

FLASHPOINTS UNDER THE INDIAN CHILD WELFARE ACT: TOWARD A NEW UNDERSTANDING OF STATE COURT RESISTANCE

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INTRODUCTION

The Indian Child Welfare Act ("ICWA" or "the Act"),¹ a unique statute in the American legal landscape, was an effort by Congress to reverse the "wholesale separation of Indian children from their families" and to restore tribal authority over the welfare of Indian children.² By some accounts the Act has been the victim of entrenched state court hostility ever since its enactment more than two decades ago.³ Reported state court cases—often emerging from widely publicized disputes⁴—have involved children who are caught in

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¹ Indian Child Welfare Act of 1978, Pub. L. No. 95-608 (codified at 25 U.S.C. §§ 1901-1923 (2000)).

² H.R. REP. NO. 1386, 95th Cong. 9, reprinted in 1978 U.S.C.C.A.N. 9260, 9263.

³ See *supra* note 14 and accompanying text.

⁴ The media coverage of many ICWA cases typically exploits the emotional as well as the political dimensions of the controversies, a tendency discernible from the headlines alone. See, e.g., *Indian Abuse Law Lets Mom Renege on Adoption*, MIAMI HERALD, Feb. 3, 1995, at 3A; *Indian Woman Invokes Federal Law To Win Back Adopted Child*, ROCKY MOUNTAIN NEWS, Feb. 3, 1995, at 38A; *Law Protecting Indians Rips Apart Adopted Family*, PITTSBURGH POST-GAZETTE, June 16, 1995, at B1; *Sioux Tribe Seeks Custody of Girl Adopted off Reservation*, ORLANDO SENTINEL, May 22, 1994, at A21; *Tribe Wants Back Indian Child, 10, from Adopted Mother Who Reared Her*, LEXINGTON HERALD-LEADER, Feb. 11, 1994, at B1. A case involving the attempted adoption by an Anglo couple of a Navajo infant, Allyssa Keetso, was widely reported in the late 1980s. See, e.g., *Custody of Navajo Baby Is Awarded to Calif. Couple at Mother's Urging*, ARIZ. DAILY STAR, Apr. 23, 1988, at 1A. The Navajo Nation successfully challenged the adoption, and a Navajo tribal court ultimately granted the prospective adoptive couple permanent guardianship with visitation rights in the child's biological mother. See Barbara A. Serrano, *Parents, Indian Leaders Clash: Who Do Babies Belong to?*, ORANGE COUNTY REG., Aug. 6, 1989, at A1. The dispute recently reemerged in the news when the now-divorced non-Indian guardians disputed custody of the teenage girl. That dispute was heard in the Navajo

emotional battles that pit tribes against non-Indian prospective adoptive parents.⁵ Although the Act has greatly strengthened tribal power in child welfare matters and has curbed the most blatant abuses among state authorities that were occurring prior to its enactment,⁶ the very visible “hard cases” have polarized debates about social policies underlying the Act.

This Article examines certain flashpoints of controversy under the ICWA in an effort to understand the forces driving the state court jurisprudence. By identifying the themes that shape state court dispute resolution across a variety of factual contexts under the ICWA, this Article attempts to develop a more nuanced understanding of reactions of state court judges to this unique statute. I examine ICWA cases from a perspective of constructive skepticism about overarching narratives and categories that essentialize individuals or groups.

family court. See *Girl's Custody Torn Between Two Courts*, SEATTLE TIMES, Sept. 18, 2000, at B2; *Local Stories*, PORTLAND OREGONIAN, Nov. 10, 2000, at D-3.

⁵ See, e.g., *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (upholding ICWA's provision for exclusive tribal jurisdiction in dispute between Choctaw tribe and non-Indian adoptive parents); *In re Bridget R.*, 49 Cal. Rptr. 507 (Ct. App. 1996), 519 U.S. 1060 (1997) (applying judge-made “existing Indian family” exception to ICWA in dispute between Pomo tribe and non-Indian adoptive parents); *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986) (upholding ICWA's provision for exclusive tribal jurisdiction in dispute between non-Indian adoptive parents and Navajo Nation). Each of these cases received widespread publicity. See, e.g., Shiv Cariappa, *Caught Between Two Worlds*, CHRISTIAN SCI. MONITOR, Feb. 8, 1988, at 23 (describing *Halloway* case); *Custody Ruling Appealed*, CHICAGO TRIB., Jan. 24, 1996, at 1 (describing progress of litigation in *Bridget*); *Justices Back Airport Tactics in Drug Hunts, High Court Also Boosts Tribes' Adoption Rights*, ATLANTA J. & CONST., Apr. 4, 1989, at A4 (describing *Holyfield*); *Justices Rule Tribal Courts Have Jurisdiction in Indian Adoptions*, MINNEAPOLIS-ST. PAUL STAR TRIB., Apr. 4, 1989, at 8A (describing *Holyfield*). Indeed, the *Holyfield* case prompted proposals in Congress to eliminate the ICWA's applicability to voluntary adoptions. The most recent such proposal was H.R. 1957, 105th Cong. (1997) (“Voluntary Adoption Protection Act” to amend ICWA so as to exempt voluntary child custody proceedings from coverage). The California case, *Bridget*, has likewise spurred on reformists who hope to codify the existing Indian family exception. See H.R. 3286, 104th Cong. (1996) (proposing to amend ICWA to exclude proceedings involving a child whose parents do not maintain affiliation with their Indian tribe).

⁶ Despite some limitations in the ICWA, there is a consensus among American Indian leaders and organizations that the Act provides “vital protection to American Indian children, families, and tribes.” *Amendments to the Indian Child Welfare Act: Hearings Before the Senate Comm. on Indian Affairs*, 104th Cong. 303 (1996) (statement of Jack F. Trope, for Ass'n on Am. Indian Affairs (“AAIA”)). Similarly, Ron Allen, President of the National Congress of the American Indian, has explained that “[t]he National Congress has never advocated that the Indian Child Welfare Act be amended. Our tribes have taken the position that ICWA works well and, despite some highly publicized cases, continues to work well.” *Id.* at 134 (statement of Ron Allen, President, Nat'l Cong. of the Am. Indian). See also *Joint Hearing on S. 569 & H.R. 1082, To Amend the Indian Child Welfare Act, Before the Comm. on Indian Affairs, U.S. Senate, and Comm. on Resources*, U.S. House of Rep., 105th Cong. 142-53 (1997) (“1997 Joint Hearing”) (testimony of Nat'l Indian Child Welfare Ass'n); Terry A. Cross et al., *Child Abuse and Neglect in Indian Country: Policy Issues*, 81 FAM. SOC. J. CONTEMP. HUM. SERV. 49 (2000) (applauding ICWA as having returned responsibility for child welfare to tribes but pointing out need for greater federal funding).

Applying insights from postmodernism,⁷ I suggest that the “grand narrative” underlying the ICWA is stretched thin in cases involving children at the edges of the Act’s intended scope.

With respect to children whose “Indianness” is one of several potential identities, some state courts have found the Act inapplicable under the “existing Indian family” exception.⁸ By resorting to that judge-made exception, courts avoid the procedural and substantive mandates of the Act, often perceived as absolute and inflexible. A close examination of case law reveals that fear of categorical imperatives in interpreting the ICWA drives these judges to find ways of escaping application of the Act. On the other hand, many courts do apply the ICWA at the dispositional phase and decide the future placement of Indian children. Reported cases show that some judges view the ICWA placement decision as a choice between mutually exclusive alternatives and mutually exclusive identities. To the extent the ICWA is interpreted to compel decisionmakers to select among irreconcilable interests, the tensions engendered by the Act will only increase. Conversely, if the Act is construed to allow for flexibility and the exercise of discretion at the dispositional phase, the Act can accommodate the multiple interests at stake in the hard case.

Most of the scholarship on the ICWA attacks state court resistance as unreasonably hostile to the statutory goals at best and anti-Indian at worst. For example, Professor Jeanne Carriere has contributed a thoughtful exploration of ICWA’s “good cause” exception to the statutory provision for transfer of child custody proceedings to tribal court.⁹ In her survey of state court cases, she identifies various ways in which state judges manipulate statutory standards to deny transfer and maintain authority over disputes involving Indian children. She decries the “inherent biases” and “cultural hostility” of state courts¹⁰ and urges the elimination of the good cause exception altogether because it can be so easily manipulated by state judges to thwart tribal jurisdiction. While Carriere’s analysis of the ICWA is compelling, her portrayal of state court adjudication does not directly address the incommensurability of values

⁷ For a brief sketch of postmodern thought, see *infra* Part I.

⁸ Under the existing Indian family exception, several state courts have refused to apply the ICWA to children who otherwise qualify as Indian children under the Act, where neither the child nor the child’s parents have a social, cultural, or political relationship with a tribe. See *infra* notes 155-227 and accompanying text.

⁹ Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585 (1994).

¹⁰ *Id.* at 646.

inherent in the ICWA's overarching goals or the underlying themes that animate much of the ICWA jurisprudence.

Similarly, Professor Christine Metteer has argued forcefully that state courts have defied the plain command of the ICWA because of their deep distrust of tribal courts and their entrenched resistance to the concept of tribal sovereignty.¹¹ Metteer has catalogued what she characterizes as "abuses of the ICWA by state courts over the last two decades," including expansive interpretations of the Act's good cause exceptions, the judge-made "existing Indian family" exception, and varying interpretations of the Act's notice provisions.¹² In strongly endorsing proposed amendments to the ICWA to resolve various ambiguities, Metteer contends that state courts have persisted in defying the spirit of the Act. In Metteer's analysis, state courts appear as jurisdiction-grabbing entities that will exploit every ambiguity in the Act to retain power over proceedings involving Indian children and to thwart the placement preferences of the Act.¹³ These authors as well as others suggest that state judges are characterized by entrenched Anglo-American bias and wooden resistance to cultural difference.¹⁴

¹¹ See, e.g., Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 429 (1998) ("*Hard Cases*") (in construing ICWA, state courts have devised tests "to manipulate the application and implementation of the Act by variously defining their own criteria for 'Indian-ness'"); Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act*, 28 ARIZ. ST. L.J. 589 (1996); Christine Metteer, *The Existing Indian Family Exception: An Impediment to the Trust Responsibility To Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act*, 30 LOY. L.A. L. REV. 647 (1997) ("*Impediment to Trust Responsibility*") (criticizing existing Indian family exception to ICWA).

¹² See Metteer, *Hard Cases*, *supra* note 11, at 469.

¹³ *Id.* at 471. In recommending the elimination of the good cause exception, for example, she states:

[S]ince the state courts have broadly construed the good cause exceptions to retain jurisdiction and make placements, there is every reason to believe they would also broadly construe any circumstance which specifically detailed Congress' grant of jurisdiction and/or the power to determine placement of Indian children to the state courts.

Id.

¹⁴ See, e.g., 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 (1991-1992) (noting that state courts continue to apply Anglo best interests test to avoid application of ICWA); Lorie Graham, *Reparations and the Indian Child Welfare Act*, 25 LEGAL STUD. F. 619 (2001) (criticizing state courts for failing to transfer cases to tribal courts, ignoring statutory placement preferences, and creating judicial exceptions to ICWA); Jose Monsivais, *A Glimmer of Hope: A Proposal To Keep the Indian Child Welfare Act of 1978 Intact*, 22 AM. INDIAN L. REV. 1, 28 (1997) (concluding that existing Indian family exception to ICWA creates "dangerous precedent for state courts, hostile to the Act, to follow"); Wendy Therese Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 437 (1997) (criticizing state courts' use of existing Indian family exception as "continuing threat to tribal interests and the survival of Indian culture"); Samuel Prim, Note, *The Indian Child Welfare Act and the Existing Indian Family Exception:*

In contrast, a few scholars have gone against the tide and criticized the ICWA itself. This literature faults the Act as an infringement of individual rights (of parents and children) and contends that the Act wrongly subordinates the best interests of Indian children to tribal interests.¹⁵ The exercise of collective tribal power against the individual, exemplified in such cases as *Mississippi Band of Choctaw Indians v. Holyfield*,¹⁶ has fueled opposition to the Act. Grounded in the principles of liberalism and individual autonomy, some scholars question the view that tribal power trumps parental choice in, for example, voluntary adoptions of children domiciled on a reservation.¹⁷ Much of the critical literature bears a strident anti-tribe tone. Christine Bakeis complains that

[t]he ICWA permits tribes and courts to blatantly disregard a natural parent's deliberate and thoughtful decision to have their child adopted by a specific family of their choice. Even more frightening is the fact that under the ICWA courts and tribes can disregard a parent's conscious decision not to have their child raised in the same social setting to which they belong.¹⁸

In essence, these scholars portray the statute as a tool of power-hungry Indian tribes who are insensitive to the true welfare of children.

Rerouting the Trail of Tears, 24 L. & PSYCH. REV. 115 (2000) (concluding that existing Indian family exception continues breakdown of Indian families and tribes, is result of state courts' ignorance and lack of appreciation for Indian customs, and amounts to modern day Trail of Tears).

¹⁵ See 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 (1996) (urging codification of existing Indian family exception and amendment to allow parents to block statutory placement preferences); Michele K. Bennett, *Native American Children: Caught in the Web of the Indian Child Welfare Act*, 16 HAMLINE L. REV. 953 (1993) (criticizing ICWA and recommending that state courts continue to consider child's best interests, including child's need for permanency); Hassan Saffouri, *The Good Cause Exception to the Indian Child Welfare Act's Placement Preferences: The Minnesota Supreme Court Sets a Difficult (Impossible?) Standard—In re the Custody of S.E.G.*, 21 WM. MITCHELL L. REV. 1191 (1996) (arguing that Minnesota Supreme Court's decision effectively precludes non-Indian family from adoption of Indian children).

¹⁶ 490 U.S. 30 (1989). See discussion *supra* note 5 and accompanying text.

¹⁷ See M.M. Slaughter, *Contested Identities: The Adoption of American Indian Children and the Liberal State*, 9 SOC. & LEGAL STUD. 227 (2000) (noting irresolvable conflict between tribal norms of collective sovereignty and majoritarian norms derived from ideology of liberalism); Susan Estrich, *Indian Rights Win, Two Children Lose*, USA TODAY, July 13, 1995, at 9A (contending that ICWA may allow tribes to treat Indian children as "property").

¹⁸ See Bakeis, *supra* note 15, at 568. Interestingly, Bakeis also criticizes tribes for sometimes not pursuing their rights under the ICWA and for occasionally deviating from the ICWA's placement preferences. See *id.* at 554-57.

Another potential critique of the ICWA comes from those who resist race-matching in adoption.¹⁹ Elizabeth Bartholet, a leading proponent of interracial adoption, has argued that efforts to place racial minority children with members of the same racial minority work to the ultimate disadvantage of children by delaying permanent placements.²⁰ Randall Kennedy, for somewhat different reasons, contends that race-matching is, at core, invidious race discrimination.²¹

This Article offers a different perspective on the roles of states and tribes in disputes arising under the ICWA.²² I identify two separate themes that have

¹⁹ While the policy objections to race-sensitive adoptive placements would seem relevant to the ICWA, the proponents of transracial adoption have focused primarily on the placement of African-American children. See Elizabeth Bartholet, *Where Do Black Children Belong: The Politics of Race-Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991). For a thoughtful analysis of the role of racism in the transracial adoption debate, see Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1994) ("Transracial Adoption"). Professor Perry turned her attention to the role of feminism in the same debate in *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101 (1998) (arguing that plight of indigent and minority birth mothers should play a more prominent role in debate). See also RACHEL F. MORAN, *INTERRACIAL INTIMACY* 126-53 (2001) (analyzing role of race in custody and adoption disputes).

²⁰ See ELIZABETH BARTHOLET, *FAMILY BONDS* (1993); Bartholet, *supra* note 19.

²¹ Randall Kennedy, *Interracial Adoption: Is the Multi-Ethnic Placement Act Flawed? Yes: Race Matching Is Horrendous*, 81 A.B.A. J. 44, 44 (1995). Although the Supreme Court has not decided a case addressing the constitutionality of a state's consideration of race in adoption, the Court has held that a state court's consideration of race in an interparental custody dispute was a violation of the Equal Protection Clause. *Palmore v. Sidoti*, 466 U.S. 429 (1984). Professor Kennedy argues that state-sponsored race-matching in adoption is likewise unconstitutional. For the more far-reaching argument that a state's deference to adoptive parents' expressed desires for a child of a particular race is also unconstitutional, see Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Activity*, 107 YALE L.J. 857 (1998).

²² My thinking about the ICWA has been influenced by personal experience. In representing a Northern Cheyenne grandmother in her effort to reclaim custody of her granddaughter as against the child's Mexican-American father, I encountered a hostile state trial judge. The judge viewed the Northern Cheyenne tribal courts with suspicion and seemed understandably sympathetic to the identity arguments of the non-Indian father. See *Alegria v. Redcherries*, 812 P.2d 1085 (Ariz. Ct. App. 1991) (reversing trial judge's refusal to enforce Northern Cheyenne custody award favoring grandmother). Although I argued successfully for the vindication of tribal sovereign rights, I gradually realized that the state trial judge's reactions were grounded in his sincere but misguided desire to protect the interests of the child. On another occasion a few years later, during a presentation about the ICWA to a group of state court judges, I criticized an Arizona appellate court decision that had equated good cause to deny transfer of a proceeding to tribal court with a consideration of an Indian child's best interests. See *Appeal in Maricopa Juvenile Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1991). In my presentation, I explained that the incorporation of substantive placement concerns into jurisdictional determinations might improperly sabotage the intent of the ICWA. *Id.* In particular, a state court's reliance on its assessment of best interests invariably privileges the state's cultural mindset over the tribe's. *Id.* Others have eloquently articulated these same points. See, e.g., Carriere, *supra* note 9. The experience is memorable not because of the substance of my remarks, however, but because of the audience's response. Several judges (including one of the appellate judges who participated in the case that I singled out

surfaced across the recurring flashpoints of controversy under the ICWA. First, state judges have often exhibited frustration, implicitly or explicitly, with the ICWA's approach to Indian identity. As multiracial categories become more common in law,²³ the Act's definition of "Indian child" may run against the understanding that identity is a fluid, contingent construct.²⁴ When a state court judge is faced with feuding parties advancing disparate characterizations of a child's identity, the judge may well resist cloaking the child of mixed heritage with one monolithic classification, especially if the judge perceives the ICWA as a set of statutory absolutes. When a child of multiple heritages fits within the ICWA's definition of "Indian child," state courts may develop a cynicism toward the underlying premises of the Act. Not surprisingly, the case law reveals efforts by state courts in such circumstances to devise theories to avoid application of the Act.

A second fundamental theme in state court jurisprudence is the assumption that a child who has bonded to a primary caregiver within a stable placement will suffer harm if the child's custodial arrangement is disrupted. According to social science research, bonding and attachment between a child and her caregiver are critical elements in child development, and a break in continuity of caregiving places the child at risk for serious emotional harm.²⁵ A

for criticism) became visibly angry and objected strenuously to my suggestion that they should not consider the child's best interests in deciding a tribe's transfer motion. The judges were not simply reacting defensively to the mild critique in my remarks. Rather, their reactions revealed a deep-seated conviction that their judicial role necessarily included the power to consider the impact on children—whether Indian or non-Indian—of any adjudicative action they might take. *Id.*

²³ The "multiracial category movement," as some scholars call it, urges society to move away from the monolithic, "one-drop" rule of earlier times and to recognize that race is a fluid construct. See Steven A. Holmes, *The Confusion over Who We Are*, N.Y. TIMES, June 3, 2001, § 4, at 1 (describing nexus between racial groups and political power, and dilemma posed by new practice of multiracial categorizations). Proponents of multiracial categories contend that mixed-race persons should be allowed to self-identify and acknowledge their full racial heritage. See Tanya Kateri Hernandez, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 (1998). For a critique of the idealism within the multiracial category movement, see Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000) (advocating that discrimination based on skin color be recognized as actionable under antidiscrimination laws, wholly apart from biological race).

²⁴ See Barbara Bennett Woodhouse, *Protecting Children's Rights of Identity Across Frontiers of Culture, Political Community, and Time*, in FAMILIES ACROSS FRONTIERS 259, 261 (Nigel Lowe & Gillian Douglas eds., 1996) (arguing that child's identity is fluid construct reflecting child's own evolving capacities and need for connection to family and group).

²⁵ See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973). In this first of three related works, the authors built on psychoanalytic knowledge of child development in analyzing child welfare systems. They recommended that placement decisions should safeguard the child's need for continuity of relationships, should reflect the child's sense of time, and should take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.

corresponding body of law—both statutory and judge-made—increasingly recognizes the significance of continuity of care in children's lives.²⁶ Much of the case law in this area embraces the concept of the "psychological parent," the one who on a day-to-day basis fulfills the child's physical needs as well as emotional needs for a parent and for whom the child develops a deep attachment.²⁷ Where the ICWA applies to an Indian child who has been in a stable placement for a significant period of time, state courts often search for a

Id. at 31, 40, 49. In a later book, the same authors argued that psychological bonds between a child and a longtime substitute caretaker amount to familial ties that merit "the same protection from state intervention as is accorded to relationships in functioning biological and adoptive families." See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 10 (1979). The literature on attachment theory is enormous. See, e.g., J. BOWLBY, ATTACHMENT AND LOSS VOL. I—ATTACHMENT (2d ed. 1982); J. BOWLBY, ATTACHMENT AND LOSS VOL. II—SEPARATION: ANXIETY AND ANGER (1973); J. BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (1988); ATTACHMENT IN THE PRESCHOOL YEARS (M.T. Greenberg et al. eds., 1990); HANDBOOK OF ATTACHMENT: THEORY, RESEARCH, AND CLINICAL APPLICATION (J. Cassidy & P.R. Shaver eds., 1999) ("HANDBOOK OF ATTACHMENT"). Attachment theory has been extremely influential and has "spawn[ed] one of the broadest, most profound and creative lines of research in 20th century psychology." HANDBOOK OF ATTACHMENT, *supra*, at x.

²⁶ Some states have statutorily created standing for persons acting *in loco parentis* to seek custody or visitation of children. See, e.g., ARIZ. REV. STAT. §§ 25-415 (2000) (permitting persons standing *in loco parentis* to seek custody or visitation under limited circumstances; defining *in loco parentis* to mean "a person who has been treated as a parent by the child and who has formed a meaningful parental relationship with the child for a substantial period of time"). Other states have recognized rights of de facto parents through court decisions. See, e.g., V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (recognizing former lesbian partner of biological mother to be child's psychological parent entitled to seek visitation). For the American Law Institute's recent proposal to strengthen recognition of the custodial and visitation rights of de facto parents, see AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.03(1) (a) & (b) (Tentative Draft No. 4, Apr. 10, 2000).

²⁷ The concept of "psychological parent" was explained by Goldstein, Freud, and Solnit in their original book. See GOLDSTEIN ET AL., *supra* note 25, at 98 ("A psychological parent is one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological . . . adoptive, foster, or common-law . . . parent, or any other person. There is no presumption in favor of any of these after the initial assignment at birth . . ."). According to the authors, young children give no weight to biological ties. Instead, "[w]hat registers in their minds are the day to day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached." *Id.* at 12-13. The concept of psychological parenthood has had widespread influence in the state courts. See, e.g., *In re Carrie B.*, 2000 WL 1769491 (Conn. Super. 2000); *In re I.C.C.G.*, 726 So.2d 806 (Fla. App. 1999). The enormous popularity of the Goldstein work has provoked its own strand of criticism. One of the most prominent critics has been Professor Peggy Davis. See Peggy Davis, "There Is a Book out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 HARV. L. REV. 1539 (1987). Davis' scholarship demonstrates that many state courts refer to factors derived from the psychological parent theory when determining a child's best interests. Indeed, Davis concludes that reliance on psychological parenthood theory was so widespread that state courts have altered the common law. *Id.* at 1563.

basis to avoid the Act's substantive and jurisdictional provisions as a means of preserving the child's immediate sense of home and belonging.²⁸

These themes, which I refer to as the identity question and the continuity principle, inform much of the state court adjudication under the ICWA involving children on the periphery of congressional concern and lie at the core of contemporary resistance to the ICWA. This Article suggests that those questions of identity and continuity are legitimate considerations in adjudicating child welfare cases and that the ICWA can be read to encompass these concerns.

Part I of this Article explores various expressions of postmodern thought and highlights strands that can be drawn on to illuminate decisionmaking under the ICWA. Postmodern skepticism toward grand narratives and broad categories seems particularly useful in light of the ICWA's pivotal reliance on the category of "Indian child." Part II describes the ICWA's core features and the ways in which the Act mediates between the collective will of the tribe and the voice of the individual. Part III discusses certain flashpoints of controversy that continue to surface in state court interpretations of the Act—the judge-made "existing Indian family exception" to the Act's applicability and the good cause exception to the Act's placement preferences. In examining the hard cases under the ICWA, I highlight ways in which the state courts, while wrestling with questions of a child's personal and cultural identity, often characterize the tension as a clash of incommensurable values. Part IV explores in more depth the underlying narratives that have shaped much of the thinking about the ICWA today and the tendency of some courts to essentialize the Indian children that appear before them. Part IV also proposes means by which a child's multiple identities and interests might be accommodated under the Act. Part V summarizes proposed revisions of the ICWA introduced in the 107th Congress. As explained there, some provisions offer reasonable statutory improvements while others would be misguided and might intensify the conflicts that already exist between states and tribes regarding Indian child welfare.

²⁸ See cases cited *infra* note 22 and accompanying text. The dilemma faced by courts in the hard ICWA cases is not unique to this country. In the aftermath of state-sanctioned disappearances in Argentina during the military dictatorship of the late 1970s, children of the "disappeared" were illegally adopted. When the children's blood relatives, particularly their grandmothers, brought legal proceedings to reclaim their lost children, Argentinian courts had to resolve disputes that pitted claims of legitimate blood identity against claims of psychological acquired identity. For an insightful account of the legal efforts to reclaim the children, see Laura Oren, *Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina*, 14 HARV. HUM. RTS. J. 123 (2001).

This Article is an effort to move beyond the cynicism of the opposing camps to a recognition of the core themes manifest in the state court jurisprudence under the ICWA. The grand narrative underlying the Act, while born of a grim history of governmental destruction of Indian tribes, families, and culture, sometimes has little direct correlation with the actual circumstances of individual Indian children before state judges. In any child welfare case, it is essential that the decisionmaker be able to exercise discretion in arriving at a disposition that is most likely to protect the future welfare of the unique child. On the one hand, courts that rely on the existing Indian family exception to avoid the Act altogether are wrongly ignoring the value to the child and to the child's tribe of the child's Native heritage. On the other hand, courts that read the Act too rigidly at the dispositional stage rob the statute of needed flexibility and may ultimately lead to its demise. A construction of the Act that permits a multiplicity of voices to be heard at the placement stage of Indian child custody proceedings in state court, I argue, will better serve the interests of children while still safeguarding the federal policy of promoting tribal self-determination and tribal survival.

I. THINKING IN THE POSTMODERN VEIN

Insights from postmodern philosophy are helpful in thinking about the ICWA simply for their illumination of the dynamics underlying judgments, judicial reasoning, and nuances within reported ICWA opinions. Despite their many differences, most postmodern philosophers are suspicious of classic notions of truth, reason, objectivity, and identity.²⁹ Postmodernism recognizes that abstract "universal" normative values are contingent, situated in particular historical and cultural traditions. Postmodern critics of the law aim to expose the historicity and the "constructedness" of legal rules and theories that were traditionally viewed as natural, permanent, and essential.³⁰ One goal of such criticism is to reveal law's "messy, contingent relations with social life and

²⁹ While there are many differences among them, most postmodernists agree on the relativism of values and the inherently contextual nature of social practices, institutions, and theories. See generally STEVEN CONNOR, *POSTMODERNIST CULTURE—AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY* (2d ed. 1997) (describing various strands of postmodern philosophy in law, literature, architecture, performance art, and popular culture studies); Douglas Litowitz, *In Defense of Postmodernism*, 4 GREEN BAG 39, 46 (2000).

³⁰ CONNOR, *supra* note 29, at 65. Connor identifies three strands of postmodern legal thought: the critical, as embodied primarily by Critical Legal Studies; the pragmatic, as exemplified by the work of Stanley Fish; and the ethical, associated with the work of Costas Douzinas, Ronnie Warrington, and Peter Goodrich. *Id.* at 64-65. This Article draws primarily on postmodernist theory in the critical vein.

process.”³¹ In the postmodern view, particularly in the critical legal studies realm, all thought and practice is contextual and situated, and ideas are always formed within historically limited and limiting fields of possibility.³² Personal identity, furthermore, is a dynamic construct that is subject to change over the course of a lifetime.

Recognizing the contingent nature of legal interpretation and the potential incommensurability of values³³ leaves many postmodernists without a clear prescription for improving justice. If all categories are suspect because of their essentializing nature, claims of gender or racial discrimination may be difficult to sustain.³⁴ Moreover, postmodernists have been faulted for the internal inconsistency of their anti-foundationalist philosophy: on the one hand, no single unifying foundation can explain human thought and action; on the other hand, the anti-foundationalist insight itself applies to all human thought and action.³⁵ While some critics have argued that postmodernism leads inevitably to nihilism,³⁶ other commentators celebrate the liberating and constructive potential of postmodern knowledge.³⁷

³¹ *Id.* at 64-65.

³² *Id.* at 66 (describing work of Roberto Unger); see, e.g., Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1986).

³³ Professor Brett Scharffs has offered an accessible working definition of incommensurability: two choices are incommensurable if everything that matters in one choice and everything that matters in the other cannot be expressed in terms of some shared value. See Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1390 (2001). The topic of incommensurability is clearly in vogue among legal scholars. See, e.g., INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997); Matthew Alder, *Symposium: Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998). Its popularity may be due to the growing sense in our interconnected, pluralistic world that individuals, groups, and governments need guidance in the face of incommensurable choices.

³⁴ As Professor Bartlett has observed, postmodern critics are “left in the awkward position of maintaining that [racial or] gender oppression exists while challenging [their] capacity to document it.” *Id.* at 877 (citing Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 620 (1990)).

³⁵ Stanley Fish has criticized Jean-Francois Lyotard on this point, using pragmatism as a way out of the dilemma. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 342-55 (1989). Another major critic is Richard Rorty. See, e.g., Richard Rorty, *Reply to Jean-Francois Lyotard*, 41 CRITIQUE 456, 570-71 (1985).

³⁶ See RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 16-18 (1983) (describing the “Cartesian Anxiety” as “the forces of darkness that envelop us with madness, with intellectual and moral chaos” when we lose a fixed foundation for our knowledge). See also TERRY EAGLETON, *THE ILLUSIONS OF POSTMODERNISM* (1996). Eagleton is a major critic of postmodern thought, in large part because of what he sees as the ineffectiveness or irrelevance of political reform in a postmodern world.

³⁷ Steven Winter, for example, has argued that “[t]he relativism of human moral systems can . . . be seen as an adaptive mechanism essential to any human (which is to say fallible) normative enterprise. We have no reason to want to bring our moral versatility to a stop, and much reason to carry on with it.” Steven L. Winter, *Human Values in a Postmodern World*, 6 YALE. J.L. & HUMAN. 233, 248 (1994). Taking a concededly

The influential postmodernist philosopher Jean-Francois Lyotard seems to envision a society in which diverse value systems coexist, not as hermetically sealed structures but as dynamic and interactive fluid processes. Defining postmodernism as “incredulity toward metanarratives,”³⁸ Lyotard maintains that postmodern knowledge “reinforces our ability to tolerate the incommensurable.”³⁹ Thus, we give reality to our values by acting on them, and we can be full participants in the process of human moral development by remaining open to insights from others whose values are differently situated.⁴⁰

Focusing often on language itself, Lyotard recognizes that linguistic cues help define culture and that narratives in a particular culture “are legitimated by the simple fact that they do what they do.”⁴¹ To Lyotard, the disappearance of metanarratives has left us with the liberating potential of local, interlocking language games—a weave of intricate interconnections that has no overarching, defining commonality. In his work, this philosopher uses the term “*differends*” to mean the ways in which persons from different cultures may talk past one another because of the particular narratives and language games that are distinct to each culture.⁴² To Lyotard, acknowledgment of these *differends*, or irreconcilable conflicts, forces people to confront the difficulty, if not impossibility, of reaching an accommodation of culturally constructed values.

As a key figure among postmodernists, Lyotard does not idealize grand consensus as an ultimate goal;⁴³ rather, he contends that to achieve justice, we

optimistic view, one scholar maintains that postmodernism “is not a nihilistic rejection of law, but rather a willingness to step back from legal materials and question the fundamental assumptions that animate a given area of law and then to follow the deconstruction with reconstruction.” Litowitz, *supra* note 29, at 47.

³⁸ JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE*, at xxiv (Geoff Bennington & Brian Massumi trans., 1984). The original version of Lyotard's book was published as *La Condition Postmoderne*.

³⁹ *Id.* Similar to Lyotard, Steven Winter's view is that “the problem of values is one of learning to rediscover their locus in our practices and commitments. There is no other basis for our values than our own committed actions.” Winter, *supra* note 37, at 248.

⁴⁰ The goal of multiplicity in discourse might be viewed as uniquely well-suited for law—in the sense that legal structures can provide a vehicle for engaging diverse populations with multiple perspectives. See Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 YALE J.L. & HUMAN. 95 (2001).

⁴¹ LYOTARD, *supra* note 38, at 23.

⁴² JEAN-FRANCOIS LYOTARD, *THE DIFFERENCE: PHRASES IN DISPUTE* (G. Van Don Abeel trans., 1988).

⁴³ Lyotard is quite critical of Jurgen Habermas' search for a universal consensus. See LYOTARD, *supra* note 38, at 65-66. In Lyotard's view, the ideal of universal consensus rests on false assumptions, namely that it is possible for all speakers to agree on which rules are universally valid for language games, and second, that the goal of dialogue is consensus. *Id.* at 65. Lyotard, mysteriously, posits the goal of dialogue as being “paralogy.” *Id.* at 66. By that term, I take him to mean parallel understanding but not necessarily agreement.

must recognize the “heteromorphous” nature of language games. He is prepared to live with a multiplicity of themes and prescriptions, limited in space and time.⁴⁴ In discourse among separate groups, the separate group or individual participants will give voice to disparate, often irreconcilable, goals and claims.⁴⁵ To address the *differends* that inevitably arise in today’s diverse and increasingly interconnected world, Lyotard envisions the birth of new idioms.⁴⁶

The use of postmodernism in this project is somewhat ironic.⁴⁷ The ICWA itself can be seen as a mandate for cultural pluralism in reaction to the destructive hegemony of majoritarian culture—a hegemony that took its toll on Indian children, families, and tribes. As such, the Act builds on postmodern insights that law is a constitutive societal force shaping social relations, and that law was instrumental in the destruction of American Indian families and tribes. The legislative history of the Act is replete with examples of state courts employing white, middle-class values as universal truths in assessing the fitness of Indian parents. As explained in Part II, the Act’s jurisdictional and substantive rules were drafted to combat this hegemonic tendency of dominant culture and to ensure the survival of tribal culture within the United States. Thus, one might view the ICWA as a victory for postmodernism.⁴⁸ On the other hand, a postmodern skepticism can be turned back against the ICWA

⁴⁴ Lyotard does not provide solutions, because any solution to the irresolvable conflicts would inevitably privilege one set of rules over another. This aspect of his work has triggered frustration and criticism. For a summary of the critical debates surrounding Lyotard’s work, see JAMES WILLIAMS, *LYOTARD: TOWARDS A POSTMODERN PHILOSOPHY* 129-45 (1998).

⁴⁵ See LYOTARD, *supra* note 42, at 178.

⁴⁶ *Id.* at 13. Lyotard explains this point in the context of a complaining victim whose category of injury is unfamiliar to the responsible party:

To give the differend its due is to institute new addressees, new addressors, new significations, and new referents in order for the wrong to find an expression and for the plaintiff to cease being a victim. This requires new rules for the formation and linking of phrases. No one doubts that language is capable of admitting these new phrase families or new genres of discourse. Every wrong ought to be able to be put into phrases. A new competence (or “prudence”) must be found.

Id. Lyotard distinguishes the case of literal “litigation,” where a single rule of judgment must be applied to disputing parties in order to settle the controversy, seeming to assume that in a lawsuit the concept of *differend* cannot apply. *Id.* at 9. His insights, nevertheless, can helpfully illuminate the dynamics between decision-maker and litigant.

⁴⁷ The value of paradox and a commitment to irony have been identified as common themes in postmodern thought. See STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOID* 152 (2000).

⁴⁸ For a description of the link between postmodernism and indigenous self-determination, see Robert A. Williams, *Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System*, 2 REV. CON. STUD. 146 (1995).

itself, to question the applicability of the Act's underlying assumptions and its grand narrative to individual disputes before the courts.

A few scholars have considered the connection between postmodern thought and the position of Native peoples within the dominant culture of the United States. Jennifer Wicke, for example, has focused her literary critic's eye on Lyotard's tenet that heterogeneity and multiplicity should supplant essentialist notions of identity, and she accurately attributes to Lyotard the postmodern position that liberal rights discourse is flawed.⁴⁹ Significantly, she has noted that tensions surface when postmodernism confronts groups, such as Indian tribes, that must use rights discourse to accomplish their goals. In Wicke's view, the contradictions of postmodernism "are writ large" in the Native American struggles for self-determination—where legal rules require that parties establish "Indianness" or sovereign status as a tribe in order to obtain juridical rights.⁵⁰ Wicke sees Lyotard's "ebullient heterogeneity" as inconsistent with the efforts of tribes to use a language of rights and a legal platform of tribal identity. Lyotard's insights, however, may still be useful as a tool for illuminating the continuing tensions engendered by hard cases under the ICWA.

At least one scholar has applied postmodern thought to the ICWA in particular, but that effort was directed at reinforcing the Act's goal of enhancing Indian children's sense of personhood.⁵¹ Law professor Sandra Ruffin has argued that a postmodern "phenomenology of connectedness" is available through the lives and cultural narratives of indigenous peoples, and that a postmodern perspective can help ameliorate the existential crisis experienced by Indian children. Viewing Indian children's psychological welfare as dependent on their connection with their cultural community, Ruffin recommends that the ICWA require the application of tribal law to all custody determinations involving Indian children in state court, including interparental custody disputes.⁵² She also engages postmodernism as a vehicle for criticizing proposed amendments to the ICWA that would have codified the "existing Indian family" doctrine.⁵³ Thus, Ruffin focuses on cultural pluralism as a means of protecting Indian children's fragile links with their Indian

⁴⁹ Jennifer Wicke, *Postmodernism and Law: A Symposium*, 62 U. COLO. L. REV. 455 (1991).

⁵⁰ *Id.* at 465.

⁵¹ See Sandra C. Ruffin, *Postmodernism, Spirit Healing, and the Proposed Amendments to the Indian Child Welfare Act*, 30 MCGEORGE L. REV. 1221 (1999).

⁵² *Id.* at 1267-68.

⁵³ *Id.* at 1248-52.

heritage. Indeed, her position is that the postmodern emphasis on multiculturalism regrounds the ICWA.⁵⁴ Significantly, she does not examine the problem posed by the child who has competing cultural identities.

My use of postmodernism differs from the perspectives employed by others by focusing the lens more directly on the hard cases arising under the ICWA. Rather than employing the insights of postmodernism to buttress the substantive goals of the Act, I examine state court cases that fall at the outer limits of congressional concern. This analysis attempts to maintain a skepticism about the grand narratives that underlie the Act itself, a wariness about categories that essentialize persons on the basis of group membership, and an approach to identity that recognizes its fluid, dynamic, and highly contextual character.

II. THE INDIAN CHILD WELFARE ACT: A BRIEF OVERVIEW

A. Background

The ICWA was designed to remedy a unique and longstanding record of child welfare abuses by federal and state officials, state court judges, and private adoption agencies that led to widespread removal of Indian children from their homes and communities. Extensive congressional hearings on the topic of Indian child welfare in the 1970s established that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."⁵⁵ Testimony before congressional committees in 1974, 1977, and 1978 documented the existence of a crisis in the Indian family of sufficient proportion to threaten tribal survival.⁵⁶ The hearings revealed that state child welfare authorities were separating Indian children from their families and homes at extremely high rates and that

⁵⁴ "[T]his Article seeks legal reform of the Act but a type of reform which has transformative potential." *Id.* at 1231. Ruffin's use of multiculturalism assumes that Indian tribes are encompassed within its meaning along with other cultural minorities. The concept of "multiculturalism," however, is a general term that fails to recognize the unique status of American Indian tribes within this nation's social reality. See generally Rebecca Tsosie, *American Indians and the Politics of Recognition: Soifer on Law, Pluralism, and Group Identity*, 22 LAW & SOC. INQUIRY 359 (1997).

⁵⁵ H.R. REP. NO. 1386, 95th Cong. 9, reprinted in 1978 U.S.C.A.N. 7530, 7531.

⁵⁶ *Indian Child Welfare Act of 1978, Hearings Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 95th Cong. (1978); *Indian Child Welfare Act of 1977: Hearing on S.1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong. (1977) ("1977 Hearings"); *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93rd Cong. (1974) ("1974 Hearings").

a majority of these children were being placed in non-Indian adoptive or foster families.⁵⁷ In many states, two-thirds or more of the Indian child placements were in non-Indian homes, and in some states the percentage was even higher.⁵⁸

The removal of Indian children from their families did not begin with the child welfare abuses of the mid-twentieth century. The well-established tradition of white-run boarding schools dates back to the 1800s when Indian children were the targets of blatant cultural genocide. Indian youths were gathered into large governmental and private mission boarding schools, typically located far from the reservations, in an effort to introduce the children to "civilization."⁵⁹ In these institutions, the children were often denied the right to speak their language, practice their religion, or partake in any cultural practices.⁶⁰ Moreover, pursuant to its placing-out program, the federal government in the same time period placed Indian children on white-owned farms in the East and Midwest "to learn the 'values of work and the benefits of civilization.'"⁶¹

Gradually, as child welfare policy became more interventionist through the twentieth century, public and private agencies turned their attention to Indian child rearing practices. In the era when "termination" was official federal

⁵⁷ The disparity in placement rates for Indians and non-Indians was striking. In the state of Washington, for example, the Indian adoption rate was reported as almost twenty times greater and the foster care rate ten times greater than that for non-Indian children. H.R. REP. NO. 1386, at 9. In Arizona, 4.2 times more Indian children were placed for adoption than non-Indian children, and the overwhelming majority of these children were placed in non-Indian homes. CONG. REC. 38102 (daily ed. Oct. 14, 1978) (statement by Rep. Udall in support of H.R. 12533).

⁵⁸ 1977 *Hearings*, *supra* note 56, at 538, 603 (presenting tables showing comparative rates of foster and adoptive placements of Indians and non-Indians); 1974 *Hearings*, *supra* note 56, at 17 (reporting on study by AAIA of sixteen states showing eighty-five percent of all Indian child placements were with non-Indian families).

⁵⁹ In the late nineteenth century, the Bureau of Indian Affairs "developed an extensive network of off-reservation boarding schools designed to inculcate Indian children with the virtues and values of Western civilization and to eliminate the traces of tribal 'barbarism' that their own heritage was thought to represent." VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 241 (1983).

⁶⁰ See Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 15-32 (1990).

⁶¹ 1997 *Hearings*, *supra* note 56, at 144 (describing "placing out" program of 1884). According to recent historical scholarship, a quite different institution—the Indian orphanage—existed on or near reservations for Indian children whose parents and extended families could not provide care. See generally MARILYN IRVIN HOLT, *INDIAN ORPHANAGES* 43-48 (2001). These institutions, which reportedly were more sensitive to their wards' cultural identity than were the infamous boarding schools, disappeared towards the middle of the twentieth century. *Id.* at 251-58.

policy toward Indian tribes,⁶² foster and adoptive placements of Indian children rose dramatically.⁶³ For a decade beginning in 1958, the Child Welfare League of America, along with the Bureau of Indian Affairs ("BIA"), worked with social workers across the country to facilitate the adoptions of Indian children into non-Indian families.⁶⁴ The "Indian Adoption Project," as it was known, stemmed from studies showing that many Indian children were legally available for adoption but remained in foster care or were being passed among relatives on impoverished reservations. Through a combination of paternalism, assimilationist motives, and gross cultural insensitivity, welfare workers and state officials dedicated themselves to finding non-Indian homes for these "at risk" Indian children.⁶⁵ Moreover, as the number of healthy white infants available for adoption declined, childless non-Indian couples became increasingly interested in adopting Indian children.⁶⁶ In a recent apology, the League acknowledged that its actions in connection with the Indian Adoption Project assumed that Indian children "would be better off with white families as opposed to staying in their own communities and tribes."⁶⁷

Testimony before Congress preceding the enactment of the ICWA indicated that state child welfare officials were insensitive to traditional Indian approaches to child rearing, in particular the widespread practice of involving members of a child's extended family in significant caregiving. Applying

⁶² See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47 (1982) (dividing federal policy into discrete phases, including the Formative Years, from 1789 to 1871; the era of Allotments and Assimilation, from 1871 to 1928; the period of Indian Reorganization, from 1928 to 1942; the era of Termination, from 1942 to 1961; and finally the era of Self-Determination, from 1961 to the present).

⁶³ See generally William Byler, *The Destruction of American Indian Families*, in THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 1-2 (Stephen Unger ed., 1977). Interestingly, the rise in foster care occurred at a time when Indian orphanages were declining. See HOLT, *supra* note 61, at 256.

⁶⁴ Judith Graham, *Adoption Apology Too Late for Indians*, CHICAGO TRIB., May 7, 2001, at 1.

⁶⁵ *Id.* See also Pauline Arrillaga, *America's Lost Birds Fly Home: Adopted Indians Find Way Back to Their Tribes*, ARIZ. REPUBLIC, July 1, 2001, at A10 (describing cultural and psychological legacy of Indian Adoption Project).

⁶⁶ Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. DETROIT L. REV. 451, 455-56 (1989).

⁶⁷ See Graham, *supra* note 64. According to Graham's account, Shay Bilchik, Executive Dir. of Child Welfare League of America, issued a statement in April 2001 that included the following passage: "What we did may have been well-intentioned, but it was wrong, it was biased, it was hurtful. It is time to tell the truth—that our actions presupposed that Indian children would be better off with white families as opposed to staying in their own communities and tribes—and be reconciled." *Id.* Similar to the experience of American Indian children, thousands of First Nations children in Canada were also adopted by white families in the twentieth century as a result of welfare officials' desires to "civilize" the indigenous populations. See generally Keri B. Lazarus, *Adoption of Native American and First Nations Children: Are the United States and Canada Recognizing the Best Interests of the Children?*, 14 ARIZ. J. INT'L & COMP. L. 255 (1997); Clayworth Jason, "Stolen" Iowan Wants Family, *Culture Back*, DES MOINES REG., Oct. 9, 2000, at 1.

majoritarian middle-class values, state workers often construed such practices as neglect or even abandonment.⁶⁸ In addition, high rates of alcoholism and poverty were relied on as justifications for removing Indian children from their communities.⁶⁹ Congress also heard compelling evidence about the destructive impact of this abuse by state authorities for children, families, and tribes. Not only did Indian children suffer the trauma of separation from their homes but, in addition, Indian youths raised in non-Indian settings often encountered difficulty in forming a positive identity later in life, exhibiting serious emotional and psychological problems.⁷⁰ In contrast, proponents of interracial adoption pointed to social science evidence suggesting that children who are members of racial minorities have thrived in interracial placements in terms of adjustment, achievement, and self-esteem.⁷¹ Anecdotal evidence presented to Congress in the hearings leading up to the ICWA painted a very different and negative picture of the psychological impact on Indian children of their non-Indian placements. Indian families suffered from the loss of their children, and tribes, in turn, lost their membership.⁷² As will be seen, the narrative of the

⁶⁸ See H.R. REP. NO. 95-1386, at 10. Congress found, for example, that "the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." *Id.* For a detailed summary of the congressional hearings, see Russel Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287 (1980).

⁶⁹ H.R. REP. NO. 95-1386, at 10, 12 (finding that non-Indian social workers demonstrate cultural bias in assessing parental fitness with reference to such factors as alcohol abuse, low income, unemployment, substandard housing, and low educational attainment).

⁷⁰ See, e.g., 1977 *Hearings*, *supra* note 56, at 355 (statement of Don Milligan); 1974 *Hearings*, *supra* note 56, at 46-47 (statement of Dr. Joseph Westermeyer); Barsh, *supra* note 68 at 1290-92 (summarizing testimony before Congress about destructive psychological impact on Indian children); Arrillaga, *supra* note 65 (describing experiences of Indian children who were adopted by non-Indian couples in era preceding ICWA). A similar phenomenon has been observed elsewhere. In Australia, the forced removal of Aboriginal children from their homes and families during the nineteenth and twentieth centuries produced a population of people with Aboriginal roots who were raised in white homes or institutions. As with American Indian children raised in non-Indian environments, the disjuncture between legal identity and ancestral or racial identity of the Aboriginal children has given rise to intense emotional conflict. See *THE LOST CHILDREN* (Coral Edwards & Peter Read eds., 1989) (collecting personal narratives of Aboriginal adoptees). As noted by editor Peter Read, when Aboriginal children have been introduced to their birth families, the children's emotional turmoil is apparent. "'I'm Aboriginal, but what do I do about my white family who raised me?' It becomes an emotional tug of war." *Id.* at xxii.

⁷¹ See generally Bartholet, *supra* note 19, at 1207-23. Bartholet notes that the results of the studies are particularly persuasive in light of the acknowledged bias of many of the researchers favoring same-race adoptions. *Id.* at 1208.

⁷² See H.R. REP. NO. 95-1386, at 9 (high rate of removal of Indian children leads to fragmentation of families and tribal communities); 1974 *Hearings*, *supra* note 56, at 58 (statement of Drs. Carl Mindell & Alan Gurwitt) (explaining that placement of children in prolonged substitute care destroys fabric of Indian families).

destruction of Indian families and the grim plight of Indian children raised in non-Indian homes continues to inform judicial decisionmaking in the state courts.⁷³

B. Key Statutory Provisions

Congressional findings at the beginning of the ICWA summarize the evidence presented to Congress and set the tone for the Act. In stark language, the findings include the recognition that “there is no *resource* that is more vital to the continued existence and integrity of Indian tribes than their children.”⁷⁴ Thus, Indian children are characterized as a resource essential to tribal survival, a premise that has been stretched taut in litigation where children of mixed heritage are the focal points of battles between tribal and non-Indian claimants. In these disputes the objectification of the child as a tribal resource sometimes results in a duel of ostensible incommensurables: the tribe’s assertion of its interest in maintaining cultural survival pitted against a prospective adoptive parent’s assertion of the child’s interest in maintaining an established family relationship.

⁷³ That narrative has appeared in various forms in modern literary works. Sherman Alexie’s John Smith is a man struggling to regain a lost identity after his Native heritage disappeared when a white couple adopted him. See SHERMAN ALEXIE, *INDIAN KILLER* (1996). The character of Turtle in Barbara Kingsolver’s *Pigs in Heaven* also has two identities, one deriving from her Cherokee ancestry and one deriving from her relationship with her white adoptive mother. With fictional license, Kingsolver creates a happy ending that melds the two dimensions. See BARBARA KINGSOLVER, *PIGS IN HEAVEN* (1993). In F. Scott Momaday’s moving history of the young Sioux warrior named Plenty Horses, we learn that Plenty Horses as a child had been sent to a boarding school founded in 1879 by Richard Henry Pratt, “whose obsession was to ‘kill the Indian and save the man.’” After five years at the school, where Plenty Horses was forbidden to speak his native Lakota, he returned to his people, but they did not fully accept him.

He had lost touch with the old ways; he had lived among whites, and the association had diminished him. He rejected the white world, but he had been exposed to it, and it had left its mark upon him. And in the process he had been dislodged, uprooted from the Indian world. . . . [H]e lived in a kind of limbo, a state of confusion, depression, and desperation.

F. SCOTT MOMADAY, *THE MAN MADE OF WORDS* 101-02 (1997). Momaday goes on to describe the theft of the young boy’s language:

After five years Plenty Horses had not only failed to master the English language, he had lost some critical possession of his native tongue as well. He was therefore crippled in his speech, wounded in his intelligence. In him was a terrible urgency to express himself—his anger and hurt, his sorrow and loneliness. But his voice was broken. In terms of his culture and all it held most sacred, Plenty Horses himself was thrown away.

Id. at 103.

⁷⁴ 25 U.S.C. § 1901(3) (2000) (Congressional Findings) (emphasis added).

The findings go on to note that an alarmingly high percentage of Indian children were being removed from their homes by state authorities and placed in non-Indian homes and institutions, and that the states had “failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”⁷⁵ Significantly, a congressional declaration of policy at the outset of the Act emphasizes Congress’ dual focus on the interests of tribes as well as the interests of children:

The Congress hereby declares that it is the policy of this Nation *to protect the best interests of Indian children and to promote the stability and security of Indian tribes* and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.⁷⁶

Thus, Congress explicitly undertook to protect the interests of Indian children and to protect the survival of Indian tribes—two fundamental goals that the Act assumes are complementary. In the words of the House Report, the ICWA “seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.”⁷⁷ As discussed below, this bifurcated policy has produced the major points of tension and conflict under the Act.

The congressional approach to remedying the vast problem of widespread dislocation of Indian children was multipronged. Acting under its “plenary power over Indian affairs,”⁷⁸ Congress created various jurisdictional, pro-

⁷⁵ 25 U.S.C. § 1901 (2000) (Congressional Findings).

⁷⁶ 25 U.S.C. § 1902 (2000) (emphasis added).

⁷⁷ H.R. REP. NO. 95-1386, at 23.

⁷⁸ 25 U.S.C. § 1901(1). Authority to regulate commerce with Indian tribes was the principal source of power relied on by Congress. See U.S. CONST. art. I, § 8, cl. 3. Indian tribes are an anomaly within the American political system, occupying a status of subordinate sovereignty that Chief Justice John Marshall once described as “domestic dependent nations.” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In Chief Justice Marshall’s strongly influential view, Indian tribes’ “relation to the United States resembles that of a ward to his guardian.” *Id.* Although the history of federal Indian law has occasionally relied on a theory of national ownership of land occupied by tribes as a conceptual basis for federal control of Indian affairs, see, e.g., *United States v. Kagama*, 118 U.S. 375 (1886), the “guardian-ward” reasoning remains a central justification for federal regulation of tribes. This concept of tribal sovereignty, with its roots in colonialism and theories of conquest, has created conceptual problems throughout the history of federal Indian law and is a topic of active debate today both within and outside of Indian communities. See ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

cedural, and substantive protections governing child welfare matters concerning Indian children. A "child custody proceeding," under the Act, includes foster, preadoptive, and adoptive placements and terminations of parental rights.⁷⁹ Reflecting the congressional focus on child welfare practices, the definition of child custody proceeding does not include juvenile delinquency placements or interparental custody disputes at divorce.⁸⁰

The meaning of "Indian child" under the ICWA is constructed by an amalgam of defining forces: the federal government's definition of "tribe,"⁸¹ and its insistence on membership criteria for the dissemination of federal benefits,⁸² the tribes' coerced acquiescence in that system and their frequent use of blood quanta for defining membership,⁸³ and the fluctuating social and cultural value to an individual of assuming the identity of "Indian."⁸⁴ The

For a very different vision of a national government's responsibility to protect indigenous group rights within a national political system, see PATRICK MACKLEM, *INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA* (2001). According to Macklem, a unique constitutional relationship exists between aboriginal people and the Canadian state, and he sees in the Canadian constitution's guarantee of equality a constitutional means for protecting indigenous difference. Other scholars and activists have increasingly turned to international human rights law as a basis for recognition of the rights of indigenous peoples. See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996).

⁷⁹ See 25 U.S.C. § 1903(1). The Act applies to voluntary and involuntary proceedings but differentiates between them. Compare 25 U.S.C. § 1912 (involuntary), with 25 U.S.C. § 1913 (voluntary).

⁸⁰ *Id.* § 1903(a).

⁸¹ One standard definition from an early case is that a tribe is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory." *Montoya v. United States*, 180 U.S. 261, 266 (1901).

⁸² Under the ICWA, a tribe must be recognized as eligible to receive services from the BIA in order to qualify as an "Indian tribe." See 25 U.S.C. § 1903(8). Recognition as a tribe by the Department of the Interior depends on the satisfaction of several requirements, including historical identification as an American Indian tribe or aboriginal group, geographic cohesion, political authority over members, defined membership criteria, records of current and past membership, and existing rules of governance. See 25 C.F.R. § 83.7 (1998). A list is published annually by the BIA of all tribes recognized and receiving services. See 51 C.F.R. § 131. A tribe that is not listed falls outside the ambit of the ICWA. See *In re Wanomi P.*, 264 Cal. Rptr. 623 (Ct. App. 1989).

⁸³ Before the passage of the Indian Reorganization Act of 1934, most tribes did not keep formal membership rolls, but when the federal government conditioned recognition of tribal status on defined membership criteria, tribes developed such criteria, often with the BIA's assistance. Many tribes require a minimum of one-fourth degree of blood, but a few require as much as one-half degree of tribal blood. See COHEN, *supra* note 62, at 22-23. Although most tribes require some showing of blood quantum, some have taken a more inclusive approach that broadens the membership base of the tribe. Almost one-third of the federally recognized tribes have no minimum requirement at all. See Russell Thornton, *Tribal Membership Requirements and the Demography of "Old" and "New" Native Americans*, 16 POP. RES. & POL'Y REV. 33, 36-37 (1997).

⁸⁴ Jo Carrillo notes that federal law has not adequately dealt with the issue of Native American identity and that the ICWA, for example, may be ineffective in cases involving individuals who do not wish to proclaim a tribal identity. See JO CARRILLO, *READINGS IN AMERICAN INDIAN LAW* 16 (1998) (describing facts

problem of tribal identity under American law is also fundamentally shaped by the history of race relations in the United States and the long record of the federal government's efforts to destroy Indian tribes.⁸⁵ The ICWA itself is a response to the historical practices of state child welfare authorities in too readily removing Indian children from their families and of the federal government in its housing of Indian children at boarding schools run by the Bureau of Indian Affairs. In its approach to Indian identity, Congress understandably wanted clear definitions that would protect the tribes in maintaining and expanding their membership. In that sense, Congress was committed to restoring to the tribes that which they had lost.

The ICWA defines "Indian child" to mean any unmarried minor who is either a member of a federally recognized Indian tribe or who is eligible for membership and is the biological child of a member of a tribe.⁸⁶ The BIA, in its nonbinding guidelines for state courts in applying the Act, has addressed the question of determining whether a child is an "Indian child" within the meaning of the ICWA. Consistent with other understandings in federal Indian law,⁸⁷ the BIA Guidelines provide that a determination by a tribe that a child is or is not a member or eligible for membership in that tribe is conclusive.⁸⁸

of *In re Bridget R.*, discussed *infra* notes 164-88, 207-08 and accompanying text, in which Indian father initially concealed his Indian identity on advice of counsel).

⁸⁵ See generally ROBERT F. BERKHOFFER, JR., *THE WHITE MAN'S INDIAN* 113-94 (1978); WILLIAMS, *supra* note 78.

⁸⁶ 25 U.S.C. § 1903(4) (2000).

⁸⁷ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (recognizing that power to determine tribal membership is a fundamental aspect of tribal sovereignty); COHEN, *supra* note 62, at 248 (noting that each tribe, as a distinct political community, has the power to determine its own tribal membership—whether by written law, custom, intertribal agreement, or treaty). Notwithstanding Cohen's view that tribal sovereignty necessarily encompasses the power to determine membership, many federal programs use a different approach to determining Indian identity—an approach that imposes an absolute blood quantum requirement without regard to a particular tribe's determination of membership. For example, many BIA regulations governing the administration of federal Indian benefit programs rely on a one-half or one-quarter blood quantum requirement. See, e.g., 25 C.F.R. § 5.1 (2000) (Indian Hiring Preference); 25 C.F.R. § 26.1(g) (2000) (Employment Assistance for Adult Indians). Other statutes require proof of both tribal enrollment and a one-quarter blood quantum. See 25 C.F.R. § 20.1 (2000) (setting eligibility for federal financial assistance and social services). For a thoughtful review of the varying definitions of Indianness in federal law and a recommendation for a uniform definition that defers to tribes in certifying who should be counted as an Indian, see Margo S. Brownell, Note, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 339 (2001).

⁸⁸ BIA Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979) ("BIA Guidelines"). The BIA Guidelines go on to note that, absent a contrary determination by a tribe, a determination by the BIA that a child is or is not a tribal member is conclusive. Thus, while it is the tribe's prerogative to determine membership criteria and to decide who meets those criteria, the BIA's determinations are also given deference. According to the BIA Guidelines, verification from the BIA of a child's Indian status may be desirable in voluntary placement cases where the parent has requested anonymity

The legislative history of the ICWA addresses the question of identity only briefly. In defending the constitutionality of the Act against critics, including the Justice Department, which urged that the Act be limited to enrolled Indian children, the House Report contended that Congress has power to act with respect to non-enrolled Indian children as well. In this regard, it explained:

This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing there from. Obviously, Congress has power to act for their protection. The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, *particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.*⁸⁹

Congress' language reveals an assumption about Indian identity—that the eligible child would claim it if she possessed sufficient maturity—and does not address the dilemma of the child with mixed parentage, where each parent supplies a dimension of the child's potential identity.

While the statutory definition has been criticized as too narrow,⁹⁰ others have argued that it should have been further delimited by requiring that an Indian child reside on a reservation or maintain close family ties to one.⁹¹ What these opposing camps do not address is the identity conundrum posed by the child of Indian and non-Indian parentage. In this regard, I do not assume

and the tribe does not have a system for keeping child custody matters confidential. The BIA Guidelines also make clear that enrollment is not always required in order to be a member of a tribe, because some tribes lack written rolls and others do not maintain rolls containing current members. *Id.* As a formal matter, state courts have accepted tribal determinations of membership as conclusive. *See, e.g., In re Welfare of S.N.R.*, 617 N.W.2d 77 (Minn. Ct. App. 2000) (holding that determination by tribe of membership is function of sovereignty and conclusive), but the existing Indian family exception followed in several states is itself a means of questioning Indian identity. *See infra* notes 198-205 and accompanying text.

⁸⁹ H.R. REP. NO. 95-1386, at 17 (emphasis added).

⁹⁰ *See* Barsh, *supra* note 68, at 1307-10 (arguing that the criterion of eligibility for tribal membership perpetuates anachronistic and irrelevant classifications).

⁹¹ In 1978, the Justice Department argued to Congress that the ICWA's proposed definition of Indian child would be unconstitutional if it did not require close affiliation with an Indian reservation in addition to the requirement for eligibility for tribal membership. *See* H.R. REP. NO. 95-1386, at 37-40 (letter from Patricia M. Wald, Asst. Att'y Gen.). The Department's position was that absent such a requirement, the Act would constitute invidious racial discrimination. That argument has reemerged in recent years in connection with the existing Indian family exception to the ICWA. A bill in 1996 proposed to codify the exception by making the Act inapplicable to a child whose parents do not maintain affiliation with their Indian tribe. *See* Adoption Promotion and Stability Act of 1996, H.R. 3286, 104th Cong. (1976).

that the status of "Indian" is a racial category—a problematic and recurring question cogently explored by others.⁹² Whether Indian status is viewed as a racial classification, a cultural identity, or political membership in a sovereign entity, the reality remains that many children within the ICWA structure today possess potential Indian identity through only one parent. A tribe's willingness to accept a particular child into tribal membership does not eliminate the multiple identities the child possesses, nor does it address the non-Indian parent's insistence that she has an equal claim to any characterization of the child's identity. With the incidence of intermarriage between non-Indians and Indians at its highest point in history,⁹³ we can expect this tension in the ICWA's reliance on the construct of Indian identity to continue.

⁹² See, e.g., Brownell, *supra* note 87; Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702 (2001); Moran, *supra* note 19, at 165-70. Professor Gould argues that tribes should move towards a non-racial definition of membership in order to bolster the constitutionality of the myriad governmental programs designed to benefit Indian tribes and Indians. He relies in part on the recent Supreme Court case, *Rice v. Cayetano*, 528 U.S. 495 (2000), in contending that the Court's decisions have moved towards a concept of tribal sovereignty based on consent. In *Rice*, the Court struck down on Fifteenth Amendment grounds a Hawaiian statute that gave exclusive voting privileges to Hawaiians with the requisite ancestry. In the Court's view, legal categories based on ancestry caused the same injuries as racial classifications by conditioning the bestowal of benefits on lineage rather than individual merit. While reaffirming the validity of *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding constitutionality of Indian hiring preferences under Indian Reorganization Act as political rather than racial classification), the Court in *Rice* concluded that *Mancari* did not save the Hawaiian voting scheme because the Hawaiian structure had nothing to do with tribal sovereignty or Indian self-government. In Gould's view, *Mancari* is on a collision course with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that strict scrutiny is the sole standard of review for racial classifications). Gould's view is problematic because it disregards the traditional reliance on ancestry in most tribal determinations of membership. See Carole Goldberg, *American Indians and "Preferential Treatment,"* 49 UCLA L. REV. 1, 19-20 (2002) (suggesting that the Indian Commerce Clause provides a specific source of constitutional authority to justify preferential treatment for Indians).

⁹³ According to recent census data, Native Americans, comprising only about one percent of the population, have the highest rate of intermarriage (marriage outside their "racial" category) of any racial minority in the United States. See THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 113-23 (James P. Smith & Barry Edmonston eds., 1997). See also Gould, *supra* note 92, at 757-65 (citing ongoing demographic research that indicates forty percent of American Indians marry outside their "racial" group and predicting that by year 2100, nine of ten people claiming to be Indian will have multiracial roots). After persistent efforts by multiracial category proponents, U.S. Census officials added a multiracial category on decennial census forms for the year 2000. For the first time, the census questionnaire now permits individuals to select "one or more" racial classifications. See Form D-61A, U.S. Census 2000, U.S. Dep't of Commerce, Bureau of the Census (Question 8). Interestingly, some tribal spokespersons opposed the multiracial option on the census questionnaire, fearing that permitting American Indians to self-identify as members of more than one race would reduce the number of people reporting to be American Indian or Alaskan Native and would produce a corresponding reduction in federal monies allocated for programs such as the Indian Health Service. See *Federal Measures on Race and Ethnicity and the Implications for the 2000 Census: Hearing Before Subcomm. on Gov't Management, Information, and Technology of the House Comm. on Gov't Reform and Oversight*, 105th Cong. (1997) (testimony of JoAnn K. Chase, Executive Dir. of Nat'l Congress of Am. Indians) ("Chase Testimony").

The jurisdictional provisions of the Act implement Congress' view that tribal sovereignty encompasses the power to decide foster and adoptive matters involving Indian children. Moreover, by curbing state court authority, the provisions also reflect the congressional understanding that state courts shared responsibility for the unjustified removal of Indian children from their homes.⁹⁴ First, under § 1911(a), the Act provides for exclusive tribal court jurisdiction over any child welfare proceeding involving an Indian child who resides or is domiciled on a reservation or is a ward of tribal court.⁹⁵ The Act's recognition of exclusive tribal jurisdiction under the Act was consistent with the developing federal Indian law.⁹⁶ For such children who have the key geographic or wardship affiliation with a tribe, the tribe's authority is paramount and cannot be defeated by a parent who wants to place his or her child for adoption through the state courts.⁹⁷ Thus, tribal courts are recognized as possessing exclusive jurisdiction over such cases, and the domiciliary parent lacks the power to circumvent tribal authority. In that jurisdictional mandate, Congress declined to give parents a right to subvert the tribe's essential role in

⁹⁴ Testimony leading up to the ICWA suggested that state courts suffered from ignorance, poor training, and cultural bias in deciding Indian child welfare matters. See 1974 Hearings, *supra* note 56; AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 79-80 (Comm. Print 1976) ("1976 REPORT"). The formal findings included in the Act itself provide that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901 (5) (2000).

⁹⁵ 25 U.S.C. § 1911(a) provides:

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

⁹⁶ See, e.g., *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976) (per curiam) (holding that Northern Cheyenne tribal court had exclusive jurisdiction over custody dispute between Indian foster mother and Indian biological mother where all parties resided on reservation); *Wis. Potawatomies v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973) (holding that adoption proceedings involving Indian children domiciled on reservation, though temporarily absent, were within exclusive jurisdiction of tribal court).

⁹⁷ H.R. REP. NO. 95-1386, at 12. The words of the House Report are revealing:

Cultural disorientation, a person's sense of powerlessness, his loss of self-esteem—these may be the most potent forces at work. They arise, in large measure, from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government.

One of the effects of our national paternalism has been to so alienate some Indian parents from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family. Another expression of it is the involuntary, arbitrary, and unwarranted separation of families.

Id.

child welfare proceedings involving domiciliary children; the exclusive power of the tribe trumps individual choice.

On the other hand, when an Indian child is domiciled off the reservation, relationships under the Act shift and the parent's interests play a more prominent role. For the non-domiciliary child, the Act recognizes concurrent tribal/state authority but creates what is sometimes termed "presumptive tribal jurisdiction."⁹⁸ The Act through § 1911(b) requires state courts to transfer child custody proceedings to tribal court upon the petition of a parent or the child's tribe, unless either parent objects or the court finds good cause to the contrary.⁹⁹ Thus, in contrast to proceedings involving children domiciled on a reservation, in proceedings involving non-domiciliary Indian children Congress protected parental autonomy, giving either parent an absolute veto over the transfer option.¹⁰⁰ As noted by one critic, this provision means that the state forum will prevail whenever there is parental disagreement¹⁰¹—a scenario most likely to occur where the parents do not share Indian heritage or a common tribal affiliation.¹⁰² As a consequence, the Act's underlying tension in determining Indian identity may surface in disputes about this "transfer jurisdiction."¹⁰³ Moreover, the good cause exception to the transfer of cases to tribal court—a statutory battleground for jurisdiction—continues to be a source of controversy under the Act.¹⁰⁴ In the House Report on the ICWA, Congress

⁹⁸ See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989); Michael J. v. Michael J., 7 P.3d 960, 962 (Ariz. Ct. App. 2000).

⁹⁹ 25 U.S.C. § 1911(b).

¹⁰⁰ *In re Larissa*, 51 Cal. Rptr. 2d 16 (Ct. App. 1996), is illustrative. There, the court concluded that § 1911(b) gives the parent of an Indian child not domiciled or residing on the reservation an unconditional veto power over any request to transfer a proceeding to the tribal court. In the court's view, the statutory veto

supports the policy behind the ICWA by giving the parents, the persons best suited to determining the importance of the family's Indian connection, the option of defending in the court system most reflective of family standards. It additionally conforms to the legislative aim of balancing the interests of the tribe, when the child is not domiciled on the reservation, with those of the parents.

Id. at 22. See also *In re Juv. Action No. JD-6982*, 922 P.2d 319 (Ariz. Ct. App. 1996) (holding that ICWA gives parent absolute veto over transfer motion by tribe); BIA Guidelines, *supra* note 88, at 67,591 (same).

¹⁰¹ Barsh, *supra* note 68, at 1317.

¹⁰² In *In re Interest of A.E.*, 572 N.W.2d 579 (Iowa 1997), for example, the mother's tribe moved for transfer of proceedings under § 1911(b), and the children's non-Indian father objected. *Id.* at 582. The court read the statute as giving either parent veto power over the transfer and therefore denied the tribe's motion. *Id.*

¹⁰³ Jurisdictional disputes in battles over Indian children, often highly polarized and emotional, can implicate themes of cultural survival and tribal sovereignty. I have written elsewhere about the significance of jurisdiction in interparental disputes involving Indian children. See Barbara A. Atwood, *Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051 (1989).

¹⁰⁴ See, e.g., *In re Robert T.*, 246 Cal. Rptr. 168 (Ct. App. 1988) (affirming trial court's consideration of child's best interests in denying tribe's motion to transfer).

indicated, somewhat ambiguously, that the good cause provision was intended to permit a state court to apply "a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected."¹⁰⁵ The BIA Guidelines, which offer examples of good cause,¹⁰⁶ caution that socioeconomic conditions or the perceived adequacy of tribal social services or court systems may not be considered in determining whether good cause exists.¹⁰⁷ The state courts are divided over whether the good cause provision allows for a consideration of a child's best interests, and those that have assumed that a best interests analysis is appropriate have been sharply criticized.¹⁰⁸

The Act creates a host of procedural protections for Indian parents and children when cases do remain within state court, and these rights strengthen the position of birth parents as compared to the law governing non-Indian families. The procedural protections include: a right of intervention for Indian parents and tribes;¹⁰⁹ the tribe's right to notice of involuntary proceedings

¹⁰⁵ H.R. REP. NO. 95-1386, at 21.

¹⁰⁶ BIA Guidelines, *supra* note 88, at 67,591. According to the BIA Guidelines, good cause not to transfer exists if there is no tribal court to which the case can be transferred or if any of the following circumstances exist:

- (i) The Proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
- (ii) The Indian child is over twelve years of age and objects to the transfer.
- (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
- (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

Id.

¹⁰⁷ *Id.*

¹⁰⁸ In finding good cause to denying transfer of a child welfare case to tribal court, several state courts have noted either that the Indian child had bonded with the foster or adoptive parents or that it would be psychologically damaging to remove the child from her present situation. *See, e.g., In re Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993); *In re Juv. Action No. JS-8287*, 828 P.2d 1245, 1250-51 (Ariz. Ct. App. 1991); *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 682 (Ct. App. 1996); *In re Robert T.*, 246 Cal. Rptr. 168, 175 (Ct. App. 1988). Critics see this blend of a best interests analysis with a jurisdictional determination as improper and dangerous to the underlying goals of the Act. *See Carriere, supra* note 9; Metteer, *Hard Cases, supra* note 11, at 439-44.

¹⁰⁹ Under 25 U.S.C. § 1911(c), the child's Indian custodian and the child's tribe have the right to intervene at any point in a state court proceeding for foster care placement or termination of parental rights. Because Congress specified the two types of proceedings giving rise to a statutory right to intervene, courts have questioned whether intervention is barred in other proceedings, such as preadoptive or adoptive placements. Most courts addressing the issue have concluded that intervention by the tribe, while not statutorily mandated, can still be granted as a matter of trial court discretion. *See, e.g., In re Juv. Action No. A-25525*, 667 P.2d 228 (Ariz. Ct. App. 1983) (holding that although ICWA did not expressly authorize intervention by tribe in adoption proceeding, trial court properly exercised discretion to grant intervention); *In*

where the court has reason to know that an Indian child is involved;¹¹⁰ appointment of counsel for indigent parents or Indian custodians in any removal, placement, or termination proceeding;¹¹¹ and a requirement that state courts give full faith and credit to tribal acts and decrees relating to Indian child custody proceedings.¹¹² In addition, the Act sets up mandatory standards governing the burden of proof for state child welfare proceedings involving an Indian child. Any party seeking a foster care placement or parental rights termination must show that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."¹¹³ Case law has made clear that this provision supplements the mandates otherwise existing under federal or state law and imposes a particularized requirement where the state proceeding involves an Indian child.¹¹⁴

As a further protection for Indian parents, the ICWA heightens the burden of proof to a level above that required as a matter of constitutional due process. For foster care placements or other temporary removals, the state court must find by clear and convincing evidence that continued parental custody is likely to result in serious emotional or physical damage to the child.¹¹⁵ In proceedings to terminate parental rights, the Act imposes the highest burden of proof. In such cases, the state must establish the likelihood of harm to the child by evidence beyond a reasonable doubt, including testimony of qualified expert

re Baby Girl A., 282 Cal. Rptr. 105 (Ct. App. 1991) (holding that tribe could not intervene as matter of right in ancillary proceeding intended to assist in completing voluntary adoptive placement, but intervention was proper under state civil procedural rule).

¹¹⁰ 25 U.S.C. § 1912(a). Congress' failure to give an express right to notice for tribes in voluntary proceedings, while granting them a right to intervene in such cases, has caused some interpretational problems. *See, e.g., Navajo Nation v. Superior Ct.*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999) (holding that ICWA did not provide tribe with right to notice of private voluntary adoption proceeding). Many states themselves have enacted laws requiring notice in voluntary proceedings so as to protect the tribe's right of intervention. *See, e.g., CAL. R. OF CT.* 1439. An amendment to the Act making notice to tribes an express requirement for voluntary proceedings is now pending before Congress. *See infra* notes 328-30 and accompanying text.

¹¹¹ 25 U.S.C. § 1912(b).

¹¹² *Id.* § 1911(d).

¹¹³ *Id.* § 1912(d).

¹¹⁴ A recent California decision gave force to the requirement of "active remedial efforts." In *In re Michael G.*, 74 Cal. Rptr. 2d 642 (Ct. App. 1998), the court remanded a parental rights termination case involving Indian children in order for the state to provide the parents (who were incarcerated during much of the proceedings) with remedial services consistent with "the prevailing social and cultural conditions and way of life of the Indian child's tribe." *Id.* at 650. Although the court rejected the parents' argument that the active remedial efforts requirement had to be proven beyond a reasonable doubt, it nevertheless found insufficient support in the record to satisfy even the lesser standard of clear and convincing evidence. *Id.* at 651.

¹¹⁵ 25 U.S.C. § 1912(e).

witnesses.¹¹⁶ In contrast, for child welfare cases not involving Indian children, the preponderance of the evidence standard governs temporary removals of children from their homes, and parental rights terminations are governed by the “clear and convincing evidence” standard as a matter of constitutional due process.¹¹⁷

Other procedural rights under the ICWA pertain to voluntary proceedings, where the parent or Indian custodian consents to a foster care placement or termination of parental rights. By mandating certain procedural protections, Congress was responding to evidence that Indian parents often relinquished children to state authorities without fully understanding the nature of their actions. Under the Act, parental consents must be in writing and must be accompanied by a judge’s certificate that the terms and consequences of the consent were fully explained to and understood by the parent.¹¹⁸ The parent may withdraw consent to foster placement at any time,¹¹⁹ and may withdraw consent to a termination of parental rights at any time before a final decree of termination or adoption is entered.¹²⁰ In contrast, state law generally imposes stricter limits on the right of birth parents to withdraw consent to adopt.¹²¹ The ICWA further protects the parent by allowing a withdrawal of consent on the grounds of fraud or duress for up to two years after an adoption is decreed.¹²² Moreover, the ICWA gives a broad right to Indian children, their parents or Indian custodians, and their tribes to challenge involuntary or voluntary foster care placements or parental rights terminations whenever the state court decrees were entered in violation of the described jurisdictional or procedural requirements of the Act.¹²³ This right of retroactive invalidation, which can result in the disruption of a longstanding placement, applies without regard to the passage of time or the circumstances of the Indian child who is the subject of the proceedings.¹²⁴

¹¹⁶ *Id.* § 1912(f).

¹¹⁷ *See Santosky v. Kramer*, 455 U.S. 745 (1982).

¹¹⁸ 25 U.S.C. § 1913(a).

¹¹⁹ *Id.* § 1913(b).

¹²⁰ *Id.* § 1913(c).

¹²¹ *See generally* JOAN HEIFETZ HOLLINGER, *ADOPTION LAW AND PRACTICE* § 8.02 (2001) (stating that states typically treat consent as irrevocable if voluntarily and knowingly executed before a judge; alternatively, states may require best interests hearing if birth parent seeks to revoke).

¹²² 25 U.S.C. § 1913(d).

¹²³ *Id.* § 1914. This remedial section authorizes the child, parent or custodian, or tribe to “petition any court of competent jurisdiction” to invalidate the foster care placement or parental rights termination “upon a showing that such action violated any provision of §§ 1911, 1912, and 1913 of this title.” *Id.*

¹²⁴ In *In re Michael G.*, 74 Cal. Rptr. 2d 642 (Ct. App. 1998), for example, the state agency’s failure to apply the statutorily required burden of proof in terminating the parental rights of a Navajo father left the

Finally, a key component of the ICWA for purposes of this Article is § 1915. In that provision, the Act sets out substantive guidelines for state courts to follow when they retain jurisdiction over child custody proceedings for foster and adoptive placements. In this regard, Congress was pursuing its stated goal of promoting the “placement of [Indian] children in foster or adoptive homes which will reflect the unique values of Indian culture.”¹²⁵ The hearings established that a majority of Indian children removed from their homes were placed in non-Indian settings, and testimony vividly portrayed the host of problems engendered by that practice. As a result, Congress mandated a preference for Indian placements—a statutory policy understandable in historical context but clearly at odds with current federal policy on interracial adoption. Race-matching in adoption, for example, was the target of the Multiethnic Placement Act of 1994, driven by concerns that minority-race children were being denied adoptive placements because of the paucity of minority-race adoptive parents.¹²⁶ Significantly, Congress included a pro-

subject children in limbo “without the permanence and stability they deserve,” more than three years after the agency initiated its dependency action. *Id.* at 652.

¹²⁵ 25 U.S.C. § 1902 (“Congressional declaration of policy”).

¹²⁶ The Multiethnic Placement Act of 1994, as amended by the Interethnic Adoption Provisions of 1996, provides that a person or agency involved in adoption or foster care placements may not:

- (A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or
- (B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

42 U.S.C. § 1996b. The Act provoked a furor of controversy between those who believe in “race-blind individualism” and those who ascribe to “color and community consciousness.” See Perry, *Transracial Adoption*, *supra* note 19. As Professor Woodhouse explains,

[t]he perspective of race-blind individualism sees racial matching as a threat to the individual rights of children to a nurturing home and to the rights of prospective adoptive parents to equal treatment regardless of their race or ethnicity. . . . The colour and community-conscious perspective sees race and belonging in a community as inextricably linked and inevitably defining elements.

Woodhouse, *supra* note 24, at 271-72.

The race-matching/transracial adoption controversy has been waged largely outside of the context of the ICWA, but in 1986 the National Association of Black Social Workers proposed an amendment to the ICWA to provide comparable placement preferences for African Americans and other minorities. See Bartholet, *supra* note 19, at 1182 n.43. For an argument that the policy underlying the ICWA should be used to justify a preference for placement of African-American children with extended family, see Cynthia G. Hawkins-Leon, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201 (1998). Professor Hawkins-Leon’s article prompted a response from Professor Christine Metteer, a staunch supporter of the ICWA, arguing that the unique status of Indian tribes vis-à-vis the federal government distinguishes Indians from other racial or ethnic minorities and justifies the preferences set out in the ICWA. See Christine M. Metteer, *A Law unto Itself: The Indian Child Welfare Act as Inapplicable and*

vision that the Multiethnic Placement Act should not be construed to affect the application of the ICWA.¹²⁷ In contrast to the federal policy opposing race-matching in the non-Indian context,¹²⁸ § 1915 of the ICWA requires that state courts give a preference to extended family members, the child's tribe, or other Indian families for adoptive placements¹²⁹ and imposes a somewhat more flexible set of preferences for foster care placements.¹³⁰ This provision establishes "a Federal policy that, where possible, an Indian child should remain in the Indian community," and attempts to ensure that Indian child welfare decisions are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."¹³¹ To achieve that goal, the Act further directs state courts to apply "the prevailing social and cultural standards of the Indian community . . . with which the parent or extended family members maintain social and cultural ties."¹³²

Inappropriate to the Transracial/Race-Matching Adoption Controversy, 38 BRANDEIS L.J. 47 (1999). In a somewhat ironic vein, Professor Metteer also suggests that the resistance to the ICWA since its enactment makes it a particularly poor model for adoption policy in other contexts. *See id.* at 66-87.

¹²⁷ *See* 42 U.S.C. § 1996b(3).

¹²⁸ For an argument that the ICWA is not about "race-matching" but rather turns on tribal membership as a form of political association, *see Metteer, supra* note 126.

¹²⁹ 25 U.S.C. § 1915(a), discussed *infra* at notes 228-72 and accompanying text.

¹³⁰ *Id.* § 1915(b), requiring that

in any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Id. The differences between the adoptive and foster care placement preferences can pose problems for children subject to the Act. For example, an Indian child might be placed in a tribally-approved foster home in full compliance with the ICWA, but the foster home, if non-Indian, would not satisfy the adoptive placement preferences. An adoptive placement might thus require yet another disruptive move for the child. *See* Caroline Brown & Lisa Rieger, *Culture and Compliance: Locating the Indian Child Welfare Act in Practice*, 24 POL. L. ANTH. REV. 58 (2001) (discussing differing views among Native and non-Native social workers regarding placement of Indian children under ICWA, including practical problems produced by differences in Act's placement preferences).

¹³¹ H.R. REP. NO. 95-1386, at 24.

¹³² 25 U.S.C. § 1915(d). The mandate that the placement decision be based on the cultural standards of the child's tribe has led courts to require qualified expert testimony from persons knowledgeable in the tribe's culture and tradition. In litigation under the ICWA, questions frequently arise concerning the qualifications of particular experts. *See, e.g., In re Custody of S.E.G.*, 521 N.W.2d 357, 364-65 (Minn. 1994).

Importantly, the placement preferences need not be followed by state courts "in the absence of good cause to the contrary."¹³³ As with the good cause exception to transfer under § 1911(b), the Act's inclusion of a good cause exception in the placement guidelines has generated controversy and bitter litigation. Unlike the jurisdictional and procedural provisions of the ICWA, § 1915 speaks to the state court's authority to assess substantively the child's circumstances and decide the child's future. As one of the selected "flash-points" for discussion in this Article, the question whether state courts should employ the "child's best interests" standard under the good cause provision is not easily resolved by reference to the statute or to policy.

C. Implementing the Act

The ICWA's recognition of exclusive tribal authority over child custody proceedings involving an Indian child domiciled on a reservation provided the backdrop to the only case under the Act that has been reviewed by the Court. In *Mississippi Band of Choctaw Indians v. Holyfield*,¹³⁴ the Court confronted a dispute in which state judicial power and parental autonomy were aligned against tribal power. In invalidating a state-decreed adoption of twin Choctaw infants who were born off the reservation, the Court held that the Act's exclusive tribal jurisdiction provision applied. As a result, the state court adoption was void. Writing for the majority, Justice Brennan rejected the contention that the state's definition of domicile or the wishes of the children's mother should defeat the tribal court's exclusive authority. Noting that "Congress perceived the States and their courts as partly responsible for the problem it intended to correct,"¹³⁵ the Court concluded that a uniform federal law of domicile for the ICWA was necessary. Relying on common law understandings of the concept of domicile for the content of that federal law, the Court held that because the mother was domiciled on the Choctaw reservation, the children likewise were deemed to possess reservation domiciles, despite the fact that the mother had traveled off the reservation to give birth and had immediately placed the children for adoption with a non-Indian couple. The Court¹³⁶ endorsed the Act's recognition of the superiority

¹³³ *S.E.G.*, 521 N.W.2d at 359 n.1.

¹³⁴ 490 U.S. 30 (1989).

¹³⁵ *Id.* at 45.

¹³⁶ Justice Brennan, writing for the majority, assumed that he was being faithful to congressional intent in subordinating the individual tribe member's desires to the ICWA's mandate for exclusive tribal jurisdiction. *Id.* In contrast, the dissent argued that the majority's approach "distorts the delicate balance between individual rights and group rights recognized by the ICWA." *Id.* at 55 (Stevens, J., dissenting, joined by

of tribal authority as against the desires of an individual member, at least as to the question of exclusive tribal jurisdiction. Justice Brennan wrote:

Nor can the result be any different simply because the twins were “voluntarily surrendered” by their mother. Tribal jurisdiction under Sec. 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.¹³⁷

The Court thus made clear that at least as to the exclusive jurisdiction requirement, individual tribal members have no right to circumvent the Act and cannot do so by the simple expedient of traveling off the reservation to give birth. In this regard, Justice Brennan noted that “[t]he protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.”¹³⁸

The Court acknowledged in *Holyfield* that nullification of the state court adoption was occurring over three years after the infants had been placed in the adoptive home, and that “a separation at this point would doubtless cause considerable pain.”¹³⁹ The Court continued with an important observation about the conflict between the children’s interests and those of the tribe:

Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of who should make the custody determination concerning these children—not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. . . . It is not ours to say whether the trauma that might result from removing these children from their adoptive families should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community. Rather, “we must defer to the experience,

Rehnquist, C.J., and Kennedy, J.). In the dissent’s view, Congress did not intend the result reached by the majority. To the contrary, the dissenting Justices argued that “when an Indian child is deliberately abandoned by both parents to a person off the reservation, no purpose of the ICWA is served by closing the state courthouse door to them.” *Id.* at 63.

¹³⁷ *Id.* at 49.

¹³⁸ *Id.* at 52 (quoting *In re Adoption of Hallaway*, 732 P.2d 962, 969-70 (Utah 1986)).

¹³⁹ *Id.* at 53.

wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy.”¹⁴⁰

Holyfield thus constitutes an emphatic endorsement of the federal policy of protecting tribal authority in child welfare proceedings affecting Indian children, even when the tribal will is ostensibly in conflict with parental choice. The opinion articulates respect for the competence (and compassion) of tribal courts, a view that informs the ICWA. The majority opinion conspicuously avoids confronting directly the clash between individual and collective rights, because the Court’s institutional role required deference to congressional intent. In that sense, *Holyfield* may have been an easy case after all, because the Act mandated an unambiguous jurisdictional result. In any event, the *Holyfield* Court read the Act to endorse the superiority of tribal authority vis-à-vis individual tribal members living within the tribe’s reservation.¹⁴¹

Holyfield points out a core tension underlying the ICWA—the potential clash between tribal rights and individual rights. In selecting its jurisdictional approach and in subordinating domiciliary tribal members to the will of the tribe, Congress provided a clear rule of decision but did not, and could not, dispel the tension. In the view of Martha Minow:

[*Holyfield* reveals] the central dilemma posed by the Indian Child Welfare Act; do the children have the same interests as the tribe, and if not, should the group’s interests prevail? . . . Does the case stand as a victory for group identity as a principle but a victory for individualized judgments in practice? A hypocritical pretense of respect for group identity? A signal to lower courts to enforce more vigorously the group identity dimensions of the Indian Child Welfare Act? The case is arguably all of these, and also manifests the grave difficulties involved in assigning race, family, and tribal status by law.¹⁴²

¹⁴⁰ *Id.* at 53-54 (quoting *In re Adoption of Halloway*, 732 P.2d at 972). Subsequent events demonstrated that the Court’s articulated confidence in the “compassion” of the tribal court was well-placed. After the Choctaw court assumed jurisdiction in the matter, it decreed the Holyfields’ adoption as a matter of tribal law, the tribal judge deciding that it was in the children’s best interests to remain in the adoptive home. See Marcia Coyle, *After the Gavel Comes Down*, NAT’L L.J., Feb. 25, 1991, at 1, 24.

¹⁴¹ The controversial nature of this recognition of tribal power over the will of individual parents is manifest in the proposals introduced in Congress to limit the ICWA to involuntary child welfare proceedings. See, e.g., H.R. REP. NO. 1957, 105th Cong. (1997) (exempting voluntary child custody proceedings from coverage of the ICWA).

¹⁴² MARTHA MINOW, NOT ONLY FOR MYSELF—IDENTITY, POLITICS, AND THE LAW 76 (1997).

The *Holyfield* decision makes clear that the Act's mandate for exclusive tribal jurisdiction governs voluntary terminations by Indian parents with respect to children domiciled on their tribe's reservation. In cases involving children with more attenuated ties to their tribes, however, state courts possess concurrent jurisdiction as delimited by § 1911(b). In those cases, state judiciaries continue to confront the tensions underlying the Act. These tensions come into play when state judges question the legal, social, and cultural meaning of Indian identity and the propriety of assigning a single identity to children. The tensions also surface when state judges inquire into the meaning of an Indian child's best interests, the nature of the tribe's collective will, and the significance of individual parental choice. To the extent that the Act is founded on categories that essentialize Indian children, the tensions are inevitable.

The ICWA has achieved considerable success in stemming unwarranted removals by state officials of Indian children from their families and communities. Nevertheless, removals of Indian children from their families of origin—by either tribal or state authorities—continue in high numbers.¹⁴³ Indian children are placed in substitute care at a much higher rate than is the average for all other children in the nation, notwithstanding the passage of the ICWA.¹⁴⁴ Some observers attribute such statistics to the persistence of dire socioeconomic problems on Indian reservations and among urban Indian populations and the lack of adequate resources to remedy such problems. Poverty, crime, violence, domestic abuse, and substance abuse occur at higher

¹⁴³ See Child Welfare League of America, *Substitute Care Reports*, CHILD WELFARE (1996) (data from 34 states showed 12.5 out of every 1,000 Indian children placed in substitute care, compared to almost 7 out of every 1,000 from all races); THE INDIAN CHILD WELFARE ACT: UNTO THE SEVENTH GENERATION: CONFERENCE PROCEEDINGS 48-50 (Troy R. Johnson ed., 1993) ("THE SEVENTH GENERATION") (noting persistently high rates of removal of Indian children); M.C. Plantz et al., *Indian Child Welfare: A Status Report—Final Report on the Survey of Indian Child Welfare and Implementation of the Indian Child Welfare Act and Section 428 of the Adoption Assistance and Child Welfare Act of 1980*, U.S. Dep't of Health and Human Servs., Admin. for Children, Youth and Families; U.S. Dep't of Interior, BIA (1988) (reporting that number of Indian children in substitute care increased by about twenty-five percent since passage of ICWA).

¹⁴⁴ Terry A. Cross et al., *Child Abuse and Neglect in Indian Country: Policy Issues*, 81 FAM. SOC'Y: J. CONTEMP. HUM. SERVS. 49 (2000). This article paints a grim demographic picture of American Indian life today. Among the statistics cited are the following: forty-five percent of Indian mothers having their first child are under the age of twenty, compared to twenty-four percent of all race mothers; thirty-eight percent of Indian children aged six to eleven live below the poverty level, more than twice the number for all races in the same age group combined; from 1992 to 1995, Indian children experienced an eighteen percent increase in reported abuse or neglect, compared to six percent for Asian children (the only other ethnic group reporting increases in rate of abuse); 12.5 out of every 1,000 Indian children are placed in substitute care, compared to almost seven out of every 1,000 from all races. *Id.* at 62.

rates among Indian populations than among any other racial minority.¹⁴⁵ Ironically, it has also been suggested that the increased child welfare authority of tribes pursuant to the ICWA has contributed to the persistently high rates of removal: as tribes implement new programs for child protection, more children are placed in substitute care.¹⁴⁶ Others, however, assume that the “failure” of the ICWA is the fault of recalcitrant state agencies and state judiciaries who continue to defy the Act with impunity. Those critics suggest that the remedy lies in greatly constricting judicial discretion in the roles assigned to state courts under the ICWA.¹⁴⁷ Contrary to such suggestions, today most state courts and state child welfare agencies seem to be making broad-based efforts to comply with the statutory directives, although the occasional blatant flouting of the Act undoubtedly occurs.¹⁴⁸ The fact that high numbers of Indian children are living in out-of-home placements may be more realistically explained as a function of the continuing poverty, social dysfunction, and family breakdown within Indian communities. The appropriate response to such realities would seem to be greater funding for social services in general

¹⁴⁵ See generally Am. Indians and Crime, Bureau of Justice Stat., Office of Justice Programs, U.S. Dep’t of Justice (1999); Program Stat. Team, U.S. Dep’t of Health & Human Servs., Trends in Indian Health 1993-99 (2001). Indian communities experience uniquely high rates of social violence, including domestic violence, child abuse, and other categories of violent crime. See Lawrence A. Greenfield & Steven K. Smith, *American Indians and Crime*, Bureau of Justice Stat., Office of Justice Programs, U.S. Dep’t of Justice (1999) (reporting that acts of violence against American Indians occur twice as often across all age groups than for all other “racial categories”); Nat’l Indian Justice Ctr., *Indian Child Maltreatment*, Indian Health Serv. (1993) (reporting that 34.4% of Indian children are at risk for abuse or neglect). Moreover, Native Americans experience disproportionately high rates of incarceration—about thirty-eight percent higher than the national average. Greenfield & Smith, *supra*. The health status of Native Americans is significantly lower than that of the rest of the U.S. population, due not only to poverty and lack of accessible medical care but also to higher rates of death and injury caused by accidents, homicide, and suicide. See THE SEVENTH GENERATION, *supra* note 143, at 87-115 (describing high rates of domestic violence, alcohol and drug abuse among Indian populations); *id.* at 121 (reporting elevated high school drop-out rates); Andy Schneider & Jo Ann Martinez, *Native Americans and Medicaid: Coverage and Financing Issues*, Henry J. Kaiser Family Foundation (1998). Indian women in particular are physically disabled more often than other groups, are more likely to be the targets of violence, and experience significantly greater mortality rates than other groups. See Pamela J. Kingfisher, *The Health Status of Indigenous Women of the U.S.: American Indian, Alaska Native, and Native Hawaiians*, Ctr. for Research on Women and Gender, Univ. of Illinois at Chicago (1996).

¹⁴⁶ THE SEVENTH GENERATION, *supra* note 143, at 49 (noting that surveys have revealed that tribally-run ICWA programs seem to be responsible for increasing rate of placements).

¹⁴⁷ See, e.g., Metteer, *Hard Case*, *supra* note 11, at 470-71 (recommending that the good cause exceptions to 25 U.S.C. § 1911(b) and to 25 U.S.C. § 1915 be eliminated); Jose Monsivais, *supra* note 14 (noting that tribes and states historically have had adversarial relationship and that “because of this, some state courts have not allowed the Act to function”).

¹⁴⁸ See THE SEVENTH GENERATION, *supra* note 143, at 4 (statement of Roxanne Burgess, ICWA Specialist for Los Angeles, California) (describing specialization of state court judges for ICWA cases); *id.* at 81 (noting that several states have ICWA program coordinators at statewide level).

and child welfare services in particular¹⁴⁹ and greater attention to preventive measures¹⁵⁰—not the elimination of state judicial discretion under the ICWA.

The Act, although imperfect, appears to work smoothly when a child's Indian identity is uncontested and is made known early on in the proceedings, tribes receive timely notice that involuntary or voluntary proceedings are pending involving a member or a member's eligible child,¹⁵¹ and tribal representatives act promptly in invoking their statutory remedies.¹⁵² The next Part of this Article examines the hard cases under the Act that fall on the periphery of congressional concern—where the welfare of an Indian child with only an attenuated connection to the tribal community is the target of controversy, often belatedly, between tribal representatives and non-Indian parties. In these difficult cases, state judges confront competing formulations of the child's identity and interests.

¹⁴⁹ The need for more adequate funding at the federal level has plagued the implementation of the ICWA since its enactment. See Cross et al., *supra* note 144 (finding that lack of stable and adequate funding for tribal child welfare programs is serious barrier to success of ICWA). As noted by Cross, Kathleen A. Earle, and David Simmons, tribal programs were initially funded on the basis of year-to-year grants, and not until 1993 were ICWA funds appropriated that enabled each tribe to have even one caseworker. Tribes have had to look to other sources of funding beyond the ICWA appropriations, primarily to programs administered by the Department of Health and Human Services. For a discussion of the four major HHS programs and their significant shortcomings as revenue sources for Indian tribes, see *id.* The inadequacy of ICWA funding has been the subject of litigation. See, e.g., *Navajo Nation v. Hodel*, 645 F. Supp. 825 (D. Ariz. 1986).

¹⁵⁰ The absence of family preservation services has been identified as an ongoing gap in ICWA implementation. See *THE SEVENTH GENERATION*, *supra* note 143, at 48-59 (emphasizing need to shift focus from child protection to culturally appropriate support of families, and describing various family preservation projects in operation across country); Kathryn A. Carver, *The 1985 Minnesota Indian Family Preservation Act: Claiming a Cultural Identity*, 4 LAW & INEQ. 327 (1986). Inadequate criminal law enforcement on Indian reservations may also be a factor. See Larry Echohawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. LEG. PUB. POL'Y 83 (2001-02).

¹⁵¹ Perceived problems in tribal notification have been widely reported by tribes. See *THE SEVENTH GENERATION*, *supra* note 143, at 69-71 (reporting results of survey of tribes within five states). The failure of the Act to expressly require notice to tribes for *voluntary* child custody proceedings is a shortcoming in the ICWA that various bills have proposed to remedy. See *infra* notes 325-30 and accompanying text.

¹⁵² Many of the reported disputes under the Act have arisen because of delays—sometimes caused by the state in belatedly notifying the appropriate tribe. See, e.g., *In re IEM*, 592 N.W.2d 751 (Mich. Ct. App. 1999) (involving state agency which failed to comply with tribal notice requirements after mother briefly testified as to Indian ancestry). Sometimes they have been caused by the tribe in failing to respond promptly to notification from the state. See, e.g., *In re Juv. Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1992) (Pueblo tribe not seeking transfer of dependency action until more than two years after tribe received notification); *In re Lucas*, 33 P.3d 1001 (Or. Ct. App. 2001) (tribe not requesting transfer of proceedings to tribal court until eighteen months after receiving notice of parental rights severance action). Finally, some disputes are caused by parents in failing to reveal their Indian identity. See, e.g., *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996), *cert. denied sub nom.*, 519 U.S. 1060 (1997); or in failing to object in a timely fashion to the state's proposed action, see, e.g., *In re Derek W.*, 86 Cal. Rptr. 2d 742 (Ct. App. 1999) (Indian father not asserting rights under ICWA until almost ten years after child placed in state custody).

III. FLASHPOINTS UNDER THE ICWA

Flashpoints under the Act occur when apparently opposing values intersect. By studying the flashpoints and identifying the conflicting values, we can gain an understanding of the dynamic of the ICWA within our multicultural society. This Part seeks to illuminate the forces that shape decisionmaking within the state courts through a search for key themes discernible in the case law. The flashpoints, selected in this analysis for their permeability,¹⁵³ are the judicially created “existing Indian family exception” to the application of the ICWA, and the state courts’ use of the best interests standard under the Act’s good cause exception to the statutory placement guidelines in § 1915.¹⁵⁴ These flashpoints occur at two quite distant loci on the continuum of state court involvement in the ICWA: the “existing Indian family exception” engages the state courts in deciding whether the Act applies in the first place, and the good cause exception to the placement guidelines engages the courts in their most substantive role vis-à-vis Indian children. Throughout the many cases addressing these ICWA flashpoints, common themes recur. These themes reflect clashes in values that are inevitably raised by the Act, but they are submerged beneath the courts’ doctrinal analysis. As one reads through the factual descriptions and attends to the judicial emphasis of certain facts, a not-so-subtle subtext becomes apparent—a subtext in which state judges grapple with the identity question and their desire to preserve continuity in children’s lives.

¹⁵³ I have selected these particular flashpoints because they seem to readily reveal the subjective concerns of the state court judges—concerns that are often in tension with the goals of the ICWA—in contexts that are not clearly resolved by reference to the statute itself. I do not directly explore another question of ongoing controversy under the Act—the use of a best interests analysis in determining whether there is good cause to deny transfer of custody proceedings from state court to tribal court on a § 1911(b) motion. Compare, e.g., *In re Juv. Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1991) (state court may consider best interests in considering transfer motion), with *In re M.E.M.*, 635 P.2d 1313 (Mont. 1981) (best interests analysis should not be applied on transfer motion). The use of a best interests analysis in deciding a motion to transfer to tribal court confuses substantive concerns with jurisdictional questions and is squarely in conflict with the ICWA. It has been persuasively criticized by others. See, e.g., Carriere, *supra* note 9, at 615-32. The use of a best interests analysis at the placement stage of an ICWA proceeding, on the other hand, rests on much firmer ground, although laden with potential cultural bias. At that stage, the state court must assess the child’s interests and render a substantive decision.

¹⁵⁴ See 25 U.S.C. § 1915(a) (authorizing state court to diverge from substantive placement guidelines for adoptive and foster care placements).

A. The Existing Indian Family Exception

1. The Origin of the Doctrine

The “existing Indian family exception” is an entirely judge-made doctrine that precludes application of the ICWA when neither the child nor the child’s parents have maintained a significant social, cultural, or political relationship with his or her tribe.¹⁵⁵ It has been endorsed by the courts of at least ten different states¹⁵⁶ and remains the focal point of enormous controversy.¹⁵⁷ The courts in California, while badly split, have generated the most penetrating analyses of the doctrine, with some courts giving the exception constitutional underpinnings.¹⁵⁸ The California legislature, in turn, has attempted to preclude

¹⁵⁵ See *In re D.A.C.*, 933 P.2d 993 (Utah App. 1997).

¹⁵⁶ Court decisions that have adopted the existing Indian family exception to the ICWA include *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996), *cert. denied sub nom.*, 519 U.S. 1060 (1997); *In re D.S.*, 577 N.E.2d 572 (Ind. 1991); *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982); *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331 (La. 1995), *cert. denied*, 517 U.S. 1158 (1996); *In re S.A.M.*, 703 S.W.2d 603 (Mo. 1986); *In re T.S.*, 801 P.2d 77 (Mont. 1990); *In re S.C.*, 833 P.2d 1259 (Okla. 1992); *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. 1997); *In re Crews*, 825 P.2d 305 (Wash. 1992). Although Alabama’s appellate court endorsed the exception in an early case, see *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Ct. App. 1990), a recent decision suggests but does not squarely hold that the exception is inconsistent with congressional intent underlying the Act. See *S.H. v. Calhoun County Dep’t of Human Resources*, 748 So. 2d 684, 692 (Ala. Ct. App. 2001) (reversing trial court’s refusal to apply ICWA and holding that “in child-custody proceedings involving an ‘Indian child,’ as that term is defined in the ICWA, a state court must strictly construe and apply the provisions of the Act”).

¹⁵⁷ Courts that have rejected the doctrine include *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982); *Michael J. v. Michael J.*, 7 P.3d 960 (Ariz. Ct. App. 2000); *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993); *In re Adoption of S.S.*, 657 N.E.2d 935 (Ill. 1995); *In re Elliott*, 554 N.W.2d 32 (Mich. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *In re Adoption of Quinn*, 845 P.2d 206 (Or. 1993); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997). Not only are courts from different states in conflict, but within California the courts of appeals have taken opposing views on the exception. Compare *Bridget*, 49 Cal. Rptr. 2d 507 (endorsing existing Indian family doctrine), and *Crystal R. v. Superior Court*, 69 Cal. Rptr. 2d 414 (Ct. App. 1997) (same), with *In re Alicia S.*, 76 Cal. Rptr. 2d 121 (Ct. App. 1998) (rejecting existing Indian family doctrine), and *Adoption of Lindsay C.*, 280 Cal. Rptr. 194 (Ct. App. 1991) (same), and *In re Junious N.*, 193 Cal. Rptr. 40 (Ct. App. 1983) (same). Some courts have acknowledged the debate but have declined to take a position. See, e.g., *In re Catholic Charities & Community Servs.*, 942 P.2d 1380 (Colo. 1997) (given paucity of evidence and lack of basis in trial court’s order, appellate court would decline to adopt or reject doctrine).

¹⁵⁸ An early California decision initially rejected the existing Indian family doctrine, relying on the absence of a statutory basis for the exception. See *In re Junious*, 193 Cal. Rptr. 40 (Ct. App. 1983). Six years later, the First District of the California Court of Appeals endorsed the doctrine, see *In re Wanomi P.*, 264 Cal. Rptr. 623 (Ct. App. 1989), but reversed course after the Supreme Court’s *Holyfield* decision. See *Adoption of Lindsay C.*, 280 Cal. Rptr. 194 (Ct. App. 1991). In 1996, the Second District of the California Court of Appeals applied the existing Indian family exception, holding that the ICWA was unconstitutional on due process, equal protection, and Tenth Amendment grounds if applied to a child whose biological parents lacked “a significant social, cultural or political relationship with [their] tribe.” *Bridget*, 49 Cal. Rptr. 2d at 516. That view was recently reaffirmed by a different division within the same district. See *In re Santos Y.*, 112 Cal.

application of the exception by statute, only to be met by the judicial rejoinder that a statutory directive cannot cure a constitutional flaw.¹⁵⁹

The existing Indian family exception had its genesis in *In re Baby Boy L.*, a case before the Kansas state courts involving a child of mixed heritage.¹⁶⁰ In that dispute, the unmarried non-Indian mother sought to voluntarily relinquish her child for adoption by a non-Indian couple. The Indian father and the tribe objected, arguing that the tribe had a right to intervene in the proceedings and that the trial court should comply with the placement priorities of the ICWA. Rejecting the application of the ICWA outright, the Kansas Supreme Court reasoned that because the child was not being removed from an existing Indian family, no legislative purpose of the ICWA would be served by allowing intervention by the tribe:

A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes. . . . It was 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.¹⁶¹

While courts that have followed the lead of the Kansas Supreme Court have invoked the exception in a variety of circumstances, the exception has been asserted most often in disputes involving children of mixed heritage, with the *Baby Boy L.* factual paradigm appearing with particular prominence.¹⁶² The

Rptr. 2d 692 (Ct. App. 2001). The Fourth and Sixth Districts have endorsed the doctrine, see *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679 (Ct. App. 1996) (4th Dist.); *Crystal R. v. Superior Court*, 69 Cal. Rptr. 2d 414 (Ct. App. 1997) (6th Dist.), but the Fifth District handed down a decision in 1998 rejecting the exception. See *In re Alicia S.*, 76 Cal. Rptr. 2d 121 (Ct. App. 1998) (5th Dist.).

¹⁵⁹ In 1998, in apparent response to the *Bridget* decision, the California legislature expressly rejected the existing Indian family exception through an amendment to the Welfare and Institutions Code. In section 360.6, the legislature provided that a tribe's determination that a child is an Indian child within the meaning of the ICWA constitutes significant political affiliation with the tribe and requires application of the ICWA. See CAL. WELF. & INST. CODE § 360.6. In *Santos*, the appeals court ruled that the legislative amendment of state law did not cure the constitutional problems posed by application of the ICWA to children lacking an existing Indian family. See 112 Cal. Rptr. 2d at 726-27, 730-31 (holding that section 360.6 does not alter conclusion that ICWA is unconstitutional when applied to child who lacks existing Indian family).

¹⁶⁰ 643 P.2d 168 (Kan. 1982).

¹⁶¹ *Id.* at 175.

¹⁶² The exception has been applied most often in circumstances similar to the *Baby Boy L.* facts: voluntary relinquishment by non-Indian mother and subsequent challenge by Indian father and tribe. See, e.g., *In re Adoption of D.M.J.*, 741 P.2d 1386 (Okla. 1985). The exception, however, has also been applied to thwart an Indian mother's belated attempt to revoke a voluntary adoptive or foster placement by relying on the ICWA.

unifying theme in the case law has been that the exception is necessary to ensure that the ICWA is limited to situations of primary congressional concern underlying the ICWA. The exception has been the subject of various proposals in Congress, offered by both proponents and foes.¹⁶³

While most courts endorsing the exception maintain that it is necessary as a matter of policy to ensure that Congress' basic purpose is fulfilled, a California court of appeals has concluded that the ICWA would be unconstitutional if the exception were not read into the Act. In the controversial case of *In re Bridget R.*,¹⁶⁴ the Second District of the California Court of Appeals determined that various constitutional infirmities would arise if the Act were to apply to children whose biological parents had no significant relationship with an Indian community.¹⁶⁵ In *Bridget*, a case that generated immense media coverage and triggered proposals for reform in Congress,¹⁶⁶ a California trial court had applied the ICWA to a dispute involving twin daughters of an Indian father who was a member of the Pomo tribe and a mother who was descended

See, e.g., In re Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988); *In re Adoption of Crews*, 825 P.2d 305 (Wash. 1992). One commentator has identified four fact patterns in which state courts have addressed the existing Indian family exception: cases involving unwed Indian fathers seeking to challenge the adoption of their children; Indian mothers seeking to revoke previous consents to adopt; extended family members seeking to bar other relatives from invoking the ICWA; and parties seeking to avoid a surrogate motherhood arrangement. *See* Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465, 478-94 (1993).

¹⁶³ An amendment of the ICWA was proposed to codify the exception shortly after the *Bridget* decision was announced, led by Representative Deborah Pryce whose constituents included the adoptive parents in that case. *See, e.g., Adoption Promotion and Stability Act of 1996*, H.R. 3286, 104th Cong. (1996) (providing that ICWA does not apply to an Indian child not residing or domiciled within a reservation unless "at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member"). The Senate Committee on Indian Affairs, however, deleted the language that would have codified the doctrine, recognizing that such a revision would undermine tribal autonomy. *See* S. REP. NO. 104-288, at 6 (1996); Amendments to the Indian Child Welfare Act: Hearings on H.R. 3286 Before the Senate Comm. on Indian Affairs, 104th Cong. 1-2 (1996) (testimony of Sen. John McCain, Chairman). A compromise bill that did not codify the doctrine emerged after Native American leaders and adoption professionals convened and contributed suggestions. *See* S. REP. NO. 105-56 (1997). That bill, however, fell victim to other political controversies and did not achieve passage. An early proposal for amending the ICWA would have explicitly barred application of the existing Indian family doctrine. *See* S. 1976, 100th Cong., 133 CONG. REC. S18,532, S18,533 (daily ed. Dec. 19, 1987) (proposing amendment that would make ICWA applicable regardless of whether child had "previously lived in Indian country, in an Indian cultural environment or with an Indian parent"). It should be noted that the failure of Congress to enact the amendment banning the existing Indian family exception has led some courts to conclude that Congress has implicitly endorsed the doctrine. *See, e.g., Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *In re Adoption of Baby Girl S.*, 690 N.Y.S. 2d 907 (Surr. Ct. 1999); *In re S.C.*, 833 P.2d 1249 (Okla. 1992).

¹⁶⁴ 44 Cal. Rptr. 2d 507 (Ct. App. 1996), *cert. denied sub nom.*, 519 U.S. 1060 (1997).

¹⁶⁵ In a later decision, the court reaffirmed the *Bridget* analysis. *See In re Santos Y.*, 112 Cal. Rptr. 692 (Ct. App. 2001), discussed *infra* notes 209-23, 251-56 and accompanying text.

¹⁶⁶ *See supra* note 163.

from the Yaqui Tribe of Mexico.¹⁶⁷ The parents originally gave up their infant daughters for adoption by a non-Indian couple but later attempted to invalidate the relinquishment of their parental rights, invoking the ICWA. The father apparently concealed his Indian identity initially in order to facilitate the adoption. Finding that the consents to adopt had not complied with the ICWA, the trial court had declared the relinquishments invalid under the ICWA and had ordered that the twins, then two-years-old, be removed from their adoptive parents' home and placed in the custody of their paternal grandparents. The court of appeals reversed, observing at the outset that "California recognizes the principle that children are not merely chattels belonging to their parents, but rather have fundamental interests of their own."¹⁶⁸ According to the court, a strict application of the ICWA without the existing Indian family exception would violate multiple constitutional provisions:

[R]ecognition of the existing Indian family doctrine is necessary in a case such as this in order to preserve the ICWA's constitutionality. We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe.¹⁶⁹

In the court's view, if the ICWA were to apply to persons who were in all respects indistinguishable from other residents of the state except for genetic heritage, Congress would have transgressed its constitutional authority. Specifically, the court reasoned that the twins had a fundamental interest under the Due Process Clause in maintaining their relationship with their adoptive family and that the ICWA's potential interference with that interest must be based on a compelling state interest. The court found no such compelling justification where the "assimilated parents" had voluntarily relinquished their children for adoption.¹⁷⁰

The *Bridget* court relied on the Equal Protection Clause to conclude that application of the ICWA to children whose sole connection with a tribe is

¹⁶⁷ The mother's tribal affiliation did not trigger the applicability of the ICWA, since the Mexican Yaqui tribe was not a federally recognized tribe.

¹⁶⁸ 44 Cal. Rptr. 2d at 514.

¹⁶⁹ *Id.* at 516.

¹⁷⁰ *Id.* at 526. The due process contentions regarding the children's liberty interests are discussed more fully *infra* notes 213-23 and accompanying text.

biological would amount to an impermissible racial classification. Under traditional equal protection analysis vis-à-vis Indian tribes, Congress has enjoyed wide latitude on the theory that legislative distinctions based on Indian status are political rather than race-based classifications and need satisfy only a rational basis standard of review.¹⁷¹ As the Supreme Court announced in *Morton v. Mancari*,¹⁷² where it upheld the BIA's hiring preference, "[t]he preference, as applied, is granted to Indians, not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."¹⁷³ Even though the BIA preference included a blood quantum requirement,¹⁷⁴ the Court emphasized that the benefit was available only to members of recognized tribes.¹⁷⁵ The *Mancari* approach has been applied in domestic relations contexts. In *Fisher v. District Court*, for example, the Court concluded that a rule of exclusive tribal jurisdiction in an adoption dispute involving parties who were all Indians and domiciliaries of their tribe's reservation was constitutional.¹⁷⁶ The Court reasoned that the lack of state court authority was not race discrimination. Rather, it stemmed from the "quasi-sovereign status of the . . . [t]ribe" and was therefore a permissible political classification.¹⁷⁷ Under *Fisher*, even if the exclusivity of tribal court power were viewed as disparate treatment that disadvantaged the would-be state court plaintiff, it would be justified because it was intended to benefit the class of which the state court plaintiff was a member.

The California Court of Appeals in *Bridget* rejected the political classification theory as inapplicable to ICWA contexts where a child's eligibility for tribal membership depended solely on blood lines rather than a parent's actual participation in the tribal community. The court reasoned that

¹⁷¹ See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (upholding validity of treaties securing preferential fishing rights); *United States v. Antelope*, 430 U.S. 641, 645-47 (1977) (upholding validity of exclusive federal jurisdiction over crimes committed by Indians in Indian country); *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding federal statutory preference for hiring of Indians by BIA).

¹⁷² 417 U.S. 535 (1974).

¹⁷³ *Id.* at 554.

¹⁷⁴ The preference favored individuals who were "one-fourth or more degree Indian blood and . . . member[s] of a Federally-recognized tribe." See *id.* at 553 n.24 (quoting 44 BIAM 335, 3.1 (1972)).

¹⁷⁵ *Id.* at 553.

¹⁷⁶ 424 U.S. 382 (1976) (per curiam). In *Fisher*, an Indian foster mother brought an action for adoption in Montana state court while a neglect proceeding against the Indian birth mother was still pending before the Northern Cheyenne tribal court. The Montana Supreme Court concluded that the exclusion of the Indian plaintiff from the state courts would be a violation of equal protection.

¹⁷⁷ *Id.* at 390.

any application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause.¹⁷⁸

Again, the court found no compelling interest where the child's parents lacked a significant relationship with an Indian community.¹⁷⁹

The *Bridget* analysis raises important questions about the ICWA's constitutionality in cases where the Act's applicability seems to rest on blood ties alone. Moreover, some might argue that the Supreme Court's recent decision in *Rice v. Cayetano*¹⁸⁰ gives the *Bridget* holding added force. In *Rice*, the Court struck down a Hawaiian electoral scheme on Fifteenth Amendment grounds, finding that Hawaii's use of ancestry as a voter qualification to establish Native Hawaiian status was an impermissible racial classification.¹⁸¹ Foreshadowing *Rice*, the *Bridget* court similarly reasoned that if the ICWA's applicability turns solely on genetic heritage without any requirement of political affiliation with a tribe, the Act will rest on impermissible racial classifications.

Despite the *Bridget* court's instructive analysis, I disagree with the court's ultimate conclusion under the Equal Protection Clause. The definition of "Indian child" under the ICWA requires a showing of tribal membership, either of the child or the child's biological parents.¹⁸² The key element of

¹⁷⁸ *In re Bridget R.*, 44 Cal. Rptr. 2d 507, 528 (Ct. App. 1996), cert. denied sub nom., 519 U.S. 1060 (1997).

¹⁷⁹ The *Bridget* court also invoked federalism principles in pointing to a final constitutional problem with the Act. Extrapolating in part from *United States v. Lopez*, 514 U.S. 549 (1995), the court reasoned that Congress must have an adequate nexus with its enumerated powers, especially where it legislates in matters traditionally viewed as the province of the states. "No such nexus," the court concluded, "exists respecting application of ICWA to children whose families do not maintain significant relationships with an Indian tribe or community or with Indian culture." 44 Cal. Rptr. 2d at 529.

¹⁸⁰ 528 U.S. 494, 514-15 (2000), discussed *supra* note 92.

¹⁸¹ The electoral scheme restricted the right to vote for officers in the state-created Office of Hawaiian Affairs to those defined as Native Hawaiians as determined by ancestry. See HAW. CONST. art. XII, § 5 (amendment establishing OHA). The Hawaii legislature had implemented the scheme to administer a state-run trust endowed to improve conditions for descendants of Hawaiian natives. HAW. REV. STAT. § 10-2 (1993 & Supp. 2000). In his opinion for the majority, Justice Kennedy observed that "[a]ncestry can be a proxy for race," and concluded on the basis of legislative history that the ancestral requirement promulgated by the State was blatantly racial in nature. *Rice*, 528 U.S. at 514. For a trenchant criticism of *Rice*, see Aviam Soifer, *Descent*, 29 FLA. ST. U. L. REV. 269, 275 (2001) (arguing that by insisting that Hawaii disregard ancestry in its voting scheme, Supreme Court advances a "dystopian vision of a nation in which each individual stands entirely alone, without a past that might matter in any way").

¹⁸² See 25 U.S.C. § 1903(4) (2000), discussed *supra* note 88.

tribal membership distinguishes the ICWA context from the voting structure before the Court in *Rice* and would seem to satisfy the “Indian status as political classification” theory advanced by the Court in *Mancari* and other cases.¹⁸³ Whether a tribe chooses to include a blood quantum requirement in its membership criteria should not affect the political meaning of tribal membership under equal protection theory.¹⁸⁴ However determined, membership will entitle the member to exercise rights vis-à-vis the tribe, and the fact that genetic heritage is a component of membership does not transform membership from a political classification into a racial classification. Membership in a tribe, while often resting on requirements of ancestry, gives rise to certain political rights—such as rights to participate in tribal decisionmaking, to receive tribal benefits, and to reside on tribal land. Further, the failure of a member actually to participate in tribal life should not render unconstitutional what would otherwise be a constitutional classification. The right of political participation in the tribe still exists, and it is the member’s formal relationship with the tribe under the doctrine of *Mancari* that enables Congress to legislate regarding that member.

Moreover, the congressional intent underlying the ICWA was to protect the interests of Indian children and Indian tribes. In contrast, in *Rice*, the Court rejected Hawaii’s defense that the voting scheme should be upheld under the precedents allowing differential treatment of Indians. Without resolving the question of whether Native Hawaiians are the equivalent of Indian tribes for equal protection purposes,¹⁸⁵ the Court reasoned that the agency involved in *Rice* for which the elections were conducted was not a separate quasi-sovereign but was “an arm of the State.”¹⁸⁶ In the Court’s view, “[t]o extend

¹⁸³ See, e.g., *United States v. Antelope*, 430 U.S. 641, 646 (1977); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-81 (1976).

¹⁸⁴ The Supreme Court has affirmed the power of tribal governments to set their own criteria for membership, explaining that “[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Definitions vary among tribes, with most imposing some form of blood quantum requirement or descent from a tribal member. Considerable debate has occurred within Indian groups about whether enhanced political power can be achieved by either relaxing or tightening tribal membership criteria. See Gould, *supra* note 92, at 764-71 (exploring question whether tribes should be inclusive or exclusive to survive); Brownell, *supra* note 87, at 305-12 (describing wide variety in tribal membership criteria and different political views about role of blood quantum requirements). Professor Gould argues that tribes should consider dropping blood quanta and ancestral requirements altogether and focus instead on cultural affinity. See Gould, discussed *supra* note 92, at 769-71.

¹⁸⁵ The Court referred to that question as one of “considerable moment and difficulty.” *Rice*, 528 U.S. at 518-19.

¹⁸⁶ *Id.* at 521.

Mancari to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs.”¹⁸⁷ The ICWA, on the other hand, is designed precisely to benefit Indian children as tribal members and to protect tribal survival by ensuring the prominence of the tribe’s voice in child welfare proceedings. Unlike the scheme involved in *Rice*, tribal self-government is directly served by the jurisdictional and procedural protections afforded tribes under the Act. So long as the Act’s key definition of “Indian child” remains intact,¹⁸⁸ the constitutionality would seem secure, even when applied to cases involving children whose families have not maintained meaningful affiliation with their tribes.

Putting the equal protection concerns to one side, many compelling arguments have been advanced in the case law and in the literature against the existing Indian family doctrine.¹⁸⁹ In essence, opponents contend that the exception is bad policy, represents flawed statutory construction, and is inconsistent with the Act’s legislative history.¹⁹⁰ The primary objection to the

¹⁸⁷ *Id.* at 522.

¹⁸⁸ In the late 1980s, Congress considered a proposed amendment to the ICWA that would have expanded the definition of “Indian child” to include any unmarried person under eighteen who is a member of a tribe or is eligible for membership, or is of “Indian descent and is considered by an Indian tribe to be part of its community,” S. 1976, 100th Cong., § 4(5) (1987), reprinted in *Indian Child Welfare Act: Hearing Before the Select Comm. on Indian Affairs*, 100th Cong. 9 (1988). Under the bill, “if a child is an infant he or she is considered to be part of a tribal community if either parent is so considered.” *Id.* at 9-10. By eliminating the key requirement of tribal membership, the proposed revision of the ICWA would surely have encountered constitutional challenges under the equal protection clause as a racial classification. See John Robert Renner, Comment, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power over Indian Affairs*, 17 AM. INDIAN L. REV. 129, 168-74 (1992).

¹⁸⁹ Some of the more prominent contributions in the literature include Hollinger, *supra* note 66, at 477-81; Metteer, *Hard Cases*, *supra* note 11; Metteer, *Impediment to Trust Responsibility*, *supra* note 11; Parnell, *supra* note 14.

¹⁹⁰ Perhaps proving the adage that principles of statutory construction can be marshaled to support any interpretation of a statute, both opponents and proponents of the existing Indian family exception have advanced their own statutory construction arguments. Critics note the absence of statutory language supporting the exception and have pointed out that Congress was careful to exempt particular circumstances from the applicability of the Act when it wanted to. See, e.g., *A.B.M. v. M.H.*, 651 P.2d 1170, 1173 (Alaska 1982). Moreover, an earlier version of the Act that contained a “significant contacts” requirement similar to the existing Indian family exception was rejected. See *Indian Child Welfare Act*, S. 1214, 95th Cong., § 102(c) (1977), cited in S. REP. NO. 95-597, at 4 (1977). Courts have relied on that fact as a justification for rejecting the doctrine. See, e.g., *Michael J. v. Michael J.*, 7 P.3d 960, 963-64 (Ariz. Ct. App. 2000). On the other hand, some of the courts that have endorsed the exception have advanced their own statutory construction arguments based on Congress’ failure to adopt legislative proposals to amend the ICWA that would have expressly forbidden the exception. As one court explained, “Obviously, the U.S. Congress is aware of the Existing Indian Family Doctrine as used by Oklahoma and other courts and with such knowledge has specifically refused to take legislative action to alter that interpretation. We are persuaded that the true

doctrine is that it disregards the interests of the tribe under the ICWA and denies to tribes the sovereign right to determine membership. As an Arizona appellate court recently put it, “[f]irst among our reasons [to reject the exception] is to support ICWA’s goal not only of preserving Indian families, but also of protecting the tribe’s interests in the welfare of its Indian children and the maintenance of its culture.”¹⁹¹ According to the court, the existing Indian family exception “frustrates the policy of protecting the tribe’s interest in its children” and the tribe’s right to define who its children are.¹⁹² The right of Indian tribes to maintain a relationship with children eligible for membership was a central concern of Congress in enacting the ICWA, and the existing Indian family exception thwarts that interest. Thus, in the view of the courts that have rejected the doctrine, the existing Indian family exception directly conflicts with the idea of tribal sovereignty and the goal of strengthening tribal relations.¹⁹³ Further, in allowing state courts to assess the sufficiency of an individual’s ties with his or her Indian heritage, the doctrine invites precisely the kind of state court interference and paternalism that the ICWA was intended to eliminate.¹⁹⁴ As one court explained:

Engrafting a new requirement into ICWA that allows the dominant society to judge whether the parent’s cultural background meets its view of what “Indian culture” should be puts the state courts right back into the position from which Congress has removed them. That would be especially ironic, in that one of the reasons that the parents may not be involved in their Indian culture could be the very policies of removal of Indian children that ICWA was intended to counteract. If state courts impose their own value system on these decisions, the tribes will never be able to regain members who have been lost because of earlier government policies.¹⁹⁵

According to opponents of the doctrine, state judges should not be in the business of deciding whether a child’s family is Indian enough to satisfy a judge’s subjective, culturally biased standard.¹⁹⁶

intent of Congress is not to disturb situations . . . where the Indian child is fully integrated in a non-Indian family.” *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996) (referring to S. 1976, 100th Cong. (1987) (proposing to amend ICWA to provide that applicability is not affected by whether child had previously lived in Indian country, in Indian cultural environment, or with Indian parent)).

¹⁹¹ *Michael J.*, 7 P.3d at 963.

¹⁹² *Id.*

¹⁹³ *See, e.g., In re Adoption of Quinn*, 845 P.2d 206, 208 (Or. Ct. App. 1993).

¹⁹⁴ *Id.* at 208-09 n.2.

¹⁹⁵ *Id.* at 209 n.2 (citations omitted).

¹⁹⁶ *Id.*

As explained above, I do not agree with the California court of appeals that the existing Indian family exception is constitutionally compelled. Moreover, I find the court decisions rejecting the existing Indian family doctrine as a matter of policy and legislative interpretation to be far more persuasive than those that have accepted it. The exception, which rewrites the Act's definition of "Indian child" without statutory basis, undercuts the sovereign authority of tribes to determine their own membership. Nevertheless, my aim here is not to revisit the debate about the legitimacy of the exception—one that has been well-explored in the literature.¹⁹⁷ Rather, my goal is to highlight the extra-doctrinal forces that have played a role in the life of the exception in the state court jurisprudence.

2. *The Identity Question*

The existing Indian family exception itself may represent a reaction to the construct of "Indianness." In many of the cases that apply the doctrine, the children who were the subject of the proceedings had an Indian and non-Indian parent.¹⁹⁸ The child's social identity as an Indian is often confounded because of parental desire to avoid ties with the Indian community; indeed, the Indian parent may have chosen to place the child with a non-Indian family.¹⁹⁹ While as a matter of positive law under the ICWA, a tribe's determination of membership is conclusive,²⁰⁰ the courts still exhibit uneasiness with characterizations of membership that may have little reality for the child.

¹⁹⁷ The law review literature on the exception seems uniformly to condemn it. See, e.g., Metteer, *Hard Cases*, *supra* note 11; Metteer, *Impediment to Trust Responsibility*, *supra* note 11, at 647; Parnell, *supra* note 14; Prim, *supra* note 14.

¹⁹⁸ See, e.g., *In re Derek W.*, 86 Cal. Rptr. 2d 742 (Ct. App. 1999) (father identified as African-American and Cherokee, and represented mother to be Costa Rican); *Crystal R.*, 69 Cal. Rptr. 2d 414 (Ct. App. 1997) (father was "one-half Haida" and mother was non-Indian); *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982) (father identified as Kiowa, mother was non-Indian); *In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986) (father was Kickapoo, mother was non-Indian).

¹⁹⁹ In *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. 1997), for example, the court applied the exception to bar the Tohono O'odham Indian Nation from asserting rights under ICWA to challenge the Indian mother's voluntary relinquishment of her child for adoption. The court noted that the mother, who did not live on the reservation and had had "little or no contact with the Nation for over fifteen years," objected to the Nation's intervention. *Id.* The court also took into account that if the child had remained with the birth mother, he would not have been raised in an Indian environment. Under such circumstances, the court's decision to invoke the existing Indian family exception can be seen, in part, as an effort to protect the birth mother's choice.

²⁰⁰ See BIA Guidelines, *supra* note 88, at 67,586-67,587. Although the vast majority of courts adhere to this premise, see, e.g., *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 530 (Ct. App. 1996), a few courts still persist in challenging a tribe's formal determination of membership, sometimes by rejecting the tribe's presentation of evidence. In *Quinn v. Walters*, 881 P.2d 795 (Or. 1994), for example, a birth mother sought to revoke her

In the originating case of *In re Baby Boy L.*, for example, the words of the Kansas Supreme Court are worth repeating. The Kansas court refused to construe the ICWA to mean 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.”²⁰¹ The passage reveals the court’s discomfort with the conflicting identities of the young child and the recognition that the child acquired a “cultural heritage” from its non-Indian parent as well as its Indian parent.

Other courts have shown similar discontent with the all-or-nothing nature of the Act’s definition of “Indian child.” An Alabama court in *S.A. v. E.J.P.*²⁰² considered the familiar fact pattern involving a child of a non-Indian mother and Indian father. The court accepted the tribe’s determination of the child’s eligibility for membership, but relied on the existing Indian family doctrine to escape application of the Act. The language of the court is illuminating:

*The child may be an Indian child, as defined in the act, by virtue of her biological father. However, since birth, she has either resided with her non-Indian mother or her non-Indian great-aunt and great-uncle—except for a period of four weeks when she lived with her father and paternal grandmother. . . . The child has had minimal contact with her father. She has had no involvement in tribal activities or any participation in Indian culture.*²⁰³

The court concluded that because the young girl had never been a member of an Indian family, lived in an Indian home, or experienced the Indian social and cultural world, applying the ICWA to the case would be contrary to congressional intent.²⁰⁴ The court’s words reveal its dissatisfaction with the

consent to adopt prior to the entry of a final adoption order—an absolute right under the ICWA if her infant qualified as an “Indian child” within the meaning of the Act. To support her revocation, the mother offered an affidavit of the registrar of the Cherokee Nation, stating that the child was eligible for tribal membership. The appeals court affirmed the final decree of adoption, holding that the trial court had properly excluded evidence of the child’s eligibility for tribal membership as inadmissible hearsay. A dissenting judge, characterizing the case as a “grave miscarriage of justice,” *id.* at 805 (Unis, J., dissenting), accused the majority of contravening the goal and spirit of the ICWA by relying on a technical point of evidence and by failing to actively seek verification of the child’s status. *See id.* at 809-14 (Unis, J., dissenting).

²⁰¹ *Baby Boy L.*, 643 P.2d at 175.

²⁰² 571 So. 2d 1187 (Ala. Civ. App. 1990).

²⁰³ *Id.* at 1189 (emphasis added).

²⁰⁴ *Id.* at 1189-90.

statutory cloak of Indian identity under the circumstances before it, a reaction that is common in cases endorsing the exception.²⁰⁵

In these cases, courts often acknowledge the underlying premise of the ICWA—that the child's interests will be best served by giving paramount importance to the child's Indian identity. When that identity, however, rests on a tenuous link that has no present social reality for the child, many courts seem to waver. Clearly, their redefinition of the child is an affront to tribal sovereignty. State courts' reliance on the existing Indian family exception is improper as a matter of formal statutory construction and underlying policy. Nevertheless, we should recognize that the courts' unease with the characterization of the children as "Indian" for purposes of the Act and their fear that the Act must be applied rigidly drive their willingness to endorse the exception.

3. *The Continuity Principle*

The continuity principle presumption has likewise strongly influenced numerous state court decisions that rely on the existing Indian family exception. The existing Indian family doctrine has been invoked frequently in factual contexts where the ICWA's operation might result in the removal of a child from a longstanding custodial arrangement.²⁰⁶ Indeed, the desire to avoid such a disruption seems to shape many of the decisions, and again, *In re Bridget R.* is instructive. There, the twin girls who were the subject of the

²⁰⁵ A further example can be found in *In re Adoption of Infant Boy Crews*, 825 P.2d 305 (Wash. 1992), where the child's mother had been uncertain of her Indian heritage but ultimately discovered Choctaw ancestry in an effort to invalidate her earlier relinquishment of her child for adoption. The court wrote:

[The mother] has shown no substantive interest in her Indian heritage in the past and has given no indication this will change in the future. While B. may be an 'Indian child' based on the Choctaw Constitution, we do not find an existing Indian family unit or environment from which B. was removed or to which he would be returned. To apply ICWA in this specific situation would not further the policies and purposes of ICWA.

Id. at 310. The court in *Bridget*, 44 Cal. Rptr. 2d 507, similarly emphasized the father's original concealment of his Indian heritage ("three-sixteenths Pomo") and his belated enrollment in the Pomo Tribe after the custody dispute arose. Surely the father's own ambivalence about claiming an Indian identity influenced the appellate court in holding that the case was not governed by the ICWA. Likewise, in *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988), the court noted that "the child's biological ancestry is Indian. However, except for the first five days after birth, her entire life of seven years to date has been spent with her non-Indian adoptive parents in a non-Indian culture." See also *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995) (Indian mother showing little substantive interest in Indian heritage and maintaining no ties to tribe).

²⁰⁶ See, e.g., *In re Derek W.*, 86 Cal. Rptr. 2d 742 (Ct. App. 1999) (nine-year placement with foster parents).

proceeding were three-years-old by the time the case reached the appellate court and had been living in their adoptive home since birth. In holding that the girls' relationship with their adoptive parents was entitled to constitutional protection, the California court emphasized their personal circumstances in vivid language:

[T]he twins do have a presently existing fundamental and constitutionally protected interest in their relationship with the only family they have ever known. . . .

. . . .

In this circumstance, [application of the ICWA] can serve no purpose which is sufficiently compelling to overcome the child's fundamental right to remain in the home where he or she is loved and well cared-for, with people to whom the child is daily becoming more attached by bonds of affection and among whom the child feels secure to learn and grow. ICWA cannot constitutionally be applied under such facts.²⁰⁷

Thus, taking a decidedly child-oriented view of constitutional law, the *Bridget* court concluded that the rupture in the children's relationships with their adoptive parents could only be justified if necessary to serve a compelling interest. Although the court conceded that preservation of American Indian culture might qualify as a compelling state interest in the abstract, applying the ICWA under the circumstances—where neither the child nor the Indian parent had a cultural or social affiliation with the tribe—was not an effective means of achieving that goal.²⁰⁸

In a very recent decision, the Second District of the California Court of Appeals again ruled that if the ICWA were to require the removal of a young unaffiliated child from his de facto non-Indian family, the Act would be an unconstitutional deprivation of the child's liberty interests. In *In re Santos Y.*,²⁰⁹ a premature child was born to an enrolled Chippewa mother and an unenrolled father of Navajo descent.²¹⁰ The infant was placed with a non-Indian foster family shortly after birth, due to positive testing for cocaine.

²⁰⁷ *Bridget*, 44 Cal. Rptr. 2d at 526-27 (emphasis omitted).

²⁰⁸ The court commented: "It is almost too obvious to require articulation that the unique values of Indian culture will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture." *Id.* at 526 (quoting 25 U.S.C. § 1902).

²⁰⁹ 112 Cal. Rptr. 2d 692 (Ct. App. 2001).

²¹⁰ The father's grandmother was apparently Navajo, but the Navajo Nation formally determined that the child involved in the proceeding was not eligible for tribal membership. See *id.* at 700.

Although the Chippewa tribe was notified at the initial stages of the dependency action, it did not seek to intervene actively until the boy was eighteen-months-old.²¹¹ At that point, the tribe had identified a potential adoptive mother who was an extended family member and an enrolled Chippewa, and it therefore objected to the proposed adoption by the foster parents. The trial court agreed with the tribe that the non-Indian foster parents were unacceptable under § 1915 of the ICWA and ordered the child to be placed in the adoptive home of the tribal member.²¹²

Relying on the unconstitutionality of the ICWA as applied, the court of appeals reversed. Tracking the reasoning of *Bridget*, the court found that the child had a fundamental liberty interest in remaining in his stable de facto family, and that the ICWA must be subjected to strict scrutiny if its placement guidelines would require the child's removal. As in *Bridget*, the court acknowledged that preservation of Indian culture might amount to a compelling state interest but held that the ICWA was not achieving that interest on the facts presented, i.e., a case involving "a multi-ethnic child who has had a minimal relationship with his assimilated parents" and who lacks an Indian family to preserve.²¹³ Noting that the child's interests in a stable placement had become paramount to his biological parents' interest in reunification, the court explained that the tribe's interests were similarly subordinate. "When the Minor's interest outweighs the constitutionally protected interest of a biological parent," the court explained, "it necessarily outweighs the interest of a tribe, whose interest is solely a creature of statute."²¹⁴

²¹¹ The tribe's delay may have been due to miscommunication between the tribe and the particular band with which the mother was affiliated. See *id.* at 704-05. Also, relatives initially contacted by the tribe did not want to adopt the child. Only after a year and a half did the tribe locate a tribe member who was amenable to the idea of adoption. *Id.* at 706-07.

²¹² See *id.* at 712.

²¹³ *Id.* at 726.

²¹⁴ *Id.* As in *Bridget*, the court additionally concluded that application of the ICWA solely based on a child's genetic heritage would constitute impermissible race discrimination in violation of equal protection and was beyond the power of Congress under the Indian Commerce Clause. *Id.* at 727-31. The original opinion in *Santos* also announced an alternative rationale for reversing the lower court. Because of the mixed responses from the tribe after notification as to whether it would object to the state agency's proposed adoption and the prolonged inaction by the tribe, the original opinion held that the tribe had waived its right to assert the placement preferences under the ICWA. See *In re Santos Y.*, 110 Cal. Rptr. 2d 1, 41-5 (Ct. App. 2001). That alternative rationale was omitted from the published opinion issued on rehearing. See *Santos*, 112 Cal. Rptr. 2d at 699.

The California court of appeals in *Bridget* and *Santos*, by constitutionalizing the children's interest in remaining in their adoptive/foster homes, interpreted federal constitutional principles to go beyond existing Supreme Court precedent.²¹⁵ While the Court has recognized that a parent's interest in determining the care and custody of her child is protected as a liberty interest under the due process clause,²¹⁶ it has not yet squarely held that the corollary principle exists—that a child's interest in maintaining a relationship with a parent is entitled to equivalent constitutional protection. Rather, children's rights vis-à-vis the family are generally subsumed within the rights of the parents.²¹⁷ The *Bridget* and *Santos* decisions extend the principle even further—to a child's potential constitutional interest in maintaining a relationship with a psychological or de facto parent. Although prominent scholars have argued persuasively for just such an extension,²¹⁸ the Court has

²¹⁵ In both *Bridget* and *Santos*, the California Court of Appeals formulated the children's interests as constitutionally protected in order to shore up its argument that the existing Indian family exception was constitutionally compelled on the facts before it. Although the Supreme Court has recognized that "individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship," the Court has pointedly cautioned that courts should not translate that liberty interest into "some sort of squatter's rights in another's child." *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 846 n.54 (1977). The *Smith* opinion, however, relied heavily on the state-regulated nature of foster care, and it characterized the foster parents as in opposition to the child's natural parents. Where the natural parents' rights have been terminated, *Smith* may leave room for stronger claims of due process rights by a variety of de facto parents. See, e.g., Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children To Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994). Also, although a parent-like relationship of a child with nonparents has not received constitutional protection on a par with that of legal parents, a judicial desire to protect a child's relationship with established caregivers has figured prominently in cases involving belated challenges to adoptions by biological fathers. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 262-63 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Adoption of Michael H.*, 898 P.2d 891 (Cal. 1995).

²¹⁶ See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000).

²¹⁷ The Supreme Court has been consistently unresponsive to children's claims of due process rights within the family, distinct from those of parents. In *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989), for example, Justice Scalia writing for a plurality of the Court stated: "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, [the child's] claim must fail." Similarly, in *Santosky v. Kramer*, 455 U.S. 745 (1982), a case that focused on the due process rights of parents in a parental rights termination, the Court held by a 5-4 vote that the children's interests did not diverge from those of the parents until after the state proves parental unfitness: "At the factfinding, the State cannot presume that a child and his parents are adversaries. . . . [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760. Recognizing that children's interests do diverge even at the dispositional stage, however, does not translate into a child's fundamental right to remain with de facto parents.

²¹⁸ Barbara Woodhouse has argued persuasively for greater recognition of children's rights in a variety of contexts. See, e.g., Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on*

not taken up the challenge.²¹⁹ The California court of appeals acknowledged that the nation's high Court had not recognized a child's constitutional liberty interest to remain within a de facto family, but reasoned that such a right is a logical extension of existing doctrine and had been endorsed by the state supreme court.²²⁰ Nevertheless, in light of the Court's traditional subordination of children's rights to other concerns²²¹ and the Court's recent reaffirmation of parental autonomy as a protected liberty interest,²²² I would not expect a majority of the Court to adopt views similar to those expressed in *Bridget and Santos*.²²³ Moreover, even if children were recognized as

Parents' Rights, 14 CARDOZO L. REV. 1747 (1993). See also Holmes, *supra* note 215; Laurence D. Houlgate, *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory*, 2 U. PA. J. CONST. L. 77 (1999); David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075 (2001).

²¹⁹ The Court had the chance in two cases in the 1990s outside the ICWA context. In the well-known "Baby Jessica" case, an adoption was successfully challenged by a birth father who had not received requisite notice. The child argued that as a matter of constitutional law her interest in remaining in her established family had to be considered by the courts before the adoption could be set aside. See *In re Clausen*, 502 N.W.2d 649 (Mich. 1993). Dissenting from a denial of a stay in the case, Justices Blackmun and O'Connor noted that the child's constitutional arguments raised a sufficiently important question to justify granting the application for a stay. See *DeBoer v. DeBoer*, 509 U.S. 938 (1993) (Blackmun & O'Connor, J.J., dissenting from denial of stay). Similarly, in the "Baby Richard" case, also involving a belated challenge by a birth father to an adoption, Justices O'Connor and Breyer dissented from the Court's denial of stay. See *O'Connell v. Kirchner*, 513 U.S. 1138 (1995) (O'Connor & Breyer, J.J., dissenting from denial of application for stay).

²²⁰ See *Santos*, 112 Cal. Rptr. 2d at 725. The court explained:

While the United States Supreme court [sic] has reserved the issue of deciding the nature of a child's liberty interests in preserving established familial or family-like bonds, our Supreme Court has declared that "[c]hildren . . . have fundamental right—including the fundamental right . . . to have a placement that is stable, [and] permanent."

Id. (citations omitted).

²²¹ As Professor Woodhouse powerfully observes, the foundational decisions of Anglo-American law protecting familial privacy and autonomy, such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), "constitutionalized a narrow, tradition-bound vision of the child as essentially private property," without voice or legal rights. See Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992).

²²² See *Troxel v. Granville*, 530 U.S. 57 (2000) (invalidating Washington's third-party visitation statute as applied, reasoning that the trial court's order for grandparent visitation over the mother's objection was an unconstitutional infringement of a fit parent's interest in determining the care and custody of her minor children). Significantly, in *Troxel*, Justice Stevens' dissent acknowledged that the "Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds." *Id.* at 88 (Stevens, J., dissenting). He argued, however, that children likely do possess fundamental liberty interests in preserving intimate relationships and that their interests should be balanced in the equation.

²²³ The lower courts have been reluctant to recognize constitutional liberty interests in foster parents, see, e.g., *Rodriguez v. McLoughlin*, 214 F.3d 328 (2d Cir. 2000), and the likelihood of their recognizing a child's interest in maintaining contact with a de facto parent would seem equally remote. On the other hand, a very recent opinion from a New York trial court thoughtfully explored the question of a child's constitutional liberty interests and concluded that a child "has an independent, constitutionally guaranteed right to maintain

possessing a constitutional liberty interest in preserving family-like relationships, it is not at all clear that the ICWA is therefore unconstitutional under circumstances such as those presented in *Santos*. Instead, the presence of a child's constitutional liberty interest would seem to require a careful adjudication at the placement stage where the court would take into account the child's interest in remaining with his de facto family.

Even though the constitutional law premises of *Bridget* and *Santos* are tenuous, the decisions are nevertheless a powerful statement that children may have a psychological and emotional interest in remaining a member of their de facto families and that such an interest can coexist alongside the child's interest in being raised within his or her tribal community.²²⁴ Other courts that have adopted the existing Indian family exception have stopped short of characterizing the child's interest in constitutional terms, but have similarly exhibited deep misgivings about potential disruptions of an Indian child's placement where he or she has established strong emotional bonds with existing caregivers.²²⁵ The Supreme Court of Indiana expressed this concern in stark terms:

The child has resided in Indiana since the first week of her life. To now sever and dislodge the child from the family and culture she has known during all of her seven years of life cannot be anything except devastating to the best interests of the child. The purpose of the

contact with a person with whom the child has developed a parent-like relationship." *Webster v. Ryan*, 729 N.Y.S.2d 315, 316 (Fam. Ct. 2001). In *Webster*, that right translated into a child's right to seek visitation with his former foster mother. The court reasoned that the equal protection guarantee required recognition of the child's right, separate from that of his or her legal parents, to seek to maintain contact with a parent-like caregiver. Significantly, the *Webster* court relied heavily on New York's long history of state regulation limiting the rights of parents rather than on any clear indication from the U.S. Supreme Court that a child possesses a liberty interest in maintaining ties with a de facto caregiver.

²²⁴ In a somewhat analogous situation outside the ICWA, courts and legislatures have taken measures in recent years to limit the impact of belated challenges by birth parents to an adoption, recognizing that an established adoptive placement gives rise to strong emotional bonds. See, e.g., *In re Custody of C.C.R.S.*, 892 P.2d 246 (Colo. 1995) (notwithstanding constitutional rights of biological parents, child and psychological parents should have opportunity to be heard in custody determination); *In re Adoption of J.J.B.*, 894 P.2d 994 (N.M. 1995) (even if adoption is dismissed, would-be adoptive parents of child may seek custody based on best interests showing); see generally HOLLINGER, *supra* note 121, § 8.01[1].

²²⁵ In *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. 1997), for example, the young Indian child had lived with non-Indian adoptive parents since birth. Faulting the tribe for its delay in seeking intervention, the court noted that the child had "lived with the adoptive parents over a year, long enough to view them as his mother and father. The emotional trauma to the child of removal, in the face of such unwarranted delay, must be considered." *Id.* at *16 n.2. The court noted that if the tribe were allowed to intervene, it would assert the adoptive preferences set forth in the Act. Quite clearly wishing to avoid that result, the court relied on the existing Indian family exception to conclude that the ICWA did not apply.

ICWA, to protect the interests of the Indian family, is patently clear. However, a paramount interest is the protection of the best interests of the child.²²⁶

These attitudes exhibited by state court judges seem to reflect a practical, immediate concern for protecting the welfare of vulnerable children rather than an entrenched desire to thwart application of the ICWA. The constructions of the ICWA that many scholars characterize as “manipulations” may be more aptly viewed as part of a mediating process in which courts are struggling to accommodate conflicting values.²²⁷ Although the existing Indian family exception is problematic in terms of both policy and legislative interpretation, the exception emerged from deeply held concerns in the state courts about the welfare of individual children.

B. Good Cause Exception to Placement Preferences

1. The Statutory Standard and a “Best Interests” Analysis

Unlike the jurisdictional and procedural provisions of the ICWA, the placement preferences in the Act give explicit substantive force to the strong congressional policy of keeping Indian children with members of their extended family or their tribe. Because the preferences curb state judicial discretion in the substantive disposition of child welfare cases, they go to the heart of state adjudicative power and have engendered another layer of debate. Under § 1915 of the ICWA, Congress set out placement preferences for adoptive and foster care placements. The section addressing adoptive placements provides:

²²⁶ *In re Adoption of T.R.M.*, 525 N.E.2d 298, 308 (Ind. 1988) (applying existing Indian family exception, but also finding good cause to refuse to transfer and to diverge from placement preferences, even assuming ICWA applied).

²²⁷ A recent New York trial court opinion summarized its reasons for applying the existing Indian family exception, drawing on the fundamental themes of identity and continuity. *In re Adoption of Baby Girl S.*, 690 N.Y.S. 2d 907 (Surr. Ct. 1999), the court explained:

The court is persuaded that the ICWA was not intended to apply in circumstances such as these, where: (1) the mother does not live on the reservation, has voluntarily consented to the adoption of her daughter who she relinquished at birth and objects to the intervention of the tribe; (2) the putative father is non-Indian, has not demonstrated any connection to the tribe or to the Indian way of life; and (3) the infant has lived with her prospective adoptive parents throughout these proceedings.

Id. at 913.

In any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.²²⁸

The section prioritizes the placements in the order listed, but permits state courts to follow a different order of preference if the child's tribe has passed a resolution setting out the revised order.²²⁹ In that manner, the tribe's voice is given a role, even where the state court has the power to adjudicate the case. At the same time, the statute provides a role for parental choice but does not define the weight to be given to a parent's wishes: "[W]here appropriate, the preference of the Indian child or parent shall be considered."²³⁰ Furthermore, the Act directs the state court in meeting the preference requirements to apply "the prevailing social and cultural standards of the Indian community" with which the parent or extended family members reside or have cultural ties.²³¹ According to the House Report, the subsection establishes federal policy "that, where possible, an Indian child should remain in the Indian community, but is not to be read as precluding the placement of an Indian child with a non-Indian family."²³² Thus, Congress clearly intended to provide state courts with discretion, albeit limited, to diverge from the placement preferences under the Act; the question that remains unresolved is the scope of that discretion.

The BIA guidelines promulgated shortly after the ICWA's enactment, while not binding on state courts unless they affirmatively adopt them, offer a more elaborate explanation of the preferences and the good cause exception than does the Act itself.²³³ The guidelines state that "use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding."²³⁴ The BIA defines good cause for this purpose to include a request by the biological parents or the child if the child is of sufficient age, the extraordinary needs of the child, or the unavailability of suitable families meeting the preference criteria.²³⁵ Conspicuously

²²⁸ 25 U.S.C. § 1915(a) (2000) (emphasis added). For the text of § 1915(b), relating to foster care placements, see *supra* note 130.

²²⁹ *Id.* § 1915 (c).

²³⁰ *Id.*

²³¹ *Id.* § 1915 (d).

²³² H.R. REP. NO. 95-1386, at 23, *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.

²³³ BIA Guidelines, *supra* note 88, at 67,594. The guidelines state that preference is to be given in the order listed in the Act, with the child's extended family to be looked to first.

²³⁴ *Id.* at 67,584 (citing S. REP. NO. 95-597 at 17 (1977)).

²³⁵ Under the regulations,

absent from the list of justifications for deviating from the placement preferences is a determination that adherence to the preferences would not be within the child's best interests—presumably because the BIA did not wish to invite state courts to engage in a highly discretionary and potentially biased analysis.

State courts are sharply divided as to the weight to be given the BIA's guidelines, but the disagreements reflect a more fundamental discord about the appropriate role of state judges in making substantive dispositions in Indian child welfare proceedings. Several courts have insisted that their authority under the good cause standard necessarily includes broad discretion—not limited by the BIA factors—to discern an Indian child's best interests.²³⁶ The Alaska Supreme Court, for example, has reasoned that “[a]lthough ICWA and the guidelines draw attention to important considerations, the best interests of the child remain paramount.”²³⁷ The same court earlier explained that “[w]hether there is good cause to deviate . . . depends on many factors including, but not necessarily limited to, the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement and the child's ties to the tribe.”²³⁸ Courts that view best interests as an appropriate standard characterize the disposition phase of a child welfare proceeding as one that is fact-determinative, necessarily involving a consideration of a panoply of factors; under this view, judicial discretion should not be limited by the BIA guidelines' explanation of good cause.²³⁹ The implicit theme of these decisions is that consideration of children's best interests is at the core of judicial responsibility in any child welfare proceed-

a determination of good cause not to follow the order of preference . . . shall be based on one or more of the following considerations: (i) The request of the biological parents or the child when the child is of sufficient age. (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness. (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

Id.

²³⁶ See, e.g., *In re Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993); *In re Adoption of M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992) (finding that good cause is matter of discretion that must be exercised in light of many factors, including best interests of child, wishes of biological parents, suitability of persons preferred for placement, child's ties to tribe, and child's ability to make necessary cultural adjustments).

²³⁷ *Adoption of N.P.S.*, 868 P.2d 934, 936 (Alaska 1994).

²³⁸ *In re Adoption of F.H.*, 851 P.2d 1361, 1363-64 (Alaska 1993).

²³⁹ See, e.g., *In re A.E.*, 572 N.W.2d 579, 585 (Iowa 1997). In *In re A.E.*, the court went so far as to suggest that the BIA guidelines' reference to the need for state court “flexibility” in determining the disposition of a placement proceeding was an implicit endorsement of the best interests standard. See *id.* (quoting Introduction to Guidelines, 44 Fed. Reg. 67,584 (Nov. 26, 1979)).

ing, and that the Indian identity of the child should not categorically preclude such consideration. In such cases, the unfettered exercise of discretion poses a real danger that the ICWA preferences will be overridden upon the slightest evidence favoring an alternative placement.²⁴⁰

In cases where courts do diverge from the statutory preferences under a best interests analysis, the adjudicated placement is most often to a non-Indian home where the child has been living for a period of time. Predictably, the continuity presumption surfaces repeatedly in such decisions, with state courts concluding that the child's best interests require a permanent placement that will preserve existing emotional bonds and attachments.²⁴¹ Judges reason that the certainty of emotional harm to the child if removed from a primary caregiver should be considered in deciding whether to deviate from the statutory placement preferences.²⁴² To that end, it is not uncommon for trial courts to hear extensive expert testimony on the emotional and psychological implications of bonding and the likely impact of disruptions in placement.²⁴³

In addition, many of the cases interpreting § 1915 involve children of mixed heritage, sometimes described as "part Indian,"²⁴⁴ where the courts

²⁴⁰ In *N.P.S.*, 868 P.2d 934, for example, the court approved of an adoptive placement of a Yup'ik child with a non-Indian man over the objection of the child's Yup'ik grandmother. The record presented to the trial reflected a mix of factors pointing in opposite directions: the child had emotional ties both to his de facto father as well as his Indian grandmother; the child's sibling, with whom the child also had ties, lived with the grandmother; the grandmother, a resident of her Native village, offered a superior cultural environment but the child's educational needs might be better served if he were living with the non-Indian prospective adoptive father; the child expressed a slight preference for the non-Indian placement but was ambivalent; and the mother had indicated before her death a desire that the child remain with the non-Indian man. With the evidence seemingly in equipoise, the trial court applied a best interests test to find that the ICWA preference need not be followed. The state high court affirmed, concluding that "[n]one of [the trial court's] factual determinations is clearly erroneous, and it did not abuse its discretion when weighing the various factors, most of which support granting [the de facto father's] petition." *Id.* at 939. The court did not explicitly define the weight to be accorded the ICWA preferences, but its opinion clearly seems to undervalue the facts supporting the statutory presumption.

²⁴¹ See, e.g., *C.L. v. P.C.S.*, 17 P.3d 769 (Alaska 2001); *F.H.*, 851 P.2d 1361; *People ex rel. A.N.W.*, 976 P.2d 365 (Colo. Ct. App. 1999).

²⁴² See, e.g., *A.N.W.*, 976 P.2d at 369.

²⁴³ See, e.g., *L.G. v. State Dep't of Health & Soc. Servs.*, 14 P.3d 946 (Alaska 2000); *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001).

²⁴⁴ In *In re Baby Girl A.*, 282 Cal. Rptr. 105 (Ct. App. 1991), for example, the court suggested that good cause to diverge from the placement preferences existed with respect to a child of mixed heritage whose birth parents were opposed to the child's being raised in an Indian community.

Here, both [the mother] and the minor's natural father have made it clear, by their words and actions, that they do not want the child placed with an Indian family. In addition, we note the minor is *only part Indian*. She has never lived in appellant's village nor in a tribal environment.

seem influenced by the tenuousness of the child's tribal affiliation. The nomenclature of "part Indian" is both problematic and revealing. As an indication of tribal membership or eligibility for membership, the term "Indian" denotes an all-or-nothing status of political membership, determined by the tribe pursuant to its sovereign powers. In that sense, "part Indian" is meaningless: one cannot be partly a member of a tribe or partly eligible for membership. On the other hand, if the term "Indian" is viewed as a racial category, "part Indian" simply denotes the presence of a mixed racial ancestry—a characterization that would accurately describe many, if not most, American Indians.²⁴⁵ In its usage in the ICWA cases, the term "part Indian" generally refers to a child of mixed parentage and seems to reveal a judicial uneasiness with the monolithic nomenclature of "Indian child."²⁴⁶

2. *Balancing the "Incommensurables"*

Courts that embrace a broad discretion to deviate from the preferences of § 1915 do not necessarily disregard the value of maintaining an Indian child's cultural heritage. Indeed, some judges attempt the difficult task of weighing the tribe's interest in incorporating the child into its community against the child's interest in maintaining her bonded relationship with a non-Indian de facto parent. In an early Arizona decision, for example, a trial judge confronted the ostensibly incommensurable values at stake. In *In re Juvenile Action No. A-25525*,²⁴⁷ the court affirmed the adoption of an Indian child by a non-Indian woman, interpreting "good cause" to allow for a consideration of the child's best interests and the possibility that the child's interest may

Id. at 110 (emphasis added). Similarly, the court in *Santos*, 112 Cal. Rptr. 2d at 723, applying the existing Indian family exception to avoid a § 1915 inquiry, described the child as "multi-ethnic" with "one-quarter Chippewa Indian blood."

²⁴⁵ See *supra* note 93 (discussing demographics of American Indians as a racial grouping).

²⁴⁶ A decision from Washington illustrates judicial reliance on the good cause exception as a way of tailoring (and perhaps minimizing) the ICWA's impact on a fact pattern involving a child with attenuated tribal affiliations. In *In re Adoption of M.*, 832 P.2d 518 (Wash. Ct. App. 1992), the court held that the ICWA applied to an adoption proceeding involving a child of a non-Indian mother and Navajo father. The prospective adoptive parents, who had had custody of the child since birth, argued that good cause existed to diverge from the placement preferences, while the Navajo Nation argued to the contrary. In remanding for a full consideration of good cause, the appellate court emphasized the "ample discretion" possessed by the trial court. "Although we feel constrained to hold that the Act applies, we emphasize . . . that the provisions of the Act vest the trial court with ample discretion to allow the child to remain permanently in the home selected by both natural parents and in which she has lived since birth." *Id.* at 522-23. The court's language evinces the familiar tensions surrounding identity, parental authority, and permanency.

²⁴⁷ 667 P.2d 228 (Ariz. Ct. App. 1983).

sometimes “override” the tribal interest. The court explicitly approved of the trial judge’s attempt to balance the competing interests raised in the case:

Here, the trial court exercised its discretion in weighing the failure to comply with the Act once the paternity of the [Indian] father was established and the tribal interest in the child against the fact that the baby girl had resided with the adoptive mother for three years; that a close mother-child relationship with the adoptive mother had been established; and that the baby’s removal would cause psychological damage. . . . Under these circumstances, we find no abuse of discretion in the decision of the trial court declining to follow the preferences for adoptive placement.²⁴⁸

Thus, the trial court was determined to protect the child from the emotional harm of being separated from a longtime caregiver. At the same time, the judge gave at least verbal recognition to the goal of tribal survival inherent in the Act’s design.²⁴⁹ In affirming the trial court decision, the appellate court seemed to suggest that a tribe’s interest in cultural survival could be compared to or weighed against the child’s interest in maintaining the existing mother-child relationship. Surely, the qualitative differences in such interests preclude a simple weighing. What the court in reality was doing was to give substantive priority to the immediate interest of the child in continuity of care over the competing interest of the tribe which, from the court’s perspective, appeared more remote and intangible.²⁵⁰

²⁴⁸ *Id.* at 234.

²⁴⁹ Similarly, in *L.G. v. State Dep’t of Health & Soc. Servs.*, 14 P.3d 946 (Alaska 2000), the court affirmed a trial court’s placement of an Indian child with a non-Indian foster mother, noting that removing the child from her placement “was certain to cause her serious emotional or psychological damage. [Experts] testified that—having been through eleven placements already—J.G. was essentially at the end of her capacity to withstand the stress of another placement.” *Id.* at 955. The court noted, moreover, that the foster mother was willing to maintain the child’s ties with the extended family and tribe. *Id.* See also *In re Interest of Alan L.*, 1995 WL 663542 (Neb. Ct. App. Nov. 7, 1995) (holding that value of transfer to tribe must be balanced against detrimental consequences to children due to separation from parents to whom children have bonded and become attached).

²⁵⁰ See *In re Baby Boy Doe*, 902 P.2d 477 (Idaho 1995), where the Idaho Supreme Court affirmed a trial court’s adoptive placement of an Indian child with a non-Indian couple. The supreme court held that the trial judge had properly considered the non-Indian mother’s preference, the certainty of trauma to the child if he were removed from the adoptive home (where he had lived since birth), and the likelihood of emotional harm to the child through contact with the Indian father. Significantly, the adoptive parents had advanced additional arguments that the trial court rejected and that the state high court likewise viewed as inappropriate, including the argument that the negative social and economic conditions on the reservation constituted good cause. The supreme court noted that the trial judge “correctly held that ICWA requires the court to apply the prevailing social and cultural standards of the Indian community.” *Id.* at 487. The case also addressed the child’s need for permanence. The trial court had held that the child’s need for permanency created an extraordinary emotional need for formal adoption. Since the Indian placement would be a foster arrangement rather than

The *In re Santos Y.* decision from California,²⁵¹ discussed in connection with the existing Indian family exception, also demonstrates the balancing of interests that some courts embrace as a way of accommodating competing values. In *Santos*, the potential operation of § 1915 led the court to follow the existing Indian family exception and to find that the ICWA would be unconstitutional if applied to a young “multi-ethnic child who has had a minimal relationship with his assimilated parents.”²⁵² There, the trial court had interpreted § 1915 to require strict adherence to the placement preferences absent one of the factors listed in the BIA guidelines; finding none of the three factors to be present on the facts, the trial judge ruled that the boy in *Santos* should be removed to the reservation and placed with a tribal member for adoption.²⁵³ The California appellate court reversed and thus avoided what it viewed as an unconstitutional and traumatic disruption of the child’s placement. In so holding, the court considered the relationship among the child’s interests, the interests of his biological parents, and the interests of the tribe, concluding that “the child’s interests in a stable placement” under the circumstances of that case outweighed the interests of the parents and the tribe.²⁵⁴ The appellate court thus purported to engage in a balancing of values in order to preserve the child’s existing relationship with his *de facto* family.²⁵⁵ Indeed, in *Santos*, the anti-disruption presumption took on constitutional strength: the child’s fundamental liberty interest in maintaining his familial relations, in the court’s view, required use of a strict scrutiny test. As explained earlier, the court found that the ICWA did not serve a compelling state interest on the facts before it.²⁵⁶ Under the *Santos* reasoning, an Indian

adoption, the trial court assumed that the child’s need for permanence would not be satisfied through the Indian placement. The supreme court questioned the propriety of that assumption, reasoning that other placement options besides adoption may satisfy the need for permanence. *Id.* at 488-89. For a discussion of judicial interpretations of children’s needs for permanence and stability in the context of the ICWA, see *infra* notes 271-72 and accompanying text.

²⁵¹ See *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001), discussed *supra* notes 209-14 and accompanying text.

²⁵² 112 Cal. Rptr. 2d at 726.

²⁵³ *Id.* at 712. The trial court included a telling passage in its order: “[B]eing Indian is not an optional lifestyle . . . he is a Grand Portage child . . .” *Id.* (omissions in original). The trial judge thus viewed the child’s Indian identity as determinative of the question of his placement.

²⁵⁴ *Id.* at 726.

²⁵⁵ The strength of the child’s attachment to his caregivers was the subject of extensive expert testimony at trial. Although a court-appointed expert testified that placement with a new caregiver would not have catastrophic consequences for the child, another expert, testifying for the state child welfare agency, stated that separating the boy from his foster parents would have dire short-term and long-term psychological consequences for him. See *id.* at 708-12.

²⁵⁶ See *supra* notes 213-14 and accompanying text.

child's attachment to his established caregivers is the constitutional equivalent of family, outweighing the values underlying the ICWA where the child's Indian identity seems to rest on a blood line connection alone. Thus, the *Santos* approach subordinates the tribe's customary law of membership as well as the tribe's sovereign right to define itself to the child's perceived interest in remaining in a stable home. At the same time, the *Santos* approach accords no weight to the child's interest, protected by the ICWA, in embracing her Indian heritage.

3. Construing § 1915 To Preclude a "Best Interests" Determination

In stark contrast to those courts that may give dispositive weight to Indian children's de facto family attachments, other courts have taken the position that the best interests of the child standard—with its inherent subjectivity and well-known susceptibility to bias—is not appropriate in applying the good cause standard under § 1915.²⁵⁷ In the view of such courts, applying a best interests standard would be contrary to the plain language of the ICWA read as a whole and its legislative history and would threaten the fundamental goals of the Act. According to the Minnesota Supreme Court, for example, the statutory language and history

clearly indicate the state courts are a part of the problem the ICWA was intended to remedy. . . . The best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture. It therefore seems "most improbable" that Congress intended to allow state courts to find good cause whenever they determined that a placement outside the preferences of § 1915 was in the Indian child's best interests.²⁵⁸

Clearly desirous of finding a way to constrain trial court discretion, the Minnesota court went on to hold that a determination of good cause should be based on a finding of one or more factors described in the BIA guidelines. In other words, the guidelines were to be taken as the exclusive definition of a trial judge's authority to deviate from the preferences.²⁵⁹ The court reasoned that eliminating the best interests standard ensures "that Indian child welfare determinations are not based on a white, middle class standard which, in many

²⁵⁷ See, e.g., *In re Custody of S.E.G.*, 521 N.W.2d 357, 361-62 (Minn. 1994); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996).

²⁵⁸ *S.E.G.*, 521 N.W.2d at 362-63 (citations omitted).

²⁵⁹ *Id.* at 363.

cases, forecloses placement with [an] Indian family.”²⁶⁰ Thus, to those courts opposed to use of the best interests standard, a curb on state judicial discretion is essential to accomplish the fundamental ICWA goal of promoting placement of Indian children within the Indian community.

Courts that strictly adhere to the BIA’s definition of “good cause” in interpreting § 1915 sometimes subordinate or reframe the Indian child’s psychological need for permanence and stability to accommodate the ICWA’s goal of placing the child within the Indian community.²⁶¹ Such courts construe “good cause” to require a showing of extraordinary particularized need, in keeping with the BIA guidelines, and reject arguments that “ordinary” emotional bonding between an Indian child and de facto caregivers should constitute good cause.

A recent decision from the Montana Supreme Court vividly illustrates this approach. In *In re C.H.*,²⁶² the Montana high court reversed a lower court’s decision that good cause existed to diverge from the statutory preferences. There an infant had been removed from her mother’s care after being admitted to a hospital with extensive fractures and other injuries. Upon release from the hospital, the three-month-old child was placed with a non-Indian foster family. After discovering the child’s eligibility for enrollment in the Confederated Tribes of Siletz Indians of Oregon, the state notified the tribe. The tribe and the state then embarked on protracted procedural negotiations, with the tribe ultimately losing on a bid to transfer the case to tribal court. At the dispositional hearing in state court, which took place when the child was almost two-years-old, the tribe urged the court to place the child with a named tribal member who happened also to be a member of the child’s extended family. In response, the state argued that the child’s extraordinary needs warranted a finding of good cause to deviate from the placement guidelines. Relying primarily on evidence of the child’s strong psychological bond with her foster parents, the trial court concluded that the child did indeed have extraordinary physical and emotional needs justifying a finding of good cause.²⁶³

²⁶⁰ *Id.* at 359 (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989)) (alteration in original).

²⁶¹ See, e.g., *S.E.G.*, 521 N.W.2d 357; *In re C.H.*, 997 P.2d 776 (Mont. 2000). The Montana Supreme Court concluded, for example, that the three factors listed in the BIA guidelines are “the only circumstances constituting good cause to avoid the section 1915(a) adoptive placement preferences.” *C.H.*, 997 P.2d at 782.

²⁶² 997 P.2d 776.

²⁶³ *Id.* at 778-79.

The Montana Supreme Court reversed, holding that the trial court had improperly relied on a best interests determination. The trial judge had found that the child's strong emotional bond with the foster family constituted extraordinary emotional need justifying deviation from the ICWA preferences.²⁶⁴ Relying in part on *Holyfield*, the state high court disagreed.²⁶⁵ Its rationale is worth quoting at length:

[T]he emotional attachment between a non-Indian custodian and an Indian child should not necessarily outweigh the interests of the Tribe and the child in having that child raised in the Indian community. . . . Moreover, a conclusion that an Indian child should be placed with a non-Indian foster parent because of a strong emotional bond is essentially a determination that it is in the child's best interests to be so placed. [W]hile the best interests of the child is an appropriate and significant factor in custody cases under state law, it is an improper test to use in ICWA cases because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in accordance with statutory preferences. To allow emotional bonding—a normal and desirable outcome when, as here, a child lives with a foster family for several years—to constitute an “extraordinary” emotional need would essentially negate the ICWA presumption.²⁶⁶

The court in *In re C.H.* thus concluded that the child's emotional attachment to the foster family did not constitute good cause to avoid the ICWA placement preferences. Although the court conceded that the child was “at risk for developing emotional or physical disorders,” it noted that there was no testimony that the child “was *certain* to develop an attachment disorder” if

²⁶⁴ The trial judge's findings included a likelihood of attachment disorder if the child is moved, the presence of a strong emotional bond with the foster parents, and the need of the “high risk” child for a secure and stable environment. The supreme court rejected all of the findings as insufficient on their face, or inadequately supported on the record, to constitute extraordinary emotional needs, as required by the BIA guidelines. *See id.* at 782-85.

²⁶⁵ *Id.* at 783-84. The court's reliance on *Holyfield* is misplaced. There the Supreme Court acknowledged the likelihood of emotional trauma to the young children if they were removed from the custody of their adoptive family, but reasoned that the question for resolution was jurisdictional, not substantive. “We have been asked to decide the legal question of who should make the custody determination concerning these children—not what the outcome of that determination should be.” 490 U.S. 30, 53 (1989). Thus, the likely trauma to the children was not legally relevant. In contrast, under 25 U.S.C. § 1915 (2001), the state court is indisputably clothed with jurisdiction and must decide the substantive disposition of the child welfare proceeding. In that context, the emotional trauma to the child would seem highly relevant.

²⁶⁶ *C.H.*, 997 P.2d at 783-84 (citations omitted).

removed from the foster home.²⁶⁷ On the record before it, the court determined that the child's "need for a safe, secure and stable environment [did] not constitute an extraordinary physical or emotional need as contemplated by the ICWA."²⁶⁸

The court's opinion gave dispositive weight to the statutory presumption that an Indian child's best interests are met by placement within the Indian community. The immediate interest of the child in continuity of care—a value recognized as legitimate for non-Indian children—was inadequate to overcome the ICWA's codified preferences. Under the logic of *In re C.H.*, the preservation of "ordinary" attachments within a de facto family may be in the best interests of non-Indian children but is outweighed by the ICWA presumption when addressing the needs of an "Indian child," as statutorily defined.²⁶⁹ In this sense, the *personal* identity the young girl had formed through her intimate attachments was trumped by her potential *group or cultural* identity as a member of the Siletz tribe.²⁷⁰

Interestingly, the Minnesota Supreme Court, while a strict adherent to the BIA guidelines, has attempted to mediate between the two potentially conflicting values—the child's need for permanence and the tribe's interest in cultural survival. In *In re Custody of S.E.G.*,²⁷¹ the Minnesota Supreme Court constrained trial court discretion to a consideration of the factors listed in the

²⁶⁷ *Id.* at 783 (emphasis added). In an interesting use of developmental psychology, the supreme court noted that, according to expert testimony, a secure and stable home environment for a child is most important during the first two years of life. Since the child C.H. had lived with her foster family for most of her first two years, the court reasoned that C.H. was less at risk for an attachment disorder upon removal. *Id.* at 784-85.

²⁶⁸ *Id.* at 785. The supreme court similarly rejected other rationales advanced by the trial court for lack of clear support in the record. These included the need to protect the child from the family member who abused her, the child's status as a "high risk child because of all of her misfortune," and the extended period in which the child was in foster care. *Id.* at 783-86.

²⁶⁹ The opinion in *C.H.* was heralded by the local press as a decision that "further strengthens the Indian Child Welfare Act." See *Montana Supreme Court Upholds Indian Child Welfare Act*, KNIGHT-RIDDER TRIB. BUS. NEWS (Mar. 27, 2000), available at 2000 WL 17760415. The opinion might be viewed as consistent in theme with an earlier decision from the Montana high court in which it held that interparental custody disputes between Indian and non-Indian parents are within the exclusive jurisdiction of tribal courts if the child and one parent reside on the tribe's reservation. See *In re Marriage of Skillen*, 956 P.2d 1 (Mont. 1998). In fashioning its jurisdictional rules, the court in *Skillen* stated that tribal sovereignty had to include a tribe's "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." *Id.* at 16 (quoting *Wis. Potawatomes v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973)). *Skillen*'s concern with tribal survival parallels the court's emphasis in *C.H.* on the goal of maintaining Indian children in Indian homes pursuant to the ICWA.

²⁷⁰ For a discussion of the distinction between personal and group identities from a child's perspective, see Woodhouse, *supra* note 24, at 273-74.

²⁷¹ 521 N.W.2d 357 (Minn. 1994).

BIA guidelines, but it also found that nothing in the ICWA or the BIA guidelines precludes consideration of a child's need for permanence or stability in determining whether good cause exists. The court reasoned, however, that other permanent placement options besides adoption, such as permanent foster care, may satisfy the child's need for permanence. In *S.E.G.*, moreover, the court credited testimony suggesting that an Indian child's need for permanence could be met through attachment to the tribe as an ongoing part of the child's life. In other words, the court viewed permanence as a legitimate goal, one that could be satisfied through affiliation with the tribe (including contacts with the child's extended Indian family) and not just through the maintenance of a permanent adoptive placement.²⁷²

The reported cases under § 1915 thus reveal dramatic disagreements among state judges about the proper scope of discretion in determining placements for Indian children. This flashpoint engages the courts in a struggle to accommodate the statutory goals of the ICWA while also protecting children's immediate interests in remaining in a stable and secure placement. The courts that have assumed the power to apply a best interests standard in determining placement have done so emphatically, stating without ambiguity that the child's best interests necessarily remain paramount in any placement decision. Other courts (most prominently Montana and Minnesota) have stated, with equal force, that applying the highly malleable best interests standard would undermine the core goals of the Act. While the power of the continuity principle has persuaded some courts to find good cause to deviate from the statutory preferences, other courts, while acknowledging the traumatic consequences of removal, have interpreted the good cause requirement to require something more. Among the latter, the presumption that an Indian child's best interests are served by placement within the tribal community trumps the competing presumption that a successful placement imbued with "ordinary bonding" should not be disrupted.

IV. LOOKING BEYOND THE GRAND NARRATIVE

The ICWA and the history leading to its passage have today attained the status of what might be called a "metanarrative" whose chapters include the destruction of American Indian tribes, the culpability of governments, and the

²⁷² *Id.* at 363 (quoting H.R. REP. NO. 1386, 95th Cong. (1978), reprinted in 1978 U.S.C.A.N. 7530, 7532). In *S.E.G.*, the court explained that good cause may include a child's need for stability, but that stability is not equivalent to a need to be adopted. 521 N.W.2d at 364.

restoration of what was lost. The central role of the federal and state governments in the decimation of Indian tribes and Indian families is an indisputable historical fact, and the continued impact of the policies of termination is starkly evident in the grave socioeconomic problems facing many Indian populations today. In the face of this grim reality, the themes of guilt and restoration animated the congressional hearings of the 1970s preceding the enactment of the ICWA, informed the structure of the Act, and continue to shape judicial interpretations of the Act.

The federal government's belated desire to save tribes from extinction resulted in the prioritizing by Congress of tribal survival as a fundamental goal of the ICWA.²⁷³ The power of self-definition—the right to define one's constituents and survive as a collective entity—lies at the core of tribal sovereignty and self-determination. In this respect, the narrative of the ICWA foreshadowed a growing consensus at the international level regarding the position of indigenous peoples and their right to cultural integrity.²⁷⁴ In contrast to the draft declarations on indigenous peoples' rights, however, the ICWA directly employs Indian children as the vehicle for restoration of tribal existence. In so doing, the Act insists through a strong presumption and various implementing strategies that the best interests of Indian children are coextensive with the interests of tribes, and that an Indian child's welfare is best protected by placement within the tribal community. The alignment of tribal interests with children's interests in the narrative is bolstered by the understanding that an Indian child who is raised in a non-Indian environment will encounter grave psychological problems in the future, an experience

²⁷³ See 25 U.S.C. § 1902 (declaring that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . .").

²⁷⁴ According to Professor Anaya, "international law, although once an instrument of colonialism, has developed and continues to develop, however grudgingly or imperfectly, to support indigenous peoples' demands." S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 4 (1996). Through various international instruments and principles of customary law, one can discern that "self-determination" includes, among other elements, the rights of self-government, self-definition, and cultural integrity. See, e.g., Draft U.N. Declaration on the Rights of Indigenous Peoples, Comm. on Hum. Rts., Rep. of Subcomm'n on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994), reprinted in ANAYA at 207; Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, O.A.S. Doc. OEA/Ser/L/V/II.90, Doc. 9 rev. 1 (1995), reprinted in ANAYA at 218. For a description of the norm of self-determination for indigenous peoples as it relates to land and natural resources, see S. James Anaya & Robert A. Williams, *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

observed among many displaced Indian children during the pre-Act era.²⁷⁵ Similarly, because the federal government's policy of termination undermined the social fabric of reservation life and eroded the individual parent's understanding of family and tribal affiliation, voluntary relinquishments of children by Indian parents are viewed with skepticism under the Act. In light of the state courts' complicity in the destruction of Indian families before the Act—a key component of the narrative—state judges now are suspect whenever they determine that the Act does not apply²⁷⁶ or that good cause exists to diverge from the placement guidelines.²⁷⁷ The Act's metanarrative, rooted in historical fact, has great staying power, and one can see its influence in almost every court opinion interpreting or applying the ICWA. Such an overarching story, however, cannot capture the reality of all cases. Invariably, Indian child welfare disputes will arise that push uncomfortably at the narrative's assumptions.

At one level, the metanarrative may blur questions of institutional responsibility. Rather than blaming state courts for the continuing high rate of placement of Indian children in non-Indian homes and institutions, reformers might look to the persistence of severe socioeconomic problems on Indian reservations and among urban Indian populations.²⁷⁸ The high incidence of poverty, crime, and substance abuse among Indian communities can fundamentally undercut the goals of the ICWA—tribal child welfare systems lack the resources they need adequately to meet the demands of their populations; birth parents may choose to place their children with non-Indian families and may oppose transfer to tribal courts precisely because of the socioeconomic conditions existing on many reservations; and potential Indian foster and adoptive placements, often unsubsidized, may be difficult to locate.²⁷⁹ As state courts struggle with the human reality of implementing the Act, they have often been blamed for failures that are more accurately attributable to governmental hypocrisy. While the ICWA purported to restore

²⁷⁵ See, e.g., H.R. REP. NO. 95-1386, at 9-10.

²⁷⁶ See, e.g., Metteer, *Hard Cases*, *supra* note 11, at 427-36 (criticizing existing Indian family exception).

²⁷⁷ See, e.g., *S.E.G.*, 521 N.W.2d at 364 (disapproving of standard that would allow state courts to determine child's best interests in placement decision, reasoning that "[p]roblems can arise when a system that is largely white, with middle-class values is called upon to evaluate cultural and racial norms that are neither white nor necessarily middle-class").

²⁷⁸ See sources cited *supra* notes 143-45.

²⁷⁹ The unavailability of suitable Indian foster homes is a chronic problem for social workers charged with complying with the placement preferences of the Act. See Brown & Rieger, *supra* note 130 (describing the difficulties encountered by ICWA workers in attempting to license Alaskan Native foster homes that lacked plumbing, adequate windows, or other physical features required under standard state licensing regulations).

to tribes the authority to administer child welfare programs for their children, Congress was not forthcoming with necessary funding to enable tribes to do so. Ever since the enactment of the ICWA, tribal leaders and Indian child welfare activists have urged Congress to increase and restructure its appropriations so that tribes can effectively meet their child welfare responsibilities.²⁸⁰

At an individual level, the narrative may obscure particularized factors that would ordinarily inform a court's disposition in a child welfare proceeding. The narrative assumes that any child identified as an "Indian child" has a paramount interest in being reared within the child's tribal community, an interest that defeats other concerns. To recall the reasoning of the Montana Supreme Court, while the best interests of the non-Indian child, including consideration of emotional bonding, is an essential consideration in custody cases under state law, the courts cannot consider best interests in ICWA cases because of the Act's presumptions.²⁸¹ In the postmodern view, this narrative, as with any transcending explanation, should be understood as situated, contextual, and contingent. It may be valid as applied to *many* Indian children but cannot be an accurate characterization (or prediction) of the experience of *all* Indian children. The approach of the Montana court essentializes the young girl involved in that case such that she becomes every Indian child, whose interests will be best served by removal from the only home she has known and placement with strangers on a distant reservation.²⁸²

²⁸⁰ See Barsh, *supra* note 68, at 1333 (observing that "[t]he major threat to successful implementation of the [ICWA] is a lack of funding for tribal courts and family services"). As Barsh explains, the Congressional Budget Office planned a five-year capital program for implementing the Act, but the plan was not funded. *Id.* The effort to achieve better funding is ongoing. Currently pending before Congress are two bills that would provide more effective funding for foster care and adoption services provided by tribes, a need that was overlooked for many years. See *Indian and Alaska Native Foster Care and Adoption Services Amendments of 2001*, S. 550 and H.R. 2335, 107th Cong. (2001), discussed *infra* notes 355-57 and accompanying text. See Oscar Johnson, *Indian Children Belong with Their Own People*, INDIAN COUNTRY TODAY, May 18, 1998, at A3 (noting that scarce economic resources pose formidable challenges for successful implementation of ICWA, and reporting on proposed federal funding increases). For testimony on the compelling need for greater resources at the tribal level for child welfare and family preservation services, see *Hearing Before House Interior Appropriations Subcomm.* (2000) (testimony of Terry Cross, Executive Dir., Nat'l Indian Child Welfare Ass'n) (explaining historic underfunding of ICWA tribal programs), available at 2000 WL 19302704; see also *Hearings on S. 612, Indian Needs Assessment and Program Evaluation Act* (Apr. 5, 2000) (testimony of Kevin Gover), available at 2000 WL 19302278. Similar views from the National Indian Child Welfare Ass'n, the largest child welfare organization representing tribes and tribal leaders, are available at the website maintained by the Association. See <http://nicwa.org>.

²⁸¹ *In re C.H.*, 97 P.2d 776, 784 (Mont. 2000).

²⁸² A telling example of the ICWA's essentializing narrative is found in the participation of Evelyn Blanchard in *In re Robert T.*, 246 Cal. Rptr. 168 (Ct. App. 1988). Blanchard, an officer in the Association of American Indian and Alaskan Native Social Workers, was an influential proponent of the ICWA, and her scholarship about the subjectivity of the best interests standard as applied to Indian children formed part of the

The values underlying the ICWA and the values informing much state court adjudication are often in tension and play themselves out in revealing dialectics. While the Act privileges the tribal role at certain points,²⁸³ in § 1915 the statute authorizes substantive decisionmaking by state courts in the placement of Indian children. Most legal scholars have criticized the exercise of state court discretion, both at the transfer stage and the dispositional stage—portraying judicial discretion as a ready vehicle for undermining the goals of the Act.²⁸⁴ That critique, however, seems misdirected. Because the ICWA necessarily engages non-tribal decisionmakers in the ultimate disposition of any child welfare proceeding that remains in state court, those decisionmakers inevitably confront the tensions inherent in the Act's design. Affording decisionmakers latitude in accommodating the Act's policies to individual cases would reduce the risk of essentializing every child who falls within the Act's definition of "Indian child."

Returning to the nomenclature of Lyotard, the discussion in Part III of this Article points to conflicting values, or apparent *differends*, that sometimes surface in disputes arising under the ICWA. These include, first, the conflict between the collective voice of the tribe and the voice of individual tribal

record on which Congress relied in enacting the statute. See Evelyn Blanchard, *The Question of Best Interest*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* 58 (S. Unger ed., 1977) ("Question of Best Interest"). She continued to be an outspoken advocate for Indian child welfare reform after the passage of the ICWA. See Evelyn Blanchard, in *THEY ARE YOUNG ONCE BUT INDIAN FOREVER* (Joseph A. Myers ed., 1980); Evelyn Blanchard & Russel Lawrence Barsh, *What Is Best for Tribal Children? A Response to Fischler*, 25 SOC. WORK 350 (1980). Although her expert testimony in *Robert T.* was ultimately rejected by the courts, her participation reveals her categorical understanding of Indian children's welfare. In that case, the appeals court affirmed the trial court's pre-adoptive placement of an Indian child with his foster parents. While the foster parents were of Indian ancestry, they did not have ties to the child's tribe—the Santo Domingo Pueblo of New Mexico—and were therefore subordinate to an extended family member in § 1915's order of preference. By the time the Pueblo sought transfer to a tribal court and placement with a Pueblo member, the child had been living with the foster family for more than a year. Blanchard testified in support of transferring the case to the Pueblo and placing the child with extended family members living there. The thrust of her testimony was that the child would not be irreparably harmed by a move to the reservation. Her testimony, however, was based solely on a home visit with the Indian mother's extended family. Significantly, she did not meet with the child or his foster parents. The trial court found more persuasive the testimony of other experts regarding the harm that might occur to the child were he to be removed from his psychological family. *Robert T.*, 246 Cal. Rptr. at 175. The weakness in Blanchard's testimony was her lack of knowledge of the immediate reality of the child who was at the center of the controversy. The implication of her testimony, based only on an interview with the extended family member, was that so long as a suitable placement could be found that comported with the placement preferences of the ICWA, the child's interests would be served by such placement without regard to the child's individual circumstances.

²⁸³ See 25 U.S.C. § 1911(a) (providing exclusive tribal jurisdiction); 25 U.S.C. § 1911(b) (directing transfer to tribal court unless a parent objects or court finds good cause to contrary).

²⁸⁴ See *supra* notes 9-14, 108, 147 and accompanying text.

members, most visibly demonstrated in cases such as *Holyfield*.²⁸⁵ The Act itself, as interpreted by the Supreme Court, has resolved that tension in favor of the tribe, at least where the conflict is between a tribe and a tribal member domiciled on the reservation. The Indian parent, by maintaining a domicile within the tribal reservation, is situated within the tribe's cultural and geographic community. In the exclusive jurisdiction provisions of § 1911, the Act simply recognizes the tribe's traditional sovereignty vis-à-vis its domiciliary members. Tribal members are consensually a part of the tribal community; if they wish to avoid tribal power, they can change their domicile by choice.²⁸⁶

Other *differends* that are not so easily resolved have surfaced in the case law. These include the perceived conflict between the goals of promoting tribal survival and the child's interest in becoming or remaining a member of the tribal community, on the one hand, and that same child's pressing interest in continuity of care.²⁸⁷ As discussed in Part III, in many decisions that ultimately diverged from the Act's placement preferences, the courts ostensibly engaged in a balancing of interests, pitting a child's emotional need to remain in a stable placement against a tribe's desire to return the child to the cultural community and thus enhance the tribe's future survival.²⁸⁸ Underlying these tensions—these clashes of apparent incommensurables—is the basic conundrum of identity, a multifaceted construct with legal, cultural, social, and emotional dimensions.

One's identity, as postmodernists have contended, is transient, tentative, culturally situated, and socially constructed.²⁸⁹ From a child's perspective,

²⁸⁵ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (birth mother wishing to avoid tribal jurisdiction by giving birth and placing children for adoption off reservation), discussed *supra* notes 134-42 and accompanying text.

²⁸⁶ Patrick Macklem has noted the consensual nature of cultural identity and the dynamic nature of any individual's choice to assume or continue membership in an indigenous community. See MACKLEM, *supra* note 78. As he puts it, "There is an elective aspect to cultural membership. Individuals are not locked into belonging to particular cultures but instead can and do assimilate, break cultural bonds, and change cultural allegiances over time. . . . [C]ultural membership does not preclude choice." *Id.* at 53.

²⁸⁷ Similarly, a prominent Indian law scholar has remarked on the "vast gulf separating state and tribal judges' conceptions of child and family welfare." See Carole Goldberg-Ambrose, *Heeding the Voice of Tribal Law in Indian Child Welfare Proceedings*, in *LAW AND ANTHROPOLOGY 1* (Rene Kuppe & Richard Poiz eds., 1994). As Goldberg-Ambrose notes, "it is not uncommon to find that state courts fret over children's psychological bonding to particular 'stable' nuclear families, while tribal courts look to the child's place in the more extended family and community." *Id.*

²⁸⁸ See *supra* notes 247-56 and accompanying text.

²⁸⁹ In Martha Minow's view, "[t]he use of a specific notion of identity to resolve a legal dispute can obscure the complexity of lived experiences while imposing the force of the state behind the selected notion of

personal identity is circumscribed by the child's narrow universe and is given content by the child's intersubjective connection to her intimate caregivers.²⁹⁰ For the young child, continuity in that connection may be of paramount importance to the child's ability to develop into a socially and emotionally competent adult.²⁹¹ Group, cultural, or political identity, on the other hand, may take on meaning as the child matures and develops an understanding of group membership.²⁹² Group identity, moreover, encompasses additional contingencies surrounding the group's status and representation in the larger society. As Martha Minow has noted, "[t]he legal treatment of identity may trap people in categories that deprive them of latitude for choice and self-invention; legal assignments of identity may also fail to recognize affiliations that are meaningful or weighty in the lives of individuals."²⁹³ The identity conundrum surfaces most starkly in ICWA cases involving children of mixed heritage, where only one parent is the source of the child's tribal affiliation. Although the ICWA addresses the situation of children with affiliations to more than one tribe,²⁹⁴ no statutory attention is given to the child with Indian/non-Indian parentage. In such cases, each parent may assert conflicting claims to the child's identity. At the center of the dispute is the child whose very youth prevents her from choosing an identity for herself. From the child's

identity." Martha Minow, *Identities*, 3 YALE J. LAW & HUM. 97, 111 (1991). Jennifer Wicke has described the postmodern approach to identity as fragmented, fractured, inconclusive, elusive, and "fissur[ed] by the myriad social discourses which construct it." Wicke, *supra* note 49, at 463. See also Litowitz, *supra* note 29, at 46 (noting that postmodernism emphasizes pluralism, indeterminacy, marginality, and difference, and rejects the belief that a stable, essential self exists).

²⁹⁰ Attachment theorists have characterized the role of the child's interaction with primary caregivers as the development of a "secure base from which to explore," a base that provides the child with a sense of safety in all aspects of engagement with the world. See, e.g., J. Bowlby, *Attachment and Loss*, in ATTACHMENT (2d ed. 1982); E. Waters & E.M. Cummings, *A Secure Base from Which To Explore Close Relationships*, 71 CHILD DEV. 164 (2000). Even researchers who question the universalism of attachment theory seem to agree that "[y]oungsters of many cultures use the secure base with the attachment figure to gain the support they need to adapt to the outside world, but cultural differences abound in the behavioral system to which attachment is most closely linked, as well as in the meaning of adaptation." Fred Rothbaum et al., *Attachment and Culture—Security in the United States and Japan*, 55 AM. PSYCHOLOGIST 1093, 1100 (2000).

²⁹¹ See generally HANDBOOK OF ATTACHMENT, *supra* note 25; see also Woodhouse, *supra* note 24, at 260.

²⁹² Woodhouse, *supra* note 24, at 260.

²⁹³ MINOW, *supra* note 142, at 78.

²⁹⁴ The Act's definitional section provides that an "Indian child's tribe" means, in the case of an Indian child with multiple tribal affiliations, "the Indian tribe with which the Indian child has the more significant contacts." 25 U.S.C. § 1093(5).

perspective, the identity battle is pivotal. It will both open up and foreclose opportunities; it becomes constitutive of her present and future experience.²⁹⁵

Under the mandate of the ICWA as well as the federal policy of tribal self-determination, a tribe's determination of a child's eligibility for tribal membership should be accepted as conclusive by state courts. The existing Indian family exception undercuts the fundamental goal of tribal self-determination and has allowed state courts improperly to avoid the Act in cases which plainly fall within its purview. Nevertheless, the vitality of the exception evinces a tension that arises when courts are compelled to apply a legal classification in cases where the basic construct of identity is fraught with inherent ambiguity.²⁹⁶ That dynamic is at work in many of the cases endorsing the existing Indian family exception, most prominently *In re Bridget R.* and *In re Santos Y.*, where the courts' clear resolve to avoid the placement preferences of the Act drives the decisionmaking process. While the exception is fundamentally inconsistent with the language and history of the ICWA as well as contemporary federal policy promoting tribal self-determination,²⁹⁷ the exception itself demonstrates a deep dissonance within the state courts about the potential application of the Act where multiple claims of identity exist as to particular children.

²⁹⁵ As noted by Professor Woodhouse, "[i]dentity itself is a contested and contextual concept. . . . 'an organizing framework which holds the past and present together providing some anticipated shape to future life.'" Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 110 (1995) (citations omitted).

²⁹⁶ The case that originated the existing Indian family exception is a revealing illustration of this point. In *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982), the child's non-Indian mother had placed the child for adoption with a non-Indian couple, but the Indian father and his tribe challenged the adoption. In fashioning the existing Indian family doctrine, the court explained that the tribe's intervention in the proceedings could have produced an undesirable and absurd result:

[A]ny proceedings which the Kiowa Tribe might have undertaken or allowed to intervene would have been useless. Any attempt to effect the preferential placement contemplated by the Act would necessarily result in the removal of the baby from the custody of appellees and thereupon there being no consent by the mother to any such action, the child would be returned to her. We do not believe that the Congress intended such ridiculous results nor do we believe that the Kiowa Tribe could in good faith recommend such a procedure.

Id. at 177. Similarly, a California court relied on the exception as a way of avoiding the ICWA in a case involving a child of mixed heritage who had lived with his prospective adoptive parents for nine years. *In re Derek*, 73 Cal. App. 4th 828 (1999). After outlining the consequences of a holding that the ICWA applied (including the applicability of the placement preferences), the court said that it was "unwilling to plunge the parties and the juvenile court into this morass where there is no evidence that doing so would serve the underlying policies of the ICWA by preserving Indian culture and protecting the stability and security of an Indian tribe and family." *Derek*, 73 Ct. App. 4th at 834.

²⁹⁷ See *supra* notes 182-97 and accompanying text.

The good cause exceptions within the ICWA—governing the transfer of proceedings to tribal court and the placement preferences—have likewise triggered proposals for reform by proponents of a stronger ICWA.²⁹⁸ Frustrated with the pattern of state court adjudication, many critics argue that the good cause provisions should be eliminated since they too easily lend themselves to manipulation and abuse by judges eager to circumvent the Act.²⁹⁹ These commentators fear that state courts will continue to subvert statutory goals unless the language is removed. With respect to the good cause exception to transfer under § 1911(b), I agree with other commentators that state courts should not at that point engage in a substantive best interests analysis.³⁰⁰ The question for the state judge on a transfer motion is jurisdictional. At that stage, the judge should limit the analysis to factors that bear on the ability of the tribal court to adjudicate the case adequately.³⁰¹

In contrast, the good cause exception to the placement preferences of § 1915 must remain flexible enough to allow state courts to yield individualized justice at the dispositional phase of Indian child welfare cases. To the extent that the existing Indian family exception is a vehicle for avoiding the placement preferences of § 1915, then Congress would be ill-advised both to bar application of the exception and also further constrain state court discretion at that key dispositional phase. As seen in *Santos*, courts will resist the prospect of removing a child from a longstanding and successful placement to serve the goal of tribal survival. Moreover, the Act is reduced to wooden prescriptions of an essentializing nature unless the § 1915 good cause language is interpreted to allow state judges to take into consideration the complex circumstances of an individual case. On the other hand, the best interests standard is notorious for its subjectivity and susceptibility to bias.³⁰² Indeed,

²⁹⁸ See, e.g., S. 1976, 100th Cong. (1987) (eliminating good cause exceptions and providing strict guidelines for refusing to transfer and for deviating from the placement preferences, essentially tracking the BIA guidelines).

²⁹⁹ Both of the good cause provisions under the ICWA—the exception to the right of transfer of proceedings to tribal court, 25 U.S.C. § 1911(b), and the exception to the placement preferences of 25 U.S.C. § 1915—have triggered vigorous scholarly critiques. See, e.g., Carriere, *supra* note 9 (recommending elimination of the good cause exception in § 1911); Hollinger, *supra* note 66, at 496-500 (discussing state court interpretations of good cause under § 1915); Metteer, *Hard Cases*, *supra* note 11 (recommending elimination of the good cause exception to § 1911 and the imposition of stringent legislative limitations on the good cause exception to § 1915).

³⁰⁰ See, e.g., Carriere, *supra* note 9.

³⁰¹ The BIA Guidelines contain helpful examples of good cause for purposes of § 1911(b) that do not entail a full assessment of children's best interests. See BIA Guidelines, *supra* note 88.

³⁰² For a classic critique of the inherent subjectivity of the best interests standard, see Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226

evidence of widespread misuse of best interests determinations regarding Indian children was presented to Congress in the hearings leading to the ICWA's enactment.³⁰³ Thus, broad discretion in state judges at the placement stage could impede the statutory goal that Indian children be raised within Indian families.

Section 1915, then, poses a policy dilemma: state courts should have discretion to consider particularly compelling circumstances in an individual case, but the discretion must not be so broad as to sabotage the Act. A way out of this conundrum may lie in the standard of proof. Section 1915 operates to place the burden of proof squarely on the party seeking to diverge from the presumptive placements,³⁰⁴ but the statute does not specify the *degree* of proof. In light of the Act's attention to burden of proof elsewhere, the clear and convincing evidence standard may offer the best alternative.³⁰⁵ The Act imposes that burden of proof for temporary removals of Indian children, reserving the "beyond a reasonable doubt" standard for terminations of parental rights.³⁰⁶ The heightened standard of proof in both situations reflects Congress' reaction to the history of unwarranted and culturally biased removals of Indian children from their homes.

If a party seeking to depart from the Act's placement preferences were held to a "clear and convincing" standard of proof, the preferences would be strengthened in those states that now allow a departure on a mere best interests showing. Where the evidence seems in equipoise or nearly so, the statutory presumptions should prevail, giving effect to the fundamental policies under-

(1975); see also John Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1 (1987); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); ALI, *supra* note 26, at 1-7 (best interests test is routinely disparaged as unpredictable and culturally biased to favor dominant lifestyles).

³⁰³ See, e.g., Blanchard, *supra* note 282. Blanchard contends that under the guise of a best interests approach, non-Indian decisionmakers imposed their own value systems on Indian families to wrongly justify the removal of children in the first place and then compounded the problem by terminating parental rights so that the children could be permanently placed with non-Indian caregivers. According to Blanchard, "[h]ow the courts define 'best interest' negates the right of an Indian person to look for strength and assistance from his tribal identity by denying it as a resource, keeps the Indian parent, child and tribe in a dependent position in this era of self-determination and individual rights, and effectively kills more Indian people through the smothering arms of the helping process." *Id.* at 60. For a description of Blanchard's post-ICWA participation in a case as an expert witness, see *supra* note 282.

³⁰⁴ See BIA Guidelines, *supra* note 88, at 67,594-67,595.

³⁰⁵ Cf. *In re Adoption of S.W.*, 41 P.3d 1003, 1013 (Okla. Civ. App. 2001) (adopting "clear and convincing evidence" standard for determinations of good cause under § 1911(b)'s transfer provision).

³⁰⁶ See 25 U.S.C. § 1912(e), (f), discussed *supra* at notes 115-17 and accompanying text.

lying the ICWA.³⁰⁷ State courts should be required to justify a departure from the presumed placements by particularized findings, taking into account all circumstances bearing on the individual child's physical, psychological, and social welfare.³⁰⁸ At the same time, by reading the good cause exception to permit state courts to consider a panoply of factors affecting a child's future placement (while still placing a heightened burden on the party seeking to depart from the preferences), judges can bring a multidimensional, situated interpretation to the goal of advancing the interests of individual Indian children. Where the evidence concerning an individual child tips clearly and convincingly in favor of an alternative placement, state courts should be free to rule accordingly.

In particular, § 1915 should be construed to permit state courts to take into account the quality and strength of a child's attachment to his or her existing caregivers—a factor that would seem to transcend cultural difference. Tribal courts, often viewed as a key constitutive voice for tribal culture,³⁰⁹ have explicitly recognized the significance of continuity in a child's care and have tried to minimize the trauma a child will suffer when established bonds are severed.³¹⁰ Moreover, tribal court actions reported in the media indicate that

³⁰⁷ Adhering to a heightened standard of proof might avoid decisions such as that in *In re Adoption of N.P.S.*, 868 P.2d 934 (Alaska 1994), discussed *supra* at note 240, where the court departed from the ICWA placement preferences without clear and convincing evidence to justify such a departure.

³⁰⁸ As noted earlier, the BIA Guidelines suggest factors for courts to consider in determining good cause. See BIA Guidelines, *supra* note 88, at 67,594. The suggested factors are useful but too restrictive. The BIA Guidelines reasonably point to the requests of the parents or the child and the unavailability of an Indian placement as factors that courts should consider. In the only factor that relates directly to the child's circumstances, however, the BIA Guidelines refer to the "extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness." *Id.* The use of the term "extraordinary" is problematic in that it suggests that a child's actual needs should be disregarded unless they rise to the subjective and uncertain level of extraordinary. The Montana case of *In re C.H.*, 250 P.2d 776 (Mont. 2000), discussed *supra* notes 262-70 and accompanying text, demonstrates the potential negative impact of the concept of extraordinary, where the court acknowledged that "ordinary" bonding would be relevant to the placement of non-Indian children but not to the placement of Indian children.

³⁰⁹ I have written elsewhere on the dynamic voice of tribal courts in imbuing law with cultural meaning. See Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577 (2000).

³¹⁰ In *In re the Welfare of C.W.*, 23 Indian L. Rptr. 6213, 6213 (NW Regional Tribal S. Ct. for Tulalip Tribal Ct. App. 1996), for example, the court explicitly endorsed "a fundamental proposition that children placed in adoptive care become integrated into the family within a very short period of time. The severance of a parent-child relationship of the quality enjoyed by [the child] in his [de facto parents'] household was a sad and tragic consequence." In that case, a young child was placed with a family in what the family believed to be "pre-adoption" status. Due to mistakes by the tribal Indian Child Welfare worker, however, the placement was neither a pre-adoption status nor foster status. The court concluded that the de facto parents lacked any protected right or interest, although they "may have bonded with the child in manner which is deeper and more committed than that of a foster parent." *Id.* Although the court there held that the de facto parents lacked legal

tribal courts have awarded permanent guardianship to non-Indian caregivers while requiring continued contact between the child and tribal members. The disposition in the Choctaw tribal court after the Supreme Court announced its ruling in *Holyfield*, for example, resulted in an arrangement under which the twins resided permanently with their adoptive parent but were to maintain regular contact with their birth family and tribe.³¹¹ Moreover, if the good cause exception under § 1915 were understood to allow state courts to consider the strength of de facto family bonds, the existing Indian family doctrine might lose momentum.³¹²

Significantly, if alternatives available to state judges at the dispositional stage included placement options that recognized the multiple needs and multiple identities of the children before them, the Act's goal of protecting Indian children would be more attainable. As explained in Part III, courts often treat the competing goals of the ICWA as incommensurable values that are mutually exclusive, as *differends* in the Lyotardean sense. That categorical, either/or approach to child placement can result in a disposition that affirms one dimension of the child's world at the expense of another. Under the holding of *Santos*, the child's relationship with his non-Indian de facto

standing to intervene in the child's dependency action, it directed a guardian to determine the appropriate temporary placement of the child and expressly noted that placement could be with the child's former caregivers. The court explained, "[B]ecause of the unfortunate placement of the child with the Gobins and its tragic consequence resulting in the heartbreaking severance of family ties, a . . . guardian ad litem shall be appointed . . . and make an independent evaluation to the court on behalf of the child." *Id.* See also *Miner v. Banley*, 22 Indian L. Rptr. 6044, 6045 (Cheyenne River Sioux Ct. App. 1995) (recognizing that under Cheyenne law, a tribal court must "evaluate the need of the minor child for a stable and secure home and the physical, emotional, and cultural appropriateness of the placement" in determining a child's best interests).

³¹¹ See Marcia Coyle, *After the Gavel Comes Down*, NAT'L L.J., Feb. 25, 1991, at 1. A similar accommodation was struck in the highly-publicized *Keetso* case from the 1980s, where the Navajo court granted permanent guardianship over infant Patricia Keetso to a non-Indian adoptive couple but authorized continued contact between the child and her Navajo birth mother. See Barbara A. Serrano, *Parents, Indian Leaders Clash: Who Do Babies Belong to?*, ORANGE COUNTY REG., Aug. 6, 1989, at A1, discussed *supra* at note 4. Likewise, in *In re Adoption of Holloway*, 732 P.2d 962 (Utah 1986), the dispute was ultimately resolved among the parties by an arrangement that reflected the various claims to the boy who was at the center of the controversy. After the Utah Supreme Court voided the state court adoption of a Navajo child under the ICWA, the Navajo tribal court was faced with the question of the child's placement. In that case, the Navajo tribe's social workers recommended against returning the boy to his mother. In their reports to the tribal judge, the social workers contended that moving the boy to the reservation would further damage his already confused self-image. Under the arrangement approved by the tribal court, the Mormon couple who had had custody of the child for over five years were awarded permanent guardianship. At the same time, the couple agreed to continue contact between the child and his Navajo mother, at least until the child reached the age of thirteen. At that age, the child could decide for himself whether to maintain contact with his mother and tribe. See Sheryl Kornman, *A Cross-Cultural Custody Fight*, NEWSDAY 4 (Nov. 3, 1987).

³¹² See *supra* notes 206-07 and accompanying text (suggesting that rigid application of placement preferences under § 1915 has fueled popularity of existing Indian Family exception).

parents displaced in absolute terms the child's potential cultural identity deriving from his Indian heritage. Conversely, under the holding of *In re C.H.*, the child's potential cultural identity assumed absolute primacy over her existing emotional relationship with her de facto family. In both scenarios, a dimension of the children's worlds was lost.

Placement orders of a more fluid nature could provide a way out of the ICWA conundrum in many circumstances. Instead of viewing the tribe's interest in cultural survival and the child's interest in remaining in an established home as irreconcilable *differends*, state courts can be more creative in fashioning placements that accommodate multiple values by learning from the example of tribal judges.³¹³ As noted above, tribal courts have demonstrated in several high-profile cases their willingness to place children permanently with established non-Indian caregivers while requiring the caregivers to maintain contact with members of the child's tribe and extended family.³¹⁴ That resolution of competing interests is consistent with a more fluid approach to parenting responsibilities that many tribes embrace as part of their cultural traditions.³¹⁵ As explained in Part V, proposed amendments to the ICWA would take a step toward such a goal.

Moreover, an approach that seeks to accommodate the goals of protecting the child's sense of security, promoting the child's affiliation with her tribal community, and advancing the tribe's cultural survival would implement domestically a framework suggested by emerging norms of international law. With the appearance of draft declarations on the rights of indigenous peoples in recent years,³¹⁶ there is a growing international consensus favoring the protection of the physical and cultural survival of indigenous groups around the globe. The ICWA's affirmation of a tribe's central role in determining its membership and in overseeing child welfare is consistent with the emphasis in international law on indigenous peoples' rights of self-determination.

³¹³ If state judges knew more about tribal law and custom regarding child welfare, their decisionmaking in ICWA cases might reflect a more multicultural dimension. See Goldberg-Ambrose, *supra* note 287, at 31 ("[T]ribal law should have a loud voice as Indian child welfare matters are resolved in state courts. . . . If state courts heeded this 'voice' of tribal law, many interpretive errors in cases covered by ICWA could be laid to rest.").

³¹⁴ See *supra* note 311 and accompanying text.

³¹⁵ I have explored this dimension of tribal approaches to parenthood in Atwood, *supra* note 315, at 640-46. See also Goldberg-Ambrose, *supra* note 287, at 12-21 (explaining primacy of child's well-being in law of many tribes).

³¹⁶ See *supra* note 274 (citing the Draft U.N. Declaration on the Rights of Indigenous Peoples and the Draft Inter-American Declaration on the Rights of Indigenous Peoples).

Predating these draft declarations is the U.N. Convention on the Rights of the Child,³¹⁷ a general human rights treaty for children that also contains specific articles protecting the rights of the indigenous child.³¹⁸ Importantly, the Convention not only recognizes adults' responsibilities to safeguard children's religious, ethnic, or cultural identities, but also creates a framework for preserving continuity in children's relations with intimate caregivers.³¹⁹ As explained by Cynthia Price Cohen, a participant in the drafting of the Convention, the document protects indigenous children both through general principles creating a child rights structure and through articles protecting specific rights of the indigenous child.³²⁰ The Convention envisions a system in which children's human rights include the right to security as well as the indigenous child's right to maintain ties with his or her indigenous community.³²¹ The ICWA, if interpreted to allow for individualized justice at

³¹⁷ G.A. Res. 44/25, U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/736 (1989), available at 28 I.L.M. 1448. While the United States (along with Somalia, among the world's nations) has not become a State Party to the Convention, apparently due to federalism concerns, the Convention is legally enforceable in 191 countries. Interestingly, however, the United States was a major force in the drafting of the Convention. See Cynthia Price Cohen, *Role of United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L.J. 9 (1998).

³¹⁸ The linguistic needs of indigenous children are addressed in Article 17 of the Convention; the goal of education to foster a spirit of equality and tolerance among indigenous groups is addressed in Article 29; and most significantly, the right to cultural identity is addressed in Article 30:

In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such minority or who is indigenous shall not be denied the right, in a community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

U.N. Doc. ECN.4/1989/48 (1989), at art. 30.

³¹⁹ The Convention provides that in all actions concerning children, "the best interests of the child shall be a primary consideration," *id.* at art. 3, and that States should "undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." *Id.* at art. 8. In addition, the Convention addresses the child welfare context, stating that for children who must be removed from their families, states shall give "due regard . . . to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background." *Id.* at art. 20.

³²⁰ Cynthia Price Cohen, *International Protection of the Rights of Indigenous Children*, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 37, 40 (Cynthia Price Cohen ed., 1998).

³²¹ For a recent effort to utilize international human rights principles as a justification for enforcement of the ICWA, see Lorie Graham, *Reparations and the Indian Child Welfare Act*, 25 LEGAL STUD. F. 619 (2001). For a very different argument that international law, in its growing focus on the rights of indigenous peoples, must not lose sight of the need to protect individual human rights of indigenous children, see Cohen, *supra* note 311, at 37-62. Cohen warns that "in the rush to protect the rights of the indigenous group, the declarations [on the rights of indigenous peoples] will inadvertently treat indigenous children as tribal property." *Id.* at 38.

the dispositional stage, would comport with this blend of norms from international human rights law.

V. LEGISLATIVE PROPOSALS

Efforts to amend the ICWA have been ongoing ever since the Act became law, with the most controversial proposals typically attempting to correct a perceived injustice in the Act that became apparent from certain highly visible disputes. Thus, several bills have been introduced over the years to exclude voluntary adoption proceedings from the Act's coverage, sparked in large part by the Supreme Court's *Holyfield* decision.³²² Similarly, bills to codify the existing Indian family have been introduced on several occasions, without success,³²³ and a bill to preclude the use of the existing Indian family doctrine has likewise failed to pass.³²⁴ The most promising package of proposals emerged in 1997 from a coalition of tribal representatives, adoption agencies, and child welfare specialists.³²⁵ The "Tulsa amendments," so named because the proposals were hammered out during a long session in Tulsa, Oklahoma in 1996 among the various constituencies, had the support of the National Indian Child Welfare Association, other advocacy groups, and a majority of Indian tribes.³²⁶ The Indian Child Welfare Act Amendments of 1997 were designed to strengthen the Act by, among other things, addressing the problem of delay. The proposals would have imposed deadlines for tribes in intervening in state court proceedings and for birth parents in revoking consents to adopt—both sound recommendations in light of the human costs of removing a child from a longstanding placement. At the same time, the Amendments would have clarified and strengthened the tribe's role in determining a child's eligibility for membership and in participating in voluntary proceedings. Despite broad

³²² See, e.g., H.R. 3156, 104th Cong. (1996) (proposal to exempt voluntary child custody proceedings from the Act).

³²³ See, e.g., H.R. 3275, 104th Cong. (1996) (proposal to codify existing Indian family exception, providing that Act would not apply to child custody proceedings involving child whose parents do not maintain significant social, cultural, or political affiliation with their tribe).

³²⁴ See S. 1976, 100th Cong. (1987).

³²⁵ See S. 569 & H.R. 1082, 105th Cong. (1997); Indian Child Welfare Joint Hearing, 105th Cong. (1997) (statement of W. Ron Allen, President, Nat'l Cong. of Am. Indians), available at 1997 WL 11234052 (explaining that tribal representatives met with adoption attorneys and child welfare specialists to develop proposals that addressed concerns of multiple constituencies).

³²⁶ 1997 Hearings, *supra* note 56, at 48-49 (statement of Hon. Ada E. Deer, Ass't Sec'y of Indian Affairs).

support, the 1997 Amendments failed to pass, in large part due to political battles unrelated to the substance of Indian child welfare reform.³²⁷

Bills introduced in 2001 propose once again some of the major changes contained in the 1997 Amendments and also recommend new revisions of the Act. The proposals are both promising and problematic. The Indian Child Welfare Act Amendments of 2001³²⁸ seek, in part, to address the raw significance of delay—the likelihood that a young child in a “temporary” placement may form attachments that inevitably become a factor in determining a permanent placement. The 2001 Amendments approach the problem of delay in various ways. The bill would require effective notice to tribes of voluntary placements³²⁹ and would expressly give them a right to intervene³³⁰ so that they can have an early voice in such proceedings. At the same time, the bill would set limits on when Indian parents can withdraw consents to adoptive placements, thus attempting to avoid the emotional toll exacted when a parent wishes to challenge a longstanding adoptive placement.³³¹ Similarly, the Amendments place time limitations on a tribe’s right to intervene in voluntary proceedings and create a form of statutory waiver if the tribe gives notice of an intent not to intervene.³³² Clearer guidelines for timely notice to parents of changes in the adoptive status of their children are also

³²⁷ See 1997 *Hearings*, *supra* note 56, at 35 (statement of Rep. Patrick Kennedy) (noting concern among some groups that House Bill 1082 and Senate Bill 569 would increase abortion rates among Native American women); *id.* at 61 (statement of Ron Allen, President, Nat’l Cong. of Am. Indians) (noting that pro-life groups opposed Tulsa amendments because of concerns that Indian women would consider abortion more readily if adoption procedures were made more rigorous).

³²⁸ Indian Child Welfare Act Amendments of 2001, H.R. 2644, 107th Cong. (2001). The bill reintroduces proposals from previous congressional sessions. See H.R. 1082 & S. 569, 105th Cong. (1997); S. 1213, 106th Cong. (1999).

³²⁹ Indian Child Welfare Act Amendments of 2001, H.R. 2644, 107th Cong. § 8 (2001) (requiring notice to the child’s tribe by any person seeking voluntary placement of Indian child or voluntary termination of parental rights, within clearly stated time periods). The required content of the notice is also explained in detail. See *id.* § 9.

³³⁰ *Id.* § 10 (extending right to intervene to voluntary proceedings for parental rights terminations, adoptive placements, and foster care placements).

³³¹ *Id.* § 7 (amending § 1913 of ICWA by imposing time limitations on right of parent to revoke consent to adopt, keyed to the dates notice was received by tribe or parent). Section 7 would allow a parent to revoke consent outside the time lines under certain circumstances: if otherwise permitted under state law, if a court finds that consent was the result of fraud or duress, or if the parent did not receive the required notice. The proposed Amendments would retain the ICWA’s existing limitation that bars revocation of consent after an adoption has been effective for two years. *Id.* Also, the Amendments would not change the availability of a court action to invalidate at any time a foster placement or termination of parental rights if the Act’s jurisdictional or procedural guarantees have been violated. See 25 U.S.C. § 1914.

³³² H.R. 2644, § 10.

proposed.³³³ These provisions offer sensible improvements in the Act by facilitating the participation of birth parents and tribes while also placing outside limits on belated challenges. Such changes hold the promise of reducing the number of hard Indian child welfare cases that result from delay by one or more of the participants—delay that often has compelling significance in the world of a child. In emphasizing the collaborative nature of the bill, a congressional proponent explained that different interest groups had collaborated in the legislative drafting and that the resulting bill would “protect the interests of prospective adoptive parents, Native extended families, and most importantly, American Indian and Alaska Native children.”³³⁴

An important provision of the 2001 Amendments would encourage compromise among tribal and state officials and might offer a means of accommodating the competing interests identified in this Article. Under the proposal, state courts would be authorized to endorse an approach to adoption that is less absolute than the “all-or-nothing” model mandated by the law of most states.³³⁵ The Amendments propose a new section, entitled “Visitation.”³³⁶ The revision would authorize state courts to approve of post-adoption visitation agreements as part of an adoption decree if in the best interests of a child, notwithstanding any other provision of state law.³³⁷

The contemplated agreements would grant enforceable rights of visitation or contact with the child by birth parents, extended family members, or a child’s tribe, but the violation of such an agreement would not be the basis for

³³³ *Id.* § 11.

³³⁴ 147 CONG. REC. E1426 (statement of Congressman Young of Alaska) (July 25, 2001).

³³⁵ Traditional Anglo-American law has required the termination of parental rights as a corollary of adoption and the consequent extinction of all rights to continued contact between the child and the birth parents. *See generally* HOMER H. CLARK, LAW OF DOMESTIC RELATIONS 855-62 (2d ed. 1988). This doctrine has manifested itself in recent years in the continued refusal of a majority of state courts to enforce visitation agreements entered into between adoptive parents and birth parents. *See, e.g., In re Adoption of Vito*, 728 N.E.2d 292 (Mass. 2000) (holding that trial court’s order for post-adoption visitation with biological mother was clearly erroneous since it rested solely on child’s speculative future need to develop racial identity). Significantly, even in the new Uniform Adoption Act, post-adoption visitation is authorized only in the context of stepparent adoption. *See* UNIF. ADOPT. ACT §§ 1-105, 4-113.

³³⁶ H.R. 2644, § 14.

³³⁷ The Amendments would add a new section 115 to the ICWA, providing, in part:

Notwithstanding any other provision of law (including any State law)—(1) a court may approve, if in the best interests of an Indian child, as part of an adoption decree of that Indian child, an agreement that states that a birth parent, an extended family member, or the tribe of the Indian child shall have an enforceable right of visitation or continued contact with the Indian child after the entry of a final decree of adoption.

Id.

voiding the adoption.³³⁸ In this provision, the drafters are responding to recommendations over the years that state courts endorse a form of "open adoption" as a way of accommodating plural interests under the ICWA.³³⁹ As explored elsewhere, tribal approaches to adoption often take a more fluid form than the conventional Anglo-American tradition, with traditional tribal forms often contemplating continued contact with birth parents.³⁴⁰ In this regard, state courts would do well to learn from their tribal counterparts in designing placements for children that avoid the head-to-head collision of interests.

The post-adoption visitation proposal, then, would be a meritorious revision of the ICWA by enabling state courts to give effect to agreements that might otherwise be void under state law. Agreements for continued contact would allow state courts to fashion remedies that accommodate the child's interest in remaining with psychological parents while maintaining ties with her cultural community. Through continued contact, the child's identity as a member of the tribe would remain vital, thus benefiting the child as well as the tribe. Indeed, as noted earlier, such arrangements have been achieved in several highly visible ICWA disputes that were finally resolved in tribal courts, including the *Holyfield* case itself.³⁴¹

On the other hand, certain provisions of the 2001 Amendments seem problematic. First, the Amendments would revise the definition of "Indian child" by eliminating the requirement that a child eligible for membership in a tribe also have a biological parent who is a member.³⁴² Thus, any child who

³³⁸ The Amendments would clarify that: (1) the failure to comply with any provision of a court order concerning the continued visitation or contact referred to in paragraph; (2) shall not be considered to be grounds for setting aside a final decree of adoption. *Id.*

³³⁹ For several years Indian leaders have urged Congress to amend the ICWA to include a provision authorizing open adoptions even where otherwise prohibited by state law. See H.R. 1082, 105th Cong. (1997); S. 569, 105th Cong. (1997); *Indian Child Welfare Joint Hearing Before the Senate Comm. of Indian Affairs and the House Resources Comm.* (June 18, 1997), available at 1997 WL 338648 (testimony of Deborah J. Doxtator, Chairwoman of the Oneida Nation of Wisconsin) (stating that "[t]his provision would . . . mak[e] adoption to non-Indian families more attractive to Tribes, because of the possibility that the child may be more likely to keep ties with his or her culture").

³⁴⁰ Atwood, *supra* note 309, at 615-17.

³⁴¹ See *supra* note 311 and accompanying text.

³⁴² H.R. 2644, § 15(4). The proposed definition is the following:

'Indian child' means any unmarried person who is less than 18 years of age and—

(A) is a member of an Indian tribe;

(B) is eligible for membership in an Indian tribe; or

(C) if the child is not a member of or eligible for membership in an Indian tribe, the child is a child or grandchild of a member of an Indian tribe and is considered by an Indian tribe to be part of its community.

falls within a tribe's particular standard for membership would constitute an "Indian child," without regard to the membership status of the child's birth parents. At the same time, the Amendments would enlarge the definition to include children not eligible for membership where the child is socially and culturally considered by the tribe to be a part of the tribal community so long as the child has a parent or grandparent who is a tribal member.³⁴³ In an apparent response to critics who argue that the existing definition of Indian child is too narrow,³⁴⁴ the drafters of the Amendments have proposed a structure that would further tribes' sovereign interest in defining their own community.³⁴⁵ Through the vagaries of membership criteria, some children with tribal ancestry may not be eligible for enrollment because of blood quantum requirements.³⁴⁶ These children, however, may be very much a part of the tribal community, and the tribe may view such children as properly subject to its child welfare authority.

Although the proposed definitional changes comport with our national policy of tribal self-determination, they raise potential constitutional problems. In eliminating the requirement of the biological parent's membership in the first alternative, the bill would likely trigger outcries from those who fear that the ICWA already sweeps too many children into its definition of Indian child. For them, the requirement of a member parent operates as a control on the potential application of the Act that grounds the Act in the necessary predicate of tribal membership. Indeed, objections were voiced in 1978 to an earlier version of the ICWA that did not contain the requirement of a member parent.³⁴⁷ The argument was made then, and would most likely be advanced again, that imposing the statutory framework on non-member parents would be unconstitutional.³⁴⁸ Moreover, under the second alternative—a provision that

Id.

³⁴³ *Id.*

³⁴⁴ See, e.g., Barsh, *supra* note 68, at 1307-10.

³⁴⁵ For an argument that Indian identity means the existence of a particular relation to an Indian community, defined by the Indian tribe itself rather than by outsiders, see Fred Lomayesva, *Indian Identity—Post Indian Reflections*, 35 TULSA L.J. 63 (1999). Lomayesva, who is Hopi, criticizes common definitions of Indian identity that turn on the individual's fidelity to tradition or the individual's possession of a sufficient blood quantum. In his view, "to be Indian is to possess a type of connection between oneself and a tribal community." *Id.* at 64.

³⁴⁶ See *id.* at 68.

³⁴⁷ H.R. 95-1386, at 33-38 (letter from Asst. Att'y Gen. Patricia Wald, Feb. 9, 1978) (noting that unenrolled Indian parent could argue that depriving him of access to state court through the operation of the Act would constitute invidious discrimination).

³⁴⁸ The original Senate bill was amended to contain the text of the House bill that, *inter alia*, added the requirement that an Indian child eligible for enrollment be the biological child of an enrolled member. See *id.*

eliminates the key component of the child's tribal membership or eligibility for membership—the constitutionality of the ICWA would be drawn into serious question. Under such a definition of Indian child, the ICWA might lose its constitutional justification as a statute that rests on political classifications rather than racial distinctions; without tribal membership as the *sine qua non* of the Act's applicability, the rationale of *Morton v. Mancari*³⁴⁹ would seem unavailable.³⁵⁰ Clearly, the California appellate court's decisions in *In re Bridget R.* and *In re Santos Y.* have shown that equal protection challenges to the ICWA already have found a receptive audience. The proposed revision—in effect the converse of the existing Indian family doctrine—could bring an uncertain number of children under the cloak of the ICWA depending on a tribe's unique perception of its community. In short, the underlying tensions regarding the legal and social construct of “Indianness” might be exacerbated if the definition of Indian child is relaxed in such a way as to include any child whom a tribe considers to be part of its social or cultural community. Surely, such a change would fuel state court opposition.

Another provision of the pending Amendments would similarly interject uncertainty into the Act's enforcement without producing any clear benefit. In an attempt to curb state court discretion under the transfer provision of § 1911(b), the bill does away with the automatic veto that either parent possesses under the Act as it stands. In its place, the bill tries to ensure that a parental objection to transfer must be consistent with the policies of the ICWA—that children are the most vital resource for tribal survival, and that foster and adoptive placements should be in homes that reflect the unique values of Indian culture.³⁵¹ Critics of the Act have complained of the existing veto provision, arguing that the non-Indian parent can always block transfer to a tribal court,³⁵² and this proposal may be a response to such criticisms. The revision, however, would engage state courts in a merits-oriented analysis—an

at 38-42 (letter from Asst. Att'y Gen. Patricia Wald, May 23, 1978) (concluding that changes had eliminated “for the most part” the constitutional problems explained in earlier letter).

³⁴⁹ 417 U.S. 535 (1974), discussed *supra* notes 172-84 and accompanying text.

³⁵⁰ See discussion *supra* notes 182-88 and accompanying text. For an analysis of the constitutionality of a similar proposal, see Renner, *supra* note 188.

³⁵¹ H.R. 2644, § 3. The proposed revision would qualify the parent's veto right by barring transfer only if the veto is “not inconsistent with the finding in section 2(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and the policy declared in section 3 that children requiring foster or adoptive home placement be placed in homes that reflect the unique values of Indian culture.”

³⁵² See, e.g., Barsh, *supra* note 68.

inappropriate inquiry when the issue is one of jurisdiction.³⁵³ Moreover, the uncertainty of the standard is problematic. On its face, the proposed amendment would seem to require the state court to predict whether retaining the case will advance the goals of the ICWA. A clearer directive to curb state discretion at the transfer stage would be preferable, such as a codification of the BIA Guidelines.³⁵⁴

A separate bill also introduced in the 107th Congress would dramatically impact the effectiveness of the ICWA. The Indian and Alaska Native Foster Care and Adoption Services Amendments of 2001³⁵⁵ would end the disparate treatment of Indian children under the Social Security Act's Title IV-E Foster Care and Adoption Assistance programs by providing Indian children in out-of-home placements with the same level of funding and services that are currently provided to other eligible children in the United States.³⁵⁶ The bill seeks to correct deficiencies in funding that have existed since the ICWA's enactment and would enhance tribal autonomy by allowing tribes to administer the IV-E program on a government-to-government basis.³⁵⁷ In particular, the funding would improve tribes' ability to recruit Indian foster and adoptive homes and would provide better support services for children in out-of-home placements. The failure of Congress to provide tribes with the necessary resources to meet their responsibilities under the ICWA has been a major factor in the uneven implementation of the Act. This proposed legislation would greatly strengthen tribal child welfare programs and would lend substance to the symbolic language of the ICWA.

CONCLUSION

The Indian Child Welfare Act is an emphatic and justified response to the past destructive practices of state and federal governments vis-à-vis Indian families and tribes. The Act has enhanced tribal sovereignty in a realm of core

³⁵³ Indeed, the impropriety of a merits analysis at the jurisdictional stage is one of the bases for criticizing the use of a best interests test in determining whether good cause exists to deny transfer. *See, e.g.,* Carriere, *supra* note 9.

³⁵⁴ *See supra* note 106.

³⁵⁵ Indian and Alaska Native Foster Care and Adoption Services Amendments of 2001, S. 550 & H.R. 2335, 107th Cong. (2001). The bill is similar to S. 1478, 106th Cong. (1999).

³⁵⁶ *See* S. 550, § 2(a) (providing that children placed in tribal custody are eligible for federal foster care funding).

³⁵⁷ *Id.* § 2(b) (giving child welfare programs operated by Indian tribal organizations same autonomy as that given to State programs and providing that Indian tribes shall receive amounts in proportion to corresponding amounts specified for states).

tribal concern—the care and custody of children—by greatly strengthening the tribal role in child welfare and by promoting Indian children’s cultural ties with their tribes. Nevertheless, the Act has generated state court resistance that warrants understanding rather than condemnation. Ultimately, by exploring the tensions in values that shape much of the state court resistance to the Act, we can better protect the welfare of the complex, real children at the center of these controversies. To paraphrase Tina Rosenberg, laws that try to do justice on a grand scale risk doing injustice on an individual scale; our goal should not be Justice but justice case-by-case.³⁵⁸

Postmodern philosophy points out the basic importance of difference and the injustice of imposing universal standards on groups and individuals who do not share a common belief in the legitimacy of the standard. The ICWA is a unique and laudable statutory effort to restore to American Indian tribes a measure of cultural integrity, to protect Indian children as Indians, and to promote tribal survival, and in that sense it implements a postmodern insight. The flashpoints of the ICWA, however, reveal tensions concerning the Act’s approach to Indian identity and tribal power, especially in cases involving children at the outer limits of congressional concern who have only attenuated links to their tribal community. As shown in this Article, the flashpoints are intensified because of the bonding and emotional attachments that often develop between Indian children and their non-Indian caregivers. In cases such as California’s *In re Santos Y.* and Montana’s *In re C.H.*, courts struggle with the competing goals of protecting the immediate emotional interest of the individual child in remaining in a de facto family, promoting the child’s presumptive interest in belonging to an Indian community, and advancing the Indian tribe’s vital interest in maintaining its existence. At the core of many of the hard cases is the courts’ profound unease with the consequences of classifying a child as an “Indian child” to the exclusion of other identities. The power and durability of these themes is clear as they have continued to surface during the two decades since the Act’s passage.

Judge-made exceptions to the ICWA have emerged in part because the grand narrative of the ICWA does not fit comfortably onto the circumstances of every Indian child and because children’s identities are fluid and complex.

³⁵⁸ TINA ROSENBERG, *THE HAUNTED LAND—FACING EUROPE’S GHOSTS AFTER COMMUNISM* 351 (1995). Rosenberg, analyzing efforts to vindicate international human rights violations through war crimes tribunals and other measures, wrote: “[T]rials that seek to do justice on a grand scale risk doing injustice on a small scale; their goal must not be Justice but justice bit by bit by bit. Trials, in the end, are ill-suited to deal with subtleties of facing the past.” *Id.*

Consequently, state courts charged with determining an Indian child's welfare are often confronted with seemingly incommensurable values. As courts grapple with the tensions inherent in the ICWA, the placement decision under § 1915 becomes the fulcrum around which conflicting interests turn.

In applying the existing Indian family exception, state courts not only violate the clear language and intent of the Act, but they also strip the child of her Indian identity. By sweeping the Act off the table, these state courts eliminate the voice of the tribe and denigrate the value to the child of cultural affiliation with the tribe. The exception, which erases the meaning of the child's tribal heritage altogether, removes an essential voice from the state court's ultimate determination of the best placement for the child. Conversely, state courts that interpret the placement preferences of § 1915 as tantamount to an irrebuttable presumption without regard to the circumstances of the individual child likewise strip the child of a part of her identity—the sense of herself, for example, as a member of a functioning non-Indian family. Such an approach can edge into a view of individual Indian children as “every Indian child”—whose tribal heritage is the sole determinant of future placements.

A postmodern skepticism about categorical approaches to the protection of Indian children's welfare can strengthen the Act. Irreconcilable themes, or *differends*, may require a new genre of discourse, as Lyotard would contend. The judicial act of placing a dependent child, Indian or otherwise, is surely one of the most difficult tasks trial judges face. Developing a new language for resolving the hard cases that arise under the ICWA may mean the authorization of new, more fluid conceptions of adoption and guardianship, as suggested by the 2001 Amendments to the ICWA. Increased federal funding, also currently before Congress, would significantly strengthen the ability of tribes to operate their child welfare programs, to develop family-preservation systems, and to recruit prospective foster and adoptive homes from among their membership.

State courts should ensure that all Indian children who come within the Act are given the full benefit of the Act's jurisdictional, procedural, and substantive rights. The Act's goal of promoting tribal self-determination will remain elusive unless courts ensure that the tribe's perspective on the welfare of the child before the court is heard. Where the Act is followed, the state judge at the dispositional stage can render a decision informed by the tribe's understanding of the particular case, giving due regard to the statutory placement preferences and the tribe's vital interest in survival. In this Article, I have suggested one means of protecting the statutory placement preferences:

requiring that any alternative disposition be justified by clear and convincing evidence. At the same time, I have argued for a broader understanding of good cause than that envisioned by the BIA Guidelines and several state courts.

A state court's final resolution of an Indian child's placement must allow for a consideration of the child's individual circumstances. In performing that critical function, state judges should be free to consider a child's immediate interests in continuity of care as well as the child's interest in embracing her identity as a member of a tribe. State courts that recognize an Indian child's multiple potential allegiances and interests reduce the risk of essentializing the child either as every Indian child or as the non-Indian subject. They thus can give the Act a contingent and individualized reading—a messier, less ordered approach than some would like but one that comports better with the diverse and complicated human condition.