

ENDNOTES

- 1 See, e.g., Charlotte Alter, "Inside the Agonizing Custody Fight over Six-Year-Old Lexi," *Time*, March 27, 2016.
- 2 Brenda Gazzar, "Santa Clarita Family Won't Give Up on Lexi Despite Legal Setback," *L.A. Daily News*, July 12, 2016; Lindsey Bever, "Keep Lexi Home": A Foster Family's Wrenching Fight for A 6-Year-Old Choctaw Girl, *Washington Post*, March 24, 2016.
- 3 Petition for Writ of Certiorari, R.P. & S.P. v. L.A. Dept of Child. & Fam. Svcs., et al., (No. 16-500), 6.
- 4 25 U.S.C. § 1901, *et seq.*
- 5 Matthew L. M. Fletcher & Wenona T. Singel, "Indian Children and the Federal-Tribal Trust Relationship," (April 28, 2016), available at SSRN: <https://ssrn.com/abstract=2772139>.
- 6 25 U.S.C. § 1903(4).
- 7 133 S. Ct. 2552, 2564–65 (2013).
- 8 For an especially thorough and powerful explanation of the history of abuse that led to the adoption of ICWA, see Fletcher & Singel, "Indian Children."
- 9 8 U.S.C. § 1401(b).
- 10 Randall Kennedy provides a powerful critique of the allegations of abuse that led to the passage of ICWA. *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* (New York: Vintage, 2003), 484–99. On the other hand, as Kennedy acknowledges, hard evidence on such subjects is difficult to come by. *Ibid.*, 489–502. As recently as March 2015, a federal district court in South Dakota found that local child welfare officers were failing to comply with ICWA and were engaging in abusive practices that "failed to protect Indian parents' fundamental rights to a fair hearing." *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 772 (D.S.D. 2015).
- 11 It does not, however, require tribal courts to accord full faith and credit to state proceedings. As Ivy N. Voss observes, "Tribal courts are not subject to provisions of the ICWA, presumably because they are expected to act in harmony with Indian priorities." "In the Best Interest: The Adoption of F.H., an Indian Child," *BYU Journal of Public Law* 8 (1993): 164.
- 12 8 U.S.C. § 1903(4).
- 13 Guidelines, 80 Fed. Reg., 10153, B.3(c)(1).
- 14 Cherokee Const. art. IV § 1. The Dawes Rolls, or Final Rolls of Citizens and Freemen of the Five Civilized Tribes, was an attempted census of tribal membership overseen by the Dawes Commission in 1898. The rolls were closed in 1907, although some names were added in 1914. The rolls are problematic evidence of Indian ancestry for several reasons. First, many Indians refused to sign the rolls. Erik M. Zissu, *Blood Matters: The Five Civilized Tribes and The Search for Unity in The Twentieth Century* (New York: Routledge, 2001), 26. Thus even full-blooded Cherokee are today ineligible for tribal membership if a direct ancestor did not sign. Also, the Dawes Commission mandated that Indians identify with a single tribe when signing, even though tribal membership and ancestry often overlapped. As a result, non-Indian enrollment agents often arbitrarily assigned enrollees to one tribe or another. S. Alan Ray, "A Race or A Nation? Cherokee National Identity and the Status of Freedmen's Descendants," *Michigan Journal of Race & Law* 12 (2007): 387–463. The Cherokee National Citizenship Act purports to make all eligible children automatic members of the tribe for a period of 240 days after birth in order to expand tribal authority under ICWA. The Tenth Circuit Court of Appeals has rejected "this sort of gamesmanship on the part of a tribe." *Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011).
- 15 Navajo Nation Code Ann. tit. i, § 701(B) (2016).
- 16 Gila River Indian Comm. Const. art. III § 1(b) (emphasis added).
- 17 *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989).
- 18 ICWA does allow parents to object when a tribe seeks to transfer jurisdiction over a foster care or termination of parental rights proceeding to its own courts in cases involving children not domiciled or residing within the tribe's reservation. 25 U.S.C. § 1911(b). But parents do not have similar rights in cases involving children domiciled on a reservation, as in *Holyfield*. Nor can parents bar a tribe's authority to intervene in a state court proceeding, or block application of ICWA's adoption or foster care placement preferences, or block other applications of ICWA. In re S.B., 130 Cal. App. 4th 1148, 1159 (2005) (ICWA "serve[s] the interests of the Indian tribes irrespective of the position of the parents and cannot be waived by the parent." (citations and quotation marks omitted)).
- 19 490 U.S. 30, 37–38, 49 (1989).
- 20 Lorinda Mall, "Keeping It in The Family: The Legal and Social Evolution of ICWA in State and Tribal Jurisprudence," in Matthew L. M. Fletcher, et al., eds., *Facing the Future: The Indian Child Welfare Act at 30* (East Lansing, MI: Michigan State University Press, 2009), 165 (emphasis added). This is not entirely accurate. Provisions of ICWA depend not on tribal affiliation but on Indian ancestry. Thus ICWA declares that if extended family or members of the child's tribe are unable to adopt an Indian child, that child must be placed with "other Indian families," regardless of tribe, instead of non-Indian families. 25 U.S.C. § 1915(a).
- 21 530 U.S. 57, 60, 66, 69–70, 78–79, 80 (2000). See also *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (parental rights are so important that it is unconstitutional for the state to authorize termination of those rights on a "preponderance of the evidence" basis).
- 22 *Troxel*, 530 U.S. at 76 (Souter, J.).
- 23 See Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, 13th ed. (Boston: Little, Brown, 1886), 2:675–77 (tracing the origins of the best interests of the child standard to the English *parens patriae* doctrine); Julia Halloran McLaughlin, "The Fundamental Truth about Best Interests," *St. Louis University Law Journal* 54 (2009): 160–61 (The best interest standard has "exist[ed] from time immemorial and has become the bedrock of our state custody statutory law." It is a "right that is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental or implicit in the concept of ordered liberty.'" (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 [1989])).
- 24 *Finlay v. Finlay*, 240 N.Y. 429, 433 (1925) (citation omitted).
- 25 In re Marriage of Wellman, 104 Cal. App. 3d 992, 998 (1980); In re Robert L., 21 Cal. App. 4th 1057, 1068 (1993).
- 26 In re Adoption of Kelsey S., 1 Cal. 4th at 816, 845–50 (1992).
- 27 See, e.g., *In re C.H.*, 997 P.2d at 782 ("while the best

ENDNOTES

- interests of the child is an appropriate and significant factor in custody cases under state law, it is improper" in ICWA cases because "ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences"; *In re Zylena R.*, 284 Neb. 834, 852 (2012) ("Permitting a state court to deny a motion to transfer [to tribal court] based upon its perception of the best interests of the child negates the concept of 'presumptively tribal jurisdiction'"). Some state courts have rejected this view. See, e.g., *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1353–54 (2014); *Navajo Nation v. Arizona Dep't of Econ. Sec.*, 230 Ariz. 339, 348 (Ct. App. 2012).
- 28 25 C.F.R. § 23.111(e). The regulations require that ICWA be applied when there is "reason to know" a child is an "Indian child" under ICWA. But "reason to know" is defined in remarkably loose ways. It occurs when "any participant in the proceeding . . . informs the court that the child is an Indian child," or if "any participant . . . informs the court that it has discovered information indicating that the child is an Indian child," or if "the child . . . gives the court reason to know he or she is an Indian child," among other things. *Ibid.* § 23.107(c). While a child may later prove not to be an Indian child—due to ineligibility for tribal membership, for instance—ICWA's provisions may have caused substantial delay in the proceedings by the time eligibility is disproven.
- 29 *Troxel*, 530 U.S. at 66 (2000) (plurality); *In re N.N.E.*, 752 N.W.2d 1, 9 (Iowa 2008) (ICWA violates substantive due process to the extent that it "makes the rights of a tribe paramount to the rights of an Indian parent.").
- 30 N. Bruce Duthu, *American Indians and The Law* (New York: Viking, 2008), 154–55 (emphasis added).
- 31 405 U.S. 645, 656–57 (1972).
- 32 50 Ariz. 382, 386 (1937).
- 33 *Holyfield*, 490 U.S. at 32. The Utah case was *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986), which quoted *Wisconsin Potawatomes of the Hannahville Indian Community v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973).
- 34 25 U.S.C. § 1901.
- 35 *Cf. Reid v. Covert*, 354 U.S. 1, 5–6, 16 (1957) ("no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution," or allow Congress to "strip[] away" the "shield which the Bill of Rights and other parts of the Constitution provide . . . just because [the citizen] happens to be in another land.").
- 36 See, e.g., Catherine M. Brooks, "The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future," *Creighton Law Review* 27 (1994): 668.
- 37 Carol Locust, "Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children," <https://splitfeathers.blogspot.com/p/split-feathers-study-by-carol-locust.html>, originally published in the *Ontario Association of Children's Aid Society Journal* 44 (2000).
- 38 These and other shortcomings of the *Split Feathers* study are detailed in Bonnie Cleaveland, *Split Feather: An Untested Construct* (March 2015), <http://www.icwa.co/split-feather-scientific-analysis/>.
- 39 See Kennedy, *Interracial Intimacies*, 499–503 (critiquing other "junk social science" cited by ICWA advocates).
- 40 See, e.g., David Fanshel, *Far from The Reservation* (Metuchen, N.J.: Scarecrow Press, 1972), 322 ("My overall impression is that the children are doing remarkably well as a group"); Rita J. Simon & Sarah Hernandez, *Native American Transracial Adoptees Tell Their Stories* (Lanham: Lexington Books, 2008), 13–14 (nonscientific series of interviews with subjects in which 16 of 20 Indians adopted into non-Indian families reported positive experiences); Elizabeth Bartholet, "Where Do Black Children Belong? The Politics of Race Matching in Adoption," *University of Pennsylvania Law Review* 139 (1991):1221–24. See also Christine D. Bakeis, "The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe," *Notre Dame Journal of Law, Ethics, & Public Policy* 10 (1996): 548–49.
- 41 Notice of Proposed Rulemaking, Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 25 C.F.R. § 23.103(e) (2015) (to be codified at 25 C.F.R. pt. 23); Michael C. Snyder, "An Overview of the Indian Child Welfare Act," *St. Thomas Law Review* 7 (1995): 820.
- 42 B.J. Jones, "Differing Concepts of 'Permanency,'" in Fletcher, *et al.*, 129, 131.
- 43 25 U.S.C. § 1915(a)(3).
- 44 See, e.g., *In re Adoption of T.A.W.*, 2016 WL 6330589, at *8 (Wash. October 27, 2016) (non-Indian birth father invoked ICWA to bar adoption when custodial parent—an Indian mother—remarried and her new husband sought to adopt her child).
- 45 See, e.g., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563–64 (2013) (noting that ICWA's mandates can "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home"); *In re Bridget R.*, 41 Cal. App. 4th 1483, 1508 (1996) ("ICWA requires Indian children . . . to be treated differently from non-Indian children . . . As a result . . . the number and variety of adoptive homes that are potentially available to an Indian child are more limited than those available to non-Indian children, and an Indian child who has been placed in an adoptive or potential adoptive home has a greater risk . . . of being taken from that home and placed with strangers.").
- 46 25 U.S.C. § 1911(b). "Good cause" is not defined in ICWA, and dispute over its meaning is among the greatest sources of controversy over ICWA.
- 47 *Guidelines*, 80 Fed. Reg., 10153–54, B.6.
- 48 25 U.S.C. § 1911(c).
- 49 *Ibid.*, § 1914. *Cf. In re S.L.*, 2006 WL 477772, *1 (Cal. Ct. App. 2006) (remanding termination proceeding of 15-year-old twins on grounds that ICWA notice requirements had not been followed seven years earlier).
- 50 See *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana*, in & for *Rosebud Cty.* 424 U.S. 382, 387–89 (1976) (per curiam). In this regard, ICWA simply reinforced the Supreme Court's holding that tribal court determinations of on-reservation child custody proceedings were a routine application of tribal sovereignty.
- 51 *Holyfield*, 490 U.S. at 48–49.
- 52 See, e.g., *Gaudin v. Remis*, 379 F.3d 631, 636–38 (9th Cir. 2004).
- 53 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).
- 54 *Int'l Shoe Co. v. Washington*, Office of Unemployment Comp. & Placement, 326 U.S. 310, 319 (1945).
- 55 *World-Wide Volkswagen*, 444 U.S. at 292, 295.

ENDNOTES

- 56 Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977) (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) (plurality)).
- 57 Cf. Kennedy, 513 (“I see little virtue in burdening the living, particularly youngsters who have no choice in the matter, for the sake of preserving—freezing—group identities as they are presently constituted.”).
- 58 See, e.g., Red Fox v. Hettich, 494 N.W.2d 638, 645 (S.D. 1993) (“the same due process standards which govern state court assertions of jurisdiction over nonresident defendants apply to tribal courts.”). On the other hand, *In re Interest of Armell*, 550 N.E.2d 1060, 1068 (Ill. App. Ct. 1990), held that Congress’s powers with regard to tribes overrides the minimum contacts analysis. David Castleman, “Personal Jurisdiction in Tribal Courts,” *University of Pennsylvania Law Review* 154 (2006): 1268, contends that these limitations on personal jurisdiction are “based on Western values, not tribal ones.” But sovereignty itself is a “Western concept.” David Eugene Wilkins & Heidi Kiiwetinepineskiik Stark, *American Indian Politics And The American Political System* 3rd ed. (Lanham: Rowman & Littlefield, 2011), 312. Given that all American Indians are citizens of the United States, it is appropriate (indeed, mandatory) that Congress protect their due process rights. In any event, Castleman, 1268–77, acknowledges that tribal courts themselves employ the minimum contacts/purposeful availment analysis.
- 59 Sosna v. Iowa, 419 U.S. 393, 404 (1975).
- 60 Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992).
- 61 133 S. Ct. 2675, 2691-92 (2013).
- 62 Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2619 (2013). See also Williams v. Babbitt, 115 F.3d 657, 665–66 (9th Cir. 1997) (where social and economic conditions of indigenous population have changed, legislation that addresses their interests may be rendered unconstitutional).
- 63 Indian children are still removed from Indian homes and placed in non-Indian homes at a disproportionately high rate, but as the problems of poverty, alcoholism, drug abuse, and domestic violence are disproportionately higher in Indian country, this fact alone cannot show that the problems ICWA was enacted to redress still remain. See Stephen L. Pevar, *The Rights of Indians and Tribes*, 4th ed. (New York: Oxford University Press, 2012), 306 (“The extent to which these disparities are due to persistent bias and prejudice as opposed to legitimate responses to child abuse and neglect cannot be determined with any degree of certainty.”). Of course, some abuses remain, including the shocking case of *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015). But the abuses involved there were sufficiently addressed by due process protections already in place.
- 64 New York v. United States, 505 U.S. 144, 161–66 (1992).
- 65 521 U.S. 898, 903-04 (1997).
- 66 25 U.S.C. § 1915(b).
- 67 Ibid. § 1915(e).
- 68 Ibid. § 1912(d).
- 69 *Printz*, 521 U.S. at 927–28.
- 70 *Guidelines*, 80 Fed. Reg. 10146, 10150 A.1 (Feb. 25, 2015) (emphasis added).
- 71 Ibid., 10157, F.1(b) (emphasis added)
- 72 See, e.g., *In re M.K.T.*, 368 P.3d 771, 783–84; (Okla. 2016); *Brenda O. v. Arizona Dep’t. of Econ. Sec.*, 226 Ariz. 137, 140 (Ct. App. 2010); *In re Interest of Tavian B.*, 292 Neb. 804, 815 (2016) (Stacy, J., concurring and dissenting) (“we are under no obligation to follow the guidelines.”).
- 73 *The Federalist* No. 33, 206 (J. Cooke ed., Middletown, CT: Wesleyan University Press, 1961).
- 74 Pub. Law. 105-89, § 111 Stat. 2129 (1997).
- 75 See, e.g., 42 U.S.C. § 671(a)(15); Alaska Stat. § 47.10.086 (2016); Iowa Code § 232.102(5)(b); Minn. Stat. § 260.012(a).
- 76 25 U.S.C. § 1912(d) (emphasis added).
- 77 See, e.g., *In re Adoption of Hannah S.*, 142 Cal. App. 4th 988, 998 (2006) (“Active efforts are essentially equivalent to reasonable efforts to provide or offer reunification services in a non-ICWA case and must likewise be tailored to the circumstances of the case.”).
- 78 See, e.g., *In re Shayla H.*, 22 Neb. App. 8 (Neb. Ct. App. 2014), *aff’d*, 289 Neb. 473 (2014); *People ex rel. A.R.*, 310 P.3d 1007, 1015 (Colo. Ct. App. 2012); *In re JL*, 770 N.W.2d 853, 865 (Mich. 2009); *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. Ct. App. 2007); *In re A.N.*, 106 P.3d 556, 560–61 (Mont. 2005); *In re Interest of Walter W.*, 274 Neb. 859, 865 (2008); *In re J.S.*, 177 P.3d 590, 593 (Okla. Civ. App. 2008); *Dept of Human Services v. K.C.J.*, 228 Or. App. 70, 74 (2009); *State ex rel. C.D.*, 200 P.3d 194, 205 (Utah. Ct. App. 2008). See also Megan Scanlon, “From Theory to Practice: Incorporating the ‘Active Efforts’ Requirement in Indian Child Welfare Act Proceedings,” *Arizona State Law Journal* 43 (2011): 646–54.
- 79 *Guidelines*, 80 Fed. Reg., 10150–51, A.2(15).
- 80 The regulations chose simply to omit reference to “reasonable efforts,” rather than to compare “active” and “reasonable” efforts. 81 Fed. Reg., 38791.
- 81 See, e.g., *A.A. v. State, Dep’t of Family & Youth Servs.*, 982 P.2d 256, 261 (Alaska 1999).
- 82 See, e.g., *In re. People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 618 (S.D. 2005).
- 83 See, e.g., 42 U.S.C. § 671(a)(15)(D); *In re Interest of Ethan M.*, 723 N.W.2d 363, 372–74 (Neb. Ct. App. 2006); *New Jersey Div. of Youth & Family Servs. v. A.R.G.*, 179 N.J. 264, 283–85 (2004).
- 84 *A.M. v. State*, 891 P.2d 815, 827 (Alaska 1995).
- 85 *Guidelines*, 80 Fed. Reg., 10156, D.2 & D.3. The 2016 regulations “decline[d] to establish a uniform standard of proof” with regard to active efforts, but promised further evaluation for “future rulemakings.” *Ibid.*, 38816.
- 86 BIA Regulations § 23.107, 81 Fed. Reg. 38869-70. California Rule of Court 5.481 also requires that ICWA be applied whenever there is “reason to know” the child is an Indian child.
- 87 *Adoptive Couple*, 133 S. Ct. at 2562.
- 88 846 N.W.2d 668, 672-73, 677-78 (Neb. App. 2014).
- 89 855 N.W.2d at 776.
- 90 *In re Interest of Shayla H.*, et al., Doc. JV13 (Juvenile Court of Lancaster County, May 1, 2015), 3, 18, 19 (on file with Goldwater Institute).
- 91 266 Or.App. 453, 455-57, 465-67 (2014).
- 92 *Dept of Hum. Serv. v. J.M.*, 356 Or. 689 (2015).
- 93 Ashley E. Brennan, “Child Abuse Is Color Blind: Why the Involuntary Termination of Parental Rights Provision of the Indian Child Welfare Act Should Be Reformed,” *University of*

ENDNOTES

Detroit Mercy Law Review 89 (2012): 278.

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

95 A.R.S. § 8-821(A)-(B).

96 *In re Juvenile Action No. 5666-J*, 133 Ariz. 157, 159 (1982); A.R.S. § 8-844(C).

97 455 U.S. 745, 758, 769 (1982). The court observed in passing that ICWA was the “only analogous federal statute of which we are aware” that “permits termination of parental rights solely upon ‘evidence beyond a reasonable doubt.’” *Ibid.*, 749–50. Although it did not address the constitutionality of that requirement, it did note that in passing ICWA “Congress did not consider . . . the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all state-initiated parental rights termination hearings.”

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

99 25 U.S.C. § 1912(e)

100 Debra Ratterman Baker, “Indian Child Welfare Act,” *Children’s Legal Rights Journal* 15 (1995): 28.

101 See Hollinger, 500 (“Congressional funding for the remedial services authorized by the ICWA has consistently been lower than the \$12 million per annum recommended by the Senate Select Committee. State welfare programs are often unavailable for reservation domiciliaries.”).

102 2016 WL 6330589 (Wash. October 27, 2016).

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

104 *In re Adoption of T.A.W.*, 188 Wash. App. at 804–05.

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

106 *In re Adoption of T.A.W.*, 188 Wash. App. at 806-09.

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

108 2016 WL 6330589, at *8 (Wash. October 27, 2016).

109 2016 WL 6330589, at *18 (Madsen, C.J., dissenting).

110 *In re Custody of S.E.G.*, 521 N.W.2d 357, 363, 365 (Minn. 1994).

111 *Bakeis*, 551, Kennedy, 517.

112 25 U.S.C. § 1903(2).

113 *Ibid.*, § 1915(b).

114 *Ibid.*, § 1915(a).

115 Even if they did break down along tribal lines, they would constitute national-origin discrimination. *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998).

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

117 42 U.S.C. § 1996(b)(3).

118 See Mark Flatten, *Death on a Reservation* (Goldwater Institute, July, 2015): 29. On June 3, 2016, President Obama signed the Native American Children’s Safety Act, Pub. Law No. 114-165, which requires criminal background checks for foster parents in cases involving tribal social services agencies.

119 *In re Alexandria P.*, 228 Cal.App.4th at 1329–30.

120 *Petition for certiorari, R.P. & S.P. v. Los Angeles Dep’t of Child Welfare, et al.* (No. 16-500), 4-5 (on file with Goldwater Institute).

121 *In re Alexandria P.*, 228 Cal. App. 4th at 1330–36, 1352–57.

122 *R.P. v. Superior Court*, No. B268111, 2015 WL 7572569, at *1 (Cal. Ct. App. Nov. 25, 2015).

123 Fewer than 10 percent of foster children remain in foster care for four years. See Child Welfare Information Gateway, *Foster Care Statistics 2014*, 7, <https://www.childwelfare.gov/pubPDFs/foster.pdf>. It goes without saying that children in foster care who experience repeated separations often suffer emotional and psychological strain, leading to problems with identity, stability, and fears of intimacy, and are at greater risk for delinquency. See Benjamin Kerman, et al., eds., *Achieving Permanence for Older Children and Youth in Foster Care* (New York: Columbia University Press, 2009); Gina Miranda Samuels, “Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds,” *Children & Youth Services Review* 31 (2009): 1229-39; Mark E. Courtney & Darcy Hughes Heuring, “The Transition to Adulthood for Youth ‘Aging Out’ of the Foster Care System,” in D.W. Osgood, et al., eds., *On Your Own Without a Net* (Chicago: University of Chicago Press, 2005), 68–91; Jimmy Mosqueda & Jennifer Rodriguez, *Voices Carry: Recommendations of Young People in the Foster Care System* (California Youth Connection Policy Conference Report 2005), 10–12; Joseph P. Ryan & Mark F. Testa, “Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability,” *Children & Youth Services Review* 27 (2005): 227–49;

ENDNOTES

Virginia L. Colin, *Infant Attachment: What We Know Now* (U.S. Dep't of Health & Human Servs., 1991), ii ("The importance of early infant attachment cannot be overstated. It is at the heart of healthy child development and lays the foundation for relating intimately with others, including spouses and children.")

"Given the potential long-term effects that lack of attachment can have on a child, it is crucial that the foster care system respond in ways that help the child develop attachments with their primary caregivers whomever they may be. No matter if the plan for a child in interim care is reunification . . . or a move into an adoptive home . . . the development of an attachment to foster parents should be encouraged. Children need ongoing relationships to continue their growth and change." Vera Fahlberg, *A Child's Journey through Placement* (London: Jessica Kingsley, 1991) 23–24.

124 In re Alexandria P., 1 Cal. App. 5th 331, 351 (2016) (emphasis added).

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

126 In re Alexandria P., 1 Cal. App. 5th at 351 (emphasis added).

127 The Pages petitioned the U.S. Supreme Court, but it declined to hear the case.

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

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

130 *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

131 Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984) (freedom of association especially protects family association, because the "choices to enter into and maintain certain intimate human relationships" are an essential "individual freedom . . . [and] central to our constitutional scheme."); *United States v. Crook*, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) ("the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence").

132 *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

133 *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969); *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

134 *Guidelines*, 80 Fed. Reg., 10153, B.4(d)(iii).

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

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

137 *Barnette*, 319 U.S. at 642.

138 *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

139 See Duthu, 138 ("As domestic dual citizens, American Indian members of federally recognized tribes are heirs to the American legal tradition . . . as well as their own tribal systems . . . There is clearly a tension between the two.")

140 *Ambach v. Norwick*, 441 U.S. 68, 75 (1979).

141 *Kawakita v. United States*, 343 U.S. 717, 733 (1952). Tribal members are subject to tribal criminal jurisdiction in ways that nonmembers are not, and can be taxed by tribes in ways nonmembers cannot be. Tribal governments are exempt from many of the constitutional rules that protect people against other forms of government in the United States. And the legal remedies available when tribes deprive members of their federal constitutional rights are far narrower than those available when states violate the rights of citizens.

142 *Roberts*, 468 U.S. at 620 (1984).

143 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015).

144 Barbara Atwood, "The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation," *Arizona Law Review* 50 (2008): 137.

145 417 U.S. 535, 553 n. 24 (1974).

146 430 U.S. 641, 646–47 & n. 7 (1977).

147 528 U.S. 495, 515–19 (2000).

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

149 25 U.S.C. § 1903(3), (4). ICWA does apply to children who are tribal members, but as membership requires eligibility, the determinative factor is still eligibility, which is based on biology.

150 Solangel Maldonado, "Race, Culture, and Adoption: Lessons from *Mississippi Band of Choctaw Indians v. Holyfield*," *Columbia Journal of Gender & The Law* 17 (2008): 23.

151 See *Guidelines*, 80 Fed. Reg., 14887, 23.103(d) (ICWA applies "[i]f there is any reason to believe the child is an Indian child . . . unless and until it is determined that the

ENDNOTES

child is not a member or is not eligible for membership in an Indian tribe."); In re Jack C., III, 192 Cal. App. 4th 967, 981 (2011) (upholding state court rule requiring courts to proceed under ICWA before a child's tribal membership is determined).

152 *Guidelines*, 80 Fed. Reg., 14893, 23.134(b), (c).

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

154 *Adoptive Couple*, 133 S. Ct. at 2558-59.

155 *Ibid.*, 2565.

156 25 U.S.C. § 1903(4) (2012).

157 See Marquis James, *The Raven: A Biography of Sam Houston* (Austin: University of Texas Press, 2004), 20. Houston, adopted at the age of 16 in 1809 by Chief Oo-loo-te-ka, was named Colonneh, or The Raven, in Cherokee. Under today's Cherokee Constitution, Houston would be ineligible for membership in the tribe, since he obviously had no ancestor who signed the Dawes Rolls. Nor was he the biological child of a tribal member. He therefore could not qualify as an "Indian child" under ICWA.

158 See Louise Erdrich, *The Round House* (New York: Harper Perennial, 2012), 114. In the novel, Linda, a white child born with birth defects, is abandoned by her birth parents and taken in by members of the Ojibwe tribe. Under that tribe's constitution, Linda would not be eligible for membership, because membership requires biological Chippewa ancestry. See also Minn. Chippewa Tribe Const. art. II (1964). Nor is she a biological child of a tribal member, as required by 25 U.S.C. § 1903(4)(b).

159 *Rice v. Cayetano*, 528 U.S. 495, 516-17 (2000).

160 See Wendy Ng, *Japanese Internment During World War II: A History and Reference Guide* (Westport, CT: Greenwood Press, 2002), 37. Even persons with more than this amount of Japanese ancestry could leave detention centers if they enlisted in the military or obtained sponsorship. See Benson Tong, *Asian American Children: A Historical Handbook and Guide* (Westport, CT: Greenwood Press, 2004), 95.

161 *Korematsu*, 323 U.S. at 216.

162 State courts, wary of the equal protection problems caused by applying a different set of laws to children based solely on biological ancestry, have fashioned an exception to ICWA known as the Existing Indian Family Doctrine. The doctrine, however, has been heavily criticized, and the current trend is to abandon it. Toni Hahn Davis, "The Existing Indian Family Exception to the Indian Child Welfare Act," *North Dakota Law Review* 69 (1993): 465-96. Debate over the doctrine, which is at times heated, actually misses the essential point. The doctrine is not an assault on ICWA, but a saving construction intended to preserve a statute that would otherwise violate the Constitution. Abolishing it would only unveil ICWA's racially discriminatory aspects.