

Notes and Comments

THE INDIAN CHILD WELFARE ACT'S WANING POWER AFTER *ADOPTIVE COUPLE V.* *BABY GIRL*

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ABSTRACT—In the 1970s, state authorities began removing Indian children from their homes by the thousands and placing them into foster care, institutional housing, and with white families. To counteract this forced assimilation, Congress passed the Indian Child Welfare Act (ICWA) in 1978. The ICWA conferred many powers previously held by the states to tribal courts and created a preference for Indian children to be placed with their extended family, other members of their tribe, or other Indian families. Despite congressional efforts, the practice of removing Indian children from their homes still persists. Many states resist the ICWA through judicially created exceptions to its application. Other states reject these exceptions and apply the ICWA more broadly. Confusion about the scope of the ICWA's authority came to a head in *Adoptive Couple v. Baby Girl*, decided by the Supreme Court in June 2013. This Note considers *Adoptive Couple* against the backdrop of the tug-of-war among tribes, states, and the federal government and attempts to define the boundaries of authority within the context of the ICWA. Part I describes the condition of state and tribal relations leading up to *Adoptive Couple*. Part II provides an analysis of *Adoptive Couple*. Part III explores the implications of this decision and concludes with proposed legislation to clarify, and consequently preserve, the power of the ICWA.

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INTRODUCTION

By paralyzing the ability of the tribe to perpetuate itself, the intrusion of a State in family relationships within the Navaho Nation and interference with a child’s ethnic identity with the tribe of his birth are ultimately the most severe methods of undermining retained tribal sovereignty and autonomy.¹

Indian² tribal sovereignty predates the U.S. Constitution.³ Although not fully sovereign, Indian tribes retain their “original natural” right of self-government.⁴ This unique sovereign-within-a-sovereign relationship is not without an equally unique myriad of conflicts and cultural tensions. One tragic example of this cultural tension manifested in the 1970s when state authorities began removing Indian children from their homes by the thousands and placing them into foster care, institutional housing, and with white families.⁵

Congress recognized this forced assimilation trend and sought to counteract it by passing the Indian Child Welfare Act (ICWA) in 1978.⁶ The ICWA conferred many powers previously held by the states, such as

¹ AM. INDIAN POLICY REVIEW COMM’N, 94TH CONG., REP. ON FED., STATE, AND TRIBAL JURISDICTION 86 (Comm. Print 1976) [hereinafter TASK FORCE], available at <http://www.narf.org/icwa/federal/lh/76rep/76rep.pdf> [<http://perma.cc/PB83-L32H>].

² For consistency with the Indian Child Welfare Act’s terminology, this Note uses the term “Indian” instead of Native American or American Indian.

³ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (describing the longstanding federal recognition of Indian semi-sovereignty).

⁴ *Id.* at 55 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

⁵ See H.R. REP. NO. 95-1386, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7531, 1978 WL 8515.

⁶ See 25 U.S.C. §§ 1901–1902 (2012).

certain adoption proceedings, to tribal courts.⁷ It also created a preference for Indian children to be placed with their extended family, other members of their tribe, or other Indian families.⁸

Despite congressional efforts, the practice of removing Indian children from their homes still persists. Janice Howe offers an example of one such story: Her one-year-old twin grandchildren were taken from her daughter's home after social workers told Howe that her daughter was going to be arrested for drug possession.⁹ Strangely, the social worker did not take the other two grandchildren—two girls aged five and six. Despite the fact that other family and tribe members wanted to care for the children, they were placed in a white foster home 100 miles away.¹⁰ Howe's daughter was never arrested and they later discovered that the social worker based her accusations on a rumor.¹¹

Two months later, Howe was waiting at the school bus stop to pick up her other two grandchildren, "but when the bus came, the girls weren't on it."¹² Without so much as a phone call, a social worker had taken the girls from their school and placed them in homes with white families.¹³ Howe spent the next year-and-a-half writing to state and federal government employees with no success. Then the tribal council threatened the state with kidnapping charges. A few weeks later, all four grandchildren were returned. But rather than providing an apology, the state warned: "We can take them back at any time."¹⁴

Tragedies like this continue to occur when states misapply the ICWA. Many states resist the ICWA through judicially created exceptions to its application.¹⁵ Other states reject these exceptions and apply the ICWA

⁷ See *id.* § 1911.

⁸ *Id.* § 1915.

⁹ Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011, 12:00 PM), <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system> [<http://perma.cc/JH35-287Z>].

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *All Things Considered: Native Foster Care: Lost Children, Shattered Families* (NPR radio broadcast Oct. 25, 2011) (transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=141672992> [<http://perma.cc/4U7R-CECA>]).

¹⁵ See, e.g., Cheyana L. Jaffke, *Judicial Indifference: Why Does the "Existing Indian Family" Exception to the Indian Child Welfare Act Continue to Endure?*, 38 W. ST. U. L. REV. 127, 136 (2011) (describing the "existing Indian family" exception); Erik W. Aamot-Snapp, Note, *When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements*, 79 MINN. L. REV. 1167, 1181–82 (1995) (discussing the "good cause" exception).

more broadly.¹⁶ Confusion about the scope of the ICWA's authority came to a head in *Adoptive Couple v. Baby Girl*,¹⁷ decided by the Supreme Court in June 2013.

Adoptive Couple involved an Indian father, Dusten Brown, who terminated his parental rights outside the tribal court, unaware that the mother intended to place the child for adoption.¹⁸ Under the ICWA, Mr. Brown's consent to terminate parental rights would not be valid.¹⁹ Upon learning of the mother's adoption plans, Mr. Brown withdrew his consent and sought custody of his daughter.²⁰ The issue came before the South Carolina Supreme Court, which reluctantly held that the ICWA applied and granted custody to Mr. Brown.²¹ Two years later, the United States Supreme Court reversed this decision by applying a narrow exception to the ICWA sections governing parental rights termination.²² Some believed this case would settle once and for all whether courts should employ the judicially created exceptions to the ICWA.²³ However, because the exception was so narrowly considered, it is unclear how this ruling affects the overall scope of the ICWA's authority.

This Note considers *Adoptive Couple* against the backdrop of the tug-of-war among tribes, states, and the federal government and attempts to define the boundaries of authority within the context of the ICWA. Part I describes the condition of state and tribal relations leading up to *Adoptive Couple*. This Part begins with a brief history of the conflict between Indian tribes and state governments during the 1970s. It then moves into the

¹⁶ See, e.g., *In re A.J.S.*, 204 P.3d 543, 548–49, 551 (Kan. 2009) (discussing the rejection of the existing Indian family doctrine by a majority of the court's sister states and holding that the ICWA applies regardless of a family's current custodial relationship).

¹⁷ *Adoptive Couple v. Baby Girl (Adoptive Couple II)*, 133 S. Ct. 2552 (2013).

¹⁸ *Id.* at 2558; Michael Overall, *Baby Veronica Case: Dusten Brown to Stop Custody Fight for Veronica*, TULSA WORLD, Oct. 10, 2013, http://www.tulsaworld.com/news/baby-veronica-case-dusten-brown-to-stop-custody-fight-for/article_2d903520-319a-11e3-abf1-0019bb30f31a.html [<http://perma.cc/E6Q8-LSPV>].

¹⁹ 25 U.S.C. § 1913(a) (2012) (“Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction . . .”).

²⁰ See *Adoptive Couple II*, 133 S. Ct. at 2558–59.

²¹ *Adoptive Couple v. Baby Girl (Adoptive Couple I)*, 731 S.E.2d 550, 567 (S.C. 2012) (“We do not take lightly the grave interests at stake in this case. However, we are constrained by the law and convinced by the facts that the transfer of custody to Father was required under the law. Adoptive Couple are ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl. . . . Because this case involves an Indian child, the ICWA applies and confers conclusive custodial preference to the Indian parent.”), *rev'd*, 133 S. Ct. 2552 (2013).

²² See *Adoptive Couple II*, 133 S. Ct. at 2557.

²³ See, e.g., Marcia Zug, *Adoptive Couple v. Baby Girl: Two-and-a-Half Ways to Destroy Indian Law*, 111 MICH. L. REV. FIRST IMPRESSIONS 46 (2013), available at <http://www.michiganlawreview.org/articles/em-adoptive-couple-v-baby-girl-em-two-and-a-half-ways-to-destroy-indian-law> [<http://perma.cc/G4PG-58L7>].

actions taken by Congress to remedy the tragic separation of Indian families. Lastly, it discusses the states' reactions to the ICWA and identifies the conflicts that arose from the allocation of state power to Indian tribes. Part II provides an analysis of *Adoptive Couple*. It begins with a background and summary of the case. It then examines the Supreme Court's motivations and identifies the problems presented by the Court's textual analysis. Part III explores the implications of this decision on application of the ICWA and concludes with proposed legislation. The first proposed change adds language to the ICWA's policy statement removing the possibility that physical custody be required for the ICWA to apply. The second proposed change provides definitions for terms within the ICWA that tend to be the source of misinterpretation. The final change removes the "good cause" exception that is commonly used to bypass the ICWA's placement preferences. These proposed legislative changes will clarify, and consequently preserve, the power of the ICWA.

I. HISTORICAL OVERVIEW OF THE ICWA

A. *The Most Precious Resource—Social Services Attack Indian Tribes*

[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children²⁴

Before the ICWA was passed in 1978, a shocking trend was discovered among social service workers in Indian tribes: Indian children were being torn from their homes in record numbers and placed with non-Indian families.²⁵ For example, in Minnesota (one of the worst offenders) more than one in eight Indian children were adopted.²⁶ Of these, 97.5% were adopted by non-Indian families.²⁷ Also, 16.5 times as many Indian children were taken from their homes and placed into foster care as non-Indian children.²⁸ Removing Indian children in this manner is hauntingly similar to assimilation attempts made in the 1800s when Indian children were removed from their homes and placed in white-run boarding schools.²⁹

Perhaps more shocking are the reasons given for these removals. Social workers removed children because of abuse in only 1% of cases; in

²⁴ § 1901(3).

²⁵ See H.R. REP. NO. 95-1386, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7531, 1978 WL 8515.

²⁶ TASK FORCE, *supra* note 1, at 82.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 602 (2002).

the other 99% of cases they removed children for social deprivation or neglect.³⁰ Because social workers were ignorant of tribal culture and family norms, they frequently found neglect or abandonment simply because children were being raised outside the nuclear family.³¹ But in many tribes it is common for children to have several relatives responsible for their care.³² Furthermore, standards based on middle-class values discriminated against placing Indian children with Indian families.³³ The result was the gradual assimilation of children and devastation of Indian tribal integrity.³⁴ This forced assimilation harms both Indian tribes and the children placed in non-Indian homes.

Indian tribes, as semi-sovereigns, have an interest in survival and the authority to self-govern.³⁵ The Supreme Court has recognized that Indian tribes are “distinct, independent political communities.”³⁶ In order to survive, tribes must preserve their number of members; without members there can be no self-government and these distinct communities will cease to exist. The only way for tribes to avoid extinction is through procreation, not only as a means of maintaining tribal membership numbers, but also as a means of passing on their cultural ideals and practices.

Removing Indian children from their tribe also harms the child because it often deprives them of their rich cultural heritage. A group of adult Indian adoptees filed an amicus brief on behalf of the birth father in *Adoptive Couple*.³⁷ In their brief, they detail difficulties each of them faced after being removed from their Indian tribe. The process of immersing themselves into their tribe’s culture was often difficult and caused conflict between the adoptee and the adoptive parents.³⁸ One adoptee expressed that she felt shame and anxiety as there was no one in her life to teach her how to be “a Lakota girl.”³⁹

The Howe family, discussed above, provides another striking example of how even temporary removal can be harmful to Indian children. When

³⁰ H.R. REP. NO. 95-1386, at 10, *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532, 1978 WL 8515. These findings were based on a North Dakota study and a study of tribes in the American Northwest. *Id.*

³¹ *Id.*

³² *Id.* (explaining that Indian families often did not resemble the nuclear family valued by these agencies).

³³ *Id.* at 11, *reprinted in* 1978 U.S.C.C.A.N. at 7533.

³⁴ See TASK FORCE, *supra* note 1, at 78–79.

³⁵ See Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 3–4 (2008).

³⁶ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

³⁷ Brief for Amici Curiae Adult Pre-ICWA Indian Adoptees Supporting Birth Father and the Cherokee Nation at 1, *Adoptive Couple II*, 133 S. Ct. 2552 (2013) (No. 12-399).

³⁸ See *id.* at 14–16.

³⁹ *Id.* at 16.

Janice Howe's grandchildren were returned to her home, they no longer remembered their native dance.⁴⁰ The oldest granddaughter faced a unique struggle as she tried to integrate back into her tribe. According to her grandmother: "She's got to be getting ready to learn these things that she has to do in order to become a young lady. They took a year and a half away from us. How are we going to get that back?"⁴¹ Although the children were only absent from their tribe for a year-and-a-half, they had lost a part of themselves, a part that connected them to their culture.

B. Congress Intervenes—The Creation of the ICWA

In response to the devastating trend of removing Indian children from their homes, Congress passed the ICWA in 1978 to establish minimum federal standards for removing Indian children from their families and placement standards that reflect Indian cultural values.⁴² To accomplish these objectives, Congress put several requirements on state family courts that altered their common practices, and in some cases, removed jurisdiction altogether. The following describes several relevant sections of the Act necessary to understand the backdrop for *Adoptive Couple*.

Section 1911 confers exclusive jurisdiction to tribal courts over any child custody proceeding involving an Indian child who is domiciled on a reservation.⁴³ This section also instructs the state court to transfer proceedings to a tribal court even if the Indian child is not domiciled on a reservation, absent good cause or parental objection.⁴⁴

Section 1912 establishes protections for Indian parties in any involuntary court proceedings related to foster placement or termination of parental rights.⁴⁵ Subsection (a) requires a state court to notify an Indian parent or custodian and the Indian child's tribe if the court knows or has reason to know that an Indian child is involved in the proceedings. Subsection (d) requires any party seeking to adopt an Indian child to make active efforts to "prevent the breakup of the Indian family."⁴⁶ Subsections (e) and (f) relate to foster care placement orders and involuntary parental rights termination orders.⁴⁷ These subsections require a showing of clear

⁴⁰ Sullivan & Walters, *supra* note 11.

⁴¹ *Id.*

⁴² 25 U.S.C. § 1901 (2012).

⁴³ *Id.* § 1911(b). According to the Supreme Court, a child is domiciled on a reservation if that reservation is the mother's domicile. It is unclear whether the father's domicile would be sufficient if the mother were not also domiciled on the reservation. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

⁴⁴ § 1911.

⁴⁵ Subsections (b) and (c) of § 1911 are not relevant to the issues presented in this Note.

⁴⁶ § 1912(d).

⁴⁷ *Id.* § 1912(e), (f).

and convincing evidence that the continued custody of the child by the Indian parent or custodian “is likely to result in serious emotional or physical damage to the child.”⁴⁸

Section 1913 provides special protections to Indian parents who are voluntarily terminating their parental rights.⁴⁹ This section includes two significant departures from traditional family law. First, to voluntarily terminate parental rights, an Indian parent must execute the consent in writing before a judge.⁵⁰ The presiding judge must provide a certificate showing that the consequences of consent were fully explained and were fully understood by the Indian parent or custodian.⁵¹

By contrast, for non-Indian voluntary termination of parental rights, state statutes set the procedures. For example, Kansas requires that consent be in writing and acknowledged by a judge or officer.⁵² Texas requires an affidavit by the parent to be signed by two credible persons and verified before a person authorized to take oaths, so the person terminating his or her rights never even needs to stand before a judge.⁵³

Second, § 1913 allows Indian parents who have consented to foster care placement or termination of their rights to withdraw this consent “at any time prior to the entry of a final decree of termination or adoption.”⁵⁴ If the parent chooses to withdraw consent, the child is returned to the parent.⁵⁵ This is drastically different from state approaches to withdrawal of consent. In most states, a parent cannot withdraw consent simply because of a change of heart.⁵⁶

Section 1915 provides adoptive and foster care placement preferences for Indian families.⁵⁷ The placement preference proceeds in the following order: “(1) a member of the child’s extended family; (2) other members of

⁴⁸ *Id.* § 1912(f).

⁴⁹ *Id.* § 1913(b).

⁵⁰ *Id.* § 1913.

⁵¹ *Id.*

⁵² KAN. STAT. ANN. § 59-2114 (2013). Notably, the court must only advise the consenting person of the consequences of the consent if a judge gives the acknowledgment. *Id.* (“If consent is acknowledged before a judge of a court of record, it shall be the duty of the court to advise the consenting person of the consequences of the consent.”).

⁵³ TEX. FAM. CODE ANN. § 161.103 (West 2013).

⁵⁴ 25 U.S.C. § 1913.

⁵⁵ *Id.*

⁵⁶ 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 6:7 (rev. 2d ed. 2005). Some states provide a time period in which a natural parent can withdraw consent for any reason. Other states allow revocation if it is in the best interests of the child, for good cause, or the consent was obtained by fraud, duress, undue influence, or mistake. *Id.*

⁵⁷ 25 U.S.C. § 1915. The term “social standards” refers specifically to common child-rearing practices such as discipline and the participation of extended family in caring for children. H.R. REP. NO. 95-1386, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532, 1978 WL 8515.

the Indian child's tribe; or (3) other Indian families."⁵⁸ It is one of the most controversial sections of the ICWA because it necessarily requires the consideration of race when placing children in adoptive homes.⁵⁹ Section 1915 also requires the court to consider the social standards of the Indian community with the closest ties to the child.⁶⁰ The language of this provision is meant to address the issue of social workers basing their assessment on middle-class standards when determining foster placements for Indian children.⁶¹

These provisions highlight the areas of potential conflict among federal, state, and tribal courts. Before the ICWA was enacted, child custody proceedings were solely in the purview of state courts. Many states resented this federal venture into family law⁶² and have developed judicial exceptions that allow them to dodge the additional ICWA requirements and maintain control over child custody proceedings.

C. *The Fallout—States Reject Reallocation of Power*

Despite the extensive measures taken by Congress, many states continue to remove Indian children from their tribes. A 2011 study in South Dakota revealed that over half the foster care population is made up of Indian children even though they make up less than 15% of the state's child population.⁶³ Many of the study's findings reflect those found in the investigation performed by Congress in 1976. For example, Indian children remain more than twice as likely to be placed in foster care, and nearly 90% of these children are placed in non-Indian homes or group care.⁶⁴ Less than 12% are removed for physical abuse; the majority of children are still removed for neglect.⁶⁵

⁵⁸ § 1915.

⁵⁹ One California case found this provision to be unconstitutional. See *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 726 (Cal. Ct. App. 2001) ("We do not, however, see that interest being served by applying the ICWA to a multiethnic child who has had a minimal relationship with his assimilated parents, particularly when serving the tribal interests 'can serve no purpose which is sufficiently compelling to overcome the child's fundamental right to remain in the home where he . . . is loved and well cared for, with people to whom the child is daily becoming more attached by bonds of affection and among whom the child feels secure to learn and grow.'" (alteration in original) (quoting *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 526–27 (Cal. Ct. App. 1996))). The issue of racial considerations in the adoption context is outside the scope of this Note. For a discussion on racial considerations under the ICWA as compared to other adoptions, see Maldonado, *supra* note 35, at 32–33.

⁶⁰ § 1915.

⁶¹ H.R. REP. NO. 95-1386, at 11, reprinted in 1978 U.S.C.C.A.N. at 7533.

⁶² See Patrice H. Kunesh, *Borders Beyond Borders—Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act*, 42 NEW ENG. L. REV. 15, 59 (2007).

⁶³ Sullivan & Walters, *supra* note 11.

⁶⁴ *Id.*

⁶⁵ *Id.* According to officials from several South Dakota tribes, social workers frequently cite "neglect" as a reason for removing Indian children simply because the family is poor. Additionally,

States continue to deplete Indian tribes through two judicial maneuvers. First, state courts often use the “[E]xisting Indian [F]amily Exception” (EIFE).⁶⁶ The EIFE allows courts to avoid application of the ICWA altogether.⁶⁷ Second, state courts will often apply a lenient “good cause” standard to avoid the placement preferences required by § 1915.⁶⁸ Importantly, although many states apply these exceptions, others have explicitly declined to do so.⁶⁹

1. *The Existing Indian Family Exception.*—The EIFE allows a court to first determine whether a child was removed from an existing Indian family before applying the ICWA; if it finds no such existing Indian family, the ICWA does not apply.⁷⁰ The logic behind the EIFE rests with what state courts have deemed the primary congressional purpose: “to prevent the breakup of the Indian family.”⁷¹ If a child does not belong to an Indian family, then his removal does not constitute a breakup of the Indian family unit.

The EIFE first appeared in *In re Adoption of Baby Boy L.*, a Kansas case involving a non-Indian mother and an Indian father who were not married.⁷² The court found that because the child had never lived with the Indian father the ICWA did not apply.⁷³ The court relied primarily on language in the ICWA such as the “breakup of Indian family” and “continued custody.”⁷⁴ According to the court, this language indicated that

because of a high turnover rate with social workers involved with the tribes, many social workers have little experience with tribal culture. This lack of familiarity with the culture leads to a misunderstanding of common practices such as allowing extended family to care for a child for an extended period of time. *Id.*

⁶⁶ See Jaffke, *supra* note 15, at 136.

⁶⁷ *Id.*

⁶⁸ See *infra* Part I.C.2 (describing the “good cause” standard).

⁶⁹ See, e.g., *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 931–32 (N.J. 1988) (finding that the existing Indian family doctrine is contrary to the ICWA’s text and congressional purpose).

⁷⁰ *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175–76 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

⁷¹ *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988) (holding that where a child was given up for adoption “at the earliest practical moment after childbirth,” the adoption proceeding was not a breakup of the Indian family and therefore the ICWA does not apply).

⁷² 643 P.2d 168.

⁷³ *Id.* at 175 (“A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not 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 primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.”).

⁷⁴ *Id.* (citing 25 U.S.C. § 1912(d)–(f)).

Congress only intended for children currently in the custody of an Indian parent to be covered by the Act.⁷⁵ Notably, the Kansas Supreme Court overruled this case in a 2009 decision and abandoned the EIFE doctrine.⁷⁶ However, other states continue to apply this exception to avoid the ICWA's application.⁷⁷

Courts have applied the EIFE in a variety of ways. For example, courts have applied it in ways that make a parent's Indian affiliation immaterial to the decision.⁷⁸ Similarly, courts have used it when a child is adopted directly from the hospital and never lived with an Indian family.⁷⁹ Courts also use the EIFE when they want to decide whether the family is "Indian enough" for the ICWA to apply, regardless of the length of time the child has been in the Indian family's custody.⁸⁰ Rather than saying that the child has not lived with an Indian family long enough to establish connections, this interpretation of the EIFE lets the court make a determination about a family's level of "Indian-ness."

The court in *In re Adoption of Crews* used the EIFE for precisely this purpose.⁸¹ The court faced the question of whether the ICWA can invalidate a termination of parental rights entered under state law, but not in accordance with the ICWA's procedures.⁸² Tammy Crews, a woman with Indian ancestry, decided to place her unborn child for adoption and signed a consent form to terminate her parental rights in accordance with state law.⁸³ A few days after giving birth, Tammy called the adoption agency to request the return of her baby.⁸⁴ When the baby was not returned to her, she contacted the Bureau of Indian Affairs and eventually the Choctaw Nation of Oklahoma intervened.⁸⁵ They confirmed that Tammy

⁷⁵ *Id.*

⁷⁶ *In re A.J.S.*, 204 P.3d 543, 549–51 (Kan. 2009) (holding that the EIFE was inconsistent with the clear language and policy of the ICWA).

⁷⁷ *See, e.g.*, *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995); *In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997).

⁷⁸ *See, e.g.*, *In re Adoption of T.R.M.*, 525 N.E.2d at 303; *In re Adoption of Baby Boy L.*, 643 P.2d at 178.

⁷⁹ *See, e.g.*, *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1985), *overruled by In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004).

⁸⁰ *See, e.g.*, *In re Adoption of Crews*, 825 P.2d 305, 310 (Wash. 1992) (en banc) (holding that the ICWA does not apply "when an Indian child is not being removed from an Indian cultural setting," and thus applying the ICWA would not return the Indian child to an Indian environment).

⁸¹ *Id.*

⁸² *Id.* at 308.

⁸³ *Id.* at 307. There was some dispute as to whether the adoption agency knew that Tammy had Indian ancestry sufficient to place the adoption within the ICWA's scope.

⁸⁴ *Id.*

⁸⁵ *Id.* at 307–08.

was eligible for enrollment and, therefore, the ICWA's procedures must be followed.⁸⁶

Despite finding that the baby was an Indian child under the Choctaw Constitution, the court refused to apply the ICWA.⁸⁷ The court based its decision on several facts: neither Tammy nor her family ever lived on the Choctaw reservation, Tammy had no plans to move to the reservation, Tammy showed no interest in her Indian heritage, and Tammy proffered no evidence that the child would grow up in an Indian environment.⁸⁸ Because the child was not removed from (and could not be returned to) an Indian family, the court deemed it unnecessary to apply the ICWA.⁸⁹

Crews illuminates a common problem with using the EIFE to avoid application of the ICWA: it places the determination of what constitutes an Indian family—a determination based largely on cultural values—with the state courts. This application is especially damaging to the ICWA's purposes because it necessarily involves determining what constitutes a family unit and cultural membership.

Much of the tension between state and tribal governments arises from a fundamental difference in the way each side defines “family.” American law is trending toward an affirmative view of family.⁹⁰ That is, rather than depending solely on blood ties, the law is looking more toward what actions people take to be part of a family. A good example of this is found in establishing rights for unwed, biological fathers. In many states, a biological connection merely creates an opportunity for legal rights; to achieve legal rights the father must establish a relationship with the child.⁹¹ Some suggest that, in American society, even race is becoming less tied to biology and more tied to social constructs.⁹²

On the other hand, tribal membership depends heavily on biological ties. Virtually every tribe requires Indian ancestry for membership.⁹³ The structure and language of the ICWA reinforces biological ties as the basis

⁸⁶ *Id.* at 308.

⁸⁷ *Id.* at 310.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See, e.g.,* *Lehr v. Robertson*, 463 U.S. 248 (1983) (holding that an unmarried father who has not established a relationship with his child is not constitutionally entitled to notice of a pending adoption); *In re Adoption of R.A.J.*, 201 P.3d 787 (Mont. 2009) (holding that a father's parental rights could not be terminated because of the relationship he forged with the child).

⁹¹ *See, e.g., Lehr*, 463 U.S. at 261.

⁹² *See* Maldonado, *supra* note 35, at 21–22. Maldonado suggests that biological notions of race are disappearing and the court system is adopting a view that race is a social construct. As an example, Maldonado examines the Supreme Court case *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), in which the Court discussed evolving views of racial classification. *Id.*

⁹³ *Id.* at 26.

for identification as Indian.⁹⁴ Congress was fully aware that tribal membership generally depends on blood ties when it utilized tribal membership as a gateway to classification as an Indian family or an Indian child in the ICWA.⁹⁵ When state courts make a determination about who is “Indian enough” for the ICWA to apply, they do so by applying their own cultural values. This is the very thing that Congress was concerned about when it passed the ICWA.⁹⁶

2. *The “Good Cause” Exception.*—The second way that state courts have bypassed the ICWA is through the good cause exception. As discussed above, § 1915 establishes placement preferences for Indian children in adoption proceedings to be placed with the child’s extended family, the child’s tribe, or another Indian tribe.⁹⁷ However, § 1915 gives courts some discretion by allowing them to forego the preference if there is good cause to do so.⁹⁸ Unfortunately, the ICWA does not provide a definition of good cause.

Many state courts have filled this gap by making a “best interests of the child” determination.⁹⁹ The so-called best interests test is used by state courts when making custody determinations.¹⁰⁰ However, it is not appropriate to insert this test as a barrier to § 1915’s placement preferences. The best interests test has resulted in the catastrophic depletion of Indian children from their tribes because it relies heavily on the state court’s cultural values.¹⁰¹ This distrust of best interests determinations was the impetus to pass the ICWA in the first place.¹⁰² Using the best interests test in this way yields the absurd result of states making a cultural determination to bypass a federal act passed in large part to prevent states from making a cultural determination.

One factor that courts consistently use in the best interests test is the child’s need for permanence.¹⁰³ State courts often weigh the nuclear family’s potential involvement in the child’s life heavily when determining

⁹⁴ *Id.* at 27.

⁹⁵ *Id.*

⁹⁶ *See supra* Part I.B.

⁹⁷ 25 U.S.C. § 1915 (2012).

⁹⁸ “In any adoptive placement of an Indian child under State law, a preference shall be given, in the 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.” *Id.* § 1915(a).

⁹⁹ Aamot-Snapp, *supra* note 15, at 1181–82.

¹⁰⁰ *See, e.g.,* Hall v. Hall, 655 S.E.2d 901, 905 (N.C. Ct. App. 2008).

¹⁰¹ Aamot-Snapp, *supra* note 15, at 1182.

¹⁰² *See supra* Part I.B.

¹⁰³ *Id.*

permanence, and ignore the extended family's involvement.¹⁰⁴ However, many Indian communities value extended family involvement and consider a child's time living with various relatives as a sign of permanence.¹⁰⁵

Another factor commonly used by state courts is the attachment the child has to her prospective adoptive parents.¹⁰⁶ Many cases that arise under the ICWA involve prospective adoptive parents who have had the child in their custody throughout the adoption proceedings.¹⁰⁷ Under the best interests test, state courts consider the impact of removing a child from the only home she knows.

However, when a non-Indian adoptive parent has custody of an Indian child it is often because the ICWA's provisions regarding placement preferences were not followed in the first place. In *Mississippi Band of Choctaw Indians v. Holyfield*, the only time the Supreme Court had evaluated the ICWA before *Adoptive Couple*, the Court rejected the argument that attachment to the adoptive parents is a valid consideration in determining whether the state court or tribal court had jurisdiction for that very reason:

Had the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation."¹⁰⁸

It should be noted that the *Holyfield* dispute concerned the provision conferring jurisdiction upon the tribal court and that when the case was remanded, the tribal court decided to allow the child to stay with his adoptive parents based on a best interests test.¹⁰⁹ However, the Supreme Court did not allow the state court to bypass any of the ICWA's provisions. Allowing state courts to use the attachment consideration to bypass the ICWA insults the tribe's very sovereignty and provides an incentive to

¹⁰⁴ See, e.g., *In re Adoption of F.H.*, 851 P.2d 1361, 1365 (Alaska 1993) (finding that placing the child with a nuclear, non-Indian family was in favor of permanence while placing the child with her extended family was not).

¹⁰⁵ Aamot-Snapp, *supra* note 15, at 1182-83.

¹⁰⁶ *Id.* at 1184.

¹⁰⁷ *Id.*

¹⁰⁸ 490 U.S. 30, 53-54 (1989) (quoting *In re Adoption of Holloway*, 732 P.2d 962, 972 (Utah 1986)).

¹⁰⁹ Maldonado, *supra* note 35, at 17 ("Given the Tribe's interest in raising Choctaw children, not to mention the Tribe's significant legal efforts in asserting jurisdiction, one might have expected the Tribal Court to return the twins to the Tribe. However, the Tribal Court balanced the Tribe[s] interest in keeping tribal children in tribal communities against the children's interests in continuity and stability. . . . Judge Jim determined that it was in the twins' best interest to remain with Joan Holyfield.").

prolong litigation so that adoptive couples can show a stronger attachment in the good cause analysis.

It is doubtful that Congress intended state courts to engage in these cultural value judgments when applying (or avoiding) the ICWA. Congress noted in its findings “that the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”¹¹⁰

Furthermore, in the ICWA’s declaration of policy, Congress mandated that the adoptive and foster placement of Indian children “reflect the unique values of Indian culture.”¹¹¹ It is hard to conceive of language that more explicitly limits state courts’ judicial discretion when making cultural judgments. However, as the following Part shows, state sovereignty considerations appear to outweigh these policy concerns.

II. BABY VERONICA BRINGS THE ICWA BACK TO THE SUPREME COURT

It was against a backdrop of tension between sovereignties that *Adoptive Couple v. Baby Girl* was decided on June 25, 2013. For the second time, the Supreme Court found itself interpreting the ICWA. In an opinion that largely ignores Congressional policy and the clear language of the Act, the Supreme Court held that §§ 1912(d), (f), and 1915 do not apply to Indian parents who do not have preexisting custody of their child.

A. *Adoptive Couple v. Baby Girl—Facts and Lower Court Decisions*

Dusten Brown—a member of the Cherokee Nation—and Christina Maldonado were engaged when they learned that Ms. Maldonado was pregnant.¹¹² After a tumultuous engagement, Ms. Maldonado called off the wedding and cut off communication with Mr. Brown.¹¹³ After not hearing from Ms. Maldonado for nearly three months, Mr. Brown received a text message presenting him with a choice: pay child support or relinquish all parental rights.¹¹⁴ Mr. Brown chose to relinquish his rights.¹¹⁵

Ms. Maldonado’s attorney contacted the Cherokee Nation to see if Mr. Brown was formally enrolled; however, because the attorney’s letter misspelled Mr. Brown’s name, the Cherokee Nation responded that they could not verify tribal membership.¹¹⁶ Ms. Maldonado selected Adoptive

¹¹⁰ 25 U.S.C. § 1901(5) (2012).

¹¹¹ *Id.* § 1902.

¹¹² *Adoptive Couple II*, 133 S. Ct. 2552, 2558 (2013).

¹¹³ *Id.*

¹¹⁴ *Adoptive Couple I*, 731 S.E.2d 550, 553 (S.C. 2012).

¹¹⁵ *Adoptive Couple II*, 133 S. Ct. at 2558.

¹¹⁶ *Id.*

Couple, both non-Indians, to adopt her baby, Baby Veronica.¹¹⁷ Four months after Baby Veronica was born, Adoptive Couple notified Mr. Brown of the pending adoption. Mr. Brown signed papers indicating he would not contest the adoption, but later testified that he did not understand he was consenting to an adoption—rather, he believed he was relinquishing his rights only to Ms. Maldonado so she could raise Baby Veronica.¹¹⁸ At this point, Mr. Brown contacted an attorney to contest the adoption.¹¹⁹

Both the family court and the South Carolina Supreme Court awarded custody to Mr. Brown.¹²⁰ The South Carolina Supreme Court found that Baby Veronica was an Indian child and that Mr. Brown was a parent as defined in the ICWA.¹²¹ It then awarded custody to Mr. Brown based on the ICWA §§ 1912 and 1915. First, Adoptive Couple did not make active efforts to provide services designed to prevent the breakup of the Indian family as required in § 1912(d).¹²² Second, Adoptive Couple did not show that Mr. Brown's custody of Baby Veronica would result in serious emotional or physical harm as required by § 1912(f).¹²³ Last, even if Mr. Brown's rights had been terminated, § 1915's placement preferences would apply.¹²⁴ Because awarding custody to Adoptive Couple would violate the ICWA, the court reluctantly awarded custody to Mr. Brown.¹²⁵ At the time custody was awarded, Baby Veronica had lived with Adoptive Couple for nearly three years.¹²⁶

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2559.

¹²¹ *Id.* (citing *Adoptive Couple I*, 731 S.E.2d 550, 560 (S.C. 2012)).

¹²² *Id.*; see also 25 U.S.C. § 1912(d) (2012) (“Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family* and that these efforts have proved unsuccessful.” (emphasis added)). Because the biological parents’ parental rights must be terminated prior to adoption, § 1912 applies to both adoptions and foster care placements.

¹²³ *Adoptive Couple II*, 133 S. Ct. at 2559; see also § 1912(f) (“No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, *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.*” (emphasis added)).

¹²⁴ *Adoptive Couple II*, 133 S. Ct. at 2559. “In any adoptive placement of an Indian child under State law, a preference shall be given, *in the 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.*” § 1915(a) (emphasis added).

¹²⁵ *Adoptive Couple I*, 731 S.E.2d, at 567 (“[W]e are constrained by the law and convinced by the facts that the transfer of custody to Father was required under the law. Adoptive Couple are ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl. Thus, it is with a heavy heart that we affirm the family court order.”).

¹²⁶ See *id.*

B. Adoptive Couple v. Baby Girl—*The Supreme Court Decision*

After losing custody in the South Carolina Supreme Court, Adoptive Couple sought help in the U.S. Supreme Court. In an opinion written by Justice Alito, the Supreme Court ultimately rejected the application of both §§ 1912 and 1915. It refused to apply § 1912(d) and (f) based on the lack of an existing relationship between Mr. Brown and Baby Veronica.¹²⁷ Section 1915 was rejected because no interested Indian parties petitioned for custody at the time proceedings commenced. The Court reversed the South Carolina Supreme Court's decision, concluding that the ICWA does not apply, and remanded to the state court for a custody determination in favor of Adoptive Couple.¹²⁸

The first line of the Court's opinion sets the stage for hostility toward application of the ICWA: "This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."¹²⁹ The Court echoes this sentiment when it begins its legal analysis: "[H]ad Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law."¹³⁰ Before explaining why the ICWA would not apply in the case, the Court emphasized Baby Veronica's low percentage of Indian blood—despite the fact that the outcome would have been the same even if Baby Veronica was half-Indian rather than 3/256. The message is clear: This Court will not allow a drop of Indian blood to take custody-determination power away from state courts.

The textual acrobatics employed by the U.S. Supreme Court in *Adoptive Couple* are particularly striking. The majority's reasoning is logical if one accepts its foundational premise—that parents must forge a relational bond with their offspring to receive parental rights. The problem is that premise finds no support in the ICWA's text. Without providing justification, the Court imposes the often-used state characterization of a family, one which requires a parent to forge a relational bond with their offspring to receive the rights of parenthood.¹³¹ The Court then uses this definition as a lens through which it interprets each disputed section of the ICWA. In this way the Court is able to assume that Mr. Brown falls within

¹²⁷ *Adoptive Couple II*, 133 S. Ct. at 2559–62.

¹²⁸ *Id.* at 2565.

¹²⁹ *Id.* at 2556.

¹³⁰ *Id.* at 2559.

¹³¹ See *id.* at 2562 ("And as a matter of both South Carolina and Oklahoma law, Biological Father never had *legal* custody either."); *id.* at 2565 ("As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests."); *id.* at 2558 ("Indeed, Biological Father made no meaningful attempts to assume his responsibility of parenthood during this period." (internal quotation marks omitted)).

the ICWA definition of parent¹³² while simultaneously stripping him of all substantive protections provided to parents under the ICWA.¹³³ The Court's analysis of both the congressional intent and text is flawed.

1. § 1912(f): Continued Custody.—The Court first examined the requirements of § 1912(f) that “[n]o termination of parental rights may be ordered” without first determining that “the *continued custody* of the child” by the Indian parent is likely to result in harm.¹³⁴ The Court asserted that the primary purpose of the ICWA was to keep Indian families intact, meaning that the ICWA should not apply if the child is not residing with an Indian family.¹³⁵ To support this assertion, the Court cited to House Report 1386: “[T]he purpose of [the ICWA] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the *removal* of Indian children from their families.”¹³⁶

However, the Court failed to address the stability of Indian tribes or that one of the ICWA's stated purposes is to preserve Indian tribes as well as Indian families.¹³⁷ The Court's focus was on the *family* unit as defined by the state rather than the *tribal* unit. As discussed above, this approach is typical of many state courts as they determine whether a child is Indian or not.¹³⁸ This mirroring of state court reasoning shows both the Court's support of state power over custody determinations and its own reluctance to involve itself or align itself with the tribal courts.¹³⁹

In addition, the Court emphasized that the ICWA provides no special rights for unwed fathers.¹⁴⁰ The Court agreed with many state courts that the bond created by biology is fragile and must be solidified through actions on the part of the biological father. The Court strongly emphasized the father's responsibility to assert his parental rights rather than placing that burden on the adoptive parents.¹⁴¹ While it is desirable for parents to

¹³² *Id.* at 2560.

¹³³ *Id.* at 2575 (Sotomayor, J., dissenting).

¹³⁴ *Id.* at 2560 (majority opinion) (citing 25 U.S.C. § 1912(f) (2012)).

¹³⁵ *Id.* at 2561.

¹³⁶ *Id.* (citing H.R. REP. NO. 95-1386, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7530, 1978 WL 8515).

¹³⁷ *Id.* “[T]hat Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources[.]” § 1901.

¹³⁸ *See supra* Part I.C.

¹³⁹ Depending on the tribal court, the determination of whether a child is Indian typically relies on blood relation. *See supra* Part I.C.

¹⁴⁰ “None of these three provisions *creates* parental rights for unwed fathers where no such rights would otherwise exist.” *Adoptive Couple II*, 133 S. Ct. at 2563.

¹⁴¹ *Id.* at 2563–64 (“But if prospective adoptive parents were required to engage in the bizarre undertaking of ‘stimulat[ing]’ a biological father’s ‘desire to be a parent,’ it would surely dissuade some

involve themselves in the lives of their children, the ICWA simply does not require a relational bond. To do so excepts many Indian parents from the ICWA, including those with children placed for adoption immediately after birth.

The Court asserted that the phrase “continued custody” necessarily requires a preexisting relationship between the Indian parent and child and framed much of its argument around this point.¹⁴² This is precisely the reasoning used by several state courts to avoid the ICWA’s application through the Existing Indian Family Exception (EIFE).¹⁴³ Thus, while not explicitly doing so, the Supreme Court appears to embrace the state court-created EIFE—at least in cases of an absentee parent who never had physical or legal custody.

The Court wiped out protection under the ICWA for all noncustodial fathers by defining continued custody as “custody that a parent already has (or at least had at some point in the past).”¹⁴⁴ It referred to several dictionaries for the meaning of “continued” and came to the conclusion that “continued” assumes a preexisting state.¹⁴⁵ However, this reasoning not only neglects the other language in § 1912(d), but it also imposes a definition that is neither required nor the most logical possibility.

Under § 1912(f), “[n]o termination of parental rights may be ordered” unless it is shown that “the continued custody of the child by the parent” is likely to result in emotional or physical harm to the child.¹⁴⁶ The majority seems to ignore the first five words of this subsection. As explicitly defined by the ICWA, “termination of parental rights” includes “*any* action resulting in the termination of the parent-child relationship.”¹⁴⁷ It is hard to imagine what words Congress could have used that would have been more inclusive than “no” or “any.” But still, the majority reads this phrase to exclude every parental rights termination proceeding involving noncustodial parents. The dissent is similarly bothered by the majority’s willingness to “disregard[] the Act’s sweeping definition of ‘termination of

of them from seeking to adopt Indian children. And this would, in turn, 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.” (alteration in original) (footnote omitted)).

¹⁴² *Id.*

¹⁴³ *See supra* Part I.C.

¹⁴⁴ *Adoptive Couple II*, 133 S. Ct. at 2560.

¹⁴⁵ *Id.*

¹⁴⁶ 25 U.S.C. § 1912(f) (2012).

¹⁴⁷ *Id.* § 1903(1)(ii) (emphasis added).

parental rights,” and notes that continued custody “simply cannot bear the interpretive weight the majority would place on it.”¹⁴⁸

The next, perhaps more obvious, problem with the majority’s interpretation of continued custody is pointed to by Justice Scalia in his partial dissent: “[T]here is no reason that ‘continued’ must refer to custody in the past rather than custody in the future.”¹⁴⁹ This definition can be just as easily drawn from the dictionary definitions provided by the majority. The majority uses three dictionaries: *Oxford English*, *Webster’s*, and *American Heritage*.¹⁵⁰ Each dictionary, as used by the majority, defines “continued” as follows:

- *Oxford English*: “[C]arried on or kept up without cessation; or extended in space without interruption or breach of connection.”¹⁵¹
- *Webster’s*: “[S]tretching out in time or space esp. without interruption.”¹⁵²
- *American Heritage*: “1. To go on with a particular action or in a particular condition; persist 3. To remain in the same state, capacity, or place.”¹⁵³

One might first notice that none of these definitions foreclose the possibility that “continued” refers to a future state, meaning that throughout the child’s relationship with the parent they will not suffer harm.¹⁵⁴ The *American Heritage Dictionary*’s third definition appears to be the most consistent with the majority’s. However, one might next notice that the Court failed to include the second definition in the *American Heritage Dictionary*: “[t]o exist over a period; last.”¹⁵⁵ This supports Justice Scalia’s theory that continued custody could simply mean prolonged or long-term.

Reading continued custody to mean “to exist over a period” is not only permissible by any of the listed dictionary definitions, but also is in perfect

¹⁴⁸ *Adoptive Couple II*, 133 S. Ct. at 2577 (Sotomayor, J., dissenting). The dissent went on to argue that the definitions provided by the ICWA encourage “continued custody” to include a continuation of the parent–child relationship rather than physical custody as required by the majority. *Id.* at 2577–78.

¹⁴⁹ *Id.* at 2571 (Scalia, J., dissenting).

¹⁵⁰ *Id.* at 2560 (majority opinion).

¹⁵¹ *Id.* (quoting 1 COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 909 (1971)) (brackets and internal quotation marks omitted).

¹⁵² *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 493 (1961)).

¹⁵³ *Id.* (alteration in original) (quoting AMERICAN HERITAGE DICTIONARY 288 (1981)).

¹⁵⁴ *Id.* at 2571–72 (Scalia, J., dissenting) (“I read the provision as requiring the court to satisfy itself (beyond a reasonable doubt) not merely that initial or temporary custody is not likely to result in serious emotional or physical damage to the child, but that continued custody is not likely to do so.” (internal quotation marks omitted)).

¹⁵⁵ AMERICAN HERITAGE DICTIONARY 288.

sync with the ICWA's inclusive terms that clearly reach into all termination of parental rights proceedings, not just those including custodial parents.

2. § 1912(d): *Breakup of the Indian Family*.—The Court then turns to § 1912(d), which requires any party seeking to terminate the parental rights to an Indian child to demonstrate that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”¹⁵⁶ Based on the phrase “breakup of the Indian family,” the Court held that this section only applies when a relationship would be discontinued by the termination.¹⁵⁷ It cannot apply when an “Indian parent abandons an Indian child prior to birth” because the child was never in the parent’s physical or legal custody.¹⁵⁸ The Court bolstered this reasoning by noting that § 1912(d) is placed within the context of § 1912(e) and (f), both of which deal with the continued custody of Indian children, a term which they have already defined as requiring a traditional custodial relationship.¹⁵⁹

The Court flatly contended that there is no family to “breakup” when the parent does not have a relational bond to their child. While the Court went to great pains to define “breakup” they make no such efforts for the term “family.”¹⁶⁰ Instead, the Court presupposed that a familial relationship exists only when the parent has established a relationship with the child. This definition does not comport with the ICWA or tribal definitions of family.

The ICWA defines “parent” as “any biological parent or parents of an Indian child.”¹⁶¹ “Indian child” is defined as a child who is either (1) a member of an Indian tribe or (2) eligible for tribal membership and the biological child of an Indian tribe member.¹⁶² There is no question that Baby Veronica meets the definition of Indian child and the Court assumed that Mr. Brown is a parent under the ICWA. Although the ICWA does not define “family,” it does require that “extended family member” be defined by the law or custom of the Indian child’s tribe.¹⁶³

Baby Girl’s tribe—the Cherokee Nation—bases its tribal membership purely on proof of biological relationship.¹⁶⁴ Also, as discussed above, the

¹⁵⁶ 25 U.S.C. § 1912(d) (2012).

¹⁵⁷ *Adoptive Couple II*, 133 S. Ct. at 2563.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* The Court refers to three dictionaries to define breakup as the discontinuation of a relationship, or ending as an effective entity.

¹⁶¹ § 1903(9).

¹⁶² *Id.* § 1903(4).

¹⁶³ *Id.* § 1903(2).

¹⁶⁴ See Jill E. Tompkins, *Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions*, 81 U. COLO. L. REV. 1119, 1128 (2010) (“In addition, several

Indian definition of family tends to spread much farther than traditional American family to include extended relatives.¹⁶⁵ Significantly, the Cherokee Nation intervened in the adoption proceeding on behalf of the father.¹⁶⁶ In its brief to the Supreme Court, the Cherokee tribe condemned any requirement that the relationship be custodial to be recognized by the ICWA as a family.¹⁶⁷

Last, the dissent points out that there is no reason to exclude the biological relationship from the family definition. As pointed out by the dissent, the ICWA not only defines Baby Girl as an Indian child and Mr. Brown as a parent, but also “further establishes that their ‘parent-child relationship’ is protected under federal law.”¹⁶⁸ The dissent then pointed out that the majority substituted its own policy views simply because “it views their family bond as insufficiently substantial to deserve protection.”¹⁶⁹ A family that does not fit into the mold crafted by the majority is a family nonetheless and is entitled to the protections provided by the ICWA.¹⁷⁰

Rather than implicitly using the relationship-based definition of family offered by the majority, it would be more consistent with the ICWA to give deference to the tribal definition, which depends primarily on biological relationship.¹⁷¹ Doing otherwise demeans tribal sovereignty as recognized by the ICWA and damages the ICWA’s purpose as discussed in the next section.

tribes, such as the Cherokee Nation, have modified their tribal membership criteria from one based on the possession of a minimum quantum of Indian blood to one requiring only that a person demonstrate his or her biological relationship to a tribal member ancestor without regard to blood quantum.”)

¹⁶⁵ See *supra* Part I.C.

¹⁶⁶ *Adoptive Couple I*, 731 S.E.2d 550, 555 (S.C. 2012).

¹⁶⁷ “Congress included *all* such unwed fathers who acknowledge or establish paternity as parents, without regard to the status of the family or the current custody of the Indian child.” Brief for Respondent Cherokee Nation at 23, *Adoptive Couple II*, 133 S. Ct. 2552 (2013) (No. 12-339), 2013 WL 1225770.

Likewise, ICWA plainly applies to voluntary adoptions and voluntary terminations of parental rights, including those occurring immediately upon a child’s birth. Such children never live in any birth family at all, much less an ‘existing Indian family.’ So, too, § 1915(a)’s placement preferences apply to ‘*any* adoptive placement of an Indian child,’ and § 1915(b) applies to ‘*any* foster care or preadoptive placement.’ ‘Any’ is clear, and these provisions require neither a preexisting Indian family nor an Indian custodial parent.

Id. at 24 (citation omitted).

¹⁶⁸ *Adoptive Couple II*, 133 S. Ct. at 2576 (Sotomayor, J., dissenting).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ The ICWA’s definition of Indian child includes children who are eligible for membership. 25 U.S.C. § 1903(4) (2012). The ICWA defers to the tribe’s membership criteria for determination of who qualifies as a child. Because “parent” is defined under the ICWA as the biological or legally adoptive parents, *id.* § 1903(9), the entire “Indian family” identification relies on tribal determinations for membership, *see id.* § 1912(d) (referencing “Indian family”).

3. *§ 1915 Placement Preferences.*—The last issue the Court addressed was whether § 1915(a)'s placement preferences should apply.¹⁷² Section 1915(a) creates a preference for the child's extended family, other members of the child's tribe, or other Indian families.¹⁷³ This preference is to be applied "in the absence of good cause to the contrary."¹⁷⁴ However, the Supreme Court sidestepped this rule by requiring that a formal adoption request by a member of the child's family, tribe, or another Indian family is pending at the time of the proceeding for § 1915 to apply: "[T]here simply is no 'preference' to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward."¹⁷⁵

This ruling is particularly hard to swallow considering that the adoptive couple's attorney improperly spelled the father's name when submitting paperwork to the tribe. Because of this clerical error, the tribe was not properly notified that an Indian child was being adopted and, therefore, had no reason to intervene in the proceedings. Furthermore, the Court did not allow this section to apply to Mr. Brown because he was not a party seeking adoption—he was a parent attempting to stop the adoption proceedings.¹⁷⁶

The opinion concluded by essentially making a best interests appeal. It warned against "put[ting] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian."¹⁷⁷ From the opening sentence to the conclusion, the Court conveyed its apprehension to applying the ICWA, particularly regarding the importance of the custodial relationship above biological ties.

III. IMPLICATIONS AND A LEGISLATIVE SOLUTION

Aside from being incorrectly decided on the basis of text and policy, *Adoptive Couple* damages Indian tribes. This case will cause more courts to avoid the Indian Child Welfare Act (ICWA) and will, therefore, undermine its protective purpose. Eliminating placement preferences and parental termination protections for noncustodial parents contributes to the problem of diminishing tribal numbers that the ICWA sought to remedy. When Congress passed the ICWA, it did so with the express purpose of protecting

¹⁷² *Adoptive Couple II*, 133 S. Ct. at 2565.

¹⁷³ "In any adoptive placement of an Indian child under State law, a preference shall be given, in the 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." § 1915(a).

¹⁷⁴ *Id.*

¹⁷⁵ *Adoptive Couple II*, 133 S. Ct. at 2564.

¹⁷⁶ *Id.* ("Biological Father is not covered by § 1915(a) because he did not seek to *adopt* Baby Girl; instead, he argued that his parental rights should not be terminated in the first place.")

¹⁷⁷ *Id.* at 2565.

Indian tribes.¹⁷⁸ As discussed in detail below, the *Adoptive Couple* decision is likely to increase the use of judicially created exceptions to the ICWA, thus resulting in more children being placed in non-Indian households.

A. Impact on the ICWA's efficacy

Adoptive Couple leaves several questions unanswered and imposes upon the states new restrictions on the ICWA application. First, as the dissent points out, the Court's definitions of "breakup of the Indian family" and "continued custody" strip away § 1912(d) and (f) protection for noncustodial fathers, even if they are heavily involved in their child's upbringing. Second, this decision gives further support to the minority of states that currently use the Existing Indian Family Exception (EIFE) and good cause exceptions to avoid applying the ICWA. Third, those states not currently using the EIFE are likely to do so in the wake of this decision.

The Court's approach to § 1912(d) and (f) alters rights not only for absentee parents, but also for noncustodial, heavily involved parents. Justice Sotomayor voices this concern in her dissent. She offers the example of an Indian father who visits his child and regularly pays child support.¹⁷⁹ If the child was removed from her custodial home and placed with a foster family, the father would receive no benefit under § 1912(d) or (f) in parental rights termination proceedings.¹⁸⁰ A court deciding whether to terminate his rights would, according to the majority, be fully within its authority to apply state law. The result of this partial gutting of the ICWA's power is a "patchwork" mess of federal and state law.¹⁸¹ This patchwork serves only to confuse the ability of state courts to make ICWA decisions and encourage the use of judicially created exceptions that harm Indian tribes, which is contrary to congressional intent.

For those states that have adopted the EIFE, this decision will further support their position and allow them to continue avoiding the ICWA's mandates. Nearly every state¹⁸² using the EIFE follows the reasoning from one decision: *In re Adoption of Baby Boy L.*, the Kansas case that established the EIFE doctrine.¹⁸³ Notably, this decision was later overturned by the Kansas Supreme Court. *Baby Boy L.* used a nearly identical approach to § 1912(d) and (f) as *Adoptive Couple*. It focused on the

¹⁷⁸ See *supra* Part I.B.

¹⁷⁹ *Adoptive Couple II*, 133 S. Ct. at 2578 (Sotomayor, J., dissenting).

¹⁸⁰ *Id.* at 2579.

¹⁸¹ *Id.*

¹⁸² See, e.g., *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995); *In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997).

¹⁸³ 643 P.2d 168, 175 (Kan. 1982).

“continued custody” and “breakup of the Indian family” language and also determined that the congressional intent must have been “the maintenance of the family and tribal relationships existing in Indian homes.”¹⁸⁴ Because other states rely so heavily on this decision to justify the EIFE, they now have solid Supreme Court precedent to discourage them from following in the footsteps of many former EIFE states and overruling the doctrine.¹⁸⁵

Also, the Court’s view of “Indian family” encourages states that apply a lenient good cause exception to the statute to continue using this exception. Some states currently use permanence as a factor in the good cause determination.¹⁸⁶ As discussed above, state courts will often misinterpret cultural practices as neglect, specifically when the child’s upbringing is the responsibility of the extended family and other tribe members.¹⁸⁷ *Adoptive Couple* only reinforces this cultural misunderstanding by refusing to recognize biological parents who do not live with their children. It also requires state courts to step in to determine when a family is “Indian enough” for the ICWA to apply.¹⁸⁸ This cuts against the very purpose of the ICWA, which is to protect the removal of Indian children from their families resulting from arbitrary state court decisions.¹⁸⁹

More troubling is the effect *Adoptive Couple* will have on those states that have rejected or refused to apply the EIFE. The Kansas case discussed above, *In re Adoption of Baby Boy L.*, was later overruled by the Kansas Supreme Court in *In re A.J.S.*¹⁹⁰ The Kansas court ruled that the EIFE is at odds with the plain language of the ICWA, particularly the definition of Indian child, which includes no exception for those children not living with Indian parents.¹⁹¹ The court also rejected its previous use of the EIFE based on the congressional policy under which the ICWA was created, namely, to preserve and protect the interests of Indian tribes and their children.¹⁹² Many states have expressed similar reasons for rejecting the EIFE and have done so to further the ICWA’s purpose in protecting Indian tribes.¹⁹³

Adoptive Couple has the potential to unravel this protection. Consider Kansas, which not less than five years ago overturned a decision based

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., *In re A.J.S.*, 204 P.3d 543 (Kan. 2009); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004).

¹⁸⁶ See *supra* Part II.C.

¹⁸⁷ See *supra* Part II.C.

¹⁸⁸ See *Adoptive Couple II*, 133 S. Ct. 2552, 2578–79 (2013) (Sotomayor, J., dissenting).

¹⁸⁹ See 25 U.S.C. § 1902 (2012).

¹⁹⁰ 204 P.3d 543.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See, e.g., *id.*; *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004).

largely on the interpretation of “continued custody” and “breakup of the Indian family.” Now, a case has been decided by the Supreme Court using precisely the same reasoning to reject application of the ICWA for a father who never had custody of his child. Although the Supreme Court does not directly reference the EIFE doctrine in its decision, the outcome is the same: The child did not live with an existing Indian family, and therefore the ICWA cannot apply. State courts will now be second-guessing their own precedent and trying to determine whether the EIFE now must apply to all proceedings involving noncustodial Indian parents.

Because of the problems *Adoptive Couple* creates for the ICWA, a legislative solution clarifying the ICWA’s language and policy is necessary. This should not only provide clear guidance for applying the ICWA, but also should redirect those states who have chosen to apply the EIFE and allow states who have chosen to correctly apply the ICWA to continue doing so.

B. A Legislative Solution: Closing Off the Judicial Bypass

Application of the ICWA is now unacceptably puzzling and unworkable. A legislative solution is needed to solve this confusion. Oklahoma provides an excellent example of legislative reform that could help address this issue. The Oklahoma Indian Child Welfare Act (OICWA) was passed to provide guidance for the application of the federal law.¹⁹⁴ After a decision by the Oklahoma Supreme Court establishing the EIFE, the Oklahoma Legislature amended the OICWA to counteract the judicial exception.¹⁹⁵ To do this, they added the following language to the ICWA’s policy statement:

It shall be the policy of the state to recognize that Indian tribes and nations have a valid governmental interest in Indian children regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.¹⁹⁶

Furthermore, in section 40.3, which discusses the ICWA’s applicability, the following italicized language was added:

Except as provided for in subsection A of this section, the Oklahoma Indian Child Welfare Act applies to all state voluntary and involuntary child custody

¹⁹⁴ “The purpose of the Oklahoma Indian Child Welfare Act is the clarification of state policies and procedures regarding the implementation by the State of Oklahoma of the Federal Indian Child Welfare Act, P.L. 95–608.” OKLA. STAT. tit. 10, § 40.1 (1991).

¹⁹⁵ *See generally id.* (recognizing the valid interest Indian tribes and nations have in Indian children even if the child is not in the physical or legal custody of an Indian parent or custodian when the proceedings commence); *In re Adoption of D.M.J.*, 741 P.2d 1386 (Okla. 1985) (applying the EIFE to avoid the ICWA).

¹⁹⁶ OKLA. STAT. tit. 10, § 40.1.

court proceedings involving Indian children, *regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.*¹⁹⁷

Following the addition of this language, the Oklahoma Supreme Court overruled its precedent applying the EIFE. It no longer considers whether Indian parents are noncustodial.¹⁹⁸ Although it is unclear how this rejection of the EIFE will fare in the post-*Adoptive Couple* world, it provides guidance for a federal legislative solution.

First, the language added to the OICWA policy statement can be directly incorporated into the Statement of Congressional Policy in § 1902 so that it reads:

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.¹⁹⁹ *These standards shall apply regardless of whether or not Indian children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.*²⁰⁰

This sentence alerts states that all standards contained within the ICWA are applicable without regard to custodial relationships.

Second, Congress should add definitions of “Indian family” and “continued custody” to § 1903. The term Indian family should be defined to include both custodial and noncustodial families so that the phrase “breakup of the Indian family” will necessarily protect noncustodial family members and recognize broader tribal interests protected by the ICWA. For example, “Indian family shall be defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, shall include the biological father, mother and siblings of the Indian child regardless of legal or physical custody of the child.”

Next, continued custody must be defined to eliminate confusion surrounding whether a parent must be custodial for the ICWA to apply. This small phrase laid the foundation for complete rejection of protection

¹⁹⁷ *Id.* § 40.3 (emphasis added).

¹⁹⁸ *In re Baby Boy L.*, 103 P.3d at 1105–06 (“Under the current statutory scheme, the Oklahoma Act controls regardless of whether the child or children involved in the proceeding are in the physical or legal custody of an Indian parent or Indian custodian when the state proceedings are initiated. The change in the statute is an explicit repudiation of the ‘existing Indian family exception.’”).

¹⁹⁹ 25 U.S.C. § 1902 (2012).

²⁰⁰ *See* OKLA. STAT. tit. 10, § 40.3 (emphasis added).

for noncustodial parents in § 1912. The following definition would prevent this problem: “Continued custody means custody over a period of time regardless of whether the parent had prior custody of the Indian child.”

Third, there must be a legislative remedy to limit the overly lenient application of the good cause exception. This is particularly difficult because the ICWA’s text contains little guidance to determine what Congress means by good cause. However, one can infer from the legislative history that it cannot mean decisions based on social workers’ judgment calls tainted by cultural bias. One author suggests that Congress should abolish the “good cause to the contrary” language and simply create a presumption for state courts to place the children falling under the ICWA in Indian homes absent specific exceptions.²⁰¹

This solution can be executed as follows: In § 1915, a subsection should be added listing all exceptions appropriate for the state court to use. Each “in the absence of good cause to the contrary” phrase should be replaced by “except as provided in subsection (f).” Thus, § 1915(a) would read:

*Except as provided in subsection (f), in any adoptive placement of an Indian child under State law, a preference shall be given 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.*²⁰²

Deciding what should fall under the new subsection (f) is particularly difficult. The exceptions used here must be fashioned so that application of the placement preferences is not subject to state courts’ cultural biases as they are under the best interests test.²⁰³ However, the exceptions must also address the reality that a member of the child’s family, tribe, or other Indian family may not be able or fit to foster or adopt the child.

One solution that addresses the availability of families falling into § 1915’s categories would be to create a required timeframe in which a potential family must intervene. For example, subsection (f) could include the following: “§ 1915 placement preferences do not apply if no interested parties have sought to intervene within three months from the time the tribe received notice of the pending proceeding.”²⁰⁴ The child’s tribe would, therefore, be responsible for notifying potential foster or adoptive families that fall within § 1915’s categories. This both encourages the tribal government to seek adoptive families and prevents the court from

²⁰¹ Aamot-Snapp, *supra* note 15, at 1194–95.

²⁰² See 25 U.S.C. § 1915(a).

²⁰³ See *supra* Part I.C.2.

²⁰⁴ Notice to the child’s tribe is already required under § 1912(a).

conducting proceedings without first being certain no available family falls into the § 1915 categories.

Another exception could be included in subsection (f) that allows the child's tribe to make a recommendation regarding the fitness of a party seeking to adopt or foster under § 1915: "§ 1915 placement preferences do not apply if the child's tribe makes a recommendation to the court that the party seeking to intervene under this section is unfit."²⁰⁵ This avoids the risk of cultural bias and prevents children from being placed into unsuitable homes. If the tribe finds the potential family unfit, then the state court would be permitted to place the child in a non-Indian household.

A final exception to § 1915 could provide a limited amount of discretion to the state court using a similar standard as the one provided in § 1912²⁰⁶: "§ 1915 placement preferences do not apply if the court determines by clear and convincing evidence, including testimony of qualified expert witnesses, that the placement of the child with the party seeking to intervene under this section is likely to result in serious emotional or physical damage." This is a higher burden than the best interests test, and thus it is more likely to avoid cultural bias while still allowing the court some discretion regarding the child's well-being.

While these suggestions are not comprehensive, they provide a starting point for securing one of the most powerful tools the ICWA has for preserving Indian tribes. A legislative solution will not be simple, but it is necessary to restore the ICWA's protection as Congress envisioned it and as Indian tribes need it for their survival.

CONCLUSION

Over thirty years after the ICWA was enacted, Indian children continue to be removed from their homes at alarming rates. In many cases this is the result of state resistance to the ICWA and the complete bypass of its provisions. Until legislation is passed to clarify the language and purpose of the ICWA, states will continue to avoid its application. *Adoptive Couple* failed to provide concrete guidance for state courts regarding the ICWA's application. The guidance it did provide will lead states to ignore the plain text and congressional policy underlying the ICWA. The ICWA was passed in response to a crisis—the funneling of thousands of children from Indian homes. This crisis persists and must be addressed to ensure the survival of Indian tribes.

²⁰⁵ A similar solution was proposed by Aamot-Snapp, who suggested requiring tribal consent to any departure from the § 1915 placement preferences. Aamot-Snapp, *supra* note 15, at 1195.

²⁰⁶ Section 1912 provides this standard for when a court is deciding whether to remove a child from his Indian parent or guardian. § 1912(e)–(f).

