The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child

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For this whole century, right up until 1978 when we got the Indian Child Welfare Act, social workers would come in here with no understanding of how our families worked. They would see a child who'd been left with someone outside the nuclear family, and they would call that neglect. To us, that is an insane rationale. We don't distinguish between father, uncle, mother, grandmother. We don't think of ourselves as having extended families. We look at you guys and think you have contracted families. We couldn't understand why they were taking us apart. My brother Gabe, going to a man and woman in Texas when we had a whole family here. I've seen babies carried off with no more thought than you'd give a bag of brown sugar you picked up at the market.¹

The current controversy over the role of race and ethnicity in adoption proceedings primarily centers on the placement of black children with white foster or adoptive families. While some authors argue that race matching is justified only if the best interests of the child are served by such a policy,² others have called the practice of placing children of color with white families racial "genocide."³ The Supreme Court addressed the issue of race and child placement in Palmore v. Sidoti.⁴ Although the court held that race may not be the sole factor in a decision to remove a child from her natural mother, the question of whether race

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¹ BARBARA KINGSOLVER, PIGS IN HEAVEN 284 (1993).
³ Id. at 925-26 (citing NATIONAL ASSN. OF BLACK SOCIAL WORKERS, POSITION PAPER (Summer 1973)); See also Catherine M. Brooks, The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future, 27 Creighton L. Rev. 661, 668 (1994).
can play a role in some child-placement contexts was left unanswered.\(^5\)

Many of the arguments for and against transracial adoption focus on the "best interests of the child" standard, which is used by most state courts to determine where a child will be placed.\(^6\) The "best interests of the child" has been described as nebulous and largely undefined.\(^7\) When implementing this standard, state legislatures, courts, and social welfare agencies are left to define the best interests of a child. In 1993, members of Congress sought to codify this "best interests" standard into a federal child placement law, providing that the best interests of a child would be served by placing him or her with a racially "matched" family.\(^8\) This Act, the Howard M. Metzenbaum Multiethnic Placement Act, was passed in an amended form in 1994.\(^9\) The cited purpose of the Act was to prevent "discrimination in the placement of children on the basis of race, color, or national origin" and to facilitate the "identification and recruitment of foster and adoptive families that can meet children's needs."\(^10\) In essence, the Multiethnic Placement Act provided that child placement agencies should make every effort to place a child with a race matched family, provided that such efforts were non-discriminatory. This Act was repealed with the enactment of § 1808(c) of the Small Business Job Protection Act in 1996.\(^11\) The Small Business Job Protection Act provides:

(1) Prohibited Conduct. A person or government that is involved in adoption or foster care placements may not

\(^5\) Id. at 434.


\(^7\) Marja E. Selmann, For the Sake of the Child: Moving Toward Uniformity in Adoption Law, 69 WASH. L. REV. 841, 843 (1994). "Some states list factors that may or may not be considered in making the determination [of the best interests of the child], such as race, religion, sexual orientation, family relationship, or status as a foster parent, but states lack specific guidelines for determining exactly what is in the child's best interest." Id. at 843-44 (citations omitted).

\(^8\) The Multiethnic Placement Act of 1993 "prohibits an agency, or entity, that receives Federal assistance and is involved in adoptive or foster care placements from delaying or denying the placement of a child solely on the basis of race, color, or national origin of the adoptive or foster parent or parents involved." S. 1224, 103d Cong. (1993). This Act was introduced by Senator Metzenbaum on July 14, 1993, and was considered during a subcommittee hearing on July 15, 1993. It was reported by the Committee on Labor and Human Resources on October 6, 1993.


\(^10\) 42 U.S.C. § 5115a(b) (repealed 1996).

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child involved; or (B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved.\textsuperscript{12}

This Act eliminated the "recruitment of families that meet a child's needs" language, and was an attempt by Congress to codify the "best interests of a child" standard. In this case, Congress determined that the best interests of a child would be served through placement with a family as quickly as possible, regardless of the race of the family.

Codification of the "best interests" standard, as it applies to race and ethnicity, removes discretion from family law judges and child welfare agencies. By defining the role of ethnicity in placement decisions, Congress is attempting to limit the autonomy of these decision makers. It is interesting to note, therefore, that though the Indian Child Welfare Act\textsuperscript{13} (ICWA) employs "best interests" language, and is also a codification of the "best interests" standard as it applies to child placement proceedings, most discussions of transracial adoption give only a passing nod in the direction of ICWA. An analysis of ICWA may provide insight into the effectiveness of race matching statutes, and the feasibility of eliminating the discretion of judges and child welfare agencies in making placement decisions.

This article is not a comparative study on the provisions of ICWA and other race matching legislation. This article will address ICWA as one attempt to codify the best interests of a child in terms of the child's racial and ethnic heritage. The problems and controversies surrounding ICWA could assist legislators in their attempts to codify the "best interests of a child" in racial terms. The current Congressional attempts to modify ICWA may also guide the present race matching debate.

Comparing the placement of Indian children with non-Indian families with the placement of black children with non-black families is problematic. As Toni Hahn Davis notes in The Existing Indian Family Exception to the Indian Child Welfare Act:

Throughout American history, there has been a remarkable double standard regarding Indians and blacks ... Chief Justice Taney, in \textit{Dred Scott v. Sandford}, summed up this double standard when he compared the population of imported Africans and

\textsuperscript{12} Id.
their descendants—"considered ... an inferior class of beings"—
to the Indian race—"uncivilized ... yet a free and independent
people, associated together in nations or tribes, and governed by
their own laws."\(^{14}\)

So too is the history of adoptive placements different for Indian children
than for black children. As Zanita E. Fenton argues in *In A World Not
Their Own: The Adoption of Black Children*,\(^ {15}\) black children are
desperately in need of adoption services.\(^ {16}\) Yet, ICWA was passed for
precisely the opposite reason, to stop the involuntary removal of Indian
children from their reservations and families. Despite the passage of
ICWA, however, Indian children are still placed in non-Indian homes,
and "Indian families continue to be confronted with an unreasonably
high risk that their homes will be disrupted and that their children will
face cultural confusion and disorientation."\(^ {17}\)

Another reason to limit the comparison of Indian and black children
in child placement proceedings is the unique political and legal position
of Indians in the United States. Whether an Indian tribe is defined as a
political or a racial entity is one aspect of this unique position. Another
is the concurrent and exclusive jurisdiction provisions of ICWA. Be-
cause Indian tribes may develop and maintain separate court systems,
these jurisdictional provisions in ICWA are not only feasible but neces-
sary.\(^ {18}\) None of the proposed Congressional measures regarding transra-
cial adoption propose a separate jurisdiction for placement proceedings
concerning black children. Indeed, it would be impossible to maintain
such a jurisdictional scheme.\(^ {19}\)

The examination of why, despite the passage of ICWA, Indian chil-

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\(^{14}\) Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare

\(^{15}\) 10 HARV. BLACK LETTER J. 39 (1993).

\(^{16}\) See Davidson M. Pattiz, *Racial Preference in Adoption: An Equal Protection
Challenge*, 82 GEO. L.J. 2571 (1994). Pattiz argues that "pressing too hard for race-matching in
the adoption of black children will interfere with the child's best interest by relegating her to
a family that is less well off." Id. at 2573.

\(^{17}\) Stan Watts, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Bal-

\(^{18}\) For a review of the concurrent and exclusive jurisdiction provisions of ICWA, and
the treatment of tribal jurisdiction of matters arising under ICWA by state courts, see Mi-
ichael E. Connelly, *Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act

\(^{19}\) Tribes occasionally must litigate which Tribe has jurisdiction over a particular Indian
child, especially a child who is not enrolled in any Tribe but eligible for enrollment in more
than one. States face similar jurisdiction problems in child custody matters. See Christopher
children continue to be placed with non-Indian foster care and adoptive families, could be an important step toward redefining the role of transracial placement legislation. Understanding why ICWA has at times failed to preserve the “Indian family” might aid in the discussion of the role of ethnicity preferring statutes in the current debate over transracial adoption.

I. THE INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act was passed in 1978 in response to increasing awareness by Congress that tribes rather than states should have jurisdiction over child placement proceedings:

Congress recognized that state social welfare systems, influenced by the cultural bias that informed assimilationist policies, removed Native American children from their families and tribes in extraordinary numbers. Those state actions threatened Native American tribes with cultural extinction and inflicted the heartbreak of forced separation on Native American families. The strategy for cultural and familial survival advocated in the congressional hearings rested on tribal autonomy over the placement of tribal children.  

ICWA was an acknowledgment by Congress of the need for tribal court jurisdiction over cases involving tribal children. The jurisdictional scheme of ICWA can be divided into three distinct factual scenarios. When an Indian child is domiciled on a reservation, section 1911(a) provides that the child’s tribe shall have exclusive jurisdiction.  

When an Indian child is not domiciled on the reservation, section 1911(b) provides that the child’s tribe will have concurrent jurisdiction with the State. In some cases, the child’s tribe will not have a court system in

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21. That section reads as follows:

   Exclusive jurisdiction. An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

22. That section reads as follows:

   Transfer of proceedings; declination by tribal court. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the
place. However, the child’s tribe is still entitled to notice of any child placement proceeding involving a tribal child, and the right to intervene in the State court proceedings. The child’s tribe also has the right to void any court proceedings that are not in compliance with ICWA. An Indian child is defined under the act as “any member of an Indian tribe” or any child “eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”

The real bite of ICWA is the preferencing section, which provides a list of preferences for Indian children placed in foster care or adoptive homes. In adoptive placements, an Indian child shall be placed first with a member of the child’s extended family, second with other members of the Indian child’s tribe, or third with other Indian families. In foster care placements, an Indian child shall be placed first with a member of the child’s extended family, second with a foster home specified by the child’s tribe, third with an Indian foster home, and fourth in an

jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.


23. 25 U.S.C. § 1912 (1978); see also Douglas R. Nazarian, Catholic Social Services, Inc. v. C.A.A.: Best Interests and Statutory Construction of the Indian Child Welfare Act, 7 ALASKA L. REV. 203, 215 (1990). Nazarian argues that “[w]ithout some means of ensuring that tribes can intervene, their ability to protect their interests as Congress intended will be significantly impaired.” Id. (citing In re J.R.S., 690 P.2d 10, 15 (Alaska 1984) (“If Indian tribes are to protect the values Congress recognized when it enacted the Indian Child Welfare Act, tribes must be allowed to participate in hearings at which those values are significantly implicated.”)).


State court proceedings, intervention. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.


Petition to court of competent jurisdiction to invalidate action upon showing of certain violations. Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child’s tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act. [25 U.S.C. §§ 1911, 1912, and 1913].


institution approved by the child’s tribe. These placement preferences are applicable to both State and tribal agencies, and include a provision that any placement agency must adhere to “prevailing social and cultural standards of the Indian community in which the parent or extended family resides.”

ICWA embodies implicit assumptions about what is in the “best interests” of an Indian child. When it enacted ICWA, Congress recognized that the best interests of Indian children are of tantamount importance, that the best interests of an Indian child are served by ensuring tribal participation in placement and adoption proceedings, and that tribal participation in proceedings involving Indian children is necessary because “the States, exercising their recognized jurisdiction over Indian child custody proceedings through 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.” The underlying premise of ICWA is that Indian tribes, as sovereign governments, have a vital interest in any decision as to whether Indian children should be separated from their families. To that end, ICWA applies a “best interests of the tribe” standard, in addition to the best interests of the child and the parent.

Prior to the passage of ICWA in 1978, a very high percentage of Indian families were “broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.” In Mississippi Band of Choctaw Indians v. Holyfield, the Supreme Court

33. Two sometimes competing interests are involved: a parent’s interests in raising a child as he or she sees fit and the tribe’s interest in fostering its community by preserving Indian families. The Act accommodates these interests in two manners. As to Indian children domiciled on the reservation, the interests are presumed to coincide . . . In such cases, the tribe’s interests in its children “is distinct from but on a parity with the interests of the parents.” When the child is domiciled off the reservation, the relationships shift under the Act and the parents’ interests may be primary.

noted that studies presented in the 1974 Senate hearings "showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions."36 The court went on to note that in 1971 and 1972, "[t]he adoption rate of Indian children was eight times that of non-Indian children, [and that] approximately 90% of Indian placements were in non-Indian homes."37 Many social workers unused to working with Indian families and children, or perhaps hostile to an unfamiliar culture, consider leaving a child with persons outside the nuclear family as neglect and thus good cause for terminating parental rights.38 As noted in a Washington Post article addressing proposed amendments to ICWA:

On many reservations it was once enough for caseworkers to decide arbitrarily that a family was too poor to raise a child. It was overlooked that in tribal cultures the amount of care given a child often went well beyond one household. The full social and blood-tie network of parents, grandparents, relatives and neighbors was a wealth not categorized on a caseworker's clipboard of acceptable standards for child-raising.39

ICWA was a response by Congress to this involuntary removal of Indian children from Indian tribes by state agencies. The stated purposes of ICWA are:

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.40

It is in light of these Congressional goals that the role of ethnicity, and the effectiveness of ICWA in regulating that role, will be examined.

36. Id. at 32.
37. Id.
38. Id. at 35, n.4; see also Brooks, supra note 3 at 667 ("Up to now, however, public and private welfare agencies seem to have operated on the premise that most [American] Indian children would really be better off growing up non-Indian.").
II. THE BEST INTERESTS OF THE CHILD UNDER ICWA

The language of ICWA is clear and relatively unambiguous with specific placement preferences. As previously noted, ICWA was an attempt by Congress to codify the best interests of the child standard. What this codification necessarily means is that courts and state agencies will no longer apply the best interests of the child standard but instead will look to the specific provisions of ICWA in making placement decisions. Parties who are unable to adopt Indian children under the preferencing mandates of ICWA have sought to circumvent the Act. This circumvention has been accomplished in a variety of ways. There is considerable anecdotal evidence that natural parents are often told by adoption attorneys and agencies that they should not reveal that a child is of Indian heritage in order to avoid the application of the Act.41 Other approaches for avoiding the application of the Act which have occurred include attorney-induced renunciations of tribal membership by the parent or the transport of such children out of the country for placement, often to provinces in Canada that do not have laws dealing with the adoption of Indian children.42

Other parents have resorted to the court system. Parties have argued that ICWA does not apply to illegitimate Indian children.43 Others have relied on the familiar best interests of the child standard to argue for placement of an Indian child outside of the preferences outlined in ICWA. ICWA states that the placement preferences outlined must be followed "in the absence of good cause to the contrary."44 The Bureau of Indian Affairs (BIA) has issued guidelines regarding this "good cause" inquiry:

For purposes of ... adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

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41. Establishing Status of Indian Children: Hearings on S. 1448 Before the House Subcommittee on Native American and Insular Affairs, 104th Cong. 34-35 (1995) (Statement of Attorney Jack Trope); see also Susan Estrich, Indian Rights Win, Two Children Lose, USA TODAY, July 13, 1995, at 9A.

42. Susan Estrich, Indian Rights Win, Two Children Lose, USA TODAY, July 13, 1995, at 9A

43. For a listing of these cases, see Michelle L. Lehmann, The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child?, 38 CATH. U. L. REV. 511-13 (1989).

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.\[45\]

The BIA guidelines avoid the use of any "best interests" language, which would suggest the "best interests of the child" standard has no place in determining good cause.\[46\] However, the "good cause exception" contained in ICWA has led some state courts to find to the contrary that the best interests of the child is good cause.

In *Yavapai-Apache Tribe v. Mejia*,\[47\] the Appellant argued that the state court had abused its discretion in considering the best interests of the child as a reason to retain jurisdiction of a child placement matter under ICWA.\[48\] The Texas Court of Appeals found that the term "good cause" in ICWA was "designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child."\[49\] The court then went on to hold that the best interests of the child standard was inapplicable in cases arising under ICWA because:

(1) it defeats the very purpose for which ICWA was enacted, in that, it allows Anglo cultural biases into the analysis; and (2) questions of "best interest" are appropriate to issues of placement, not jurisdiction.\[50\]

The *Yavapai-Apache Tribe* court recognized that the best interests of an Indian child can be very different culturally and legally than the best interests of a non-Indian child. "Under ICWA, what is best for an Indian child is to maintain ties with the Indian tribe, culture, and family."\[51\]

This decision was in accordance with many other state courts rejecting the "best interests of the child" standard's application under ICWA.\[52\] Some courts, however, have held that the "best interests of the

\[47\] 906 S.W.2d 152 (Tex. App. 1995).
\[48\] *Id.* at 168.
\[49\] *Id.* at 164.
\[50\] *Id.* at 169.
\[51\] *Id.*
\[52\] For a listing of state courts that have rejected the best interests of the child standard as a good cause consideration under ICWA, see *id.*; see also In the Matter of the Adoption of Jessica Lynn Riffle, 922 P.2d 510, 515 (Mont. 1996) (specifically rejecting the best interests of
child" standard is an appropriate consideration in determining good cause to disregard the placement provisions of ICWA.\footnote{Adoption of Jessica Lynn Riffle, 922 P.2d at 515; see also In the Matter of Baby Boy Doe, 902 P.2d 477, 487 (Idaho 1995) (declining to overturn a trial court's determination that "good cause" existed to disregard the placement preferences contained in ICWA).}

The "best interests of the child" standard is a familiar construct in state court, and one judges are loathe to forego in favor of a codified standard under federal law. As one author argues in an article addressing a need for uniformity in adoption law, "While all of these parties' interests merit consideration, the most important factor should be the best interests of the child."\footnote{Selmann, supra note 7, at 850.} The placement preferences of ICWA do not contain any best interests language. Yet, some state courts have consistently sought to utilize this standard under ICWA. A good cause exception that embodies the best interests standard renders specific placement preferences meaningless. Codifying the best interests of a child with regard to ethnicity, then, requires a clear mandate with regard to preferencing. Legislators attempting to codify the best interests of a child with regard to ethnicity must clearly and specifically reject any application of a state or court defined best interests of the child standard.

III. THE INDIAN FAMILY EXCEPTION

To avoid the placement preferences embodied in ICWA, parties have also argued that an "Indian family" exception to ICWA exists. The Indian family exception focuses on two separate but related inquiries; whether the child has ever been a part of an Indian tribe or community, and whether the child's birth parents have ever been a part of an Indian tribe or community.\footnote{Watts, supra note 17, at 225.} If a child or the child's parents are found to have insufficient ties to the Indian tribe attempting to intervene in a child custody proceeding, some state courts have held that ICWA does not apply, reasoning that in such cases, ICWA's stated goal of "promoting the stability and security of Indian tribes and families" is not met.\footnote{Id.}

A majority of state courts considering this issue have found that the "Indian family" doctrine is not a valid exception to ICWA. In rejecting the "Indian family" exception, many of these state courts rely on the Supreme Court's holding in Mississippi Band of Choctaw Indians v.
In *Holyfield*, the Mississippi Choctaw parents of twins, who were residents of their reservation, moved off the reservation to have their children. The move was specifically to defeat the provisions of ICWA and allow them to voluntarily give up their babies for adoption. The *Holyfield* majority held that ICWA "was not meant to be defeated by the actions of individual members of the tribe," and that the Act's provisions must be seen "as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." There is an underlying presumption in ICWA:

that it is in the best interest of an Indian child that the role of the tribal community in the child's life be protected. Thus, the dual purposes promoted by the Act—the "best interests of Indian children" and the promotion of "stability and security of Indian tribes and families"—are intertwined.

The same logic employed by the Supreme Court in *Holyfield* was subsequently employed by the Utah Supreme Court in *In the Matter of the Adoption of Jeremiah Halloway,* when it stated that "Utah abandonment law cannot be used to frustrate the federal legislative judgment expressed in ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents." If Utah's abandonment law cannot be used to frustrate ICWA, a judicially created exception should not be used to frustrate it either. The Utah Supreme Court recognized the best interests standard implicit in ICWA, stating "[t]he protection of this tribal interest is at the core of ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents."

The majority of states that have heard arguments relating to ICWA

57. 490 U.S. 30 (1989). In *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993), the Idaho Supreme Court held that the "Indian family" doctrine is an improper restriction on the application of the Indian Child Welfare Act. *Id.* at 931. Citing *Holyfield*, the court stated that "although an Indian family requirement has been applied by the courts of other states, we believe that the United States Supreme Court has effectively undermined the imposition of this requirement." *Id.*

58. 490 U.S. at 37

59. *Id.*


63. *Id.* at 970.

64. *Id.* at 969.
recognize its implicit protection of the interests of tribes as well as individual children and families:

- "It is incorrect when assessing ICWA's applicability to a particular case to focus only upon the interests of an existing family."\(^\text{65}\)
- "We initially note that in enacting ICWA, Congress did not seek simply to protect the interests of individual Indian parents. Rather, Congress sought to also protect the interests of Indian tribes and communities, and the interests of the Indian children themselves."\(^\text{66}\)
- "Limiting the Act's applicability solely to situations where non family entities physically remove Indian children from actual Indian dwellings deprecates the very links—parental, tribal and cultural—the Act is designed to preserve."\(^\text{67}\)
- "*Mississippi Choctaw* indicates that the jurisdictional provisions of ICWA apply to child custody proceedings involving Indian children regardless of where the children are born or where they are proposed for adoption. This application of ICWA is based on the interest the tribe has in its children."\(^\text{68}\)
- "*[I]*t is in keeping with the tenor of *Holyfield* which stresses consideration of not only the wishes of the parents, but the well-being and interests of the child and the tribe."\(^\text{69}\)

These courts have recognized a best interests of the tribe standard inherent in ICWA.

Some courts do not employ the "best interests" standard, but instead rely on the express provisions of ICWA to reject an "Indian family" exception. In *In re Adoption of S.S.*,\(^\text{70}\) the Illinois Court of Appeals specifically rejected the "Indian family" doctrine, stating:

> We are troubled in no small measure by an approach which departs from the clear language of the statute based upon a generalized policy analysis. The provisions at issue are unambiguous and the case at bar is undeniably within their scope ... *P*ursuant to the plain language of the Act, depending on where

\(^{65}\) In the Matter of the Adoption of Baade, 462 N.W.2d 485, 489 (S.D. 1990).

\(^{66}\) In re Adoption of T.N.F., 781 P.2d 973, 977 (Alaska 1989).

\(^{67}\) In re Crystal K., 276 Cal. Rptr. 619, 625 (Cal. App. 3d 1990).

\(^{68}\) In the Matter of Baby Boy Doe, 849 P.2d 925, 931 (Idaho 1993).

\(^{69}\) In the Adoption of Lindsay C., 280 Cal. Rptr. 194, 201 (Cal. App. 3d 1991).

\(^{70}\) 622 N.E.2d 832 (Ill. App. 1993).
the children are domiciled, one or the other of these subsections [of the Act] will be applicable ... [t]his limitation on the scope of ICWA is entirely a judicial creation with no basis in the language of ICWA.\textsuperscript{71}

In \textit{In re Custody of S.B.R.},\textsuperscript{72} the Washington Court of Appeals held that “the language of the Act makes but two exceptions; it does not apply to the custody provisions of a divorce decree nor to delinquency proceedings.”\textsuperscript{73} The court went on to state that the explicit language of the Act does not contain an “Indian family” exception, and the court found “no compelling reason to create one.”\textsuperscript{74} The South Dakota Supreme Court also rejected the Indian family exception in \textit{In the Matter of the Dependency and Neglect of N.S.}\textsuperscript{75} The court emphasized that there was no statutory requirement that a child be born into an Indian home or community before ICWA applied. According to the court, “No amount of probing into what Congress ‘intended’ can alter what Congress said, in plain English, at 25 U.S.C. 1903(4).”\textsuperscript{76} In \textit{Quinn v. Walters}\textsuperscript{77} the Oregon Court of Appeals held the “Indian family” doctrine to be:

directly in conflict with the idea of tribal sovereignty and the policy of improving tribal ties reflected in ICWA. It also involves exactly the type of state court interference that ICWA was intended to protect against. If ICWA does not apply because the parent is not “Indian” enough for a particular state court, the protection afforded to the child, the parents and the tribe is defeated.\textsuperscript{78}

The court went on to say that the role of creating exceptions to ICWA was left to Congress, and that it is not for state courts to add additional requirements.\textsuperscript{79}

Other courts have taken the view that the “Indian family” doctrine is not a judicially-created theory but an exception “supported amply by the language of the Act itself, and shored up by Congress’ refusal to amend ICWA.”\textsuperscript{80} One California court defined the various “versions”

\textsuperscript{71} Id. at 838-39.
\textsuperscript{72} 719 P.2d 154 (Wash. App. 1986).
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} 474 N.W.2d 96 (S.D. 1991).
\textsuperscript{76} Id. at 101.
\textsuperscript{77} 845 P.2d 206 (Or. App. 1993).
\textsuperscript{78} Id. at 208.
\textsuperscript{79} Id. at 209.
\textsuperscript{80} In the Matter of S.C. and J.C., 833 P.2d 1249, 1256 (Okla. 1992); see also S.A. v.
of the Indian family exception:

One group of cases has refused to apply ICWA where the Indian child himself has never lived in an Indian family and has had no association with Indian culture, even though his biological parent has had such associations. Other cases have looked beyond the Indian ties of the child to those of the parents when considering the existing Indian family exception to the applicability of ICWA.81

The court went on to hold that ICWA did not apply to the placement of the child in question, as neither the child nor the child’s parents had maintained a connection to the tribe.82 The Oklahoma Supreme Court found an “underlying thread that runs through the entire Act to the effect that the Act is concerned with the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family.”83 This reliance on the “Indian family” effectively supersedes the provisions of ICWA, which require the interests of the child, the parents, and the tribe to be considered. More importantly, focusing on the individual circumstances of the particular child in question is not consistent with the assumption underlying ICWA—that the best interests of any Indian child are served by ensuring tribal participation in placement and adoption proceedings.84

The language of ICWA, especially its purpose as defined by Con-

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82. Id. at 687.
gress, opposes any action which would result in the removal of Indian children from their tribes. Congress sought to protect tribal participation in child placement proceedings because "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." However, the Indian family doctrine assumes that if you take away a child early enough from their tribe, they cannot develop ties to the tribe and are therefore not part of an "Indian family":

The existing Indian family exception is based on the notion that ICWA will only be applicable if an Indian child is removed from an "existing Indian family unit" or "Indian home or culture." When there is no "existing Indian family" from which an Indian child is being removed, proponents of the exception argue, ICWA is inapplicable.

The Indian family exception ignores the best interests of the tribe. As the Utah Court of Appeals stated, "The policies of the Act require its application not just to preserve an Indian parent's rights, or an Indian family, but also the tribe's interest in its children. These policies are frustrated by the adoption of the existing Indian family exception." By allowing parties to circumvent ICWA by demonstrating that the child was never part of an "Indian family," state courts have effectively taken back the autonomy implicit in "the best interests of the child" standard.

IV. INDIVIDUAL VERSUS TRIBAL RIGHTS

The term "Indian family" constrains the relations of tribal members into a familiar construct. This construct may be consistent with an American view of a nuclear family, but its application to an Indian child is contrary to the provisions of ICWA. While the concept of collective

86. Davis, supra note 14, at 475 (citations omitted).
88. See Watts, supra note 17, at 22-23.

It is inherently difficult for a system founded on individual rights to deal effectively with a cultural system based on communal duties and responsibilities and in which individual rights are subordinate to the good of the group. The rights of communities are generally secondary to the right of individuals in contemporary American society and it is a philosophical leap for courts to reverse this thought process when dealing with Indian tribes. ICWA does encourage the existence of the tribal communal culture and requires the non-Indian legal system to recognize and accommodate it.

In the context of tribal/communal culture, the weight of an individual parent's or of both parents' consent to their child's adoption is diminished.

Because of the Unique cultural aspects of child care in tribal and extended family
rights is not new to American jurisprudence, American society focuses heavily on the rights of the individual over the community.

A rights-focused analysis is contrary to the provisions of ICWA. In an article addressing the constitutional protections afforded children under federal and state law, Professor Homer H. Clark, Jr. recognized that ICWA includes a codification of the best interests of the tribe in addition to the “best interests of the child” standard.\(^9\) Professor Clark argued that “[t]hese and other provisions of the Act effectively give tribal political interests priority over the interests of Indian children where adoption is concerned.”\(^9\) He went on to note that no constitutional challenge to the preferencing provisions of ICWA had been made or presumably could be made.\(^9\) In fact, Professor Clark was in error. In \textit{In re Bridget R.}, the plaintiffs challenged the Indian Child Welfare Act on equal protection grounds.\(^9\) The California Court of Appeals noted that ICWA requires Indian children who cannot be cared for by their natural parents to be treated differently from non-Indian children in the same situation.\(^9\) The court then went on to find that such disparate treatment would rise to the level of an equal protection violation if no social, cultural, or political relationships existed between Indian children and their tribes.\(^9\) The court also relied on a due process analysis to find that the placement provisions of ICWA did not apply.\(^9\) The court held that the rights of children in their family relationships are at least as fundamental and compelling as those of their parents, and that the children in that case had a right to be placed with the “only family they had ever known.”\(^9\) The court did not mention the rights of the tribe at all.

One author used the same analysis to question the constitutionality of any race-based adoption law.\(^9\) While specifically exempting ICWA from his analysis, the author argues that any race-matching statute would not survive strict scrutiny under an equal protection challenge.

\begin{footnotes}
\item[90] \textit{Id}.
\item[91] \textit{Id}.
\item[92] 49 Cal. Rptr. 2d 507, 527 (Ct. App. 4th 1996).
\item[93] \textit{Id}.
\item[94] \textit{Id} at 528.
\item[95] \textit{Id} at 522-27.
\item[96] \textit{Id}.
\item[97] Pattiz, \textit{supra} note 16, at 2574.
\end{footnotes}
The author notes that the “best interests of the child” was given compelling state interest status by the United States Supreme Court in Palmore v. Sidoti\textsuperscript{98} and that the best interests of a child were not served by delaying a child's adoption to serve a “cultural agenda.”\textsuperscript{99}

The best interests of the tribe standard is part of the “collective rights” thinking that is inherent in many Indian tribes. Many Indians are taught to think of themselves as part of the larger cultural group, where every child belongs to both its family and to the tribe. “The concept that a mother has the right to remove her child from its extended family and community, thereby depriving the child of its heritage, and the community of its valued member, is foreign to Indian cultures.”\textsuperscript{100}

As author Catherine M. Brooks notes in her article chronicling the application of ICWA in Nebraska:

In devising a system of child placement and adoption designed to distance the child from his or her biological family, American jurisprudence has created a system of child rearing that is foreign to the American Indian population, upon which the process is used disproportionately frequently. Often, tribal languages do not have an analog for the Anglo word “adoption.” Equally unknown to American Indian culture is the characteristic termination of all ties with an original family in order to create a new set of attachments with a separate family. The spiritual bonds between mother and child, father and child, child and family, as acknowledged in native peoples' cultural beliefs, make severance incomprehensible.\textsuperscript{101}

The United States Supreme Court recognized the disparity between American jurisprudence and Indian philosophy in Holyfield. Citing the Utah Supreme Court, the Court stated:

The protection of this tribal interest is at the core of ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cul-

\textsuperscript{98} 466 U.S. 429, 433 (1984).
\textsuperscript{99} Pattiz, supra note 16, at 2590.
\textsuperscript{100} Goldsmith, supra note 61 at 7-8, (citations omitted); see also Carriere, supra note 20, at 600 for a discussion of the “cultural construction of the Native American,” and how this construction operates in the Indian Child Welfare Act to “perpetuate the subordination of Native American culture, families, and individuals.” This article focuses on the reasons why courts should not presume to adopt “Anglo” notions of the nuclear family and apply them to Indian children.
\textsuperscript{101} Brooks, supra note 4, at 665 (citations omitted).
ures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize.\textsuperscript{102}

Although this passage specifically deals with children domiciled on the reservation, the United States Supreme Court resolved the issue of domicile in favor of the Indian view.\textsuperscript{103} The "Indian family" doctrine takes the domicile argument one step further. The "Indian family" doctrine assumes that a child that lives off the reservation and does not have any contact with any blood relatives is no longer part of an "Indian family." Even in cases where a court rejects the "Indian family" exception, the idea of a cultural aspect to the Indian Child Welfare Act has been upheld. For example, in \textit{In re Bridget R.},\textsuperscript{104} the California Court of Appeals held that "a rule which would preclude the application of ICWA to any Indian child who has not himself (or herself) lived in an Indian family does not comport with either the language or purpose of the Act," but went on to find that "it is questionable whether a rational basis, far less a compelling need, exists for applying the requirements of the Act where fully assimilated Indian parents seek to voluntarily relinquish children for adoption."\textsuperscript{105} The idea of "full assimilation" implies that the placement preferencing requirements of ICWA do not apply to children of parents who are not culturally bound to their tribe.

The United States Supreme Court implied in \textit{Holyfield} that the correct angle from which a court should view the application of ICWA is from the vantage point of the tribe.\textsuperscript{106} Therefore, the collective's rights (\textit{i.e.} the tribe's) should be given equal weight to the rights of the individual (the child or the parent) under ICWA.

\section{V. Congressional Attempts to Limit the Indian Child Welfare Act}

The best interests of a non-Indian child are defined by state courts and welfare agencies. It is a highly discretionary standard, and has been questioned as a means of determining placement.\textsuperscript{107} The best interests of an Indian child and the tribe are codified in ICWA, with the underlying

\begin{itemize}
\item \textsuperscript{102} 490 U.S. 30, 52 (1989).
\item \textsuperscript{103} Id.
\item \textsuperscript{104} 49 Cal. Rptr. 2d at 507 (Cal. App. 4th 1996).
\item \textsuperscript{105} Id at 522, 526.
\item \textsuperscript{106} 490 U.S. at 52.
\item \textsuperscript{107} "The standard is so embedded in Euro-American values that, unless it is radically redefined, cultural bias inescapably results from its application." Carriere, \textit{supra} note 20, at 615.
\end{itemize}
preemption that it is in the best interests of an Indian child to be placed with Indian parents, and it is in the best interests of an Indian tribe to keep the child in the tribe. Lobbyists rely on this predetermined best interest of Indian children as a reason to amend ICWA.\textsuperscript{108}

On April 6, 1995, Representatives Gerald Solomon of New York, Dan Burton of Indiana, and Deborah Pryce of Ohio proposed an amendment to the Indian Child Welfare Act ("Pryce Amendment").\textsuperscript{109} The amendment proposed to "clarify" ICWA by defining a member of an Indian tribe to be:

[O]nly those who are on the membership roll of a tribe, or those who are otherwise considered members under consistently applied policies and practices, and in accordance with all written requirements for membership. If over the age of eighteen before first becoming a member of an Indian tribe, one should become a member only upon his or her personal, written consent. For the purposes of any child custody proceeding involving an Indian child, membership in an Indian tribe should be effective from the actual date of admission to membership in the Indian tribe, and should not be given retroactive effect.\textsuperscript{110}

Congresswoman Pryce stated that the proposed amendment was an attempt to safeguard against:

the arbitrary, retroactive designation of individuals as members of an Indian tribe in those instances where the biological parent(s) of the child involved in either placement or adoption proceedings had absolutely no affiliation with a tribe either before, or at the time of the child's birth; and the tribe is attempting to invoke the protections afforded by ICWA in an effort to affect or disrupt the outcome of such placement or adoption.\textsuperscript{111}

By attempting to limit the application of ICWA to only those proceedings in which the parent or child has an "affiliation with the tribe," it is clear that the purpose of the amendment is to codify the Indian family exception and apply it at a federal level. The American Academy of

\textsuperscript{108} "The fact is that ICWA, unlike other legislation pertaining to child welfare, does not address in statute or regulation those policies of 'stability' or 'permanency' which are, after all critical to promoting any child's best interest." Establishing Status of Indian Children: Hearings on S. 1448 Before the House Subcommittee on Native American and Insular Affairs, 104th Cong. (1995) (Testimony of Dr. William Pierce, President of National Council for Adoption).


\textsuperscript{111} Id.
Adoption Attorneys even proposed its own amendments to broaden the Pryce Amendment to “disenable tribes who misuse the provisions of the Act to preclude adoptions of non-Indians.”\textsuperscript{112}

The Pryce Amendment would delete the “eligible for enrollment” language of 25 U.S.C. § 1903 (4)(b), and replace it with the proposed language above. This language “would unduly restrict the application of ICWA, conditioning the definition of an ‘Indian child’ upon the formal enrollment of the biological parent as members of a tribe at the time of the child’s birth.”\textsuperscript{113} The eligibility language currently in place in ICWA allows the interests of the tribe in determining their membership to be on par with those of the parent in child custody proceedings. The interests of the tribe would no longer be on par with that of the parents if an enrollment requirement is passed by Congress. Not only that, but as Terry Cross, the Executive Director of the National Indian Child Welfare Association indicates, a requirement of enrollment would violate the right of a tribe to determine its own membership.\textsuperscript{114}

This proposed amendment fails to recognize the competing interest of an Indian tribe in custody proceedings involving an Indian child. The problem with a concurrent jurisdictional scheme is quite apparent in this light. If the tribe had exclusive jurisdiction in all custody proceedings involving Indian children, the tribe would not have to “disrupt the outcome of a placement or adoption.” As is noted in the testimony of Mark Tilden, representing the interests of twenty-three Indian tribes:

The importance of tribal primacy in matters of child custody and adoption cannot be minimized, for ICWA is grounded on the premise that tribal self-government is to be fostered and that few matters are of more central interest to a tribe seeking to preserve its identity and traditions than the determination of who will


\textsuperscript{114} Enrollment does not equal membership in many situations. Tribal membership may be determined in whole or in part by enrollment, but may also utilize traditional or customary practices such as knowledge of kinship networks. Enrollment lists are not, in fact, a traditional practice of tribes, but rather have been foisted upon tribes by the federal government.

have the care and custody of its children. This bill will pierce tribal sovereignty in three ways.

1. It will interfere with a tribe making a determination as to who is a tribal member by allowing state courts to determine whether tribal membership standards and practices are consistently applied, with the focus being on "enrollment."

2. It does not permit Indian children who are tribal members to shield themselves under the protective coverage of ICWA unless they are members prior to the beginning of the child custody proceedings.

3. It may possibly deprive tribes of jurisdiction over some Indian children resident and domiciled on the reservation because they would not be considered Indian children for the purposes of ICWA under H.R. 1448.\(^\text{115}\)

In *In the Matter of S.C. and J.C.*,\(^\text{116}\) the Oklahoma Supreme Court stated that "the preservation of the existing Indian family was an integral purpose of ICWA from its inception."\(^\text{117}\) This statement by itself may be true, but the subsequent holding of the Oklahoma Supreme Court, denying the application of ICWA in that case, is indicative of the larger problem of holding child custody hearings in state courts. The "preservation of the existing Indian family" could mean a very different thing to a tribal judge than it would to an Oklahoma judge. Because of this disparity, ICWA was created to remove Indian child custody proceedings to tribal court whenever possible.

The Pryce Amendment was overwhelmingly supported by adoption agencies, and overwhelmingly rejected by Indian tribes and attorneys who work in the area of Indian child placement.\(^\text{118}\) This fact in itself is indicative of the problem with allowing state courts concurrent jurisdiction with tribal courts in deciding Indian child placement matters—the application of a "best interests" standard, as defined by the state, is too tempting to resist. The state adoption agencies and state courts have been trained to determine what is in the best interests of a child. Reducing their discretion by telling them that the best interests of an Indian child are tied to the best interests of the child's tribe is too bitter a pill.


\(^{117}\) *Id.* at 1255

\(^{118}\) See H.R. 1448, 104th Cong. (1995).
The May 10, 1995, hearings on the proposed amendments to ICWA resulted in a direction by the Committee on Resources to the National Association of Adoption Attorneys, the Alaska Federation of Natives, the National Indian Child Welfare Association, and all concerned Indian Tribes to draft a working document on the Pryce Amendment and the issues it raised regarding ICWA.\textsuperscript{119} The Committee on Resources apparently felt that some clarification of ICWA was in order. Even those opposed to the amendment supported the clarification of ICWA in some areas. An alternative amendment was proposed by Representative Young of Alaska in the House of Representative on March 13, 1997,\textsuperscript{120} and by Senator John McCain of Arizona in the Senate on April 14, 1997.\textsuperscript{121} This amendment to ICWA sets forth specific notice requirements for tribes to intervene in a placement proceeding, time lines for intervention, criminal sanctions for knowingly violating or encouraging another to violate ICWA, time limits on the withdrawal of voluntary consent for child placement, a duty on attorneys and agencies to inform Indian parents of their rights under ICWA, and other modifications of ICWA that attempt to address some of the problems that have been encountered by courts, tribes, and families in the past.\textsuperscript{122} No action has been taken on this proposed amendment by the House or Senate to date.

The provisions of H.R. 1448, the “Pryce Amendment,” were reintroduced through Title III of H.R. 3286, the “Adoption Promotion and Stability Act of 1996.” Hearings were conducted on Title III, H.R. 3286 before the Senate Committee on Indian Affairs on June 26, 1996. Again, the proposed amendment to ICWA was overwhelmingly supported by adoption agency attorneys and rejected by tribes.\textsuperscript{123} Members of Congress also testified against adoption of the amendments,\textsuperscript{124} as did

\begin{footnotesize}
\begin{enumerate}
\item[119.] Id.
\item[120.] H.R. 1082, 105th Cong. (1997).
\item[121.] S. 569, 105th Cong. (1997).
\item[122.] See H.R. 1082 and S. 569, 105th Cong. (1997).
\item[124.] See Hearing before the Senate Committee on Indian Affairs, 105th Cong. (1996) (Testimony of Honorable Eni F.H. Faleomavaega and Honorable Don Young). Representa-
\end{enumerate}
\end{footnotesize}
the Department of Justice and the Bureau of Indian Affairs. The Pryce Amendment language was subsequently removed from the Adoption Promotion and Stability Act. Congress has not taken any further action to amend ICWA to date.

VI. CONCLUSION

The Indian Child Welfare Act was an attempt by Congress to codify the "best interests of the child" standard as it applies to ethnicity. Congress made the assumption when passing ICWA that the best interests of an Indian child were necessarily tied to the interests of the child's tribe, and to the child's ethnic heritage. ICWA requires notice to a child's tribe, the right of a child's tribe to intervene in placement proceedings, and placement preferences as codification of this assumption. Yet despite the apparently unambiguous language of ICWA, courts continue to find exceptions to its application. The "Indian family" exception is one such attempt to apply the state's or the court's assumptions regarding the best interests of a child, as is the "good cause" exception. Even the amendments created to limit the application of ICWA are proposed "in the best interests of the children."

The "best interests of the child" standard is ambiguous and highly subjective. Whether it be a court-created exception, attempts by Congress at modification, or simply ignoring the law, attempts to codify the "best interests of the child" standard to include the ethnic heritage of a child face an uphill battle. Restricting the autonomy of state agencies and courts is the method utilized under ICWA, putting the interests of the tribe and the parents on par with those of the child. Under § 1808(c)
of the Small Business Job Protection Act of 1996, Congress defined the best interest of a non-Indian child as placement regardless of the race or ethnicity of the parents. Interestingly, in cases involving the placement of black children with non-black families, courts often invoke the "best interests of the child" language to necessitate a placement finding.

Regardless of the method used by Congress to codify the "best interests of the child" standard, they must first consider the assumptions that go into that codification. As Linda Hodges, a woman who adopted an Indian child in 1969, noted:

Before lawmakers encourage adoptions of Indian children by non-Indian families, before they remove tribal jurisdiction over child custody proceedings, before state courts interpret "good cause" as economic superiority, they need to acknowledge the strength of biological and cultural ties that Indian tribes can offer their own children.

