

RECENT DEVELOPMENTS IN INDIAN CHILD WELFARE
ACT LITIGATION: MOVING TOWARD EQUAL
PROTECTION?

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“Has America’s first-born forfeited his birthright to her boundless opportunities . . . ? America entered upon her career of freedom and prosperity with the declaration that ‘all men are born free and equal’ The claims of brotherhood, of the love that is due a neighbor-race, and of tardy justice have not been wholly lost on your hearts and consciences.”¹

INTRODUCTION

The Indian Child Welfare Act (ICWA)² is a federal law that dictates substantive and procedural rules to be followed by state courts and state child protection officers in child welfare cases—including foster care and adoption cases—involving “Indian children.” The ICWA defines Indian children as children who are tribal members or who are “eligible” for membership and have a biological parent who is a tribal member.³ With regard to such children, the ICWA overrides state child welfare, foster care, and adoption law. In place of those state laws, it imposes heavier evidentiary burdens than what state law requires in cases involving the termination of parental rights (TPR)⁴ and race-based restrictions on who may foster or adopt Indian children.⁵ In these and other ways, the ICWA makes it harder for states to protect Indian children from mistreatment and reduces Indian children’s opportunities to find stable foster homes or permanent, loving adoptive homes when needed.⁶ The ICWA even overrides the wishes of Indian parents who seek what is best for their children.⁷

Unfortunately, discussions of the ICWA in existing literature are often pitched in abstract terms, and fail to examine actual

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1. Zitkala-Ša, *Side by Side* (1896), reprinted in ZITKALA-ŠA, *AMERICAN INDIAN STORIES, LEGENDS, AND OTHER WRITINGS* 225–26 (Cathy N. Davidson & Ada Norris, eds. 2003).

2. 25 U.S.C. § 1901.

3. 25 U.S.C. § 1903(4). This article uses the term “Indian” because that is the term that appears in the statute.

4. 25 U.S.C. § 1912(f).

5. 25 U.S.C. §§ 1915(a)–(d).

6. See generally Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 *CHILD. LEGAL RTS. J.* 1, 50–59 (2017); MARK FLATTEN, *DEATH ON A RESERVATION*, GOLDWATER INST. 20–29 (2017), <https://perma.cc/26G7-86M2>.

7. See, e.g., *S.S. v. Stephanie H.*, 388 P.3d 569, 572 (Ariz. Ct. App. 2017) (applying ICWA to block an Indian father’s efforts to terminate parental rights of mother, who was endangering the children with her substance abuse), *cert. denied sub nom.*, *S.S. v. Colorado River Indian Tribes*, 138 S. Ct. 380 (2017); *In re Adoption of T.A.W.*, 383 P.3d 492, 494–96 (Wash. 2016) (non-Indian father allowed to invoke ICWA to halt the process of terminating his parental rights).

precedent-setting cases. Some writers have even dismissed these real-life precedents as mere “anecdotes.”⁸ Other discussions focus almost exclusively on historical abuses that led to the ICWA’s adoption, rather than today’s legal problems caused by the ICWA’s well-intended but flawed language.⁹ But several recent lawsuits—most notably *Brackeen v. Zinke*¹⁰—vividly illustrate the legal complexities and the injustices that often result from the ICWA, and indicate slow but significant progress toward extending to Indian children the equal protection of the laws to which the Constitution entitles them, and which the ICWA fails to provide. This article will survey some of these recent developments.

I. BRACKEEN: ICWA AS A RACE-BASED STATUTE AND AN INTRUSION ON STATE AUTONOMY

Brackeen directly addresses some of the major constitutional controversies surrounding the ICWA, particularly involving questions of racial discrimination and intrusion on state autonomy. To understand the significance of *Brackeen* and other cases, it’s necessary to review how the ICWA works.¹¹

A. How the ICWA Operates

1. Racial or Political Lines?

The ICWA applies to child custody proceedings involving an “Indian child,” a term defined as a child who is either a tribal member, or who is both eligible for tribal membership and is the biological child of a tribal member.¹² Eligibility for tribal membership is a function of tribal law and differs from tribe to tribe, but all tribes determine eligibility exclusively in terms of biological descent. For example, the Navajo require that a person have at least one-quarter Navajo blood in order to be a tribal member.¹³ The Gila River Indian Community (GRIC) requires

8. Kathryn Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 6 AM. IND. L.J. 32, 53 (2018).

9. See, e.g., Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 892–963 (2017) (giving an overview of the abuses faced by Indian children from the founding generation to the modern era).

10. 338 F. Supp. 3d 514 (N.D. Tex. 2018), *appeal filed sub. nom.*, *Brackeen v. Bernhardt*, 18-11479 (5th Cir. Nov. 30, 2018).

11. Another case, *Carter v. Tahsuda*, 743 F. App’x 823 (9th Cir. 2018), raises the same issues. That case, however, was dismissed as moot. *Id.* at 825.

12. 25 U.S.C. § 1903(4).

13. NAVAJO NATION CODE ANN. tit. 1, § 701(B).

one-quarter *Indian* blood, although not necessarily GRIC blood.¹⁴ The Choctaw and Cherokee have no minimum blood requirement, but they require that a person be the direct biological descendant of a signer of the 1907 Dawes Rolls.¹⁵ No tribe requires any consideration of political, religious, or cultural factors as a condition of membership. *Only* biology counts.¹⁶

That means that a child such as Lexi—the subject of a controversial 2016 ICWA case in California¹⁷—qualifies as an “Indian child” despite the fact that she has no cultural connection to the tribe, speaks no tribal language, practices no Native religion, and has never lived on tribal lands.¹⁸ Nor does a child who is *adopted* by a tribal member qualify as an Indian child under the ICWA—even if she does speak a tribal language, practice a Native religion, live on tribal land, and consider herself a member of the tribe—because a child must be the *biological* child of a tribal member to qualify.¹⁹ That means that, for example, William Holland Thomas (an adopted Cherokee who served as Principal Chief of the Eastern Band of Cherokee Indians²⁰) would not qualify as an “Indian child” if he were alive today—solely as a consequence of his genes.

Does this constitute a racial classification subject to strict scrutiny? In *Morton v. Mancari*, the Supreme Court upheld the

14. CONSTITUTION AND BYLAWS OF THE GILA RIVER INDIAN COMMUNITY OF ARIZONA art. III, § 1(b).

15. CHEROKEE CONSTITUTION art. III, § 1.

16. Until recently, California’s Shingle Springs Band of Miwok Indians allowed only “biological lineal descendants” of two named individuals to be members; the tribal enrollment law allowed no “exceptions of any kind.” SHINGLE SPRINGS BAND OF MIWOK INDIANS GOVERNANCE CODE, TIT. 5, §§ 2–4 (2014). Adopted children were expressly excluded—no matter how culturally affiliated with the tribe they might be—unless they “independently meet” the genetic requirements for membership. *Id.* § 4. The tribe even explicitly bars from membership any child who is “conceived through purchased and/or donated spermatozoa or ova,” unless the donor meets the genetic profile. *Id.* § 3. In other words, DNA is the necessary and sufficient criterion for tribal membership—political, cultural, social, or religious factors are simply irrelevant. (This provision of the tribal code has been removed from the tribe’s website, however, and it may have been superseded.)

17. *In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (Cal. Ct. App. 2016). Alexandria P., the young girl who was the subject of the case, was commonly known as ‘Lexi’ outside of court documents. Lorelei Laird, *State Appeals Court Upholds Girl’s Placement with Relatives in High-Profile Indian Adoption Case*, ABAJ. (July 11, 2016), <https://perma.cc/7HR9-KKYD>.

18. See *In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 482 (Cal. Ct. App. 2014) (citing the foster parents’ argument that Alexandria’s “only connection the tribe is biological”—an argument the court did not reach since it held that the foster parents lacked standing).

19. See, e.g., *In re Francisco D.*, 178 Cal. Rptr. 3d 388, 395–96 (Cal. Ct. App. 2014) (determining that ICWA does not apply to a child adopted by a member of an Indian tribe).

20. See E. STANLY GODBOLD, JR. & MATTIE U. RUSSELL, CONFEDERATE COLONEL AND CHEROKEE CHIEF: THE LIFE OF WILLIAM HOLLAND THOMAS xi (1990).

constitutionality of a federal law that gave a hiring preference in Bureau of Indian Affairs (BIA) to members of federally-recognized tribes.²¹ This was challenged as a form of racial discrimination, but the Court rejected that argument, holding that the law created a political classification, not a racial classification, and was therefore subject only to rational basis scrutiny. In *United States v. Antelope*, the Court again ruled that a federal law that distinguished between members of Indian tribes and other Americans was not based on race but on political affiliation, making the law subject only to rational basis review.²² It has since become routine for legal academics and courts to categorically declare that all laws differentiating between Indians and non-Indians are subject only to rational basis review.²³

But that is an overly hasty generalization. In fact, as the Ninth Circuit has observed, rational basis review does not apply in cases where the Indian/non-Indian distinction operates not on political, but on racial lines, and functions as a racial, rather than a political classification.²⁴ This principle was already implicit in *Mancari*; there, the Court limited its holding by finding that the laws at issue were “not directed towards a ‘racial’ group consisting of ‘Indians.’”²⁵ The Court made this point explicit in *Rice v.*

21. 417 U.S. 535, 553–55 (1974).

22. 430 U.S. 641, 646–47 (1977).

23. See, e.g., *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003) (“The different treatment of Indians and non-Indians under ICWA is based on the political status of the parents and children and the quasi-sovereign nature of the tribe . . . We apply the rational basis test.”); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 326 (N.Y. App. Div. 2005) (“[W]e agree with those courts that have held that ICWA is rationally related to the protection and preservation of Indian tribes and families.”); Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 537–38 (1996) (noting the Supreme Court has invoked “a constitutionally grounded ‘special relationship’ between the United States and Indian tribes” and subjected challenges to “mere rational basis review”); Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 494 (2017) (“Under current equal protection doctrine, classifications that further the federal government’s unique relationship with American Indians are not subject to heightened scrutiny.”). In *The Rights of Indians and Tribes*, Stephen Pevar states categorically that, under *Mancari*, laws that “treat Indians differently from non-Indians” are “not viewed as race legislation”—but then correctly notes that, in fact, “[e]ach federal Indian law . . . must be examined in its historical, political, and cultural context to determine if it constitutes race discrimination.” STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 59–60 (4th ed. 2012).

24. See, e.g., *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (rejecting “the notion that distinctions based on Indian or tribal status can never be racial classifications subject to strict scrutiny”).

25. *Mancari*, 417 U.S. at 553 n.24. See also *Antelope*, 430 U.S. at 646 n.7 (reserving the question of whether a law would be constitutional if it applied to “individuals who are racially to be classified as ‘Indians’”).

Cayetano,²⁶ when it ruled that a Hawaii law that differentiated between Native Hawaiians and non-Natives was race-based and subject to strict scrutiny, rather than to *Mancari*-style rational basis review.²⁷ *Rice* defined a racial discrimination as “that which singles out ‘identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.’”²⁸ Because the law at issue in that case “used ancestry as a racial definition and for a racial purpose”—specifically, the law was tailored to a class of people identified by biological descent from “aboriginal peoples” for the purpose of preserving their cultural and physical isolation from the rest of American society—the classification was racial.²⁹

In other words, *Mancari*-style rational basis applies only to laws where the relevant consideration is political, cultural, or social affiliation with a tribe. It does not apply to laws that separate Indian from non-Indian on the basis of genetics or biology alone. This is compatible with the constitutional rule that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious.”³⁰ Adults who choose to become or to remain members of a tribe are making a political decision, as opposed to being identified on the basis of “ancestral tracing”³¹ or “immutable characteristic[s] determined solely by the accident of birth.”³² A law triggered by biological and ethnic factors is therefore properly subject to the same strict scrutiny as any other racial categorization, even if that difference in treatment is labeled “tribal.”³³

Unlike other Indian law statutes,³⁴ the ICWA plainly falls on the racial, rather than the political, side of the *Rice/Mancari* division.

26. 528 U.S. 495 (2000).

27. *Id.* at 517.

28. *Id.* at 515 (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)).

29. *Id.*

30. *Id.* at 517 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

31. *Id.*

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

33. Even if characterized as a matter of “nationality” rather than race, such biological distinctions would still trigger the application of strict scrutiny, which applies both to racial- and nationality-based distinctions. See *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998) (determining that “[b]ecause the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a ‘national origin’ claim under Title VII”).

34. For example, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–21, is not triggered by the biological status of the persons involved, but by the location of gaming activity, see, e.g., §2703(4) (governing gaming occurring on “Indian lands”) and by tribal membership, see, e.g., §2710(b)(2)(B)(ii) (allowing revenues from gaming may be spent to provide for general welfare of tribe and its members).

Because it is triggered by the minor's "Indian child" status, which is a function of biological factors alone, including "eligibility" for membership, the category it establishes is racial, not political or cultural.³⁵ Other provisions of the ICWA reinforce the conclusion that it applies on a racial, not political, basis. The ICWA's foster care and adoption preferences require that, except in rare circumstances, an Indian child must be placed in "an *Indian* foster home"³⁶ *regardless of tribe*, and it mandates that she be adopted by an "*Indian* famil[y]," *regardless of tribe*, instead of families of other races.³⁷ These provisions mean that state courts must, for example, place a child of Cherokee heritage with adults of Navajo heritage, rather than with adults of white, black, Asian, or Hispanic ancestry—regardless of the (quite strong) differences between the cultures and traditions of the Navajo and Cherokee tribes. The ICWA, in short, is predicated on generic "Indianness," not tribal affiliation. And the concept of the "generic Indian" is racial, not political.³⁸

It is true, of course, that not all children who are ethnically Native American qualify as "Indian children" under the ICWA, since the statutory definition requires that a child be a member of, or have a parent who is a member of, a federally recognized tribe to qualify. But as the Supreme Court explained in *Rice*, the fact that a racial classification is drawn in such a way that some members of that race are excluded "does not suffice to make the classification race neutral."³⁹ If a law were written that applied only to left-handed Asians, for instance, it would still create a racial category even though it did not apply to right-handed Asians.

Before leaving this point, an important observation: it is sometimes contended that Indian children, being subject to the

35. 25 U.S.C. § 1903(4). For the argument that this definition excludes consideration of non-biological factors, see *In re Fancisco D.*, 178 Cal. Rptr. 3d 388, 396 (Cal. Ct. App. 2014) (arguing that the "ICWA focuses on membership rather than blood or racial origins").

36. 25 U.S.C.A. § 1915(b) (iii) (emphasis added).

37. § 1915(a) (emphasis added).

38. Indeed, it is a racist construct concocted by white settlers. See ROBERT M. UTLEY, *THE INDIAN FRONTIER OF THE AMERICAN WEST 1846-1890* 4-6, 33 (Allen Billington et al. eds., Univ. of N.M. Press rev. ed. 2003) (1984) (describing how white settlers disregarded tribal differences and imposed racial classification of "Indian."); see also CHARLES C. GLENN, *AMERICAN INDIAN/FIRST NATIONS SCHOOLING: FROM THE COLONIAL PERIOD TO THE PRESENT* 196 (2011) ("Continuing to emphasize generic 'Indian' separateness detached from specific tribal identities and cultures . . . has the effect of reviving the assumptions about fundamental racial differences that have been so profoundly harmful to the education of Indian youth."); DAVID TREUER, *REZ LIFE* 279 (2012) ("[Y]ou can't measure culture by percentages of blood.").

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

sovereignty of a tribe, ought to be regarded like foreign children, and that just as foreign nations (such as Russia⁴⁰) can legislate with regard to the adoption of children who are their citizens, so, too, tribes should have authority to bar children who are eligible for tribal membership from being adopted by non-Indians. This argument fails to account, however, for three important facts.

First, unlike foreign nationals, all Indian children are citizens of the United States.⁴¹ While they may also be tribal members or eligible for tribal membership, their status as U.S. citizens obliges the federal and state governments to respect and protect their rights in ways that are not applicable in the cases of foreign nationals. Second, the ICWA does not apply to tribal courts or instruct tribal officials; nor is it a treaty. It is a federal statute that mandates how *state* officials—both executive and judicial branch officials—must act within *state* jurisdictions when dealing with Indian children. Thus the ICWA must comply with the Constitution's federalist structure, which, among other things, forbids the federal government from commandeering state governments.⁴² Finally, even if ICWA were a treaty, the Constitution bars Congress from subjecting American citizens to a separate legal system which lacks the due process protections that apply in ordinary civil courts—even if Congress tries to do so by treaty.⁴³ Thanks to the interpretation of the Indian Civil Rights Act adopted by the Supreme Court,⁴⁴ tribal courts—into which Indian children's cases must typically be transferred, thanks to the ICWA—are not required to provide the due process rights or rights of appeal as state and federal courts. That means that Native American children and the adults who love them can have their child custody cases

40. In 2012, Russia enacted legislation banning adoption of Russian children by United States families. *Russia's Putin Signs Anti-U.S. Adoption Bill*, CNN (Dec. 28, 2012), <https://perma.cc/2DQC-YSGY>.

41. 8 U.S.C. § 1401(b).

42. *Printz v. United States*, 521 U.S. 898, 918–24, 933 (1997) (holding that the federal government may not commandeer state officials to implement federal regulatory schemes).

43. *See Reid v. Covert*, 354 U.S. 1, 17–19 (1957) (Even under the treaty power, Congress could not constitutionally force American citizen civilians to be tried by military tribunal).

44. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court ruled that federal courts can review the decisions of tribal courts only by habeas corpus and only in cases where the petitioner has experienced physical confinement, thereby rendering the Act a nullity for most practical purposes. *Id.* at 65–66. *See generally* Brief Amicus Curiae of the Goldwater Institute in Support of Petitioner at 6–13, *Tavares v. Whitehouse*, 138 S. Ct. 1323 (2018) (No. 17-429), 2018 WL 1210848, at *6–13 (arguing that *Martinez* should be overruled).

sent out of state court and into tribal courts where their due process rights are sharply curtailed—something that would obviously be unconstitutional in the foreign-relations context. These factors render the international adoption analogy untenable.

It is often claimed that, as tribal sovereignty necessarily includes the right to establish membership criteria, any intervention by state or federal courts on the matter of “Indian child” status—or any rule that required consideration of cultural, as opposed to biological, factors—would intrude on tribal authority.⁴⁵ Such a rule, according to this argument, would amount to non-Indian courts deciding who is “Indian enough” to qualify.⁴⁶ But this argument confuses tribal membership, which is a function of tribal law, with “Indian child” status under the ICWA, which is a function of state and federal law.⁴⁷ Tribes certainly have authority to establish membership criteria without interference. But state and federal courts may not create a legal status, or impose any legal burden, or grant any benefit, on a racial basis. Thus, if a tribe—or, for that matter, a private association—makes race a requirement for membership, state and federal governments may not then make that membership a criterion for differential treatment of the individual. As the Court said in *Palmore v. Sidoti*,⁴⁸ which held prohibitions on interracial adoption unconstitutional:

The Constitution cannot control [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. “Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.”⁴⁹

45. See, e.g., Wendy Therese Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 384–85, 409–19 (1997) (criticizing the “Indian family exception” to ICWA on several grounds, including that ICWA intended the broad protection of Indian cultural welfare by encompassing even children not listed on tribal rolls).

46. See, e.g., *In re N.B.*, 199 P.3d 16, 22 (Colo. App. 2007) (“[A]pplying the [ICWA] exception would empower state courts to make an inherently subjective factual determination as to the ‘Indianness’ of a particular child or the parents, which courts are ‘ill-equipped to make.’”) (quoting *In re Alicia S.*, 76 Cal. Rptr. 2d 121, 128 (Cal. Ct. App. 1998)).

47. *In re Abbigail A.*, 375 P.3d 879, 885 (2016).

48. 466 U.S. 429 (1984).

49. *Id.* at 433 (quoting *Palmer v. Thompson*, 403 U.S. 217, 260–61 (1971) (White, J., dissenting)).

2. State Autonomy over Family Law

The ICWA also has unique ramifications for the constitutional division of authority between state and federal governments. Child welfare, foster care, adoption, and other family law matters are virtually always the exclusive province of the states. Federal courts even decline to hear such cases where they would otherwise satisfy jurisdictional standards.⁵⁰ The federal government has no general police power⁵¹ and no authority to impose national standards for adoption, foster care, or child protection.⁵² Those things are reserved to the states under the Tenth Amendment. Yet the ICWA overrides state law in several respects in off-reservation state-law cases involving the welfare of Indian children. Indeed, because the ICWA does not apply on reservations, and *only* applies in state courts, its instructions are directed *exclusively* to state executive and judicial officers with regard to matters taking place on non-Indian state land.⁵³ The following are just a few of the ways in which ICWA purports to preempt the application of state family law in cases involving Indian children.

The ICWA bars termination of parental rights (TPR) generally a necessary step before adoption—unless the state first proves that it has engaged in “active efforts” to reunite a child with her birth parents.⁵⁴ Although the ICWA does not define “active efforts,” it is clear that they are more demanding than the “reasonable efforts” required by the laws of most states.⁵⁵ “Reasonable efforts” generally means providing the birth parents with appropriate remedial services or counseling.⁵⁶ “Active efforts” means

50. Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992); Sosna v. Iowa, 419 U.S. 393, 404 (1975).

51. United States v. Lopez, 514 U.S. 549, 564 (1995).

52. True, cases arising on reservation land outside state jurisdiction fall within federal authority. It is arguable that Congress might indeed have authority to promulgate family law in those cases. But the ICWA does not apply there and is not an effort to govern tribal lands. See Adoptive Couple v. Baby Girl, 570 U.S. 637, 658–66 (2013) (Thomas, J., concurring) (arguing that the Indian Commerce Clause does not give Congress plenary power over Indian affairs, that it gives Congress authority only over Indians not within state lands, and that it should be limited to authorizing congressional acts regarding commercial trade).

53. In an increasing number of cases, however, courts have begun applying ICWA’s mandates even in private, intra-family disputes, in which no state agency is involved. See *infra* Part II.

54. 25 U.S.C. § 1912(d).

55. *In re* J.S.B., 691 N.W.2d 611, 617–19 (S.D. 2005); Colorado *ex rel.* A.R., 310 P.3d 1007, 1014–15 (Colo. App. 2012).

56. See, e.g., Suter v. Artist M., 503 U.S. 347, 352, 368 (1992) (describing the Adoption Act’s requirement that “reasonable efforts [] be made . . . to prevent or eliminate the need

something more than this, and it must be provided by the party seeking TPR—whether that be a state agency or a private party—before an at-risk child can be rescued from an abusive parental relationship. Even worse, while the “reasonable efforts” requirement is excused in cases of “aggravated circumstances,” such as molestation or systematic abuse,⁵⁷ no such exception applies to the “active efforts” requirement.⁵⁸ In consequence, Indian children must be returned to abusive situations more often, to suffer more abuse and neglect, than children of other races.⁵⁹ State child welfare officers are also required to notify tribal governments and offer them the opportunity to participate in litigation if the tribe so chooses, and if state officials fail to do so the case must typically be delayed or even reversed for a determination of Indian child status and for reconsideration before the trial court or remand to the tribal court.⁶⁰ Even if the child turns out later not to have been Indian, this process will result, at a minimum, in delay of TPR, which can hinder adoption or force further litigation over a child’s future. Of course, lengthening these legal proceedings, each of which might result in the removal of a child from a safe and loving home or a child’s remaining in an abusive or neglectful home, imposes greater stress and even danger on Indian children.

The ICWA’s mandates apply not only to state executive officers (child welfare services), but also to state judicial officers. For example, state judges must allow tribal governments to intervene in litigation involving Indian children⁶¹ and must apply a “beyond a reasonable doubt” standard of evidence in state-law TPR cases,⁶² as opposed to the “clear and convincing evidence”

for removal of the child from his home, and . . . to make it possible for the child to return to his home” (quoting 42 U.S.C. § 671(a)(15)).

57. 42 U.S.C. § 671(a)(15)(D)(i); Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 281 (2003).

58. *J.S.B.*, 691 N.W.2d at 617–20.

59. See Sandefur, *supra* note 6, at 38–42 (citing several examples where children were forced to return to or continue relations with homes and parents who neglected or abused the child); see also Angie Koehle, *DCS Claims ‘Jurisdictional, Legal Issues’ in Phoenix Toddler’s Death Case*, ABC 15 NEWS (Oct. 15, 2018), <https://perma.cc/H7XC-78SZ> (reporting on the death of a one-year-old boy as a result of abuse from his mother—who retained custody because of the ICWA).

60. See, e.g., *In re Francisco W.*, 43 Cal. Rptr. 3d 171, 177 (Cal. Ct. App. 2006) (explaining the court’s utilization of “limited reversal” in TPR cases with defective ICWA notice to avoid delay, children aging out of adoption, and other possible issues).

61. 25 U.S.C. § 1911(c).

62. *Id.*, § 1912(f).

standard applies in cases involving non-Indian children.⁶³ This reasonable-doubt standard is problematic because, as the Supreme Court noted in *Santosky v. Kramer*,⁶⁴ such a high burden of proof makes it too hard to rescue children from abusive and neglectful homes, and “erect[s] an unreasonable barrier to state efforts to free permanently neglected children for adoption.”⁶⁵ Recognizing that the “preponderance of the evidence” standard would make it too easy to terminate the rights of parents, the *Santosky* Court settled on the “clear and convincing” standard instead,⁶⁶ and that is the standard that applies under the laws of all states for non-Indian children. The ICWA overrides that standard, however, in cases involving Indian children, and imposes the dangerously burdensome reasonable-doubt requirement.⁶⁷ It is important to emphasize that the ICWA does not simply adopt a substantive set of family law rules, but dictates procedures by which state courts are bound when applying their own substantive family law. The significance of this distinction will be discussed below, in Section I.C.

Also, the ICWA requires state courts to transfer jurisdiction over child welfare cases involving Indian children to tribal courts, except where “good cause” exists not to.⁶⁸ The meaning of “good cause” is unclear, but the BIA and the courts of several states have declared that it is *improper* for a state court to assess the child’s best interests as part of the good cause determination.⁶⁹ Until recently,⁷⁰ state courts had also never addressed whether personal jurisdiction should be a function of the good cause determination. As a result, cases involving children who have never visited tribal lands are often transferred to the jurisdiction of tribal courts with which neither the child nor the parents have any of the “minimum contacts” required for personal jurisdiction.⁷¹

63. Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 543, 549–51 (1996).

64. 455 U.S. 745 (1982).

65. *Id.* at 758, 766, 769.

66. *Id.* at 748.

67. § 1912(f).

68. § 1911(b).

69. *In re Zylena R.*, 825 N.W.2d 173, 185–86 (Neb. 2012).

70. See *infra* Part III(A) (explaining how a recent Ohio case barred the imposition of tribal authority over an adoption case by applying a “minimum contacts” personal jurisdiction analysis).

71. See Sandefur, *supra* note 6, at 23–32 (listing several instances where tribes successfully asserted authority over adoption cases despite the child’s lack of “minimum

Of course, Congress can override state authority under certain circumstances. The most obvious is the Commerce Clause, and Congress has at least as much power to regulate commerce with Indian tribes as it does to regulate commerce between the states.⁷² Whether the ICWA is a constitutional exercise of the Indian Commerce Clause is therefore a subject of major concern in ICWA litigation.

It seems obvious that Congress lacks authority to rewrite state law involving *non*-Indians under the Interstate Commerce Clause. In *United States v. Morrison*,⁷³ the Court found that the Violence Against Women Act exceeded the commerce power because domestic violence is not a form of interstate commerce.⁷⁴ Neither are adoption, foster care, and the protection of children from abuse and neglect. True, there are circumstances where cases might fall within the commerce power—for example, the Child Support Recovery Act of 1992 involves the exchange of money across state lines in such a way that courts have concluded that it qualifies as a regulation of commerce.⁷⁵ But for cases involving wholly intrastate conduct, not occurring on tribal lands or involving the buying and selling of goods and services, it is unlikely that the Interstate Commerce Clause authorizes Congress to impose a code of family law—let alone a set of *federal* restrictions on *state* family law. Thus, if the Indian Commerce Clause is no broader than the Interstate Commerce Clause, it cannot authorize the ICWA—which imposes restrictions on family law matters that are intrastate, non-commercial activities not occurring on tribal land.

Some scholars have argued that the Indian Commerce Clause should be viewed as “completely separate” from the Interstate and Foreign Commerce Clauses because, unlike the other two, it was aimed at such “domestic, intrastate” matters as family law.⁷⁶ This is

contacts” with the tribal forum).

72. The other is section 5 of the Fourteenth Amendment. The ICWA does not purport to be an exercise of this power, but if it did, the Court would have to determine whether it is congruent and proportional to the harm it seeks to address. *Cf. Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003). And those harms would have to be demonstrable today, not circumstances of history. *Shelby Cty. v. Holder*, 570 U.S. 529, 542 (2013) (“current burdens . . . must be justified by current needs” (citation omitted)).

73. 529 U.S. 598 (2000).

74. *Id.* at 613.

75. *United States v. Parker*, 108 F.3d 28, 31 (3d Cir. 1997).

76. Matthew L.M. Fletcher, *ICWA and the Commerce Clause*, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT* AT 30 28, 32–33 (Matthew L.M. Fletcher et al. eds., 2009).

implausible given that there are not three separate clauses in the Constitution, but a single clause which uses the word “commerce” only once, strongly implying that Congress’s “commerce” power is substantively the same with regard to the states, foreign nations, and tribes.⁷⁷ In the *Brackeen* case, the state amici curiae took an even more extreme position, arguing that the Indian Commerce Clause should be read to authorize federal regulation of “the *individuals* composing [Indian] tribes,” as opposed to the articles, channels, or instrumentalities of commerce.⁷⁸ The state amici relied on a citation to *United States v. Holliday*,⁷⁹ an 1865 case that involved a federal law banning the sale of liquor to an Indian in Indian territory.⁸⁰ That statute was challenged as exceeding Congress’s Commerce Clause power because the transaction in question occurred within a state.⁸¹ In rejecting this claim, the Court concluded that Congress’s power to regulate commerce with the Indians “relates to buying and selling and exchanging commodities,”⁸² and that Congress’s power under the Indian Commerce Clause was *the same* as its power under the Interstate Commerce Clause: “Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals.”⁸³ “And so commerce with the Indian tribes, means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce and, therefore, comes within the terms of the constitutional provision.”⁸⁴ In other words, *commercial transactions* fell within Congress’s regulatory authority. Nothing in *Holliday* warrants congressional power to regulate non-economic conduct by or involving Indian individuals nationwide.

The extreme interpretation of the Indian Commerce Clause offered by the state amici would conflict both with individual rights and tribal sovereignty. One troubling indicator on that

77. See Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 214–15, 241 (2007) (exploring the original understanding of the Indian Commerce Clause and contending that it does not provide Congress with plenary power over Indian affairs).

78. Brief of California, et al. as Amicus Curiae Supporting Defendants at 11 n.6, *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-00868-O).

79. 70 U.S. (3 Wall.) 407 (1865).

80. *Id.* at 416.

81. *Id.*

82. *Id.* at 417 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824)).

83. *Id.*

84. *Id.*

front is suggested by Professor Jerry Mashaw's comment that "[f]rom the political perspective of the late eighteenth century, commerce with the Indian tribes may have seemed less like regulating interstate commerce than like some combination of the exercise of the war and foreign affairs powers."⁸⁵ This observation—quoted with approval by at least one prominent advocate of the ICWA in support of the proposition that the Indian Commerce Clause authorizes federal imposition of family law⁸⁶—may be true, but it leads to the opposite conclusion. Congress, writes Mashaw, essentially gave the president a free hand to treat tribes as conquered peoples to whom constitutional protections, including the limitations inherent in a more restrained understanding of the Commerce Clause, did not apply.⁸⁷ But that is hardly a model to follow regarding domestic relations law in a time of peace, a century after the Indian wars. The awful results of the federal government treating Indians as conquered people speak for themselves. In any event, circumstances have changed, particularly with the extension of citizenship to Native Americans in 1924.⁸⁸ It would be shocking, to say the least, if the Indian Commerce Clause were interpreted today as giving Congress power over Native American individuals on a par with a conquering power's authority over enemy aliens in wartime. Such an interpretation would mean that Congress

85. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1300 (2006).

86. Fletcher, *supra* note 76, at 33.

87. Mashaw, *supra* note 85, at 1299–300 (explaining that Congress ceded its regulatory authority over commerce with Indian tribes to the President, “mirror[ing] its judgment with respect to the War and State Departments”); *see also* United States v. Lara, 541 U.S. 193, 201 (2004) (“Indian affairs [historically] were more an aspect of military and foreign policy than a subject of domestic or municipal law . . .”) (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 208 (1982 ed.)).

88. 8 U.S.C. § 1401(b). One is reminded of *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), in which Justice Sutherland, speaking for the Court, reflected on how ratification of the Nineteenth Amendment had changed the existing jurisprudence with regard to women's status as the “weaker” sex. “In view of the great—not to say revolutionary—changes which have taken place . . . in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment,” said the Court, the constitutionally justifiable distinctions between men and women “have now come almost, if not quite, to the vanishing point.” *Id.* at 553. The Court noted that to hold:

[T]hat women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract . . . would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.

Id.

could, among other things, forbid tribal members from leaving their tribes, or from divorcing, or from marrying non-tribal members, or from leaving reservations. Such absurd examples would obviously be unconstitutional,⁸⁹ and they show that Congress cannot claim limitless authority to regulate Indian individuals in the service of preserving tribes. Even if that was a tenable interpretation of the Clause when it was written, legal developments in the years since the Indian Wars ended have rendered it untenable in our day. Just as Congress cannot control the personal choices of other Americans under the Interstate Commerce Clause, so its authority over tribal members under the Indian Commerce Clause is confined to *commerce*.

Not only does this purported power to govern individual Indians' choices clash with individual rights, but it would also interfere with federal commitments to tribal sovereignty, since presumably if Congress has such "plenary"⁹⁰ power, let alone power to legislate with regard to individual Native American citizens, then it would have more authority over internal tribal affairs than it has over internal state affairs. As Justice Thomas wrote in *United States v. Bryant*,⁹¹ precedents that "endowed Congress with an 'all-encompassing' power over all aspects of tribal sovereignty" have also empowered Congress to interfere with matters that "are purportedly the apex of tribal sovereignty" and to "second-guess" how tribes regulate conduct by Indians on Indian land.⁹² These factors show that the more plausible interpretation of the Indian Commerce Clause is that it, like the Interstate Commerce Clause, authorizes only regulations of commercial exchange, not federal control over individual behavior or over noncommercial matters such as family affairs. This interpretation alone accords proper dignity not only to individual Native Americans, but to tribal authority as well.⁹³

89. See, e.g., *United States v. Crook*, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) ("[T]he individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it.").

90. See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (explaining that "the tribes are subject to plenary control by Congress"). Although the term "plenary" appears countless times in the case law, the courts have said that this "plenary" power is "not absolute." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (citing *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899)).

91. 136 S. Ct. 1954 (2016).

92. *Id.* at 1968 (2016) (Thomas, J., concurring).

93. Holding tribal governments to the standards of due process is an expression of respect on a government-to-government basis. See *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) ("We demand that foreign nations afford United States citizens due

Tribal governments also argued in *Brackeen* that there is another source of congressional authority justifying the ICWA beyond the Indian Commerce Clause: relying on *United States v. Lara*, they argued that Congress's power with regard to tribes depends "not upon affirmative grants of the Constitution, but upon the Constitution's adoption of pre-constitutional powers necessarily inherent in any Federal Government."⁹⁴ But if there are any such "pre-constitutional powers," they must relate to general, fundamental, essential attributes of sovereignty and national preservation.⁹⁵ It is not credible to argue that they include power to impose a national child welfare law on states relating to children who are biologically eligible for tribal membership and who reside on non-tribal lands. And it is absurd to appeal to such "pre-constitutional powers" to justify, for example, the ICWA's imposition of a "reasonable doubt" standard on TPR cases. In the end, the *Brackeen* Court found it unnecessary to address these questions, but it is to be expected that they will come up in future ICWA litigation.

B. The Brackeen Court finds the ICWA Unconstitutional

The plaintiffs in *Brackeen* were a group of foster parents, seeking to adopt their foster children, and the attorneys general of Texas, Louisiana, and Indiana. They challenged the constitutionality both of the ICWA and of 2016 BIA-issued regulations on various constitutional and statutory grounds. In addition to the racial discrimination arguments outlined above, they argued that the

process of law before recognizing foreign judgments; we must ask no less of Native American tribes Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance. However, the tribal court proceedings must afford the defendant the basic tenets of due process or the judgment will not be recognized by the United States.").

94. Motion of Cherokee Tribe et al. for Summary Judgment at 23, *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-00868-O) (quoting *United States v. Lara*, 541 U.S. 193, 201 (2004)).

95. A power to take emergency military action to preserve the union, such as during the secession crisis of 1861, would qualify as an example of such a pre-constitutional power necessarily inherent in federal government. But it is not plausible to appeal to such authority to justify the enactment of a code of family law within the United States—a proposition the framers expressly rejected. *See, e.g.*, THE FEDERALIST NO. 33 at 179 (Alexander Hamilton) (American Bar Ass'n 2009) (explaining that federal efforts to "vary the law of descent in any State" would plainly "exceed[] [federal] jurisdiction"); *id.* No. 45, at 262 (James Madison) (explaining that states will retain power over ordinary domestic relations law). Certainly legislation over adoption and foster care of children eligible for tribal membership cannot be credibly considered a "necessary concomitant[] of nationality." *Lara*, 541 U.S. at 201 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)).

ICWA violates the Tenth Amendment by intruding on state authority over child welfare matters, and exceeds Congress's power under the Commerce Clause.⁹⁶ They also argued that the ICWA unconstitutionally delegates federal power to tribal governments.⁹⁷ The federal district court ruled in their favor on almost all counts.⁹⁸

The Court concluded that the ICWA creates a racial, not a political distinction. Because “Indian child” is defined solely in biological terms, it fell outside of the *Mancari* rule and qualified as the sort of “blanket [law] for Indians’ which *Mancari* noted would raise the difficult issue of racial [categorization].”⁹⁹ In fact, the ICWA applies even to children who never become tribal members—to “potential Indian children”¹⁰⁰—which crosses the line into racial classification. And because it is therefore necessarily over-inclusive, the ICWA fails the strict scrutiny test that applies to such classifications.¹⁰¹

Then, the court agreed that the ICWA intrudes on the states’ authority. But it did not address the question, discussed above, whether the Indian Commerce Clause substantively gives Congress authority to promulgate family law. Instead, it focused solely on the fact that the ICWA commandeers state executive and judicial officers. Relying on *Murphy v. National Collegiate Athletic Association*,¹⁰² it found that the anti-commandeering principle consists of three principles: preserving the structural division of responsibility between federal and state governments, ensuring political accountability by preventing federal officials from shifting responsibility for their choices onto state officials, and barring Congress from forcing states to pay the costs of the

96. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 538–39, 546 (N.D. Tex. 2018).

97. *Id.* at 536.

98. The court rejected the plaintiffs’ Fifth Amendment Due Process argument, on the grounds that the foster parent plaintiffs did not have the sort of intimacy relationship protected by that Clause. *Id.* at 546.

99. *Id.* at 533 (quoting *Morton v. Mancari*, 417 U.S. 535, 554 (1974)).

100. *Id.* at 535; see also N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 154–55 (2008) (explaining that the ICWA presumes “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”) (emphasis added).

101. *Brackeen*, 338 F. Supp. 3d at 536. Some state versions of ICWA, notably the Minnesota Indian Family Preservation Act, MINN. STAT. §§ 260.751–835 (2018), are even more obviously race-based. Minnesota’s Act, for example, defines “Indian child” as a child who is either a tribal member or is eligible for membership, regardless of the status of the parent. *Id.* at § 260.755(8)(2).

102. 138 S. Ct. 1461 (2018).

regulations it imposes.¹⁰³ The ICWA violated all three principles: (1) the Constitution presumptively leaves family law matters to the states; (2) state officials are compelled to enforce its substantive requirements; and (3) doing so costs states financially.¹⁰⁴ Together, this means that the ICWA “regulates States—not individuals,”¹⁰⁵ which exceeds Congress’s Commerce Clause authority.

This straightforward application of the anti-commandeering principle rendered it unnecessary for the court to address whether family law is qualitatively beyond the reach of federal authority. The ICWA, said the court, intrudes on state authority by requiring state executive officials to engage in “active efforts” to verify a child’s tribal status, to seek foster or adoptive placements that comply with the ICWA’s preferences, and so forth.¹⁰⁶ And because “no provision in the Constitution grants Congress the right to ‘issue direct orders to the governments of the states,’” “regardless of the reach of the Indian Commerce Clause,” there was no need to address the question of whether “commerce” in that Clause includes authority over child protection, foster care, or adoption law.¹⁰⁷

Less straightforward was the court’s application of the anti-commandeering principle to those provisions of the ICWA that govern the states’ judicial branches. In addition to “dragoon[ing]”¹⁰⁸ state executive officials, the ICWA also forces state courts to follow certain procedural and evidentiary rules—including the right for tribal governments to intervene¹⁰⁹ and the beyond a reasonable-doubt standard¹¹⁰—while applying state law. Given that these procedural and evidentiary rules apply only to one racially-defined class of children, the result, as the state of Texas argued, is that the ICWA forces states to “racially discriminate against potential foster care and adoptive parents.”¹¹¹

103. *Brackeen*, 338 F. Supp. 3d at 539 (citing *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1477 (2018)).

104. *Id.* at 539–40.

105. *Id.* at 540.

106. *Id.*

107. *Id.*

108. *See Printz v. United States*, 521 U.S. 898, 928 (1997) (explaining that federal commandeering of state officials to enforce federal regulations was incompatible with state sovereignty).

109. 25 U.S.C. § 1911(c).

110. § 1912(f).

111. State Plaintiffs’ Response in Opposition to Defendants’ Motion to Dismiss and Memorandum in Support for Summary Judgment at 15, *Brackeen v. Zinke*, 338 F. Supp.

Neither *Printz* nor any subsequent anti-commandeering case in the Supreme Court has addressed whether Congress can impose procedural and evidentiary standards on state courts. While *Printz* held that state courts can be required to enforce the substantive requirements of *federal* statutes,¹¹² it did not discuss the type of situation posed by the ICWA, in which a federal statute imposes *procedural* or *evidentiary* rules on state courts when they apply or enforce *state law* causes of action. This distinction is significant, because while Congress can certainly require state judges to adjudicate causes of action created by federal law—and to do so in accordance with federally-prescribed procedural or evidentiary standards—no case has addressed whether it can dictate the evidentiary burden or other procedural rules for *state* statutes or *state* common law. For example, one can hardly imagine Congress ordering state judges to use a clear-and-convincing standard instead of a preponderance standard when determining liability for traffic accidents under state tort laws.¹¹³ To reiterate: the ICWA does not impose a federal substantive legal requirement and then require state courts to “entertain a claim arising under [that] federal law”—something the *Printz* Court said is constitutional. Instead, it dictates how state courts may go about adjudicating state law causes of action—thereby interfering with states’ authority to “regulate the ‘ordinary jurisdiction’ of their [own] courts”—which *Printz* implies is not constitutional.¹¹⁴ Indeed, the *Antelope* Court specifically said that it would be unconstitutional for Congress to subject Indians “to differing . . . burdens of proof from those applicable to non-Indians,”¹¹⁵ which the ICWA literally does.

True, the Supreme Court has never said whether *Printz* means that Congress’s power to compel state courts “to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power”¹¹⁶ would also include authority to prescribe procedural or evidentiary rules. Nor has it addressed

3d 514 (N.D. Tex. 2018) (No. 4:17-cv-00868-O).

112. *Printz*, 521 U.S. at 908–09.

113. Again, one possible exception would be if Congress were to act pursuant to its Fourteenth Amendment authority, but there is no indication that Congress had any such thing in mind in enacting the ICWA, or that its standards could satisfy the congruence and proportionality requirement applicable to such cases.

114. *Id.* at 906 n.1.

115. *United States v. Antelope*, 430 U.S. 641, 649 n.11 (1977).

116. *Printz*, 521 U.S. at 907.

the situation in which—as in the ICWA—a cause of action is a creature of *state*, not federal law (i.e., specifically, child protection, adoption, or foster care statutes) and where the federal government is dictating the process of applying that state law. Certainly they have never addressed whether Congress can do so based on a party’s racial or ethnic status.¹¹⁷

The *Brackeen* court found it irrelevant that the ICWA’s mandates were “primarily” addressed to state courts.¹¹⁸ State courts are still part of the state government, and the ICWA regulates them directly in their capacity as states, rather than creating federal causes of that state courts must administer.¹¹⁹ What’s more, the ICWA does not, like other federal statutes, set out the elements of a cause of action that may be brought in a state court of ordinary jurisdiction; it requires states to modify their own laws by forcing state courts to give preferences to certain parties over others in adoption cases.¹²⁰ In this and other ways, the Act “commands that states modify existing state law claims” and “modify *state created* causes of action.”¹²¹ That is unconstitutional.

Relatedly, *Brackeen* found that the ICWA unconstitutionally delegates federal lawmaking authority to tribal governments. Alongside the race-based adoption and foster care placement rules, the Act allows these governments to create new placement preferences and to require states to apply those preferences.¹²² This is not the same as administering a federal law; tribal governments are empowered “to change specifically enacted Congressional priorities and impose them on third parties.”¹²³ This empowers tribal governments to exercise legislative authority by creating rules that state courts and private individuals must implement—which means tribal governments can regulate conduct by non-members living outside of tribal lands. This is unconstitutional because only Congress may exercise lawmaking authority, and, while it may delegate to federal agencies the power

117. The only federal statute that is even analogous is the Indian Major Crimes Act, but it gives federal courts jurisdiction exclusive of state courts, *Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993), which is the opposite of ICWA’s jurisdictional provisions.

118. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 540 (N.D. Tex. 2018).

119. *Id.* at 541.

120. *Id.*; cf. *United States v. Windsor*, 570 U.S. 744, 768–72 (2013) (holding that the Defense of Marriage Act intruded on state authority by forcing them to discriminate against certain types of family relationships when state law would have treated them equally).

121. *Brackeen*, 338 F. Supp. 3d at 538.

122. *Id.* at 537.

123. *Id.*

to create regulations for enforcing federal law, it cannot surrender lawmaking power—that is, it “cannot delegate its exclusively legislative authority at all.”¹²⁴ The ICWA’s delegation of authority exceeds these limitations.

II. DEPRIVING INDIAN PARENTS OF THE RIGHT TO CHOOSE WHAT IS BEST FOR THEIR CHILDREN

A. Termination of Parental Rights

TPR is typically a necessary step prior to adoption. In *Santosky*, the Supreme Court held that due process requires courts to use the “clear and convincing evidence” standard in TPR cases, because “preponderance of the evidence” would make it too easy to terminate parental rights, thereby intruding on the rights of the parent, and “beyond a reasonable doubt” would make it too difficult to terminate parental rights, thereby intruding on the state’s ability to protect children from abuse or neglect.¹²⁵

Yet, as noted above, the ICWA imposes the extraordinarily high reasonable-doubt standard in TPR cases. And in addition to requiring state courts to find the factual bases for TPR on a “beyond a reasonable doubt basis,” it also requires them to find, on the basis of expert witness testimony, “that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”¹²⁶ This burden is remarkably severe—more demanding than is used in criminal cases, where expert testimony is not necessary. And because TPR is often a prerequisite to finding a child an adoptive home, this extreme burden of proof is—just as the *Santosky* Court warned—creates a barrier to state efforts to find adoptive homes for children in need.¹²⁷

In addition, the ICWA’s evidentiary burden, combined with the power it gives tribes to intervene in adoption cases, means that the ICWA often obstructs efforts by parents themselves to conclude adoptions for their children—or even to bar visitation with ex-

124. *Id.* (quoting *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring)).

125. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

126. 25 U.S.C. § 1912(f).

127. *See, e.g.*, Elizabeth Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, PHOENIX NEW TIMES (Sep. 7, 2016), <https://perma.cc/K95U-VDGW> (describing how the ICWA forces children to “languish[] in foster care” due solely to their Indian heritage).

spouses whose behavior has rendered them unfit. That is because the ICWA is triggered by the *child's* Indian status, which means that even a parent who is non-Indian can use the ICWA to block a TPR case. The result is to obstruct the efforts of Indian parents to protect their own children.

Thus in *In re. Adoption of T.A.W.*,¹²⁸ a mother who was a member of the Shoalwater Bay Tribe sought to terminate the rights of her child's abusive, career-criminal father so that her new husband (a tribal member) could legally adopt the boy.¹²⁹ The birth father was non-Indian.¹³⁰ But he invoked the ICWA to block the mother's wishes, and the Washington Supreme Court ruled in his favor.¹³¹ It held that the ICWA's heightened TPR burden applied, meaning that the mother could not terminate the birth father's parental rights without first making "active efforts" to "prevent the breakup of the Indian family."¹³² Yet the Indian parent was the one seeking TPR (of a non-Indian)—and she was doing so to enable her new husband, an Indian man, to adopt her son as his own.¹³³ The ICWA was therefore being employed not to prevent the breakup of an Indian family, but to prevent the *formation* of an Indian family—and to do so on behalf of a *non-Indian*.

Unfortunately, this is a common situation. Although the ICWA was written to prevent the unwarranted removal of Indian children from their parents by government agencies or by private entities operating in concert with the government, it is now often employed in private family disputes, including TPR cases, for which it was not designed.¹³⁴

In 2017, an Indian father sought to terminate the rights of his children's birth mother on account of her neglect and drug abuse.¹³⁵ The Arizona Court of Appeals refused because he had not made "active efforts" to reunite the mother with the

128. 383 P.3d 492 (Wash. 2016).

129. *Id.* at 494–95.

130. *Id.* at 494.

131. *Id.* at 495–96, 507.

132. *Id.* at 502–03.

133. *See id.* at 510 (Madsen, J., dissenting) (explaining that the trial court's orders, if left standing, would result in an "Indian child . . . in an Indian home with his Indian natural mother and with an Indian stepfather with whom [he] has bonded").

134. If anything, ICWA's authors sought to prevent the application of ICWA to private family disputes by barring it from applying to divorce cases. 25 U.S.C. § 1903(1) (defining "child custody proceeding" to *not* include divorce).

135. *S.S. v. Stephanie H.*, 388 P.3d 569, 572 (Ariz. Ct. App. 2017), *cert. denied sub nom.*, *S.S. v. Colorado River Indian Tribes*, 138 S. Ct. 380 (2017).

children.¹³⁶ The reason for this was that he had barred the mother from communicating with the children due to her improper behavior.¹³⁷ Thus the father's efforts to protect his children were *themselves* grounds for denying him the right to take steps to protect his children's interests. In another 2017 case, a mother who was a member of the Tohono O'odham Nation but lived off the reservation in Tucson, sought to terminate the parental rights of her ex-husband on account of his long criminal record and abuse.¹³⁸ Had Arizona law applied, she would have been required only to show the grounds of TPR by "clear and convincing evidence,"¹³⁹ and, because the Tohono O'odham code was identical with Arizona law on this point,¹⁴⁰ the same would have been true if she had lived on the reservation and was proceeding in tribal court. But because she lived *off* reservation, and the child was an "Indian child," neither state nor tribal law applied. The ICWA's "reasonable doubt" rule applied instead—requiring an extraordinary burden and expense. She abandoned her TPR case in light of these difficulties.¹⁴¹

B. Other Private Custody Disputes

Even in non-TPR cases, the ICWA has been used in intra-familial disputes to block adoption or to mandate transfer of custody—even though these cases do not involve the removal of an Indian child from an Indian family, and no public or private agency is involved. These are simply not what the ICWA was designed to govern. In one recent case, three Indian children in California were orphaned when their parents were killed in a car accident.¹⁴² Their father was a member of the Shingle Springs Band of Miwok Indians and had a relative who served on the tribal council.¹⁴³ The tribal court issued an order commanding that the children be taken from the non-Indian relatives who took them in after the accident and handed over to the Indian relatives,

136. *Id.* at 576.

137. *Id.*

138. Petition for Review at 2, *In re* J.P.C., CV-17-0298-PR (Ariz. Feb. 13, 2018).

139. ARIZ. REV. STAT. ANN. § 8-537(B) (2019).

140. TOHONO O'ODHAM CODE tit. 3, ch. 1, art. 5, § 1517(F) (2013).

141. Petition for Review at 3, *In re* J.P.C. CV-17-0298-PR (Ariz. Feb. 13, 2018).

142. *Cuellar v. Portillo*, No. VPR-047731 at 1 (Cal. Super Ct. Tulare Cnty. Feb. 3, 2017), *writ of mandate denied sub nom.*, *Renteria v. Superior Court*, No. F075331 (Cal. Ct. App. 5th Dist. July 14, 2017).

143. Petition for Review at 8, *Reneteria v. Superior Court*, S243352 (Cal. Aug. 30, 2017).

instead.¹⁴⁴ A federal court enjoined enforcement of that order on the grounds that the tribal court's conflict of interest (being overseen by the Indian relative who was a party to the proceeding) rendered the order invalid.¹⁴⁵ The dispute then proceeded in state court, which ruled that the ICWA applied because the children qualified as "Indian," despite the fact that there was no removal of children from parents going on, no Indian parent's rights were being terminated, and no government or private adoption agency was involved.¹⁴⁶

Although the trial court could find no precedent for applying the ICWA under such circumstances, it declared that "[t]he proper point to begin an analysis as to the applicability of [the] ICWA" was whether the child is an Indian child.¹⁴⁷ That was also the end point: the court ruled that the ICWA applied, despite the fact that the case involved a private, intra-family dispute.¹⁴⁸ The children's guardians appealed, but the case ultimately settled.¹⁴⁹

Equally striking was the Utah Supreme Court's decision in *In re Adoption of B.B.*,¹⁵⁰ which created a new "reasonableness" standard for the establishment or acknowledgment of paternity in ICWA cases—a standard that differs from the stricter standard that governs cases not involving Indian children.¹⁵¹ The ICWA expressly excludes from its definition of "parent" an unwed father who has not acknowledged or established paternity.¹⁵² But it includes no procedure for establishing paternity. Presumably, therefore, the ICWA was meant to incorporate state rules on that subject, just as it borrows state rules for such important concepts as "divorce proceeding" "foster care," or "adoption."¹⁵³ It is commonplace for federal law to rely on state law in this way—including on such crucial topics as property¹⁵⁴ or statutes of

144. *Id.*

145. *Renteria v. Shingle Springs Band of Miwok Indians*, 2016 WL 4597612 at *11 (E.D. Ca. Sept. 2, 2016).

146. *Cuellar*, No. VPR-047731 at 2.

147. *Id.*

148. *Id.*

149. Email from Client to author (Oct. 3, 2018, 6:29 MST) (on file with author).

150. 417 P.3d 1 (Utah 2017), *cert. denied sub nom.*, *R.K.B. v. E.T.*, 138 S. Ct. 1326 (2018).

151. *Id.* at 25.

152. 25 U.S.C. § 1903(9).

153. These terms are not defined in ICWA.

154. *See, e.g.*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (describing how federal constitutional protections apply to property interests and other rights as created or defined by state law).

limitations.¹⁵⁵ Yet the Utah Supreme Court held that “Congress intended that a [uniform, nationwide] federal standard apply” to define the process of acknowledging paternity in ICWA cases.¹⁵⁶ The ICWA says no such thing, and there is no legislative history to support that conclusion. The court sought to buttress its assertion with a plainly illogical argument: the idea that words such as “acknowledge” or “establish” are legal terms defined by state law was “contradictory,” it claimed, because “there are fifty variants of the terms.”¹⁵⁷ But that is hardly uncommon in the federalist system. Congress routinely relies on state law when it passes statutes, even though it knows that those federal statutes may apply differently in different states as a consequence of differences in state law. That is particularly true in the realm of family law.

The Utah Supreme Court’s answer to this point was that while there may be “nuanced differences” in state law, it was important for the ICWA’s terms to have a nationwide “core meaning.”¹⁵⁸ Maybe so, but “acknowledge” and “establish” *do* have the same “core meaning” from state to state; that was not in dispute. What was at issue were the “nuanced differences” about *how* that “core meaning” applies—such as statutes of limitation or who must sign what forms to be valid.¹⁵⁹ Diversity of substantive law is a feature, not a bug, of federalism and is well understood by Congress. Where Congress wished to bar states from applying their own rules in ICWA cases, it said so expressly in that Act.

The Utah Supreme Court rejected these arguments. Relying on *Holyfield*, it concluded that there was “no reason to believe that Congress intended to rely on state law for the definition of a critical term” because the ICWA was enacted out of concern that state authorities were failing to give sufficient protection to “the rights of Indian families and Indian communities *vis-à-vis* state authorities.”¹⁶⁰ True enough, but there is also no reason to believe

155. See, e.g., *Wilson v. Garcia*, 471 U.S. 261, 277–80 (1985) (federal statute borrows state’s statute of limitations for analogous claims).

156. *In re Adoption of B.B.*, 417 P.3d 1, 19 (Utah 2017), *cert. denied sub nom.*, R.K.B. v. E.T., 138 S. Ct. 1326 (2018).

157. *Id.* at 20.

158. *Id.*

159. By analogy, some states recognize the validity of holographic wills and some do not. Nobody would deny that the term “will” has the same “core meaning” in all states, but failure to comply with the rules for writing a valid will can render a writing legally unenforceable in one state versus another—notwithstanding the fact that federal law occasionally makes reference to wills. Such federal laws were certainly not intended to establish a single set of nationwide criteria for the validity of wills.

160. *In re Adoption of B.B.*, 417 P.3d at 21 (quoting Mississippi Band of Choctaw Indians

that the ICWA was intended as a universal, federal code of family law for Indian families. Instead, it was designed to provide protections against wrongdoing by state and private agencies, while otherwise leaving undisturbed the states' own family law systems, and the ICWA certainly does rely on state law for definitions of at least some critical terms, such as "good cause" or "qualified expert witness." (Where Congress sought to avoid the incorporation of state law, it again chose to do so expressly.¹⁶¹) Nevertheless, the Utah Supreme Court took a remarkably expansive view of federal power, ruling that "within the context of Indian welfare . . . Congress has plenary authority," which "encompasses family matters such as child-raising."¹⁶²

Forced then to fashion a new nationwide standard for acknowledging paternity, the Utah justices adopted to the most lenient standard imaginable, that of "reasonableness." Because the ICWA is "silent" on the matter¹⁶³—a silence which the court had earlier interpreted as proving that Congress meant to take such questions *away* from state authorities¹⁶⁴—the state judges chose to exercise their own power to create a "reasonability [*sic*] standard"¹⁶⁵ not found in the laws of other states *or* the ICWA. The result, strangely enough, is to create *non-uniform* law; as a dissenting justice observed, "[n]o [other] court . . . treats the notion of 'paternity' in the ICWA as a purely federal standard"¹⁶⁶—a standard, moreover, which is so fact-specific that

v. Holyfield, 490 U.S. 30, 44–45 (1989)).

161. For example, ICWA includes a definition of "child custody proceeding" to address the fact that state laws use different terms for different types of child custody matters. 25 U.S.C. § 1903(1). It also used carefully designed terminology such as "any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child," 25 U.S.C. § 1911(b), in order to cover the variations in state law proceedings relating to such matters. As the Minnesota Supreme Court has said, "We cannot assume that . . . Congress was simply careless in using terms" in the ICWA. *In re Welfare of R.S.*, 805 N.W.2d 44, 51 (Minn. 2011).

162. *In re Adoption of B.B.*, 417 P.3d at 22–23.

163. *Id.* at 25–26.

164. The court also relied on the BIA's *failure* to establish a reasonableness rule by regulation as support for the proposition that reasonableness should be the standard. *See id.* at 26 n.28. Courts are ordinarily reluctant to rely on legislative or administrative inaction as support for any proposition of law. *See, e.g.*, *Nawrocki v. Macomb Co. Rd. Comm.*, 615 N.W.2d 702, 720 n.33 (Mich. 2000) (explaining that the "doctrine of legislative acquiescence 'is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence'" (quoting *Donajkowski v. Aplena Power Co.*, 596 N.W.2d 574, 583 (Mich. 1999))).

165. *In re Adoption of B.B.*, 417 P.3d at 25.

166. *Id.* at 33 (Lee, C.J., dissenting).

the result will be “chaos and unpredictability—not uniformity.”¹⁶⁷

B.B.’s anomalous and unjustifiable reasonableness rule will likely worsen the already bleak state of affairs for Indian children in need of adoptive homes. Courts¹⁶⁸ and scholars¹⁶⁹ have repeatedly recognized that the ICWA severely limits the options of Indian children in need of adoptive homes by imposing the severe “beyond a reasonable doubt” evidentiary burden, mandating race-matching in adoption, and allowing tribal governments to block adoptions that would otherwise be approved. Would-be adoptive parents, willing to open their homes to Native American kids in need, are less likely to do so if they know that adopting such a child is likely to be a vastly more expensive, time-consuming, and emotionally draining affair—and that even after an adoption is finalized, a putative Indian father can intervene and undo that adoption on the basis of a merely “reasonable” assertion of paternity. As the dissent noted, “there is no assurance” under the reasonableness rule “that an adoption of an Indian child will ever be truly final.”¹⁷⁰ That is not in the best interests of Indian children.

C. Voluntary Adoption

In many cases, including *Santosky* and *Troxel v. Granville*,¹⁷¹ the Supreme Court has expressed deep concern with protecting what it calls the fundamental right of parents “to direct the upbringing of their children.”¹⁷² Notably, this right is not limited to *raising* children, but to *directing* their upbringing—which includes the

167. *Id.* at 56 (Lee, C.J., dissenting).

168. *Cf.* *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013) (“[M]any prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA.”); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (Cal. Ct. App. 1996) (“As a result of this disparate treatment [by the ICWA], 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 home has a greater risk . . . of being taken from that home and placed with strangers.”).

169. Joan Heifetz Hollinger, *Beyond the Best Interests of The Tribe: The Indian Child Welfare Act and The Adoption of Indian Children*, 66 U. DET. MERCY L. REV. 451, 453 (1989) (“For non-Indians who wish to adopt an Indian child, the risks are often considerably greater than in adoptions of other children.”).

170. *In re Adoption of B.B.*, 417 P.3d at 56–57 (Lee, C.J., dissenting).

171. 530 U.S. 57 (2000).

172. *Id.* at 65 (plurality op.); *id.* at 78–79 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring); *id.* at 91 (Scalia, J., dissenting); *see also* *Santosky v. Kramer*, 455 U.S. 745, 787 (1982) (discussing the “right of parents ‘to bring up their own children’”) (quoting N.Y. SOC. SERV. LAW. § 384-b.1(a)(iii) (McKinney 2019)).

right to educate them and “to make decisions concerning [their] care, custody, and control.”¹⁷³ This would seem to include the right to choose adoptive parents, as well.¹⁷⁴ However, the ICWA interferes with the right of Indian parents to choose to have their children adopted by non-Indians.

In the first Supreme Court case to address the ICWA, *Mississippi Band of Choctaw Indians v. Holyfield*,¹⁷⁵ the Court invalidated an adoption order in a case in which two Indian parents left the reservation to give birth in order to ensure that the child would be adopted by the couple they had selected.¹⁷⁶ Acting pursuant to its powers under the ICWA, the tribe intervened to bar the adoption, arguing that its own courts had jurisdiction to decide the matter.¹⁷⁷ The Court agreed, ruling that the parents were domiciled on the reservation, and that “[t]ribal jurisdiction under [the ICWA] was not meant to be defeated by the actions of individual members of the tribe,” such as leaving the reservation to give birth.¹⁷⁸

Holyfield was an unobjectionable application of the principle of domicile for personal jurisdiction law,¹⁷⁹ but its comment on the powers of tribal governments is revealing. The ICWA, said the

173. *Troxel*, 530 U.S. at 66 (plurality op.); *see id.* at 80 (Thomas, J., concurring) (“[T]he right to determine who shall educate and socialize them.”); *id.* at 77 (Souter, J., concurring) (“[T]he nurture, upbringing, companionship, care, and custody of children.”).

174. *See In re N.N.E.*, 752 N.W.2d 1, 8–9 (Iowa 2008) (determining that establishing a “high burden to deviate from the placement preferences in a voluntary termination violates substantive due process” as a result of the parent’s constitutional interest in the child’s care, custody, and control); *In re Welfare of H.Q.*, 330 P.3d 195, 200–01 (Wash. Ct. App. 2014) (“[S]ubstantive due process requires that parents be permitted the opportunity to pursue voluntary relinquishment prior to the involuntary termination of their parental rights if voluntary relinquishment is available as a viable alternative.”); *Y.H. v. F.L.H.*, 784 So.2d 565, 571–72 (Fla. Dist. Ct. App. 2001) (determining that the parent’s fundamental right to make decisions for her child includes the right to give the child up for adoption by somebody other than her maternal grandmother); *see also* Teri Dobbins Baxter, *Respecting Parents’ Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children*, 67 RUTGERS U. L. REV. 905, 950 (2015) (“[P]arents have fundamental rights . . . specifically with respect to the biological parent’s right to choose adoptive parents for their children.”).

175. 490 U.S. 30 (1989).

176. *Id.* at 30.

177. *Id.* at 38.

178. *Id.* at 49.

179. It was also distinguishable from ICWA cases (such as *Brackeen*) involving parents and children domiciled off reservation, in that the tribe in *Holyfield* was arguably acting within its retained, inherent sovereignty over on-reservation activities—whereas tribes cannot claim similar authority to adjudicate child welfare cases that involve off-reservation families and children who are not members, but are only eligible for membership, in a tribe. In those cases, tribal authority can only be seen as granted by the ICWA, not as inherent.

Court, “recognizes that the tribe has an interest in the child which is distinct from but *on a parity with the interest of the parents*.”¹⁸⁰ But as *Troxel* teaches, elevating any third party to a position of “parity” with the interests of parents intrudes on a fundamental right.¹⁸¹

The recent case of *In re A.L.M.*¹⁸² typifies the problems that ICWA’s anti-adoption rules cause. That case involved a Texas child of mixed Navajo and Cherokee parentage who was placed in foster care for two years.¹⁸³ When the foster parents filed a petition to adopt the child, however, the tribes intervened to bar the adoption—despite the fact that no other party had sought to adopt.¹⁸⁴ Both birth parents also agreed to the adoption because, as the birth father testified, “he’s been with [the foster parents] ever since he was basically born almost [They are] the only parents he knows.”¹⁸⁵ Nevertheless, the tribes opposed it, and in the hallway outside the courtroom prior to the hearing, attorneys from the Cherokee and Navajo tribes decided to deem the child Navajo.¹⁸⁶ They then claimed to have located a possible adoptive family for the child, on the Navajo reservation in New Mexico. Soon afterwards the Texas court denied the adoption, and the state’s Department of Family Protective Services announced its intention to remove the child from the foster parents and send him to live in New Mexico with a Navajo couple whom the child had met for three hours.¹⁸⁷ (That case ultimately settled out of court, but the parties filed a federal case: *Brackeen*, discussed above.)

The ICWA’s race-matching rules are so severe that in some cases parents have tried to take the extreme step of seeking to disenroll from their own tribes in order to prevent its application. In one 2016 Oklahoma case, for example, a Cherokee father whose daughter was being raised by a foster

180. *Id.* at 52 (emphasis added).

181. *Troxel*, 530 U.S. at 67–68 (“[That] a court can disregard and overturn any decision by a fit custodial parent . . . whenever a third party affected by the decision files a [p]etition . . . exceeds the bounds of the Due Process Clause.”)

182. Nos. 02-17-00298-CV, 02-17-0030-CV, 2017 WL 6047677 (Tex. App. Dec. 7, 2017).

183. Amended Emergency Motion to Stay Move of Child Pending Appeal at 3, *In re A.L.M.*, No. 323-105593-17 (Tex. Dist. Ct. Tarrant Cnty. Aug. 21, 2017).

184. *Id.*

185. Transcript of Record at vol. 2, 55, 58, *In re A.L.M.*, Nos. 323-103401-16, 323-105593-17 (Tex. Dist. Ct. Tarrant Cnty. (Aug. 21, 2017).

186. *Id.* at vol. 2, 136–139.

187. *Id.* at vol. 2, 89–90; see *In re A.L.M.*, No. 323-105593-17 at 2 (Tex. Dist. Ct. Tarrant Cnty. Aug. 21, 2017) (denying the petitioner’s request to adopt A.L.M.); Emergency Motion to Stay Move of Child Pending Appeal at 1, *In re A.L.M.*, No. 323-105593-17 (Tex. Dist. Ct. Tarrant Cnty. Aug. 21, 2017).

mother tried to relinquish his tribal membership when the tribe sought to remove the child and place her with a different family.¹⁸⁸ Recognizing that the removal would inflict emotional trauma on the child, the father hoped that surrendering his tribal citizenship would “take the matter . . . out of the Tribe’s hands” and “help keep . . . [the child] where she’s at.”¹⁸⁹ The court refused to allow that. In a Minnesota case, *In re Petition of Rada*,¹⁹⁰ a Shoshone mother volunteered her child for adoption, but the tribe intervened under the ICWA to bar that from happening.¹⁹¹ The mother therefore disenrolled from the tribe.¹⁹² In a subsequent proceeding, she argued that her child was therefore no longer an Indian child under the ICWA because that statute defines Indian child as a child who “is” the biological child of a tribal member.¹⁹³

The fact that tribal member parents have been forced to abandon their tribal membership in efforts, sometimes unsuccessful, to ensure that their children are adopted by families that they believe will do the best for their children is a tragic commentary on how far the ICWA falls short of its goals. Although purportedly aimed at protecting Indian families, it often intrudes on the fundamental right of parents to direct the upbringing of their children and to make choices that are in their children’s best interests. It does so because it seeks to elevate tribal authority to “parity” with the rights of parents. But the constitutional rule is clear: it is unconstitutional to elevate any third party’s rights to parity a parent’s rights.

188. *In re M.K.T.*, 368 P.3d 771, 776–77 (Ok. 2016).

189. *Id.* at 776.

190. No. 27-JV-FA-17-117 (Minn. Dist. Ct. Juv. Ct. Hennepin Cnty. Oct. 16, 2017).

191. Findings and Order Vacating Good Cause Finding and Denying Constitutional Challenges at 3, *In re Petition of Rada*, No. 27-JV-FA-17-117 (Minn. Dist. Ct. Juv. Ct. Hennepin Cnty. Oct. 16, 2017).

192. *Id.* at 2.

193. Petition for Writ of Prohibition at 3–4, *In re Z.R.R.*, A17-1846 (Minn. Ct. App. Dec. 12, 2017). The court held that notwithstanding the mother’s action, the Minnesota state version of the ICWA—called the Minnesota Indian Family Preservation Act (MIFPA), MINN. STAT. §§ 260.751–835—still applied, because that statute defines “Indian child” more broadly than the ICWA. MINN. STAT. § 260.755(8); *In re Petition of Rada*, No. 27-JV-FA-17-117 at 5. The MIFPA does *not* require that the parent be a member of a tribe, but applies to any child who is “eligible for membership in an Indian tribe.” MINN. STAT. § 260.755(8)(2). Moreover, a determination by a tribe that a person is eligible for membership “is conclusive.” *Id.* § 260.755(8). The court therefore ruled that the child was subject to the MIFPA notwithstanding the mother’s surrendering of her tribal membership. The Minnesota Court of Appeals denied a petition for writ of prohibition. *In re Z.R.R.*, A17-1856 at 3.

III. LIMITS ON TRIBAL AUTHORITY

A. Personal Jurisdiction

Among the most potentially significant recent developments in ICWA law is the discussion of personal jurisdiction—a matter that, astonishingly, appears virtually never to have been addressed prior to the Ohio Court of Appeals’ ruling in *In re C.J., Jr.*¹⁹⁴

Under ordinary personal jurisdiction rules—which also apply to tribal courts¹⁹⁵—a court cannot adjudicate a case involving parties who lack “minimum contacts” with that forum.¹⁹⁶ Instead, principles of due process require that there be some “affiliating circumstances” between the parties and the court such that the court’s adjudication of a case meets the basic requirements of “fair play and substantial justice.”¹⁹⁷ It would be unconstitutional for a California court to assert authority to decide a matter involving Maine residents on the grounds that the parties’ great-great grandparents were born in Maine. Yet that is precisely the jurisdiction that the ICWA purports to give tribal courts.

Section 1911 of the ICWA provides that tribal courts have exclusive jurisdiction over child welfare matters occurring on reservation.¹⁹⁸ This is unobjectionable and satisfies the requirements of personal jurisdiction for people domiciled on reservation, as in *Holyfield*. But the ICWA goes further by commanding state courts to surrender jurisdiction over child welfare cases to tribal courts, except in the rare cases where “good

194. 108 N.E.3d 677 (Ohio Ct. App. 2018).

195. See, e.g., *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 819–20 (9th Cir. 2011) (“To exercise civil authority over a defendant, a tribal court must have both personal jurisdiction and subject matter jurisdiction”); *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) (“The lack of personal jurisdiction mandates rejection of a foreign judgment . . . and that requirement must logically extend to tribal judgments.”); *Red Fox v. Hettich*, 494 N.W.2d 638, 645 (S.D. 1993) (“[A]pplying traditional long-arm analysis, before the tribal court can assert jurisdiction over a non-Indian, he must receive notice and have ‘minimum contacts’ with the tribe.”); cf. *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514–15 (8th Cir. 1989) (“[A] tribal court exercising in personam jurisdiction over a nonmember nonresident parent of a minor child domiciled within the Indian reservation may violate due process . . .”); see also Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts’ Jurisdiction*, 101 CAL. L. REV. 1499, 1507 (2013) (“[T]ribal jurisdiction can and should be governed by the same jurisdictional doctrines applicable to state, federal, and foreign courts.”).

196. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

197. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (quoting *Int’l Shoe*, 326 U.S. at 316).

198. 25 U.S.C. § 1911(a).

cause” exists to deny such transfer of jurisdiction.¹⁹⁹ “Good cause” is not defined, which has led to much litigation, but most courts that have addressed the issue have ruled that the best interests of the child are *not* to be considered as part of the “good cause” determination.²⁰⁰ And the ICWA’s jurisdiction-transfer requirement is triggered *solely* by a child’s status as an “Indian child,” which, again, is a function of the child’s ancestry. This means that children who fall within the ICWA’s racial profile, but have never resided on a reservation and have no cultural, social, religious, linguistic, or political affiliation with a tribe, can be required to have their child welfare proceedings decided by tribal courts located on reservations they’ve never visited, perhaps in states far across the country. Adults involved in their cases, such as foster parents and prospective adoptive parents, are likewise forced into the tribal forum to defend their interests and those of the children, even though they, too, lack any constitutionally adequate minimum contacts with the tribal forum.

This arrangement certainly violates due process. The due process requirement of minimum contacts would bar a trial court in Arizona, for example, from deciding a child custody case involving a child born and raised in Ohio, simply on the grounds that the child shares a distant ancestor with certain Arizonans. Yet

199. § 1911(b).

200. See, e.g., *In re Zylena R.*, 825 N.W.2d 173, 185 (Neb. 2012) (“BIA Guidelines do not include the best interests of a child as ‘good cause’ for denying transfer to a tribal court.”); *In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) (“[W]hile the best interests of the child is an appropriate and significant factor . . . it is improper to apply a best interests standard when determining whether good cause exists to avoid the ICWA placement preferences.”); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 (Tex. App. 1995) (“[C]onsideration of the best interest of the child in determining whether good cause exists under section 1911(b) is improper.”); *In re J.L.P.*, 870 P.2d 1252, 1258 (Colo. App. 1994) (“[T]he ‘best interests of the child’ standard as used in other custody proceedings[] . . . is not one of the good cause factors enumerated in the BIA Guidelines and has only been applied in a few states.”); *In re Ashley Elizabeth R.*, 863 P.2d 451, 456 (N.M. Ct. App. 1993) (noting that “the best interests of the child” is not used to judge jurisdiction); *In re C.E.H.*, 837 S.W.2d 947, 954 (Mo. Ct. App. 1992) (explaining that the jurisdiction has rejected the “best interests of the child” theory in favor of a *forum non conveniens* standard that revolves around the “good cause” analysis); *In re Armell*, 550 N.E.2d 1060, 1065 (Ill. App. Ct. 1990) (stating that “considerations involving the best interests of the child” are not “relevant” to determine jurisdiction); *In re B.W.*, 454 N.W.2d 437, 444 (Minn. Ct. App. 1990) (determining that a good cause finding must be supported by an ICWA expert—someone who is an expert in the tribal aspects of the child, rather than general safety and well-being). Some courts, however, have that have held that good cause *can* include an assessment of best interests. *In re J.J.*, 454 N.W.2d 317, 331 (S.D. 1990); *In re T.R.M.*, 525 N.E.2d 298, 307–08 (Ind. 1988); *In re N.L.*, 754 P.2d 863, 869 (Okla. 1988); *In re M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981); *In re Maricopa Cty. Juvenile Action No. JS-8287*, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991); *In re Robert T.*, 246 Cal. Rptr. 168, 173 (Cal. Ct. App. 1988).

this is exactly what happened in *In re C.J., Jr.*²⁰¹ A tribe located in Arizona obtained an *ex parte* order from its tribal court commanding that a child born in Ohio—who had lived most of his life with an Ohio foster family and whose birth parents also lived in Ohio—be sent instead to live on the reservation in Arizona with a family he had never met. The state court found this improper. The child “is not a [tribal] member, he has never been on [tribal] soil, and he is not residing in and is not domiciled [on the reservation],” so that the tribe could not assert jurisdiction under the ICWA.²⁰² But even if it could, such an assertion of jurisdiction would violate due process given the lack of minimum contacts.²⁰³ It should hardly need saying that ancestry cannot satisfy the minimum contacts requirement.²⁰⁴

Although the tribe argued that Ohio courts were obligated to give full faith and credit to the tribal court order, the court ruled that full faith and credit applies only where the court issuing the original order had proper jurisdiction and gave the parties due process.²⁰⁵ Because the tribal court order in *C.J. Jr.* was procured without personal jurisdiction, or even notice and appearance by the parties, that order was not entitled to full faith and credit.²⁰⁶

Remarkably, virtually no case prior to *C.J. Jr.* has resolved the question of personal jurisdiction in the ICWA context.²⁰⁷ Yet the constitutionality of the Act’s jurisdiction transfer provisions demands judicial attention. Can the federal government compel

201. *In re C.J., Jr.*, 108 N.E.3d 677, 685 (Ohio Ct. App. 2018).

202. *Id.* at 694.

203. *Id.* at 696. The court recognized that the “status exception” to the minimum contacts rule does allow courts to resolve certain questions in the absence of minimum contacts—including cases involving child welfare—but that exception could not apply because it requires that the child be present in the forum, which was not the case. *Id.*

204. It also violates principles of tribal sovereignty. See Kim Benita Furumoto & David Theo Goldberg, *Boundaries of the Racial State: Two Faces of Racist Exclusion in United States Law*, 17 HARV. BLACKLETTER L.J. 85, 102 (2001) (explaining that efforts to establish “racially contingent” jurisdiction in cases involving Indians “detrimentally affects the self-determination of Indian nations since it departs from a territorial conception of jurisdiction”).

205. *In re C.J., Jr.*, 108 N.E.3d at 696.

206. *Id.* at 697.

207. In *Merrill v. Altman*, 807 N.W.2d 821 (S.D. 2011), the South Dakota Supreme Court held that the parties were not domiciled on reservation and, consequently, that the exclusive jurisdiction provision of Section 1911(a) of ICWA was inapplicable; it did not address personal jurisdiction considerations under Section 1911(b). *Id.* at 827. In *In re J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007), the court found that a tribal court lacked jurisdiction in a neglect case that was filed in tribal court after finding that the parties were not domiciled on reservation and that the exclusive jurisdiction provision of Section 1911(a) was inapplicable. *Id.* at 813. But, again, the court found that Section 1911(b) was not at issue. *Id.* at 807–08.

state courts to transfer child welfare cases over which they have jurisdiction into tribal courts that lack it? And do so solely on the basis of the child's biological ancestry? Congress has passed statutes requiring that certain types of cases be adjudicated in certain courts, but only where the transferee courts already have constitutionally adequate jurisdiction. After all, personal jurisdiction is a constitutional matter, not a statutory one,²⁰⁸ and Congress has no authority to create personal jurisdiction where none exists.²⁰⁹ Transfer of cases is not unusual, but it is only proper where the court receiving the case already has or can constitutionally obtain personal jurisdiction; transfer itself cannot create it.²¹⁰

It is sometimes argued that tribal court jurisdiction under the ICWA is an exercise of a tribe's retained, inherent sovereignty rather than a power granted by the Act.²¹¹ And such considerations proved significant to the Alaska Supreme Court in *In re C.R.H.*,²¹² which declared that the ICWA's jurisdiction-transfer provision "reflect[s] congressional intent that all tribes . . . be able to accept transfer jurisdiction of ICWA cases from state courts."²¹³ But that case did not address *personal* jurisdiction, or determine whether Congress has constitutional authority to mandate the transfer of cases involving American citizens out of state courts that have jurisdiction into tribal courts that would otherwise have none. Nor does the distinction between "retained sovereignty" and "granted authority" resolve that question. While tribes retain sovereignty to adjudicate disputes that occur on reservation, or that occur between

208. See, e.g., *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (recognizing that the personal jurisdiction requirement is "a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty").

209. See *Barrett v. Union Pac. R.R. Co.*, 390 P.3d 1031, 1039 n.18 (Or. 2017) (asserting that an attempt to confer personal jurisdiction where it otherwise wouldn't exist contravenes the Due Process Clause).

210. See *Volkswagen De Mexico, S.A. v. Germanischer Lloyd*, 768 F. Supp. 1023, 1029 (S.D.N.Y. 1991); *Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 709 F. Supp. 1279, 1288 (S.D.N.Y. 1989); cf. *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960) (explaining that a venue transfer is only proper where the transferee court would already have had jurisdiction).

211. *Simmonds v. Parks*, 329 P.3d 995, 1008–09 (Alaska 2014); Grant Christensen, *Personal Jurisdiction and Tribal Courts After Walden and Bauman: The Inadvertent Impact of Supreme Court Jurisdictional Decisions on Indian Country*, 68 RUTGERS U.L. REV. 1367, 1394 (2016).

212. 29 P.3d 849 (Alaska 2001).

213. *Id.* at 852.

members,²¹⁴ that cannot satisfy the requirement of personal jurisdiction over children who are only *potential*, not actual members, or over cases that involve individuals not domiciled on reservation. Retained tribal sovereignty does not *by itself* displace state court jurisdiction over matters not occurring on tribal land; tribal authority in such cases is “presumptively invalid,”²¹⁵ and can only come about by statute, or by the ordinary principles of comity—which means that due process must be satisfied. Because due process does not permit Congress to create personal jurisdiction where it does not exist, it also cannot allow Congress to give tribal courts personal jurisdiction over cases where none exists. Thus Congress cannot compel the transfer of child welfare cases out of state court and into tribal court based on the child’s “Indian child” status alone.

State courts and the BIA have often said that the ICWA’s jurisdiction transfer provisions should be read as a “a modified version of the *forum non conveniens* doctrine,”²¹⁶ meaning as a matter of statutory or common law comity. This does not alter the conclusion, however. The modified *forum non conveniens* doctrine consists of the traditional *forum non conveniens* factors (including the ease of access to evidence,²¹⁷ the availability of a more convenient forum,²¹⁸ the risk of forum shopping by one of the parties²¹⁹) with the modification that the state court can also retain jurisdiction if the tribal forum is not convenient²²⁰ or if other “good cause” exists to deny the transfer.²²¹ But even assuming courts may not consider the child’s best interests in determining good cause, certainly they are free to decide the more neutral question of the presence or absence of personal jurisdiction, which is a consideration already inherent in venue-transfer cases.²²² And in any case where a child has no minimum contacts with the tribal forum sufficient to entitle the tribal court

214. *John v. Baker*, 982 P.2d 738, 753 (Alaska 1999).

215. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001).

216. *Thompson v. Fairfax Cty. Dep’t of Family Servs.*, 747 S.E.2d 838, 843 (Va. Ct. App. 2013).

217. *In re Maricopa Cty. Juvenile Action No. JS-8287*, 828 P.2d 1245, 1249 (Ariz. Ct. App. 1991).

218. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

219. *Van Dusen v. Barrack*, 376 U.S. 612, 638 (1964).

220. *In re Juvenile Action No. JS-8287*, 828 P.2d at 1249.

221. 25 U.S.C. § 1911(b).

222. *See, e.g., Van Dusen*, 376 U.S. at 619–20 (considering the ability of a court to decide an action where the defendant was not subject to personal jurisdiction but nevertheless consented to the court’s jurisdiction).

to personal jurisdiction, the lack of due process must weigh heavily in the “good cause” assessment—so that the modified *forum non conveniens* approach must result in a refusal to transfer.

The *C.J. Jr.* case is significant not only for its discussion of personal jurisdiction, but also for the involvement of the Ohio Attorney General, who participated as amicus curiae in support of the child and against the tribe.²²³ The Ohio Attorney General also appeared as amicus in *Brackeen*, in which the states of Texas, Louisiana, and Indiana are plaintiffs.²²⁴ This is a welcome development. Attorneys general have primary responsibility for the protection of the legal rights of children in their states, and the troubling jurisdictional assertion at issue in *C.J. Jr.* is an example of why they should take seriously the need to resist overly-aggressive tribal government actions in ICWA cases. This is far from the only case in which tribal authorities have tried to remove a child from his or her home state and order the child sent elsewhere based solely on the child’s biological status as an Indian child. In *Alexandria P.*²²⁵ and *A.L.M.*,²²⁶ tribal governments sought—successfully in *Alexandria*, and almost successfully in *A.L.M.*—to take children away from families, where they had lived safely and happily for years, and send them to reside in other states with other families handpicked by tribal authorities—a shocking intrusion on the *parens patriae* responsibilities of state attorneys general.²²⁷ Given the political stakes, attorneys general have proven reluctant to involve themselves in such matters, and it is gratifying to see what appears to be a shift toward protecting the best interests of Indian children in *C.J. Jr.* and *Brackeen*.

223. *In re C.J., Jr.*, 108 N.E.3d 677, 693 (Ohio 2018).

224. Brief of Amicus Curiae of Ohio in Support of Plaintiffs–Appellees and Affirmance, *Brackeen v. Bernhardt*, 18-11479 (5th Cir. Nov. 30, 2018).

225. 204 Cal. Rptr. 3d 617 (Cal. Ct. App. 2016).

226. 2017 WL 6047677 (Tex. App. Dec. 7, 2017).

227. See *In re Alexandria P.*, 204 Cal. Rptr. at 626, 643 (directing the child to be placed with the “Indian family” rather than the foster family she bonded with for two years); Amended Emergency Motion to Stay Move of Child Pending Appeal at 1–2, *In re A.L.M.*, No. 323-105593-17 (Aug. 21, 2017). During the appeals process in *A.L.M.*, the parties reached a settlement that allowed the adoption to proceed. See *In re A.L.M.*, 2017 WL 6047677 at *1 (dismissing the appeal as a result of a settlement); *In re A.L.M.*, GOLDWATER INST. (Oct. 31, 2017), <https://perma.cc/B7LB-N3M6> (reporting that the parties agreed to a settlement which allowed the child’s adoption).

B. Timing of Jurisdiction Transfer

In *Gila River Indian Community (GRIC) v. Department of Child Safety*,²²⁸ the Arizona Supreme Court addressed a question of timing. The ICWA allows tribal governments to compel state courts to transfer TPR cases to tribal courts in certain instances. But in *GRIC*, the tribe participated in state court proceedings involving TPR and, after termination was granted, did not seek to appeal that determination.²²⁹ Only later, when the foster parents filed an adoption petition, did the tribe stay those proceedings and then file a motion to transfer the case to tribal court.²³⁰ The court found that the tribe had no authority under the ICWA to do so because Section 1911(b) gives tribes this transfer authority only in “State court proceeding[s] for the foster care placement of, or termination of parental rights to, an Indian child,”²³¹ and the case had gone beyond those stages already. Still, the court took care to note that the ICWA did not forbid transfer in such circumstances; rather, a tribe must employ ordinary state law or the *forum non conveniens* doctrine if it wishes to seek transfer.²³²

That ruling is welcome, given that it prevents tribal governments from exercising indefinite veto power over adoptions of children in need. The difference between a transfer proceeding under the ICWA and a transfer proceeding under state law, *forum non conveniens*, or other law—such as the federal Uniform Child Custody Jurisdiction and Enforcement Act²³³—is an important one. Outside of the ICWA, a court must consider the child’s best interests, but under the ICWA, a court cannot make use of the “best interests” test in such circumstances, at least according to most courts that have addressed the matter.²³⁴ One might suppose that “good cause” would include determining whether transfer would serve the child’s best interests, but state courts have ruled to the contrary, that such an assessment is improper, because the “best interests” test is an

228. 395 P.3d 286 (Ariz. 2017).

229. *Id.* at 288.

230. *Id.*

231. *Id.* at 290 (quoting 25 U.S.C. § 1911(b)).

232. *Id.* at 291.

233. This act, which is law in every state except Massachusetts, provides for transfer, intervention, and other matters in child custody cases where jurisdiction is disputed. Even in the absence of ICWA, tribes would have authority under this Act to intervene and participate in child welfare cases involving Indian children, with this proviso: The Act does include consideration of the child’s best interests.

234. *Supra* note 216.

“Anglo” concept that should play no role in a transfer determination,²³⁵ and because the ICWA creates a conclusive presumption regarding the best interests of all Indian children.²³⁶ This is extremely troubling, given that Indian children are entitled as a matter of due process to have their best interests considered *on an individualized basis*, and that conclusive presumptions in state court proceedings involving their welfare are unjust, unwise, and unconstitutional.²³⁷

While *GRIC* was a positive development, its applicability is limited. In *Michelle M. v. Department of Child Safety*,²³⁸ the Arizona Court of Appeals distinguished *GRIC* in ordering remand of a TPR proceeding because of the possibility that the child could be an Indian child.²³⁹ Although the judges agreed with the trial court that the child would be endangered by continuing to live with the mother,²⁴⁰ and that TPR would have been proper in a non-ICWA context—that is, if the child did not meet the racial profile of “Indian”—it decided that remand was required because the mother claimed (without corroborating evidence) that the child was eligible for tribal enrollment.²⁴¹ The state, relying on *GRIC*, argued that the ICWA could not apply because by the time the mother made these claims, there were no proceedings pending for a tribe to participate in—but the court found that the “[m]other’s testimony occurred before the motion to terminate was granted,” and therefore that *GRIC* did not apply.²⁴² Citing cases from other jurisdictions that held that the ICWA requires tribal notification as a condition for the validity of a judgment, the court concluded that the case had to be remanded so that the state could notify the tribal government of the possibility that the child was an Indian child.²⁴³ Still, it refused to reverse the termination of parental rights and ordered

235. See, e.g., *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 168–70 (Tex. App. 1995) (declining to use the “best interest” test and suggesting that its Anglo context makes it unsuitable for Indian children transfer decisions).

236. See, e.g., *In re C.H.*, 997 P.2d 776, 782–83 (Mont. 2000) (examining “best interests” through the lens of ICWA).

237. See Sandefur, *supra* note 6, at 14–18 (discussing impropriety of ICWA’s blanket presumption).

238. 401 P.3d 1013 (Ariz. Ct. App. 2017).

239. *Id.* at 1017.

240. *Id.* at 1016.

241. *Id.* at 1017.

242. *Id.*

243. *Michelle M. v. Department of Child Safety*, 401 P.3d 1013, 1017 (Ariz. Ct. App. 2017).

the matter stayed to give the tribe the opportunity to determine whether the ICWA governed or not.²⁴⁴

IV. CONCLUSION

A century ago, the Sioux author Zitkala-Ša told a story about a trip she took through South Dakota. A passenger on a train asked her about a star-shaped badge she wore, and she answered that she wore it for her husband, who was serving in the Army. “Oh! Yes!” replied the traveler. “You are an Indian! Well, I knew when I first saw you that you must be a foreigner.”²⁴⁵

As an activist for American Indian citizenship, Zitkala-Ša used the story to emphasize that American Indians are not from some foreign land. “America! Home of the Red Man!” she wrote. “When shall the Red Man be deemed worthy of full citizenship if not now?”²⁴⁶ Sadly, although Indians were granted full citizenship only five years after this incident, federal law still deprives the most vulnerable among them of the legal protections that Americans of other races enjoy. Among the most egregious examples of this second-class citizenship is the Indian Child Welfare Act.

The ICWA was passed with the best of intentions. But today it is the source of many injustices to Indian children, who are too often at economic, social, and physical risk. It subordinates their best interests to other considerations, makes it harder for states to protect them from injury, and prevents, or even forbids, their adoption by safe, loving families. State courts have applied it in private, intra-family disputes in ways that block Indian parents from taking steps to protect their own children. And it empowers tribal governments in far away states to take foster children away from the only parents they have ever known, often for insufficient reasons. And too often, Indian children are treated as though they are foreigners—or like “dogwood trees, to be uprooted, replanted, then replanted again for expediency’s sake.”²⁴⁷

Fortunately, recent cases have made significant progress toward establishing the legal equality to which Indian children are entitled. One hopes that in the future, courts will emphasize that no consideration—least of all race—should take precedence over

244. *Id.*

245. Zitkala-Ša, *America, Home of the Red Man* (1919), reprinted in AMERICAN INDIAN STORIES, *supra* note 1, at 193.

246. *Id.* at 195.

247. Guardianship of Cassandra H., 75 Cal. Rptr. 2d 668, 674 (Cal. Ct. App. 1998).

the rights of children and the adults who love them. When shall our Native American fellow citizens be deemed worthy of the equal protection of the laws, if not now?