisphere.<sup>439</sup> When the Dawes Commission sought to compile authoritative lists of the native population, it categorized people into tribes on the basis of biology, and affiliated each person with only a single tribe, notwithstanding the long tradition of tribes accepting members from other tribes or even from white society.<sup>440</sup> White anthropologists, in the grip of racist pseudo-scientific fads, also employed phrenology and other quack methods to categorize Indians—and to impose significant legal handicaps.<sup>441</sup> ICWA’s use of such stereotypical language as “an Indian family” is a throwback to the racialized concept of “generic Indian” that whites invented to serve a racist agenda.<sup>442</sup> Those who assert that blood ancestry is sufficient justification for treating Indian children differently, and reject both the best interests of the child test and the Existing Indian

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<sup>438</sup> CURRY, *supra* note 421, at 99.

<sup>439</sup> ROBERT M. UTLEY, *THE INDIAN FRONTIER, 1846–1890* at 4–6 (Allen Billington et al. eds., Univ. of N.M. Press rev. ed. 2003) (1984).

<sup>440</sup> Ray, *supra* note 40, at 408; ELLEN SAMUELS, *FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE* 161–85 (2014).

<sup>441</sup> See, e.g., ORIN STERN, *ISHI’S BRAIN: IN SEARCH OF AMERICA’S LAST “WILD” INDIAN* 174, 174–86 (2004).

<sup>442</sup> See further CHARLES C. GLENN, *AMERICAN INDIAN/FIRST NATIONS SCHOOLING: FROM THE COLONIAL PERIOD TO THE PRESENT* 196 (2011) (“Continuing to emphasize generic ‘Indian’ separateness detached from specific tribal identities and cultures benefits the virtuosi of identity, those who make it their business to be accepted as ethnic leaders or spokesmen . . . . [T]he demand for special treatment is often made not only on the basis of a deprived condition but also on what is represented to be a racially based and significantly distinct mode of functioning that only the racial virtuoso understands and can prescribe for. This has the effect of reviving the assumptions about fundamental racial differences that have been so profoundly harmful to the education of Indian youth.”).

Family Doctrine for racialist reasons, have become “caught in the colonial feedback loop” that uses “colonial mechanisms of power under the guise of self-determination.”<sup>443</sup>

By contrast, the idea that all people are fundamentally free and equal, with a right to be treated as individuals, rather than as members of this or that ethnic category, is revolutionary precisely because it is *not* situated within Anglo-American culture, or any particular culture at all. It is true of all people everywhere.<sup>444</sup> As John Locke wrote, it is true even of “an Indian, in the woods of America,” because it applies “to men, as men, and not as members of society.”<sup>445</sup> The propositions that a child should be treated as an individual, and that her best interests *as a child* should be the overriding priority in a case involving her welfare, are rooted in the idea of universal human rights—an idea to which oppressed peoples have too long been denied access, and which is too precious to compromise in the service of collective tribal interests.

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<sup>443</sup> Chin, *supra* note 43, at 1267–68. *Cf.* United States v. Bryant, 136 S.Ct. 1954, 1968–69 (2016) (Thomas, J., concurring) (“Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty. And, until the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the ‘remnants of a race’ for its own good.”).

<sup>444</sup> See Abraham Lincoln, Letter to Henry Pierce, Apr. 6, 1859, in 3 COLLECTED WORKS OF ABRAHAM LINCOLN 376 (Roy Basler, ed. 1953) (referring to Declaration of Independence’s principle of equality as “an abstract truth, applicable to all men and all times.”). One testament to the universal applicability of these principles is the United Nations Universal Declaration of Human Rights, which proclaims that “[a]ll human beings are born free and equal in dignity and rights.” U.N. GAOR, 3d Sess., 1st plen. mtg. at 72, U.N. Doc A/810 (Dec. 12, 1948). The U.N.’s Declaration on the Rights of Indigenous Peoples (which has not been ratified by the United States) specifies that while “indigenous communities” have the “right” to “retain shared responsibility for the upbringing, training, education, and well-being of their children,” that right must be “consistent with the rights of the child.” U.N. ESCOR, Comm. Declaration on the Rights of Indigenous Peoples, Resolution adopted by the General Assembly, 3,E/CN.4/Sub.2 (1993) (emphasis added), [http://staging.ilrc.vm-host.net/sites/indianlaw.org/files/DRIPS\\_en.pdf](http://staging.ilrc.vm-host.net/sites/indianlaw.org/files/DRIPS_en.pdf) at 3. It also pronounces the right of “[i]ndigenous individuals, particularly children,” to “all levels and forms of education of the state without discrimination,” requires states to “take effective measures” to ensure “the rights and special needs of children,” and to “take specific measures to protect indigenous children” from various types of dangers “to the child’s health, or development.” *Id.* art. XIV(2), XXI(2), XVII(2) (emphasis added).

<sup>445</sup> John Locke, *Second Treatise of Civil Government* § 14, in JOHN LOCKE: TWO TREATISES OF CIVIL GOVERNMENT 318 (Peter Laslett, ed. 1963).

Professor Christine Metteer has put the point in particularly striking terms. Quoting novelist Barbara Kingsolver, she argues that an Indian child should be subjected to tribal jurisdiction just like “a baby elephant [ought to] be raised by elephants.”<sup>446</sup> But dividing human beings along biological lines—regarding Indians as a different species, as pack animals that, like elephants, must be raised by “their own kind”—is repugnant to a constitutional order that strives to protect every person as an individual human being. The proposition that “it is *per se* in an Indian child’s best interest to remain with his or her family and/or tribe,”<sup>447</sup> or that “the child *belongs to* the tribe”<sup>448</sup> because of her genetics, or that “the best interests of Indian children” are “*necessarily dependent upon*” the tribe’s interests,<sup>449</sup> or that a child is a “tribal resource” if her biology fits a certain profile—all these are obnoxious to American legal institutions. Our nation’s commitment to the constitutional rights of every citizen, including American Indian children, cannot yield to *Volksgemeinschaft* reasoning—let alone tolerate ICWA’s implicit notion of *Republikflucht*.<sup>450</sup> Even if it were true that “the Indian community focuses on the collective rights of the community as a large cultural group and not on individual rights”<sup>451</sup>—a generalization not supported by history<sup>452</sup>—then the fact that Indian children are citizens of the United States, whose rights are constitutionally guaranteed, must still take precedence.

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<sup>446</sup> Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act*, 28 ARIZ. ST. L.J. 589, 624 (1996) (quoting KINGSOLVER, *supra* note 356).

<sup>447</sup> Mall, *Keeping it in The Family*, *supra* note 51, at 165 (emphasis added).

<sup>448</sup> Paul David Kouri, Note, In Re M.J.J., J.P.L., & J.P.G.: The “Qualified Expert Witness” Requirements of the Indian Child Welfare Act, 29 AM. INDIAN L. REV. 403, 415 (2005).

<sup>449</sup> Brian D. Gallagher, *Indian Child Welfare Act of 1978: The Congressional Foray into the Adoption Process*, 15 N. ILL. U. L. REV. 81, 105–06 (1994) (emphasis added).

<sup>450</sup> *Republikflucht* was the term applied by the East German government to the act of “deserting” the nation by fleeing across the Berlin Wall. See PATRICK MAJOR, BEHIND THE BERLIN WALL: EAST GERMANY AND THE FRONTIERS OF POWER ch. 3 (2010).

<sup>451</sup> Debra Dumontier-Pierre, *The Indian Child Welfare Act of 1978: A Montana Analysis*, 56 MONT. L. REV. 505, 523 (1995).

<sup>452</sup> American Indian tribes have widely different cultures. Some, such as the Sioux and Cherokee, have long been renowned for their strong individualism. See, e.g., Stephen Cornell & Joseph P. Kalt, *Where Does Economic Development Really Come From? Constitutional Rule Among the Modern Sioux And Apache* (Harvard Project on

There is nothing ignorant or chauvinistic about saying so.<sup>453</sup> Quite the contrary. It is precisely because the idea of individual rights is the opposite of ignorance or chauvinism that it has any meaning at all, and that peoples of vastly different cultures may justly claim it.<sup>454</sup> On this principle, the legal institutions of the United States must hold firm, as with a chain of steel.<sup>455</sup> To the extent that sovereignty—whether of a state or of a tribe—may conflict with protections for the rights of individual children, that sovereignty must yield.<sup>456</sup>

None of this is to deny that Indians have suffered cruel wrongs at the hands of the federal government. Nor is it to minimize the persistent problems of racism. Indeed, it is just because we must regard Indians as individuals, and *not* as biologically beyond the pale of legal equality, that we see racism, past and present, as wrong. And that is why it is imperative that our law cease depriving Indian children of the protections available to children of other races. Nor is it to deny that state courts applying the best-interest standard have sometimes wrongly incorporated

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American Indian Economic Development, Apr. 1993) at 27, <http://t.hpaied.org/sites/default/files/publications/PRS93-7.pdf> (“In fact, a high degree of individualism characterized Sioux society.”); ROYAL B. HASSRICK, *THE SIOUX: LIFE AND CUSTOMS OF A WARRIOR SOCIETY* 31 (1964) (Sioux culture included an “individualism that could be daring to the point of recalcitrance.”); Amy Sturgis, *Liberty in Perfection: Freedom in Native American Thought*, FOUND. FOR ECON. EDUC., Sept. 1, 1999, <https://fee.org/articles/liberty-in-perfection-freedom-in-native-american-thought/> (“Native American culture and politics revolved around the individual.”). In others, that individualist tradition was radically undermined by the Indian Reorganization Act and other federal policies that imposed a romanticized vision of collectivism on tribes. See ANDERSON, *supra* note 18, at 140–46, 168–71. Today, Indian tribes continue to develop and implement legal approaches to protect individual rights. See generally Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889 (2003).

<sup>453</sup> Cf. Ester C. Kim, *Mississippi Band of Choctaw Indians v. Holyfield: The Contemplation of All, the Best Interests of None*, 43 RUTGERS L. REV. 761, 789 (1991) (noting how appeals to Indian cultural uniqueness often “serve[] as an impenetrable shield” against criticism of ICWA because “[a]ny attack made on this ‘unique’ relationship by a non-Indian can immediately be discounted without further discussion because of that person’s non-Indian ancestry.”).

<sup>454</sup> Those who view such principles as chauvinistic or racist commit the fallacy of the “stolen concept”: the only reason why racism is a wrong to be condemned is because it offends the principle of equality underlying the Declaration. It is logically incoherent to denounce the proposition of universal human equality and at the same time to embrace the idea that different legal standards should apply to people on the basis of race.

<sup>455</sup> Cf. Letter from Abraham Lincoln to Elihu Washburne, Dec. 13, 1860, in 4 BASLER, *supra* note 450, at 151.

<sup>456</sup> Cf. FEDERALIST NO. 45, *supra* note 192, at 309 (James Madison) (to the extent that sovereignty is irreconcilable with individual rights, “the voice of every good citizen must be, Let the former be sacrificed to the latter.”).

cultural biases into the analysis,<sup>457</sup> or that Indian children suffer by being removed from their families, or that tribal cultures are worth preserving, or even that tribal courts should have jurisdiction to adjudicate the child custody disputes of tribal members domiciled on reservations. But it *is* to deny that “Indian children are different, an exemption requiring a separate argument”<sup>458</sup> on account of their genetic ancestry, or that children like Lexi—whose only connection to an Indian tribe is biological—can or should be segregated when it comes to legal proceedings that are supposed to protect them from abuse and find them permanent, caring homes.

And it *is* to deny that the welfare of Indian children is none of non-Indians’ business. As Martin Luther King explained, “the interrelatedness of all communities and states” makes it wrong to “sit idly by” while our fellow citizens are treated unjustly on account of their race. “Injustice anywhere is a threat to justice everywhere,” he wrote. “Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.”<sup>459</sup> It should go without saying, of course, that it is also ultimately in the best interests of Native Americans themselves to prioritize the *individual* safety and well-being of Indian children, even over the distinct interests of tribal governments.<sup>460</sup>

## CONCLUSION

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<sup>457</sup> See, e.g., *Brokenleg v. Butts*, 559 S.W.2d 853, 855 (Tex. Civ. App. 1977).

<sup>458</sup> Matthew L.M. Fletcher & Wenona T. Siegel, *Introduction*, in FLETCHER, ET AL., *supra* note 51, at xiii.

<sup>459</sup> Martin Luther King, Letter from Birmingham Jail (1963), in WASHINGTON, *supra* note 443, at 290.

<sup>460</sup> Cf. Michelle Zehnder, *Who Should Protect the Native American Child: A Philosophical Debate Between the Rights of the Individual Verses the Rights of the Indian Tribe*, 22 WM. MITCHELL L. REV. 903, 949–50 (1996) (“If child abuse continues unabated on reservations, the ability of tribes to achieve total independence could be jeopardized . . . Punishing those who abuse children will break the cycle of abuse, allowing Indian children to grow up free of dysfunction and become strong tribal leaders.”).

The Indian Child Welfare Act was passed with good intentions: to stop abuses that broke up Indian families and intruded on legitimate tribal government interests. But six of its provisions—jurisdiction transfer, the “active efforts” requirement, the different standards of evidence for foster care decisions and for terminating parental rights, and the preferences applied to foster placement decisions and to adoption cases—place Indian children in a penalty box, depriving them of critical constitutional protections. This applies even to children whose only connection to a tribe is their biological ancestry. The resulting system of legal segregation cannot be reconciled with this nation’s commitments to federalism, equality, and due process of law—or its commitment to the best interests of American Indian children.