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Trusting the Tribe: Understanding the Tensions of the Indian Child Welfare Act

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TRUSTING THE TRIBE: UNDERSTANDING THE TENSIONS OF THE INDIAN CHILD WELFARE ACT

". . . Remember your birth, how your mother struggled
to give you form and breath. You are evidence of
her life, and her mother's, and hers.
Remember your father. He is your life, also . . .
Remember you are all people and all people are you.
Remember you are this universe and this universe is you.
Remember all is in motion, is growing, is you.
Remember language comes from this.
Remember the dance language is, that life is.
Remember."[1]

The Indian Child Welfare Act of 1978 ("ICWA") was enacted to address abusive child welfare practices which resulted in the separation of Indian children from their families and tribes.[2] Testimony from Senate hearings directly preceding the enactment of the ICWA estimated that twenty-five to thirty-five percent of all Indian children were separated from their families and placed in adoptive families, foster care, or institutions.[3] This widespread removal of Indian children caused serious adjustment problems for children and had negative impacts on tribal communities.[4]

The ICWA has been the subject of controversy and criticism since its enactment, with emotionally-charged challenges to its constitutionality occurring before the Supreme Court in 1989 in *Mississippi Band of Choctaw Indians v. Holyfield,* and in 2013 in *Adoptive Couple v. Baby Girl*. On August 9, 2019, the Fifth Circuit Court of Appeals ruled on a controversial challenge to the ICWA: *Brackeen, et. al., v. Bernhardt, et. al*., a case in which the United

1. Joy Harjo, "Remember," Strawberry Press (1981).
2. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).
3. *Id*.
4. *Id. See also* Twila L. Perry, *infra* note 89, at 88 (noting that while most of the social science research on transracial adoption has concluded that Black children who are adopted by White families can grow up to be emotionally healthy, happy, and productive citizens, researchers have more openly acknowledged and discussed some of the serious complications and problems that can arise in transracial adoptions); BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 50–51 (2010) (describing the difficulties transracial adoptees face in connecting to their sense of Indian identity and community).

States District Court for the Northern District of Texas found the ICWA unconstitutional on multiple grounds.[5] This Note analyzes the Fifth Circuit's reversal of the district court's findings in *Bernhardt* by focusing on the tensions within the ICWA between tribes, biological parents, adoptive parents, state court systems, tribal courts, and Indian children. After addressing the court's findings, this Note offers four modifications to the ICWA, each aimed at recognizing the value of the tribe and promoting the best interests of Indian children.

I. HISTORY AND DEVELOPMENT OF THE INDIAN CHILD WELFARE ACT

The reasons for removing Indian children from their families prior to the enactment of the ICWA were structural—meaning aimed at a policy of terminating the role of Indians in American society and territory—and individual—meaning based on misunderstanding and cultural insensitivity toward Indian child-rearing and community practices. Beginning in the early 1800s, missionary schools and federally-operated boarding schools removed Native American children from their tribes and families and placed them at boarding schools far away from reservations.[6] Boarding schools for Native American children inculcated Christian values and prohibited Native language, attire, and hairstyles; striving to "civilize" Native American children by changing their dress, language, religious practices, and outlook on life.[7] The boarding school experience separated children from their homes for long periods of time and subsequently broke their ties with their families and tribes.[8]

Child welfare policy became increasingly interventionist in the twentieth century, and public and private agencies focused on individual child-rearing practices.[9] State child welfare officials rejected traditional Indian approaches to child rearing, including the common practice of involving members of a child's

5. *See* Gabby Deutch, *A Court Battle over a Dallas Toddler Could Decide the Future of Native American Law*, THE ATLANTIC (Feb. 21, 2019), available at https://www.theatlantic.com/family/archive/2019/02/indian-child-welfare-acts-uncertain-future/582628/ [https://perma.cc/SV5B-BGGZ]; *see also* Brackeen v. Bernhardt, 937 F.3d 406 (2019).

6. ATWOOD, *supra* note 4, at 29–30, 155–56.

7. *Id*. at 30, 156.

8. *Id*. at 156. See MARGARET D. JACOBS, A GENERATION REMOVED 69–71 (2014) for a narrative discussing the impact of removal on Indian children as well as prevailing race, class, and gender discrimination, which led to the removal of children from their tribes and families. Congress further acknowledges the devastation caused by boarding schools, noting that it considers it in the best interests of Indian children to be afforded the opportunity to live at home while attending school, and that more than 10,000 Navajo children "have been boarded." H.R. REP. NO. 95-1386 at 7549–50.

9. ATWOOD, *supra* note 4, at 157. The legislative history of the ICWA reveals that financial considerations of agencies contributed to the policy of removing Indian children from their homes. H.R. REP. NO. 95-1386 at 7533. Congress concluded, "agencies established to place children have an incentive to find children to place." *Id*.

extended family in significant care giving roles.[10] Thus, state officials often construed the practice of grandparents and extended family members caring for children as neglect, abandonment, and grounds for terminating parental rights.[11] Officials relied on high rates of alcoholism and poverty within reservation communities as further justifications for removing Indian children from their families.[12] Overall, these practices led to the removal of between twenty-five and thirty-five percent of all Indian children from their families by 1974.[13] In evaluating this grim history of cultural genocide, Congress concluded that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."[14]

The ICWA acknowledges the tragic history of the removal of Indian children and announces that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ."[15] In the ICWA, Congress recognized that administrative and judicial bodies have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[16] In enacting the ICWA, Congress expressly found that the state court systems and state agencies have often acted contrary to the interests of Indian tribes and their

10. ATWOOD, *supra* note 4, at 160; H.R. REP. NO. 95-1386 at 7532 (1978).

11. *Id*. State practices leading to the often-unfounded removal of Indian children "stemmed regularly from cultural ignorance or even blatant racism about Indian families and their child-rearing capacities" and ignored the value and role of extensive tribal kinship systems. N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 150 (2008); *see also* Brian D. Gallagher, *Indian Child Welfare Act of 1978: The Congressional Foray Into the Adoption Process*, 15 N. ILL. U. L. REV. 81, 82 (1994) (pointing out the failure of non-Indian judges in child welfare cases to recognize the differences between Indian culture and that of mainstream America, as well as non-Indian judges' propensity to accept imprecise definitions of "abuse" and "neglect," which resulted in the removal of Indian children from their homes).

12. ATWOOD, *supra* note 4, at 160. While one of the grounds most frequently advanced for taking Indian children from their parents was the abuse of alcohol, this standard was applied unequally. For example, in areas where rates of "problem drinking" among Indians and non-Indians were the same, it was rarely applied against non-Indians. H.R. REP. NO. 95-1386 at 7533 (1978).

13. ATWOOD*, supra* note 4, at 159; *see also* DUTHU, *supra* note 11, at 17 (noting that in states like South Dakota, Indian children were placed in foster care at a rate sixteen times that of non-Indian children; Washington's adoption rate for Indian children was nineteen times that of non-Indian children just prior to the enactment of the ICWA).

14. ATWOOD, *supra* note 4, at 159 (quoting H.R. REP. NO. 95-1386); *see also* Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARVARD WOMEN'S L. J. 1 (1990) (calling the ICWA an effort "to halt what had become a genocidal phenomenon" of removing Indian children from their homes and communities).

15. *Id*. at 36; 25 U.S.C. §1901 (1978). *See also* Stan Watts, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Families, and Tribes*, 63 S. CAL. L. REV. 213, 214 (1989) (noting that the removal of Indian children from their families and tribes to non-Indian foster and adoptive homes "threatens to deprive tribes of the most basic necessity for their survival – a next generation.").

16. 25 U.S.C. §1901 (1978).

children and thus, Congress gave Indian tribes a right of action in Federal court with respect to child custody issues.[17] Congress expressed concern that court actions resulting in the removal of Indian children from their homes may be conducted in the absence of due process, and thus determined that if judges were more knowledgeable about Indian culture and required to find more precise information and evidence of abuse and neglect, they could largely nullify abusive or improper actions of social workers.[18] Therefore, the ICWA protects the rights of the Indian child as an Indian, and the rights of the Indian community and tribe in retaining its children in its society.[19] The ICWA protects Indian children and tribes by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with an Indian family."[20]

II. THE STRUCTURE OF THE INDIAN CHILD WELFARE ACT

The ICWA uses a combination of jurisdictional and procedural rules, in addition to substantive placement criteria, to restore tribal authority in child placement decisions and to guide placement decisions when they occur in state court.[21] The congressional findings at the beginning of the ICWA set the stage for the regulations and establish congressional authority to protect the most vital resource of Indian tribes: their children.

The enactment of the ICWA is predicated on Congress' interpretation of the Indian Commerce Clause and recognition of a federal responsibility to Indians individually and as tribes.[22] Thus, the ICWA expressly recognizes that Congress has plenary power over Indian affairs and has therefore assumed responsibility for protecting and preserving tribes and their resources.[23] Further, the ICWA was enacted because "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," and "the United

17. *Id.*; *see* Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 553 (1991) (interpreting the ICWA as "intend[ing] to give Indian tribes access to federal court to determine their rights and obligations under" the ICWA); *see also* Doe v. Mann, 415 F.3d 1038, 1045-46 (9th Cir. 2005) (affirming Congress' reasoning that without a cause of action under the ICWA, tribes would essentially be left without a remedy where state courts act contrary to the interests of Indian tribes).

18. Ester C. Kim, *Mississippi Band of Choctaw Indians v. Holyfield: Contemplation of All, the Best Interests of None*, 43 RUTGERS L. REV. 761, 766 (1991).

19. *Holyfield*, 490 U.S. at 37.

20. *Id*. (quoting U.S. Code Cong. & Admin. News 1978, at 7546); *but see* Kim, *supra* note 18 (noting that critics of the ICWA express concern that the ICWA does little to address the cultural biases of state courts, agencies, and social workers and instead simply eliminates the state from the proceedings by transferring jurisdiction to the tribal courts).

21. DUTHU, *supra* note 11, at 17.

22. 25 U.S.C. § 1901 (1978); *see also* H.R. REP. NO. 95-1386, at 7537 (1978) (recognizing a responsibility of the United States to protect the integrity of the tribes).

23. 25 U.S.C. § 1901 (1978).

States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." [24] In the ICWA, Congress acknowledged that state judicial bodies and administrative agencies have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[25]

Under the ICWA, an Indian child is "any unmarried minor who is either a member of a federally-recognized Indian tribe or who is eligible for membership and is the biological child of a member of a tribe."[26] The burden of proof rests with the party claiming that the child is an Indian child.[27] The mere assertion that a child has some Indian blood is not sufficient; rather, where the court is uncertain as to whether a child is an Indian child under the ICWA, the court should contact the tribes for which the child may be eligible for membership and accept the tribe's determination as to that child's membership as conclusive.[28] Consistent with the purpose of protecting the tribe's role in deciding child custody issues among Indian families, the Bureau of Indian Affairs's ("BIA") 2016 Final Rule also provides that a tribe's determination of a child's membership is conclusive.[29] Whether Indian status is viewed as a racial classification, a cultural identity, or political membership in a sovereign entity, with the incidence of intermarriage between non-Indians and Indians at its highest point in history, tensions abound between non-Indian and Indian parents and the multiple identities a child may possess.[30]

24. *Id.* Accurate implementation of the ICWA requires review of a precise list of definitions codified in 25 U.S.C. § 1901, including definitions of "tribe," "parent," "child custody proceeding," and other terms. *See generally* Gallagher, *supra* note 11.

25. 25 U.S.C. § 1901 (1978).

26. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 608 (2002). The ICWA does not apply to children who are placed with one parent in a divorce. GARY A. SOKOLOW, NATIVE AMERICANS AND THE LAW, A DICTIONARY 107–08 (2000).

27. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 295 (4th ed. 2012).

28. *Id*. at 294.

29. *Id*.

30. Atwood, *supra* note 26*,* at 610; GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, BUREAU OF INDIAN AFFAIRS 18–19 (2016); *see also* 25 C.F.R. § 23.109 (2018), explaining that if the Indian child meets the definition of "Indian child" through more than one tribe, deference should be given to the tribe in which the Indian child is already a member, unless otherwise agreed to by the tribes. Further, if the Indian child meets the definition of "Indian child" by being a member of more than one tribe, then the tribes decide which shall be designated as the tribe for the purposes of the custody proceedings. Finally, if a child is eligible for membership in more than one tribe, but is a member of none, the tribes decide which shall be designed as the child's tribe for the purposes of the child custody proceeding. Where the tribes cannot decide, the court may designate the tribe. All potential tribes of which the child may be a member must be notified for the purposes of a child custody proceeding under the ICWA, and it is best practice to hold a hearing to determine the child's tribe.

III. JURISDICTION: DETERMINING THE ROLE OF THE TRIBE

With the purpose of protecting the tribe's role in child custody proceedings, the exclusive power of the tribe trumps individual choice.[31] In order to serve this purpose, the ICWA creates a system of dual jurisdiction between state court systems and tribal court systems, while establishing a strong preference for tribal courts to oversee child custody proceedings.[32] The ICWA as a whole "emphasizes the tribe's competency to make adoption decisions with respect to tribal children."[33] However, because tribal courts may be better-suited and more willing to make complex evaluations about child custody, which include considering the interests of the child, the birth parents, the adoptive parents, and the tribe, the answer to the question of who has jurisdiction over the proceedings may determine whether the ICWA's purpose is accomplished.[34]

The ICWA curbs state court authority to decide foster and adoptive matters involving Indian children by providing for exclusive tribal court jurisdiction over any child welfare proceeding involving an Indian child who resides or is domiciled on a reservation, or is a ward of tribal court.[35] In the instance of a child domiciled on a reservation, the tribe's authority is paramount and cannot be defeated or circumvented, even by a biological parent who wants to place their child for adoption through the state courts instead.[36] Underneath the question of whether a custody proceeding belongs in state or tribal court is the possible tension between an Indian parent's desire to place their child outside of the tribal community in a non-Indian home, and the tribe's ability to preempt that choice in the tribal court context.[37] Because tribal rights and interests are placed above the interests and rights of the individual in custody proceedings involving a child domiciled on a reservation, resentment toward the tribe may be created which in turn, "may lead to migration of the young from the tribes, the very result the [ICWA] is attempting to prevent."[38] While scholars point out the possible equal protections issue in this tension, in *Fisher v. District Court*, the Supreme Court resolved it by finding that even where a jurisdictional

31. Atwood, *supra* note 26, at 611; *see also* Goldsmith, *infra* note 37, at 7 (acknowledging the tension between jurisprudence recognizing that the "right to raise one's children is considered an essential and basic civil right," and the Indian tradition of perceiving oneself as part of a larger cultural group, not as a completely autonomous individual).

32. PEVAR, *supra* note 27, at 293.

33. Kasey D. Ogle, *Why Try to Change Me Now – The Basis for the 2016 Indian Child Welfare Act Regulations*, 96 NEB. L. REV. 1007, 1010 (2018).

34. *See* Watts, *supra* note 15, at 231–32.

35. Atwood, *supra* note 26, at 611.

36. *Id*. *See also* Watts, *supra* note 15, at 245 (pointing out that "[w]hether the parent is motivated by a desire to give the child a 'better life' off the reservation or merely to find the highest bidder for an unwanted child, the parent is not permitted a choice of forums").

37. Donna J. Goldsmith, *Individual vs. Collective Rights: the Indian Child Welfare Act*, 13 HARV. WOMEN'S L. J. 1, 2 (1990).

38. Kim, *supra* note 18, at 792.

decision occasionally denies an Indian plaintiff a forum to which a non-Indian has access, that disparate treatment is justified because it is intended to benefit Indians by furthering the congressional policy of self-government.[39]

Even where a child is domiciled off a reservation, the presumption is that the tribal courts, not the state courts, should have jurisdiction to decide the child custody issue.[40] When a state court has reason to believe that a child may come under the ICWA, it has a duty to properly notify the tribe concerned.[41] The child's tribe, Indian parent, or Indian custodian may petition the state court to transfer the case to the tribal court and the state court must transfer the case unless either parent objects to the transfer, the tribe declines to accept the transfer, or there is "good cause" for the state court to refuse.[42]

Examples of "good cause" include a lack of a tribal judicial tribunal; a lack of contact between the child and the tribe; a situation where the child is more than twelve years old and does not want the case heard in tribal court; and evidence that it would be extremely difficult or cause great hardship to present the evidence necessary to decide the case in tribal court.[43] The 2016 Final Rule offers examples of good cause[44] for the state tribunal to refuse to transfer the custody proceedings to tribal courts. However, the guidelines caution that the socioeconomic conditions of the tribe or the perceived inadequacy of tribal social services or court systems may not be considered in determining whether

39. Watts, *supra* note 15, at 245 (quoting *Fisher v. District Court,* 424 U.S. 382, 390–91 (1976)).

40. SOKOLOW, *supra* note 26, at 108.

41. *Id*.; 25 U.S.C. § 1912 (1978).

42. SOKOLOW, *supra* note 26, at 108; *see* 25 U.S.C. §1911(b) (1978). *See also* Carriere, *infra* note 315, at 649–50 (arguing that although it has been suggested that Congress should define additional circumstances in which the state court would retain jurisdiction over child welfare proceedings, relying on the tribe to decline jurisdiction is the solution most consistent with the Act's purpose of entrusting decisions on the welfare of Indian children, even those with multiple or mixed identities, to the tribe).

43. SOKOLOW*, supra* note 26, at 108–09.

44. The legislative history of this provision indicates that this provision is intended to permit a state court to apply a modified doctrine of forum non conveniens, in appropriate cases, to insure that the rights of the child, the Indian parents or custodian, and the tribe are fully protected. Exceptions cannot be construed in a manner that would swallow the rule. GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, BUREAU OF INDIAN AFFAIRS 48–49 (2016); *see also* 25 C.F.R. § 23.118(c) ("In determining whether good cause exists, the court must not consider: (1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage; (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed; (3) Whether transfer could affect the placement of the child; (4) The Indian child's cultural connections with the Tribe or its reservation; or (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.").

good cause exists.[45] There is an open question regarding whether state courts may use this "good cause" provision to consider the best interests of the child, and state courts are divided on this issue.[46] For example, some courts, as in the *Matter of Adoption of T.R.M.*, use the best interests of the child as a measure of good cause to deny a transfer to tribal court.[47] In weighing whether there was good cause to deny a transfer to tribal court, the court determined that since the biological mother's "parenting record was not good," and she had "a long history of drug and alcohol abuse," the custody of the child by the biological mother would likely result in serious emotional and physical harm to the child.[48] Further, the court pointed out that the child had resided with her adoptive family since the first week of her life, and "[t]o now sever and dislodge the child from the family and culture she has known during all of her seven years of life cannot be anything except devastating to the best interests of the child."[49] The court stated that while the purpose of the ICWA to protect the interests of the Indian family was patently clear, "a paramount interest is the protection of the best interests of the child."[50]

On the other hand, some state courts use "little or no contact with the tribe" as a proxy for determining whether the ICWA applies to the custody proceedings, even if the child is an Indian child for the purposes of the Act. For example, in *Matter of Adoption of T.R.M.*, the court reasoned that since "[t]he purpose of the Act is to promote the best interest[s] of Indian children through promoting the stability and security of Indian tribes and families. . . [t]he Act is applicable when you have Indian children being removed from their existing Indian environment."[51] The court acknowledged the biological ancestry of the child as Indian, however the court weighed the fact that she was "abandoned to the adoptive mother essentially at the earliest practical moment after childbirth and initial hospital care," as meaning that the child's subsequent adoption did

45. Atwood, *supra* note 26, at 613. The regulations prohibit consideration of perceived socioeconomic conditions within a tribe because Congress found that misplaced concerns about low incomes, substandard housing, and similar factors on reservations resulted in the unwarranted removal of Indian children from their families and tribes, introduced bias into the decision-making process, and thus should not come into play in considering whether transfer is appropriate. GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, BUREAU OF INDIAN AFFAIRS 49, 51 (2016).

46. Atwood, *supra* note 26, at 613.

47. *See* Matter of Adoption of T.R.M., 525 N.E.2d 298, 308 (1988). *See also* Wisconsin Potowatomies of Hannahville Indian Community v. Houston, 393 F. Supp. 719, 727 (W.D. Mich. 1973) (finding that while the ultimate question of the best interests of the children was not directly before the court, it does not necessarily follow that the court is thereby precluded from any consideration of the question).

48. *Matter of Adoption of T.R.M.,* 525 N.E.2d at 308.

49. *Id*.

50. *Id*.

51. *Id.* at 303.

not constitute a "breakup of the Indian family."[52] Thus, the court declined to transfer the proceedings to tribal court and found that the ICWA did not apply.[53]

When an Indian child is domiciled off the reservation and placed for voluntary adoption in a state court proceeding, the parents' interests as individuals, where those interests may diverge from the tribe in the child custody proceedings, may play a more dominant and vocal role in the custody proceedings.[54] Some scholars argue this illustrates Congress' intent to protect parental autonomy.[55] Section 1911 of the ICWA provides for concurrent state and tribal court jurisdiction in child placement proceedings where a child is domiciled off the reservation, and this concurrent jurisdiction "implicitly recognizes the right of Indian parents to separate themselves from tribal influence by choosing to assimilate into non-Indian society and to exercise their parental prerogatives with minimal interference from outside groups."[56] Parental authority can be exercised in the form of an objection to a transfer to tribal court, as well as the state court's consideration of a parent's placement preferences for the child,[57] thus providing a counterbalance to the tribal authority recognized throughout the ICWA.[58] These opportunities permit individualized justice where a parent's wishes diverge from the interests of their tribe.[59]

Even where a tribe declines to intervene or refuses a transfer to a tribal court, the ICWA still governs the child custody proceedings in state court for Indian children, thereby preserving the tribe's role in making adoption decisions with respect to Indian children.[60] The ICWA allows tribes to intervene as parties in state court proceedings, reflecting the rationale that "state courts are more likely to make proper placement decisions if tribes have an opportunity to inform the court as to the tribe's social and cultural values" and participate in the custody determination process.[61]

52. *Id.* The Indian child, T.R.M., was placed for adoption at five days old after her mother made arrangements prior to her birth, and T.R.M. lived with her adoptive family for seven years before the custody proceedings were brought in this case. *Id*. at 301–02.

53. *Id*. at 303.

54. Atwood, *supra* note 26, at 612.

55. Atwood, *supra* note 26, at 612; *but see* Adoption of Lindsay C., 229 Cal. App. 3d 404, 412 (1991) (finding that pursuant to the Court's holding in *Holyfield*, congressional objectives make clear that a rule of domicile which would permit individual Indian parents to defeat the ICWA's jurisdictional scheme is inconsistent with what Congress intended).

56. *See* Watts, *supra* note 15, at 230–31.

57. *See* 25 U.S.C. § 1915(c) (state court must consider parent's preference in determining placements of Indian children "where appropriate")

58. ATWOOD, *supra* note 4, at 192–193.

59. *See id.*

60. SOKOLOW, *supra* note 26, at 109.

61. PEVAR, *supra* note 27, at 293-294.

IV. PLACEMENT PREFERENCES

The ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes."[62] Congress created a framework to govern the adoption of Indian children, establishing: "(1) placement preferences in adoptions of Indian children; (2) good cause to depart from those placement preferences; (3) standards and responsibilities for state courts and their agents; and (4) consequences flowing from noncompliance with the statutory requirements."[63]

"In any adoptive placement of an Indian child under State law, a preference shall be given, in absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[64] In contrast to the placement categories for adoption, the ICWA provides a more nuanced description of the tribe's role in foster care and pre-adoptive placement, finding that the child must be placed "in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met."[65] Further, the child shall also be placed within reasonable proximity to his or her home, with a preference given, in the absence of good cause to the contrary, to a placement with a member of the Indian child's extended family, a foster home or institution approved by the tribe, or an Indian foster home licensed or approved by a non-Indian licensing authority.[66] The ICWA requires that the standards applied in the preference requirements be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or maintains social and cultural ties to.[67]

V. THE EXISTING INDIAN FAMILY DOCTRINE

Section 1912(f) of the ICWA addresses the termination of parental rights with respect to an Indian child, providing that no termination of parental rights may be ordered in the absence of a determination, supported by evidence beyond a reasonable doubt, 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.[68] Section 1912(d) of the ICWA provides that any party seeking to place an Indian child in foster care or terminate parental rights to an Indian child under state law "shall satisfy the court that active efforts have been made to

62. Brackeen v. Zinke, 338 F. Supp. 3d 514, 521 (N.D. Tex. 2018); 25 U.S.C. § 1915 (1978).

63. *Zinke*, 338 F. Supp. 3d at 521.

64. 25 U.S.C. § 1915(a) (1978).

65. 25 U.S.C. § 1915(b) (1978).

66. *Id.*

67. 25 U.S.C. § 1915(d) (1978).

68. Adoptive Couple v. Baby Girl, 133 S. Ct. 2252, 2560 (2013) (citing 25 U.S.C. § 1912(f) (1978)).

provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[69] Further, an Indian child may not be placed in foster care absent a determination, supported by clear and convincing evidence, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.[70]

The language of Section 1912(d) gives rise to an entirely judge-made, controversial body of law known as the "existing Indian family" doctrine.[71] Applied by some state courts, the existing Indian family doctrine mirrors the concept of "good cause" discussed above, and finds that the ICWA does not apply where the child involved has no demonstrable social and cultural links to an existing Indian family.[72] Under this controversial doctrine, state courts employ a "minimum contacts" analysis to determine whether the child's ties to its Indian parent and tribe are sufficient to trigger application of the ICWA.[73] The existing Indian family doctrine finds that the ICWA is applicable only where an Indian child is removed from an existing Indian family, home, or culture, regardless of how the child would be classified under the Act.[74] This doctrine can be summarized as an argument that while the protection of genuine Indian families is compelling, it is not compelling enough to interfere with the adoptive placement of a child who was never part of an existing Indian family.[75] This doctrine is sometimes used by state courts as a proxy to determine if a child is an Indian under the ICWA, and therefore, whether the tribal courts have jurisdiction over the proceeding or the right to intervene in a custody proceeding in state court.[76] Where the court determines that no Indian family exists, the tribe

69. *Id.* at 2562 (quoting 25 U.S.C. § 1912(d) (1978)). Legislative history reveals Congress' acknowledgement that many states already required remedial and rehabilitative services, however these services were rarely provided and thus, Congress enacted a Federal requirement of these services being provided to Indian children and their families. H.R. REP. NO. 95-1386 at 22 (1978).

70. 25 U.S.C. § 1912(e) (1978).

71. DUTHU, *supra* note 11, at 153; *see also* ATWOOD, *supra* note 4, at 204.

72. DUTHU, *supra* note 11, at 153.

73. Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 430 (1998).

74. Gallagher, *supra* note 11, at 96. *See also* Joan Heifetz Hollinger, *Children of the Tribe: Determining Children's Identity under the Indian Child Welfare Act*, 1 U.C. DAVIS J. JUV. L. & POL'Y 19, 20 (1996) (pointing out that courts have reasoned that this judicial doctrine is consistent with the ICWA's policy of promoting the stability and survival of Indian tribes and culture through federal standards intended to promote the unwarranted removal of Indian children, and when a child's family is not actually affiliated with a tribe or tribal culture, the voluntary placement of the child with non-Indian adopters is not a removal, and certainly not an unwarranted removal, under the ICWA).

75. *See* Hollinger, *supra* note 74, at 21.

76. Christine Metteer, *supra* note 73, at 430. *See also Matter of Adoption of T.R.M.,* 525 N.E.2d at 308.

is "effectively remov[ed] . . . from the equation."[77] Some state courts have extended this doctrine to include an analysis of whether the child "would probably [ever] become a part of . . . any . . . Indian family."[78]

Critics of this doctrine argue that state courts often seek to circumvent the application of the ICWA since much of the litigation around the ICWA centers on attempts to avoid employing the strict standards of the Act by finding that there is no existing Indian family.[79] A common set of facts giving rise to the application of the existing Indian family doctrine involves an Indian parent who has relinquished custody or who no longer has contact with the child, and a non-Indian parent who has custody of the child and is seeking to place them for adoption with a non-Indian family.[80] For example, in *Adoption of Baby Boy L*, the Kansas Supreme Court held that the ICWA did not apply to adoption proceedings involving an illegitimate child born to an Indian father and a non-Indian mother, because the child had never been in the care or custody of the Indian father.[81] Relying on the plain meaning of the ICWA, the court determined that the issue of the preservation of an Indian family was not involved in the case because the child had never been a part of any Indian family.[82] The court reasoned that Congress was not trying to use the ICWA to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its adoptive family and placed in an Indian environment over the express objections of its non-Indian mother.[83]

While proponents of this exception argue that the language of the ICWA is broad enough to be interpreted to require an existing Indian family, opponents argue that this interpretation is contrary to the plain language and purpose of the ICWA.[84] Courts have found that the application of this judicially-created existing Indian family doctrine reflects the ongoing issue that "the States . . . have often failed to recognize essential tribal relations of Indian people, and the

77. *See* Gallagher, *supra* note 11, at 97.

78. Metteer, *supra* note 73, at 431.

79. *See* Gallagher, *supra* note 11, at 96. *See also* ATWOOD, *supra* note 4, at 208 (explaining instances where state courts have used the "existing Indian family" exception to "escape the application of the Act.").

80. *See generally Matter of Adoption of T.R.M.,* 525 N.E.2d at 304–05 (discussing contact with the tribe as a proxy for deciding whether a child is an Indian child for the purposes of a custody proceeding and ultimately, whether the tribe will have a role in the proceedings); *see also* ATWOOD, *supra* note 4, at 207 (noting that in many cases applying the "existing Indian family" doctrine, the children who were the subject of the proceedings had an Indian and non-Indian parent and the dispute arose where a parent chose to place the child with a non-Indian family).

81. 643 P.2d 168, 176 (Kan. 1982).

82. *Id.* at 168.

83. *Id.* at 175.

84. *See* Gallagher, *supra* note 11, at 96–97.

cultural and social standards prevailing in Indian communities and families."[85] Thus, the states that reject the application of the existing Indian family doctrine do so because they view the ICWA's underlying assumption to be that it is in the Indian child's best interest that its relationship with the tribe be protected.[86] On the other hand, some scholars suggest that instead of using the existing Indian family doctrine, the ICWA could be improved with a more uniform procedure for assessing a child's Indian status, including the tribe's determination of membership as well as additional evidence that a child's family perceives itself and is perceived by others as Indian, thus permitting the parents to sever their relationship to the tribe through their own actions and behavior.[87] The existing Indian family doctrine plays a role in the Court's analysis in *Adoptive Couple v. Baby Girl,* despite having arguably no presence in the ICWA and being expressly invalidated by the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*.[88]

VI. THE BEST INTERESTS OF THE CHILD IN THE CONTEXT OF THE TRIBE

The longstanding common law principle applied in child placement decisions is the "best interests of the child" rule, which employs a multi-factor balancing test.[89] In the context of voluntary adoption of Indian children under the ICWA, courts should consider and balance parental preference, the nature of the tribal and extended family relationships, the potential psychological effects of adoption, and the potential negative impact on long-term tribal survival.[90] Some scholars also advocate for considering the child's right to determine his or her own identity.[91] In considering extended family relationships, scholars advocate for a comprehensive view of family, including recognizing the "concept of the extended family maintains its vitality and strength in the Indian community . . . Indian child[ren] may have over a hundred 'relatives who are

85. Metteer, *supra* note 73, at 435 (quoting 25. U.S.C § 1901(5) (1978)).

86. Metteer, *supra* note 73, at 435 (internal quotations omitted). *See also* Matter of Adoption of Baade, 462 N.W.2d 485, 489–90 (S.D. 1990) (noting that the ICWA must be read to protect the rights of the tribe even against the clearly expressed wishes of the parents). Further, the ICWA's application to a case is contingent only upon whether an Indian child is the subject of a child custody proceeding—there is no other prerequisite. *Id.* at 490.

87. *See* Hollinger, *supra* note 74, at 21.

88. Metteer*, supra* note 73, at 433.

89. Twila L. Perry, *Race, Color, and the Adoption of Biracial Children*, 17 J. OF GENDER, RACE & JUST., 73, 83 (2014). *See also* Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 615 (1994) (calling the best interests of the child "the shibboleth of Euro-American family law when custody is at issue" and noting that the term "best interests" is so embedded in Euro-American values that it would be difficult to escape attendant cultural and social biases).

90. *See* Watts, *supra* note 15, at 248.

91. *See* ATWOOD, *supra* note 4, at 46.

counted as close, responsible members of the family.'"[92] Consideration of the tribal and communal child-rearing culture by a state court as a factor in determining the best interests of the child would constitute a shift in the non-Indian legal system, which acknowledges that the rights of communities are generally secondary to the rights of individuals in contemporary American society.[93] In considering the psychological effects of adoption, some scholars advocate for courts to consider the risk of cultural isolation and the development of identity issues faced by children adopted by parents of a different racial or ethnic background.[94] Additionally, state courts and tribal courts may pursue "creative" options for child disputes involving voluntary adoption of Indian children by non-Indian parents, such as providing open visitation rights for extended members of the biological family and an expectation that the child would be exposed to the cultural values of the tribe.[95]

In enacting the ICWA, "Congress determined that depriving a child of his or her Indian heritage was not routinely in a child's best interest."[96] On the other hand, critics of the majority's decision in *Holyfield,* which found that the tribe had exclusive jurisdiction over adoption proceedings involving Indian children domiciled on reservations, point out that the conditions on Indian reservations are "not the type of environment to which Indian children should be mandatorily relegated under the guise of their 'best interest.'"[97] Some scholars suggest that instead of merely applying a "best interests" test, courts should instead base their custody decisions on an "avoidance of detriment test," which would give regard to the reasonable expectations of the parties at the time of the child's initial placement with a non-Indian family at the request of their parents, while also considering the harms children are likely to suffer when they are removed from a stable or long-term custodial environment.[98] This goal of avoiding detriment to the child is based on the idea that children have substantive due process rights to remain with the adoptive families their birth parents voluntarily selected.[99]

The ICWA is premised upon the belief that it is in the best interest of an Indian child to protect the role of the tribal community in the child's life.[100] Thus, the dual purposes promoted by the ICWA, "the best interests of Indian

92. Watts, *supra* note 15 at 249 (quoting the H.R. REP. NO. 95-1386 at 20, 10 (1978)).

93. *Id.* at 250.

94. *See id.* at 250–51; *but see* Perry, *supra* note 89, at 91.

95. *See* Watts, *supra* note 15, at 253–54.

96. Gallagher, *supra* note 11, at 86.

97. *See* Kim *supra* note 18, at 793 (discussing the conditions on Pine Ridge Indian Reservation in South Dakota where, according to a news report, fifty percent of residents have experienced some sort of abuse, thirty-five percent drop out of school, and seventy-six percent abuse alcohol).

98. *See* Hollinger, *supra* note 74, at 22.

99. *See id.* at 21.

100. *See* Goldsmith, *supra* note 37, at 4. *See also* Watts, *supra* note 15, at 231 (stating that "the best interest of an Indian child is often intertwined with tribal and family interests and that both state and tribal courts should weigh all of these interests when making a placement decision").

children" and the "stability and security of Indian tribes and families," are intertwined.[101] Indian tribes have an interest in preventing removal of children from their communities because both the child's right to its own identity and the tribal community's need to perpetuate its culture depend on the child remaining in the community.[102] "From the tribes' perspective, their survival depends on being able to reach out to current and future generations of children of partial Indian descent whose initial tribal ties may be nonexistent or quite attenuated."[103] Further, "Indians perceive themselves as part of the larger cultural group, not as completely autonomous individuals" and as such, "[e]very child belongs to both its 'nuclear' family and to the tribe."[104] Therefore, some scholars argue that the concept that a parent has a right to remove her child from its extended family and community and place them with a non-Indian family for adoption or foster care, thereby depriving the child of its heritage and the community of which it is a valued member, is a foreign concept to Indian culture.[105]

VII. WITHDRAWAL OF CONSENT AND COLLATERAL ATTACK

If the custody proceeding is a termination of parental rights, "the state must show that the parents signed a written consent before a judge and that the judge explained the consequences of their actions in a manner they understood."[106] This requirement is connected to the widespread practice used by social workers to coerce Indian parents into "temporarily" waiving their parental rights in exchange for welfare payments.[107] Further, regardless of state law on the issue, the parents' consent is invalid if given prior to, or within ten days after, the child's birth.[108] "Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian."[109] Further, in a voluntary adoption proceeding, the consent of the parent may be withdrawn for

101. *See* Goldsmith, *supra* note 37, at 4 (internal quotations omitted).

102. *See id.* at 2. However, this interest in preventing the removal of children does not come at a cost to the child's welfare; rather, as exemplified in *Holyfield*, tribal courts have frequently recognized that stability and continuity are important to a child's well-being and have ruled in ways that promote permanency in placements, even with non-Indian families. *See* ATWOOD, *supra* note 4, at 273–74.

103. *See* Hollinger, *supra* note 74, at 23.

104. Goldsmith, *supra* note 37, at 7–8.

105. *See id.* at 8.

106. PEVAR, *supra* note 27, at 296.

107. *See* H.R. REP. NO. 95-1386 at 11 (1978). Evidence of an Indian parent signing "temporary custody" of their child over to the state could be used as evidence of neglect and grounds for permanent termination of parental rights. *Id.*

108. *Id.* at 4.

109. 25 U.S.C. § 1913(b) (1978).

any reason, at any time prior to the final adoption decree.[110] After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent on the grounds that consent was obtained through fraud or duress, and may petition the court to vacate the adoption decree for up to two years after the adoption is final.[111] However, the adoption of an Indian child may not be vacated after the two-year period of collateral attack unless otherwise permitted by state law.[112]

Violating any provision of the ICWA carries a steep penalty even after an adoption is final: an adoption can be invalidated.[113] At any time after an adoption, the child, their parents, and their tribe may petition the court to invalidate the adoption by showing the ICWA was violated. [114]

VIII. THE 2016 FINAL RULE: BINDING GUIDELINES

The BIA's 2016 Final Rule provides a binding, consistent, nationwide interpretation of the ICWA's minimum procedural and substantive standards.[115] The BIA has traditionally maintained a hands-off, non-binding approach to promulgating the ICWA.[116] This hands-off approach is reflected in the first iteration of non-binding guidelines, issued in 1979 and designed by Congress to provide state courts guidance for applying the provisions of the ICWA.[117] State courts have, nevertheless, maintained their autonomy in deciding cases under the ICWA, which resulted in disparate outcomes and created conflicts such as the existing Indian family doctrine, differing definitions of "active efforts" to avoid separating a child from their family, and other areas of controversy within the application of the ICWA.[118] After a period of public comment in 2014 and

110. 25 U.S.C. § 1913(c) (1978).

111. 25 U.S.C. § 1913(d) (1978). This provision of the ICWA is connected to the identified conflict between Indian and non-Indian social systems, which operated to defeat due process. H.R. REP. NO. 95-1386 at 11 (1978). Because of the extended family's role in child-rearing, it is common in a tribal setting for a child to go away for a long period of time, thus the child's immediate family would not necessarily have an "immediate realization" that their child was removed by the state, and would not act until "the opportunity for due process has slipped away." *Id.*

112. 25 U.S.C. § 1913(d) (1978).

113. 25 U.S.C. § 1914 (1978). "Attorneys who fail to properly abide by the ICWA in facilitating adoptions may be subject to civil liability to their client or to the tribe." Gallagher, *supra* note 11, at 91–92.

114. 25 U.S.C. § 1914 (1978). See 25 U.S.C. § 1911 (1978), which governs tribal jurisdiction; 25 U.S.C. § 1912 (1978), which governs notice; and 25 U.S.C. § 1913 (1978), which governs consent.

115. *Guidelines for Implementing the Indian Child Welfare Act*, BUREAU OF INDIAN AFFAIRS 6 (2016); *see also* 25 C.F.R. § 23.106 (2018), which states that "[t]he regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA."

116. Ogle, *supra* note 33, at 1011.

117. *Id.* at 1012.

118. *Id.* at 1013.

2015, the BIA changed its approach and issued binding regulations on June 14, 2016, called the Final Rule.[119] Citing the special relationship between the United States and the Indian tribes which Congress based their passage of the ICWA on, the BIA notes in the Final Rule that the United States has a direct interest, "as trustee," in protecting Indian children who are members of, or are eligible for membership within, an Indian tribe.[120] The binding nature of the Final Rule was one of the issues raised by the Brackeen family in their challenge of the ICWA.

IX. CHALLENGES TO THE INDIAN CHILD WELFARE ACT

The constitutionality of the ICWA has been challenged before the Supreme Court only a handful of times. In each case, the Court conducted a fact-specific inquiry to determine whether the ICWA applied and if it did, whether it was violated. The details matter when it comes to determining whether a child is an Indian under the ICWA, and whether the lower courts adjudicated the adoption proceedings properly. Overall, the ICWA "appear[ed] to work smoothly" when a child's Indian identity was uncontested, was made known early in the adoption or custody proceedings, and when the tribe received timely notice and intervened promptly.[121] However, the "hard cases" emerged when the child's tribal identity was unknown or uncovered late in the proceedings, when only one parent was a member of an Indian tribe, and where one parent had either terminated parental rights or abandoned the child.[122] Thus, to be solved effectively, these "hard cases" must balance the welfare of an Indian child, the attenuated connections to the tribal community, late intervention by tribal representatives, and non-Indian parties.[123]

In *Mississippi Band of Choctaw Indians v. Holyfield*, the Supreme Court addressed the issue of voluntary adoption of Indian children from the perspective of jurisdiction. On the other hand, in *Adoptive Couple v. Baby Girl,* the Supreme Court examined the detailed language of the law and determined that the ICWA did not apply in the first place. In *Brackeen v. Zinke, et. al*, the U.S. District Court for the Northern District of Texas added another interpretive voice and found that the ICWA itself was unconstitutional on multiple grounds. On appeal, the Fifth Circuit preserved the ICWA and affirmed its role in resolving tensions between tribes, biological parents, adoptive parents, and Indian children.

119. *Guidelines for Implementing the Indian Child Welfare Act*, BUREAU OF INDIAN AFFAIRS 5–6 (2016).

120. *Id.* at 6.

121. Atwood, *supra* note 26, at 623.

122. *Id.*

123. *Id.*

A. Mississippi Band of Choctaw Indians v. Holyfield

In *Holyfield*, the Court vacated a consensual adoption decree of two Indian children born outside of a reservation and held that the ICWA mandated exclusive tribal court jurisdiction over children domiciled on Indian reservations.[124] Twin babies were born to enrolled members of the Mississippi Band of Choctaw Indian Tribe who resided on the reservation, but intentionally gave birth to their children 200 miles away from the reservation.[125] The birth parents consented to the adoption of the twins and they were formally adopted by the Holyfields about one month after their birth, with no reference to the ICWA or the Indian background of the children in the proceedings.[126] Two months after the adoption, the tribe moved to vacate the adoption decree on the grounds that the ICWA granted exclusive jurisdiction to tribal courts for the adoption of any baby domiciled on an Indian reservation.[127] The lower court denied the motion because the mother "went to some efforts" to give birth to the children outside of the reservation, the adoption was arranged for promptly by the birth parents, and the children never resided on the reservation.[128]

The Supreme Court determined that the voluntary nature of the adoption did not change the outcome of the case—tribal jurisdiction under the ICWA was not meant to be defeated by the actions of individual members of the tribe, because in enacting the ICWA, Congress was concerned not solely with the impact on Indian children and families, but also with the impact on the tribe as a whole.[129] In reasoning that the voluntary nature of the adoption did not defeat the ICWA, the Court acknowledged that the effect of placing Indian children outside their tribal culture extended beyond the individuals involved.[130] Thus, the Court

124. 490 U.S. at 53.

125. *Id.* at 37. *But see* Goldsmith, *supra* note 37, at 5–6 (maintaining that the record in the *Holyfield* case does not support the state court's conclusion that "the Choctaw mother wanted to avoid placement within the Choctaw reservation to provide her children with opportunities that the reservation could not provide[,]" but rather that the Choctaw mother gave birth off the reservation because there were no hospital facilities on the reservation); *But see* Watts, *supra* note 15, at 216 (citing Clarion-Ledger, May 24, 1988, at B2, col.1) (noting that the biological mother "felt that she could not afford any more children and attempted to find a home for the twins on the reservation" and "[a]lthough she did find couples who were willing to adopt one child, she could not find a family on the reservation who would adopt both children").

126. *Holyfield,* 490 U.S. at 37–38.

127. *Id.* at 38.

128. *Id.* at 39. In affirming the appellate court, the Supreme Court of Mississippi noted that the twins "were voluntarily surrendered and legally abandoned by their natural parents to the adoptive parents." *Id.* at 40. The court also reiterated the effort the natural parents went to in order to prevent the children from being placed on the reservation. *Id.*

129. *Id.* at 49.

130. *Id.* at 50; Kim, *supra* note 18, at 777; *see also* Watts, *supra* note 15*,* at 222 (pointing out that voluntary adoption was among the problems considered by Congress in enacting the ICWA because social workers were accused of using coercive methods, such as withholding welfare

construed each provision of the ICWA as a means of protecting not only the interests of the individual Indian children and their families, but also of the tribes themselves.[131] The Court acknowledged the argument that the twins' mother went to great lengths to ensure her children could be adopted by the Holyfields, however, the Court determined that "[p]ermitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would . . . nullify the purpose the ICWA was intended to accomplish."[132]

While the meaning of domicile is not defined within the ICWA, the Court reasoned that in enacting the ICWA, Congress confirmed that tribal court jurisdiction was exclusive in child custody proceedings involving Indian children domiciled on reservations.[133] In construing the meaning of the term "domicile" and rejecting the argument that Congress left interpretation of this term up to the individual state courts to decide, the Court reasoned that federal statutes have an inherent purpose of uniformity across all state jurisdictions.[134] Further, the Court noted that Congress enacted the ICWA because it was "concerned with the rights of Indian families and Indian communities vis-à-vis state authorities[,]" and thus, Congress would not leave the determination of the meaning of domicile up to the states to decide.[135] The Court reasoned that "[o]ne acquires a 'domicile of origin' at birth, and that domicile continues until a new one is acquired."[136] Since "minors are legally incapable of forming the requisite intent to establish a domicile," their domicile is their parents' domicile.[137] The mother was undisputedly domiciled on the Choctaw reservation, and thus, the Court determined that at their birth, the twins were also domiciled on the reservation, even though they had never been there.[138]

payments unless consent was given, and the "explosive demand for adoptable babies" often produced financial rewards to poor Indian parents who could be persuaded to allow their children to be adopted).

131. *Holyfield,* 490 U.S. at 49. Further, the Court reasoned that Congress determined to subject the consensual adoption of Indian children to the ICWA's jurisdictional and other provisions "because of concerns going beyond the wishes of individual parents." *Id.* at 50.

132. *Id.* at 51–52.

133. *See id.* at 42. *See also* Wis. Potowatomies of the Hannahville Indian Cmty. v. Houston, 393 F. Supp. 719, 721–22, 728 (1973) (holding that children of mixed Indian and non-Indian parentage born off the reservation and who lived off the reservation for a period of time acquired the residence and domicile of their natural father, whose domicile was the reservation, for the purposes of determining jurisdiction in custody proceedings following the death of both parents).

134. *See Holyfield,* 490 U.S. at 45–47.

135. *Id.* at 45.

136. *Id.* at 48.

137. *Id.* Further, the Court noted that in the case of an illegitimate child, the domicile of the mother is the domicile of the child. *Id.*

138. *Id.* at 48–49. *See also* Kim, *supra* note 18, at 776–77 (noting that "[i]n the case of an illegitimate child, courts have traditionally held the child's domicile to be that of the mother," and

In closing, the Court sidestepped deciding the issue of the best interests of the children, saying, "It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community."[139] Ultimately, the Court deferred the responsibility of determining the best interests of the child to the experience, wisdom, and compassion of the tribal courts.[140]

The Court's ruling in *Holyfield* illustrates the tension between individual rights and tribal rights—what the dissent called a "delicate balance" of group rights and individual rights recognized by the ICWA.[141] Justice Stevens' dissent advocated for a stronger position for individual autonomy and recognized the possibility that Indian families can be better protected where Indian parents have the freedom to choose who adopts their child. "Because [the mother]'s domicile is on the reservation and the children are eligible for membership in the Tribe, the Court today closes the state courthouse door to her."[142] Highlighting an alternative reading of Congress' rationale for enacting the ICWA, Justice Stevens reasoned that the purpose of the ICWA is to prevent the removal of Indian children by nontribal public and private agencies.[143] Further, Justice Stevens pointed out testimony in the congressional record asserting that by allowing parents to choose a forum in which to sever their parent-child relationship, the security of Indian families is promoted.[144] Justice Stevens reasoned that when both parents deliberately abandon an Indian child to a person off the reservation, no purpose of the ICWA is served by preventing the adoption of an Indian child by non-Indian parents, because this choice represents an

therefore "in some cases, a child's domicile of origin will be a place where the child has never been").

139. *Holyfield,* 490 U.S. at 54. The Court acknowledged awareness of the three years that passed since the twins were born and reasoned that "three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain." *Id*. at 53.

140. *Id*. at 54. The judgment of the Supreme Court of Mississippi was reversed, and the case was remanded for further proceedings. *Id*. This deference, says the dissent, "establishes a rule of law that is virtually certain to ensure that similar anguish will be suffered by other families in the future." *Id*. at 65. However, in the ensuing tribal court proceedings, the Choctaw tribal judge confirmed adoption rights in favor of the Holyfield family after finding it was in the children's best interests to remain in the only home they had known. DUTHU, *supra* note 11, at 153. *But see* Goldsmith, *supra* note 37, at 6–7, arguing that any potential anguish suffered by a child removed from an adoptive home and returned to their tribe could be avoided had the state court followed the mandates of the ICWA initially.

141. *Holyfield*, 490 U.S. at 55.

142. *Id*. (Stevens, Rehnquist, and Kennedy dissenting).

143. *Id*.

144. *Id*. at 60–61.

intentional invocation of state court jurisdiction and does not implicate an interest in tribal self-governance.[145]

B. Adoptive Couple v. Baby Girl

In *Adoptive Couple v. Baby Girl*, the Supreme Court held that the provisions of the ICWA barring involuntary termination of a parent's rights absent a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child, did not apply because the parent opposing termination of rights never had custody of the child.[146] Additionally, the Court reasoned that the condition of showing that remedial efforts have been made to prevent the breakup of the Indian family is inapplicable when the parent abandoned the Indian child before birth and never had custody of the child.[147] Finally, the Court held that the provision of the ICWA "which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family . . . from adopting an Indian child when no other eligible candidates have sought to adopt the child."[148]

In *Adoptive Couple v. Baby Girl*, Baby Girl was born to a predominantly Hispanic mother and a father who was an enrolled member of the Cherokee Nation.[149] The couple was engaged for a six-month period and after their relationship deteriorated, Birth Mother broke off the engagement several months before Baby Girl was born.[150] Birth Mother sent Biological Father a text message asking if he would rather pay child support or relinquish his parental rights and Biological Father responded via text message that he relinquished his rights.[151] During the pregnancy and the first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl, even though he had the ability to do so; Biological Father "made no meaningful attempts to assume his responsibility of parenthood."[152] Birth Mother decided to put Baby Girl up for adoption, and her attorney contacted the Cherokee Nation to determine whether Biological Father was formally enrolled.[153] Birth Mother selected Adoptive Couple, non-Indians living in South Carolina, to adopt Baby Girl, and Adoptive Couple supported Birth Mother emotionally and financially

145. *Id*. at 63.
146. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2557 (2013).
147. *Id*. (emphasis added).
148. *Id*.
149. *Id*. at 2558.
150. *Id*.
151. *Adoptive Couple*, 133 S. Ct. at 2558.
152. *Id*.
153. *Id*. "The inquiry letter misspelled Biological Father's first name and incorrectly stated his birthday, and the Cherokee Nation responded that, based on the information provided, it could not verify Biological Father's membership in the tribal records." *Id*.

and were present at Baby Girl's birth.[154] The day after Baby Girl's birth, Birth Mother relinquished her parental rights and consented to the adoption—Adoptive Couple initiated adoption proceedings and returned with Baby Girl to South Carolina.[155]

Approximately four months after Baby Girl's birth, Adoptive Couple served Biological Father with notice of the pending adoption; Biological Father signed papers stating that he accepted service and he was not contesting the adoption.[156] The day after signing papers, Biological Father contacted a lawyer and requested a stay of the adoption proceedings, stating that he sought custody of his daughter and did not consent to the adoption.[157] A trial took place two years later, and the Family Court concluded that Adoptive Couple did not carry the heightened burden under the ICWA "of proving that Baby Girl would suffer serious emotional or physical damage if Biological Father had custody"—therefore, Adoptive Couple's petition for adoption was denied and Baby Girl was handed over to Biological Father, whom she had never met.[158] On appeal, the South Carolina Supreme Court affirmed the Family Court's denial of the adoption because Adoptive Couple did not show that "active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family," and the court concluded that Adoptive Couple did not show beyond a reasonable doubt that Biological Father's custody of Baby Girl would result in serious emotional or physical harm to her.[159]

On appeal, the Supreme Court held that Section 1912(f) of the ICWA does not apply to cases where the Indian parent never had custody of the Indian child.[160] The Court reasoned that because the ICWA conditions the involuntary termination of parental rights on a showing of the merits of continued custody of the child by the parent, the use of the adjective "continued" plainly refers to a pre-existing state of custody, in existence prior to the adoption proceeding.[161] Thus, since Biological Father did not already have custody of Baby Girl at the time he contested her adoption, the ICWA did not apply to the adoption proceedings.[162] Further, the Court noted that the primary mischief the ICWA

154. *Id*. Biological Mother selected Adoptive Couple via a private adoption agency. *Id*.

155. *Adoptive Couple*, 133 S. Ct. at 2558.

156. *Id*. "Biological Father later testified that, at the time he signed the papers, he thought that he was relinquishing his rights to Birth Mother, not to Adoptive Couple." *Id*.

157. *Id*. at 2558–59.

158. *Id*.

159. *Adoptive Couple*, 133 S. Ct. at 2559.

160. *Id.* at 2560. *See supra* notes 71–75 (discussing the existing Indian family doctrine and its use to determine that the ICWA only applies to prevent the removal of Indian children from their Indian families, not the voluntary adoption of an Indian child by a non-Indian adoptive parent).

161. *Adoptive Couple*, 133 S. Ct. at 2560 (emphasis added). In dissent, Justice Scalia wrote that he rejects the conclusion that continued custody must refer to custody in the past, instead of custody in the future. *Id*. at 2571.

162. *See id*. at 2560–61.

was designed to counteract was the unwarranted *removal* of Indian children from Indian families due to cultural insensitivity and biases of social workers and state courts.[163] Here, however, "the adoption of an Indian child [wa]s voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights."[164] Therefore, in the Court's view, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families was not implicated by this case.[165] This reasoning mirrors the existing Indian family doctrine and interprets the ICWA as having the purpose of preserving only existing Indian families.[166]

Finally, the Court held that Section 1912(d) of the ICWA, which is designed to prevent the breakup of Indian families, did not apply to the adoption of Baby Girl because the Indian parent abandoned their Indian child prior to birth, and that child had never been in the Indian parent's legal or physical custody.[167] Thus, the Court determined there was no relationship that would be discontinued and no effective family entity that would be ended by the termination of the Indian parent's rights.[168] While this is an arguably controversial interpretation of the ICWA, the Court's decision is consistent with precedent that generally confers "'parental status' only on unwed fathers who have established a parental relationship with their children."[169] Thus, the Court reasoned, the "breakup of the Indian family" had long since occurred, and Section 1912(d) was inapplicable.[170] Further, the Court found that were Section 1912(d) to apply to a proceeding in which an Indian parent abandoned their child, as in the case of Baby Girl, it would dissuade prospective adoptive parents from seeking to adopt Indian children and would "unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption.[171]

163. *Adoptive Couple*, 133 S. Ct. at 2561 (emphasis added).

164. *Id*.

165. *Id*. *See also supra* notes 71–75, discussing the existing Indian family doctrine.

166. *See supra* notes 71–75, discussing the existing Indian family doctrine and its role in state court child custody proceedings.

167. *Adoptive Couple*, 133 S. Ct. at 2562.

168. *Id*. The Court's decision here is in accord with the statutory definition of "parent" given in the ICWA, which specifically excludes "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9).

169. Gallagher, *supra* note 11, at 90. *See also* Michael v. Gerald, 491 U.S. 110, 119–20 (1989) (finding that societal traditions protect a biological mother and adoptive father against the filial claim of a child's biological father); Lehr v. Robertson, 463 U.S. 248, 250–51, 265 (1983) (holding that a putative father's due process and equal protection rights were not violated by the state's failure to notify him of adoption proceedings because he could have taken action to register as the child's father).

170. *Adoptive Couple*, 133 S. Ct. at 2562.

171. *Id*. at 2563–2564.

In opposition to the ICWA's opening provision declaring Congress' plenary power to legislate on issues related to Indian affairs, Justice Thomas wrote in concurrence that the Indian Commerce Clause gives Congress the authority to regulate commerce with Indian tribes, but not with individual Indian persons.[172] Further, Thomas reasoned that commerce does not include noneconomic activity, such as the adoption of children.[173] Thomas reasoned that "[n]othing in the Indian Commerce Clause permits Congress to enact special laws applicable to Birth Father merely because of his status as an Indian."[174] This reasoning resurfaces to play a central part in the District Court's findings in the Brackeen's case.

C. Brackeen et. al, v. Bernhardt et. al

In late 2018, the United States District Court for the Northern District of Texas held in *Brackeen et. al., v. Zinke, et. al.,* that the ICWA was unconstitutional because adoption preferences for Indian children violate equal protection, the non-delegation doctrine, and the Tenth Amendment's anti-commandeering requirements.[175] The court also determined that the specific classification of children under the ICWA was impermissible because as a racial classification, it failed to pass strict scrutiny.[176] Since the court found the ICWA unconstitutional, it held that the BIA lacked statutory authority to enact the 2016 Final Rule and therefore granted the plaintiffs' motion for summary judgment.[177] Following this ruling, the Fifth Circuit Court of Appeals heard oral arguments on the case in March 2019, and reversed the district court's findings on August 9, 2019. The plaintiffs continue their appeal process, and as of the time of this writing, a rehearing en banc was granted by the 5th Circuit on November 7, 2019.[178]

While courts have previously been able to sidestep many constitutional challenges to the ICWA, this case presented an opportunity for the Fifth Circuit Court of Appeals to address these issues head on and acknowledge Congress' plenary power to regulate Indian affairs. Ultimately, in ruling against the Brackeens, the Fifth Circuit solidified the ICWA's protection of Indian children, families, and tribes. The analysis below addresses the plaintiffs' arguments

172. *Id*. at 2567. Later, Justice Thomas reasoned that the portions of the ICWA at issue in this case regulate individuals, not "Indian tribes as tribes," since portions of the ICWA apply to all child custody proceedings involving any Indian child, regardless of whether an Indian tribe is involved. *Id*. at 2570.

173. *Id*. at 2567.

174. *Id*. at 2570.

175. 338 F. Supp. 3d at 536, 538, 541.

176. *Id*. at 533–34.

177. *Id*. at 546.

178. *See* Deutch, *supra* note 5. Brackeen v. Bernhardt, 942 F.3d 287 (Mem) (5th Cir. 2019).

before the district court, and the Fifth Circuit's resolution of the issues on appeal.[179]

1. Overview of the Plaintiffs and Claims in *Zinke*

In *Zinke*, the plaintiffs were three states—Texas, Louisiana, and Indiana—and seven individual plaintiffs, including Chad and Jennifer Brackeen; Nick and Heather Libretti; Altagracia Hernandez; and Jason and Danielle Clifford.[180] Shortly after the case was initially filed, the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and the Morongo Band of Mission Indians filed an unopposed motion to intervene, which the court granted.[181]

In the case before the district court, the plaintiffs made three arguments: first, that the ICWA and its accompanying regulations implemented a system that mandates racial and ethnic preferences in direct violation of state and federal law.[182] Second, that the ICWA was "unconstitutional under Article One and the Tenth Amendment of the United States Constitution" because its provisions violated the Commerce Clause, intruded into state domestic relations, and violated the anti-commandeering principle.[183] Individual plaintiffs also argued that the ICWA was unconstitutional in violation of the equal protection guarantee of the Fifth Amendment and asked that the ICWA be declared unconstitutional in violation of substantive due process.[184]

By joining together multiple prospective adoptive families, the individual plaintiffs presented a "hard case" which illustrated the tensions between tribes, states, adoptive families, and Indian parents in the context of the ICWA. After the district court ruled that the ICWA was unconstitutional on multiple grounds and granted summary judgment in favor of the plaintiffs, the Fifth Circuit reversed the district court's grant of summary judgment to the plaintiffs and rendered judgment in favor of the defendants.[185]

Chad and Jennifer Brackeen sought to adopt A.L.M., who was born to an unmarried couple and placed with the Brackeens through the state foster care

179. This article does not discuss State Plaintiffs' Tenth Amendment and anti-commandeering claims.

180. *Zinke*, 338 F. Supp. 3d at 519. Defendants include the U.S. Department of the Interior and Secretary Ryan Zinke; the Bureau of Indian Affairs (BIA) and Director Bryan Rice; the BIA Principal Assistant Secretary for Indian Affairs, John Tahsuda III; and the U.S. Department of Health and Human Services and Secretary Alex Azar. *Id*. at 519–20.

181. *Id.* at 520.

182. *Id*.

183. *Id*.

184. *Id*.

185. *Bernhardt*, 937 F.3d at 441 (2019). The district court and the Fifth Circuit addressed standing issues raised by the defendants in their appeal, however the focus of this note is several of the constitutional issues addressed by the courts. Ultimately, the Fifth Circuit affirmed the district court's ruling that Plaintiffs had standing to raise their arguments. *Id*.

system when he was ten months old.[186] A.L.M. is eligible for membership in an Indian tribe because his biological mother is an enrolled member of the Navajo Nation and his biological father is an enrolled member of the Cherokee Nation.[187] The Cherokee Nation and the Navajo Nation were notified of A.L.M.'s placement with the Brackeens, and after sixteen months of living with the Brackeens and with the support of his paternal grandmother and biological parents, the Brackeens sought to adopt A.L.M.[188] These facts illustrate the tensions that arise where the individual preferences of the child's Indian family members diverge from the ICWA's regulations and the preference of the tribe. In May 2017, a Texas state court terminated parental rights of A.L.M.'s biological parents and shortly thereafter, one year after the Brackeens took custody of A.L.M., the Navajo nation notified the state court that it had located a potential alternative placement with non-relatives of A.L.M. in New Mexico.[189] Similar to the state court ruling in *Adoptive Couple v. Baby Girl*, which returned Baby Girl to Biological Father whom she had never met, this proposed placement would have moved A.L.M. away from both his biological parents and the only home he had ever known.[190] In July 2017, the Brackeens filed a petition to adopt A.L.M., and the Cherokee and Navajo Nations were notified of the adoption proceeding, though no tribe, nor any tribal member, intervened or sought to adopt A.L.M.[191]

The Brackeens argued in state court that the ICWA's placement preferences should not apply because they were the only party seeking to adopt A.L.M., and thus good cause existed to depart from the ICWA's preferences for adoptive placement with an Indian family.[192] To show good cause to depart from the preferences, the Brackeens submitted testimony by A.L.M.'s biological parents, his court appointed guardian, and an expert in psychology.[193] The court denied their petition to adopt A.L.M. at that time, but in January 2018, the Brackeens successfully petitioned to adopt A.L.M.[194] However, under the ICWA and the 2016 Final Rule, this adoption remains open to collateral attack for two years.[195] The Brackeens explained that in light of these proceedings, they are now

186. *Zinke,* 338 F. Supp. 3d at 525. Though the Brackeens were told on their "first chaotic day with A.L.M. . . . that he was an American Indian child," they were unaware of the traumatic history of the removal of Native American children from their families, the ICWA, or what implications A.L.M.'s status as an Indian child would have on their future adoption of him. *See* Deutch, *supra* note 5.

187. *Zinke,* 338 F. Supp. 3d at 525.

188. *Id*.

189. *Id*.

190. *Id*.

191. *Id*.

192. *Zinke*, 338 F. Supp. 3d at 526.

193. *Id.*

194. *Id.*

195. *Id.*

reluctant to provide foster care for other Indian children in the future; therefore, the Brackeens argued that the ICWA and the 2016 Final Rule interfere with their intention and ability to provide a home to additional children, and this legal regime harms Texas's interests by limiting the supply of available, qualified homes necessary to help foster care children in general, and Indian children in particular.[196]

The Libretti family's adoption of Baby O illustrates the tension between tribal interests and the interests of adoptive parents under the ICWA. The Libretti family sought to adopt Baby O when she was born in March 2016.[197] Ms. Hernandez, Baby O's mother, felt that she would be unable to care for Baby O and wished to place her for adoption at her birth, though she has continued to be a part of Baby O's life and she and the Librettis visit each other regularly.[198] Baby O's biological father descends from members of the Pueblo Tribe of El Paso Texas, but at the time of Baby O's birth, he was not a registered member of the tribe.[199] The Pueblo Tribe intervened in the Nevada custody proceedings in an effort to remove Baby O from the Librettis, but when the Librettis joined the action before the district court, the tribe indicated a willingness to settle in a way that would permit the Librettis to adopt Baby O.[200] Ultimately, the Pueblo Tribe agreed not to contest the Librettis' adoption of Baby O, and on December 19, 2018, the Nevada state court issued a decree of adoption, declaring that the Librettis were Baby O's lawful parents.[201] The Librettis pointed out that the settlement would be open to collateral attack for two years under the ICWA, and alleged that while they intend to provide foster care for, and possibly adopt, additional children in need, they are reluctant to foster Indian children after this experience.[202]

196. *Id.* The Brackeens are petitioning to adopt another Indian child: A.L.M.'s baby sister, who is currently residing with a Native American family member in another state. The Navajo Nation recently located the girl's great aunt, who lives on a reservation in Arizona and would be willing to adopt her. However, the Brackeens still think they're the right choice, so the baby can be with her brother. *See* Deutch, *supra* note 5. In ruling on the adoption of A.L.M.'s sister, a Texas court granted the Brackeens' motion to declare the ICWA inapplicable as a violation of the Texas constitution, but has refrained from ruling on the Brackeens' claims under the United States Constitution, pending the Fifth Circuit's resolution of the claims pending in A.L.M.'s case. *Bernhardt*, 937 F.3d at 423.

197. *Zinke*, 338 F. Supp. 3d at 526.

198. *Id*.

199. *Id*.

200. *Id*.

201. *Bernhardt*, 937 F.3d at 419.

202. *Zinke*, 338 F. Supp. 3d at 526–27. Further, according to plaintiffs' complaint, plaintiff Altagracia Hernandez brings this action because the ICWA and the 2016 Final Rule are interfering with her wishes to have her biological child adopted in a placement that best suits Baby O's interests and needs. First Amended Complaint and Prayer for Declaratory and Injunctive Relief at 5, Brackeen v. Zinke, No. 4:17-cv-868-O (N.D. Tex. 2018) (Dkt. No. 22). *See also Bernhardt*, 937 F.3d at 419.

The Clifford family's adoption of Child P illustrates the tension of balancing the preferences of extended family members, tribes, and adoptive families under the ICWA. The Clifford family sought to adopt Child P, whose grandmother is a registered member of the White Earth Band of Ojibwe Tribe.[203] "Child P is a member of the White Earth Band for the purposes of the ICWA only."[204] Because the ICWA placement preferences applied, county officials removed Child P from the Clifford's custody and placed Child P in the care of her maternal grandmother, whose foster license was revoked in January 2018.[205] Child P's guardian ad litem supported the Clifford's efforts to adopt her and agreed that the adoption is in Child P's best interest, "[h]owever, due to the application of the ICWA, the Cliffords and Child P remain separated and the Cliffords face heightened legal barriers to adopt Child P."[206] On January 17, 2019, the Minnesota court denied the Clifford's motion for adoptive placement.[207] Even if the Cliffords adopted Child P, that adoption could be collaterally attacked for two years under the ICWA.[208]

2. The Indian Commerce Clause

The constitutionality of the ICWA as a valid act of Congress under the Indian Commerce Clause is both a threshold issue and an underlying element to the analysis of the plaintiffs' other claims. Before the district court, the parties disagreed as to whether Congress properly exercised its power when enacting the ICWA. Plaintiffs claimed that "Congress did not have the constitutional authority to pass Sections 1901–23 and Sections 1951–52 of the ICWA under the Indian Commerce Clause."[209] Defendants argued that Congress' grant of authority over Indian tribes is plenary.[210] In explaining the context and regulations of the ICWA, the Fifth Circuit noted that Congress has plenary power over Indian affairs, however, the court also tied its ruling to other modes of constitutional analysis.[211]

Congress' absolute and plenary authority over Indian matters is grounded in long-standing legal precedent.[212] The Supreme Court has affirmed this broad,

203. *Zinke*, 338 F. Supp. 3d at 527.

204. *Id*.

205. *Id*. According to plaintiffs' complaint, Child P's grandmother was "determined. . . unfit to serve as a foster placement, and who has limited rights over Child P under state law." First Amended Complaint and Prayer for Declaratory and Injunctive Relief at 3, Brackeen v. Zinke, No. 4:17-cv-868-O (N.D. Tex. 2018) (Dkt. No. 22).

206. *Zinke*, 338 F. Supp. 3d at 527.

207. *Bernhardt*, 937 F.3d at 420.

208. *Zinke*, 338 F. Supp 3d at 527.

209. *Id.* at 546.

210. *Id.* The district court rejected defendants' argument. *Id.*

211. *Bernhardt*, 937 F.3d at 416.

212. Morton v. Mancari, 417 U.S. 535, 551–52 (1974) (describing the attachment of the plenary power of Congress with respect to the Indian Tribes to the Indian Commerce Clause and its

plenary authority attached to the Indian Commerce Clause in multiple cases.[213] The legislative history of the ICWA reveals Congress' own consideration of whether the regulation of child custody proceedings and the imposition of minimum federal standards is an appropriate exercise of Congress' plenary power over Indian affairs.[214] In settling this issue, Congress determined, pursuant to the Court's holding in *Dick v. United States*, 208 U.S. 340 (1908), that as long as Indians remain a distinct people, with an existing tribal organization recognized by the government, "Congress has power to say with whom, and on what terms, they shall deal."[215] Further, Congress reasoned in enacting the ICWA, that even as state courts at that time had recognized that a tribe's children are vital to its integrity and future, Congress has the responsibility to protect the integrity of the tribes and thus, pursuant to the Court's holding in *United States v. Kagama*, "there arises the duty of protection, and with it the power."[216]

In affirming Congress' broad power to regulate tribal affairs under the Indian Commerce Clause, the Court has also recognized that this plenary power, combined with the "semi-independent position" of Indian tribes, creates two formidable barriers to the assertion of state regulatory authority over tribal reservations and members.[217] First, the exercise of regulatory authority may be

affirmation by the Supreme Court); *see also* United States v. Lara, 541 U.S. 193, 202 (2004) (finding that "Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority"). Additionally, the legislative history of the ICWA acknowledges the plenary power of Congress to act with regard to Indian affairs, relying on the Supreme Court's ruling in United States v. Wheeler, 98 S. Ct. 1079, 1084 (1978) (acknowledging the undisputed plenary power of Congress to regulate the Indian tribes) and United States v. Kagama, 118 U.S. 375, 384 (1886).

213. Ogle, *supra* note 33, at 1017 (citing *Lara*, 541 U.S. at 200 and arguing that the Constitution grants Congress broad general powers to legislate with respect to Indian tribes). *See also* Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 470–71 (1979) (noting that Congress has a "plenary and exclusive" power over Indian affairs when deciding an issue of jurisdiction); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (establishing that the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian Affairs, while also pointing out that this central function is different from the central function of the Commerce Clause, which is to regulate commerce among the several states).

214. H.R. REP. No. 95-1386 at 14 (1978).

215. *Id.*

216. *Id.* at 15. *See also* Watts, *supra* note 15, at 224 (pointing out that "[b]y giving tribal governments more influence in [child custody proceedings] and restricting state courts jurisdictionally, procedurally, and substantively, Congress acknowledged its role as a trustee in protecting Indian tribes and their children," while also returning a degree of self-determination to tribes in "an area perceived as fundamentally important by both tribes and Congress").

217. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980). *See also Kagama*, 118 U.S. at 384–85 (justifying the plenary power of Congress to regulate Indian Affairs as "necessary to their protection," and grounded in the rationale that "[i]t must exist in [the general

pre-empted by federal law.[218] Additionally, state regulatory authority may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them.[219] In recognizing this tension, the Court notes that the right of tribal self-government is ultimately dependent on, and subject to, the broad power of Congress.[220]

While the Supreme Court has continually recognized the plenary power of Congress to regulate Indian affairs, Justice Thomas authored a series of opinions advancing an argument that Congress has limited or weak powers to regulate Indian affairs.[221] In *Adoptive Couple v. Baby Girl,* Justice Thomas interpreted Congress' history with respect to the Indian tribes narrowly and reasoned that because at the time of the writing of the Constitution commerce did not include agriculture and manufacturing, it certainly does not include "noneconomic activity such as adoption of children."[222] Additionally, the drafting process of the Indian Commerce Clause reveals that the original draft contained the phrase "Indian affairs," instead of "commerce with Indian tribes," and as such, Justice Thomas concluded that the preference of the drafters was to restrict Congress' power over the Indian tribes to the regulation of commerce only.[223] Justice Thomas also pointed out that the Indian Commerce Clause expressly contains the word "tribes" as opposed to "individuals" or "persons," and therefore, he reasoned that Congress does not have power to regulate the adoption of individual Indian children.[224]

On the other hand, in *United States v. Lara*, the Court acknowledged that the origins of Indian affairs are more rooted in aspects of military and foreign policy than in domestic or municipal law.[225] Similarly, the Court in *Morton v. Mancari* found that the plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself and thus singles out Indians as a proper subject for separate legislation by Congress.[226] Thus, Congress' legislative authority would rest at least in part, not only on "affirmative grants of the Constitution," like the Indian Commerce

government] because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.").

218. *White Mountain Apache Tribe*, 448 U.S. at 142.

219. *Id.*

220. *Id.* at 143.

221. *See* United States v. Bryant, 136 S. Ct. 1954, 1968 (2016) (Justice Thomas in concurrence wrote that "[n]o enumerated power—not Congress' power to 'regulate Commerce . . . with Indian Tribes,' not the Senate's role in approving treaties, nor anything else—gives Congress such sweeping authority" as to have plenary power over Indian tribes).

222. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring).

223. *See id.*

224. *Id.*

225. United States v. Lara, 541 U.S. 193, 201 (2004).

226. Morton v. Mancari, 417 U.S. 535, 551–52 (1974).

Clause, but upon the Constitution's adoption of pre-constitutional powers necessarily inherent in the Federal government.[227] Further, the Court in *United States v. Lara* recognized that from the nation's beginning, Congress' need for a plenary legislative power over Indian tribes would have "seemed obvious" due to the fluctuating nature of billions of acres of land, numerous tribes with distinct cultures, and policies toward Indians which ranged from "removal" and "termination" to "government-to-government relationship" and "development of strong and stable tribal governments."[228] A full consideration of legislative history, coupled with two centuries of congressional action and Court approval, supports the constitutionality of the ICWA as enacted pursuant to Congress' express authority under the Indian Commerce Clause and implicit authority in the context of Indian affairs.[229]

3. The Non-Delegation Doctrine: Section 1915(c) and The Final Rule

Before the district court, the State Plaintiffs argued that Section 1915(c) of the ICWA was unconstitutional because it delegated congressional power to Indian tribes in violation of Article I of the Constitution.[230] Contrary to the longstanding history of Congress' regulation of Indian affairs and recognition of Indian tribes as quasi-sovereign,[231] State Plaintiffs argued that Section 1915(c) of the ICWA impermissibly granted Indian tribes the authority to reorder Congress' enacted adoption placement preferences by tribal decree, and then apply their preferred order to states in state court custody proceedings.[232] Additionally, State Plaintiffs argued that several sections of the 2016 Final Rule implemented an unconstitutional statute; exceeded the scope of the Interior Department's statutory regulatory authority to enforce the ICWA with binding regulations; and reflected an impermissible construction of several terms within the ICWA.[233]

"Distinguishing between permissible and non-permissible delegations of congressional power usually requires asking whether Congress is delegating discretion to create law or discretion to execute law."[234] "In a delegation challenge, the constitutional question is whether the statute has delegated

227. *Lara*, 541 U.S. at 201.

228. *Id.* at 202.

229. For a full discussion of the Indian Commerce Clause and its predicted effect on the proceedings in the *Bernhardt* case, see generally Ogle, *supra* note 33 at 1017, 1018.

230. Brackeen v. Zinke, 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018) (quoting U.S. CONST. art I, § 1, cl. 1.) ("All legislative Powers. . . shall be vested in a Congress of the United States.").

231. *See* H.R. REP. NO. 95-1386 at 7536–37, 7559 (1978).

232. Brackeen v. Bernhardt, 937 F.3d 406, 425 (2019)

233. *Id.* at 437.

234. *Zinke*, 338 F. Supp. 3d at 536 (citing Loving v. United States, 517 U.S. 748, 758 (1996)).

legislative power to the agency."[235] Congress cannot delegate its inherent power to formulate binding rules generally applicable to private individuals, however, Congress may grant a federal agency the regulatory power necessary to execute legislation as well as interpret ambiguities therein.[236]

The district court reasoned that under the ICWA, the tribes were granted power to change the legislative preferences Congress enacted in the ICWA, and those changes made by the tribes then became binding on the states.[237] Thus, the district court determined that the power to change specifically-enacted congressional priorities related to the adoption of Indian children, and the power to impose those changes on third parties, could only be described as legislative, and accordingly, the district court found that Section 1915(c) of the ICWA and Section 23.130(b) of the Final Rule violated the non-delegation doctrine.[238] The district court reasoned that Congress impermissibly granted federal regulatory power to Indian tribes via the ICWA and the 2016 Final Rule because an Indian tribe is not a coordinate branch of government, nor part of the federal government at all.[239]

On appeal, the defendants refocused the non-delegation analysis on sovereignty.[240] The defendants contended that Section 1915 of the ICWA recognized and incorporated a tribe's exercise of its inherent sovereignty over Indian children—therefore, it did not, and could not, delegate this existing sovereign authority to Indian tribes at all.[241] This argument was in line with other judicial interpretations of tribal sovereignty,[242] and the Fifth Circuit's holding in

235. *Bernhardt*, 937 F.3d at 435 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001)).

236. *Zinke*, 338 F. Supp. 3d at 536.

237. *Id.* at 537.

238. *Id.*; 25 C.F.R. § 23.130 (2018) addresses the application of placement preferences in adoptive placement of Indian children, requiring that if the Indian child's tribe has established by resolution a different order of preference for adoption than that specified in the ICWA, the tribe's placement preferences apply. GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, BUREAU OF INDIAN AFFAIRS 56 (2016). Further, "resolution" can include a statement by a competent Tribal authority as well as a Tribal-State agreement laying out an objective order of placement preferences. *Id.*

239. *Zinke*, 338 F. Supp. 3d at 537. *But see* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1 (1997) (calling Indian tribes one of the three sovereign entities in the United States).

240. *See Bernhardt*, 937 F.3d at 435.

241. *Id.*

242. *See* Morton v. Mancari, 417 U.S. 535, 553 (1974) (noting a special commitment of Congress to turn over to the Indians a greater control of their own destinies); *see also* Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 556 (9th Cir. 1991) (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232 (1982 ed.) (Indian tribes have consistently been recognized as "'distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty.")); *see also* O'Connor, *supra* note 239, at 1 (noting that the United States has three

Bernhardt quietly, but clearly, affirmed the role of tribal sovereignty in American jurisprudence.

In deciding the issue of non-delegation with respect to Section 1915(c) of the ICWA, the Fifth Circuit affirmed that the Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the non-delegation doctrine.[243] The Fifth Circuit's analysis of non-delegation smartly tied together various Court rulings on several areas of Indian affairs and built a consistent interpretation of sovereignty and Indian tribes within the law. Although some exercises of tribal power require express congressional delegation, the Court cited past decisions that indicate that tribes may "retain their inherent power to determine tribal membership and to regulate domestic relations among members."[244] Analyzing the issue of adoption through the lens of the alcoholic beverage laws in *Mazurie*, the court reasoned that like the tribes in *Mazurie* who passed laws to regulate the introduction and use of intoxicants within their reservation's bounds, here, tribes may use their own legislative authority to reorder the preferences set forth by Congress in Section 1915(a) of the ICWA.[245] Pursuant to Section 1915(a), a tribe may assess whether the most appropriate placement for an Indian child is with the members of the child's extended family, the child's tribe, or other Indian families, and thereby exercise its "'inherent power to determine tribal membership and regulate domestic relations among members' and Indian children eligible for membership."[246]

State Plaintiffs argued that *Mazurie* was distinguishable because it involved the exercise of tribal authority on tribal lands, whereas the ICWA permitted the extension of tribal authority over states and persons on non-tribal lands—persons like the Brackeens, the Librettis, and the Cliffords.[247] However, the Fifth Circuit remained focused on children as members of Indian tribes and determined that "it is well established that tribes have 'sovereignty over both their members and their territory,'" and reasoned that "[f]or a tribe to exercise its authority to determine tribal membership and to regulate domestic relations among its members, it must necessarily be able to regulate all Indian children,

types of sovereign entities—the Federal government, the States, and the Indian tribes, and that each sovereign plays an important role in the administration of justice in the United States).

243. *Bernhardt*, 937 F.3d at 436 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975) ("[I]ndependent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'") and Gibbons v. Ogden, 22 U.S. 1, 80 (1824) ("Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject.")).

244. *Bernhardt*, 937 F.3d at 436–37. The Court also cited past decisions indicating that tribes retain the power to create substantive law governing internal tribal affairs like tribal citizenship and child custody. *Id*.

245. *Id.* at 436.

246. *Id.*

247. *Id.*

irrespective of their location."[248] Thus, the court found that "by recognizing the inherent powers of tribal sovereigns to determine by resolution the order of placement preferences applicable to an Indian child," Congress was deliberately continuing to adopt tribal law as binding federal law.[249] Thus, the Fifth Circuit concluded that Section 1915(c) was not an unconstitutional delegation of congressional legislative power to tribes, but was instead an incorporation of inherent tribal authority by Congress.[250] This ruling recognized the heart of the ICWA: protecting and preserving Indian children and their relationships with their tribes.

While the district court in *Brackeen v. Zinke* grounded its analysis of the 2016 Final Rule in the constitutionality of the ICWA itself, the Fifth Circuit considered the 2016 Final Rule's basis in the ICWA, the BIA's scope of authority, and the construction of the statute. The Fifth Circuit's analysis began with affirming the overall constitutionality of the ICWA and acknowledging that Congress granted the Secretary of the Interior and the Bureau of Indian Affairs the broad authority to promulgate regulations necessary to the ICWA's implementation.[251]

The Fifth Circuit conceded that the plain language of the ICWA may be considered ambiguous because Congress has not directly addressed the precise question of the 2016 Final Rule and other regulations promulgated by the BIA.[252] However, the court found that the Final Rule's binding standards for Indian child custody proceedings were reasonable because they were reasonably related to the ICWA's purpose of establishing minimum federal standards in child custody proceedings involving Indian children.[253]

The Fifth Circuit rightly framed the issue of Congress' delegation of rulemaking authority to the BIA around the legal test of reasonableness set out in *Chevron*. However, there is an important practical issue resolved by the application of this test. The 2016 Final Rule was promulgated by the BIA—after research, public comment, and tribal consultations—because of the lack of uniformity in state court interpretation of the ICWA and the resulting inconsistencies in child custody proceedings.[254] Congress' delegation of

248. *Id.*

249. *Bernhardt*, 937 F.3d at 437.

250. *Id.*

251. *Id.*

252. *Id.* at 438.

253. *Id.*

254. Ogle, *supra* note 33, at 1016. In considering whether the BIA's issuance of binding guidelines in 2016 was reasonable in light of their previous issuance of non-binding guidelines, the Fifth Circuit noted that in the past, "the BIA had neither the benefit of the *Holyfield* Court's carefully reasoned decision nor the opportunity to observe how a lack of uniformity in the interpretation of ICWA by State courts could undermine the statute's underlying purposes." *Bernhardt*, 937 F.3d at 439.

rulemaking authority to the BIA was borne of necessity—without the 2016 Final Rule, state courts would continue to implement divergent and inconsistent interpretations of the ICWA and its preference categories. Congress' delegation of rulemaking authority to the BIA was valid because it was practically necessary to execute the ICWA in the manner Congress intended.[255]

4. The Fifth Amendment Equal Protection Claim and Classification Under *Mancari*

The parties disagreed about whether Sections 1915(a)-(b) relied on racial classifications that required strict scrutiny review.[256] Plaintiffs argued that the ICWA provides special rules in child placement proceedings based on the race of the child, which was permissible only if the race-based distinctions survived strict scrutiny.[257] On the other hand, the federal and tribal defendants disagreed, contending that the ICWA distinguishes children based on political categories, which required only a rational basis review.[258] This section analyzes the Fifth Circuit's resolution of this issue, which found that the ICWA's definition of "Indian child" was a political classification, subject to rational basis review, and did not violate Equal Protection.[259] The analysis below argues that the classifications in the ICWA would survive even strict scrutiny.

To survive strict scrutiny review, "federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."[260] On the other hand, under rational basis review, "when a federal statute governing Indians relies on political classifications, the legislation is permissible if singling out Indians for 'particular and special treatment' is 'tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'"[261] In evaluating an equal protection claim, strict scrutiny applies to laws that rely on classifications of persons based on race, but where the classification is political, rational basis review applies.[262]

255. Ogle, *supra* note 33, at 1016. The initial authority granted by the ICWA to the BIA required the BIA to promulgate guidelines within 180 days, though the Fifth Circuit determines the promulgation of binding guidelines in 2016 has a rational explanation that does not make them invalid due to the timing of their release. *Bernhardt*, 937 F.3d at 439.

256. Brackeen v. Zinke, 338 F. Supp. 3d 514, 531 (N.D. Tex. 2018).

257. *Id.* (emphasis added).

258. *Id.* (emphasis added).

259. *Bernhardt*, 937 F.3d at 429–30.

260. *Zinke*, 338 F. Supp. 3d at 531 (quoting Richard v. Hinson, 70 F.3d 415, 417 (5th Cir. 1995)).

261. *Zinke*, 338 F. Supp. 3d at 531 (quoting Morton v. Mancari, 417 U.S. 535, 554–55 (1974)). *See also* Watts, *supra* note 15, at 229 (supporting the idea that the ICWA would survive a rational basis standard of review).

262. *Bernhardt*, 937 F.3d at 425.

Plaintiffs argued that the placement preferences in Sections 1915(a)-(b) of the ICWA, as well as the collateral attack provisions in Section 1913(d) and Section 1914, included unlawful race-based classifications like those at issue in *Rice v. Cayetano*.[263] In *Rice*, the Court found that "ancestry can be a proxy for race" and noted that "racial discrimination is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics."[264] On the other hand, the federal and tribal defendants argued that the ICWA's placement preferences relied on political classifications like the statute at issue in *Morton v. Mancari*.[265] In *Mancari*, the Supreme Court upheld the statute's preference for Indian applicants as a hiring criterion within a government agency because the statute applied only to members of federally-recognized tribes, which provided special treatment only to Indians living on or near reservations.[266] Noting that on numerous occasions the Supreme Court specifically upheld legislation singling out Indians for particular and special treatment, the Court in *Mancari* determined that the employment preference was granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities whose lives and activities were governed by the Bureau of Indian Affairs and Congress in a unique fashion.[267] Reasoning that the preference was not directed toward a "racial" group consisting of "Indians," but rather only toward members of "federally recognized" tribes, the Court determined that this category could exclude many individuals who are racially classified as Indians, and thus, it was a political rather than racial preference.[268]

In deciding to apply the strict scrutiny test in *Zinke*, the district court reasoned that the Supreme Court's ruling in *Mancari* was uniquely tailored to that particular set of facts, and *Mancari* did not announce all preferences

263. *Zinke*, 338 F. Supp. 3d at 531. In *Rice v. Cayetano,* 528 U.S. 495 (2000), the Supreme Court overturned a Hawaiian statute restricting voter eligibility to only "native Hawaiians" and those with "Hawaiian ancestry." *Id.* at 531–32. The Supreme Court reasoned that extending *Mancari* to the Hawaiian context "would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision making in critical state affairs." *See* ATWOOD, *supra* note 4, at 191. However, scholars point out that the ICWA, on the other hand, embodies Congress' intent to benefit Indian children as tribal members and protect tribal sovereignty and survival. *Id.* Thus, "[u]nlike the scheme involved in *Rice*, tribal self-government is directly served by the jurisdictional and procedural protections afforded to tribes under the" ICWA. *Id.*

264. *Zinke*, 338 F. Supp. 3d at 532 (quoting Rice v. Cayetano, 528 U.S. 495, 496 (2000)). Scholars argue that whether or not a tribe chooses to include a blood quantum requirement in its membership criteria should not affect the political meaning of tribal membership under equal protection theory. ATWOOD, *supra* note 4, at 190.

265. *Zinke*, 338 F. Supp. 3d at 532. In *Mancari*, plaintiffs sought to declare unconstitutional a BIA hiring standard that gave preference to Indian applicants. *Id.*

266. *Id.*

267. Morton v. Mancari, 417 U.S. 535, 553–54 (1974) (emphasis added). Decided just a few years before the ICWA was enacted by Congress, the *Mancari* Court acknowledges the important relationship Congress has with Indian tribes. *Id*. at 552–53.

268. *Id.* at 554 n.24.

involving Indians are political.[269] Therefore, the *Zinke* court reasoned that because the ICWA's definition of Indian children deferred to the tribal membership eligibility standards rather than actual tribal affiliation, the ICWA used ancestry as a proxy for race, as in *Rice*, and therefore was subject to the strict scrutiny test.[270]

Contrary to the *Zinke* court's reasoning, *Mancari* contains no language limiting its holding to its particular set of facts or to only Indians living on reservations, and the Fifth Circuit correctly concluded that *Mancari* controlled the classification issues in *Bernhardt*.[271] While the Supreme Court has declined to extend the *Mancari* doctrine to other racial or ethnic groups,[272] the issue in *Bernhardt* involved the classification of Indian children in an analogous manner to the classification in *Mancari*, and the Fifth Circuit indicated that *Mancari's* holding did not "rise or fall with the geographical location of the Indians receiving 'special treatment.'"[273] The Fifth Circuit grounded its analysis in the foundational concept that Congress has exercised plenary power over tribal relations from "the beginning," and this exercise of power has always been deemed political and not subject to control by the judiciary.[274] Thus, the district court created a false distinction in Congress's power to legislate Indian affairs by distinguishing between Indians living on reservations and those that do not.[275]

"The Supreme Court's decisions 'leave no doubt that federal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications.'"[276] Like the statute at issue in *Mancari*, the ICWA relies on a definition of "Indian" that requires tribal acknowledgement of membership (or eligibility for membership), and in doing so, makes the classification political and not racial. "Membership in a tribe, while often resting on requirements of ancestry, gives rise to certain political rights," including "rights to participate in tribal decision making, to receive tribal benefits, and to reside on tribal land."[277] Membership in a tribe is consensual in nature[278] and one of a tribe's most basic

269. *Zinke*, 338 F. Supp. 3d at 532.

270. *Id.* at 533–34.

271. *Bernhardt*, 937 F.3d at 427.

272. *See* Metteer, *infra* note 280, at 56.

273. *Bernhardt*, 937 F.3d at 427.

274. *Id.* at 426 (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903)). The court also cites *Mancari*, 417 U.S. at 552, pointing out that "[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Bernhardt*, 937 F.3d at 426. *See also* Perrin v. United States, 232 U.S. 478, 482 (1914) (acknowledging Congress's power to regulate Indians "whether upon or off a reservation and whether within or without the limits of a state").

275. *Bernhardt*, 937 F.3d at 427.

276. *Id.* at 426 (quoting United States v. Antelope, 430 U.S. 641, 645 (1977)).

277. ATWOOD, *supra* note 4, at 190–91.

278. *Id.* at 192.

sovereign powers is the right to determine their own membership, which creates a political status in which Indians are citizens of two sovereign powers—the United States and their tribe.[279] Some scholars assert that tribal members often see the tribes' exercise of power over their children as a "core manifestation of tribal sovereignty."[280] Further, like the statute in *Mancari*, the definition of "Indian child" in the ICWA could exclude individuals who are racially classified as Indians but who are not politically eligible for membership in a tribe.[281] In further considering this point, the Fifth Circuit pointed out that the law ties eligibility at least in part, on whether the child is eligible for membership in a federally recognized tribe, and therefore, conditioning a child's eligibility for membership on whether a biological parent is a member of the tribe is not a proxy for race, but rather for the not-yet formalized tribal affiliation.[282]

In *Zinke*, the district court determined that the ICWA did not survive strict scrutiny review because the federal defendants did not offer the court a compelling government interest that the ICWA's purported racial classifications served.[283] In evaluating whether the government met its burden of proof with regard to the narrow tailoring requirement, the court determined that "fulfilling Congress's unique obligation toward the Indians," and "maintain[ing] the Indian child's relationship with the tribe" did not meet the necessarily required and stronger government interest.[284] In contrast, on appeal, the Fifth Circuit found that

> [g]iven Congress's explicit findings and stated objectives in enacting the ICWA . . . the special treatment the ICWA affords Indian children [wa]s rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its

279. *See* Metteer, *infra* note 280, at 56.

280. *See* Christine M. Metteer, *A Law Unto Itself: The Indian Child Welfare Act as Inapplicable and Inappropriate to the Transracial/Race-Matching Adoption Controversy*, 38 BRANDEIS L. J. 47, 54 (1999–2000).

281. *See id.* at 56 (pointing out that "because the race-matching preferences of the ICWA apply only to members or children of members of federally recognized tribes, rather than to all who might be racially classified as 'Indian,' these preferences are also 'political rather than racial in nature'"); *but see* Watts, *supra* note 15, at 229 (arguing that for Indian parents no longer affiliated with a tribe, application of the ICWA's placement preferences may be unconstitutionally discriminatory). However, Watts points out that because the ICWA provides for judicial discretion if "good cause" exists, the proper challenge would be one of the court's discretion, not the validity of the ICWA. *Id.*

282. *Bernhardt*, 937 F.3d at 428.

283. Brackeen v. Zinke, 338 F. Supp. 3d 514, 534 (N.D. Tex. 2018).

284. *Id.* at 534, 536. *But see* Watts, *supra* note 15, at 229 (noting that "Congress could have reasonably believed that tribal survival interests would be protected by requiring Indian parents to submit to the exclusive jurisdiction of tribal courts under certain circumstances and by limiting their parental autonomy in placement preference," and thus, "[b]y protecting these interests, Congress could have believed it was fulfilling its 'unique obligation toward Indians.'").

> stated purpose of protecting the best interests of Indian children and promoting the stability and security of Indian tribes.[285]

While the Fifth Circuit only considered whether there was a rational link between the ICWA and the governmental interest in the Indian tribes and the best interests of Indian children, the analysis below finds that the ICWA's classifications also meet strict scrutiny review.

Even assuming the interests of Congress in the enactment of the ICWA were compelling, the district court determined that the ICWA was over-inclusive, and therefore not narrowly tailored, because it establishes standards that are unrelated to specific tribes' interests and applies those standards to potential Indian children.[286] The district court reasoned that by "[a]pplying the preference to *any* Indian, regardless of tribe, [the statute was] not narrowly tailored to maintaining the Indian child's relationship with his tribe."[287] Further, the district court noted that the ICWA applies to many children who will never become members of any Indian tribe, and "the first preference is to place the child with family members who may not be tribal members at all"—thus, "[t]hese provisions burden more children than necessary to accomplish the goal of ensuring children remain with their tribes."[288]

By finding that the ICWA was not narrowly tailored to meet a compelling government interest, the district court in *Zinke* failed to consider the longstanding history of legislation that singles out Indians for particular and special treatment, including statutes which grant tax immunity, jurisdiction over reservation affairs, federal welfare benefits, and other treatment.[289] The reasoning used by the Supreme Court in *Mancari* drew on a historical and legal context in which Congress acknowledged the assumption of a special "guardian-ward" status with respect to Indian tribes, while also endeavoring to "turn[ ] over to the Indians a greater control of their own destinies."[290] By failing to consider the history of legislation granting special status to Indians, the district court glossed over the important rationale behind the ICWA which demonstrates several compelling interests, including increasing tribal control over their governance, protecting the future growth and stability of the tribe in their children, and preventing the traumatic and biased removal of Indian children

285. *Bernhardt*, 937 F.3d at 430.

286. *Zinke*, 338 F. Supp. 3d at 535.

287. *Id.* (emphasis in original).

288. *Id.* at 535–36.

289. Morton v. Mancari, 417 U.S. at 554–55. *See also* Gallagher, *supra* note 11, at 82 (noting that an important context to the enactment of the Indian Child Welfare Act is the fact that Indians are the only "foreign" people singled out in the Constitution, and they have always had a special relationship with the American government).

290. 417 U.S. at 551, 553.

from their tribes and families.[291] The substantive, jurisdictional, and procedural requirements of the ICWA are compelled by the grim history of removing Indian children from their tribes and families, and are designed to specifically protect against the occurrence of such practices.[292] For instance, the provisions of the ICWA requiring a state court to transfer child custody proceedings to a tribal court absent good cause are specifically designed to protect the rights of the "Indian child as an Indian," as well as the rights of the Indian parents or custodians, and their tribe.[293] Thus, the district court failed to recognize the compelling government interests found in decades of jurisprudence and supported by the ICWA.

In deciding that the ICWA is not narrowly tailored enough to justify the classifications with it, the district court failed to acknowledge an important reality for children protected by the ICWA: to be Indian is not to have a 100 percent blood quantum of any single tribe, but rather, to be Indian is to be connected to language, religion, ancestry, storytelling, meaningful relationships with close family members, and possibly a reservation or tribal community.[294] It is often children who have blended or multiple cultural identities that trigger the most contentious battles under the ICWA, and a child's multiple identities often influence courts' reasoning with respect to child custody proceedings.[295] On appeal, the Fifth Circuit acknowledges the complex nature of tribal identity in its determination that the classifications within the ICWA are political and not racial, and points out that the ICWA's definition of "Indian child" is not based solely on tribal ancestry or race itself.[296] For instance, the appellate court acknowledges that some tribal membership laws extend eligibility to children

291. H.R. REP. NO. 95-1386 at 2. *See also* Metteer, *supra* note 280, at 59–60 (recognizing "the compelling governmental interests in preserving the very existence and integrity of Indian tribes by preventing the removal of their children," and pointing out that per the Supreme Court's ruling in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978), "[a]fter such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated").

292. H.R. REP. NO. 95-1386 at 19. By acknowledging the harm caused by boarding schools, the legislative history of the ICWA codifies a requirement for children to remain at home while they attend school. *Id.* at 9, 27. Additionally, where state law affords a higher degree of protection for an Indian custodian, such a standard will be applied by the state court in lieu of the protection afforded by the ICWA. *Id.* at 25. Acknowledging the harm originating from social work practices, Congress notes that a white, middle class standard of parenting and family structure will not be applied to remove children from their homes. *Id.* at 11, 20.

293. *Id*. at 3, 23.

294. *See* ATWOOD, *supra* note 4, at 46–55. *See also* Fred Lomayesva, *Indian Identity-Post Indian Reflections*, 35 TULSA L. J. 63, 67-68 (1999) (discussing the limits of a framework of Indian identity which includes blood quantum and pointing out that any blood quantum is arbitrary and will disenfranchise members of an Indian community and fail to recognize tribal adoption practices which may include cross-racial adoptions).

295. *See* ATWOOD*, supra* note 4, at 7.

296. Brackeen v. Bernhardt, 937 F.3d 406, 429 (2019).

without Indian blood, such as the descendants of former slaves of tribes, who became members after they were freed, or the descendants of adopted white persons.[297] Thus, the appellate court pointed out that a child may fall under the ICWA's membership standard because his or her biological parent became a member of the tribe, despite not being racially Indian.[298] In the face of tensions about blood quantum and tribal membership, the ICWA respects the tribe's decision on membership as conclusive and protects Indian children regardless of their blood quantum.[299] Further, the ICWA recognizes that tribes vary dramatically in defining and keeping track of membership, but all tribes are concerned with preserving their future in their children.[300]

Children with mixed identities illustrate the reality that the ICWA is as narrowly tailored as it can be, while still being broad enough to successfully protect the future interest of the tribe.[301] That is to say, just because a child's blood quantum is less than 100 percent Indian does not mean the tribe has no interest in the child, nor in protecting their future and culture in that child's life.[302] Thus, in finding that the ICWA is not narrowly tailored because it is over-inclusive, the district court in *Zinke* failed to recognize the full purpose and importance of the ICWA in the current age. However, the Fifth Circuit brought the purpose and realities of the ICWA and the children it protects to the forefront of its analysis and considered the nuance of identity when considering the constitutionality of the law.[303] Ultimately, the structures of the ICWA and the outcomes it fosters for children, families, and tribes, as well as the substantive

297. *Id.* at 428.

298. *Id.*

299. *See* 25 U.S.C. § 1903(4) (2012) (finding that an Indian child for the purposes of the ICWA is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"). *See also* GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, BUREAU OF INDIAN AFFAIRS 10 (2016) (determining that the "ICWA does not apply simply based on a child or parent's Indian ancestry," but rather that "there must be a political relationship to the Tribe").

300. *See* ATWOOD, *supra* note 4, at 38. Some tribes use blood quantum requirements, others define membership as including "[all] children born to resident members;" others use either a matrilineal or patrilineal framework for determining membership. *Id*. at 38–39. To further complicate the issue of enrollment, "DNA testing for 'Native American markers' has been debated among tribes as a method of determining biological ancestry," and "one study reported that there are over thirty-three different definitions of 'Indian' in federal law." *See id.* at 39, 38 n.105.

301. *See* Metteer, *supra* note 280, at 58–59 (finding that the ICWA is narrowly tailored to apply only to Indian children who are members or eligible to become members of a federally-recognized tribe, and the governmental interest is compelling because it the ICWA is a measure that furthers the government's interest in preserving the very existence and integrity of the Indian tribes by preventing the removal of their children).

302. *See* ATWOOD, *supra* note 4, at 38, 245–46.

303. *See generally* Brackeen v. Bernhardt, 937 F.3d 406 (2019).

and procedural requirements within the law, are strong enough to withstand even the highest standard of review.[304]

5. The Fifth Amendment Due Process Claim

In *Zinke*, the individual plaintiffs claimed that Sections 1910(a) and (b) of the ICWA, as well as the 2016 Final Rule, violated the Fifth Amendment Due Process Clause because the ICWA's racial preferences "disrupt . . . intimate familial relationships based solely on the arbitrary fact of tribal membership" and families have a fundamental right "to make decisions concerning the care, custody, and control of their children."[305] The district court reasoned that while the Supreme Court has recognized both custody and the right to keep the family together as fundamental rights,[306] the Court has never applied those rights to foster families, nor to a situation involving prospective adoptive parents whose adoption is open to collateral attack.[307] Thus, the district court determined there was no violation of the Due Process protections of the Fifth Amendment with respect to the individual plaintiffs.[308] This claim was not raised on appeal by the plaintiffs, and the Fifth Circuit did not address it.

X. PROPOSED MODIFICATIONS TO THE ICWA: RECOGNIZING THE TENSION IN INTERESTS

Despite its criticism and a handful of challenges to its constitutionality, the ICWA has achieved considerable success since 1978, including an increase in respect for tribal authority, an expansion in tribal family preservation programs, and a reduction in the rate of removal of Indian children from their homes.[309] The following policy recommendations suggest modifications of the Indian Child Welfare Act and the 2016 Final Rule in light of the success of the ICWA to date. These proposals are designed to address the concerns raised by the Brackeens and other adoptive parents in "hard cases," as well as balance the wishes of Indian parents and respect the role of the tribe and tribal courts in child

304. *See* Metteer, *supra* note 280, at 58 (noting, "even under the strict scrutiny test demanded in cases involving 'racial classifications [which might be] constitutionally suspect,' the ICWA passes constitutional muster" because the ICWA is narrowly tailored to further the compelling governmental interest of applying the law to only the federally-recognized tribes with whom the United States government has a political connection as a semi-sovereign nation).

305. Brackeen v. Zinke, 338 F. Supp. 3d 514, 546 (N.D. Tex. 2018).

306. *Id.*; *see also* Troxel v. Granville, 530 U.S. 57, 66 (2000) (holding "that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (acknowledging the right of parents "to direct the education and upbringing of one's children" as protected by the Fourteenth Amendment).

307. *Zinke*, 338 F. Supp. 3d at 546.

308. *Id*.

309. ATWOOD, *supra* note 4, at 193. *But see* Metteer, *supra* note 280, at 84 (finding that "the ICWA does not work well and never has").

custody proceedings. As with all child custody proceedings, there are many parties and many interests—the right balance acknowledges tension where interests are truly at odds and gives voice to parents, tribes, and the children themselves. In fact, a construction of the ICWA that permits a multiplicity of voices to be heard at the placement stage of Indian child custody proceedings in state court will better serve the interests of children.[310]

Proposal 1: Trust the Tribes and Tribal Courts to make determinations about the child's best interests in custody proceedings. A fundamental theme in state court jurisprudence is the assumption that a child who has bonded to a primary caregiver within a stable placement will suffer harm if the child's custodial arrangement is disrupted, and thus, a body of judge-made and statutory law increasingly recognizes the significance of continuity of care in children's lives.[311] Where the ICWA applies to an Indian child who has been in a stable placement for a significant period of time, state courts often search for a basis to avoid the ICWA's substantive and jurisdictional provisions, in an effort to preserve the child's immediate sense of home and belonging.[312] However, this avoidance of the ICWA is unnecessary and is predicated on a belief that the tribe's interests and the child's interests are fundamentally incompatible and cannot be reconciled. Despite the tribal court's ultimate decision to permit the Indian children to remain with their non-Indian adoptive parents, the exercise of collective tribal power against an individual Indian parent, exemplified in cases such as *Mississippi Band of Choctaw Indians v. Holyfield*, has fueled opposition to the ICWA.[313] Some scholars question the view that tribal power trumps parental choice in voluntary adoptions of children domiciled on a reservation and as such, much of the literature bears an anti-tribal tone, portraying the ICWA as a tool of power-hungry Indian tribes who are insensitive to the true welfare of their children.[314]

310. Atwood, *supra* note 26, at 596.

311. Atwood, *supra* note 26, at 593. Tribes themselves have also recognized the importance of stability, continuity, and permanency in a child's life and some tribes have drafted creative code provisions to define children's interests within a tribal perspective. *See* ATWOOD, *supra* note 4, at 273–74. Such terms include "a child's need for love, nurturing, protection, and stability," "a child's need for family," "a child's need for identity," and others. *Id.*

312. ATWOOD, *supra* note 4, at 272. *See also supra* notes 71–75 (discussing the existing Indian family doctrine). *See also* Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 648 (1994) (discussing the deep distrust that state courts feel for tribal courts and the ways this distrust negatively impacts their examinations of good cause, including the mislabeling of difference as incompetence). Further, Carriere points out that "[s]tate courts have repeatedly signalled [sic] their belief that transfer to tribal courts will lead to placements contrary to the Native American children's welfare." *Id.*

313. Atwood, *supra* note 26, at 591.

314. *Id.*

Instead of taking the posture of skepticism toward tribal courts, state courts should trust the tribe and tribal courts to determine the best interests of an Indian child in custody proceedings. Tribal courts have demonstrated a commitment to protecting the child's sense of family, as well as the child's cultural and tribal identity, even when this balance resulted in the placement of the child with a non-Indian family.[315] Notably, the tribal court reached the conclusion in *Holyfield* that the best interest of the twins was to remain with their adoptive family.[316] Similarly, in the case of the Brackeens and the Librettis, the children's tribes have demonstrated their recognition of the importance of the children remaining with their adoptive family where removal would be disruptive.

Proposal 2: Adjust the window for collateral attack of the adoption of an Indian child to be the same as state adoption proceedings (typically one year), while simultaneously strengthening the notice requirement for tribes. This proposal is supported by the notion that the ICWA is most effective when tribes intervene early, and children are best served when their early years are not disrupted by the uncertainty of adoption proceedings and long periods of collateral attack.[317] Additionally, the tribe's interests and the Indian parents' interests are aligned in the early stages of a custody proceeding—both the parents and the tribe want the Indian child to be placed in a loving, nurturing home. Shortening the period for collateral attack by the Indian parent and the tribe serves the purpose of lessening the period of uncertainty after adoption and serves the interests of the adoptive family as well as the Indian child.[318] Additionally, the notice requirement is essential to the tribe's right to assert jurisdiction or to intervene in placement proceedings.[319] While the ICWA provides "rigorous requirements" for notice, tribes are often not given timely notice and learn about the child's placement after the child has lived with the prospective adoptive family for a long time.[320] In this situation, there would be a heavy emotional toll on the parties if the child were removed.[321] Therefore, shortening the period of collateral attack to reduce uncertainty for children and

315. DUTHU, *supra* note 11, at 153. *See* O'Connor, *supra* note 239, at 3 (noting that tribal courts often act more quickly and more informally than their federal and state counterpart, and incorporate tribal customs and beliefs into the factors considered to reach a decision, the procedures used, and the punishment or resolution arrived at). "Tribal court judges frequently are tribal members who seek to infuse cultural values into the process." *Id. See also* ATWOOD, *supra* note 4, at 274.

316. DUTHU, *supra* note 11, at 153.

317. ATWOOD, *supra* note 4, at 242.

318. *See* ATWOOD, *supra* note 4, at 243 (calling proposed amendments to the ICWA in 2001 and 2003 "sensible improvements in the Act by facilitating the participation of birth parents and tribes while also placing outside limits on belated challenges"). Imposing strict and clear notice requirements would reduce the number of "'hard cases' that result from delay" by a participant, where the delay "often has compelling significance in the world of a child." *Id.*

319. Metteer, *supra* note 280, at 75.

320. *Id.* at 75.

321. *Id.*

adoptive families comes at a cost to tribes unless the notice requirement is strictly adhered to and even strengthened. While state courts remain split over whether strict compliance or substantial compliance with the notice requirements in the ICWA is required, the 2016 Final Rule should be modified to mandate strict compliance with each of the written notice requirements already set out in the ICWA, thereby strengthening the notice requirement to protect tribal sovereignty and a right to intervene in child custody proceedings.[322] Strict compliance with notice requirements models trust for the tribe.

Proposal 3: Expand the proceedings to which the ICWA does not apply to include the adoption of an Indian child by any member of either biological parent's immediate family, such as the child's grandparents, aunts, and uncles. This proposal is tailored to address the "hard cases" where one biological parent is an Indian and one is a non-Indian, and members of the extended family of the non-Indian parent are seeking to adopt the child. Under the ICWA, the child's adoption proceedings could be transferred to a tribal court, creating uncertainty for the non-Indian family members seeking to adopt the child. The relevance of this policy proposal is underlined by the fact that children with blended or multiple cultural identities trigger the most contentious battles under the ICWA, and it is children with mixed identities who seem to challenge the meaning of "Indian-ness" under the law.[323] While some critics of the ICWA's broad applicability advocate for a narrower definition of "Indian child," a simple, less drastic expansion of those eligible to adopt children without the application of the ICWA may solve the "hard cases" brought before many state courts without relinquishing protection for Indian children not residing on reservations.[324]

In the alternative, Congress may also reconsider the repeated urging of tribal leaders to amend the ICWA to include a provision permitting open adoptions, even where such adoptions are otherwise prohibited by state law.[325] This

322. *See id.* at 75–76. *See also* ATWOOD, *supra* note 4, at 242–43 (pointing out that the 2001 and 2003 proposed amendments to the ICWA would have required effective notice to tribes of voluntary placements and would have expressly given tribes a right to intervene, while also setting out express time limits and requirements for notice). These proposed amendments failed to pass. *Id.* at 242.

323. *See* ATWOOD, *supra* note 4, at 7 (describing the case of *In re the Matter of Lupe Moriah Alegria*, DC 201 (Northern Cheyenne Tribal Ct.)).

324. *See id.*, at 244–45 (explaining potential amendments which would have revised the definition of "Indian child" under the ICWA to either eliminate the requirement of a biological parent who is an Indian, include children who are not eligible for membership with the tribe but who reside on the reservation nonetheless, and other possible revisions of the definition of "Indian child").

325. *Id.* at 276. *See also* Hawkins-Leon, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS L. J. 201, 216–17 (1997-98) (advocating for a "child-centered" approach to adoption, which blends the biological family and the adoptive

potential amendment, while controversial, would create the possibility that the child may keep ties with his or her culture even if adopted by a non-Indian family, or a member of his or her extended, non-Indian family.[326] Tribes offer their own cultural view of adoption by creating "alternative permanency options," such as a permanent guardianship, which creates a parent-child relationship with someone other than the child's birth parents but does not legally terminate the birth parent's parental rights.[327] Such an option may create the sense of permanency and belonging a child deserves, while also respecting the authority and sovereignty of the tribe.[328] No matter what, it is imperative for the success of the ICWA and the future of tribal communities that state courts trust tribal courts to make healthy, educated, and fair decisions about the custody of their children—where state courts seek to subvert the ICWA by avoiding the transfer of cases to tribal court using the existing Indian family doctrine, the future of Indian tribes and families is in jeopardy.

Proposal 4: Amend the ICWA to guarantee consideration of biological parents' preferences in the context of voluntary adoption. An example of such an amendment would adjust the ICWA to shift the burden to the contesting party to show that the parents' preferences for the adoption of their child are *not* in the child's best interest. Such an amendment would bring the ICWA more in line with the fundamental parental rights acknowledged in *Troxel* while still honoring the context and authority of tribal courts over custody proceedings. Such an amendment to the ICWA would also recognize the consensual and political nature of membership in a tribal community and appropriately value the parents' choice to raise their child outside of such a community. Further, the tribal court would be free to consider the tribe's interests as a counterbalance to the parents' preferences, but under this proposal, the tribal court must at least consider the biological parents' wishes. This consideration would jointly honor the tribe's authority and the individual citizenship of its members. In order to ensure that biological parents' preferences are not dispositive as to the adoption of the child and that the interests of the tribe are properly considered, state courts should also model the cooperative dispute resolution processes used in tribal

family into an extended family unit, as opposed to a nuclear family model, which recognizes a clear delineation between the two family units).

326. *See* ATWOOD, *supra* note 4, at 244 n.167 (quoting *Indian Child Welfare Joint Hearing Before the Senate Comm. Of Indian Affairs and House Resources Comm.* (1997) (testimony of Deborah Doxtator)).

327. *Id.* at 278 (describing the White Earth Band of Ojibwe's Customary Adoption Code, which affirms the tribe's commitment to the preservation of a child's identity as a tribal member and member of an extended family and clan, while also providing a sense of permanency and belonging). Under the Customary Adoption Code, a customary adoption is defined broadly to mean "a traditional tribal practice recognized by the community and tribe which gives the child a permanent parent-child relationship with someone other than the child's birth parents," while suspending, but not permanently terminating, the biological parents' rights. *Id.*

328. *Id.* at 278–79. *See also* Watts, *supra* note 15, at 254.

courts, as well as consider tribal values, culture, and customs in child-rearing.[329] "State courts that recognize the Indian child's multiple identities, emotional ties, and potential allegiances in trying to determine the best placement" promote an individualized application of the ICWA without avoiding the law altogether.[330]

CONCLUSION

The ICWA is fraught with tension. Adoptive parents, biological parents, tribes, state governments, tribal courts, and the United States government all have an interest in protecting Indian children.[331] The child herself has interests, too. The ICWA acknowledges the areas where those interests overlap—tribes have an interest in preserving their future, and this future is incarnate in their children today. Children and parents—biological and adoptive—have an interest in the early years of a child's life not being disrupted by lengthy custody proceedings and complicated appeals. However, the tribe is protected with a jurisdictional presumption against the state, and adoptive parents find themselves in potentially unfavorable forums when they seek to adopt Indian children.

History has demonstrated a compelling state interest in protecting the original purpose of the ICWA: Indian children. While the ICWA is controversial, the plenary power of Congress to regulate Indian affairs is broad, and the ICWA sits squarely within it. Even when faced with the difficult cases such as Baby O, A.L.M., and Child P, courts are equipped with precedent that suggests that the interests of the tribe, the biological parents, and the adoptive parents can be resolved in a way that serves the best interests of the child. In *Zinke*, the district court lost track of the original purpose of the ICWA by severing the best interests of the child from the future of the tribe. On appeal, the Fifth Circuit acted to protect Indian children and their tribes by preserving the constitutionality of the ICWA. However, the future of Indian children and

329. *See* O'Connor, *supra* note 239, at 3. Tribal Court systems are marked by their focus on a cooperative dispute resolution process, which is particularly useful where family issues are involved. *Id.*

330. ATWOOD, *supra* note 4, at 249. *See also* Hawkins-Leon, *supra* note 325, at 217 (suggesting that when the "child-centered" approach to adoption is applied, and the children's and parents' rights conflict, the system has traditionally protected the child, thus giving support to the theory that the extended family model of adoption, rather than simply viewing the adoption in the context of a nuclear family, is appropriate for adoption).

331. *See* Hawkins-Leon, *supra* note 325, at 201 (pointing out at least five competing interests in the adoption process, including the child, the biological parents, the adoptive parents, the agency or attorney arranging the adoption, and the state).

their tribes is about more than protection and preservation of a statutory scheme or a child's best interests. It is about remembering.

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