THE INDIAN CHILD WELFARE ACT: IN SEARCH OF A FEDERAL FORUM TO VINDICATE THE RIGHTS OF INDIAN TRIBES AND CHILDREN AGAINST THE VAGARIES OF STATE COURTS

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The Indian Child Welfare Act[1] (ICWA) was enacted by Congress in 1978 to curtail the massive removal (primarily by state agencies and courts) of Indian[2] children from their homes.[3] ICWA was also an attempt to assure that those children, who must be removed, be placed in homes that reflect their unique cultures and traditions.[4] ICWA strives to accomplish these goals by placing certain procedural requirements on parties in state courts, and on the courts themselves, before the removal of Indian children or the termination of parental rights.[5] ICWA also imposes substantive requirements on parties, usually state courts and social service agencies, who seek to place children in foster or adoptive

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1. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1983)).

2. The term "Indian," as used in this article, refers to a person who is a member of a federally recognized tribe, or eligible for membership in a federally recognized tribe and the biological child of a member of a federally recognized Indian tribe. This is also the definition of an "Indian child" under ICWA. *See* 25 U.S.C. § 1903(4) (1994). "Indian" is used because in legal parlance the term has been historically utilized to refer to the natives who inhabited the North American continent for centuries prior to the arrival of Europeans, not because it is the proper ethnic description for Native Americans.

3. In certain states with large Native American populations, an incredible 25% to 35% of native children were removed from their families and placed in foster care or adoptive homes sometime during their life. *See* H.R. REP. NO. 95-1386, at 9 (1978), *reprinted in* U.S.C.C.A.N. 7530, 7531. These removal rates were up to 19 times greater than the removal rate for non-Indian children in certain states. *See id.*

4. In addition to the severe removal rate of Indian children from their families, it concerned Congress that 85% of Indian children were placed in non-Indian foster homes. In Minnesota, for example, 90% of Indian children in adoptive placements were placed in non-Indian homes. *Id.* at 9.

5. *See* 25 U.S.C. § 1911 (1994) (restricting state court jurisdiction over Indian children domiciled on Indian reservations, requiring state courts to transfer jurisdiction over child custody proceedings involving non-reservation domiciled Indian children to tribal courts, and allowing Indian parents and tribes to intervene in state court proceedings); 25 U.S.C. § 1912 (1994) (governing involuntary placements by state courts and requiring Indian tribes to receive notice of proceedings, requiring parents to be appointed counsel, and establishing the burden of proof and requisite evidentiary showings before a foster care placement or termination of parental rights can be accomplished in state court); 25 U.S.C. § 1913 (1994) (governing the requirements for a voluntary placement of an Indian child in foster care or a voluntary termination of parental rights).

care.[6] The intent of ICWA is to restrain the authority of state agencies and courts to remove and place Indian children because of a well-documented historical abuse of that authority.[7]

The Indian Child Welfare Act presupposes that state agencies and courts, when confronted with a federal statute proscribing certain actions and dictating others, will heed the federal mandate and an uniform interstate application of the statute will be realized. The United States Supreme Court, in issuing its only decision directly addressing the Indian Child Welfare Act, stated that achieving a consistent application of the law nation wide was clearly the intent of Congress when it enacted the Indian Child Welfare Act.[8]

This objective has proven to be illusory and the goal of uniformity a farce. Many state courts have created exceptions to the application of ICWA and have interpreted the statute in such a manner as to render many of its provisions superfluous.[9] Compounding this betrayal of congressional intent has been the failure of the majority of federal courts, when given the opportunity to redress continued violations of ICWA by state courts, to take corrective measures. Many federal courts refuse to act based on the reasoning that decisions by state courts are *res judicata* in federal court.[10] Other federal courts have abstained from exercising jurisdiction over federal challenges to state court ICWA proceedings on the postulate that Congress did not intend federal court interference with state court actions in the ICWA arena.[11] Such a view forever precludes federal court review of state court decisions, with the limited exception of

6. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989). The substantive requirements of the ICWA, according to the United States Supreme Court, are the placement provisions of the Act. *See id.* (citing 25 U.S.C. § 1915 (1994)). These provisions dictate where Indian children should be placed in foster and adoptive homes, absent good cause to the contrary, with a strong emphasis on placing children in homes that "reflect the unique values of Indian culture." *See id.*; *see also* 25 U.S.C. § 1902 (1994).

7. This is an important point to understand as it somewhat forms an underlying axiom of the arguments laid out herein. Congress specifically found 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) (1994). ICWA was therefore remedial legislation, focusing on the inherent weaknesses of state courts to adjudicate child custody proceedings involving Indian children. *See, e.g.*, Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 553 (9th Cir. 1991).

8. *See Holyfield*, 490 U.S. at 47. The court rejected the argument that the definition of domicile under § 1911(a) of ICWA should be determined based upon state law, primarily because it would subject the application of ICWA to the variances in state law, in contravention of Congress's intent. *See id.* at 43-7.

9. *See infra* notes 14-16, for example, the discussion herein regarding the creation of the "existing Indian family exception," a judicially created exception to the application of ICWA stating that the federal law should not apply to an Indian child in certain circumstances. This exception has been adopted by courts in at least eight states and rejected by courts in at least ten others. This divergence in judicial decision making concerns a fundamental issue under ICWA: who exactly is an Indian child.

10. *See, e.g.*, Comanche Indian Tribe v. Hovis, 53 F.3d 298, 304 (10th Cir. 1995); Kiowa Tribe v. Lewis, 777 F.2d 587, 592 (10th Cir. 1985).

11. *See, e.g.*, Morrow v. Winslow, 94 F.3d 1386, 1398 (10th Cir. 1996).

United States Supreme Court review.[12] This diffidence on the part of the federal courts has created an "anomaly in federalism"—a federal civil rights statute which is largely unenforceable in a federal forum and whose very application and effect varies from state to state.[13]

This article will examine the stark disparities among state court decisions in two areas of the law involving ICWA and will suggest that in these two areas there is a compelling need for federal court supervision of state court decisions to both promote uniformity and effectuate the design of the Act. The first area of law is the continued expansion of the "existing Indian family" exception, whereby state courts unilaterally decide who is a real Indian child and which Indian children need the protections of the federal law in blatant contravention of the clear definition of "Indian child" contained in ICWA.[14] This ever expanding exception threatens to nullify the Act in certain states because it vests state courts with a decision they are institutionally incapable of making.[15]

12. *See* 28 U.S.C. §1738 (1994) (requiring federal courts to grant the same preclusive effect to a state court judgment as the issuing state court would); *see also* Barbara Ann Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59 (1982).

13. ICWA is not usually included in a discussion of the major federal civil rights acts. *Cf.* 18 U.S.C. §§ 241, 242 (1994) (placing criminal prohibitions on conspiracies to violate civil rights by private parties and those acting under color of state law); 42 U.S.C. §§ 1981, 1982 (1994) (originally part of the 1866 Civil Rights Act designed to eliminate the last vestiges of slavery in the South); 42 U.S.C. § 1983 (1994) (allowing suits in federal court against any person who violates federal constitutional or statutory rights under the color of state law); 42 U.S.C. § 1985(3) (1994) (providing a civil remedy for private conspiracies to violate the civil rights of a person). The parallels between these statutes and ICWA are striking. The major federal civil rights statutes are designed to provide a remedy for state violations of federally-mandated protections. Viewed in this light, ICWA is a paradigm of a federal civil rights statute because it is designed to insulate the integrity of Indian tribes and families, a federal obligation under treaties and the trust responsibility of the federal government, against the documented abuses of state authority. *See, e.g.*, White v. Califano, 437 F. Supp. 543, 555 (D.S.D. 1977), (recognizing the trust responsibility of the United States to provide mental health services for Indians).

14. Congress intended ICWA to apply to a "child custody proceeding" involving an "Indian child." Child custody proceeding is defined under the statute as: a foster care placement, termination of parental rights proceeding, a pre-adoptive placement, or an adoptive placement. *See* 25 U.S.C. § 1903(1) (1994). "Indian child" is defined under the statute as "any unmarried person who is under age eighteen and is either: (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *Id.* Some state courts have modified the definition of an Indian child, in apparent contradiction to the clear language of the statute, to hold that ICWA does not apply to an Indian child who has never lived with an Indian family member or who has only lived with an Indian family member with few ties to an Indian tribe. Such decisions are a purported attempt to effectuate the intent of the statute to prevent the breakup of Indian families.

15. One of the underpinnings of ICWA is the congressional finding that state courts, because of their ignorance of traditional Indian child rearing practices, were incapable of passing judgment on the fitness of Indian families to raise their children. *See* H.R. REP. NO. 95-1386, at 12 (1978), *reprinted in*, 1978 U.S.C.C.A.N. 7530, 7534-35; *see also Symposium on Racial Bias in the Judicial System, Minnesota Supreme Court Task Force on Racial Bias in the Judicial System*, 16 HAMLINE L. REV. 624, 625 (1993) (examining how cultural ignorance contributes to the bias against Indian families). The existing Indian family exception allows state courts to make the very value judgments pertaining to which Indians have sufficient contacts with their cultural and traditional antecedents that Congress felt the state courts were incapable of making.

The other realm of apparent state court deviation from the goals of Congress in enacting ICWA is the use of a "best interest of the child" standard in denying transfers of child custody proceedings involving Indian children from state to tribal courts.[16] Courts that have adopted the best interests standard are thus able to question the ability of tribal courts and social service agencies to effectively provide for the best interest of Indian children, turning the congressional presumption in favor of tribal court decision-making on its head.[17] These two areas of ICWA jurisprudence have been selected primarily because they point out the extremes certain state courts reach in attempting to defeat the federal goals behind ICWA and they highlight the divergence in state judicial decision making across the nation.

This article will also examine the attempts by litigants, primarily Indian parents and tribes, to invoke federal court jurisdiction to invalidate some of the decisions which scorn the existence of ICWA.[18] Almost without exception, these attempts have proven fruitless because of a reluctance on the part of federal courts to intervene in pending state court actions[19] and the existence of the federal full faith and credit statute restricting federal court review of previously litigated state court decisions.[20] Federal courts following these lines of decisions ignore the fact that state courts, because of cultural ignorance (though not necessarily malice) toward Indian families and tribes, played

16. Under, 25 U.S.C. §1911(b) (1994), a state court shall transfer a child custody proceeding involving an Indian child to a tribal court upon a petition by the Tribe, parent or Indian custodian, absent objection by either parent, declination by the tribal court or a showing of good cause to deny a transfer. The United States Supreme Court referred to this transfer provision as the Tribe's "presumptive jurisdiction," thus implying that transfer should be the rule, not the exception. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989). "Good cause" is not defined under the statute, but the Bureau of Indian Affairs has promulgated "guidelines" for state courts to follow in implementing this section. *See* Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 314 (Dep't Interior 1979) (proposed Nov. 26, 1979).

17. Congress actually passed ICWA because of its trepidations over the ability of state courts to decide what is in the best interest of the Indian child. *See In re Armell*, 550 N.E.2d 1060, 1068 (Ill. App. Ct. 1990). As a Texas appellate court held when it rejected the "best interest of the child" standard in denying a transfer of jurisdiction, "the use of the best interest standard when determining whether good cause exists defeats the very purpose for which ICWA was enacted, for it allows Anglo cultural biases into the picture." Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 169 (Tex. App. 1995); *see also* 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, 387 (1992).

18. As this article will examine, Congress must have contemplated that certain state courts would not comply with the statute because they included in the act a provision allowing a "court of competent jurisdiction" to invalidate state court action taken in violation of the portions of the act mandating compliance with procedure. *See* 25 U.S.C. § 1914 (1994). Parties who have attempted to utilize this section of the Act have invariably been confronted with the federalism problems raised by requesting that a federal court invalidate a domestic relations action of a state court, an area traditionally controlled by state law.

19. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971); Morrow v. Winslow, 94 F.3d 1386, 1393 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1311 (1996).

20. *See* 28 U.S.C. § 1738 (1994).

indispensable roles in the violation of the cultural rights of Indian children and tribes.

Further, this article will discuss the need for some federal court intercession to correct the rampant violations of ICWA in certain states. Federal courts have a moral imperative to step into this fray and rescue ICWA from the vagaries of state judicial power, not only under the banner of uniformity but also because of the role the federal government played in the forced displacement of Indian children.[21] The policy of cultural displacement, which ICWA attempts to redress via reform to the state judicial process, was the aftermath of a federal policy of moral assimilation which state courts and agencies perpetuated under their recognized authority in the area of domestic relations. Viewed in this light, the unwillingness of the federal courts to exercise some supervisory authority over the continued erosion of ICWA is a further abdication of the federal trust responsibility to promote strong Indian families and tribes.[22]

Finally, just as with other federal civil rights statutes,[23] Congress clearly intended for the federal courts to play a role in correcting erroneous state court ICWA decisions.[24] This intent is symbolized by 25

21. *See* Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17 (1996) (discussing the federal policy of assimilating Indians into mainstream Christian society). Indian children were often removed from their families for most of their youth and placed in boarding schools. *Id.* at 22. The schools were usually Christian boarding schools contracting with the United States government. *Id.* In these schools, the children were prohibited from speaking their native languages, practicing their religion, and of course learning the traditional mores of their extended families and tribes. *See id.*; *see also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 139-41 (1982). This displacement was achieved through federal statutes that required Indian families to send their children to boarding school or risk losing their food rations. Kunesh, *supra*.

22. *See* COHEN, *supra* note 21, at 221. "Trust responsibility," in the parlance of modern Indian law jurisprudence, denotes the fiduciary and moral obligations the United States government has toward Indian tribes and their members. As one commentator has suggested, this relationship is "one of the primary cornerstones of Indian law." *Id.* This unique relationship has been defined as a political relationship of the United States toward "a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of the master." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832). The relationship is embodied in numerous legislative enactments, including ICWA, the Snyder Act, 25 U.S.C. § 13 (1994) (authorizing sufficient appropriations for the benefit, care and assistance of Indians throughout the United States), and the Indian Self-Determination Act, 25 U.S.C. § 450 (1994) (authorizing Indian tribes to operate programs formerly operated by the Bureau of Indian Affairs and the Indian Health Service).

23. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (concluding that the "separate but equal" doctrine violated the Fourteenth Amendment's Equal Protection Clause).

24. Federal courts have been admittedly averse to concluding that the enactment of a federal civil rights statute designed to protect persons against violations of federal rights by persons acting under color of state law is *ipso facto* an exception to the federal full faith and credit statute. *See* Allen v. McCurry, 449 U.S. 90, 101 (1980) (stating that Congress did not exempt 42 U.S.C. § 1983 from application of the full faith and credit requirement by vesting the federal courts with jurisdiction over civil rights violations by state actors). However, 25 U.S.C. § 1914 of ICWA differs from other civil rights jurisdictional statutes because it grants federal courts the authority to invalidate *state court action*, not just to provide a remedy for a person whose rights were violated by a state actor. 25 U.S.C. § 1914 (1994) (emphasis added).

U.S.C. § 1914, a provision of ICWA that vests federal courts with the authority to overrule erroneous state court decisions, notwithstanding the federal full faith and credit statute.[25]

I. THE EXISTING INDIAN FAMILY EXCEPTION

To Indian families and tribes, there is no more pernicious development in the application of the Indian Child Welfare Act than the continued expansion of the "existing Indian family exception."[26] This doctrine recognizes an exception to the application of ICWA in cases involving an Indian child who has never resided with an "Indian family."[27] The doctrine was originally conjured up to defeat the application of the Act in cases where Indian children were being removed from non-Indian parents, often with the parents' consent, and placed in non-Indian homes over the objection of the non-custodial Indian parent who had little contact with the children.[28] The doctrine was expanded, however, to encompass situations where an Indian parent placed her child with non-Indian parents shortly after the child's birth.[29]

The United States Supreme Court arguably disavowed the exception in this second scenario in 1989, when the Court overruled a Mississippi Supreme Court decision which had used the exception.[30] Unfortunately,

25. This article suggests that Congress did not intend to merely vest federal courts with jurisdiction over actions seeking to invalidate state court action taken in contravention of ICWA by enactment of section § 1914, but intended to expressly except ICWA from the requirements of the federal full faith and credit statute. This is the only reasonable interpretation of § 1914 which does not render it a nullity.

26. The alarm created by the notion that a state court should be able to unilaterally determine who is an "Indian child" without tribal input can be seen in the reaction of Indian tribes and leaders to a legislative proposal, the Adoption Promotion and Stability Act of 1996, that passed the House of Representatives in 1996. The Act required state courts, before applying ICWA, to determine if the child in question is the natural child of a parent who "maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member." H.R. REP. NO. 104-542, at 4 (1996). There was uniform tribal opposition to this proposal which eventually led to its demise in the Senate Committee on Indian Affairs. *See* S. REP. NO. 104-288, at 9 (1996); Eric Schmitt, *Adoption Bill Facing Battle Over Measure on Indians*, N.Y. TIMES, May 8, 1996 at A1.

27. Courts differ on what subgroup of the family should be looked at to determine whether an Indian child has lived with an "Indian family," with most courts apparently concluding that the entire extended family should be looked to, whereas at least one has looked only to the natural parents as being the relevant "family." *See* Rye v. Weasel, 934 S.W.2d 257, 254 (Ky. 1996) (holding that a child who lived with an Indian uncle and his non-Indian wife almost her entire life was not an Indian child under the Act because the child had never lived with Indian natural parents).

28. *See, e.g., In re* Adoption of Baby Boy L., 643 P.2d 168, 175 (Kan. 1982); Hampton v. J.A.L., 658 So. 2d 331, 335 (La. Ct. App. 1995); *In re* Adoption of Baby Boy D., 742 P.2d 1059, 1063 (Okla. 1985).

29. *See, e.g., In re* Adoption of T.R.M., 525 N.E.2d 298, 303 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989); *In re* B.B., 511 So.2d 918, 921 (Miss. 1987), *rev'd sub nom.* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

30. *See Holyfield*, 490 U.S. at 54. Consequently, the South Dakota Supreme Court expressly held that the Supreme Court's decision in Holyfield had rendered invalid its previous holding in Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987), and held that ICWA applied to any Indian child regardless of whether the child lived in an Indian family. *See In re* Adoption of Baade, 462 N.W.2d 485, 490 (S.D. 1990).

that ruling has not prevented several state courts from finding more ingenious ways to apply the exception. Two California appellate courts have determined that the exception should not only apply to children who have only resided short periods of time with Indian persons, but also to Indian children who have resided with Indian persons who have no significant political, cultural, or social ties with their tribe.[31] Another court has carried the exception even further, applying it to a child who resided nearly her entire life with her Indian uncle.[32] However, because she resided off her Tribe's reservation and because she had never resided with Indian biological parents, the court held that she never really lived in an Indian family.[33]

A. THE BEGINNING OF THE EXISTING INDIAN FAMILY EXCEPTION

Congress intended ICWA to apply to any child custody proceeding[34] involving an Indian child, including both involuntary and voluntary proceedings.[35] However, numerous detractors of applying ICWA to voluntary placement proceedings, including several state courts, have stepped forward to challenge the application of ICWA in such

31. *See In re* Alexandria Y., 53 Cal. Rptr. 2d 679 (Ct. App. 1996); *In re* Bridget R., 49 Cal. Rptr. 2d 507 (Ct. App. 1996).

32. *See Rye*, 934 S.W.2d at 257.

33. *Id.*

34. The term "child custody proceeding" in domestic relations vernacular is generally thought to mean custody disputes between parents in a divorce or other proceeding. This is not the same definition under ICWA as custody proceedings between parents are explicitly exempted from coverage. *See* 25 U.S.C. § 1903(1) (1994) (exempting custody disputes in divorce proceedings); *see also In re* Defender, 435 N.W.2d 717, 721-22 (S.D. 1989) (exempting custody disputes between unwed parents exempted from ICWA coverage). Under ICWA, "child custody proceedings" are: 1) any voluntary or involuntary placements of Indian children outside their home where custody of the children cannot be regained upon demand (foster care placement); 2) proceedings that result in the termination of parental rights over an Indian child, either voluntarily or involuntarily; 3) placements after termination of parental rights but prior to adoption; and 4) adoptive placements. *See* 25 U.S.C. § 1903(1)(i-iv) (1994).

35. Congress's concern with "voluntary placements" is palpable in the legislative history. In the House Report there were references to numerous "voluntary" placements of Indian children by their parents who had been coerced by state social workers into giving up their children. H.R. REP. NO. 95-1386, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7533. When viewed in light of several federal statutes which historically had forced Indian families to give up their children, Congress obviously was concerned that many Indian families were being coerced into giving up their children. *See* Appropriations Act of March 3, 1893, ch. 209, § 1, 27 Stat. 612, 628 (formerly codified at 25 U.S.C. § 283) (requiring Indian parents or guardians to send their children to schools or have rations cut off).

proceedings.[36] This disenchantment with applying ICWA to voluntary placements has been extended by some courts to the point where the protections of the Act only apply in cases where an Indian family, who maintained significant political and cultural ties with their tribe, is temporarily located off the reservation when their child was removed.[37] In such a case the state courts already would have no jurisdiction under the present state of the law.[38] Thus ICWA, if left to the machinations of certain state courts, is on the road to eradication.[39]

The genesis of the existing Indian family exception lies with a Kansas Supreme Court decision, *Baby Boy L.*[40] In that case, the court held that ICWA should not apply to an adoption proceeding involving an illegitimate Indian child born to a non-Indian mother and an incarcerated Indian father when the natural mother was seeking to

36. It is in the area of voluntary proceedings, where parents are exercising what has been perceived in the non-Indian world as a parental prerogative to place a child, that commentators and courts have questioned the propriety of applying ICWA. *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, 544 (1996) (contending that the provision of ICWA governing voluntary placements violates the rights of Indian parents); *see also In re* Baby Girl A., 282 Cal. Rptr. 2d 105 (Ct. App. 1993) (suggesting that an Indian mother raised by non-Indians would have the right to place her own child for adoption with non-Indians over a Tribe's objection); Russell Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287 (1980). It is not surprising, therefore, that it is in this area that courts initially created the existing Indian family exception. However, because those cases did not rely upon the voluntariness of the actions of the non-Indian parents who placed their children, but instead on the status of the child, the logic of those cases would extend even to those cases where an Indian child is being involuntarily removed from a parent, whether Indian or non-Indian.

37. For instance, the Kentucky Supreme Court recently held that ICWA does not apply to an Indian child who was a ward of the tribal court and who had lived almost her entire life with her Indian uncle because the child had lived most of her life off the reservation. *See Rye*, 934 S.W.2d at 263.

38. *See* 25 U.S.C. §§ 1911(a), 1922 (1994) (allowing state courts to only exercise emergency jurisdiction over a reservation-domiciled Indian child temporarily located off the reservation).

39. One need not be a statistician to understand the consequences of the statistics cited by Congress in demonstrating the gravity of the removal rates of Indian children from their tribes on the survival of Indian tribes. In Minnesota, for example, in one year an astonishing one out of every four Indian children under the age of one year was adopted out, usually to non-Indian adoptive parents. *See* H.R. REP. NO. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531. Such a removal rate, extrapolated over even a short period of time and combined with other states which have similar removal rates, compels the conclusion that there are hundreds of thousands of Indian children who were raised primarily by non-Indians and who are now parents of their own children. In fact, many of the cases involving ICWA involve such parents. *See In re* Baby Girl A., 282 Cal. Rptr. 2d at 105. "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 33, 34 (1988) (quoting the testimony of Chief Calvin Isaac of the Mississippi Band of Choctaw Indians during the 1978 hearings on ICWA).

These families and their tribes should be the primary beneficiaries of a federal law designed to restore the sanctity and strength of Indian tribes by bringing those families, torn asunder by the policies of assimilation and affiliated by name only with their tribe, back into the fold. It was the author's experience in practicing on several reservations for over 12 years that many of the parents who wish to place their children outside of the tribe for placements themselves had been reared outside of the tribe and were taught to be ashamed of their status as Indians.

40. 643 P.2d 168 (Kan. 1982).

voluntarily place her child for adoption with a non-Indian couple. The Kansas Supreme Court upheld a lower court decision which had found that applying ICWA in such a situation would be maladroit because the intent of the Act was to prevent the breakup of Indian families. Since the Indian child had never lived in an Indian home, no Indian family would be broken up and thus the protections of ICWA need not, and therefore did not, apply.

In affirming the lower court's decision, the court utilized the legislative history behind the enactment of ICWA to conclude that the purposes of the Act would not be served by applying it to a voluntary adoptive placement of an Indian child born to a non-Indian mother.[41] Notwithstanding the court's acknowledgment that the Act literally applied, (the adoptive placement was a "child custody proceeding" as defined by the Act and the minor child was an Indian child because the child was enrolled with the Kiowa tribe), the court opted to redraft the statute to conform it to what the court felt Congress actually intended.[42]

Baby Boy L. has been the subject of numerous commentaries, both pro and con.[43] Surprisingly, few have attempted to counter the basic assumption underlying the decision—that the application of ICWA to such a case is inconsistent with the legislative history of the Act. Actually, the Kansas Supreme Court, as well as numerous other courts which have adopted the exception, have used sleight of hand to find that the application of ICWA in cases where Indian children are being voluntarily placed is inconsistent with the Act's legislative history. These courts explain that the intent of Congress in enacting the provisions was only to address the *involuntary* removal of Indian children from their homes.[44]

41. *In re* Adoption of Baby Boy L., 643 P.2d 168, 176 (Kan. 1982).

42. It should be noted that the existing Indian family exception is not the result of ambiguous language utilized by Congress in the enactment of ICWA. Even those courts which have adopted the exception have frankly acknowledged that ICWA, on its face, applies to all child custody proceedings involving Indian children, even those who have not been exposed to a traditional family setting. *See, e.g.*, Hampton v. J.A.L., 658 So. 2d 331, 352 (La. Ct. App. 1995) (Stewart, J. dissenting).

43. *See, e.g.*, Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465, 489-90 (1993); Michelle L. Lehmann, Comment, *The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Child*, 38 CATH. U. L. REV. 511, 534 (1989).

44. In many of the cases where courts have adopted the exception, special reference has been made to a congressional finding in 25 U.S.C. §1901(4) (1994), which expresses congressional concern with the alarmingly high percentage of "Indian families" which were being broken up by the unwarranted removal of Indian children from their families. This finding is used to support the proposition that ICWA is only designed to prevent the involuntary removal of Indian children from their Indian families. The second and third findings of that same section, where Congress stated that Indian children were vital to the continued existence and integrity of Indian tribes, are hardly ever mentioned in this analysis. 25 U.S.C. § 1901(2) - (3) (1994). These sections contravene the assumption of these courts that preventing the removal of Indian children, rather than dictating where these children should be placed, is the sole motivating cause of Congress in enacting ICWA.

It may be true that applying ICWA to the voluntary placement of an Indian child by a non-Indian parent does not perpetuate Congress' objective of preventing the unwarranted removal of Indian children from their families because of cultural ignorance or bias. However, ICWA not only applies to the involuntary break-up of Indian families, but also applies to the voluntary removal of Indian children from their families for placement in non-Indian homes for adoption.[45] The psychological and sociological studies cited by Congress in support of the proposition that the placement of Indian children in non-Indian homes impacted their well-being and that of the tribes did not differentiate between those children placed after a forced break-up, of the Indian family (involuntary) and those placed voluntarily either by an Indian or non-Indian parent.[46] Furthermore, Congress sought to proscribe the voluntary placement of very young Indian children in foster and adoptive homes because this practice is susceptible to abuse by both state officials and private entities. In short, constructing the future bond between Indian children and their heritage served just as valuable a function in the origins of ICWA as preventing the break-up of a present union.

B. VARIATIONS OF THE EXISTING FAMILY EXCEPTION

Baby Boy L. could be perceived as an aberration if it had been limited to its unique facts—a non-Indian parent voluntarily placing an Indian child who had experienced no contact with the Indian parent or extended family. However, the existing Indian family exception

45. If this were not true, there would be no need for 25 U.S.C. §1913 (1994), governing the voluntary placement of Indian children, and 25 U.S.C. § 1915 (1994), governing the placement of Indian children in both voluntary and involuntary proceedings. It is wrong for a court to rely exclusively on the intent of Congress to curtail the involuntary removal of Indian children from their families to bolster the propriety of the "existing Indian family" exception to ICWA. Such reliance ignores the discrete and equally important congressional goal of protecting the integrity of Indian tribes by keeping their children in homes that reflect the traditions and values of the Tribe.

46. One of the most convincing studies relied upon by Congress in enacting the placement preference provisions of the act was completed by Dr. Joseph Westermeyer, a University of Minnesota social psychiatrist. Westermeyer conducted a study of Indian children raised in white homes and concluded that:

> [T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended, predominately white schools, and almost in all cases, attended a church that was predominately white, and really came to understand very little about Indian culture, Indian behavior and had virtually no viable Indian identity.
>
> . . . .
>
> Then during adolescence they were to find that society was not to grant them the white identity that they had.
>
> . . . .
>
> They were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess.

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989); *see also* Joseph Westermeyer, *The Apple Syndrome in Minnesota: A Complication of Racial-Ethnic Discontinuity*, 10 J. OPERATIONAL PSYCHIATRY 134-140 (1979).

continues to rear its head in other factual circumstances and now has numerous variations among the states. There appear to be five different variations of the exception at present.

The first type is evidenced by *Baby Boy L.* and involves an Indian child born to a non-Indian mother who subsequently looks to place the child[47] or against whom an involuntary petition is filed.[48] The second exception involves an Indian child born to an Indian parent or Indian parents who then seek to place the child during infancy.[49] The third exception has become of vogue in California and involves an Indian child who is eligible for membership in a tribe, but whose Indian parent lacks sufficient contacts with the tribe to justify calling the parent an "Indian."[50] The fourth variation of the exception arises when the child has lived with an Indian caretaker much of her life, but the Indian parents have had limited contact with her and she has not lived on or near an Indian reservation so that the home cannot be considered an Indian home.[51] Lastly, some courts have decided that ICWA should apply, but that certain evidentiary rules need not be complied with under ICWA, specifically the requirement that qualified expert testimony be offered to

47. Other cases recognizing this exception are an Alabama appellate court in S.A. v. E.J.P., 571 So. 2d 1187-89 (Ala. Civ. App. 1990), an Arizona appellate court in *In re* Appeal in Maricopa County, 667 P.2d 228, 233 (Ariz. Ct. App. 1983), a Missouri appellate court in *In re* S.A.M., 703 S.W.2d 603-08 (Mo. Ct. App. 1986), and the Oklahoma Supreme Court in *In re* Adoption of Baby Boy D., 742 P.2d 1059, 1063-64 (Okla. 1985),; Harjo v. Duello, 484 U.S. 1072 (1988). *But see* Claymore v. Serr, 405 N.W.2d 650, 653 (S.D. 1987). *Claymore* was effectively overruled by the South Dakota Supreme Court in *In re* Adoption of Baade, 462 N.W.2d 485, 489 (S.D. 1990). The Oklahoma decisions have also been effectively overruled by the Oklahoma legislature adopting OKLA. STAT. ANN. tit. 10, § 40.3(B) (West Supp. 1997), which expressly states that ICWA should apply regardless of whether or not the children are in the legal or physical custody of an Indian parent or custodian when proceedings are commenced.

48. *See* C.E.H. v. L.M.V., 837 S.W.2d 947, 952 (Mo. Ct. App. 1992) (suggesting that the existing Indian family exception is doctrinally correct but goes on to apply ICWA to cover all bases); *In re* S.C., 833 P.2d 1249, 1255 (Okla. 1992).

49. This exception is exemplified by the Indiana Supreme Court's decision in *In re* Adoption of T.R.M., 525 N.E. 2d 298, 303 (Ind. 1988), the Mississippi Supreme Court decision in *In re* B.B., 511 So. 2d 918, 919 (Miss. 1987), a Louisiana appellate court in Hampton v. J.A.L., 658 So. 2d 331, 335 (La. Ct. App. 1995), and to a lesser extent the Washington Supreme Court decision in *In re* Crews, 825 P.2d 305 (Wash. 1992). *Crews* actually foreshadowed a new type of exception. *See supra* notes 73-90 and accompanying text.

50. *See In re* Alexandria Y., 53 Cal. Rptr. 2d 679, 683 (Ct. App. 1996); *In re* Bridget R., 49 Cal. Rptr. 2d 507, 526 (Ct. App. 1996). These California appellate cases, along with the Washington Supreme Court in *In re Crews*, actually recognize a new type of exception where the court's emphasis is not upon the duration of an Indian child's relationship with his or her Indian family, but the quality of "Indian life" that the natural parents have lived up to the point of the commencement of proceedings in state court. Under these cases it is irrelevant if an Indian child has lived with his or her natural Indian parents his or her entire life, if the parents themselves do not have sufficient ties to the tribe where they are members.

51. *See* Rye v. Weasel, 934 S.W.2d 257, 263 (Ky. 1996).

support the removal of an Indian child from his or her family.[52] Each of these variations of the existing Indian family exception will be discussed in turn.

1. *The Baby Boy L. Exception*

After *Baby Boy L.*, several decisions from various courts recognized a similar exception. In many of these cases, it is unclear whether the court in question recognized an exception to the Indian Child Welfare Act or merely concluded that the Indian parent challenging the adoptive placement was not a "parent" as defined by the Act.[53] For example, in *In re Baby Boy D.*,[54] the Oklahoma Supreme Court held that an Indian father of an illegitimate child who had not acknowledged the child prior to an adoption proceeding lacked standing as a parent under ICWA to challenge the adoptive placement of his child.[55] The court parlayed that limited holding into a broad declaration that the Indian Child Welfare Act should not apply to the removal of an Indian child from a non-Indian mother when the child has not resided with an Indian caretaker, thereby sanctioning the line of reasoning in *Baby Boy L.*

Several other courts concurred with the analysis in *Baby Boy L.* and *Baby Boy D.* and concluded that ICWA should not apply to an adoption proceeding involving a non-Indian mother and an Indian father who had minimal contact or no contact at all with the Indian child.[56] In addition, the New Jersey Supreme Court, in a similar factual scenario, held that an Indian father who had never acknowledged his child, lacked standing to challenge the child's adoption. Interestingly, the New Jersey Court went on to reject the existing Indian family exception to the Indian Child Welfare Act as an aberration.[57] Thus, courts have chosen not to apply ICWA to proceedings that lead to the removal of an Indian child by either explicitly following *Baby Boy L.* or by using its rationale

52. *See* Long v. State Dep't Human Serv., 527 So. 2d 133, 136 (Ala. Civ. App. 1988); *In re* N.L., 754 P.2d 863, 867 (Okla. 1988); Children's Serv. v. Campbell, 857 P.2d 888, 889 (Or. Ct. App. 1993); Juvenile Dep't v. Tucker, 710 P.2d 793, 799 (Or. Ct. App. 1985). These courts have held that unless the reason for the removal of an Indian child involves some allegation that is susceptible to cultural biases, the state court need not receive the testimony of a qualified expert witness as required by 25 U.S.C. §§ 1912(e) and (f), for the foster care placement or termination of parental rights of an Indian child.

53. "Parent" is defined under the Act at 25 U.S.C. § 1903(9) (1994), and specifically excludes the father of an Indian child born out of wedlock unless the father has acknowledged his paternity or has been adjudicated the father.

54. 742 P.2d 1059 (Okla. 1985).

55. *In re* Baby Boy D., 742 P.2d 1059, 1064 (Okla. 1985).

56. *See* note 47 and accompanying text.

57. *See In re* Adoption of a Baby Child, 543 A.2d 925, 936-37 (N.J. 1988). The New Jersey Supreme Court in this case, where an Indian mother placed her child for adoption without the knowledge of the natural father, held that the Act applied and rejected the existing Indian family exception. *Id.* The Court concluded, however that the alleged father was not the father under ICWA at the time of the adoption proceedings. *Id.*

implicitly to say that a child with an unacknowledged Indian father is not "Indian" under the law.

2. *A Child Placed During Infancy*

The existing Indian family exception detoured from the route chosen by the Kansas Supreme Court with decisions from the Indiana Supreme Court[58] and the Mississippi Supreme Court.[59] These decisions are the precursors for more contemporary decisions on the exception. In these cases, the courts recognized an exception to the Act for Indian children who had not resided in Indian families long enough to justify application of the Act, rather than examining whether the child had ever resided with an Indian custodian.

In the Indiana decision, the court held that the Act should not apply to an Indian child who was placed for adoption by an Oglala Sioux Indian mother five days after the birth of the child (in violation of numerous provisions of ICWA), because the child had resided most of her life with a non-Indian couple.[60] Although the Indiana Supreme Court was obviously hostile to the entire Act, suggesting in strong language that Congress lacked the authority to instruct Indiana courts how to handle custody proceedings involving Indian children, its obvious disdain for the voluntary placement provisions of the Act is most alarming. The court, in essence, held that the Indian Child Welfare Act should never apply to a voluntary placement of an Indian child by the child's Indian parents shortly after birth, conceivably because the child had not resided with the Indian parent long enough to justify invoking the Act.[61] Of course, such reasoning nullifies the provisions of the Act restricting the voluntary placement of Indian children shortly after birth, a practice which Congress clearly felt was being abused by state and private adoptions agencies.[62]

58. *In re* Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988).

59. *In re* B.B., 511 So. 2d 918 (Miss. 1987). The court did not expressly declare that ICWA did not apply, but did hold that an Indian parent should be able to place twins for adoption without implicating the exclusive tribal interests expressed at 25 U.S.C. § 1919(a). *Id.* at 921.

60. *In re T.R.M.*, 525 N.E.2d at 302-05.

61. *Id.* at 303-05.

62. ICWA renders void the consent to placement or voluntary termination of parental rights rendered before the Indian child is ten days old. *See* 25 U.S.C. § 1913(a) (1994). The Act also requires that consent of the parent be consummated before a court of competent jurisdiction with a degree of formality. *Id.* ICWA also allows an Indian parent to withdraw a valid consent and regain custody of the child upon demand. *See* 25 U.S.C. § 1913(b) (1994). Such a scenario occurred in *In re T.R.M.*, 525 N.E.2d at 302. In *T.R.M.*, the Indiana trial court that granted the adoption arguably did not even have jurisdiction to do so because of 25 U.S.C. § 1920 (1994), which requires a state court to decline to exercise jurisdiction over a proceeding commenced by a party who gained custody of an Indian child in violation of ICWA or who retains custody in violation of ICWA. *See In re T.R.M.*, 525 N.E.2d at 302. The adoptive couple in *T.R.M.* did violate the Act because the natural mother attempted to regain the custody of the child, but was wrongfully rebuffed by the adoptive parents before the adoption proceeding was commenced. *See id.*

In a similar vein, the Mississippi Supreme Court held that ICWA did not bar a state court adoption of Indian twins born to reservation-domiciled Indian parents because such an application of ICWA would defeat the allegedly clearly expressed intent of the natural parents to place their children for adoption.[63] The court concluded that the children at issue were domiciled off the reservation at the time of the placement, despite the fact that the parents were only located off the reservation temporarily to give birth. The court therefore exercised its jurisdiction over the adoption proceeding. The court did not address directly the application of ICWA except to state that the lower court had acted within the parameters of the Act.[64]

The United States Supreme Court reversed the Mississippi Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*[65] and held that the state court lacked jurisdiction to adjudicate the adoption because the children were domiciled on the reservation and under ICWA, were exclusively within the jurisdiction of the tribal court.[66] By implication, the Supreme Court directed that ICWA should apply to voluntary adoption proceedings involving Indian children, arguably rendering suspect the Kansas Supreme Court's decision in *Baby Boy L.* and its progeny.[67] Unfortunately, the Court did not squarely address the viability of an exception to ICWA for Indian children who either resided for only short periods of time with their Indian families or who never resided with an Indian relative, most likely because the lower court failed to clearly articulate the exception.

In *Holyfield,* the Court made other determinations which militate against state courts rewriting ICWA to prevent its application to certain Indian children. In rejecting the argument that Mississippi law should

63. *In re* B.B., 511 So. 2d at 921.

64. *See id.*

65. 490 U.S. 30 (1989).

66. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989). *Holyfield* is important to any discussion of the existing Indian family exception for numerous reasons, not the least being the fact that the fact scenario in *Holyfield* (Indian parents voluntarily surrendering their children after birth) is very similar to the cases in which the exception was adopted. *See, e.g., In re T.R.M.*, 525 N.E.2d at 298. The Supreme Court in *Holyfield*, by holding that ICWA applied in the Mississippi case so as to defeat the Mississippi court's attempt to assert jurisdiction, implicitly held that ICWA applies to voluntary placements of Indian children shortly after birth. *Holyfield*, 490 U.S. at 53. This holding is contrary to other state court decisions. Attempts to limit *Holyfield* to the Court's decision on domicile, for example, ignore the fact that the Court would have never reached the domicile issue without deciding that ICWA applies to these types of proceedings. *See, e.g., In re* Alexandria Y., 53 Cal. Rptr. 2d 679, 687 (Ct. App. 1996); Hampton v. J.A.L., 658 So. 2d 331, 335 (La. Ct. App. 1995); *In re* Crews, 825 A.2d 305, 310 (Wash. 1992).

67. *See Holyfield*, 490 U.S. at 49. By clearly expressing that the Indian tribe where the child was a member, or eligible for membership, had a tangible interest in the proceedings which could not be nullified by the actions of the natural parents the court demonstrated that the Indian family was not the only entity being protected. *Id.* "The numerous prerogatives accorded the tribe through ICWA's substantive provisions . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children, *but also of the tribes themselves.*" *Id.* (emphasis added).

determine the domicile of the twins, the *Holyfield* Court held that it was "highly improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provisions to definition by state courts."[68] Although the Court was not discussing state courts tinkering with the definition of "Indian child" under ICWA, this language clearly should dissuade state courts from reinterpreting ICWA in a manner that minimizes its employment.

Since *Holyfield,* the plight of the existing Indian family exception has been a "long and strange trip."[69] One of the first courts to construe *Holyfield* was the South Dakota Supreme Court, which reversed its previous adoption of the existing Indian family exception based upon the *Holyfield* decision.[70] The court held that the application of ICWA to a particular case should hinge exclusively on whether an Indian child is involved, not whether the child has lived in an existing Indian family.[71]

What was clear to the South Dakota Supreme Court regarding *Holyfield* was apparently nebulous to other courts, which continued to invoke the exception in even more extreme manners. The Oklahoma Supreme Court reiterated its belief in the exception by holding that ICWA did not apply to the foster care placement of an Indian child removed from a non-Indian mother, one of the first cases recognizing the exception in a case not started as a voluntary proceeding by the non-Indian parent.[72] The favorable, pro-tribal interpretation of ICWA contained in *Holyfield* did not therefore prove to be the antidote to the existing Indian family exception that tribes hoped. Instead, the exception was broadened even further after *Holyfield.*

68. *See id.* at 45.

69. GRATEFUL DEAD, *Trucking*, American Beauty (Warner Bros. 1970).

70. *In re* Baade, 462 N.W.2d 485, 489 (S.D. 1990) (overturning Claymore v. Serr, 405 N.W.2d 650 (SD 1987)).

71. *Id.*

72. *See In re* S.C., 833 P.2d 1249, 1251 (Okla. 1992). *S.C.* is a strange case because it involved an Indian father, who allegedly had little contact with his children (borne by a non-Indian mother), invoking 25 U.S.C. § 1914 (1994) of ICWA in an attempt to invalidate a foster care placement of his Indian children with an Indian foster home. *Id.* The lower courts denied the petition on the ground that the father lacked standing under § 1914 because he was not a parent from whom custody had been removed and also because the children were not removed from an existing Indian family. *Id.* at 253. The court distinguished *Holyfield* on the ground that it stood only for the proposition that state courts should not apply state law on domicile. *Id.* at 1254. The court further held that *Holyfield* had no bearing on the continued validity of the existing Indian family exception. *Id.* The case is odd because the court could have ruled that, on its face, §1914 does not permit challenges to foster care placements from a non-custodial parent. *See* 25 U.S.C. § 1914 (1994). Instead, the court strained to reconcile its ruling with the *Holyfield* decision. The Oklahoma legislature has apparently repealed the decision in *S.C.* by its passage of an amended state ICWA making it clear that ICWA does apply to any proceeding wherein an Indian child is removed, irrespective of whether the child is being removed from an existing Indian family. *See* OKLA. STAT. ANN. tit. 10, § 40.3 (West Supp. 1997).

3. *Determining "Indian Child" Based Upon Tribal Attachment or State Law*

In *In re Crews*, the Washington Supreme Court addressed the Indian Child Welfare Act for the first time. In an *en banc* decision, the court looked at the application of ICWA to an Indian mother who voluntarily consented to the termination of her parental rights and to an adoptive placement (in violation of ICWA) and then attempted to revoke her consent.[73] The court, in apparent incongruity with *Holyfield*, held that ICWA did not apply to a voluntary placement of an Indian child shortly after the child's birth.[74] The court noted that the minor child had never resided with her Indian mother, the mother had never resided on or near the Choctaw reservation where she became a member after the birth of the child, and (in a rather cryptic note) suggested that the child, if returned to the mother, would probably never live in an Indian environment because of the natural mother's neglect of her Indian heritage.[75]

In an interesting sleight of hand, the *Crews* court cited *Holyfield* in support of the proposition that ICWA should not apply to the voluntary placement of an Indian child by his Indian parent,[76] notwithstanding the similar factual circumstances presented in *Holyfield* where Indian parents voluntarily consented to an adoption by a non-Indian couple. The *Crews* court seemed to distinguish *Holyfield* on the grounds that the mother in *Crews* did not live on a reservation and did not have connections to her Indian heritage, issues that were irrelevant to the Court's decision in *Holyfield*.[77]

Crews set a dangerous precedent in the eyes of many in Indian country because, for the first time, a state court endorsed the notion that

73. *In re* Crews, 825 P.2d 305, 307-08 (Wash. 1992).

74. *See id.* at 312.

75. *Id.* at 310. In a subsequent appeals court decision, a Washington court distinguished *Crews* and applied ICWA in a case involving a child raised primarily in a non-Indian home where the natural parents were seeking to voluntarily terminate their parental rights. *In re* M. v. Navajo Nation, 832 P.2d 518, 522 (Wash. Ct. App. 1992). That court seemed to believe that *Crews* was an aberration. *Id.*

76. *In re Crews*, 825 P.2d at 310. The *Crews* court placed heavy emphasis on distinguishing the fact that the parents in *Holyfield* apparently intended to reside on the reservation whereas the mother in *Crews* had no intention to live on a reservation. *Id.* The court seemed to believe the key to application of the Act to voluntary proceedings is whether the child would be brought up in a traditional Indian family if the consent is revoked and the child returned. *Id.* It is ironic that this distinction was seized upon by the court as a distinguishing characteristic because the parents in *Holyfield* apparently never sought to regain custody of their children and were perfectly content with the children being raised in a non-Indian home. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). Whereas the mother in *Crews* made every attempt to revoke the consent she executed shortly after the birth of the child, thus evidencing her desire that her child not be raised in a non-Indian home. *See In re Crews*, 925 P.2d at 310.

77. *See Holyfield*, 490 U.S. at 52. The domicile of the parents in *Holyfield* was important in the Supreme Court's jurisdictional analysis, as it led the Court to hold that the twins in *Holyfield* were domiciliaries of the reservation. *Id.* at 53. That factor, however, was not mentioned as a prerequisite to the application of ICWA.

it should be the ultimate arbiter of whether a person, irrespective of membership or qualification of membership in an Indian tribe, should be considered an Indian based upon the state court's perception of whether that person had sufficient contacts with his or her Indian heritage.[78] Before *Crews,* the relevant consideration in determining whether the existing Indian family exception applied in a particular case was the amount of time the child had spent with an Indian family member. *Crews* endorsed a new stratagem: whether the Indian caretaker was sufficiently "Indian" to justify application of the Act. Several courts have taken the rationale of *Crews* and have run with it, with courts in California going so far as to constitutionalize its holding.[79]

Louisiana deserves the award for creativity in maneuvering to defeat the application of ICWA. In a case involving a dispute over visitation (a proceeding not even governed by the Indian Child Welfare Act)[80] between a non-Indian mother and an Indian father taking place in both state court and in a tribal forum, a Louisiana appeals court inferentially held that ICWA's definition of Indian child was superseded by Louisiana law.[81] In affirming the denial of the Indian father's motion to dismiss for lack of state court jurisdiction, the court explained that the child of a Caucasian mother, according to the civil law cited in the Justinian Institute governing the rights of slaves, assumed the race or free status of the mother.[82] This machination appears to be a clear example of the

78. The *Crews* court did not appear to find it dispositive that the Choctaw Tribe claimed both mother and child as members, but instead found it more germane that the mother had no intention to live on the Choctaw reservation were her child returned to her. *In re Crews,* 825 P.2d at 310.

79. *See In re* Alexandria Y., 53 Cal. Rptr. 2d 679, 686 (Ct. App. 1996); *In re* Bridget R., 49 Cal. Rptr. 2d 507, 516 (Ct. App. 1996).

80. As discussed before, ICWA does not apply to custody disputes between the natural parents of an Indian child in the course of divorce proceedings or outside of those proceedings. *See* 25 U.S.C. § 1903(1) (1994); *In re* Sengstock, 477 N.W.2d 310, 312 (Wis. Ct. App. 1991).

81. 25 U.S.C. § 1903(4).

82. *See* Barbry v. Dauzat, 576 So. 2d 1013, 1021 (La. Ct. App. 1991). In *Barbry,* the court held that "a child born of a Caucasian woman and Indian father would be considered a child of the Caucasian race, as the condition of the mother, and not the quantum of the Indian ancestry of the child, determines the condition of the offspring." *Id.* at 1021-22. The court then went on to hold, in a rather cryptic fashion, that the offspring of an Indian father and Caucasian mother, *under federal law,* was not an Indian. *Id.* at 1022. Although this Louisiana court properly held that ICWA did not apply to the dispute therein, the holding with regard to the definition of an Indian child may impact the future application of ICWA in Louisiana. It is clear from the opinion that at least this appellate court believes that ICWA would never apply to the child of a non-Indian mother. *Id.*

Louisiana court misunderstanding that federal law pre-empts state civil notions regarding the definition of "Indian child."[83]

Later, in a not so attenuated analysis, another Louisiana appellate court adopted the reasoning of *Crews* and the Indiana Supreme Court in *T.R.M.* by holding that ICWA did not apply to an Indian mother's attempt to regain custody of a child placed shortly after the child's birth.[84] The appellate court parroted the decisions in *Crews* and *T.R.M.* in holding that an Indian mother had no right to withdraw consent to the voluntary termination of her parental rights or to regain the custody of her child, both of which are rights reserved to Indian parents who voluntarily place their children up to the point of termination or adoption,[85] because the act of placing the child in a non-Indian home vitiates the existing Indian family.[86] In addition to these courts, appellate courts in Alabama[87] and Missouri[88] have placed their imprimaturs on a similar existing Indian family exception.

The insinuation in *Crews*, that a state court should be able to unilaterally determine the extent to which Indian parents have maintained

83. ICWA recognizes a tenet of federal Indian law that Indian tribes have the inherent authority to determine their own tribal membership, free of interference from outside jurisdictions. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (finding that the Indian Civil Rights Act, 25 U.S.C. § 1301, did not authorize federal court jurisdiction to enjoin the Santa Clara Pueblo Tribe from applying its membership rules to deny membership to a Santa Clara female member who marries outside her tribe); *In re* Dependency and Neglect of A.L., 442 N.W.2d 233, 235 (S.D. 1989) (noting the Tribe's declaration that a Caucasian child was a member of Tribe not subject to attack in state court). The Louisiana Court ignored this principle when it issued this somewhat bizarre ruling. *See Barbry*, 576 So. 2d at 1021.

84. *In re* Hampton v. J.A.L., 658 So. 2d 331 (La. Ct. App. 1995). There the Louisiana appellate court applied the "existing Indian family" analysis to determine that the child therein was not an Indian child under the Act. *Id.* at 337. The natural mother had placed the child in a non-Indian home shortly after birth, and the natural mother had not lived on the Cheyenne River reservation or any other reservation for almost nine years. *Id.* at 332-33. The court distinguished *Holyfield* on the grounds that the mother in *Hampton* was not attempting to circumvent the rights of the Tribe to be involved in the child's upbringing, thus implying that if she were, ICWA may apply. *Id.* at 335. This analysis should be contrasted with the decision in *Barbry* where the court held that the key in determining whether a child is an Indian is the status of the mother and nothing else. *See Barbry*, 576 So. 2d at 1021. These two cases exemplify how far some state courts will go in attempting to erect hurdles toward the application of ICWA. In one instance invoking a statute which the Thirteenth Amendment arguably rescinded, and in the other holding that an Indian mother who wants her Tribe to participate in her child's life effectively bars the application of ICWA by those wishes, yet theoretically an Indian mother who wishes to circumvent tribal rights has thereby invoked ICWA.

85. *See In re Hampton*, 658 So. 2d at 335. ICWA guarantees the right of an Indian parent to withdraw a consent to adoption up to the point of termination of her parental rights or adoption. *See* B.R.T. v. Social Serv. Bd., 391 N.W.2d 594, 599 (N.D. 1986).

86. In further support of its contention that ICWA was designed by Congress to apply to only Indian children being removed from existing Indian families, the court cited to unsuccessful proposed congressional legislation in 1987 to purportedly overrule the decisions adopting the exception. *See Hampton*, 658 So. 2d at 335. It should be noted that these legislative efforts predated the Supreme Court decision in *Holyfield*, which arguably overruled the exception. Furthermore there have been other *unsuccessful* legislative efforts to codify the exception. *See* H.R REP. NO. 104-542, at 4 (1996).

87. S.A. v. E.J.P., 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990) (holding that a child raised by a non-Indian mother and non-Indian aunt and uncle, with little contact by Indian father, was not an Indian child for purposes of ICWA).

88. C.E.H. v. L.M.W., 837 S.W.2d 947, 952 (Mo. Ct. App. 1992).

sufficient contacts with their tribe to warrant labeling those parents "Indian," has recently been embraced by two California appellate courts which have held that such an interpretation of ICWA is necessary to preserve its constitutionality.[89] These opinions may be harbingers of future trends in many state courts to severely curtail the rights of Indian tribes and parents to regain custody of Indian children both voluntarily and involuntarily removed from them in urban areas far from Indian reservations. The opinions represent such an extreme antipathy for the Indian Child Welfare Act that tribal leaders, and those who perceive problems with ICWA, have attempted to work out their differences to avoid similar public confrontations in an attempt to salvage ICWA.[90]

In the first of the California decisions, *In re Bridget R.*,[91] the court challenged ICWA on almost every premise it is based upon. In *Bridget*, an Indian father who consented to a voluntary relinquishment of his parental rights and placement of his twins with a non-Indian couple in Ohio (in violation of the Indian Child Welfare Act),[92] attempted to

89. *In re* Alexandria Y., 53 Cal. Rptr. 2d 679, 686 (Ct. App. 1996); *In re* Bridget R., 49 Cal. Rptr. 2d 507, 516 (Ct. App. 1996). The conflict in *Bridget R.* was the subject of much media scrutiny because the putative adoptive parents, the Rosts from Ohio, decided not only to litigate their case in the courts of California, but also in the courts of public opinion. *See* David Diamond, *Birth Rights: Custody v. Culture*, USA TODAY, Oct. 15, 1995, at A4. After the Rosts lost in the California trial court, they contacted their representative in the House of Representatives, the Honorable Deborah Pryce, who seized the issue and proposed several bills to amend ICWA and exclude from its coverage those children who were not members of a tribe at the time the child custody proceedings commenced in state court. After the California appellate court ruled ICWA unconstitutional in certain situations, Pryce proposed a bill, which eventually became Title III of the Adoption Assistance and Stability Act, which would have codified the California appellate court's decision with one major exception. Whereas the California appeals court in *Bridget R.* seemed to imply that ICWA was unconstitutional when applied to a child who was not a member of a tribe but who was eligible to become a member and whose natural parents did not have substantial contacts with the tribe, the proposed bill would have excluded ICWA coverage for any Indian child, member or not, whose parents did not have sufficient political, cultural or economic ties to the Tribe. The significance of this distinction was apparently lost upon Representative Pryce. Ironically, another California appeals court decision essentially adopted the proposed amendment when it later held that ICWA was unconstitutional regardless of a child being a member. Title III passed the House, but was killed by the Senate Committee on Indian Affairs. In retrospect, it appears that the whole dispute could have been avoided had the adoption attorney not advised the father to conceal his Indian heritage when consenting to the adoption by the Rosts. *See* A Bill to Amend the Indian Child Welfare Act of 1978, S. 1962, 104th Cong. (1996).

90. After Title III of the Adoption Promotion and Stability Act was killed by the Senate Committee on Indian Affairs, several tribal leaders and private adoption attorneys got together at the urging of Senator John McCain from Arizona and the National Congress of American Indians to work out their differences on ICWA. The result was a bipartisan bill to amend the act to give tribes, *inter alia*, deadlines to intervene and object to voluntary adoption proceedings and rules to vest tribes with the right to notice in voluntary proceedings. The resolution was submitted by Senator McCain and passed the Senate. 142 CONG. REC. S11455, S11456 (daily ed. Sept. 26, 1996). Later, Senator McCain added a provision which would have explicitly rejected the existing Indian family exception. *See* S. REP. NO. 104-335 (1996), *available in* 1996 WL 546714. However, the congressional term ended before the House had the opportunity to address the bill. Similar bills are now pending before the 105th Congress.

91. 49 Cal. Rptr. 2d 507 (Ct. App. 1996).

92. *See In re Bridget R.*, 49 Cal. Rptr. at 515. Apparently, the consents were not executed in conformance with 25 U.S.C. §1913(a). *Id.*

withdraw his consent and regain custody of the children.[93] The court of appeals reversed a lower court decision invalidating the relinquishment and placing the twins with their paternal grandparents, and remanded to the trial court for a determination of whether the parents had significant "social, cultural or political relationships" with the tribe.[94] This examination was necessary, according to the appellate court, to preserve the constitutionality of the Indian Child Welfare Act. The *Bridget R.* court held that the application of the Indian Child Welfare Act to the facts therein would violate the substantive due process rights of Indian children,[95] the Fourteenth Amendment Equal Protection Clause,[96] and the Tenth Amendment in cases where neither parent has substantial contacts with a tribe.[97] In an attempt to comport its decision with *Holyfield*, the court held that whether the Indian child, (as opposed to an Indian parent) in question has ties to the tribe is irrelevant because *Holyfield* had rejected a similar line of argument, and that an Indian child who never resided with a "real" Indian family was not being removed from an existing Indian family.[98] Although this decision is limited to voluntary placements by "unreal Indians," nothing in the language of the

93. It was later discovered that the natural father had originally sought to reveal his Indian ancestry but was counselled not to do so by the adoption attorney for the putative adoptive parents. *See* S. 1962.

94. *See Bridget R.*, 49 Cal. Rptr. 2d at 537.

95. *See id.* at 526.

96. *See id.* at 528. The Court's reasoning on the equal protection claim appears to be as follows: since most tribes determine membership by some genetic factors, such as descendancy from a tribal member, these determinations are inherently racial in nature. *Id.* Therefore, unless there is more than a genetic connection to a tribe, i.e., the significant cultural, social, or political ties test, the application of ICWA is unconstitutional. *Id.*

97. *Id.* at 528-29. The court held that the Indian Commerce Clause only permits Congress to instruct state courts to apply federal law to Indians, as defined by the relevant tribe, if that person maintains some political, social, or cultural ties to that tribe. *Id.* Otherwise, according to the *Bridget R.* court, states are being instructed to apply a different set of laws to persons who are not real Indians because they do not maintain the sufficient tribal contacts.

98. *Id.* at 522. The court indicated that under *Holyfield*, the Supreme Court implicitly rejected the notion that the existing Indian family exception should apply when an Indian child who has never resided with Indian family members is involved in a child custody proceeding. *Id.* Instead, the court suggested that the real inquiry should be whether the natural parents have significant social, political or cultural ties with the Tribe. *Id.* The court seemed to be implying that even in cases where an Indian parent has had no contact with the child, as long as the parent maintains significant ties to the Tribe, the child would be considered Indian. *Id.* This, of course, is a corruption of the original purpose cited by the courts that adopted the exception which looked to the contacts the child had with an Indian family.

decision would apparently restrict its reasoning to the involuntary removal of Indian children from "unreal Indians."[99]

What is more, the *Bridget R.* court had the judicial gumption to pronounce in its ruling what its predecessors insinuated but did not directly say: certain state courts believe that the Indian Child Welfare Act is being applied to children and parents who are not "real" Indians and that, irrespective of whether an Indian tribe declares a person a member, a state court should be able to second guess that determination and weed out the "real" from the "counterfeit" Indians.[100] As the court exclaimed, "the unique values of Indian culture will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture."[101] Thus, according to *Bridget R.*, assimilated Indians are not real Indians and ICWA has no applicability to such persons who should be solely governed by state law.[102]

Although the *Bridget R.* court deserves high marks for its brazenness, its logic is highly strained.[103] The decision typifies the Anglo-dominated value judgments utilized by state courts which compelled Congress to enact ICWA: "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*

99. The court reasoned that ICWA's purpose is not served by an application of the Act where the child may be of Indian descent but neither the child nor either parent maintains any significant social, cultural, or political relationships with Indian life. *Id.* at 529. This suggests that even in a case where a child is being involuntarily stripped from Indian parents, ICWA need not be applied unless the parents are "real Indians." Such a result is an even more alarming possible extension of the analysis because in many of the cases where Indian children are being removed involuntarily from their parents, the reasons cited are typically behavior that is most antithetical to traditional native practices. Could those reasons, however, now be utilized by the state to argue that a person is not truly an Indian because his or her behavior is uncharacteristic of the Indian culture?

100. Such a pronouncement of state authority in this arena could arguably also be extended to allowing state courts to exercise jurisdiction over criminal offenses committed by assimilated Indians in Indian country; exercise civil jurisdiction over torts committed by assimilated Indians in Indian country; deny assimilated Indians preference under various federal statutes including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1994); deny assimilated Indians the right to exercise tribal treaty rights; and the list goes on. All of these statutes are founded upon the political status of tribal affiliation, thus if the affiliation is solely due to racial heritage, according to the *Bridget R.* court, such distinctions are unconstitutional. *See Bridget R.*, 49 Cal. Rptr. 2d at 528.

101. *Id.* at 526.

102. Of course, such a gloss given to ICWA would require, in every case where an Indian child as defined by the Act is involved, a state court to make a determination that the significant political, social or cultural ties test is met.. Such a determination would be needed for the proceedings to go forward, which will undoubtedly result in significant delays while this issue is adjudicated.

103. The *Bridget R.* court restricts its analysis to off-reservation domiciled children, possibly to distinguish its ruling from *Holyfield.* However, California is a *Public Law 280* state, which means state courts can even exercise jurisdiction over reservation-domiciled children. *See* 25 U.S.C. § 1911(a) (1994) (precluding state court jurisdiction except where federal law vests state courts with jurisdiction); *see also infra* note 234, (discussing *Public Law 280*). It is therefore unclear why the decision is restricted to off-reservation children.

prevailing in Indian communities and families."[104] Apparently, the *Bridget R.* court believed that while a state court may not be able to appreciate tribal relations, it is well-suited to determine when such tribal relations do not exist based upon an amorphous notion that Indian people must maintain some political, cultural, or social ties with their tribe to be truly Indian.[105] The court seemed to believe that such a standard is constitutionally required in all cases or ICWA would be based solely upon "genetic heritage," or race, and would thus be unconstitutional.[106]

The biggest difficulty with the *Bridget R.* standard is its subjectivity and susceptibility to both abuse by, and abuse of, state courts.[107] Is an Indian grandmother who has reared two generations of Indian children in Los Angeles County in a manner similar to how her Indian grandmother raised her any less Indian than an Indian activist who tours the country pontificating to non-Indians what it means to be Indian?[108] Inviting state courts into this fray is no less damaging than allowing state courts to judge Indian families based upon the court's own subjective notions of what constitutes "normal" family life.[109] How could state court judges, who Congress found lacking in concrete knowledge of traditional Indian customs and traditions, discern which Indian families were culturally attuned and which were assimilated? When would an

104. 25 U.S.C. § 1901(5) (1994) (emphasis added).

105. This standard should be juxtaposed with the policy of the government in the 1950s to relocate Indians to urban areas away from reservations for the express purpose of assimilating them into urban life. *See* COHEN, *supra* note 21, at 169-170. The result was that many Indians migrated to the urban areas at the promise of employment opportunities. *Id.*

106. *See Bridget R.*, 49 Cal. Rptr. 2d at 528. The court cited to a few considerations it thought relevant in determining whether the parents of an Indian child maintain significant ties to a tribe. *See id.* at 531. They include whether they:

> participated in tribal community activities, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters, or other special periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events which are held in their own locality, or maintained other social contacts with other members of the Tribe.

Id. at 531.

107. When the *Bridget R.* standard was incorporated into legislative action in the form of Title III of the Adoption Promotion and Stability Act, at least one state's attorney general (Nevada) objected to creating a standard for the definition of an Indian child which would require a state court judge to make the difficult determination of whether an Indian child is really "Indian" every time ICWA may be applicable. Letter from Frankie Sue Del Papa, Attorney General, Nevada, to Newt Gingrich, Representative (May 6, 1996) (on file with the author). In addition, Title III added the requirement of a threshold finding that the child involved had some degree of Indian heritage. This potentially could have expanded the pool of children to whom the Act would have applied, thus requiring notice to any tribe which a child may have had any affiliation with.

108. *See* RUSSELL MEANS, WHERE WHITE MEN FEAR TO TREAD: THE AUTOBIOGRAPHY OF RUSSELL MEANS (1995).

109. Kafka would have been proud of the predicament the *Bridget R.* decision creates in California for Indian families. Before the passage of ICWA, they were discriminated against because they were not assimilated enough. Now, they are being denied the protections of federal law because they over-assimilated.

Indian tribe have to be notified of a proceeding involving one of its members—before the determination by the state court judge that the case involved a "real" Indian family or after? Would Indian children who were raised in non-Indian homes always be considered assimilated Indians when they grew up to be parents themselves?[110] In short, *Bridget R.* adopted, part and parcel, a stereotype of Indian people which many non-Indians continue to possess as a way of defeating a federal law.[111]

Another California Court of Appeals believed the *Bridget R.* decision was actually too limiting and that state courts should be able to determine, on a case by case basis, the amount of contacts both the child and parents have had with their tribe and determine the applicability of the act based upon a standard similar to the "totality of the circumstances."[112] Thus, according to the court in *Alexandria Y.*, even if the Indian parent has substantial contacts with the tribe, the state court should nonetheless look to determine whether that parent has imparted those "political, cultural or social" ties to the child and if not, the child should not be considered Indian.[113] The *Alexandria* court coalesced the two different theories of the existing Indian family exception into a one size fits all abstract logic: the *Baby Boy L.* exception, which looks to the amount of contacts the Indian parent has had with the child and deems it irrelevant the parent's tribal affiliations, and the *Crews* exception, which looks to whether the parent who did have contact is really an Indian.[114] The result is, at least in certain districts in California, that if an Indian child has not lived with an Indian family, or has lived with an Indian family that is assimilated, ICWA will not apply in either voluntary or involuntary proceedings.

110. Several of the California decisions before *Bridget R.* involved Indian parents who grew up in non-Indian homes and, not surprisingly, expressed an aversion for the Indian lifestyle. *See, e.g., In re* Baby Girl A., 282 Cal. Rptr. 105, 110 (Ct. App. 1993) (involving an Indian mother raised by non-Indians who expressed a preference to place the child with non-Indians and requested no tribal involvement).

111. *See* FERGUS BORDEWICH, KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY (1996) (describing the phenomenon and how it impacts policy toward native people).

112. *In re* Alexandria Y., 53 Cal. Rptr. 2d 679, 686 (Ct. App. 1996). This case actually was commenced as an involuntary proceeding, therefore extending the *Bridget R.* analysis to cases where Indian parents are having their children removed against their will. *Id.* at 681.

113. *Id.* at 687. It is interesting to note that this was the third time the California Court of Appeals heard an appeal from this case. The first time the appellate court entered a writ of mandamus directing the trial court to apply ICWA based upon the assertion by the Seminole Nation that the child involved was a member. The court held, however, that that ruling was not dispositive on the issue of whether ICWA applied because the existing Indian family exception had not been raised in that appeal. *Id.* at 681.

114. *See id.* at 685. There have been two other California appellate courts which have rejected the existing Indian family exception recognized in *Baby Boy L. See In re* Lindsay C., 280 Cal. Rptr. 194, 201 (Ct. App. 1991); *In re* Junious M., 193 Cal. Rptr. 40, 46 (Ct. App. 1983). The *Bridget R.* court purported to reconcile its decision with these cases on the grounds that those courts failed to delve into the ties of the Indian parents to their tribe. *Id.* at 686 n.8.

4. *The Indian Home Exception and Evidentiary Exceptions*

Two other variations of the existing Indian family exception need to be discussed before examining court decisions that have rejected the doctrine. At least four state courts have adopted a limited existing Indian family exception that holds that even though the Indian Child Welfare Act may apply to a particular proceeding, a party advocating for a foster care placement or termination of parental rights over an Indian child need not produce qualified expert witnesses when the removal or termination is not based upon culturally biased factors.[115] Under this line of reasoning, a state court need not hear from a party with knowledge of Indian child-rearing practices if the alleged ground for removal of the child does not pertain to traditional child-rearing practices.[116] Of course, it is difficult to comprehend a party asking for the removal of an Indian child on the ground that the child is being raised in a traditional way contrary to non-Indian practices. However, that seems to be the logic of these cases.[117]

The Kentucky Supreme Court, certainly not a bellwether of Indian law, added its voice to this simmering debate by adopting yet another version of the existing Indian family exception. The Kentucky exception focuses on the role Indian parents play in bringing up a child and ignores the role of all other Indian family members.[118] In *Rye v. Weasel*, for example, an Indian child was placed with her Indian uncle and his non-Indian wife after the natural mother was unable to care for the child, by a tribal court which retained exclusive jurisdiction over the child. After the uncle and wife separated, the wife petitioned a Kentucky court for custody of the child. The Tribe and uncle claimed that the tribal court retained exclusive jurisdiction because the child was a ward of the tribal court.[119] On appeal, the Kentucky Supreme Court held that the Indian Child Welfare Act was inapplicable because the child had, with the exception of the first nine months of her life, not lived in an Indian home.[120] The court completely ignored the fact that the child lived

115. *See* Long v. State Dep't Human Serv., 527 So. 2d 133, 136 (Ala. Civ. App. 1988); *In re* N.L., 754 P.2d 863, 867 (Okla. 1988); Children's Serv. v. Campbell, 857 P.2d 888, 889 (Or. Ct. App. 1993); Juvenile Dep't v. Tucker, 710 P.2d 793, 799 (Or. Ct. App. 1985).

116. This is similar to the argument adopted by the *Bridget R.* court that unless an Indian child is being removed from an un-assimilated Indian family ICWA should be inapplicable. *See In re* Bridget R., 49 Cal. Rptr. 2d 507, 531 (Ct. App. 1996).

117. To these courts' credit, they do apply the majority of the requirements of ICWA even though they hold that the families involved therein are not being culturally discriminated against.

118. Rye v. Weasel, 934 S.W.2d 257, 263 (Ky. 1996).

119. *See id.* at 259; *see also* 25 U.S.C. § 1911(a) (1994) (giving tribal courts exclusive jurisdiction over Indian children made wards of tribal courts); *In re* Parental Placement of M.R.D.B., 787 P.2d 1219, 1223 (Mont. 1990).

120. *Rye*, 934 S.W.2d at 260.

almost her entire life with her Indian uncle, an "Indian custodian" under the Act entitled to be treated in all legal respects as the parent of the child.[121] To further bolster its astonishing contention that ICWA was inapposite, the court noted that the child "ha[d] grown up in a non-Indian environment involving public schools and religious faith as well as complete integration in the community. She does not speak the Sioux language and does not practice its religion or customs."[122] Interestingly, the Kentucky Supreme Court relied heavily on the Oklahoma Supreme Court's decision in *S.C.* and reasoned that since Oklahoma has a substantial population of Indians, the exception must be doctrinally sound.[123] Apparently unbeknownst to the Kentucky Supreme Court, the Oklahoma legislature repealed the exception in 1995 through amendment of the state Indian Child Welfare Act.[124]

The Kentucky decision demonstrates how far the exception may creep jurisdictionally. *Weasel* was the first time a state court applied the exception to defeat a tribal court's exclusive jurisdiction. This may foreshadow state courts exercising jurisdiction over Indian children located on the reservation, whom the state courts have determined are not really Indians, in contravention of ICWA,[125] as well as its federal predecessors.[126]

5. *Cases Rejecting the Existing Indian Family Exception*

It is interesting to note that the Kentucky Supreme Court dismissed with only a vague reference, several state court decisions which had rejected the exception, explaining them away as fact-specific cases which had no bearing on the issues confronting the Kentucky court.[127] In fact,

121. *See* 25 U.S.C. § 1903 (1994). Under ICWA an "Indian custodian" is defined as an Indian person who has been granted legal custody of an Indian child under tribal or state law or a person to whom the parent has vested custody. *See* § 1903(6). If a person is determined to be an Indian custodian under ICWA that person is entitled to exercise the same rights as a parent under ICWA, except that person cannot veto a transfer of jurisdiction back to the tribal court. Bestowing the status of Indian custodian upon an Indian person is Congress's attempt to make state courts cognizant of the fact that in many Indian families children are raised not by their parents, but by extended family members. *See, e.g.*, Donna Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1, 6 (1990).

122. *Rye*, 934 S.W.2d at 264.

123. *Id.* at 261-62.

124. *See* OKLA. STAT. ANN. tit. 10, § 40.3 (West Supp. 1997). The Kentucky Supreme Court also paid substantial attention to the fact that the existing Indian family exception was the subject of a repeal effort by Congress in 1987 and 1988 and reasoned that since this effort was unsuccessful, Congress intended the exception to exist. However, many persons assumed after the United States Supreme Court's decision in *Holyfield* that the exception had been repudiated. In addition, it is difficult to understand why the analysis of the Oklahoma courts adopting the existing Indian family exception was of great precedential value when the state legislature there had repealed the exception.

125. *See* 25 U.S.C. § 1911(a) (1994).

126. *See* Fisher v. District Court, 424 U.S. 382, 389 (1976) (holding that state courts have no subject matter jurisdiction to grant adoption of a reservation-domiciled child).

127. *See Rye*, 934 S.W 2d at 261.

it is unfair to leave the reader with the impression that the majority of state courts have concocted this judicially created exception to defeat the interests of Indian tribes and children. Many state courts have rejected the existing Indian family exception as being contrary to the plain language of the statute itself.[128] One of the most thoughtful decisions rejecting the exception is the Illinois Court of Appeal's decision in *In re Adoption of S.S.*[129] This case involved an Indian child who had lived most of his life with a non-Indian father, who died of AIDS, leaving the natural mother, who resided in Indian country, with an apparent right to custody.[130] The Illinois Court of Appeals thoroughly analyzed the decisions adopting the exception and the policy statements made in support of the exception and ultimately found the analysis wanting.[131] Specifically, the court noted that it is improper to examine the legislative history behind a particular statute when the language of the statute is clear and unambiguous. In addition, the court disagreed with the proposition that applying the Act to cases where Indian children have not lived with Indian family members violates the intent of Congress, noting that preserving the bond between child and tribe was another goal of Congress when it enacted ICWA.[132]

The New Jersey Supreme Court in 1988,[133] and the Montana Supreme Court[134] in 1996 also rejected an exception to the operation of ICWA when an Indian child has not lived with an Indian family. The Montana Supreme Court decision is interesting because it is the first court to directly address the constitutionality of ICWA in light of the two California appellate court decisions limiting its application purportedly to preserve its constitutionality. In a case involving a dispute between a

128. *See In re* Adoption of T.N.F., 781 P.2d 973 (Alaska 1989); *In re* Coconino County, 741 P.2d 1218 (Ariz. Ct. App. 1989); *In re* Baby Boy Doe, 849 P.2d 925 (Idaho 1993); *In re* J.R.H., 358 N.W.2d 311 (Iowa 1984); *In re* Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996); *In re* T.J.J., 366 N.W.2d 651 (Minn. Ct. App. 1985); *In re* Adoption of Riffle, 922 P.2d 510 (Mont. 1996); *In re* Adoption of Child of Indian Heritage, 543 A.2d 925 (N.J. 1988); *In re* Oscar C. Jr., 559 N.Y.S. 531 (N.Y. Fam. Ct. 1990); Quinn v. Walters, 845 P.2d 206 (Or. Ct. App. 1993); *In re* Baade, 462 N.W.2d 485 (S.D. 1990); *In re* DAC, 933 P.2d 993 (Utah Ct. App. 1997); *see also,* Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act,* 69 N.D. L. REV. 465 (1993).

129. 622 N.E.2d 832 (Ill. App. Ct. 1993).

130. *See In re* Adoption of S.S., 622 N.E.2d 832, 834 (Ill. App. Ct. 1993). The Illinois Supreme Court subsequently rejected the appellate court's holding that when a custodial parent dies the domicile of the child automatically reverts to the domicile of the non-custodial parent. *In re* S.S., 637 N.E.2d 935, 936 (Ill. 1995).

131. *S.S.*, 622 N.E.2d at 838.

132. *Id.* at 840. The Illinois Supreme Court reversed the appellate court's decision that the Fort Peck tribal court had exclusive jurisdiction over the child, but with the exception of one concurring opinion, the existing Indian family exception was not mentioned. *See In re* S.S., 637 N.E.2d 935 (Ill. 1995). This case garnered some media attention because of the fact that the natural mother in this matter died shortly after the Illinois Supreme Court decision. Ted Gregory, *Sioux Tribe Keeps Custody Fight Alive,* CHI. TRIB., Dec. 27, 1995, at 1, *available in* 1996 WL 2636944.

133. *In re* Adoption of Baby Child, 543 A.2d 925 (N.J. 1988).

134. *In re* Adoption of Riffle, 922 P.2d 510 (Mont. 1996); *see also In re* DAC, 933 P.2d 993 (Utah Ct. App. 1997).

non-Indian couple and an Indian uncle over the rights to adopt the Indian child, the court gave short shrift to the non-Indian couple's argument that applying the placement preference provisions of ICWA to an Indian child who allegedly had lived most of her life with the non-Indian couple would violate the substantive due process rights of the child. The Indian uncle successfully relied on the Supreme Court decision in *Holyfield,* stressing that the Indian Child Welfare Act seeks to preserve not only the cultural integrity of Indian children, but also the cohesiveness of Indian tribes by maintaining a bond between tribe and child.[135]

Numerous other state courts have expressly rejected the application of the existing Indian family exception.[136] However, if Congress sought uniformity in the application of this federal statute, as the Supreme Court implied in *Holyfield*, that objective is being frustrated by state courts which continue to insist that the Act should not apply to certain Indian children. Even among the states which have adopted the exception there is no uniformity. Certain states look to whether the Indian child has resided for a substantial period of time with Indian family members;[137] others look exclusively to whether the child resided with an Indian parent.[138] Some states look to whether the Indian parents with whom the child has resided, or would reside if returned, have substantial ties to the tribe of affiliation.[139] Still others look to the nature of the allegations in a removal petition to determine if those issues are susceptible to cultural abuse. Finally, some states apply state laws to determine the "race" of the child in the face of federal law which dictates that determination.[140]

6. *Implications of the Existing Indian Family Exception*

Why is the continued expansion of the existing Indian family exception by state courts noteworthy in our federalist scheme? It is not only that these decisions appear to circumvent the intent of Congress to ameliorate the almost 100 year history of the displacement of Indian

135. *Id.* at 514.

136. *See In re* Adoption of T.N.F., 781 P.2d 973 (Alaska 1989); *In re* Coconino County, 741 P.2d 1218 (Ariz. Ct. App. 1989); *In re* Baby Boy Doe, 849 P.2d 925 (Idaho 1993); *In re* J.R.H., 358 N.W.2d 311 (Iowa 1984); *In re* Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996); *In re* T.J.J., 366 N.W.2d 651 (Minn. Ct. App. 1985); *In re* Adoption of Riffle, 922 P.2d 510 (Mont. 1996); *In re* Adoption of Child of Indian Heritage, 543 A.2d 925 (N.J. 1988); *In re* Oscar C. Jr., 559 N.Y.S. 531 (Fam. Ct. 1990); Quinn v. Walters, 845 P.2d 206 (Or. Ct. App. 1993); *In re* Baade, 462 N.W.2d 485 (S.D. 1990).

137. *See* S.A. v. E.J.P., 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re* Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988); *In re* Baby Boy L., 643 P.2d 168 (Kan. 1982); *In re* S.C., 833 A.2d 1249 (Okla. 1992).

138. Rye v. Weasel, 934 S.W.2d 257, 263-64 (Ky. 1996).

139. *In re* Bridget R., 49 Cal. Rptr. 2d 507 (Ct. App. 1996); *In re* Crews, 825 P.2d 305 (Wash. 1992).

140. Barbry v. Dauzat, 576 So. 2d 1013, 1021-22 (La. Ct. App. 1991).

children, but more importantly, these courts seem to engage in redrafting federal legislation with federal impunity. Louisiana can apply a pre-slavery civil code to defeat the application of federal law and California courts can redefine "Indian" in a manner that renders the majority of non-reservation domiciled Indians "counterfeit" Indians. Meanwhile, Indian tribes who are wards of the federal government and are legalistically entitled to the protection of the federal government from the abuses of state entities,[141] must sit idly by and see their children perhaps permanently distanced from any contact with the tribe.

Unlike most federal statutes governing the protection of children, ICWA has no federal financial linchpin and therefore the federal government cannot use the threat of withheld federal dollars as leverage to ensure compliance.[142] This makes the potential availability of a federal court remedy even more pressing in these cases. Most importantly is the appearance to both Indian tribes and states that the Indian Child Welfare Act is primarily a state court issue which the federal courts have no role to play in implementing. Such a grant of exclusive authority to a state entity is oftentimes alarming to Indian tribes as it has often served as a precursor to a diminution of sovereignty.[143] A federal remedy is a sine qua non to effective enforcement of ICWA.

II. USING THE BEST INTEREST OF THE CHILD STANDARD TO DENY TRANSFERS

Another area of wildly disparate rulings with regard to the application of the Indian Child Welfare Act concerns the application of 25 U.S.C. § 1911(b), the transfer of jurisdiction over a child custody proceeding to tribal court. Section 1911(b) is intended to be a purely

141. It has been recognized that the United States government has an obligation o protect the "assets" of Indian tribes against the excesses of state government. *See, e.g.*, Arizona v. California, 376 U.S. 340, 344-45 (1964) (discussing the intervention of the United States in a suit involving two states disputing water rights where the government had failed to adequately represent the tribes' interest resulting in a finding of a breach of trust responsibility). It is not a far stretch to extend the trust responsibility to the protection of a tribe's "most vital resource," its children. *See* 25 U.S.C. § 1901(3) (1994).

142. States receive billions of federal dollars to implement child welfare programs such as Title IV-E of the Social Security Act in their state courts. 42 U.S.C. § 670 (1994). Many of these contain requirements allowing the federal government to sanction states that fail to comply with federal mandates. However, until 1995 there was no possibility of a federal sanction for a state or state court that failed to admonish the directives of ICWA. That has changed slightly with an amendment to Title IV-B of the Social Security Act in 1995 requiring compliance with ICWA and joint coordination with Indian tribes in implementing family preservation programs. *See* Social Security Amendments Act of 1994, Pub. L. No. 103-432, 108 Stat. 4398 (codified at 42 U.S.C. § 620 (1994)).

143. *See, e.g.*, 18 U.S.C. § 1162 (1994); 25 U.S.C. §§ 1321 - 1326 (1994); 28 U.S.C. § 1360 (1994). Section 1162, often referred to as *Public Law 280*, gave certain state courts jurisdiction over civil causes of action and criminal matters arising within Indian country and gave other states the option to exercise that jurisdiction. The law was condemned by Indian leaders who saw the vesting of states with any authority over Indian country as an unwarranted intrusion into their sovereign powers. *See* SEC. INT. REP. 273 (1954).

procedural section which requires a state court to transfer jurisdiction over foster care or termination of parental rights proceedings from state court to tribal court absent objection by either parent or the finding of "good cause" to deny the transfer. Good cause is not defined under the statute, but is somewhat fleshed out in the BIA Guidelines for state courts which, although not federal regulations, have been followed by many state courts. [144]

The transfer provisions of the Indian Child Welfare Act, referred to by the United States Supreme Court as the "presumptive jurisdictional" provisions,[145] were designed to maximize tribal decision-making authority over Indian children and their placements by presuming in most circumstances that a tribal court judge would be in a better position to decide a case involving an Indian. This right of the tribe to determine the fate of Indian children is balanced against the paramount right of the parents to overrule a transfer of jurisdiction by objecting. Once a parent objects, transfer cannot take place notwithstanding the apparent merits of a transfer.[146]

"Transfer" under the Act does not refer to a physical transfer of custody of an Indian child, but merely a legal transfer of the authority to make decisions regarding the placement of said child. So, for example, nothing in the Act prohibits, and this happens frequently, a tribal court from gaining jurisdiction over a proceeding but then not altering placement, so that the child involved remains in the identical placement the child was in immediately preceding transfer, which may even be the custody of a state agency.[147] Additionally, once jurisdiction is transferred back to the tribal court, the Indian Child Welfare Act ceases to apply unless the relevant tribal court has incorporated the provisions of that law into its code or ordinances. Therefore, transfer of a case back to a tribal court neither defeats the rights of a person arguing for a placement of an Indian child, nor does it foreshadow any decision regarding the placement of an Indian child.[148]

State court judges have been indoctrinated, however, to believe that every decision they make in a proceeding involving a child must be

144. *See* State Courts—Indian Child Custody Proceedings; Final Guidelines, 44 Fed. Reg. 67584 (1979).

145. Mississippi Band Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

146. *See In re* Maricopa County, 922 P.2d 319, 323 (Ariz. Ct. App. 1996)(stating that even though the natural mother of the child was schizophrenic and the guardian ad litem consented to transfer, the court erred in transferring the case to tribal court over the mother's objections).

147. *See* B.J. JONES, INDIAN CHILD WELFARE ACT HANDBOOK 35 (1995).

148. This was proven by two very well publicized cases where, after long and arduous litigation undertaken by non-Indian couples to keep child custody proceedings involving children they were wishing to adopt out of tribal court, the couples were permitted by the tribal court to retain physical custody of the children. *See Holyfield*, 490 U.S. at 53-54; *In re* Adoption of Halloway, 732 P.2d 962 (Utah 1986).

done in the best interest of that child, and view proceedings involving Indian children no differently. Despite this standard practice, the Indian Child Welfare Act conspicuously omits reference to this term of standard parlance frequently used in child welfare decisions: the best interest of the child.[149] In only two sections of the Act is the magical term best interest of the child utilized; in the congressional declaration of policy,[150] and in a section regarding the setting aside of an adoption of an Indian child.[151] Several courts have opined that a proper implementation of the Act serves the best interest of the Indian child because it makes it extremely difficult for a state court to approve of an action or placement which tears the child asunder from the tribe and the child's extended tribal family.[152]

The question remains as to whether the best interest of the child standard should govern a decision to transfer jurisdiction over a child custody proceeding to a tribal court. At first blush, one might respond in the affirmative because of the perception that changing a child's environment will obviously cause an impact on that child. After further insight, it is apparent that the decision to transfer jurisdiction really has no impact upon the child, except to optimally permit a tribal judge, who would have more perspicacity into the needs of Indian children, to make decisions concerning the children's futures.[153] Transfer only relays the authority to render the decision as to the best interest of the child from one court to another, and does not ordain what that decision will be. To assume otherwise would be to conjecture that a tribal court will not act in a child's best interest.

Some state courts have readily sanctioned the notion, however, that they should be able to decide before transfer whether they believe the tribal court will act in the best interest of the child after transfer by claiming that a transfer of jurisdiction can be denied on the basis that such a transfer would not be in the best interest of the child.[154] This theory, as espoused by several state courts, allows state court judges to deny trans-

149. The origins of this frequently invoked nomenclature in proceedings involving children may be the Goldstein, Freud and Solnit book. GOLDSTEIN ET. AL., BEYOND THE BEST INTEREST OF THE CHILD (1973).

150. 25 U.S.C. § 1902 (1994).

151. 25 U.S.C. § 1916(a) (1994).

152. The legislative history actually reveals that Congress believed that a proper implementation of the Act itself would be in the "best interest of an Indian child." *See* H.R. REP. NO. 95-1386, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530.

153. Yavapai Apache Tribe v. Mejia, 906 S.W.2d 152, 169 (Tex. Ct. App. 1995). This case contains an excellent discussion of utilizing the best interests standard to deny transfers and why it seems inconsistent with the intent of Congress. *Id.*

154. Courts that have embraced this reasoning include Montana, South Dakota, South Carolina, Nebraska, and Arizona. *See In re* Maricopa County, 828 P.2d 1245 (Ariz. Ct. App. 1991); *In re* C.W., 479 N.W.2d 105 (Neb. 1992); Department Soc. Serv. Bd. v. Coleman, 399 S.E.2d 773 (S.C. 1990); *In re* T.S., 801 P.2d 77 (Mont. 1990); *In re* J.J., 454 N.W.2d 317 (S.D. 1990).

fers to tribal courts if the state court judge does not fancy the planned placement of a tribal court or does not approve of an anticipated action of the tribal court.

Like the existing Indian family exception, the use of the best interest of the child standard to deny transfers of jurisdiction back to tribal courts is another example of state judicial exception-making that does violence to the language of the statute itself in an attempt to craft ICWA into something which state court judges feel comfortable applying. Frequently, this exception is invoked by state court judges to avoid transferring jurisdiction over Indian children back to tribal courts when Indian children have been placed (oftentimes in violation of the placement preference provisions) with non-Indian foster or adoptive homes. State courts strive to keep the children where they have bonded, especially when they are convinced that the tribal court will negate the placement.[155] More often than not, in certain publicized cases where parties have fought hard to defeat tribal court jurisdiction, this presumption has proved erroneous.[156] Yet, this misgiving continues to be reflected in many state court decisions.

For example, one of the first courts to adopt the argument was the Oklahoma Supreme Court in *Matter of N.L.*,[157] where the court upheld the denial of a transfer petition based upon the fact that the child in question was receiving good care under state wardship, had roots in the area, and the state court was working toward reuniting the child with the mother.[158] Ergo, the court, apparently assuming that all these positives in the child's life would end upon transfer, denied the request on the ground that it would be contrary to the best interest of the child.

The *N.L.* court relied heavily upon the Montana Supreme Court's decision in *In the Interest of M.E.M.*[159] where the Montana Supreme Court remanded a termination of parental rights proceeding back to the trial court for failure to appoint counsel for the Indian mother.[160] In so doing, the court also addressed the mother's argument that the case should have been transferred back to the Standing Rock Sioux Tribal Court. The trial court had denied transfer primarily based upon the testimony of a state social worker that she was opposed to transfer because the Tribal court would not tell her what the future plans for the child

155. This appeared to be the case in the Montana decision in *T.S.*, the South Dakota decision in *J.J.*, as well as the Nebraska decision in *C.W.*, wherein the state courts were critical of the anticipated tribal court placements of Indian children.

156. *See, e.g.*, Mississippi Band Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); *In re* Adoption of Halloway, 732 P.2d 962 (Utah 1986).

157. 754 P.2d 863 (Okla. 1988).

158. *See In re* N.L., 754 P.2d 863, 869 (Okla. 1988).

159. 635 P.2d 1313 (Mont. 1981). Readers should be aware that there are numerous decisions from the Montana Supreme Court with the same name.

160. *In re* M.E.M., 635 P.2d 1313, 1317 (Mont. 1981).

were and because she believed that the Tribal court would allow the child to be sexually molested. The Montana court, while not ruling that such testimony constituted good cause, held that transfer can be denied based upon a showing of clear and convincing evidence that transfer would be contrary to the best interest of the child.[161] Thus the Oklahoma court was apparently persuaded that a trial court should be able to peer beyond the issue of transfer and determine whether the tribal court's putative placement decision will serve what is perceived to be the child's best interest.

Montana explicitly adopted the best interest of the child standard as the primary focus in determining transfer of jurisdiction issues in *In re T.S.*[162] The court held that it would be contrary to the best interest of an Alaskan native child to remove her from her foster home in Montana and to return her to her native home in Alaska because of the separation trauma such a move would cause.[163] The court distinguished this best interest of the child standard from the one typically utilized in dependency and neglect proceedings and custody determinations, though the legal impact of such a distinction is lacking.[164]

Other state courts have similarly questioned the putative decisions of tribal courts on placement issues in deciding that transfer of jurisdiction would be contrary to the best interest of an Indian child if it results in a break-up of the present placement.[165] In *In re Robert T.*,[166] a California appeals court held that considering the child's best interests was an appropriate consideration in denying a transfer request of the Santo Domingo Pueblo Tribe, which aspired to place an Indian child with his extended family members. The trial court held that placement with such persons would be contrary to the child's best interest because the child had bonded with the present non-Indian foster adoptive parents, who had become his psychological parents, and that a move to the reservation would cause the child irreparable harm.[167] The *Robert T.* court appeared to be making a decision regarding altering the placement preferences as a way of defeating a transfer request of the tribe,

161. *Id.*

162. 801 P.2d 77 (Mont. 1990), *cert. denied sub nom.* King Island Nation's Community v. Montana Dept. Soc. Serv., 500 U.S. 917 (1991).

163. *In re* T.S., 801 P.2d 77, 81 (Mont. 1990).

164. *See id.* at 80. The court seemed to imply that even though the parlance was similar to that used in a proceeding where a placement decision regarding a child was being looked at, the transfer issue did not involve all the same issues. *Id.*

165. *See, e.g., In re* J.J., 454 N.W.2d 317, 331 (S.D. 1990) (questioning the wisdom of a placement proffered by a tribe in support of a motion to transfer jurisdiction).

166. 246 Cal. Rptr. 2d 168 (Ct. App. 1988).

167. *In re* Robert T., 246 Cal. Rptr. 2d 168, 174-75 (Ct. App. 1988).

obviously foreshadowing its intent not to comply with the law on adoptive placement.[168]

Just as with the existing Indian family exception to ICWA, there is a divergence of judicial viewpoints on whether the best interest of the child standard should be utilized to disallow transfers of jurisdiction to tribal courts.[169] The Illinois appellate court decision of *In re Armell*[170] involved a guardian ad litem's objection to a transfer of jurisdiction on the ground that the best interest of the child was not considered by the trial court. The court, relying upon *Holyfield* and *Halloway,* held that the best interest of the child was a relevant consideration in determining placement but was an illegitimate consideration in determining which court should decide placement.[171] The court also rejected the notion that Illinois law required the court to look to the best interest of the child standard in every decision the court made and held that *Holyfield* prohibits the application of state law which would contribute to a lack of uniformity in the application of ICWA.[172] Courts in Texas,[173] Colorado,[174] New Mexico,[175] Utah,[176] and Minnesota[177] have similarly rejected the notion that a state court should be able to decide whether allowing a tribal court to decide the fate of an Indian child is in that child's best interest.

Interestingly enough, just as the United States Supreme Court in *Holyfield* implicitly repudiated the viability of the existing Indian family exception, much of its language also militates against the adoption of the best interest of the child standard in deciding jurisdictional issues. In response to an argument by the non-Indian adoptive parents in *Holyfield*

168. *Id.* In some of the cases where courts have denied transfer because it purportedly would be contrary to the best interest of the child, the courts seemed convinced that the placement chosen by the social services agency for the Indian child was in the child's best interest without even assessing whether efforts were made to find a placement in accordance with ICWA. *See In re* Adoption of M. v. Navajo Nation, 832 P.2d 518, 522 (Wash. Ct. App. 1992).

169. *See* Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Standard*, 27 GONZ. L. REV. 353, 370-75 (1992) (reviewing these cases).

170. 550 N.E.2d 1060 (Ill. App. Ct. 1990).

171. *See In re* Armell, 550 N.E.2d 1060, 1065 (Ill. App. Ct. 1990) (citing *In re* Halloway, 732 P.2d 962 (Utah 1986)). In *Halloway*, although the issue was the exclusive jurisdiction of the Navajo tribal courts under § 1911(a), the court in strong language indicated that psychological bonding between a child and his foster parents was not a sufficient reason to deny a tribal court the exercise of its appropriate jurisdiction. *See In re* Halloway, 732 P.2d 962, 971 (Utah 1986).

172. *In re Armell*, 550 N.E.2d at 1065-66.

173. *See* Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152 (Tex. App. 1995). The court there engaged in a thorough analysis of the issue and concluded that considering the best interest of the child in deciding a transfer issue "defeats the very purpose for which ICWA was enacted, in that it allows Anglo Cultural biases into the analysis." *Id.* at 169. The court also stated that questions of best interest were "appropriate to issues of placement," but not a transfer of jurisdiction. *Id.*

174. *In re* J.L.P., 870 P.2d 1252, 1258-59 (Colo. Ct. App. 1994).

175. *In re* Ashley Elizabeth R., 863 P.2d 451 (N.M. Ct. App. 1993).

176. *See In re Halloway*, 732 P.2d at 962.

177. *In re* B.W., 454 N.W.2d 437 (Minn. Ct. App. 1990).

that a decision to vest the Choctaw tribal court with jurisdiction over the twins would be tantamount to stripping them away from the only home they had ever known, the Court rebuffed the suggestion that such a fear was a relevant factor, holding: "Whatever feelings we might have as to where the twins should live . . . 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 regarding these children—not what that decision should be. The law places that in the hands of the Choctaw court."[178] Once again, however, state courts have been remiss in getting this message and the result is a cornucopia of conflicting decisions on another key area of jurisdictional disputes under ICWA.

The peril associated with allowing state courts to utilize a best interest of the child standard to determine a transfer issue is that it borders on licensing state courts to question the competency of tribal courts to decide the fate of Indian children, something expressly prohibited by the BIA guidelines and obviously not condoned by Congress.[179] If anything, Congress was questioning the competency of state courts to decide these issues involving Indian children.[180] Many of these state court decisions, without overtly declaring it, surmise that the tribal court will act contrary to the best interest of an Indian child.[181] Additionally, as a Texas appellate court has noted, the best interest if the child is such a subjective standard that it potentially may defeat transfer in almost every case.[182] Using the best interest standard may portend the denial of a majority of transfer motions, turning "presumptive" jurisdiction into the exception rather than the rule.[183]

178. Mississippi Band Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989). Even though *Holyfield* involved a question of exclusive jurisdiction under § 1911(a) and not transfer of jurisdiction, it is apparent that the same analysis would apply to a transfer of jurisdiction as that only involves considerations of who makes a decision about a child, not what decision should be made.

179. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 314, 321 (Dep't Interior 1979) (proposed Nov. 26, 1979).

180. This is perhaps why the Supreme Court in *Holyfield* referred to a tribal court's jurisdiction over Indian children domiciled off the reservation as its "presumptive jurisdiction." *See Holyfield*, 490 U.S. at 36.

181. *See, e.g., In re* J.J., 454 N.W.2d 317, 330 (S.D. 1990). The court insinuated that a grandmother of an Indian child was utilizing a tribal court to regain custody of her grandchild so that the child could be sexually abused. *Id.*

182. *See* Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 169 n.11 (Tex. Ct. App. 1995) (citing Jeanne Louise Carriere, *Representing the Native American Child: Culture, Jurisdiction and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 615 (1994)).

183. One of the reasons, perhaps, that the best interest of the child standard is invoked in opposition to transfer requests by tribes or Indian parents is that oftentimes the tribe or an advocate for the tribe will reveal the placement choices the tribe has for a particular child. This leaves the putative choice open to critical analysis by a state court or party opposing transfer. Tribes are under no obligation under ICWA to reveal their plans with regard to the placement of a child after transfer. Nor are tribes obliged to follow through with a placement that is put forward in a state court when a transfer motion is heard. The danger, of course, with such an approach is that many tribes appear in the same court system often and state court judges may have long memories when a particular tribe re-appears in their court.

Additionally, as one author has suggested, the use of this standard to deny transfer allows the dominant non-Indian society to exercise continued dominance over Indian child-rearing practices, in much the same way that forcing Indian families to give up their children for boarding schools did prior to the passage of ICWA.[184] Tribal courts may eventually be compelled to conform their placement decisions to appease non-Indian judges, who often times have an archetype of a family setting that best meets the needs of all children, just to facilitate the exercise of their transfer jurisdiction.

For example, some states have a predisposition against the placement of children in single-parent homes. This was cited by the Bureau of Indian Affairs as a reason many state courts used to defeat the placement of Indian children in Indian homes.[185] However, at least one court has suggested that a state agency should review its policies regarding placements of Indian children to reconcile them with the clear intent of Congress not to judge Indian families with a non-Indian barometer.[186]

Whereas the existing Indian family exception interferes with the tribal prerogative to define its own membership, the increasing number of certain state courts that deny transfers of child custody proceedings to tribal courts using the best interest of the child also adversely impacts the ability of tribes to decide the fate of their children. Both practices are alarming enough to look to federal court intervention for correction.

III. FEDERAL COURT REVIEW OF STATE COURT ICWA DECISIONS

If one accepts the premise that certain state courts are thwarting the intent of Congress as to ICWA and that disparate decisions in these vital areas do not serve the purpose of achieving a uniform federal application of ICWA, the question becomes what role the federal courts should play in enforcing both the intent of the law and in achieving nation wide uniformity. Almost without exception, every federal statute designed to protect the civil rights of an identifiable group against the vagaries of state action is justiciable in federal court except when a state court has

184. *See* Jeanne Louise Carriere, *Representing the Native American Child: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 622 (1994).

185. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 314, 324 (Dep't Interior 1979) (proposed Nov. 26, 1979). This states that "the legislative history (of ICWA) makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition."

186. *See In re* J.R.H., 358 N.W.2d 311, 322 (Iowa 1984). The Iowa Supreme Court criticized the lower court's decision to deny a placement with an Indian mother because of socioeconomic conditions on the Indian reservation. *Id.* The court stated that just as state courts should not act on preconceived notions of what constitutes a good family life in deciding whether to remove an Indian child, such standards should not be used as obstacles to deny placements with Indian families. *Id.*

decided the issue after giving each party a fair opportunity to address the matter.[187] ICWA is engaging though, because without directly saying it, the statute shows a distrust of the competency and institutional capability of state courts to handle proceedings involving Indian children. After all, it was the state courts themselves that were the perceived violators of the civil rights of Indian children and families when Congress finally interceded and enacted ICWA to curtail the authority of those courts.[188]

Did Congress postulate in ICWA that the mere act of passing legislation restraining the limits of state court authority would remedy the abuses of judicial dominion brought to its attention? Alternatively, did Congress anticipate continued violations and provide a federal vehicle in ICWA to overturn erroneous state court decisions? As this article will demonstrate, most federal courts that have encountered attempts by Indian parents and tribes to invalidate state court actions which arguably do violence to the clear language and intent of Congress, have ruled that ICWA was not intended to empower independent federal court scrutiny of state court decisions. The result is that, notwithstanding Congress's discerning focus on state courts as participants in the devastation of Indian families and culture, those state courts continue to have almost unfettered authority to superimpose their own precepts and cultural clichés on Indian families and tribes. Was it Congress' intent to slam the federal courthouse door shut on Indian families and tribes seeking to fulfill the objectives of ICWA?

Congress conspicuously ruminated that there would be violations of ICWA because throughout the statute there are provisions dictating corrective actions to be taken by the courts. For example, 25 U.S.C. § 1913(d) allows any party to a child custody proceeding to withdraw a consent to adoption and invalidate the adoption if the consent was obtained through fraud or duress, provided the adoption has been in effect less than two years.[189] Additionally, another measure of the Act requires a state court to decline an exercise of jurisdiction over any action brought by a party which obtained custody of an Indian child in

187. Of course a well recognized exception to the rule permitting federal courts to exercise jurisdiction over civil rights actions against state officials is the federal full faith and credit clause contained at 28 U.S.C. § 1738 (1994). Section 1738 requires federal courts to grant the same preclusive effect to a state court judgment as the issuing state court would grant. This statute, unless Congress intended otherwise, applies to an action brought under a federal civil rights statute. *See* Allen v. McCurry, 449 U.S. 90, 104 (1980).

188. The situation is somewhat similar to the Civil Rights Act of 1866, which called into question the ability, indeed the willingness, of the state courts to enforce the Fourteenth Amendment and other federal civil rights protections. *See* Robert J. Kaczorowski, *Article: Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 864 (1986).

189. 25 U.S.C. § 1913(d) (1994).

violation of the Indian Child Welfare Act, or who retained custody after a demand for the return of custody by an Indian parent or custodian.[190]

A. SECTION 1914 OF ICWA

The broadest remedial scheme in ICWA, however, is found at § 1914[191] which allows an

> Indian child who is the subject of any action for foster care placement or termination of parental rights under state law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe [to] petition *any court of competent jurisdiction* to invalidate such action upon a showing that such action violated any provision of sections 1911,[192] 1912[193] or 1913 of this title.[194]

The legislative history to this section states that it "authorizes the child, parent or Indian custodian, or tribe to move to set aside any foster care placement or termination of parental rights on the grounds that the rights secured under sections [1911, 1912, or 1913] were violated."[195]

Unlike § 1913(d), § 1914 does not have a timeliness restriction for challenging an action taken in contravention of ICWA. Nor is § 1914 securable to a party challenging a foster care or adoptive placement done in violation of the Indian Child Welfare Act.[196] A party could indisputably collaterally challenge a state court's decision that ICWA does not apply to a particular proceeding because of the existing Indian family exception since such a decree would inevitably result in potential violations of all three sections of ICWA which are subject to invalidation

190. 25 U.S.C. § 1920 (1994). This section was optimally designed to prevent a party from illegally obtaining custody of a child, without following the requirements of § 1913, and then filing a petition with the state court to involuntarily displace an Indian child after the natural parents seeks to regain custody. The Indiana Supreme Court in *In re Adoption of T.R.M.*, has held that this provision does not prevent the state court from finding that an Indian mother abandoned her child after placing the child with a couple shortly after birth, in violation of ICWA. *In re* Adoption of T.R.M., 525 N.E.2d 298 (1989).

191. 25 U.S.C. § 1914 (1994).

192. Section 1911 is the jurisdictional provision of ICWA vesting tribal courts with exclusive jurisdiction over reservation-domiciled Indian children and providing for transfer of jurisdiction over non-reservation domiciled children.

193. Section 1912 governs involuntary foster care and termination of parental rights proceedings and requires notice to the Indian child's tribe, appointment of counsel for the parents or Indian custodian of the Indian child, and delineates the necessary state court findings to justify a foster care placement or termination of parental rights.

194. 25 U.S.C § 1914 (emphasis added). Section 1913 governs voluntary foster care placements and consents to termination of parental rights and sets out the requirements before a voluntary termination or placement will be honored. This section also allows an Indian parent or custodian to withdraw consent and regain custody, and to challenge consents obtained through fraud or duress.

195. *See* H.R. REP. No. 95-1386, at 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.

196. *See* 25 U.S.C. § 1915 (1994) (governing those requirements).

under § 1914.[197] A party could also challenge a state court's decree not to transfer jurisdiction over a proceeding to a tribal court based on the best interest of the Indian child, as this is clearly covered by § 1911(b). On its face, § 1914 seems to be the mechanism to ensure a fair and uniform application of the Indian Child Welfare Act nation wide.

Section 1914 has proven to be a bust, however, insofar as permitting federal court oversight of state court ICWA decisions. To date, no federal court has invalidated an arguably erroneous state court decision because the majority of federal courts have emasculated their authority to do so under the principles of full faith and credit.[198] Section 1914 has proven to be a toothless saber.

One inherent weakness in § 1914 is that Congress did not delineate which court it believed would be a "court of competent jurisdiction" when it enacted ICWA. In a search for the meaning of this term, an examination of the legislative history proves fruitless. By the process of elimination, one would assume that Congress must have intended to vest the federal courts with the authority to review erroneous state court decisions, because it is illogical to believe Congress intended that state courts should be the courts of competent jurisdiction to determine whether state courts applied the law correctly.[199] This is especially true since almost all states prohibit one branch of their court system from collaterally challenging decisions of the other, but instead require that appropriate appellate remedies be utilized.

197. If a state court adopts the existing Indian family exception, it will not apply any of the provisions of § 1911, § 1912 or § 1913 of ICWA, thus denying an Indian tribe notice of a proceeding and the right to intervene. It also denies an Indian custodian the right to court-appointed counsel, the right of Indian parents or the tribe to transfer jurisdiction over a child to tribal court, or perhaps even the right of tribal courts to exercise exclusive jurisdiction over a child custody proceeding.

198. This is not to imply that no federal court has invalidated a policy of a state which is in violation of ICWA. Some federal courts have rescinded state administrative actions which violate ICWA, such as refusing to honor tribal court adoption decrees. *See* Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 562 (9th Cir. 1991) (invalidating an Alaskan policy of denying full faith and credit to Alaskan native village adoption decrees). These actions did not involve the validity of a prior state court decision, something clearly existing in those court decisions adopting the existing Indian family exception or the best interest of the child standard in denying transfers.

199. *See, e.g.*, Slone v. Inyo County Juvenile Court, 282 Cal. Rptr. 126, 130 (Ct. App. 1991) (rejecting an attempt by a litigant to invoke the jurisdiction of a California superior court, under §1914 of ICWA, to invalidate an action taken by the juvenile court). The *Slone* court rejected the notion that Congress had intended to supersede the California jurisdictional rules prohibiting one branch of the state judicial system from reviewing decisions of another by enacting § 1914. *See id.* at 128. Section 1914 would not appear to be a viable remedy in the state courts of California. *Id.*

Tribal courts are courts of competent jurisdiction to question state action in certain circumstances,[200] but it is unlikely that Congress would have intended to interpose tribal court authority to overrule state court action through its enactment of ICWA. Congress clearly did not intend to deprive state courts of their traditionally-exercised jurisdiction over child custody actions arising outside of Indian country.[201] If Congress had intended for tribal courts to exercise exclusive authority over all Indian children, wherever located, § 1911(a) would have been extended to apply to all Indian children. The fact that Congress provided for concurrent *transfer* jurisdiction strongly manifests that a tribal court's exercise of lawful jurisdiction, entitled to deference by other courts, is contingent upon a legal transfer of jurisdiction over a non-reservation domiciled child. Thus, it is dubious whether a tribal court could invalidate an action of a state court absent the state court exceeding its authority and violating § 1911(a).[202] Additionally, many tribal courts do not exercise extraterritorial jurisdiction because of internal restraints and would therefore not be accessible to review decisions of state courts involving Indian children residing off the reservation.[203] Even if they could, several state courts have indicated an aversion to deferring to tribal court decisions on ICWA cases in the face of conflicting state court decisions.

200. For example, if a state court were exercising jurisdiction over a reservation-domiciled child or a ward of the tribal court in violation of ICWA, it be appropriate in light of § 1911(a) for a tribal court to enjoin that exercise of excessive jurisdiction or invalidate any court action taken. However, the courts that have addressed this issue tend to side with the state and ignore the tribal court's ruling. *See, e.g.*, Comanche Indian Tribe v. Hovis, 53 F.3d 298, 304-05 (10th Cir. 1995) (reversing a lower court decision enjoining the state court from continuing to exercise jurisdiction over an Indian child and requiring the matter be transferred to tribal court on the grounds that the state court decision was res judicata under 28 U.S.C. § 1738). In addition, some courts have held that tribal courts can exercise jurisdiction over claims against state officials for actions taken on the reservation. *See* Nevada v. Hicks, 944 F. Supp. 1455, 1462 (D. Nev. 1996) (recognizing the authority of a tribal court to adjudicate a 42 U.S.C. § 1983 action against a state official for a wrongful seizure of a big-horn sheep on the reservation).

201. *See* H.R. REP. NO. 95-1386, at 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7541. Congress opined that it is not their intent to strip state courts of their jurisdiction, but to impose substantive requirements which they must implement. *Id.*

202. Already, as this article has demonstrated, some state courts have ignored the congressional admonition in ICWA that tribes shall be the principal authority for determining tribal membership, and instead have issued their own decisions regarding whether a child is truly an Indian under ICWA. It is highly unlikely, therefore, that a state court would honor a tribal court decision invalidating an action of a state court involving an off-reservation domiciled child. *See, e.g., In re* Adoption of T.R.M., 525 N.E.2d 298, 307 (Ind. 1988) (ignoring tribal court order declaring an Indian child a ward of tribal court on the grounds that the tribal court lacked jurisdiction to enter such an order); *In re* Welfare of R.I., 402 N.W.2d 173, 177 (Minn. Ct. App. 1987); *In re* W.L., 859 P.2d 1019, 1021 (Mont. 1993). Even if a tribal court took such action, it would probably have to look to a federal forum to enforce it, and this option appears to be very dubious. *See* Comanche Indian Tribe v. Hovis, 53 F.3d 298 (10th Cir. 1995).

203. *See In re* Defender, 435 N.W.2d 717, 721 (S.D. 1989) (refusing to honor tribal court judgment giving custody of an Indian child to the father on the grounds that the tribal court exceeded its jurisdiction under its own law).

This leaves only the federal courts as "courts of competent jurisdiction" under § 1914. However, federal courts are loath to infer federal court jurisdiction from equivocal language in federal statutes, especially ones that affect domestic relations, which are matters generally left to state courts.[204] Section 1914, if it *ipso facto* intends to bestow jurisdiction upon the federal courts to review state ICWA decisions, is not a model of clarity.

Another shortcoming in the language of the statute, is its use of discretionary, rather than precatory language. The section does not mandate that a court of competent jurisdiction repair an erroneous state court decision, but only vests that court with the discretion to do so. This is exceedingly odd and unexplained in the legislative history. Perhaps Congress used such language to permit a court of competent jurisdiction to review the totality of the circumstances surrounding a particular child (the amount of time in a particular placement, for example) before choosing to vacate the decision of a state court. This appears to be the only reasonable interpretation of such language, although it is perhaps contravened by the fact that Congress explicitly allowed such considerations in another section of ICWA dealing with adoptions which go awry and methods for freeing Indian children from adoptive placements.[205]

B. IMPACT OF FEDERAL FULL FAITH AND CREDIT STATUTE ON FEDERAL ICWA CHALLENGES

However, the frailties of § 1914 have not proved as obstructionist to parties seeking to attack state court decisions in federal court as the federal full faith and credit statute. The statute, contained at 28 U.S.C. § 1738,[206] requires that a federal court grant the same preclusive effect to a state court decision as the state court would. This axiom of federalism, combined with the abstention doctrine, which bars federal court intervention in pending state court actions, has been invoked to defeat federal court jurisdiction.[207] Taken together, these two doctrines of federal law have proven to be a fatal dose for litigants seeking to overturn arguably

204. *See* Thompson v. Thompson, 484 U.S. 174, 187 (1988) (refusing to infer a federal cause of action to resolve dispute over conflicting state custody orders under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A).

205. Section 1916 requires a state court to return custody of an adopted Indian child to the natural parent or Indian custodian who had custody immediately prior to the adoption, unless there is a showing that a return would be contrary to the best interest of the child. 25 U.S.C. § 1916 (1994). If Congress had intended there to be a "best interest" showing under § 1914 before an action of a state court could be invalidated, Congress could have used similar language.

206. *See* 28 U.S.C. § 1738 (1994); Barbara Ann Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59 (1982).

207. *See, e.g.*, Morrow v. Winslow, 94 F.3d 1386, 1397 (10th Cir. 1996) (recognizing that the abstention doctrine, as established in Younger v. Harris, 401 U.S. 37 (1971), prevented a federal court from intervening on behalf of an Indian father, when according to a state court judge, consent of the father was not necessary under Oklahoma law before the child could be adopted).

erroneous state court decisions in the area of ICWA. With a few limited exceptions, every Indian parent and tribe which has sought federal court review of a state court decision in the ICWA arena has either been barred by the doctrine of collateral estoppel or abstention. The only exceptions have been cases where litigants sought not to overturn individual state court decisions, but to prospectively challenge erroneous state administrative applications of ICWA.[208]

1. *The Tenth Circuit*

Ironically, the emasculation of § 1914 also begins with the *Baby Boy L.* decision from the Kansas Supreme Court,[209] the same decision which spawned the existing Indian family exception. After that decision was rendered by the Kansas Supreme Court, the Kiowa Tribe brought an action in federal court under § 1914 to ask the federal court to declare the adoption violative of ICWA.[210] The district court denied the request in an unpublished opinion and the United States Court of Appeals for the Tenth Circuit affirmed. In *Kiowa Tribe v. Lewis*, the Tenth Circuit held that under Kansas law, the issue of the applicability of ICWA was res judicata because the Tribe and adoptive parents had been parties to the action in state court. [211] In addition, the court held that the process by which the Kansas courts decided the issue was not so fundamentally flawed as to give rise to the argument that due process was not observed.[212] Lastly, the court, in an apparent circumscribed holding, held that § 1914 did not create an exception to the general full faith and credit rule of § 1738 when the Tribe appealed to the state court from a denial of the Tribe's request to intervene.[213]

The *Lewis* court strained to hold out the possibility that an Indian tribe or other litigant could utilize § 1914 in federal court to challenge a

208. *See* Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991) (enjoining a state court practice of denying full faith and credit to adoption decrees from native villages in Alaska as violative of ICWA full faith and credit provision).

209. 643 P.2d 168 (Kan. 1982).

210. *See* Kiowa Tribe v. Lewis, 777 F.2d 587, 587 (10th Cir. 1985).

211. *See id.* at 590. It is interesting that the Kiowa Tribe was never allowed to intervene in the state court proceeding because the Kansas court held that ICWA was inapplicable and therefore the Tribe had no right to intervention by right. Nevertheless, the federal court held that the Tribe had a fair opportunity to litigate ICWA claims in the state court and was thus barred from relitigating them in federal court. *Lewis*, 777 F.2d at 591.

212. *See id.* at 591.

213. *Id.* at 592. The court, in overturning an award of attorney's fees to the adoptive parents against the Tribe by the district court, noted that another federal district court had ruled for the Kickapoo Tribe in holding that it could challenge a state court action in federal court, and also questioned the propriety of the existing Indian family exception. *Id.* at 594. The other federal district court decision referred to in *Lewis* was later reversed. Kickapoo Tribe v. Rader, 822 F.2d 1493 (10th Cir. 1987).

state court action before the issue was litigated through the state courts. The court stated:

> the question before us is not whether the federal court is a 'court of competent jurisdiction' entitled to protect an Indian tribe's interest in foster care placement or terminations of parental rights in Indian children in a case in which the tribe sought to assert its rights under ICWA before it sought to intervene in the state proceeding. The question before us is not even whether the tribe could have brought suit in federal court after the state district court denied it the right to intervened. . . . The question before us is whether the Tribe's taking an appeal to the state supreme court foreclosed the Tribe from relitigating later in an independent federal court action.[214]

This dicta in *Lewis,* holding open the opportunity that a state trial court decision in violation of ICWA could be independently relitigated in federal court before state appellate remedies are exhausted, was seized upon by the Navajo tribe in another well-publicized decision. The Navajo Tribe tried to collaterally challenge a state trial court decision denying Navajo courts exclusive jurisdiction over a member child of the Tribe domiciled on the reservation before the matter was appealed to the Utah Supreme Court.[215] A Utah state district court refused to recognize the exclusive jurisdiction of the Navajo tribal courts to determine a child custody issue involving a Navajo child domiciled on the Navajo Indian reservation and held that Utah courts had jurisdiction over an adoption involving such a child.

After losing the jurisdictional issue at the state trial level, the Navajo tribe filed an action in federal district court in Utah seeking to pre-empt the state court's exercise of jurisdiction over the adoption. The federal district court held that § 1738 barred its reconsideration of the issue.[216] The federal court went on to say it did not sit as an appellate court for Utah state court decisions and noted that the Navajo tribe had appealed the jurisdiction issue to the Utah Supreme Court and would be given a full and fair opportunity to litigate the issue there.[217] With regard to the fact that the tribal court had entered an order declaring its exclusive jurisdiction under § 1911(a), and the fact that both the state and federal courts are mandated to grant full faith and credit to tribal court decisions in the ICWA arena, the federal court somewhat waffled by declaring that

214. *Lewis*, 777 F.2d at 592.

215. *See* Navajo Nation v. District Court for Utah County, 624 F. Supp. 130, 132 (D. Utah 1985), *affirmed,* 831 F.2d 929, 929 (10th Cir. 1987).

216. *Id.* at 135-36.

217. *Id.* at 135.

since the Utah court had ruled it had jurisdiction first, the Navajo court should have honored that determination under full faith and credit and should not have issued a contrary decision.[218]

The Tribe appealed the unfavorable federal district court decision, but in the interim the Utah Supreme Court held for the Tribe in the state court dispute.[219] The Tenth Circuit held that the state court ruling rendered moot the issues before it, notwithstanding the Tribe's insistence that a ruling should issue to give guidance to other state courts who were handling similar voluntary adoption proceedings, oftentimes without the Tribe's knowledge.[220]

What was a tribe to do after *Lewis* and *Halloway*? Both cases intimated that the use of state court appellate remedies was the *sine qua non* for an application of the federal full faith and credit provision of federal law. Perhaps the Tribe should have abandoned its appeal in state court, a fruitful appeal which has even been cited by the United States Supreme Court,[221] in order to invoke federal court jurisdiction and hopefully gain a ruling which would have precedential value outside the state of Utah. At the same time, abandoning the appeal would have been foolish in light of the ambiguity existing in the law. Further decisions shed light on these issues and serve to confirm, at least in the Tenth Circuit, that regardless of how a tribe or advocate seeking an implementation of ICWA navigates its course, the federal courthouse door will be shut upon completion of the journey.

The next case to be decided on this issue again came out of the Tenth Circuit. *Kickapoo Tribe v. Rader* involved the Kickapoo Tribe's challenge to the adoptive placement of an Indian child and the refusal of an Oklahoma state court to allow intervention by the Tribe.[222] After the denial of its intervention request, the Tribe did not appeal through the state appellate system, but instead sought federal court intervention under § 1914. *Rader* is arresting because the natural father of the Indian child also sought a federal court order declaring void a state court termination of his parental rights on the grounds that the notice by publication in which his parental rights were terminated violated federal and state due process grounds and the Oklahoma statute on service.[223] The termination occurred before ICWA took effect but the subsequent

218. *See id.* at 136. As a matter of law, this was clearly erroneous as ICWA does not require a tribal court to grant full faith and credit to a state court decision, but only vice versa.

219. *See In re* Adoption of Halloway, 732 P.2d 962, 962 (Utah 1986).

220. *Navajo Nation*, 831 F.2d at 930.

221. *Halloway*, 732 P.2d at 53.

222. *See* Kickapoo Tribe v. Rader, 822 F.2d 1493 (10th Cir. 1987).

223. The federal court took jurisdiction over this claim despite the fact that the United States Supreme Court had held that a state court order terminating parental rights cannot be collaterally attacked in a habeas corpus petition. *See* Lehmer v. Lycoming County Children's Serv. Agency, 458 U.S. 502, 516 (1982).

placement and adoption occurred after ICWA became law.[224] The federal district court held that both the father and the Tribe's rights were violated and set aside the adoption under both due process and ICWA.[225]

The court of appeals, relying upon *Lewis*, held that ICWA issues could not be relitigated in federal court, despite the fact that the Tribe did not appeal the issues to the Oklahoma Supreme Court in apparent compliance with the tantalizing dicta in *Lewis*. Rather, under Oklahoma law, they were res judicata.[226] In an apparent contradiction, the court affirmed the lower court's decision that the termination violated the father's due process rights, despite the fact that the issue was also litigated in state court and the father was most likely collaterally estopped under Oklahoma law from relitigating it.[227] The apparent moral from *Rader* is that issues of constitutional law can be relitigated in federal court, but not issues of statutory compliance with ICWA, despite there being no doctrinal distinction between the two in the area of full faith and credit.[228]

2. *The Ninth Circuit*

The United States Court of Appeals for the Ninth Circuit entered this fray in 1991 by issuing two somewhat incongruous decisions regarding the authority of a federal court to review a state court's determination of jurisdiction in child custody proceedings involving Indian children. In *Confederated Tribes of the Colville Reservation v. Superior Court*,[229] the court held that it lacked jurisdiction to enjoin a state court from exercising jurisdiction over a child custody dispute between the parents of an Indian child and that tribal court jurisdiction was precluded

224. ICWA applies to any proceeding "pending" at the time the law took effect and thus clearly applied to the placement actions taken by the state court in this case.

225. *Rader*, 822 F.2d at 1496.

226. *Id.* at 1501. Once again, just as with the *Lewis* decision, the state court in *Rader* had refused to allow the Tribe to intervene in the state court proceedings to argue for an appropriate placement for the Indian child under ICWA. *Id.*

227. The court did not analyze the issue of whether the natural father in *Rader* was collaterally estopped from relitigating in federal court the validity of the termination of his parental rights in the Oklahoma court. It is not clear what jurisdictional statute the father was proceeding under in federal court. Apparently, the natural father did not participate in the state court proceedings, nor did he seek to set aside the state court order terminating his parental rights after he discovered that it had been entered. The Tribe, on the other hand, did seek to intervene in the state court proceedings, although it was denied that right. The lesson to be learned, perhaps, is to stay out of the state court proceedings and simply await their outcome in an attempt to avoid the strictures of the full faith and credit clause.

228. If the father was proceeding under 42 U.S.C. § 1983, which is likely because he requested both monetary and equitable relief, it is unclear why the court permitted a collateral challenge on his claims since the Supreme Court has not drawn any distinction between claims of constitutional violations versus statutory violations in the application of the federal full faith and credit clause. *See* Allen v. McCurry, 449 U.S. 90 (1980).

229. 945 F.2d 1138 (9th Cir. 1991).

under federal law.[230] The case arose from a custody dispute between a non-Indian father and an Indian mother over a child enrolled as a member of the Colville Tribe. The father invoked state court jurisdiction in an attempt to gain custody, while the natural mother invoked tribal jurisdiction, alleging that the father abused and neglected the child, thus implicating ICWA.[231] The court noted that state court remedies had not been exhausted by the Colville Tribe and that federal courts are not available to state court litigants who are dissatisfied with state court decisions.[232] With regard to ICWA, however, the court affirmed the tribal court's exclusive jurisdiction over allegations of the father abusing and neglecting the child.[233] This decision, without expressly stating it, seems to rely upon the doctrine of abstention to rule that the federal courts should stay their hands even when a clear federal question—whether *Public Law 280*, a federal statute designed to confer state criminal and civil jurisdiction over certain Indian reservations, divests tribal courts of concurrent jurisdiction—is involved.[234]

In *Native Village of Venetie IRA Council v. Alaska*,[235] native villages in Alaska and adoptive parents of native children who adopted their children through native tribal courts challenged the unwillingness of the state of Alaska and its officials to recognize adoptions consummated in tribal courts of native villages. The state claimed that the native villages were divested of authority to grant adoptions under § 1918 of ICWA and that the Indian Child Welfare Act retrocession provisions[236] would have

230. *See* Confederated Tribes v. Superior Court, 945 F.2d 1138, 1141 (9th Cir. 1991); *see also* 28 U.S.C. §1360(a) (1994). The state of Washington was vested with the discretion to exercise civil jurisdiction over Indian country in that state, which Washington apparently exercised in the area of domestic relations. *Confederated Tribes*, 945 F.2d at 1140.

231. *Confederated Tribes*, 945 F.2d at 1140.

232. *Id.* at 1141.

233. *Id.* at 1140 n.3. The state court judge had apparently agreed with this proposition but declared that deferring to the tribal court on the abuse and neglect issues did not deprive him of jurisdiction over the larger custody dispute. *Id.* at 1139.

234. Public Law 83- 280, 67 Stat. 588, codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360, was enacted in 1953 to confer civil and criminal jurisdiction to certain states over Indian reservations in those states. There have been frequent disputes since 1953 over how much jurisdiction was given states. *See* Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) (finding that the extent to which *Public Law 280* vests jurisdiction in state courts and thus deprives tribal court of jurisdiction is a federal question).

235. 944 F.2d 548 (9th Cir. 1991).

236. *See* 25 U.S.C. § 1918 (1994). This section permits a tribe which had been divested of jurisdiction over child custody proceedings involving reservation-domiciled Indian children to petition the Secretary of Interior for a restoration of its jurisdiction. At first blush, this section seems to imply that tribal courts were divested of any jurisdiction over reservation domiciled Indian children by the passage of *Public Law 280* or other federal statutes designed to confer jurisdiction upon state courts. *Id.* However, most courts that have addressed this issue have held that *Public Law 280* merely gave state courts concurrent jurisdiction over Indian country and that tribal courts retained concurrent jurisdiction. *See* Bryan v. Itasca County, 426 U.S. 373 (1976) (describing the impact of *Public Law 280*).

to be complied with before tribal courts could exercise jurisdiction.[237] Initially, the court held that federal court jurisdiction was proper under 28 U.S.C. § 1362[238] for the causes of action recited by the native villages and that federal question jurisdiction for the causes of action alleged by the adoptive parents arose under the Indian Child Welfare Act full faith and credit provision.[239] The court then went on to address the question of whether the full faith and credit provision of ICWA created a federal cause of action.

In broad language, apparently implicating all the provisions of ICWA, the Ninth Circuit panel held that nothing in the legislative history of ICWA indicated a federal intent to bar the federal courts from exercising jurisdiction to enforce ICWA.[240] The Ninth Circuit also held that in light of the findings of Congress that the state courts had failed in their obligations to protect the cultural rights of Indian children and tribes, jurisdiction should be freely exercised.[241] In a footnote the court expressly stated that federal court jurisdiction did lie to correct erroneous applications of ICWA by state entities and courts.[242] The court went on to hold that if the Alaskan native villages possessed the inherent authorities of Indian tribes, something the court remanded for a determination of, then the state of Alaska had to recognize the tribal court adoption decrees under the full faith and credit provision of ICWA because *Public Law 280* had not divested tribal courts of jurisdiction.[243]

Native Village of Venetie is a powerful tool for those tribes and Indian parents who wish to invoke federal court jurisdiction in the Ninth Circuit to challenge state actions taken in violation of ICWA. The case seems to endorse the notion that because not only did Congress fail to explicitly bar federal court review, Congress also recognized the limitations of a fair state court application of the law based on past history, thus federal courts should be available to litigants for enforcement of ICWA. This decision is somewhat tempered by the Ninth Circuit's

237. Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 559 (9th Cir. 1991). The Alaska Supreme Court had held as much in Native Village of Nenana v. Department of Health, 722 P.2d 219, 221-22 (Alaska 1986).

238. *See* 28 U.S.C. § 1362 (1994). This statute vests federal courts with jurisdiction to litigate a claim brought by an Indian tribe arising under the laws of the United States. *See id.*

239. *Venetie*, 944 F.2d at 552.

240. *Id.* at 554.

241. The court held that "[i]t would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical defenders of tribal interests, to determine the scope of tribal authority under the Act." *Id.* at 553-54.

242. *Id.* at 554 n.4. The court declared that "a federal court may intervene when a state expressly refuses to abide by these substantive mandates 'of ICWA.'" The court also thoroughly examined the state of Alaska's argument that Congress did not intend the federal courts to play a role in enforcing ICWA by strongly endorsing the notion that Congress did intend that the federal courts oversee state compliance with ICWA. *Id.* at 553.

243. *See* 25 U.S.C. § 1911(d) (1994).

decision one month later in *Colville*, where the court held that a tribe should not be able to litigate an issue of jurisdiction in federal court when the state court provided an appropriate vehicle for litigating the issue.[244] Interestingly, both *Venetie* and *Colville* involved the issue of the extent to which federal law divested tribal courts of jurisdiction, although admittedly the issue in *Colville* (whether tribal courts had been divested of jurisdiction in custody disputes between parents) did not directly implicate ICWA, but the issue in *Venetie* (the extent to which tribal courts in *Public Law 280* reservations retained jurisdiction over child custody proceedings) did. The two cases can be harmonized on the ground that it is not apparent that the Alaskan native villages in *Venetie* had litigation pending in state court for the recognition of their adoption decrees. Instead, these decrees were being ignored by state administrative agencies and therefore an adequate state court remedy did not exist, as it had in *Colville*.[245]

Unfortunately, the Ninth Circuit in *Venetie*, unlike the Tenth Circuit, did not address the effect of the full faith and credit provisions of federal law on the propriety of a federal court overruling an erroneous *state court* interpretation of ICWA because the erroneous interpretation in *Venetie* was made by state administrative agencies. Section 1738 does not generally mandate that a federal court grant allegiance to state administrative interpretations of federal law.[246] Hence, it is not clear, despite the powerful language in *Venetie* that federal court jurisdiction would lie and a federal cause of action is stated by a state violation of ICWA, whether a federal court remedy would await a litigant in the Ninth Circuit when the litigant attempts to overturn a state court decision.[247]

3. *Tenth Circuit Revisits Full Faith and Credit and Abstention*

The Tenth Circuit continued a somewhat strange and conflicting odyssey of deciding when a federal court can overrule a state court

244. Confederated Tribes of Colville Reservation v. Okanogan County, 945 F.2d 1138, 1141 (9th Cir. 1991)

245. Some states recognize tribal court orders under the doctrine of comity, but it is not clear whether Alaska did so at the time the native villages commenced their lawsuit. *See, e.g.*, S.D. CODIFIED LAWS § 1-1-25 (Michie 1992). Even if Alaska did recognize tribal court orders under comity, it should be noted that the state of Alaska challenged the premise that native villages were even tribes, further evidencing that an adequate state court remedy did not exist.

246. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991).

247. There are two other opinions from the Ninth Circuit that somewhat address the issue. In *Keyes v. Huckleberry House*, the court held that a non-member of non-federally recognized tribe could not litigate ICWA violations in federal court. Keyes v. Huckleberry House, No. 89-51794, 1991 WL 113808 (9th Cir. June 21, 1991). Additionally, in *Native Village of Stevens v. Smith*, an Indian tribe challenged the refusal of a state agency in Alaska to pay foster care for children placed by a tribal court. Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985). The court did not address issues of standing or of the application of ICWA, except to state that ICWA did not mandate that a state agency reimburse foster care for children placed by tribal courts. *Id.* at 1498.

decision on ICWA in *Roman Nose v. New Mexico Dept of Human Resources.*[248] *Roman Nose* involved a pro se action brought by the natural mother of an Indian child whose parental rights had been terminated by a New Mexico court, a decision that was affirmed on appeal.[249] The mother alleged violations of various laws, including international treaties, the Constitution, state and federal law, and the Indian Child Welfare Act.[250] The district court dismissed the complaint for failure to state a federal claim upon which relief could be granted. The court of appeals affirmed the dismissal of the constitutional claims, concluding that the federal courts have no authority to review alleged constitutional violations of litigants in state child custody proceedings, and also dismissed the federal statutory claims.[251] However, the Tenth Circuit reversed the district court on its conclusion that ICWA violations were not justifiable in federal court, explicitly holding that under § 1914 of ICWA federal courts have subject matter jurisdiction to review state court decisions implementing § 1911, § 1912, and § 1913.[252] The court then distinguished its previous rulings concerning 28 U.S.C. § 1738 by holding that the rulings stood for the proposition that when a state court determines that ICWA is inapposite in state court, the decision is not subject to collateral review in federal court. The court went on to state that it never held, nor did it take the opportunity to so hold, that § 1738 bars federal court review of a litigant's argument that the state court misapplied ICWA.[253] The court remanded the matter back to the district court with instructions to give the pro se mother another chance to amend her complaint to state a specific ICWA violation.

Unfortunately, both for the mother and for legal scholars interested in the development of this area of the law, the natural mother in *Roman Nose* could not retain counsel and eventually her complaint was dismissed for failure to properly plead a federal cause of action.[254] This situation excused the court from explaining why a federal court would be barred from overruling an erroneous state court decision finding that the Indian Child Welfare Act did not apply in a particular proceeding, yet is empowered to review a flawed attempt to apply the law. Such a doctrine appears to leave the more egregious violation without redress, whereas the less glaring violations are subject to review. Perhaps the court was of the opinion that a determination that ICWA did not apply is not within the parameters of the three sections of ICWA cited in § 1914,

248. 967 F.2d 435 (10th Cir. 1992), *aff'd after remand*, 991 F.2d 806 (1993).
249. *In re* Laurie R., 760 P.2d 1295 (N.M. Ct. App. 1988).
250. Roman Nose v. New Mexico Dep't Hum. Res., 967 F.2d 435, 435-36 (10th Cir. 1992).
251. *Id.* at 437.
252. *Id.*; *see also* 25 U.S.C. § 1914 (1994).
253. *Roman Nose*, 967 F.2d at 438.
254. *See Roman Nose*, 967 F.2d at 438.

and thus is outside the authority of a court of competent jurisdiction to review. This may be a lesson to potential litigants to not challenge a conclusion by a state court in the Tenth Circuit that ICWA is inapplicable, but instead to couch one's arguments in terms of lack of notice or a violation of the procedural standards for an involuntary or voluntary placement or termination of parental rights. So, for example, in the area of the existing Indian family exception, the court may not be able to review whether ICWA applies but would be able to determine whether the tribe's right to notice or intervention was violated. This is somewhat paradoxical because before the court could even make a determination that such rights existed, a finding that ICWA applied to the proceeding would be mandatory.[255]

The window of opportunity cracked by the *Roman Nose* court has been apparently slammed shut by the Tenth Circuit in another case raising issues of federal court authority to question state court decisions concerning ICWA. In *Comanche Indian Tribe of Oklahoma v. Hovis*,[256] the Tenth Circuit reviewed a decision by the district court enjoining a state court from continuing to exercise jurisdiction over a termination of parental rights proceeding in the face of a conflicting claim of exclusive jurisdiction by a tribal court under § 1911(a).[257] The Tribe had originally intervened in the state court proceeding and requested a "transfer" of the state court proceedings to the tribal court under § 1911(a). Later, the Tribe contended that the state court lacked jurisdiction over the proceedings based on the exclusive jurisdiction provisions in ICWA.[258] The state court denied the Tribe's claim of exclusive jurisdiction and the Tribe did not pursue an appeal through the state appellate system, although the mother involved in the proceedings did.[259] Instead, the Tribe sought and obtained a declaration that it had exclusive jurisdiction over the proceeding under § 1911(a) of ICWA from the federal district court.

The facts in *Hovis* seemed to mirror perfectly the apparent exceptions to res judicata recognized in *Roman Nose:* a claim by a Tribe that

255. The Tenth Circuit also seemed to recognize the justiciability of ICWA violations in federal court in another unpublished opinion. Moore v. Muscogee Nation, No. 96-5099, 1996 WL 472489 (10th Cir. Aug. 21, 1996).

256. 53 F.3d 298 (10th Cir. 1995).

257. It appears that the state court had erroneously transferred jurisdiction to the tribal court over the mother's oral objection, something not permitted by ICWA. The real dispute over jurisdiction, however, seemed to hinge on the fact that the natural parents had given a power of attorney over the child to an Indian aunt who lived on the reservation prior to the state court proceedings being commenced. The Tenth Circuit apparently believed, however, that under *Holyfield*, the domicile of the child was dependent upon the domicile of the parents, who both lived off the reservation. Comanche Indian Tribe v. Hovis, 53 F.3d 298, 301 (10th Cir. 1995).

258. *See id.*; *see also* 25 U.S.C. § 1911(a) (1994).

259. *Hovis*, 53 F.3d at 301. The natural mother disputed the tribal court's jurisdiction and thus only appealed the issues relating to the termination of her parental rights. *Id.*

the state court failed to properly apply ICWA to the facts of a proceeding, rather than a claim that ICWA did not apply. Nevertheless, the court of appeals held that the Tribe was collaterally estopped from relitigating the issue of its exclusive jurisdiction because the state court had already ruled against it on the issue.[260] The court cited to previous language in *Lewis* in support of its rather strong ruling that § 1914 would never serve as an avenue of relief in federal court if a party litigates an issue in state court, irrespective of whether state appeals have been utilized.[261] The court held that once a party participates in a state court proceeding involving ICWA, its only remedy for an alleged violation is state court appellate remedies and that § 1914 would not serve as a federal court avenue of relief. [262]

After *Hovis*, it appeared that the only way a party could potentially utilize the federal courts to attack an unlawful application of ICWA in the Tenth Circuit would be to stay completely out of the proceeding and invoke federal court jurisdiction once a state violation is detected. This approach, fraught with the danger of not participating in the state court proceedings and thus foregoing arguments, has been rendered a dangerous strategy by yet another Tenth Circuit decision applying the doctrine of abstention to federal courts asked to intervene in ongoing state court ICWA proceedings. In *Morrow v. Winslow*[263] an Indian father attempted to utilize a federal court to enjoin a state court adoption proceeding.[264] The adoption was going forward without either the father's consent to termination of his parental rights or an involuntary termination of his parental rights because of a state court ruling that the father's consent to

260. *Id.* at 303.

261. *Id.* at 304. The *Hovis* court seemed to expand the holding in *Lewis* by contending that it held that a party who seeks to litigate a claim in state court is stuck with that decision and may never seek federal court intervention to overrule a state court decision. Rather, the *Hovis* court held that "once the Tribe chose to litigate in State court, review of the State Court's decision was limited to timely appeal to the state appellate courts and was not 'appealable' in federal district court." *Id. Lewis* seemed to turn more on the fact that the Tribe sought and failed in its state appellate remedies because the court had emphasized the fact that the Tribe had appealed the issue of the applicability of ICWA through the state appellate system.

262. *See id.* The unwillingness of federal courts to oversee a wrongful exercise of state court jurisdiction or wrongful application of ICWA should be contrasted with the apparent willingness of federal courts to micro-manage a tribal court's exercise of jurisdiction in the area of child custody proceedings, those governed by ICWA, and those not governed by ICWA. *See* Dement v. Oglala Sioux Tribal Court, 874 F.2d 510, 515 (8th Cir. 1989) (holding that a federal court has habeas corpus jurisdiction under Indian Civil Rights Act to determine whether a tribal court exceeded its jurisdiction over a non-Indian father in awarding custody of Indian children contrary to a state court decision); Brown v. Rice, 760 F. Supp. 1459, 1463 (D. Kan. 1991) (holding that a federal court has jurisdiction to enjoin a tribe from exercising jurisdiction over child custody proceeding in violation of its own law). *But see* Sandman v. Dakota, 816 F. Supp. 448, 452 (W.D. Mich. 1992), *aff'd*, 7 F.3d 234 (6th Cir. 1993) (holding that a federal court lacks jurisdiction under Indian Civil rights act and ICWA to oversee tribal court disposition of dependency and neglect action).

263. 94 F.3d 1386 (10th Cir. 1996).

264. Morrow v. Winslow, 94 F.3d 1386, 1389 (10th Cir. 1996).

the adoption was not necessary under Oklahoma law.[265] The facts in this case appear to suggest a clear violation of the provisions of ICWA requiring a state court to find evidence beyond a reasonable doubt that serious emotional or physical injury would befall a child before terminating a parent's parental rights, as well as testimony by a qualified expert witness to support such a finding.[266]

The holding in *Morrow* is fascinating because it exemplifies the *laissez faire* attitude of the Tenth Circuit toward violations of ICWA. When the case was first initiated in federal district court, there had not been a determination by the state trial court that the father's consent to the adoption was not necessary.[267] The federal district court therefore dismissed the federal action for failure to state a claim. However, while the federal court appeal was pending, the state trial court determined that the adoption could go forward without the father's consent and without termination of his rights.[268] The court even proceeded to grant the adoption petition, although there was a technical problem with the entry of the decree itself.[269] Despite the fact that the father appeared to have no remedies in state court, beyond appellate remedies, and that all the parties to the case requested the federal court to rule on the issues at hand, the Tenth Circuit *sua sponte*, apparently in order to settle the matter and not disturb the future placement of the child, invoked the

265. *Id.* It appears that the state judge held that the father had abandoned the child and thus his consent to adoption was not necessary. The natural mother was non-Indian and had consented to the adoption. *Id.* at 1388. It is unclear, based on a review of the federal court's decision, whether the state court, in holding that the natural father's consent to the adoption was not necessary, was holding that he was not a parent under ICWA or that ICWA did not apply because of the existing Indian family exception which had been adopted by the Oklahoma Supreme Court in *In re S.C.* The latter appears unlikely because Oklahoma had repealed the exception, thereby repealing the decisions allowing state law to control on the issue of abandonment. *See* OKLA. STAT. ANN. tit. 10, § 40.5 (West Supp. 1997). The decision of the state court, assuming that it is not based upon a finding that the Indian father was not a parent under the Act, appears to be in blatant violation of the state and federal ICWA. *See In re* Adoption of Baade, 462 N.W.2d 485 (S.D. 1990).

266. *See* 25 U.S.C. § 1912 (1994). Many states allow adoption proceedings to go forward without the consent of a natural parent who had abandoned his child under certain circumstances. Such state laws appear to be superseded by the requirement of ICWA that no parent's parental rights may be terminated without a finding by the state court, supported by qualified expert witness testimony, beyond a reasonable doubt that the placement of an Indian child with the non-custodial parent would result in severe emotional or physical harm to the child. *See* § 1912(e). Oklahoma decisions prior to the amendment of the Oklahoma ICWA, clarifying that the existing Indian family exception to ICWA was no longer viable in Oklahoma, recognized that state law would control on the question of whether the consent of a non-custodial parent who had abandoned his child was necessary, and that ICWA need not be complied with. *See* OKLA. STAT. ANN. tit. 10, § 40.5; *In re* Adoption of D.M.J., 741 P.2d 1386, 1389 (Okla. 1985) (holding that the fact that an Indian father had not paid support for over one year precluded the lack of his consent from barring the state court from ordering adoption by non-Indian step-parent on theory that ICWA did not apply); *In re* Adoption of Baby Boy D., 742 P.2d 1059, 1064 (Okla. 1985) (stating that termination of an Indian father's parental rights prior to the birth of an Indian child is permitted under the existing Indian family exception).

267. *Morrow*, 94 F.3d at 1388.

268. *Id.* at 1389-90.

269. *Id.*

doctrine of abstention and dismissed the father's federal complaint without prejudice.[270] The court held that § 1914, although it gave the federal court jurisdiction over ICWA violations, was not an exception to the general rule that federal courts should not intervene in ongoing state court proceedings and that the father would have to utilize the remedies available to him in state court.

Dismissing Morrow's complaint without prejudice may indicate that the court recognized the right of Morrow to bring his action anew should he not gain relief through the state appellate court system. This would be a false reading, however, because it is now apparent that, at least in the Tenth Circuit, there appears to be no way to challenge a state court's erroneous application of ICWA if the nature of the violation is the subject of a pending state court action.

4. *Synthesizing the Ninth and Tenth Circuit Perspectives*

Morrow should be contrasted with the Ninth Circuit decision in *Native Village of Venetie* which recognized a federal cause of action to enjoin state officials from continuing to violate the full faith and credit provision of the Indian Child Welfare Act.[271] There, the violation was not the subject of an ongoing state court proceeding, but instead was bureaucratic intransigence to follow federal law.[272] It is not clear, in light of the *Colville* decision from the Ninth Circuit, (wherein the court refused to enjoin a state court action premised upon a faulty interpretation of federal law with regard to whether *Public Law 280* preempted tribal court jurisdiction over child custody proceedings) whether *Venetie*

270. *Id.* at 1398. The significance of a dismissal without prejudice, as opposed to one with prejudice, is wanting because it is apparent that after the father exhausts his appellate remedies in the state system he will not be able to return to the federal court to gain a reassessment of whether his rights were violated under ICWA because of 28 U.S.C. § 1738 (1994).

271. 944 F.2d 548 (9th Cir. 1991). It is improbable that the *Venetie* court would have applied the doctrine of abstention, even if a valid state remedy existed for the native villages to challenge the refusal of state officials to recognize their adoption decrees, because of the Court's rather forceful conclusion that Congress obviously intended some federal court remedy to invalidate illegitimate state court ICWA decisions.

272. There was also a state court action brought in an Idaho district court under 42 U.S.C. § 1983 challenging the failure of the state of Idaho to adopt appropriate administrative regulations to implement ICWA. *See* Oglala Sioux Tribe v. Harris, No. 94-316, Second Judicial District, County of Nez Perce (Idaho). The case was settled before going to trial.

could be invoked to challenge a *state court's* apparent violation of the Indian Child Welfare Act.[273]

There are various potential bureaucratic violations of ICWA which could be litigated under various theories in federal court.[274] However, such theories are no consolation to Indian parents and tribes who wish to challenge the more pernicious violations of ICWA committed primarily by state courts. These include the invocation of the existing Indian family exception to deny tribal input into state court decisions regarding Indian children[275] and the use of the best interest of the child standard to

273. The only other court to address the availability of a federal remedy to challenge a state court's decision in ICWA arena is the United States Court of Appeals for the Fourth Circuit in *In re* Larch, 872 F.2d 66 (4th Cir. 1989). There the court was faced with a custody dispute between the natural parents of Indian children and conflicting state and tribal court custody orders regarding them. *Id.* at 67. The court first held that the federal district court had jurisdiction over the Tribe's request that its court order be honored under 28 U.S.C. § 1362, which permits an Indian tribe to sue in federal court to enforce rights created under federal law. *Id.* The court then held that the Tribe was a state under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, (PKPA) and that the Tribe did not state a claim under the PKPA upon which federal relief could be granted. *Id.* at 68. The court seemed to imply that had the Tribe made out a claim under ICWA, federal court jurisdiction would have existed. *Id.* at 69.

274. As this article contends, 25 U.S.C. § 1914 is not the exclusive route by which a party can challenge state activity or inactivity taken in violation of ICWA. Indian tribes have a statutory right to invoke federal court jurisdiction under 28 U.S.C. § 1362, which states that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (1994). The United States Supreme Court has held that this statute authorizes suits by tribes in federal court even when a private entity would be barred from bringing a similar action. *See* Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) (holding that a tribe's access to federal court not be defeated by Tax Injunction Act because of 28 U.S.C. § 1362). Although this statute does not waive the Eleventh Amendment immunity of states from suits by tribes, the Eleventh Amendment would apparently not be implicated in a suit brought to rescind an unlawful action of a state in violation of federal law because of the *Ex parte Young* doctrine. *See* Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991); Ex parte Young, 209 U.S. 123 (1908). *But see* Oglala Sioux Tribe v. Harris, No. 94-316, Second Judicial District, County of Nez Perce (Idaho). The United States Court of Appeals for the Ninth Circuit has held that Indian tribes may bring suit under § 1362 to contest state action taken contrary to ICWA. *See* Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991). Tribes have also been recognized as persons who can sue to enjoin state actions taken in violation of federal law under 42 U.S.C. § 1983. *See* Fond du Lac Band of Chippewa Indians v. Carlson, 68 F.3d 253 (8th Cir. 1995) (holding that a tribe's suit under 42 U.S.C. § 1983 not barred by sovereign immunity); United States v. Washington, 813 F.2d 1020, 1024 (9th Cir. 1987) (denying a tribe's application for attorney fees under 42 U.S.C. § 1988). *But see* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996) (barring tribe's suit brought under 42 U.S.C. § 1983 and the Indian Gaming Regulatory Act to enforce compact negotiation provisions of Indian Gaming Regulatory Act barred by state's Eleventh Amendment immunity). Similarly, individual Indian parents would apparently have standing to bring suit under § 1983 to enjoin state officials from violating ICWA, although one court has held that that does not extend to suits for monetary relief. *See* Fletcher v. Florida, 858 F. Supp. 169, 173 (M.D. Fla. 1994) (dismissing mother's suit for money damages under 42 U.S.C. § 1983 for violation of ICWA on the grounds that ICWA only provides for equitable relief). Finally, the federal question statute, 28 U.S.C. § 1331, has been recognized by at least one court as an alternative jurisdictional statute to challenge a violation of ICWA. *See Venetie*, 944 F.2d at 548.

275. One of the troublesome issues that arises when a state court refuses to apply ICWA because of the existing Indian family exception is that Indian tribes are denied the right to intervene in these proceedings. Because most state laws require that such proceedings be kept confidential, barring intervention also means that these tribes may be forever barred from finding out the eventual placement of an Indian child. The bond between child and tribe is thus potentially severed.

deny the exercise of tribal court jurisdiction, another form of denying appropriate tribal input. Both are instances where the state court itself is apparently doing violence to the clear language of the Act. They are also instances where appropriate tribal input into the fate of Indian children is being unnecessarily frustrated.

Unless the federal courts pump some much needed vitality into § 1914 of ICWA, the process of certain state courts deconstructing ICWA will continue. The next section offers an alternative interpretation of § 1914 which more closely resembles the intent of Congress.

IV. 25 U.S.C. § 1914 AS AN EXCEPTION TO THE APPLICATION OF 28 U.S.C. § 1738 RATHER THAN A GRANT OF JURISDICTION TO THE FEDERAL COURTS

How can a party dissatisfied with an apparently erroneous state court application of the Indian Child Welfare utilize a federal forum to gain relief without suffering the pitfalls of the federal full faith and credit provision?[276] Congress must have intended there to be some "court of competent jurisdiction" to provide redress for violations of certain provisions of the Act pertaining to state court decision-making. State courts and tribal courts, as this article has demonstrated, were apparently not the intended beneficiaries of this boon of authority. If the federal courts are the designated courts of competent jurisdiction, yet ICWA does not clearly except itself from the rigors of the full faith and credit statute, § 1914 makes no sense because it merely grants jurisdiction to the federal courts to place their imprimatur on a state court decision—the ultimate rubber stamp.

Nor can it be legitimately argued that § 1914 was intended to correct the activities of state or private non-judicial entities that violate the rights of Indian parents or tribes outside the context of an ongoing state court proceeding. The sections of ICWA which are justiciable under § 1914 all pertain to mandates imposed upon state courts and not state social service agencies.[277] Section 1911, containing the jurisdictional provisions of ICWA, clearly delimits the exercise of state court jurisdiction, while § 1912 and § 1913, which impose certain requirements upon state courts before they may place a child in foster care, terminate parental rights, or permit a voluntary placement of an Indian

276. Removing an ICWA case from state to federal court does not appear to be a viable option because removal is not available unless the action could have been brought originally in federal court. *See* 28 U.S.C. § 1441(a) (1994). Any action brought under § 1914 could not be brought until such time as the state court or entity erroneously applies ICWA, which may be too late to invoke federal court jurisdiction because of 28 U.S.C. § 1738.

277. It is interesting to note that § 1914 is not available to challenge a placement decision made by a state entity or court under § 1915. There is no indication in the legislative history why § 1914 is applicable to the procedural provisions of ICWA only and not the substantive provisions.

child, unquestionably pertain to the procedures that state courts must utilize in dealing with Indian child custody proceedings.[278] It seems unlikely that Congress intended to vest federal courts with jurisdiction to overturn erroneous state court applications of the Indian Child Welfare Act, while at the same time neglecting to except ICWA from the general requirement that federal courts must grant full faith and credit to state court decisions. The federal courts must restore some teeth to § 1914 or congressional intent will clearly be frustrated.

One obvious interpretation of § 1914 which restores its vitality is that it is not an express grant of jurisdiction to the federal courts to overturn violations of ICWA, but rather is actually an explicit exception to the full faith and credit doctrine, similar in many respects to the habeas corpus exception.[279] This exception recognizes that when there is an overriding federal interest involved, and Congress understood that there would be circumstances where "the federal courts would step in where the state courts were unable or unwilling to protect federal rights,"[280] federal courts need not grant preclusive effect to state court determinations in federal court. This interpretation of § 1914 is the only way to salvage it from the scourge of meaningless to which it has been rendered by the federal courts that have interpreted it. The remainder of this article will demonstrate why such an exception is in order and how it more fully comports with Congressional intent.

It is beyond peradventure that the Indian Child Welfare Act serves an important federal objective, one that when left to the devices of state courts had been frustrated. This is an important point to understand, as a tool of construing both the sum of ICWA's parts and its individual components.[281] The mistreatment of Indian families and tribes was widespread in both federal and state institutions and created the dire circumstances that existed prior to the passage of ICWA. An examination of why this problem was a federal priority is in order to understand why federal court involvement is necessary to fully implement the Act.

The federal legacy of the treatment of Indian children is a sad and sordid one and laid the groundwork for the situation in 1978 that caused Congress to pass ICWA.[282] The beginning of the destruction of Indian

278. This dichotomy between procedural and substantive requirements of ICWA was noted by the United States Supreme Court in *Holyfield*. Mississippi Band Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989) (noting that the most important substantive requirements of ICWA are the placement preferences in § 1915).

279. *See* 28 U.S.C. § 2254 (1994).

280. Haring v. Prosise, 462 U.S. 306, 314 (1983) (quoting Allen v. McCurry, 449 U.S. 90, 95 n.7. (1980)).

281. *See* Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 553 (9th Cir. 1991).

282. *See* Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17, 20-22 (1996); *see also* R. PRATT, BATTLEFIELD AND CLASSROOM: FOUR DECADES WITH THE AMERICAN INDIAN 1867-1904 (1964).

families lies in the assimilation period of the late 1800s and early 1900s when the federal government was attempting to assimilate Indian families into the non-Indian mainstream.[283] On the economic level, this attempt was made through the process of allotment, whereby the reservation land base was broken up into parcels of land which were then allotted to individual Indians and Indian families on the premise that the Indians would become farmers and adapt to the agrarian lifestyle of their non-Indian neighbors.[284] To facilitate this process, land that remained after the adult Indians on a particular reservation received their allotments was given to non-Indian homesteaders who would, the theory went, serve as teachers for the less sophisticated Indian farmers and ranchers.[285]

Thus, the hope was to assimilate Indians into the American economy. On the other spectrum, moral assimilation was being attempted by the government in the belief that the only way future generations of Indians would survive would be to throw off the chains of "barbarism" and adopt the Christian values of their non-Indian conquerors.[286] However, many policy makers believed that this moral assimilation would be unsuccessful on adult Indians, who were considered beyond hope, so the focus fell upon Indian children. The result was a belief that Indian children necessarily needed to be away from the "savage" influences of their parents and placed in places where Christian dogma and morals could be inculcated in them.[287]

This transmogrification would occur, it was hoped, in boarding schools, usually operated, but not always, by various denominations of

283. *See* COHEN, *supra* note 21, at 139-42.

284. *Id.* at 130-139. The allotment process, instead of increasing the value of Indian land, has actually devalued it because the land that was allotted has been so fractionalized that it is of little economic value to Indians themselves and thus is oftentimes merely leased out to non-Indians.

285. This process of surplus allotment and the allotment process itself led to the checkerboarding of reservations and compelled the United States Supreme Court to restrict tribal jurisdiction in many cases over their own reservations. *See* County of Yakima v. Confederated Bands of Yakima Indian Nation, 502 U.S. 251, 262 (1992). The court stated that tribes have no authority to tax portions of the reservation which had been opened up for homesteading to non-Indians. *Id.* At 265.

286. One of the proponents of allotment was Senator Henry Dawes for which the Dawes Allotment Act was named. Many people believe that Dawes saw allotment in pure economic terms as a way of integrating the Indian into the agrarian economy. A closer look at his writings reveals, however, that Dawes was a moral elitist who believed that Indian people led a savage lifestyle that could only be stripped of them if they were denied the right to practice their culture and traditions. For example he wrote in the Atlantic Monthly about his moral viewpoint of Indian people: "It was plain that if he (American Indian) were left alone, he must of necessity become a tramp and beggar with all the evil passions of a savage, a homeless and lawless poacher upon civilization and a terror to the peaceful citizen." H. L. Dawes, *Have We Failed with the Indian*, 84 ATLANTIC MONTHLY NEW YORK 280 (1899).

287. This is perhaps evidenced best by a statement by the Commissioner of Indian Affairs who stated: "It is admitted by most people that the adult savage is not susceptible to the influence of civilization, and we must therefore turn to his children, that they might be taught how to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization. . . . They must be withdrawn, in their tender years, entirely from the camp and taught to eat, to sleep, to dress, to play, to work and to think after the manner of the white man." *See* H.R. EXEC. DOC. NO. 50-1, at XIX (1888).

Christian sects.[288] Federal statutes were enacted which forced Indian families to allow their children to go to boarding schools or face losing their rations.[289]

At many of these boarding schools, a process of cultural degradation began. Indian children were oftentimes denied the right to speak their native languages, practice their traditional spiritual beliefs, groom and wear native attire, and were frequently denied the right to visit their native families for long periods of time.[290] All of these denials were countenanced upon the belief that Indian children needed to be "Christianized" in order to survive in contemporary society.[291] There were also reported instances of Indian children being physically and sexually abused in many of these schools to the point where several Christian denominations have recently issued apologies for their behavior during this period of time.[292]

The federal government played a role in this attempt at social engineering both by mandating that Indian children attend such boarding schools and by operating BIA boarding schools. An often overlooked provision of the Indian Child Welfare Act is § 1961 where Congress notes that the absence of conveniently located day schools for Indian students was contributing to the unwarranted break-up of Indian families.[293]

Although Congress emphasized that state courts and institutions were the primary vehicles for the unwarranted removal of Indian children from their homes and tribes, it is clear that the federal government, with its policy of forced cultural assimilation, laid the ugly foundation

288. For example, the Latter Day Saint's Church removed thousands of Indian children from their families annually on the premise that these children were being raised in cursed homes, exemplified by the dark skin of their families, and placed them in Mormon homes. *See* Kunesh, *supra* note 282, at 23 n.31 (quoting REX WEYLER, BLOOD OF THE LAND: THE GOVERNMENT AND CORPORATE WAR AGAINST THE FIRST NATIONS 149 (1982)).

289. *See* Act of July 13, 1892, ch. 164, 27 Stat. 120, 143 (formerly codified at 25 U.S.C. § 284 superseded by 25 U.S.C. § 282 (1994)).

290. As anthropologist Peter Farb described the boarding school experience:

> "The children were usually kept at boarding school for eight years during which time they were not permitted to see their parents, relatives or friends. Anything Indian—dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited. Ostensibly educated, articulate in the English language, wearing store-bought clothes and with their hair cut short and their emotionalism toned down the boarding school graduates were sent out either to make their way in a white world that did not want them or to return to a reservation to which they were now foreign."

PETER FARB, MAN'S RISE TO CIVILIZATION 257-59 (1968).

291. As the founder of one of the first boarding schools, Richard Pratt, stated in 1892: "Kill the Indian in him and save the man." *A Bid to Redefine Indian Education*, N.Y. TIMES, Nov. 27, 1995.

292. *See* CLYDE ELLIS, INDIAN EDUCATION AT THE RAINY MOUNTAIN BOARDING SCHOOL: 1893-1920 (1995); Ken Kolker & Ed Golder, *Stories Shock Nuns' Superiors; Sex Abuse Alleged at School for Indian Youth*, TIMES-PICAYUNE, July 17, 1994, at A2.

293. *See* 25 U.S.C. § 1961 (1994). This problem is somewhat addressed by 25 U.S.C. § 2001e (1994), which stresses the need for the BIA to provide more local schools for Indian education.

for the statistics Congress cited when it enacted ICWA. Not only did the federal government contribute to the problem, but it also has an obligation to correct the problem under its trust responsibility to Indian tribes and people. That responsibility resembles the obligation a guardian has toward a ward, and was described by Justice Marshall as "a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character and submitting as subjects to the laws of a master."[294] The trust responsibility is the product of treaties between many Indian tribes and the United States government and the pronouncement in the United States Constitution that the federal government has the exclusive authority to regulate commerce with Indian tribes.[295]

The federal government had a role in creating the problem that led to the enactment of ICWA and now has a role, borne of its federal trust responsibility, to attempt a resolution. The federal interest in protecting Indian children and Indian tribes from the vagaries of state courts and procedures is thus apparent. Congress heeded its trust and enacted ICWA in an attempt to rectify previous policies and vindicate the rights of Indian tribes and children against the abusive practices of state courts. The question remains as to whether Congress vested the federal courts with an concomitant obligation to protect tribal interests against state encroachment.

The United States Supreme Court rejected the argument that an overriding federal interest in protecting the civil rights of persons against the abuses of state officials justifies an exception to the federal full faith and credit statute in *Allen v. McCurry*.[296] *Allen* involved 42 U.S.C. § 1983, the jurisdictional statute that permits a party to sue a person acting under color of state law for a violation of a constitutional or statutory right preserved under federal law. The *Allen* court rejected the notion that § 1983, because it is designed to protect persons against state violations of federal civil and constitutional rights, is an exception to full faith and credit statute, § 1738.[297] In so doing the court noted that the "federal courts should be able to step in where the state courts were unable or unwilling to protect federal rights."[298] This exception, however, seems limited to instances where state procedural rules or state court action

294. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832).

295. The Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, authorizes the federal government to legislate to protect the rights of Indian tribes in the face of competing state interests. Interestingly enough, the United States Supreme Court recently declared neither this clause of the constitution, nor the interstate commerce clause, authorized Congress to waive the immunity of states from suits brought by Indian tribes. *See* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1119 (1996).

296. *See* Allen v. McCurry, 449 U.S. 90, 104 (1980).

297. *Id.* at 101.

298. *Id.* at 95, n.7; *see also* Haring v. Prosise, 462 U.S. 306, 314 (1983).

prohibits a particular party from asserting a federal claim, and does not permit a federal court to exercise jurisdiction under § 1983 over a federal claim merely because the state court got the issue wrong or historically was not vigilant in assuring the protection of rights.[299]

The Supreme Court noted in *Allen* and its progeny,[300] that the question of whether Congress intended a federal jurisdictional statute to except itself from the general rule of § 1738 is a matter of congressional intent—as it is clear that Congress can permit the litigation of a federal claim in federal court notwithstanding a resolution of the issue in state court.[301] The federal habeas corpus statute[302] is such an example of Congress effectuating the Fourteenth Amendment through an exception to the full faith and credit clause. Other federal statutes, however, do not contain evidence of a clear intent to exempt them from the requirements of § 1738.[303]

As a statute merely granting federal courts jurisdiction over ICWA violations, § 1914 does not appear to fit the bill for an exception to the full faith and credit clause, as it makes no mention whatsoever of § 1738. The United States Court of Appeals for the Tenth Circuit held as much when it decreed that it does not believe Congress intended to make an exception to the full faith and credit requirement when it enacted ICWA.[304] The analysis laid out in such decisions is wanting, however, when considering the congressional intent behind § 1914. The Tenth Circuit construes the section as a granting of jurisdiction to the federal courts. Viewed in this light, there appears to be no concomitant grant of authority to ignore state court decisions. Whether Congress intended to exempt ICWA from the requirements of § 1738 all revolves around the meaning of § 1914 and whether Congress intended it to be a jurisdictional grant or a statute authorizing federal court de novo review of state court ICWA decisions.

As this article has demonstrated, the sections of the Indian Child Welfare Act that are subject to collateral attack in a court of competent

299. The court rejected the notion that because a federal cause of action was created in response to perceived inadequacies in state court protection of civil rights, such statutory intent justifies finding an exception to the full faith and credit requirement. *Allen*, 449 U.S. at 98-99.

300. *See* Migra v. Warren City Sch. Dist. Bd. Ed. 465 U.S. 75, 84-5 (1984) (stating that even with regard to federal claims not litigated in state court action but voluntarily dismissed, federal courts must apply the same rules of preclusion that state courts would apply in pending § 1983 and § 1985 action).

301. *Id.*

302. 28 U.S.C. § 2254 (1994); *see also* Fay v. Noia, 372 U.S. 391, 417-20 (1963) (recognizing the authority of federal courts to review state constitutional determinations in habeas corpus proceedings in order to effectuate the Fourteenth Amendment).

303. *See, e.g., Migra*, 465 U.S. at 75 (stating that neither § 1983 nor § 1985 are exceptions); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1983) (stating that Title VII of the 1964 Civil Rights Act is not an exception to the full faith and credit requirement).

304. *See* Comanche Indian Tribe v. Hovis, 53 F.3d 298, 303-04 (10th Cir. 1995); *see also* Kiowa Tribe v. Lewis, 777 F.2d 587, 591 n.4 (10th Cir. 1985).

jurisdiction all involve activity that takes place inside the courtroom, whereas the provisions Congress did not subject to the section involve placement decisions usually made by state or private agencies or parties. The only reasonable interpretation of this distinction is that Congress intended to allow litigants to attack procedural violations by state courts under § 1914, whereas violations of the substantive placement provisions of the Act, contained at § 1915, which are generally made by other than non-judicial entities, are not exempt from the full faith and credit requirement.[305]

By drawing this distinction, unless Congress believed that the procedural safeguards of the Act were more important than the substantive requirements, a point of view obviously not shared by the United States Supreme Court,[306] Congress must have felt that without a particular provision in ICWA allowing collateral challenges to procedural irregularities of state court proceedings, such challenges would not be possible. In addition, other provisions of the Act could be enforced in differing manners, such as through the other jurisdictional provisions of federal law. Therefore, Congress must have intended § 1914 to represent an exception to full faith and credit rather than a creation of federal court jurisdiction. Were it solely and exclusively a grant of federal court jurisdiction, it is illogical for Congress to create federal court jurisdiction to challenge state court procedural violations which, *ipso jure*, could never be the subject of a federal court challenge because by their nature they are res judicata in federal courts.

A few examples show the validity of this assertion. Section 1914 allows a court of competent jurisdiction to overturn an erroneous application of § 1911, the jurisdictional provisions of ICWA. The action subject to challenge would be a court's exercise of jurisdiction, an action inherently imbued with judicial action, not extra-judicial action. Therefore, if a state court took jurisdiction over an adoption proceeding involving Indian children domiciled on a reservation contrary to § 1911(a), the argument that § 1914 is a grant of jurisdictional authority to a federal court to challenge that determination is a *non sequitur* because by its very nature the resolution of a federal jurisdictional question by a state court cannot be collaterally challenged. In addition, Congress acted on the presumption that federal courts already possessed jurisdiction to declare null and void a state court's exercise of excess

305. This is not to say that a court does not make placement decisions regarding the foster care or adoptive placement of a child. Generally, however, social service and private agencies place children and if challenged in court, defend those decisions.

306. The Supreme Court in *Holyfield* seemed to stress that the procedural and substantive provisions of ICWA are equally important in implementing the goals of Congress. *See* Mississippi Band Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

jurisdiction, thus did not need to be vested with it. However, § 1914, if intended to be an exception to § 1738, would clearly dictate, just as with a federal writ of habeas corpus, that the federal court review the federal question *de novo* without granting deference to a state court's legal determinations.

The language utilized by Congress in § 1914 further bolsters the contention that Congress intended § 1914 to allow federal courts to overrule erroneous state court decisions free of the yoke of the full faith and credit statute. Section 1914, unlike federal civil rights statutes which speak to affirmative injunctive or monetary relief, only permits federal courts to "invalidate" state court action which is taken in violation of federal law. As the legislative history states, this section allows a federal court to set aside a foster care placement or a termination of parental rights,[307] but does not provide any other type of affirmative relief. One court has held that this section restricts claims for monetary relief and only permits federal courts to render null and void state court actions.[308] The use of the term "invalidate" strongly suggests that Congress felt it was bestowing upon the federal courts the license to grant remedial relief from a state court decision, rather than the authority to provide some affirmative relief to a litigant whose rights may have been violated under ICWA.[309]

This suggestion comes into focus when one examines the body of federal court decisions prior to ICWA that discuss the jurisdiction of the federal courts to grant relief to Indian tribes and award damages against state entities. Congress clearly enacted ICWA understanding that there were already jurisdictional mechanisms in place for an Indian tribe, parent of an Indian child, or Indian child to utilize the federal court to seek relief from an invalid action of a state actor.[310]

This interpretation of § 1914 brings it in line with the federal habeas corpus statute, which allows federal courts to invalidate state court

307. *See* H.R. REP. NO. 95-1386 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.

308. *See* Fletcher v. Florida, 858 F. Supp. 169, 171 (M.D. Fla. 1994).

309. Indeed, the latter interpretation may very well be unconstitutional in light of *Seminole Tribe v. Florida*, as it is now clear that the Indian Commerce Clause does not permit suits against states or state officials seeking affirmative relief in federal court. Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996). ICWA was enacted pursuant to the same Indian Commerce Clause that the Indian Gaming Regulatory Act was enacted under. This constitutional impediment is not present, however, in an action seeking to invalidate a state court decision. *See* 28 U.S.C. § 2254 (1994).

310. *See* 28 U.S.C. § 1362 (1994) (authorizing federal courts to exercise jurisdiction over actions brought by Indian tribes alleging violations of federal or constitutional law by states or state actors); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976). This case was decided during debates on the passage of ICWA. The Supreme Court held that § 1362 authorizes Indian tribes to sue states in federal court for a refund of taxes illegally collected notwithstanding the Tax-Injunction Act. Examples of pre-existing jurisdictional statutes that the federal courts had recognized, prior to the enactment of ICWA, could be utilized by both tribes and Indian persons are: 28 U.S.C. § 1341 (1994) and 42 U.S.C. §§ 1983, 1331 (1994). Congress did not need to affirmatively vest federal courts with jurisdiction by § 1914 therefore to permit federal courts to review state denials of tribal rights.

convictions taken in violation of federal constitutional guarantees. It does not render state courts or officials liable either in their official or personal capacities for violation of the Indian Child Welfare Act, but merely permits federal courts to invalidate an action taken in violation of the federal mandate. It would, at the very minimum, eliminate disparate rulings between states in the same federal circuit and would hopefully facilitate the development of a uniform application of ICWA decisions, which the United States Supreme Court sees as vital.[311]

Nor should such an interpretation of § 1914 be construed as an attack upon the integrity of the state judicial process. It should be recalled that ICWA itself is an acknowledgment that the state courts were deficient in rendering judgments in child custody proceedings involving Indian families, an area imbued with judicial discretion. This deficiency is not the product of overt racism or animus toward Indian people, but instead is the result of cultural ignorance and a lack of historical retrospect regarding the plight of Indian families and tribes. Enactment of a federal statute that has no federal enforcement mechanism is not going to magically eliminate the problems that Indian tribes and families encounter in state court forums. Nor does it assure that state court judges, by merely reading the law, will gain a necessary perspective of tribal values to enable them to pass appropriate value judgments on Indian families and the cultural needs of Indian children. As the United States Court of Appeals for the Ninth Circuit recognized in *Venetie*, it would be strangely ironic if Congress had adopted a federal remedial statute imposing strict requirements upon state courts and left the enforcement of that statute solely up to the perceived violators.[312]

V. CONCLUSION

The Indian Child Welfare Act represents a golden opportunity for Indian tribes and families to address the problem of cultural dissonance, caused by federal and state efforts to destroy Indian cultures, in a culturally neutral arena without external value judgments eroding the process. It permits Indian tribes to resolve their social and familial problems internally and to bring back into the fold so many of their children torn away because of past efforts of assimilation. This process

311. *See Holyfield*, 490 U.S. at 54 (noting that federal statutes should be uniform in application).

312. The court, in response to an argument that the Indian Child Welfare Act's full faith and credit provisions could not be enforced in federal court, but rather was only a binding mandate upon state courts, held that "[i]t would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical defenders of tribal interests, to determine the scope of tribal authority under the Act." Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 553 (9th Cir. 1991).

will be a long and arduous one, but it has an effective underpinning because of the enactment of ICWA.

The Indian Child Welfare Act gives Indian tribes and families some breathing space while they go about the process of cultural rebirth. This space is invaded when state courts attempt to undermine ICWA by fanciful decision-making designed to carve out exceptions to the Act and limit its application. In instances where state courts tinker with clearly pronounced federal objectives, the federal courts must exercise the authority given them by Congress to intercede and protect Indian tribes and families against the vagaries of state courts. If this does not occur, the process of cultural degradation will continued unabated and the vision ICWA represents will be forever dimmed.