



Escaping The ICWA Penalty Box

In Defense of Equal Protection for Indian Children

June 6, 2017

Timothy Sandefur,
Vice President for Litigation

Note: The unabridged version of this article appeared in the *Children's Legal Rights Journal*, vol. 37, issue 1, http://www.childrenslegalrightsjournal.com/childrenslegalrightsjournal/volume_37_issue_1/pg=6#pg6. This paper is published with the Journal's kind permission.



Introduction

In early 2016, a six-year-old Californian girl named “Lexi” was taken from the arms of her weeping foster parents, Rusty and Summer Page,¹ and sent to live with her step-second-cousin in Utah instead. She had lived with the Pages for four years, after child welfare officials removed her from her drug-addicted mother and incarcerated father.² Lexi had found love and stability in the Pages’ home. She thought of them as “mommy” and “daddy,” and regarded their other children as her siblings.³ Had this been an ordinary case, they would almost certainly have adopted her.

But Lexi was not like other children. Her great, great, great, great-grandparent was a full-blooded Choctaw Indian. That meant that foster-care and adoption proceedings in her case were governed by the Indian Child Welfare Act of 1978 (ICWA).⁴ ICWA gives tribal governments extraordinary power to control the fate of abused, neglected, or abandoned Indian children. It overrides the “best interests of the child” standard, hampers efforts to protect abused children, and imposes race-based restrictions on foster care or adoption of Indian kids.

ICWA was originally intended to prevent the breakup of Indian families and protect children and parents from abusive state officials.⁵ Laudable goals, to be sure. But in practice, ICWA often harms children by delaying or denying them placement in stable



and loving homes, compelling their reunification with abusive birth parents, and mandating procedures that deprive them of the legal protections they need. In the most extreme cases, children who lack any cultural or political affiliation with a tribe, and do not live on a reservation, are subject to ICWA’s burdens solely because their ethnic ancestry renders

them “eligible” for tribal membership.⁶ As the Supreme Court recently observed in *Adoptive Couple v. Baby Girl*—one of only two cases addressing ICWA—the Act’s mandates put Indian kids at “a unique disadvantage in finding . . . permanent and loving home[s],” and burden their futures “solely because an ancestor—even a remote one—was an Indian.”⁷

How is it possible that more than half a century after *Brown v. Board of Education*, the United States government still maintains a de jure “separate but equal”—or more precisely, separate and *substandard*—legal system for one racial group? What does it say about the basic principles of our Constitution *vis-à-vis* our Native American population? And how can this be fixed in a way that respects the legitimate interests of Indian tribes while protecting the most vulnerable Americans?

This article provides a brief overview of the origin and structure of ICWA, focusing on six provisions of the Act that place Indian children in “the ICWA Penalty Box” solely on account of their race. Because this article focuses primarily on cases involving children who do not live on reservations and have no cultural connection to tribes—but who are eligible for membership because of their genetic ancestry—not every argument presented here will be relevant to all ICWA proceedings.

But before beginning, a disclaimer is warranted. American Indian law is fraught with a bloody, tragic, often plainly disgusting history of racism, violence, and even genocide. That history—which played a prominent role in ICWA’s origin⁸—must not and cannot be ignored or treated euphemistically. This article is written in full recognition of the deplorable legacy of abuse and betrayal, mutual incomprehension and prejudice that has plagued relations between Indians and non-Indians in North America. It is tragic that these problems persist to this day—and that ICWA is partly to blame.

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

ICWA’s Background

This last point is worth emphasizing. All Indian children are citizens of the United States, and entitled to the equal protection of the laws.⁹ That they are denied such protection today is a disgrace. However noble the intentions behind ICWA’s passage, it is today often a *cause* of abuse. All children, regardless of their ancestry, deserve to be regarded as individuals, and their best interests should be the overriding consideration in cases involving their welfare. The United States owes American Indian children nothing less.

ICWA was enacted in response to efforts during the termination era to assimilate Indian children into American society. At that time, federal policy sought to separate Indian children from their parents¹⁰ and to place them in boarding schools, where many were abused and were punished for speaking Indian languages or practicing traditional religions. Children were also removed from Indian families under local standards that failed to account for traditional Indian cultural practices.

In passing ICWA, Congress sought to preserve and strengthen Indian families by preempting state child welfare laws that led to family breakup. Among other things, it gives tribal courts exclusive jurisdiction over child custody cases involving tribal members on reservations, orders state and federal courts to give full faith and credit to the child custody decisions of tribal courts,¹¹ requires notification of parents and tribes regarding involuntary proceedings such as the severance of parental rights, mandates procedures to ensure that tribal members know their rights when asked to sign papers to terminate a parent-child relationship, and employs the “prevailing social and cultural standards of the Indian community” in child welfare cases.

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

ICWA’s Basic Presumptions

The Rights of Parents, Tribes, and Children

The problems begin with the definition of an “Indian child.” Congress, understandably reluctant to interfere with the authority of tribes to determine their own membership, deferred wholesale to tribal authorities on the question of who qualifies as Indian for purposes of ICWA. The Act defines an “Indian child” as any child who is a member of a tribe, or is *eligible* for membership and is the biological child of a tribal member.¹² Meanwhile, virtually all tribes define eligibility for membership in terms of ethnic heritage or ancestry. Federal regulations impose no minimum blood quantum.¹³ This means that a child can qualify as an Indian child for purposes of ICWA based on one drop of Indian blood.

The Cherokee Constitution, for example, defines eligibility solely based on whether a person has a direct ancestor on the Dawes Rolls.¹⁴ Other tribes define membership strictly by blood quantum. For example, Navajo law makes a person eligible for membership if he or she “is at least one-fourth degree Navajo blood.”¹⁵ Still other tribes require blood quantum but not *tribal* affiliation. Thus, the Gila River Indian Community entitles “all

children of members . . . [who] are of at least one-fourth *Indian* blood” to membership.¹⁶ This means that, for instance, a child who is the child of a member but has only 1 percent Gila River ancestry and 24 percent Navajo ancestry is eligible for Gila River membership (but not Navajo citizenship) and is subject to ICWA. It also means that a child who is not *biologically* Indian but is fully connected to a tribe’s culture—say, the adopted child of a tribal member—is not subject to ICWA, while a child whose connection to a tribe is genetic is, even if that child has no cultural or social ties to the tribe.

Once a child qualifies as “an Indian child” under ICWA, the tribe’s authority with regard to that child is in many ways equal or even superior to the rights of the parents.¹⁷ Thus, even if parents wish to block application of ICWA, they are often unable to do so, and tribes can override the expressed wishes of parents.¹⁸ In *Mississippi Band of Choctaw Indians v. Holyfield*, Indian parents chose to leave the reservation before giving birth, and signed voluntary consent forms agreeing to have their child adopted by a non-Indian couple. Nevertheless, the tribe successfully moved to have the adoption order vacated for noncompliance with ICWA. The Supreme Court concluded that ICWA “was not meant to be defeated by the actions of individual members,” because the statute protects “not solely . . . Indian children and families, but also . . . tribes themselves.”¹⁹ In short, ICWA empowers tribal governments in ways that supersede the judgment of parents when the two come into conflict. As one Indian law expert says, “The purpose of ICWA . . . is *ultimately to maintain the survival of the tribe* through the retention of its members.”²⁰

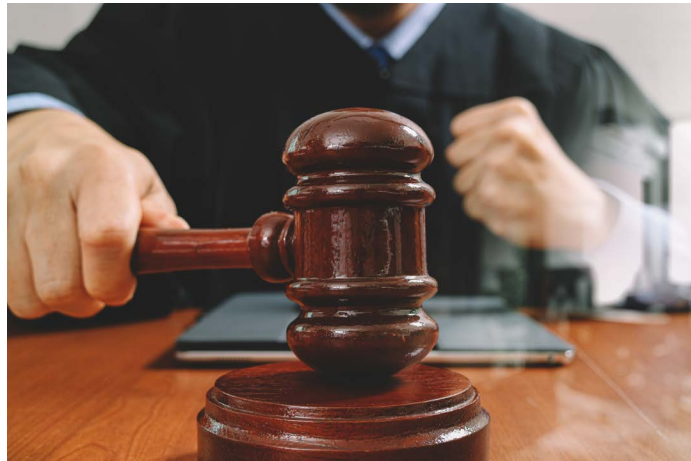
The idea of government elevating any third party to “parity” with the rights of parents is disturbing and unconstitutional. In *Troxel v. Granville*, the Supreme Court struck down a Washington state law that forced parents to let “any person” visit with their children whenever a court determined that this would be “in the best interest of the child,” even if it ran contrary to the parents’ preferences. Six justices found that parental rights, being fundamental rights, could only be infringed for extraordinarily important reasons, and that the Washington statute overrode those rights on too light a basis. Worse, the court suspected that other Washington courts were applying a presumption *against* parental choices: “In effect, the judge placed on . . . the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters.” Given the fundamental status of parental rights, the Supreme Court ruled that parents’ choices must be accorded “special weight,” over and above the quotidian “best interests” standard.²¹

ICWA goes even further than the Washington visitation statute. It involves not mere visitation rights, but the far more intrusive matter of tribal jurisdiction to make operative decisions about child foster care, adoption, and other matters, even where those children

are not domiciled on a reservation and are not members of tribes (but are only eligible for membership). It allows tribes to block adoption indefinitely while they seek foster and adoptive families of Native American ancestry, and to prohibit it entirely by mandating that children be placed in accordance with tribal preferences. ICWA promotes the interests of a tribe—nonfamily members—above the choices of parents, and does so *not* on the basis of a “best interests” determination—which, however unclear or “free-ranging”²² it might be, at least involves an assessment of a child’s unique needs.

The Best Interests of the Child

For centuries, the “best interests of the child” standard has been viewed as the essential lodestar for child welfare litigation.²³ A judge must, in the words of Justice Benjamin Cardozo, “put himself in the position of a ‘wise affectionate and careful parent’ and make provision for the child accordingly.”²⁴ Courts have called the best interests standard the



“touchstone” and the “linchpin” of the law of child welfare.²⁵ This standard is inherently individualized, meaning that it focuses on the particular interests of the specific child under his or her unique circumstances.²⁶

ICWA deprives children whose ancestry is Indian of the protection of that rule and substitutes a uniform, often insurmountable presumption that it is in Indian children’s best interests to have their futures determined by tribal authorities. Some courts—and the BIA—have taken the position that this presumption overrides individualized consideration of the child’s personal best interests, except in the rarest circumstances.²⁷ And this presumption does not depend on existing social or cultural links between child and tribe, but on the basis of biology. BIA regulations even impose a presumption that ICWA applies when a child is merely suspected of having Indian ancestry.²⁸

ICWA’s presumptions also implicate the rights of parents. The rights of birth parents—particularly their fundamental right to direct the upbringing of their children—is violated when the government gives a third party rights over the child that are equal to or even greater than their own.²⁹ ICWA also deprives non-Indian foster and adoptive parents of their right to a legal process that takes no regard of their race or nationality. Non-Indian adults seeking to adopt Indian children face a far greater burden in court, requiring a vast investment of time and money for legal representation. They also face a greater risk

of losing their cases for reasons unrelated to their fitness as adoptive parents—simply because ICWA presumes—as Indian law expert N. Bruce Duthu expresses it—“that the [Indian] child’s best interests are served by maintaining his or her actual *or even potential* cultural and social links with his or her Indian tribe.”³⁰

Blanket presumptions of this sort—even if rebuttable—raise significant due process concerns. In *Stanley v. Illinois*, the Supreme Court struck down a state law under which children of unmarried parents were taken into state custody upon the death of the mother, without any proof of neglect on the father’s part. “It may be . . . that most unmarried fathers are unsuitable and neglectful parents,” the court noted, “but all unmarried fathers are not in this category,” and a father should have a genuine opportunity to make his case based on his individual circumstances. “Procedure by presumption is always cheaper and easier than individualized determination,” declared the court, but when a legal presumption “forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.”³¹

Of course, a presumption in favor of a father can also run afoul of the “best interests standard.” In *Dickason v. Sturdavan*, the Arizona Supreme Court recognized that while a father may ordinarily be presumed to be the best caretaker of his child (because the “voice of nature, which declares that the father is the natural guardian of the minor child, cannot be silenced”), there may be cases in which fathers are unsuitable. Because the child’s welfare is the “paramount consideration,” a parent’s “prima facie right to . . . custody is not . . . unconditional.”³²

ICWA’s presumptions are at least as powerful as those rejected in *Stanley* and *Dickason*. They categorically presume that Indian children are better off in Indian families, or in families selected by tribal governments, rather than with non-Indian families. That presumption compromises, and frequently subordinates, the welfare of children by focusing on the interests of tribal collectives. ICWA itself declares that there is “no resource that is more vital to the continued existence and integrity of Indian tribes than their children,” but while that may be true, there are cases in which the interests of tribes as corporate institutions conflict with the interests of children.

Where ICWA goes wrong is in its failure, in the event of such conflict, to unequivocally prioritize the latter. In *Holyfield*, the Supreme Court quoted the Utah Supreme Court’s rationale for ICWA’s equivocation between tribal interests and the interests of children: “[the] relationship between Indian tribes and Indian children

domiciled on the reservation finds no parallel in other ethnic cultures,” it declared. “It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize.” But the Utah court supported its assertion, not by reference to any unique needs of Indian children, but instead by reference to the tribe’s interest in sovereignty. Specifically, it cited two cases that emphasized the role that tribal jurisdiction over child custody cases plays in ensuring tribal autonomy: “if tribal sovereignty is to have any meaning at all,” it concluded, “it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity.”³³

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

This blindness to the best interests of Indian children is plain from ICWA’s opening phrases. The Act defines Indian children as tribal “resources” to be regulated in such a manner as to achieve “the continued existence and integrity of Indian tribes.”³⁴ But Indian children are not resources, they are persons—citizens of the United States—and it is improper for government to treat any individual, least of all a citizen, as a means to achieve some third party’s ends.

While the United States has a trust obligation to respect and protect tribal sovereignty, it does not follow that an American citizen may be legally segregated based on Indian ancestry, or may be regarded as a



member of a separate legal class based on national origin, or may be subordinated to the federal government's interests in benefitting another corporate or government entity.³⁵ Indeed, such a proposition is fundamentally incompatible with the proposition that all men are created equal. The preservation of tribes as political and cultural units is simply not adequate justification for imposing legal presumptions that deprive children of their constitutional rights.

ICWA and Social Science

ICWA's powerful presumptions are often defended on the grounds that Indian children suffer unique psychological damage when they are placed in non-Indian households, or even that the feelings of attachment that Indian children experience is qualitatively different from those that non-Indian children experience.³⁶ Support for such claims is dubious at best. For instance, one well-known 2000 report entitled *Split Feathers* argued that Indian children adopted into non-Indian homes face a higher risk of alcoholism, social disability, and other psychological problems, and are likely to express feelings of alienation and a loss of identity.³⁷ Perhaps there are such cases, but *Split Feathers* cannot withstand scholarly scrutiny. It was confessedly unscientific, based on only twenty informal interviews of adults, and it drew untenable causal conclusions based on correlation. For instance, it did not seek to determine whether the problems it identified might have resulted from abuses that subjects experienced before they were removed from their birth families, or from the discrimination that Indians may face in white society, as opposed to the fact of adoption itself. It is impossible to know for sure what role these factors played, because the report indicated no control group, was not peer-reviewed, and the author did not disclose her methodology.³⁸ Other surveys suffer from similar flaws.³⁹ More reliable evidence supports the proposition that cross-ethnic adoption is good for children, or at least does not harm them.⁴⁰

Even if there were scientific support for the proposition that Indian children are better off when placed with other Indians, it is doubtful that ICWA properly addresses that problem. For one thing, neither the Act nor its implementing regulations apply to tribal court proceedings.⁴¹ This means that tribal courts can, and do, approve foster and adoption placements with non-Indian households. If ICWA is intended to protect Indian children from the allegedly unique injury of being placed with families of other ethnicities, it would make no sense to allow such placements simply because tribal courts order them. Nor does ICWA apply to divorce proceedings, even though divorces frequently involve child custody. State courts can therefore award custody of an Indian child to a non-Indian parent in a divorce proceeding without triggering ICWA—which, again, would be irrational if the

Act were aimed at preventing an alleged psychological harm suffered by Indian children being raised by non-Indians.

Some writers have argued that the psychological needs of Indian children are qualitatively different from the needs of non-Indian children. One argues that a child's need for a feeling of household stability and permanency "is a malleable concept," and that Indian children experience permanency "in [their] tie to the native community and the cultural practices of that community," as opposed to permanency in a stable, loving home. Thus, placing an Indian child in the custody of a family of another race "is not the type of 'permanency' they need."⁴²

It is doubtful that Indian children inherently have a categorically different psychological experience of permanency than do children with different genes—one that inherently turns on tribal links—but even if it were true, ICWA does not rationally address such concerns. Its adoption and foster placement preferences make no reference to culture or tribe, thereby encouraging adoption of Indian children by "other Indian families"⁴³ even if they are of entirely different tribal cultural backgrounds. These preferences can also be invoked to override the preferences of Native parents, and by non-Indian birth parents to bar adoptions of which tribal member birthparents approve.⁴⁴ And the fact that ICWA does not apply in tribal court means that tribal judges can, and sometimes do, override children's "ties to the native community" and place those children with non-Indian families. In any event, the notion that Indian children suffer uniquely when they are placed with adoptive families of non-Indian cultural backgrounds cannot justify applying ICWA to off-reservation children who have no pre-existing *cultural* connection to a tribe. A child like Lexi, whose only connection to a tribe is biological, has no *cultural* ties to preserve—unless, of course, she is to be regarded as *biologically* different, and consequently destined for a segregated legal regime due to her genetics.

How the ICWA Penalty Box Works

ICWA includes six provisions that diverge significantly from the rules that apply to non-Indian children in foster care and adoption proceedings. These are: (1) jurisdictional rules that mandate transfer of child welfare cases to tribal court and give tribes rights as parties to these cases on a par with the rights of parents; (2) the "active efforts" requirement that essentially requires child welfare workers to return children to the custody of unfit birth parents; (3) the "clear and convincing evidence" standard that it makes applicable in foster care cases; (4) the "beyond a reasonable doubt" standard that



states must apply in termination of parental rights cases; (5) race-based foster and pre-adoptive placement preferences; and (6) race-based adoptive placement preferences. Together, these provisions create “the ICWA penalty box”—a set of legal disadvantages that make it harder to protect Indian children from abuse, and to find them permanent adoptive homes.⁴⁵

Tribal Jurisdiction and Intervention Powers

ICWA gives tribal governments extensive power over cases involving children who are not tribal members and are not domiciled on reservations. Specifically, it requires state courts (in the absence of either parental objection or “good cause” to deviate from ICWA’s mandates) to transfer foster care and termination-of-parental-rights proceedings to the courts of the child’s tribe, to be determined there.⁴⁶ The 2015 BIA Guidelines apply this rule to *all stages* of custody proceedings, including pre-adoption (guardianship) and adoption proceedings.⁴⁷ Parents can block the transfer of foster or termination cases to tribal court, but ICWA also gives tribal governments power to intervene as parties in such proceedings anywhere in the nation if they involve Indian children.⁴⁸ Also, if a tribe learns after the fact that a state court decided an adoption matter without tribal involvement, the tribe is entitled to reopen the proceedings and have them nullified.⁴⁹

Tribal jurisdiction over children of Indian parents on reservations seems an unremarkable example of *in personam* and territorial jurisdiction.⁵⁰ *Holyfield* read this authority broadly, to encompass children born to tribal members who left the reservation to give birth, on the grounds that such an act does not change the domicile of a person who is in all other respects domiciled on the reservation.⁵¹ This, too, was unremarkable; the law of domicile is commonplace in personal jurisdiction law, and immigration law for children born to expatriate parents employs this rule.⁵² But ICWA’s jurisdictional provisions go much further. Its jurisdiction-transfer provision applies to any case anywhere in the country that involves a child *eligible* for tribal membership, even if *not* domiciled on a reservation, and even where no party to the case has any significant contact with the tribe beyond biology. This conflicts with basic jurisdictional principles required by due process of law.

Due process requires that before a court adjudicates a dispute, there must be “contacts” between the forum jurisdiction and the defendant “such that [the defendant] should reasonably anticipate being summoned to court there.”⁵³ Due process of law simply “does not contemplate” that a court “may make binding a judgment *in personam* against an individual” who has “no contacts, ties, or relations” to that court’s jurisdiction.⁵⁴ Where a person has “carr[ied] on no activity whatsoever” in the forum jurisdiction, and has “avail[ed] [himself] of none of the privileges and benefits of [the forum’s] law,” then the forum state cannot exercise jurisdiction because there are no “affiliating circumstances” that would satisfy the requirements of “fair play and substantial justice.”⁵⁵

ICWA’s grant of nationwide jurisdiction over proceedings involving children with only a *biological* connection to a tribe plainly exceeds these limits. A child who is merely born eligible for tribal membership—that is, who has the requisite genetic ancestry—has not thereby purposefully availed herself of any privileges of tribal law. One cannot “purposefully avail” oneself of one’s ethnicity. Nor have that child’s foster or would-be adoptive parents engaged in conduct in connection with the tribal forum such that tribal jurisdiction satisfies fair play and substantial justice. One could hardly imagine, say, a Virginia court asserting personal jurisdiction over a child welfare proceeding in California on the grounds that the child’s ancestors came from Virginia, or parents came from Virginia, or that the child was conceived in Virginia. Yet that is essentially the nationwide jurisdiction that ICWA gives to tribes.

Congress’s trust obligation to preserve tribal sovereignty cannot excuse ICWA from the mandates of due process and equal protection. However “plenary” Congress’s powers with regard to Indians are “not absolute” and cannot trump the Constitution.⁵⁶ Nobody would contend, for example, that the trust obligation to preserve tribal sovereignty would entitle Congress to, say, forbid Indians from relinquishing tribal membership, or leaving reservations, or marrying non-Indians, or obtaining abortions.⁵⁷ All these things would help increase and strengthen tribal membership but Congress’s powers with regard to its trust obligation are limited by the Constitution, and particularly by constitutional protections for the rights of American citizens.

As in all cases, personal jurisdiction in ICWA cases must satisfy the requirements of due process, including the “minimum contacts/purposeful availment” analysis.⁵⁸ Yet while the minimum contacts requirement is certainly satisfied when a tribal court exercises jurisdiction over tribal members domiciled on the reservation, that requirement is not satisfied in cases involving off-reservation children whose sole connection to a tribe is their biological ancestry.

Federalism and the Role of States

ICWA's interference with state court jurisdiction also collides with principles of federalism. There is typically no disputing the federal government's power to preempt states with regard to Indian law, but such preemption is problematic when it is stretched to include off-reservation matters involving children who are not members of a tribe, but only eligible for membership for biological reasons. Family law is quintessentially a subject of state concern, left to the purview of the states by the Tenth Amendment.⁵⁹ So great is the role of states in this area that federal courts even lack authority to decide divorce or child custody cases in diversity jurisdiction.⁶⁰ Primary responsibility for family law is with the states, subject to the limits of federal constitutional protections.

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

In *United States v. Windsor*, the Supreme Court held the federal Defense of Marriage Act unconstitutional in part because it interfered with state family law and mandated discrimination where none would have applied otherwise. Many states had chosen to broaden the definition of marriage to include same-sex couples, the Court noted, but the Defense of Marriage Act "intrude[d] on state power" and forced states to discriminate against same-sex couples. By imposing separate legal treatment where state law would ordinarily have applied a non-discriminatory rule, the Act "disrupt[ed] the federal balance."⁶¹ The same is true of ICWA. It subjects children whose ethnic ancestry renders them eligible for tribal membership to unequal treatment, and overrides non-discriminatory state law in a way that makes it harder to ensure their safety and to find them adoptive homes.

True, ICWA was intended in part to remedy past discrimination, and Congress has power to override state law when necessary for this purpose. But such intervention imposes *current* burdens and must be justified by *current* needs.⁶² Whatever need there may have been a generation ago for federal intervention to protect American Indians from abuses at the hands of state child protection agencies, that cannot justify the continued intrusion on state law matters without some showing that those abuses remain, and that ICWA resolves them in a constitutionally acceptable manner.⁶³

ICWA violates another essential protection for federalism, also. The federal government may not commandeer state officers or state legislatures,⁶⁴ or require that they enforce federal law. In *Printz v. United States*, the Supreme Court found the Brady Act of

1993 unconstitutional because it “direct[ed] state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.” People selling firearms were required to submit information forms to these officers so that background checks could be performed. Notably, the Act instructed officers to “make a reasonable effort” to determine whether a proposed firearm purchase was legal. If an officer determined that a sale would violate the law, the Act required the officer to give the would-be buyer a written explanation. If the purchase was legal, the officer was instructed to destroy the paperwork.⁶⁵

Like the Brady Act, ICWA commands not only state judges but also state executive officers to participate in the administration of a federal regulatory program—one that overrides the quintessential state-law realm of family law. Among other things, ICWA orders state child welfare officers to place children in foster care or adoptive families in conformity with its preferences,⁶⁶ mandates state record-keeping and inspection practices,⁶⁷ and requires that state officers make “active efforts” to reunite Indian families—which includes “provid[ing] remedial services and rehabilitative programs” to abusive parents.⁶⁸ In striking down the Brady Act, the *Printz* Court was particularly troubled by the Act’s “reasonable efforts” provision, noting that it essentially compelled states to adopt compliant policies, and “‘dragooned’” state officers “into administering federal law.”⁶⁹ ICWA does precisely this—commanding not only that states adopt and implement “active efforts” policies, but also that they comply with the administration of a federally-mandated body of family law.

The recent BIA Guidelines are even more express in directly commanding state courts. They use the word “must” 101 times while instructing state agencies and officers. The Guidelines are meant to “clarify the minimum Federal standards, and best practices . . . to ensure that ICWA *is applied in all States* consistent with the Act’s express language,”⁷⁰ and include instructions such as: “The agency seeking a[n] . . . adoptive . . . placement of an Indian child *must always* follow the placement preferences.”⁷¹ State courts often insist that the Guidelines are not mandatory,⁷² but they are certainly phrased in mandatory language.

In *The Federalist*, Alexander Hamilton thought it so hard to imagine the federal government trying “by some forced constructions of its authority” to “vary the [state] law” relating to inheritance or other domestic matters that only the “imprudent zeal” of the Constitution’s opponents could envision such a thing.⁷³ Yet with ICWA, Congress has not only varied the law of child welfare for one specific ethnic group, but has compelled state officials to develop and implement a special set of standards that deviates from the state-law norm—often in ways that harm children.

“Active Efforts” to Reunify Families

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

Among the most significant of these differences involve efforts to reunify families after children have been taken into state custody. State law, as well as the federal Adoption and Safe Families Act,⁷⁴ requires that child-welfare officials make “reasonable efforts” to reunify families in such cases.⁷⁵ But the rules are different for Indian children: in their cases, state officials must make “active efforts” toward reunification.⁷⁶ Although some state courts regard these terms as synonymous,⁷⁷ most have concluded that “active efforts” imposes a greater obligation on the government to reunite children with families after a removal than does the “reasonable efforts” standard.⁷⁸ The BIA’s Guidelines take this position,⁷⁹ although its new regulations make no explicit determination.⁸⁰

As a practical matter, the difference can be enormous. “Active efforts” is typically distinguished from “passive efforts,” such as making counseling services or similar opportunities available for parents who wish to reunify their families. While that might satisfy the “reasonable efforts” standard, it is insufficient to discharge a state’s duties under ICWA’s *active* efforts mandate.⁸¹ Instead, ICWA requires state social services workers to positively assist in developing parenting skills, obtaining employment, or whatever else the parent must have to retain custody, even if the parent shows little progress or even demonstrates a lack of interest.

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



Most courts have ruled that because ICWA's active efforts requirement is more stringent than "reasonable efforts," the circumstances that would ordinarily relieve the state of the obligation to reunite the family under the "reasonable efforts" standard do *not* relieve the state of the obligation to make *active* efforts.⁸² This means that while officials are not required to reunify a *non*-Indian child with a family after she is removed due to parental substance-abuse problems, or physical or sexual abuse,⁸³ such a duty *does* exist with regard to Indian children. Even incarceration of the parent does not relieve state child welfare workers of their duty to actively seek reunification of Indian children and birth parents.⁸⁴ The BIA's recently announced Guidelines expand the active efforts requirement, mandating that state officials prove *beyond a reasonable doubt* that active efforts have been unsuccessful, and prove this through the testimony of an expert witness who is an expert in the culture and customs of the child's tribe (as opposed to an expert on child welfare or child psychology).⁸⁵ And the BIA's 2016 regulations provide that the "active efforts" requirement must apply as soon as state officers have "reason to know"—often merely a suspicion—that a child is subject to ICWA.⁸⁶

The Supreme Court held in 2013 that "active efforts" are not required in cases where the birth parent has never had contact with the child, in which case there is no Indian family threatened with breakup.⁸⁷ But the "active efforts" requirement may be more problematic in cases where the birth parent *has* had contact, because in such cases, that requirement can force state officials to return children to the very parents who have abused them in the first place.

One example of this is *In re Interest of Shayla H.*, in which Nebraska child welfare officials removed three children, Shayla (12), Shania (11), and Tanya (9) from their birth father, David, due to allegations of physical abuse. Specifically, Shayla had been beaten by David's girlfriend, Danielle (not the children's mother), and child welfare officials found that all three were suffering from neglect. Shania and Tanya were enrolled members of the Sioux tribe, and although Shayla was not, she was eligible for membership. The children were returned to the family, and over the next seven months, David and Danielle participated in counseling services geared toward reunification. However, the children showed signs of continuing problems. The trial court concluded that it was in their best interests that custody remain with state social services, although they were physically returned to the couple. The court also required David to cooperate with state child welfare investigations, to desist from physical discipline of the children, to provide them with therapy, etc.

The Appellate Court reversed, on the grounds that although the state had employed “reasonable” efforts at reunifying the children with David, it had not employed *active* efforts. The trial court’s finding that the children’s best interests would be best served by the state retaining legal custody was therefore insufficient.⁸⁸ The Nebraska Supreme Court agreed, holding that even though the children remained in the birth parent’s physical custody, the decision to withhold legal custody fell short of the active efforts requirement.

Only briefly mentioned in the court’s opinion was the fact that “the children were subsequently removed from David’s physical custody.”⁸⁹ That was because by the time the



court ruled, David had once again abused the three, as well as other children. In May, 2015, the Juvenile Court found him “unfit by reason of debauchery or repeated lewd and lascivious behavior” and “callous disregard for those children’s emotional well-being.” David, a methamphetamine addict, had molested Danielle’s son and daughter as well as his own youngest daughter, and had failed to protect the three from sexual molestation by Danielle’s sons. The court concluded that all three girls had “experienced lifetimes of trauma.”⁹⁰ Had the courts applied the best interests standard as the overriding consideration from the outset—and had state officials not been required to make “active efforts” to reunite Shayla, Shania, and Tanya with their abusive father—much needless suffering could have been avoided.

Even in less extreme circumstances, ICWA’s “active efforts” provision inflicts unnecessary psychological harm on children. In *Department of Human Services v. J.M.*, the Oregon Court of Appeals affirmed a trial court’s decision to clear a child, referred to as L, for adoption. The case began in 2009, when state officials removed L’s sibling from the birth parents on the basis of neglect. That sibling was eventually adopted. Three years later, L was born, and child welfare workers sought to take him into custody two days after his birth. The parents were diagnosed with mental and emotional problems, as well as anger management and aggression problems, but because L was an Indian child, ICWA’s “active efforts” mandate applied.

Thus, in late 2012, the state presented the parents with rehabilitation and treatment plans requiring counseling, parenting classes, and regular visits with L. But the parents

skipped sessions, paid little attention to the classes, and had repeated emotional outbursts, including storming out of an anger management session. Nevertheless, the state persisted in its efforts throughout 2013. The parents were frequently uncooperative, and the counseling sessions, conducted with L present, often ended in tension and frustration. “At a June session,” the court later found, “father used abusive language and behavior towards [the counselor] in L’s presence; neither parent recognized how such behavior could be frightening for L.” The father’s “explosive behavior and inappropriate language” had led the counselor to terminate other sessions, all leading to greater anxiety and delay,⁹¹ but the state continued its efforts. Only after 18 months of persistent failures of this sort did the trial court rule that L could be removed from the parents and placed in foster care. The parents then appealed, and the court of appeals rendered its decision ten months later, in October of 2014. A petition to the state Supreme Court followed, and was not denied until February 2015, when L was four years old.⁹²

ICWA’s “active efforts” requirement returns abused children to the custody of abusive adults, forces children to experience the strain of parents’ psychological or social problems to a greater degree than other children must experience under the “reasonable efforts” rule, increases the stress on foster families, prolongs the adoption process, and encourages unnecessary technical appeals.⁹³ Courts in California—one of only two states to embrace the proposition that “active efforts” does not apply when parents prove unfit—have observed that ICWA “was not intended as a shield to permit abusive treatment of Indian children by their parents.”⁹⁴ But in practice, that frequently happens.

Different Burdens of Proof for Foster Care and Termination of Parental Rights

In cases involving non-Indian children, the decision to place a child in foster care is made by employing such burdens of proof as “reasonable grounds,” or “probable cause,” or “preponderance of the evidence.” These standards strike a balance between the rights of parents not to lose custody on too light a basis, and the rights of children not to be left in an abusive household simply because officers have been unable to gather definitive evidence. Arizona law, for example, allows state officials to remove a child from an abusive home in an emergency and place that child in temporary foster care if “reasonable grounds exist to believe that temporary custody is clearly necessary to protect the child,” and “probable cause exists to believe” that the child is suffering or will imminently suffer abuse, neglect, or serious emotional injury.⁹⁵ Arizona law also uses a “preponderance of evidence” standard in determining dependency—*i.e.*, placing children in long-term foster care.⁹⁶

In *Santosky v. Kramer*, the Supreme Court employed the “clear and convincing evidence” standard, finding that anything less demanding would violate the due process

rights of parents—their interests are too significant to be disposed of on a mere preponderance-of-the-evidence standard. But the Court also declined to adopt the “beyond-a-reasonable-doubt” requirement because the type of psychological evidence relied upon in family law cases is not usually susceptible of proof beyond a reasonable doubt, and such a demanding rule might “erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.”⁹⁷ This is important because termination is often necessary to clear the way for permanent adoption.⁹⁸

ICWA disregards this warning, however, and imposes heavier burdens of proof in cases involving Indian children. In order to place an Indian child in foster care, the state must prove by *clear and convincing* evidence—as opposed to reasonable grounds or probable cause—that allowing the child to remain in the parent’s custody “is likely to result in serious emotional or physical damage to the child,” and such a finding must be based on expert testimony.⁹⁹ And in cases involving *termination of parental rights*, ICWA imposes the *beyond a reasonable doubt* standard that the *Santosky* Court rejected. These different burdens mean that “caseworkers and attorneys are sometimes reluctant to accept surrenders of, or terminate parental rights to, an Indian child,”¹⁰⁰ even where that would be in the best interest of the child. Obtaining expert testimony is costly for social services agencies operating on limited budgets and staff.¹⁰¹ Requiring proof of serious physical damage is also likely to delay the removal of children from dangerous situations.

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

For example, *In re Adoption of T.A.W.*¹⁰² involved a child born in 2007 to C.B., a member of the Shoalwater Bay Tribe, and a non-Indian birth father, C.W. C.W., a methamphetamine addict, had what the trial court later called a “significant criminal history,” including convictions for drug possession, car theft, fleeing the police, and burglary.¹⁰³ When, in 2012, he was released from prison, C.B. obtained a protective order against him from the Shoalwater tribal court. It ordered C.W. to undergo six months of domestic violence classes before he could visit with the child.¹⁰⁴

C.B. met and married another man, R.B.—an Indian—in June, 2013. C.W. was back in prison by then, this time to serve two years for robbery.¹⁰⁵ C.B. and R.B. then asked a state court to terminate his parental rights, preparatory to R.B. adopting the child as his

own. The tribe supported this move, and the trial court found beyond a reasonable doubt that the requirements of ICWA were satisfied. But the Court of Appeals disagreed. It found insufficient evidence “that active efforts were made to provide C.W. with remedial services and rehabilitative programs to prevent the breakup of the Indian family.” The fact that C.W. *was not an Indian* was irrelevant, the court found, because “the plain language of ICWA states that its provisions apply to the termination of parental rights to an Indian child without regard to a parent’s status.”¹⁰⁶ In short, despite plentiful reason for concluding that C.W. was an unfit parent, despite the fact that he chose to absent himself from his child’s life, despite the best judgment of both the Indian mother and her tribe, and despite the fact that ICWA was operating in this case to interfere with the Indian parent’s choices, contrary to the wishes of the tribe, and in service of the *non-Indian* birth parent, the court barred the termination (and consequent adoption) because the parties had not made “timely and diligent efforts” to “engag[e] the parent . . . in reasonably available and culturally appropriate preventive, remedial, or rehabilitative services.”¹⁰⁷ The Washington Supreme Court affirmed. “[W]hether the parent whose rights are being terminated is non-Indian is immaterial,” it found.¹⁰⁸ One dissenting justice pointed out the absurdity of this outcome: “Indian child T.A.W. is in an Indian home with his Indian natural mother and with an Indian stepfather with whom T.A.W. has bonded.”¹⁰⁹ To allow a non-Indian to bar that adoption under a statute intended to prevent the breakup of Indian families is nonsensical.

In *In re Custody of S.E.G.*, the Minnesota Supreme Court reversed a trial court’s finding that three Indian children were better off in the custody of their non-Indian foster parents. Social services removed the children from the birth parents when one was four, another three, and another one year old, and were placed in foster care. Over the three years that followed, they were moved six times before being placed with the non-Indian couple, E.C. and C.C., in 1991. A year later, the children were placed with an Indian family, but that only lasted nine days, before they were returned to E.C. and C.C. Therapists who met with the children emphasized their need for permanent family bonds, particularly one special-needs child. After another year of searching, the tribe was unable to locate an Indian family willing to adopt the three, but E.C. and C.C. were willing, and nobody disputed their fitness. In its adoption proceeding, the trial court received evidence from both lay and expert witnesses, all of whom testified that the couple were providing for the children’s physical, emotional, and intellectual needs, but who disagreed as to whether they were providing for the children’s “cultural needs.” E.C. and C.C. attended powwows and tribal story-tellings, and even arranged a Chippewa naming ceremony for one child. But in any event, the expert witnesses testified that the most important thing was for the children to find stable and secure homes.

Nevertheless, the Minnesota Supreme Court overruled this concern and reversed the trial court's adoption order. It found that the expert witnesses E.C. and C.C. offered were not qualified experts specifically on Indian tribal culture and childrearing practices, which meant their testimony was insufficient to support a beyond-a-reasonable-doubt finding that the children's "cultural needs" were being met. Thus, although nobody disputed that adoption was in the children's best interests, the court found that the best interests standard was improper under ICWA because it is "imbued with the values of majority culture," as opposed to Indian culture.¹¹⁰



Whether or not these cases are correctly interpreted ICWA, these cases demonstrate how the Act's "beyond a reasonable doubt" test delays the removal of children from abusive or neglectful families, and can even force the return of abused children to the very people who abused them—simply because the evidence of abuse is "only" clear and convincing. As Christine D. Bakeis observes, in a classic example of understatement, "[s]uch a result is clearly not beneficial to children with Indian ancestry."¹¹¹

Foster, Pre-adoptive and Adoption Placement Preferences

When state courts review potential adoptions of Indian children, or consider placing them in foster care (or what ICWA calls "pre-adoptive placement"), those courts must abide by a hierarchy of race-based placement preferences.

In a foster or pre-adoptive placement, a state court must give preference to members of the extended family (as defined by tribal custom);¹¹² if none are available, to a foster home approved or specified by the tribe; if none are available, to an Indian foster home approved by a non-Indian authority; and, again, if none are available, to an institution approved by an Indian tribe or an Indian organization.¹¹³ In adoption cases, the court must give preference first to a member of the child's extended family (as defined by the tribe); second, to other members of the child's tribe; and, lastly, to "other Indian families."¹¹⁴

These placement preferences are based on race, not political or tribal affiliation.¹¹⁵ The foster care preferences mandate that a child be sent to "*an* Indian" foster facility approved by "*an* Indian tribe"—not the child's own tribe—and the adoption preference

hierarchy gives preference to “other Indian families” over non-Indians who wish to adopt, even if those families are of a different tribe.¹¹⁶ It is thus not tribal membership that matters, but generic Indianness. As if that were not enough, the federal Multi-Ethnic Placement Act forbids the denial or delay of an adoption or custody proceeding on the basis of race—but it specifically excludes one group of children from this protection: Indian children.¹¹⁷

Ranking would-be foster and adoptive families in terms of ancestry rather than in terms of the children’s best interests is bound to cause problems, and severe problems have indeed resulted. Shortly after their birth in 2010, Laurynn Whiteshield and her twin sister Michaela were removed from their parents and placed with a non-Indian foster family in Bismarck, North Dakota. When county officials sought to terminate parental rights, however, the Spirit Lake Sioux tribe invoked ICWA and had the case transferred to tribal court, which ordered that the children be placed with their grandfather, Freeman Whiteshield, on the Spirit Lake Reservation, despite the fact that Freeman’s wife, Hope Whiteshield, had a record of child neglect charges. A month later, Hope grew angry at the twins while they were playing outside, and threw them down an embankment. Laurynn died from the head trauma, and Hope was sentenced to thirty years in prison. Michaela was returned to the custody of the non-Indian family from whom she had originally been taken.¹¹⁸

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

That was true in the case involving Lexi, the six-year-old Choctaw girl in California who was removed from the foster family where she had lived for four years and sent to live with her father’s step-second cousins in Utah. Lexi (short for Alexandria) was born in December, 2009, to a mother addicted to methamphetamine, who had lost custody of at least six children before Lexi’s birth.¹¹⁹ Her father had an extensive criminal history. He was not aware that he was an enrolled member of the Choctaw tribe until after Lexi’s placement in foster care, and had no cultural ties to the tribe.¹²⁰ Nevertheless, Lexi was subject to ICWA. For four years, she thrived in the Pages’ care, came to call them “mommy” and “daddy,” and to regard their other children as her siblings, and California courts deemed the Pages her “*de facto* parents.” The “active efforts” to reunify Lexi with her father collapsed in 2012 when the father, having been released from prison, decided he was no longer interested in reunification. At that point, the tribe deemed Lexi’s step-

second cousins to be “extended family” thanks to their relationship to Lexi’s now-deceased grandmother. The step-second cousins, however, had no Native ancestry, and were not tribal members. Nor was there any evidence that they were familiar with Choctaw culture or that placing Lexi with them would ensure that she was exposed to Choctaw tradition.

The Pages urged the court to find “good cause” to deviate from the ICWA placement preferences. Nobody disputed that the Pages were outstanding parents. Rather, the “good cause” hearing focused on the psychological trauma Lexi would experience if she were removed from their care. Although witnesses testified that she had a strong bond with the Pages and would suffer extreme distress at being separated from them, the trial court nevertheless ordered her removal because the testimony “did not reach to the level of certainty that Alexandria would suffer extreme detriment.” It found that Lexi would likely recover from the experience of being removed from the Pages, and that the extent of her bond with them did not supersede ICWA’s placement mandates.

The Court of Appeal reversed, admonishing the trial court for requiring definitive certainty of psychological damage before deviating from ICWA, and instructing the trial court to consider Lexi’s individual best interests and the extent of her bond with the Pages.¹²¹ After contentious efforts to obtain evidence regarding Lexi’s bond with the Pages, the trial court, in November of



2015, ordered Lexi removed from the Pages and placed with the Utah family. The Court of Appeal promptly vacated that order on the grounds that the trial court had not complied with the terms of remand.¹²² Four months later, the trial court held another hearing—after refusing to receive new evidence—and again ruled against the Pages. On the morning of Sunday, March 20, 2016, after Lexi had lived with the Pages for four years and three months, she was taken from them and driven away to Utah. The psychological trauma inflicted by separating Lexi from the Pages’ stable and loving home after four years can only have been extreme.¹²³

The Pages appealed, arguing that the removal was contrary to Lexi’s best interests, but the California Court of Appeal affirmed. It did not refuse outright to apply the best interests standard, but purported to apply a different *kind* of best interests standard. “When the best interests of an Indian child are being considered,” it declared, courts



“should take an Indian child’s best interests into account as *one of the constellation of factors*.”¹²⁴

For children of other races, of course, the child’s best interest is the overriding consideration, and in cases in which children have spent long periods in foster care, California courts typically regard the child’s need for stability as the deciding factor.¹²⁵

“When the best interests of an Indian child are being considered,” the court continued, “the importance of preserving the child’s . . . *cultural connections* often cannot be separated from other factors.”¹²⁶ This statement makes no sense. Lexi had no cultural connection to the Choctaw tribe; her connection to the tribe was only biological. It was on account of her *biological* status that the court viewed her individual interests as only one of the “constellation” of factors by which her future would be determined.¹²⁷

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

ICWA’s Foster and Adoption Preferences Deprive Indian Children of Due Process, Equal Protection, and Freedom of Association Rights

ICWA’s placement preferences deprive Indian children of their rights to due process, equal protection, and freedom of association.

One of the most basic elements of due process of law¹²⁸ is that courts must address the specific facts at issue in a case,¹²⁹ and issue individualized judgments rather than impose blanket assumptions premised on a person’s race, national origin, or other “immutable characteristic[s] determined solely by the accident of birth.”¹³⁰ Yet in an ICWA case, the most crucial factor—virtually the deciding factor—is the child’s biologically-determined Indian status. ICWA’s race-based foster and adoption preferences deprive children of the individualized consideration inherent in due process, and because these preferences result in treating them differently than other children due exclusively to their racial or national origin, they also deprive Indian children of the equal protection of the law.

In addition, ICWA's preferences violate the First Amendment freedom of association. Tribal membership and family relationships are both forms of association protected by the First Amendment.¹³¹ The right to associate includes the right not to associate.¹³² Minors have First Amendment rights, including the right not to associate.¹³³ Yet ICWA tries to force the formation of tribal and even familial bonds by essentially compelling children to join Indian families based on their biological ancestry, irrespective of their individual best interests. BIA regulations even require state officers to enroll children in tribes if they are not already enrolled.¹³⁴ Thus even putting aside the question (discussed below) of whether ICWA establishes a political or a racial classification, the Act's placement preferences are unconstitutional.

The First Amendment forbids government from mandating that people join political associations,¹³⁵ make political statements,¹³⁶ or pledge allegiance to the government.¹³⁷ But ICWA seeks to force one specific class of American citizens to obtain formal membership in a political unit that enjoys attributes of sovereignty. Tribal membership is not ordinary dual citizenship, of course, given the "unique and limited"¹³⁸ nature of tribal sovereignty, but tribal membership significantly changes the legal regime that applies to a person,¹³⁹ because it "denotes an association with the polity" and imposes an "unequivocal legal bond."¹⁴⁰ A person with dual nationality can be "subject to claims from both nations, claims which at times may be competing or conflicting."¹⁴¹ The government may not force one group of citizens, defined by ancestry, to obtain citizenship from another sovereign and thereby submit to a change in his legal rights and obligations.

Even more intrusively, ICWA seeks to *create* Indian families through its preferences as well as through its "active efforts" provision. Freedom of association, a fundamental aspect of individual liberty, includes family relationships, because these are intimate and "involve deep attachments and commitments" to those "few" others with whom one shares "a special community of thoughts, experiences, and beliefs" and the "distinctively personal aspects of one's life."¹⁴² Yet ICWA endeavors to force the formation of family bonds by mandating adoption of Indian children by "other Indian families," and also *obstructs* the formation of consensual family bonds between Indian children and *non*-Indian adoptive families. The decision to form a family is entitled to legal protection,¹⁴³ yet ICWA can override that choice even where birth parents and fit adoptive families (and even children themselves)¹⁴⁴ would prefer to form an adoptive family outside the racial categories ICWA imposes. For the state to interfere with people's decision to create families through adoption—simply because of their race—violates their First Amendment freedom of association rights.

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

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

In *Morton v. Mancari*, the Supreme Court upheld the constitutionality of a law that gave preference to Indian tribal members in hiring for positions with the BIA. That preference was “political rather than racial in nature,” the Court held, and therefore did not trigger strict scrutiny, because it “applie[d] only to members of ‘federally recognized’ tribes,” and was “not directed towards a ‘racial’ group consisting of ‘Indians.’”¹⁴⁵ Three years later, in *United States v. Antelope*, the Court relied on *Mancari* when it upheld a conviction under a criminal statute that differentiated between Indians and non-Indians. As before, the Court noted that the statute was not based on the fact that a person was “racially to be classified as ‘Indian[.]’”¹⁴⁶ Instead, the parties involved were enrolled members of a tribe, and had committed a crime in Indian country. Thus although *Mancari* is frequently cited as standing for the proposition that all laws that treat Indians differently from non-Indians are subject to the forgiving standard of rational basis scrutiny, *Mancari* is actually far narrower than that.

In *Rice v. Cayetano*. That case involved a Hawaii law whereby only Native Hawaiians could vote for officials of the state’s Office of Native Hawaiian Affairs. It employed a blood quantum requirement among other factors to determine eligibility. The state relied on *Mancari* to argue that this distinction was political, instead of racial, but the court disagreed. *Mancari* and its progeny involved laws that singled out “a constituency of tribal Indians,” not “a ‘racial’ group consisting of ‘Indians,’” said the court. The Hawaii law, by contrast, “single[d] out ‘identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.’” State law even defined the term “Native Hawaiian” as “any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to [European contact] . . . [or] to the descendants of such blood quantum of such aboriginal peoples.” This definition involved factors other than race, but that did not mean it was not a racial classification.¹⁴⁷

ICWA plainly falls outside the bounds of *Mancari*.¹⁴⁸ It applies not to members of tribes, but to children who are both eligible for membership and biological children of

members.¹⁴⁹ Eligibility for tribal membership universally depends on biological ancestry. It follows syllogistically that ICWA applies to a racial group consisting of Indians.¹⁵⁰ ICWA's racial nature is reinforced in various ways, as well. For example, recent BIA regulations and some state laws apply ICWA based on a child being *suspected* of Indian ancestry, even before tribal status is determined,¹⁵¹ and require state officials to register children for tribal membership if they are eligible.¹⁵² ICWA also applies only to children who are both eligible for tribal membership and who are the biological children of members, meaning that a non-Native child adopted by a tribal member is not subject to ICWA, regardless of cultural or political affiliation. Also, other provisions of ICWA, such as the adoption preference granted to "other Indian families" and the foster-care preferences for "*an* Indian foster home," expressly apply to the "Indian" race in the abstract, rather than to tribes as specific political entities. Thanks to these provisions, an Alaskan child of Eskimo heritage could be placed with an unrelated member of a Plains Indian tribe in Montana, rather than with a fit, or even fitter, adoptive family of a different race—again, not because of political affiliation, but because of their "Indianness." The ICWA Penalty Box depends not on membership in a political organization, but on the ethnic quality of being Indian.¹⁵³

Race was at the forefront of the Supreme Court's recent decision in *Adoptive Couple*, which involved a child (known as "Baby Veronica") whose Cherokee father had surrendered his parental rights before her birth and who had never even met her.¹⁵⁴ The mother volunteered the child for adoption by a non-Indian family. After her birth, the father withdrew his consent, and two years later, the South Carolina Supreme Court awarded him custody—all based solely on the fact that the girl had Cherokee blood in her veins. The Supreme Court found this improper. Although it resolved the case on statutory rather than constitutional grounds, it observed that allowing the father to "play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests . . . solely because an ancestor—even a remote one—was an Indian . . . would raise equal protection concerns."¹⁵⁵

ICWA's racial nature is sometimes obscured by the fact that factors *in addition* to race are used in the Act's definition of "Indian child"—specifically, a child must be both (biologically) eligible for membership, and also the biological child of a tribal member before ICWA can apply.¹⁵⁶ This means that, for instance, Sam Houston—an adopted member of the Cherokee tribe¹⁵⁷—or Linda Wishkob—the fictional adoptee who plays a critical role in Louise Erdrich's novel *The Round House*¹⁵⁸—would not have been subject to ICWA despite their complete cultural and social affiliation with their tribes, whereas Lexi or Baby Veronica were subject to ICWA despite lacking any cultural or social connections to a tribe. The deciding factor is genetic.

A racial category does not cease to be a racial category just because factors other than race play a role in defining the class. As the court put it in *Rice*, “simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral.”¹⁵⁹ After all, the executive order forcing Japanese Americans into detention centers in World War II applied only to persons with more than one-sixteenth Japanese ancestry.¹⁶⁰ But the fact that not all persons of Japanese heritage were subject to the order did not make that order anything other than a race-based rule subject to strict scrutiny.¹⁶¹ The law is clear: if race is a but-for factor in the calculus, that calculus is race-based, regardless of the role other factors may play.¹⁶²



Conclusion

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

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. Dep't 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 Hallaway*, 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 J.L.*, 770 N.W.2d 853, 865 (Mich. 2009); *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. Ct. App. 2007); *In re A.N.*, 106 P.3d 556, 560–61 (Mont. 2005); *In re Interest of Walter W.*, 274 Neb. 859, 865 (2008); *In re J.S.*, 177 P.3d 590, 593 (Okla. Civ. App. 2008); *Dep’t of Human Services v. K.C.J.*, 228 Or. App. 70, 74 (2009); *State ex rel. C.D.*, 200 P.3d 194, 205 (Utah. Ct. App. 2008). See also Megan Scanlon, “From Theory to Practice: Incorporating the ‘Active Efforts’ Requirement in Indian Child Welfare Act Proceedings,” *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 *Dep’t 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.

ENDNOTES