

narizes the history and structure of ICWA, with particular attention to the jurisdictional and placement provisions of the Act. Part One describes ICWA's core features and the ways in which the Act mediates between the collective will of the tribe and the voice of the individual. I examine the decision in *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>7</sup> the only ICWA case to have been decided by the United States Supreme Court, and explore its implications for state and tribal courts. Part Two addresses the ongoing debates about the policies underlying the Act. This Chapter seeks to move beyond the hyperbole of the opposing camps to a recognition of the core values underlying ICWA.

The policies of the Act had their genesis in the tragic history of governmental destruction of Indian tribes, families, and culture. The federal Act's response to that history was a unique statute intended to promote tribal survival, to strengthen the tribes' hand in child welfare, and to protect the best interests of Indian children. Its singular focus on Indian children was necessary to meet the gravity of the wrongs. The question for the future is whether the remedy crafted in 1978 adequately addresses today's Indian child welfare needs.

## Part One. Structure and Operation of Indian Child Welfare Act

### A. Background

The Indian Child Welfare Act was designed to remedy a long history of abuses by federal and state officials, state court judges, and private adoption agencies

families, and tribes." *Amendments to the Indian Child Welfare Act: Hearings Before the Senate Committee on Indian Affairs*, 104th Cong., 2d Sess. 303 (1996) (statement of Jack F. Trope, for AAILA). Similarly, Ron Allen, President of the National Congress of the American Indian has explained that "[t]he National Congress has never advocated that the Indian Child Welfare Act be amended. Our tribes have taken the position that ICWA works well and, despite some highly publicized cases, continues to work well." *Id.* at 134. See also *Joint Hearing on S. 569 & H.R. 1082, to Amend the Indian Child Welfare Act, Before the Comm. on Ind. Affairs, U.S. Sen., and Comm. on Resources, U.S. House of Rep.*, 105th Cong., 1st Sess. 142-53 (1997) [hereinafter *1997 Joint Hearing*] (Testimony of Nat'l Ind. Child Welfare Assoc.); Terry A. Cross, Kathleen A. Earle, & David Simmons, *Child Abuse and Neglect in Indian Country: Policy Issues*, 81 FAM. SOC. J. CONTEMP. HUM. SERV. 49 (2000), available at 2000 WL 15451289 (applauding ICWA as having returned responsibility for child welfare to tribes but pointing out need for greater federal funding).

7. 490 U.S. 30 (1989).

that led to widespread removal of Indian children from their homes and communities. Beginning in the early 1800s, a sequence of missionary schools and federally-operated boarding schools strove to "civilize" Native children by changing their dress, language, religious practices, and outlook on life.<sup>8</sup>

With reformers urging the government to help "save" Indian youth, Congress appropriated funds for boarding schools in 1882, to be run under the auspices of the Bureau of Indian Affairs.<sup>9</sup> The boarding school experience separated children from their families and homes for long periods and, not surprisingly, produced "a permanent breaking of family ties."<sup>10</sup> Moreover, pursuant to its "placing out" program, the federal government in the same time period placed Indian children on white-owned farms in the East and Midwest "in order to learn the 'values of work and the benefits of civilization.'"<sup>11</sup>

In N. Scott Momaday's moving history of the young Sioux warrior named Plenty Horses, he relates that as a child Plenty Horses had been sent to a boarding school founded in 1879 by Richard Henry Pratt, "whose obsession was to 'kill the Indian and save the man.'"<sup>12</sup> After five years at the school, where Plenty Horses was forbidden to speak his native Lakota, he returned to his people, but they did not fully accept him.

He had lost touch with the old ways; he had lived among whites, and the association had diminished him. He rejected the white world, but he had been exposed to it, and it had left its mark upon him. And in the process he had been dislodged, uprooted from the Indian world.... [H]e lived in a kind of limbo, a state of confusion, depression, and desperation.<sup>13</sup>

Momaday goes on to describe the theft of the young boy's language:

After five years Plenty Horses had not only failed to master the English language, he had lost some critical possession of his native tongue as well. He was therefore crippled in his speech, wounded in his in-

8. See generally 1997 Joint Hearing, *supra* note 6, at 143 (testimony of Nat'l Ind. Child Welfare Assoc.); Lorie M. Graham, "The Past Never Vanishes:" A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 15-32 (1998) [hereinafter *Contextual Critique of the Existing Indian Family Doctrine*].

9. See Graham, *Contextual Critique of Existing Indian Family Doctrine*, *supra* note 8.

10. Lewis Meriam, *The Effects of Boarding Schools on Indian Family Life: 1928*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 14-17* (Steven Unger, ed., 1977).

11. 1997 Joint Hearing, *supra* note 6, at 144 (describing "placing out" program of 1884).

12. N. SCOTT MOMADAY, *THE MAN MADE OF WORDS* 101-02 (1997).

13. *Id.* at 102.

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telligence. In him was a terrible urgency to express himself—his anger and hurt, his sorrow and loneliness. But his voice was broken. In terms of his culture and all it held most sacred, Plenty Horses himself was thrown away.<sup>14</sup>

Bereft of his words and his culture, Plenty Horses struggles to define himself. Momaday's work provides a window into the human costs of the boarding school project.<sup>15</sup>

As child welfare policy became more interventionist through the twentieth century, public and private agencies turned their attention to Indian child-rearing practices. In the era when "termination" was official federal policy toward Indian tribes,<sup>16</sup> adoptive placements of Indian children rose dramatically.<sup>17</sup> Beginning in 1958 and continuing for a decade, the Child Welfare League of America in collaboration with the Bureau of Indian Affairs worked with state and tribal social workers across the country to facilitate the adoptions of Indian children into non-Indian families.<sup>18</sup> The "Indian Adoption Project," as it was known, stemmed from studies showing that many Indian children were legally available for adoption but remained in foster care or were being passed among relatives on impoverished reservations. Moreover, as the number of healthy white infants available for adoption declined, childless non-Indian couples became increasingly interested in adopting Indian children.<sup>19</sup> Through a combi-

14. *Id.* at 103.

15. Ironically, some BIA residential schools today are heralded by Indians as beneficial for Indian children precisely because they teach children about their Native cultures in a safe living environment away from impoverished reservations. Others, however, believe the BIA should no longer be in the business of running residential schools. See Charla Bear, *American Indian School a Far Cry from the Past*, NPR, May 13, 2008, available at <http://www.npr.org/templates/story/story.php?storyID=17645287>.

16. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 9–10 (Nell Jessup Newton ed., 2005) [hereinafter COHEN'S HANDBOOK] (dividing federal policy into discrete phases, including the Formative Years, from 1789 to 1871; the era of Allotments and Assimilation, from 1871 to 1928; the period of Indian Reorganization, from 1928 to 1942; the era of Termination, from 1942 to 1961; and finally the era of Self-Determination, from 1961 to the present). Chapter One provides an overview of federal policy toward Indian tribes.

17. See generally William Byler, *The Destruction of American Indian Families*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES*, *supra* note 10, at 1–2.

18. Judith Graham, *Adoption Apology Too Late for Indians*, CHI. TRIB., May 7, 2001, at 1.

19. Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. DET. L. REV. 451, 455–56 (1989).

nation of paternalism, assimilationist motives, and gross cultural insensitivity, welfare workers and state officials dedicated themselves to finding non-Indian homes for these "at risk" Indian children.<sup>20</sup> In the words of the Director of the Project, "many children who might have been firmly established in secure homes at an early age through adoption had been passed from family to family on a reservation or ... had spent years at public expense in federal boarding schools or in foster care. They had never had the security of family life to promote their development and assure their future."<sup>21</sup> The Child Welfare League also encouraged tribes to relinquish jurisdiction to state courts to facilitate agency adoptions.<sup>22</sup> By 1967, the Indian Adoption Project had placed almost 400 Indian children for adoption.<sup>23</sup> In a belated apology in 2001, the League acknowledged that its actions in connection with the Indian Adoption Project assumed that Indian children "would be better off with white families as opposed to staying in their own communities and tribes."<sup>24</sup>

After sustained lobbying by the Association of American Indian Affairs and other groups, Congress finally turned its attention to the plight of Indian children and, by extension, Indian tribes. Testimony before congressional com-

20. *Id.* See also Pauline Arrillaga, *America's Lost Birds Fly Home—Adopted Indians Find Way Back to Their Tribes*, ARIZ. REPUBLIC, July 1, 2001, at A10 (describing cultural and psychological legacy of Indian Adoption Project).

21. Arnold L. Lyslo, *Background Information on the Indian Adoption Project: 1958 through 1967*, in DAVID FANSHL, *FAR FROM THE RESERVATION* 36 (1972). In fairness, Lyslo also stated that the over-arching objective was for Indian children to have "a good life within their own family, or at least with a family of their own tribal heritage." *Id.* at 49. When that goal was impossible, however, the Project placed children in non-Indian families, and Lyslo concluded the children had adjusted well. *Id.*

22. *Id.* at 48.

23. *Id.* at 33.

24. See Judith Graham, *supra* note 18. According to Graham's account, Shay Bilchik, executive director of the Child Welfare League of America, issued a statement in April 2001 that included the following passage: "What we did may have been well-intentioned, but it was wrong, it was biased, it was hurtful. It is time to tell the truth—that our actions presupposed that Indian children would be better off with white families as opposed to staying in their own communities and tribes—and be reconciled." Similar to the experience of American Indian children, thousands of First Nations children in Canada were also adopted by white families in the twentieth century as a result of welfare officials' desires to "civilize" the indigenous populations. See generally Keri B. Lazarus, Note, *Adoption of Native American and First Nations Children: Are the United States and Canada Recognizing the Best Interests of the Children?*, 14 ARIZ. J. INT'L & COMP. L. 255 (1997); Clayworth Jason, "Stolen" Iowan Wants Family, *Culture Back*, DES MOINES REG., Oct. 9, 2000, at 1 (recounting experience of First Nation child who was adopted out).

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mittees in 1974, 1977, and 1978 documented the existence of a crisis in the Indian family of sufficient proportion to threaten tribal survival.<sup>25</sup> Surveys conducted by the AAIA in 1969 and 1974 showed that between twenty-five and thirty-five percent of all Indian children were separated from their families and placed in foster homes, adoptive homes, or residential institutions.<sup>26</sup> The hearings revealed that a majority of these children were being placed in non-Indian adoptive or foster families.<sup>27</sup> In many states, two-thirds or more of the Indian child placements were in non-Indian homes, and in some states the percentage was even higher.<sup>28</sup> Adding to the grim picture was the well-established tradition of BIA-run boarding schools, often located far from the reservations, in which Indian children were to learn the ways of the dominant society. In these institutions, the children were often denied the right to speak their language, practice their religion, or partake in any cultural practices.<sup>29</sup> Congress concluded that “[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”<sup>30</sup>

25. *Indian Child Welfare Act of 1978, Hearings Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. (1978); *Indian Child Welfare Act of 1977: Hearing on S.1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. (1977) [hereinafter *1977 Hearings*]; *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93rd Cong., 2d Sess. (1974) [hereinafter *1974 Hearings*].

26. Byler, *supra* note 17, at 1.

27. The disparity in placement rates for Indians and non-Indians was striking. In the state of Washington, for example, the Indian adoption rate was reported as almost 20 times greater and the foster care rate 10 times greater than that for non-Indian children. H. R. Rep. No. 95-1386, *supra* note 3, at 9. In Arizona, 4.2 times more Indian children were placed for adoption than non-Indian children, and the overwhelming majority of these children were placed in non-Indian homes. Cong. Rec. 38102 (Oct. 14, 1978) (Statement by Rep. Udall in support of H.R. 12533).

28. *1977 Hearings*, *supra* note 25, at 538, 603 (Tables showing comparative rates of foster and adoptive placements of Indians and non-Indians); *1974 Hearings*, *supra* note 25, at 17 (reporting on study by Association on American Indian Affairs of sixteen states showing 85% of all Indian child placements were with non-Indian families).

29. See Graham, *Contextual Critique of the Existing Indian Family Doctrine*, *supra* note 8, at 15-32. The boarding schools began in the late 1880s. At that time, when educational responsibility had shifted from missionaries to public institutions, the BIA “developed an extensive network of off-reservation boarding schools designed to inculcate Indian children with the virtues and values of Western civilization and to eliminate the traces of tribal ‘barbarism’ that their own heritage was thought to represent.” VINE DELORIA, JR. & CLIFFORD M. LITTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 241 (1983).

30. H.R. Rep. No. 95-1386, *supra* note 3, at 9.

Testimony before Congress also indicated that state child welfare officials were insensitive to traditional Indian approaches to child rearing, in particular the widespread practice of involving members of a child's extended family in significant care giving. Applying majoritarian middle-class values, state workers often construed such practices as neglect or even abandonment.<sup>31</sup> In addition, high rates of alcoholism and poverty were relied on as justifications for removing Indian children from their communities.<sup>32</sup> Indian families suffered from the loss of their children, and tribes, in turn, lost their membership.<sup>33</sup>

Congress also heard widely-cited evidence about the destructive impact of these practices for Indian children, but some of that evidence has come under attack in recent years. According to various advocacy groups and social scientists who testified before Congress in support of the Act, not only did Indian children suffer the trauma of separation from their homes and tribes but, in addition, Indian youths raised in non-Indian settings often encountered difficulty in forming a positive identity later in life, exhibiting serious emotional and psychological problems.<sup>34</sup> A psychologist named

31. See H.R. Rep. No. 95-1386, *supra* note 3, at 10. Congress found, for example, that the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

*Id.* For a detailed summary of the congressional hearings, see Russel Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287 (1980).

32. H.R. Rep. No. 95-1386, *supra* note 3, at 10, 12 (non-Indian social workers demonstrate cultural bias in assessing parental fitness with reference to such factors as alcohol abuse, low income, unemployment, substandard housing, and low educational attainment).

33. See H. R. Rep. 95-1386, *supra* note 3, at 9 (high rate of removal of Indian children leads to fragmentation of families and tribal communities); 1974 Hearings, *supra* note 25, at 58 (statement of Drs. Carl Mindell & Alan Gurwitt) (explaining that placement of children in prolonged substitute care destroys fabric of Indian families).

34. See, e.g., 1977 Hearings, *supra* note 25, at 355 (statement of Don Milligan); 1974 Hearings, *supra* note 25, at 46-47 (statement of Dr. Joseph Westermeyer); Barsh, *supra* note 31, at 1290-92 (summarizing testimony before Congress about destructive psychological impact on Indian children); Arrillaga, *supra* note 20 (describing experiences of Indian children who were adopted by non-Indian couples in era preceding ICWA). A similar phenomenon has been observed elsewhere. In Australia, the forced removal of Aboriginal children from their homes and families during the nineteenth and twentieth centuries produced a population of people with Aboriginal roots who were raised in white homes or institutions. As with American Indian children raised in non-Indian environments, the disjunction between legal identity and ancestral or racial identity of the Aboriginal children

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Joseph Westermeyer provided pivotal testimony on the destructive impact on Indian children of being raised by non-Indians, an impact he named the "apple syndrome" — red on the outside and white on the inside. He based his assessment on his work with Indian youth from Minnesota who had been referred to him for psychiatric treatment and then extrapolated from his personal observations to the population as a whole.<sup>35</sup> Other experts testified that Indian adoptees showed a range of self-destructive behaviors that often surfaced during adolescence, including substance abuse, delinquency, and failure to complete high school.<sup>36</sup> The tragic plight of Indian children raised in non-Indian homes is a powerful image that clearly gripped Congress, continues to influence judicial decision-making,<sup>37</sup> and has surfaced in literature.<sup>38</sup>

The empirical support for the claim of detrimental impact on Indian children of non-Indian adoptions has been sharply criticized by Professor Randall Kennedy, a staunch opponent of race-matching in adoption.<sup>39</sup> Kennedy

has given rise to intense emotional conflict. See *THE LOST CHILDREN* (Coral Edwards & Peter Read eds., 1989) (collecting personal narratives of Aboriginal adoptees). As noted by editor Peter Read, when Aboriginal children have been introduced to their birth families, the children's emotional turmoil is apparent. "I'm Aboriginal, but what do I do about my white family who raised me? It becomes an emotional tug of war." *Id.* at xxii.

35. Joseph Westermeyer, *The Apple Syndrome in Minnesota: A Complication of Racial-Ethnic Discontinuity*, *JOURNAL OF OPERATIONAL PSYCHIATRY* 10 (1979). Significantly, Westermeyer acknowledged that the Indian youth with the most severe problems were those in foster care rather than those who had been adopted. See 1974 *Hearings*, *supra* note 25, at 45.

36. See 1974 *Hearings*, *supra* note 25, at 129, 132 (Dr. Bergman's testimony); 1977 *Hearings*, *supra* note 25, at 184 ("There is a disproportionately high number of Indian children who find their way into delinquency institutions and mental hospitals. These are children who have been separated from their culture."); *id.* at 281 ("the separation of Indian children from their natural parents, including especially their placement with non-Indian families ... caus[es] the loss of identity and self-esteem, and contributes directly to the unreasonably high rates among Indian children for school drop-out, alcoholism and drug abuse, suicides and crime...").

37. Justice Brennan gave credence to Westermeyer's testimony in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 n.1 (1989).

38. That image has appeared in various forms in modern literary works. Sherman Alexie's John Smith is a man struggling to regain a lost identity after his Native heritage disappeared when he was adopted by a white couple. See *SHERMAN ALEXIE, INDIAN KILLER* (1996). The character of Turtle in Barbara Kingsolver's *PIGS IN HEAVEN* also has two identities, one deriving from her Cherokee ancestry and one deriving from her relationship with her white adoptive mother. With fictional license, Kingsolver creates a happy ending that melds the two dimensions. See *BARBARA KINGSOLVER, PIGS IN HEAVEN* (1993).

39. See *RANDALL KENNEDY, INTERRACIAL INTIMACIES* 499-503 (2003).

attacks the studies underlying much of the congressional testimony as biased, anecdotal, and wholly lacking in scientific validity. Although Westermeyer blamed white adoptive parents for the maladjustment of their adopted children, he did not study their caretaking methods in any systematic way or the possible harm suffered by the children that resulted from conduct of their biological families before the children's placement for adoption.

Moreover, as Kennedy points out, Congress ignored one of the most germane studies at the time of the effects of adoptions of Indian children by non-Indian families—David Fanshel's book, *Far From the Reservation: The Transracial Adoption of American Indian Children*.<sup>40</sup> Fanshel followed the adoptions of almost one hundred Indian children involved in the Indian Adoption Project for four to five years post-adoption. In his assessment, based on a series of interviews with parents rather than direct observation of the children, "more than 50 percent of the children [were] performing extremely well in all spheres of life and another 25 percent [were] performing in a way that makes the outlook for their future adjustment very hopeful. Only ten percent of the children were showing problems which made their outlook guarded..."<sup>41</sup> Fanshel acknowledged the weaknesses of his study—the absence of a control group,<sup>42</sup> the relatively young age of the children,<sup>43</sup> and his exclusive reliance on parental reporting.<sup>44</sup> Nevertheless, he developed sophisticated adjustment measures from a variety of perspectives and interviewed mothers and fathers independently. Interestingly, his results were consistent with other adoption studies in reporting positive outcomes for most of the children.<sup>45</sup> Kennedy relies in part on Fanshel's work to support his criticism of ICWA, but Fanshel's viewpoint warrants a closer look.

Although Fanshel did not observe the pathologies in the adopted children that Congress heard about during the ICWA hearings, he nevertheless feared that programs such as the Indian Adoption Project in the long-run would ultimately destroy Indian tribes and Indian families. In his view, the destruction of tribes would inevitably harm Indian children. He wrote, "It seems clear that the fate of most Indian children is tied to the struggle of Indian people ... for survival and social justice. Their ultimate salvation rests upon the success of

40. FANSHEL, *supra* note 21.

41. *Id.* at 323. The study showed a significant, albeit modest, association between the child's age at the time of adoption and his or her overall adjustment. As Fanshel put it, "the older the child at the time of placement, the more apt he was to be rated as showing a problematic adjustment." *Id.* at 332.

42. *Id.* at 320.

43. *Id.* at 323.

44. *Id.* at 324.

45. *Id.* at 323.



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modest, association between the ... stment. As Fanshel put it, "the ... to be rated as showing a prob-

that struggle."<sup>46</sup> For that reason, he strongly supported tribal authority over child welfare matters involving Indian children. Nevertheless, his work did conclude that the Indian children whom he had studied did not appear to suffer psychological harm from being raised in non-Indian homes. Anecdotal evidence presented to Congress in the hearings leading up to ICWA painted a very different and negative picture of the psychological impact on Indian children of their non-Indian placements. As discussed in Part Two, the debate about transracial adoption continues today at a heated pace.

Fanshel's ultimate endorsement of the goals of ICWA rests on the link between tribal survival and the well-being of a tribe's youngest members. Even if the evidence of damage to Indian children stemming from non-Indian adoptions was weak, one need not reject the underlying premise of ICWA. The widespread removal of Indian children from their homes and reservations had an indisputably destructive impact on Indian tribes, and unnecessary intrusions into Indian families inflicted harm on family members, particularly children. As Fanshel himself recognized, the interests of Indian children, when viewed in the broader perspective, are directly linked to the survival of their tribes. If tribal culture is devalued in the majoritarian society, that dimension of an Indian child's identity will suffer as well. Thus, ICWA's dual goals of promoting tribal survival and protecting the interests of Indian children are complementary. If these broad goals conflict in an individual case, the solution should not be to choose one goal over another; rather, the resolution of competing goals may lie in giving greater attention to each child's unique individuality. Although Professor Kennedy has identified weakness in the evidence presented to Congress, his broad condemnation of the policies underlying ICWA fails to account for the fundamental link between the well-being of Indian children and the survival of their tribes.

### B. Overview of ICWA

#### i. Findings and Definitions

Congressional findings at the beginning of ICWA set the tone for the Act. In stark language, the findings include the recognition that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."<sup>47</sup> Significantly, a congressional declaration of policy at the outset of the Act emphasizes Congress's dual focus on the interests of tribes as well as the interests of children:

46. *Id.* at 341.

47. 25 U.S.C. § 1901(3) (Congressional Findings).



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.<sup>48</sup>

The findings go on to note that an alarmingly high percentage of Indian children were being removed from their homes by state authorities and placed in non-Indian homes and institutions, and that the states had "failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."<sup>49</sup> In the words of the House Report, ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."<sup>50</sup> As discussed below, this dual focus, while complementary in theory, has produced the major points of tension and conflict under the Act.

The congressional approach to remedying the vast problem of widespread dislocation of Indian children was multi-pronged. Acting under its "plenary power over Indian affairs,"<sup>51</sup> Congress created various jurisdictional, procedural, and substantive protections governing child welfare matters concerning Indian children. A "child custody proceeding," under the Act, includes foster, pre-adoptive, and adoptive placements and terminations of parental rights.<sup>52</sup> Reflecting the congressional focus on child welfare practices, the definition of child custody proceeding does not include juvenile delinquency placements or interparental custody disputes at divorce.<sup>53</sup>

48. 25 U.S.C. § 1902 (emphasis added).

49. 25 U.S.C. § 1901 (Congressional findings).

50. H.R. Report No 95-1386, *supra* note 3, at 23.

51. 25 U.S.C. § 1901(1). Authority to regulate commerce with Indian tribes was the principal source of power relied on by Congress. *See* U.S. CONST. art. I, § 8, cl 3. Indian tribes are an anomaly within the American political system, occupying a status of subordinate sovereignty that Chief Justice John Marshall once described as "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Chapter One briefly discusses the legal status of Indian tribes.

52. *See* 25 U.S.C. § 1903(1). The Act applies to voluntary and involuntary proceedings but differentiates between them. *See id.* at § 1912 (involuntary); *id.* at § 1913 (voluntary).

53. *See* 25 U.S.C. § 1903(a). Chapter Two discusses jurisdictional principles governing tribal-state competition in interparental battles over Indian children.

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The meaning of "Indian child" under ICWA is constructed by an amalgam of defining forces: the federal government's definition of "tribe"<sup>54</sup> and its insistence on definable memberships for the dissemination of federal benefits,<sup>55</sup> the tribes' coerced acquiescence in that system and their frequent use of blood quanta for defining membership,<sup>56</sup> and the fluctuating social and cultural value to an individual of assuming the identity of "Indian."<sup>57</sup> The problem of tribal identity under American law is also fundamentally shaped by the history of race relations in the United States and the history of destructive governmental practices toward Indian tribes.<sup>58</sup> The Act itself, of course, is a response to the historical practices of state child welfare authorities in removing Indian children from their families without cause and of the federal government in its housing of Indian children at BIA-run boarding schools. In its approach to Indian identity, Congress understandably wanted clear definitions that would protect the tribes in maintaining and expanding their membership. In that sense, Congress was committed to restoring to the tribes that which they had lost.

The Act defines "Indian child" to mean "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for

54. One standard definition from an early case is that a tribe is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory." *Montoya v. United States*, 180 U.S. 261 (1901).

55. Under ICWA, a tribe must be recognized as eligible to receive services from the BIA in order to qualify as an "Indian tribe." See 25 U.S.C. §1903(8). Recognition as a tribe by the Department of the Interior depends on the satisfaction of several requirements, including historical identification as an American Indian tribe or aboriginal group, geographic cohesion, political authority over members, defined membership criteria, records of current and past membership, and existing rules of governance. See 25 C.F.R. §83.7 (2008). A list is published annually by the BIA of all tribes recognized and receiving services. See 51 C.F.R. §131. A tribe that is not listed falls outside the ambit of ICWA. See *In re Wanomi P.*, 264 Cal. Rptr. 623 (Ct. App. 1989).

56. Tribal membership criteria are discussed in Chapter One.

57. Jo Carrillo notes that federal law has not adequately dealt with the issue of Native American identity and that ICWA, for example, may be ineffective in cases involving individuals who do not wish to claim a tribal identity. See Jo CARRILLO, READINGS IN AMERICAN INDIAN LAW 16 (1998) (describing facts of *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996), cert. denied, 519 U.S. 1060 (1997), in which Indian father initially concealed his Indian identity on advice of counsel).

58. See generally ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: DISCOURSES OF CONQUEST (1990); ROBERT F. BERKHOFER, JR., THE WHITE MAN'S INDIAN 113-94 (1978).

membership in an Indian tribe and is the biological child of a member of an Indian tribe."<sup>59</sup> The Bureau of Indian Affairs, in non-binding guidelines for state courts published shortly after the enactment of ICWA, addressed the question of determining whether a child is an "Indian child" within the meaning of ICWA.<sup>60</sup> Consistent with other understandings in federal Indian law,<sup>61</sup> the BIA Guidelines provide that a determination by a tribe that a child is or is not a member or eligible for membership in that tribe is conclusive.<sup>62</sup>

The legislative history of ICWA addresses the question of identity only briefly. In defending the constitutionality of the Act against critics (including

59. 25 U.S.C. §1903(4).

60. 44 Fed. Reg. 67,584 (Nov. 26, 1979) (BIA, Guidelines for State Courts; Indian Child Custody Proceedings) [hereinafter BIA Guidelines].

61. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (recognizing that power to determine tribal membership is fundamental aspect of tribal sovereignty); COHEN'S HANDBOOK, *supra* note 16, at 176 (noting that each tribe, as a distinct political community, has the power to determine its own tribal membership—whether by written law, custom, intertribal agreement, or treaty.) Notwithstanding this principle, state courts have occasionally refused to recognize tribal membership determinations. In *Quinn v. Walters*, 881 P.2d 795 (Or. Ct. App. 1994), for example, a birth mother sought to revoke her consent to adopt prior to the entry of a final adoption order—an absolute right under ICWA if her infant qualified as an "Indian child" within the meaning of the Act. To support her revocation, the mother offered an affidavit of the registrar of the Cherokee Nation, attesting that the child was eligible for tribal membership. The appeals court affirmed the final decree of adoption, holding that the trial court had properly excluded evidence of the child's eligibility for tribal membership as inadmissible hearsay. A dissenting judge, characterizing the case as a "grave miscarriage of justice," *id.* at 805, accused the majority of contravening the goal and spirit of ICWA by relying on a technical point of evidence and by failing to actively seek verification of the child's status. See *id.* at 809–14 (Unis, J., dissenting).

62. BIA Guidelines, *supra* note 60, at 67,586. The Guidelines go on to note that, absent a contrary determination by a tribe, a determination by the BIA that a child is or is not a tribal member is conclusive. Thus, while it is the tribe's prerogative to determine membership criteria and to decide who meets those criteria, the BIA's determinations are also given deference. According to the Guidelines, verification from the BIA of a child's Indian status may be desirable in voluntary placement cases where the parent has requested anonymity and the tribe does not have a system for keeping child custody matters confidential. The Guidelines also make clear that enrollment is not always required in order to be a member of a tribe, since some tribes lack written rolls and others do not maintain rolls identifying current members. *Id.* As a formal matter, most state courts have accepted tribal determinations of membership as conclusive, see, e.g., *In re Welfare of S.N.R.*, 617 N.W.2d 77 (Minn. Ct. App. 2000) (determination by tribe of membership is function of sovereignty and conclusive), but the "existing Indian family exception" that is followed in several states is itself a means of questioning Indian identity. The doctrine is discussed (and criticized) in Chapter Five.

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the Justice Department) who urged that the Act be limited to enrolled Indian children, the House Report contended that Congress has power to act with respect to the non-enrolled as well. In this regard, it explained:

This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom. Obviously, Congress has power to act for their protection. The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, *particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.*<sup>63</sup>

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Congress's language reveals an assumption about Indian identity—that the eligible child would claim it if he or she possessed sufficient maturity to do so—and does not address the circumstance of the child of mixed parentage, with each parent supplying a dimension of the child's personhood. Indeed, the legislative history contains minimal discussion of the child of Indian and non-Indian parents.<sup>64</sup>

While the statutory definition has been criticized as too narrow,<sup>65</sup> others have argued that it should have been further delimited by requiring that an Indian child reside on a reservation or maintain close family ties to one.<sup>66</sup> What

63. H.R. Rep. No. 95-1386, *supra* note 3, at 17 (emphasis added).

64. For a rare mention of the possibility that an Indian child might be in the custody of a non-Indian parent, see H.R. Rep. No. 95-1386, *supra* note 3, at 39 (Letter from Patricia A. Wald, Assistant Attorney General) ("We do not think that the blood connection between the child and a biological but noncustodial parent is a sufficient basis upon which to deny the present parents and the child access to State courts.").

65. See Barsh, *supra* note 31, at 1307-10 (arguing that the criterion of eligibility for tribal membership perpetuates anachronistic and irrelevant classifications). Amendments proposed in Congress to broaden the scope of ICWA are discussed in Chapter Five.

66. In 1978, the Justice Department argued to Congress that ICWA's proposed definition of Indian child would be unconstitutional if it did not require close affiliation with an Indian reservation in addition to the requirement for eligibility for tribal membership. See H.R. Rep. No. 95-1386, *supra* note 3, at 37-40 (Letter from Patricia M. Wald, Assistant Attorney General). The Department's position was that absent such a requirement, the Act would constitute invidious racial discrimination. That argument reemerged in connection with the "existing Indian family exception" to ICWA. A bill in 1996 proposed to codify the exception by making the Act inapplicable to a child whose parents do not maintain affilia-



these opposing camps do not address is the identity conundrum posed by the child of Indian/non-Indian parentage. In this regard, I do not assume that the status of "Indian" is a racial category—a problematic and recurring question cogently explored by others.<sup>67</sup> Whether Indian status is viewed as a racial classification, a cultural identity, or political membership in a sovereign entity, the reality remains that many children qualifying as "Indian" within ICWA's structure today possess potential Indian identity through only one parent. A tribe's willingness to accept a particular child into tribal membership does not eliminate the multiple identities the child possesses, nor does it dispose of the non-Indian parent's insistence that he or she has an equal claim to any characterization of the child's cultural heritage. With the incidence of intermarriage between non-Indians and Indians at its highest point in history,<sup>68</sup> we can expect this tension in ICWA's approach to Indian identity to continue.

When Indian heritage exists through only the father, state paternity laws requiring putative fathers to assert their claims to paternity in a timely manner may interfere with the goals of ICWA. Under ICWA, the term "parent" explicitly excludes an "unwed father where paternity has not been acknowledged or established."<sup>69</sup> In a state with a strict putative fathers registry law, the failure to register in a timely manner generally bars the putative father from asserting paternity and contesting an adoption.<sup>70</sup> If the putative father is an Indian

tion with their Indian tribe. See H.R. 3286, 104th Cong., 2d Sess. ("Adoption Promotion and Stability Act of 1996").

67. See, e.g., Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702 (2001) (arguing that tribes should move toward non-racial definition of membership in order to bolster constitutionality of Indian preferences); Carole Goldberg, *American Indians and "Preferential Treatment,"* 49 UCLA L. REV. 1, 19–20 (2002) (suggesting that the Indian Commerce Clause provides a specific source of constitutional authority to justify preferential treatment for Indians).

68. As explained in Chapter One, the rate of intermarriage of American Indians with other "racial" groups is approaching 50%. See C. MATTHEW SNIPP, POPULATION REFERENCE BUREAU, AMERICAN INDIAN AND ALASKA NATIVE CHILDREN: RESULTS FROM THE 2000 CENSUS 7–9 (2005), available at <http://www.prb.org/pdf05/AmericanIndianAlaskaChildren.pdf>. See also NAT'L RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 113–23 (James P. Smith & Barry Edmonston eds., 1997).

69. 25 U.S.C. §1903(9).

70. See, e.g., ARIZ. REV. STAT. §8-106.01 (requiring putative father to register within 30 days after birth of child and providing that failure to file is waiver of right to object to adoption). In line with the goal of facilitating adoption, putative father registry laws are strictly enforced. See, e.g., *Marco C. v. Sean C.*, 181 P.3d 1137 (Ariz. Ct. App. 2008) (putative father's filing of paternity claim one day after deadline barred him from contesting adoption of child).

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man, the question arises whether the failure to comply with a state's paternity law precludes the application of ICWA. In *Jared P. v. Glade T.*,<sup>71</sup> for example, a Cherokee teenager living in Texas failed to timely petition for paternity under Arizona law after his newborn child was relinquished for adoption by the birth mother. Although the Cherokee Nation intervened in the adoption proceeding, the trial court held that ICWA was inapplicable because of the putative father's failure to timely establish paternity. The court of appeals reversed, concluding that the requirement of "acknowledgment" under ICWA was satisfied, even though the father had not complied with the strict terms of state law. Accordingly, the trial court should have followed ICWA's provisions before finalizing the adoption. In *Jared P.*, had the young father not been Indian, his procedural misstep would have barred him from contesting his child's adoption. As a potential Indian parent, however, his acknowledgment before and during the adoption process was sufficient to create parental status under ICWA, and the child qualified as an "Indian child."<sup>72</sup> In this context as well as others, the congressional policies underlying ICWA—promoting tribal survival and protecting children's Indian identities—may trump competing goals animating state law.

## ii. Jurisdictional Provisions

The jurisdictional provisions of the Act implement Congress's view that tribal sovereignty must encompass the power to decide foster and adoptive matters involving Indian children. Moreover, by curbing state court authority, the provisions also reflect the congressional understanding that state courts shared responsibility for the unjustified removal of Indian children from their homes.<sup>73</sup> First, under § 1911(a), the Act provides for exclusive tribal court ju-

71. 209 P.3d 157 (Ariz. Ct. App. 2009).

72. If the father had not acknowledged the child until long after the adoption, the court would have reached a different result. Compare *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000) (putative Indian father who failed to timely file paternity petition under state law nevertheless "acknowledged" Indian child for purposes of ICWA), with *Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. Ct. App. 1983) (ICWA did not apply retroactively to adoption of child where putative Indian father failed to acknowledge child until two and a half years after adoption). See also *Navajo Nation v. LDS Family Serv's*, 2006 WL 3692662 (D. Utah Dec. 12, 2006) (court abstains from resolving question whether Navajo Nation may assert claim under ICWA notwithstanding putative Navajo father's failure to file with state putative father registry).

73. Testimony leading up to ICWA suggested that state courts suffered from ignorance, poor training and cultural bias in deciding Indian child welfare matters. See *1974 Hearings*, supra note 25, at 57-58; *American Indian Policy Review Commission, Report on Federal, State,*

jurisdiction over any child welfare proceeding involving an Indian child who resides or is domiciled on a reservation or is a ward of tribal court.<sup>74</sup> For such children who have the key geographic or wardship affiliation with a tribe, the tribe's authority is paramount and cannot be defeated by a parent who wants to place his or her child for adoption through the state courts.<sup>75</sup> In that jurisdictional mandate, Congress declined to give parents a right to subvert the tribe's essential role in child welfare proceedings involving domiciliary children; the exclusive power of the tribe trumps individual choice.<sup>76</sup>

*and Tribal Jurisdiction* 79–80 (Comm. Print 1976) [hereinafter *1976 Report*]. The formal findings included in the Act itself provide that “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.” 25 U.S.C. § 1901(5).

74. 25 U.S.C. § 1911(a) provides:

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.

The Act's recognition of exclusive tribal jurisdiction was consistent with the existing case law. *See, e.g., Fisher v. Dist. Court*, 424 U.S. 382 (1976) (per curiam) (Northern Cheyenne tribal court had exclusive jurisdiction over custody dispute between Indian foster mother and Indian biological mother where all parties were tribal members residing on reservation); *Wisconsin Potawatomies v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973) (adoption proceedings involving orphaned Indian siblings domiciled on reservation, though temporarily absent, were within exclusive jurisdiction of tribal court).

75. The words of the House Report are revealing:

Cultural disorientation, a person's sense of powerlessness, his loss of self-esteem—these may be the most potent forces at work. They arise, in large measure, from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government.

One of the effects of our national paternalism has been to so alienate some Indian parents from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family. Another expression of it is the involuntary, arbitrary, and unwarranted separation of families.

H.R. Rep. No. 95-1386, *supra* note 3, at 12. Thus, tribal courts are recognized as possessing exclusive jurisdiction over such cases, and the domiciliary parent lacks the power to circumvent tribal authority. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), discussed *infra* at notes 137–45 and accompanying text.

76. For a thoughtful analysis of the wardship basis for exclusive jurisdiction, see Patrice H. Kunesch, *Borders Beyond Borders—Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act*, 42 *NEW ENG. L. REV.* 15 (2007) (positing that tribal jurisdic-

Significantly otherwise vested in ICWA permit Secretary of the Law 83-280 (P.L. state criminal jurisdiction states.<sup>79</sup> Al ICWA and P.L. civil jurisdiction. The withdrawal controversial. The question in 200 a tribe in a P.L. involving a child of §1911(a). In ward in California the Elem India P.L. 280 state, a reassumption of state court decision “regulatory” in tory power. The

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Significantly, § 1911(a) withholds exclusive tribal jurisdiction where it “is otherwise vested in the State by existing Federal law.”<sup>77</sup> A companion provision in ICWA permits tribes to “reassume” exclusive jurisdiction by petitioning the Secretary of the Interior.<sup>78</sup> The phrase “existing Federal law” refers to Public Law 83-280 (P.L. 280), a law enacted during the termination era that extended state criminal jurisdiction and limited civil jurisdiction over reservations in certain states.<sup>79</sup> Although the Supreme Court has not addressed the interplay of ICWA and P.L. 280, most courts have concluded that P.L. 280’s grant of state civil jurisdiction did not affect the concurrent jurisdiction of tribal courts.<sup>80</sup> The withdrawal of the exclusive jurisdiction of tribal courts, however, remains controversial. The Ninth Circuit handed down an important decision on this question in 2005. In *Doe v. Mann*,<sup>81</sup> the court confronted the question whether a tribe in a P.L. 280 state retains exclusive jurisdiction over a dependency action involving a child domiciled on the reservation, notwithstanding the language of § 1911(a). In that case a termination of parental rights and adoption went forward in California state court regarding an Indian child who was domiciled on the Elem Indian Colony reservation. Significantly, California is a mandatory P.L. 280 state, and no tribe at the time of the proceeding had petitioned for a reassumption of jurisdiction. The child’s mother challenged the validity of the state court decree in federal court, arguing that involuntary proceedings were “regulatory” in nature and therefore outside P.L. 280’s grant of civil adjudicatory power. The Ninth Circuit rejected the federal court challenge, reasoning

tion has no fixed geographic limits when addressing Indian children who are wards of tribal court). Contrary to Professor Kunesh’s view, the South Dakota Supreme Court has ruled that a tribal court lacked jurisdiction to make a tribal member child a ward of the tribal court where the child was found to be domiciled and residing off the reservation. See *In re J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007). The jurisdictional significance of the *J.D.M.C.* case is discussed in Chapter Two.

77. 25 U.S.C. § 1911(a).

78. See 25 U.S.C. § 1918(a). The statute requires the petitioning tribe to show that it has a suitable plan to exercise such jurisdiction. *Id.*

79. See Act of August 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588, codified in part at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360. See generally Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997). Chapter Two discusses P.L. 280 as it relates to tribal court civil jurisdiction more generally.

80. See, e.g., *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991); *In re C.R.H.*, 29 P.3d 849 (Alaska 2001). See generally COHEN’S HANDBOOK, *supra* note 16, at 560-61.

81. 415 F.3d 1038 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006).

that while tribes could exercise concurrent jurisdiction under ICWA in P.L. 280 states, the tribe's claim to exclusive jurisdiction had been ousted by P.L. 280.<sup>82</sup>

The Ninth Circuit's approach in *Mann* diverges from the position advanced by respected Indian law scholars.<sup>83</sup> The court's conclusion that P.L. 280 civil adjudicatory jurisdiction includes the application of state child dependency laws on reservations is a close question in light of P.L. 280 precedents.<sup>84</sup> On the other hand, the *Mann* holding seems solidly supported by ICWA's structure. Congress clearly intended to withhold exclusive tribal jurisdiction under § 1911(a) in P.L. 280 states, without drawing a distinction between voluntary and involuntary proceedings. It provided a mechanism for the reassumption of such jurisdiction tribe by tribe under § 1918, but until such a formal reassumption occurs, Congress envisioned that the state's concurrent adjudicatory jurisdiction would continue. The policy choice that was made in 1978 may no longer be appropriate three decades later, but a change in policy is in the hands of Congress.

When an Indian child is domiciled off the reservation, relationships under the Act shift, and the parent's interests play a more prominent role. For the non-domiciliary child, the Act recognizes concurrent tribal/state authority but creates what is sometimes termed "presumptive tribal jurisdiction."<sup>85</sup> The Act through § 1911(b) requires state courts to transfer child custody proceedings

82. 415 F.3d at 1058-68.

83. See COHEN'S HANDBOOK, *supra* note 16, at 570-72 (endorsing view that P.L. 280 eliminated tribal exclusive jurisdiction over "private" voluntary child custody proceedings but did not diminish tribes' exclusive jurisdiction in the "regulatory" realm of involuntary child custody proceedings). The HANDBOOK characterizes the district court opinion in *Mann*, which reached the same result as the Ninth Circuit, as an interpretation "that strains both the statutory fabric and the legislative history of ICWA." *Id.* at 571 n.495.

84. The Supreme Court has distinguished civil regulatory jurisdiction from civil adjudicatory jurisdiction for purposes of P.L. 280. See *Bryan v. Itasca County*, 426 U.S. 373, 383 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210 (1987). Under these precedents, P.L. 280 extended state civil *adjudicatory* jurisdiction over private claims involving Indians arising on reservations but was not intended as a grant of general *regulatory* power over tribal members on reservations. The plaintiff in *Mann* argued that the termination of her parental rights was an involuntary proceeding, regulatory in nature, and therefore not within the P.L. 280 grant of jurisdiction. The Ninth Circuit, noting that a conflict in authority existed, reasoned that the exercise of child dependency jurisdiction is distinct from ordinary regulatory authority, such as taxing or licensing. Instead, a state's child welfare power focuses on the best interests of children and the status of private parties and is therefore within the P.L. 280 grant. 415 F.3d at 1058-60.

85. See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989); *Michael, J. v. Michael J.*, 7 P.3d 960, 962 (Ariz. Ct. App. 2000).

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to tribal court upon the petition of a parent or the child's tribe, unless either parent objects or the court finds good cause to the contrary.<sup>86</sup> Thus, in contrast to proceedings involving children domiciled on a reservation, in proceedings involving non-domiciliary Indian children, Congress protected parental autonomy—giving either parent an absolute veto over the transfer option.<sup>87</sup> As noted by one critic, this provision means that the state forum will prevail whenever there is parental disagreement<sup>88</sup>—a scenario most likely to occur when the parents do not share Indian heritage or a common tribal affiliation.<sup>89</sup> As a consequence, the Act's underlying tension in determining Indian identity may surface in disputes about this "transfer jurisdiction." Moreover, the "good cause" exception to the transfer of cases to tribal court—a statutory battleground for jurisdiction—continues to be a source of controversy under the Act.<sup>90</sup> In the House Report on ICWA, Congress indicated, somewhat ambiguously, that the good cause provision was intended to permit a state court to apply "a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected."<sup>91</sup> The state courts are divided over whether

86. 25 U.S.C. §1911(b).

87. The decision in *In re Larissa*, 51 Cal. Rptr.2d 16 (Ct. App. 1996), is illustrative. There the court concluded that 1911(b) gives the parent of an Indian child not domiciled or residing on the reservation an unconditional veto power over any request to transfer a proceeding to the tribal court. In the court's view, the statutory veto "supports the policy behind the ICWA by giving the parents, the persons best suited to determining the importance of the family's Indian connection, the option of defending in the court system most reflective of family standards. It additionally conforms to the legislative aim of balancing the interests of the tribe, when the child is not domiciled on the reservation, with those of the parents." 51 Cal. Rptr.2d at 22. See also *Matter of Appeal in Maricopa County, Juv. Action No. JD-6982*, 922 P.2d 319 (Ariz. Ct. App. 1996) (ICWA gives parent absolute veto over transfer motion by tribe); *BIA Guidelines*, *supra* note 60, at 67,591 (same).

88. Barsh, *supra* note 31, at 1317.

89. In *In re Interest of A.E.*, 572 N.W.2d 579 (Iowa 1997), for example, the mother's tribe moved for transfer of proceedings under §1911(b), and the children's non-Indian father objected. The court read the statute as giving either parent veto power over the transfer and therefore denied the tribe's motion.

90. See, e.g., *In re Robert T.*, 246 Cal. Rptr. 168 (Ct. App. 1988) (affirming trial court's consideration of child's best interest in denying tribe's motion to transfer).

91. H.Rep. No.95-1386, *supra* note 3, at 21. Some state courts rely on the BIA Guidelines in determining what constitutes "good cause" under §1911(b). According to the Guidelines, good cause not to transfer exists if there is no tribal court to which the case can be transferred or if any of the following circumstances exist:

- (i) The Proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice



the good cause provision allows for a consideration of a child's best interests, and those that have assumed that a best interests analysis is appropriate have been sharply criticized.<sup>92</sup>

### iii. Procedural Protections

The Act creates a host of procedural protections for Indian parents and children when cases do remain within state court, and these rights strengthen the position of birth parents as compared to the law governing non-Indian families. The procedural protections include a right of intervention for Indian custodians and tribes<sup>93</sup> and a right to notice for parents, Indian custodians, and

of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or not contact with the child's tribe or members of the child's tribe.

BIA Guidelines, *supra* note 60, at 67,591. The Guidelines also caution that socio-economic conditions or the perceived adequacy of tribal social services or court systems may not be considered in determining whether good cause exists. *Id.*

92. In finding good cause to deny transfer of a child welfare case to tribal court, several state courts have noted either that the Indian child had bonded with the foster or adoptive parents or that it would be psychologically damaging to remove the child from her present situation. *See, e.g., In re Appeal in Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245, 1250-51 (Ariz. Ct. App. 1991); *In re Robert T.*, 246 Cal. Rptr. 168, 175 (Ct. App. 1988); *In re Alexandria Y.*, 53 Cal. Rptr.2d 679, 682 (Ct. App. 1996); *In re Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993). Critics see this blend of a best interests analysis with a jurisdictional determination as improper and dangerous to the underlying goals of the Act. *See* Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585 (1994).

93. Under 25 U.S.C. § 1911(c), the child's Indian custodian and the child's tribe have the right to intervene at any point in a state court proceeding for foster care placement or termination of parental rights. Because Congress specified the two types of proceedings giving rise to a statutory right to intervene, courts have questioned whether intervention is barred in other proceedings, such as preadoptive or adoptive placements. Most courts addressing the issue have concluded that intervention by the tribe, while not statutorily mandated, can still be granted as a matter of trial court discretion. *See, e.g., In re Baby Girl A.*, 282 Cal. Rptr. 105 (Ct. App. 1991) (tribe could not intervene as matter of right in ancillary proceeding intended to assist in completing voluntary adoptive placement, but intervention was proper under state civil procedural rule); *In the Matter of the Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. Ct. App. 1983) (although ICWA did not expressly authorize intervention by tribe in adoption proceeding, trial court properly exercised discretion to grant intervention).

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tribes when the court has reason to know that an Indian child is involved in an involuntary child custody proceeding.<sup>94</sup> Because compliance with ICWA notice provisions is essential to avoid belated invalidations of placements of Indian children, at least a few states have tried to strengthen the notice requirements beyond the sparse statutory language.<sup>95</sup> The Act also provides for appointment of counsel for indigent parents or Indian custodians in any removal, placement, or termination proceeding,<sup>96</sup> and a requirement that state courts give full faith and credit to tribal acts and decrees relating to Indian child custody proceedings.<sup>97</sup> Where state law might undermine these procedural rights, courts typically have ruled that ICWA preempts contrary state provisions. For example, several courts have held that a tribe may intervene in state court proceedings through a lay representative, even if state law generally requires representation by an attorney.<sup>98</sup>

Importantly, the Act imposes a heightened duty on state agencies to avoid the removal of an Indian child from his or her home. Any party seeking a foster care placement or parental rights termination must show 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."<sup>99</sup> Case law has made clear that this requirement supplements the mandates otherwise existing under federal or state law and

94. 25 U.S.C. § 1912(a). Congress's failure to give an express right to notice for tribes in voluntary proceedings has caused some interpretational problems in the state courts. Many states themselves have enacted laws requiring notice in voluntary proceedings. *See, e.g.,* 10 OKLA. STAT. ANN. § 40.4 (requiring notice to tribes for voluntary as well as involuntary child custody proceedings); *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008) (tribe entitled to notice of voluntary proceedings under state law). As discussed in Chapter Five, amendments proposed several years ago would make notice to tribes an express requirement for voluntary proceedings.

95. *See, e.g., In re R.R.*, 294 S.W.3d 213 (Tex. Ct. App. 2009) (holding that "substantial compliance" with notice provisions was not sufficient and detailing measures constituting proper notice to tribes). Strict compliance was necessary, in the court's view, because "violation of the ICWA notice provisions may be cause for invalidation of the termination proceedings at some later, distant point in time." *Id.* at 225.

96. 25 U.S.C. § 1912(b).

97. *Id.* at § 1911(d). *See* Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L. REV. 381, 397-99 (2004) (analyzing requirements under ICWA for mandatory recognition of child custody decrees).

98. *See, e.g., In re Interest of Elias L.*, 767 N.W.2d 98 (Neb. 2009); *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008).

99. 25 U.S.C. § 1912(d).

imposes a particularized requirement of “culturally relevant” services when the state proceeding involves an Indian child.<sup>100</sup> Thus, “active efforts” means that state agencies must actively support clients in complying with service plans by providing transportation, arranging appointments with providers, assisting with childcare, and taking other rehabilitative measures, optimally in collaboration with the child’s tribe.<sup>101</sup> Consistent with the overarching goal of the Act, the “active efforts” mandate applies to removals of children from extended family members, not solely to removals from the parental home.<sup>102</sup> Whether state agencies must pursue these measures even if they deem them to be futile is a matter of some disagreement.<sup>103</sup> The obvious risk is that state agencies and courts might avoid the active efforts requirement altogether under a “futility” exception. On the other hand, a requirement that states continue to expend time and resources on a parent’s rehabilitation after repeated failures seems illogical.<sup>104</sup>

In light of the congressional view that Indian children had been too readily removed from their families and communities, the Act heightens the burden of proof to a level above that required as a matter of constitutional due process. Under § 1912, foster care placements or other temporary removals must be based on “a determination, supported by clear and convincing evidence, 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.”<sup>105</sup> In proceedings to terminate

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100. A California decision gave force to the requirement of “active remedial efforts.” In *In re Michael G.*, 74 Cal. Rptr. 2d 642, 650 (Ct. App. 1998), the court remanded a parental rights termination case involving Indian children in order for the state to provide the parents (who were incarcerated during much of the proceedings) with remedial services consistent with “the prevailing social and cultural conditions and way of life of the Indian child’s tribe.”

101. See *In re J.L.*, 770 N.W.2d 853 (Mich. 2009) (noting that rehabilitative efforts for Indian parent were made both by tribe and state agency).

102. See *State ex rel. C.D. v. State*, 200 P.3d 194 (Utah App. 2008) (holding that state was required to show either that active efforts had been made to avoid removal of child from grandfather’s care, or that further efforts would be futile).

103. Compare *In re J.L.*, 770 N.W.2d 853 (Mich. 2009) (rejecting futility test but holding that § 1912 does not impose a strict temporal requirement), with *In re K.D.*, 155 P.3d 634 (Colo. Ct. App. 2007) (accepting futility test).

104. The “active efforts” requirement is explored in more detail in Chapter Six in connection with child welfare permanency goals.

105. 25 U.S.C. § 1912(e). In a contentious case from Washington, the state supreme court held that § 1912’s clear and convincing evidence standard for temporary removals could be satisfied on proof that disrupting the children’s current placement would cause them harm. See *In re Mahaney*, 51 P.3d 776 (Wash. 2002). Two justices dissented, arguing

parental rights, the Act imposes the highest burden of proof: in such cases, the state must establish the likelihood of serious harm to the child by "evidence beyond a reasonable doubt," again supported by testimony of qualified expert witnesses.<sup>106</sup> In contrast, for child welfare cases not involving Indian children, the preponderance of the evidence standard governs temporary removals of children from their homes, and parental rights terminations are governed by the "clear and convincing evidence" standard as a matter of constitutional due process.<sup>107</sup>

Not surprisingly, parents of non-Indian children facing parental rights terminations have argued that the distinction created by ICWA violates their equal protection rights by requiring the lesser "clear and convincing" burden of proof.<sup>108</sup> The courts have been consistent in rejecting these challenges, basically relying on the *Mancari* doctrine to uphold ICWA's constitutionality. In *In re Interest of Phoenix L.*,<sup>109</sup> for example, a mother of non-Indian children argued that the state could not constitutionally apply the lower burden of proof in terminating her parental rights. The Nebraska Supreme Court relied on the *Mancari* line of precedents<sup>110</sup> and pointed to ICWA's overriding goal of protecting Indian children and tribes.<sup>111</sup> The court reasoned that the mother, as a parent of non-Indian children, was "not similarly situated to an Indian parent" and thus failed to make a threshold showing necessary for an equal protection

that § 1912 requires a showing of parental unfitness. *Id.* at 787-90. On this point, the BIA Guidelines support the dissent, see BIA Guidelines, *supra* note 60, at 67, 592-93, but the children's long-term residence with their non-Indian grandmother and their desire to remain with her clearly influenced the trial court.

106. 25 U.S.C. § 1912(f). The heightened standard for parental rights terminations under ICWA has produced some confusion as to whether state laws otherwise governing terminations continue to apply. The Texas Court of Appeals, for example, has held that ICWA preempts all state law grounds for termination as well as the statutory best interests determination. See *In re W.D.H.*, III, 43 S.W.3d 30 (Tex. Ct. App. 2001). In contrast, other courts have adopted a more sensible interpretation, concluding that ICWA allows states to continue to apply state-law grounds and to specify the standard of proof for state-law findings distinct from the findings required by ICWA. See, e.g., *Valerie M. v. Arizona Dept. Econ. Sec.*, 198 P.3d 1203 (Ariz. 2009) ("beyond a reasonable doubt" standard did not apply to state-law findings or best interests determination).

107. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

108. See, e.g., *In re Interest of Phoenix L.*, 708 N.W.2d 786 (Neb. 2006); *In re M.K.*, 964 P.2d 241 (Okla Civ. App. 1998); *In re Marcus S.*, 638 A.2d 1158 (Maine 1994).

109. 708 N.W.2d 786 (Neb. 2006).

110. See, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974); *United States v. Antelope*, 430 U.S. 641 (1977).

111. 708 N.W.2d at 796-97.

claim.<sup>112</sup> The court's reasoning is unassailable as to the congressional goals of ICWA, but it overlooks the fact that ICWA's protections extend to non-Indian parents as well as Indian parents. Much of the legislative history suggests that Congress assumed that parents of Indian children would be Indian themselves,<sup>113</sup> but the classification created by § 1912 draws a line between parents of Indian children and parents of non-Indian children, without regard to the Indian status of the parents.<sup>114</sup> Nevertheless, even if the classification were characterized as "non-Indian parents of non-Indian children" vs. "non-Indian parents of Indian children," Congress might have rationally concluded that Indian children, whether in the custody of Indian or non-Indian parents, should be protected by heightened burdens of proof at the removal stage. The problem is that Congress, consistent with its general inattention to children of mixed heritage, did not seem to consider this scenario.

Through the requirement of "qualified expert witnesses" in § 1912, Congress wanted to guard against decision-making based on ignorance of cultural practices relating to Indian family life.<sup>115</sup> Most state courts, however, have held that a "qualified expert" need not possess expertise in Native culture if the evidence justifying removal of the child is culturally neutral. Medical experts, for example, with expertise in "shaken baby syndrome" or drug-addicted newborns would be qualified to testify in cases involving evidence of such conditions.<sup>116</sup> Whether an evidentiary showing is truly "culturally neutral," of course, may be hotly contested.<sup>117</sup>

112. *Id.* at 798.

113. See H.R. Rep. 95-1386, *supra* note 3, at 10-11 (justifications for heightened standards of proof related to bias toward "Indian family life" and "Indian parents").

114. See, e.g., *K.N. v. State*, 856 P.2d 468 (Alaska 1993).

115. See *L.G. v. State*, 14 P.3d 946, 952-53 (Alaska 2000) (Congress's "primary reason for requiring qualified expert testimony in ICWA ... proceedings was to prevent courts from basing their decisions solely upon the testimony of social workers who possessed neither the specialized professional education nor the familiarity with Native culture necessary to distinguish between cultural variations in child-rearing practices and actual abuse or neglect").

116. See, e.g., *Rachelle S. v. Ariz. Dep't of Econ. Sec.*, 958 P.2d 459, 461-62 (Ariz. Ct. App. 1998). At the same time, courts have rightly held that the mandate for "qualified expert witnesses" under ICWA requires specialized training and experience, and that ordinary social workers who lack relevant *specialized* expertise do not meet the statutory standard. See *In re M.F.*, 2010 WL 396175 (Kansas 2010).

117. A Native parent's long-term marijuana use, for example, might have cultural relevance that could be illuminated by experts with specialized knowledge of Native spiritual uses of marijuana. See *In re Tamika R.*, 973 A.2d 547 (R.I. 2009) (holding that state agency committed reversible error in failure to offer any expert testimony in support of depend-



available as to the congressional goals of ICWA's protections extend to non-Indian children. The legislative history suggests that Indian children would be Indian themselves. § 1912 draws a line between parents of Indian children, without regard to the race of the child, and parents of non-Indian children. The Supreme Court has concluded that Indian parents, should they have rationally concluded that removal of their child at the removal stage. The problem is a general inattention to children of this scenario.

"expert witnesses" in § 1912, Congress based on ignorance of cultural differences. State courts, however, have held that experts in Native culture if the evidence is naturally neutral. Medical experts, however, are not "culturally neutral" or drug-addicted newsmen. The evidence of such condition is "culturally neutral," of course,

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3). (Congress's "primary reason for the findings was to prevent courts from awarding custody to workers who possessed neither the skills nor the cultural knowledge necessary to care for Indian children and actual abuse or neglect was not shown.")

58 P.2d 459, 461-62 (Ariz. Ct. App. 1935) (the mandate for "qualified expert testimony, and that ordinarily does not meet the statutory standard.

ple, might have cultural reluctance to testify in support of dependency in support of dependency.

Other procedural rights under ICWA pertain to voluntary proceedings, where the parent or Indian custodian consents to a foster care placement or termination of parental rights. By mandating certain procedural protections, Congress was responding to evidence that Indian parents often relinquished children to state authorities without fully understanding the nature of their actions. Under the Act, parental consents must be in writing and must be accompanied by a judge's certificate that the terms and consequences of the consent were fully explained to and understood by the parent.<sup>118</sup> The parent may withdraw a consent to foster placement at any time,<sup>119</sup> and may withdraw consent to a termination of parental rights at any time before a final decree of termination or adoption is entered.<sup>120</sup> In contrast, state law generally imposes stricter limits on the right of birth parents to withdraw a consent to adopt.<sup>121</sup> The Act further protects the parent by allowing a withdrawal of consent on the grounds of fraud or duress for up to two years after an adoption is decreed.<sup>122</sup>

ICWA gives a broad right to Indian children, their parents or Indian custodians, and their tribes, to challenge involuntary or voluntary foster care placements or parental rights terminations whenever the state court decrees were entered in violation of the described jurisdictional or procedural requirements of the Act.<sup>123</sup> This right of retroactive invalidation, which can result in the disruption of a long-standing placement, applies without regard to the passage of time or the circumstances of the Indian child who is the subject of the proceedings.<sup>124</sup> As shown by the introductory case for this Chapter, ag-

ency based primarily on Narragansett father's drug use). The Arizona Supreme Court recently held that the qualified expert testimony required under § 1912(e) need not explicitly refer to the statutory standard so long as the testimony is forward-looking and supports a finding of the likelihood of future harm to the child. *Steven H. v. Ariz. Dep't Econ. Sec.*, 190 P.3d 180 (Ariz. 2008).

118. 25 U.S.C. § 1913(a).

119. *Id.* at § 1913(b).

120. *Id.* at § 1913(c).

121. See generally JOAN HEIFETZ HOLLINGER, *ADOPTION LAW AND PRACTICE* § 8.02 (2001) (states typically treat consent as irrevocable if voluntarily and knowingly executed before a judge; alternatively, states may require best interests hearing if birth parent seeks to revoke).

122. 25 U.S.C. § 1913(d).

123. *Id.* at § 1914. This remedial section authorizes the child, parent or Indian custodian, or tribe to "petition any court of competent jurisdiction" to invalidate the foster care placement or parental rights termination "upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title." *Id.*

124. In *In re Michael G.*, 74 Cal. Rptr.2d 642 (Ct. App. 1998), for example, the state agency's failure to apply the statutorily-required burden of proof in terminating the parental

grieved parties—whether children, parents, or tribes—may bring their challenges in federal court. In *In the Matter of the Adoption of C.D.K.*,<sup>125</sup> the federal district court exercised its power under ICWA to invalidate an adoption of a Cherokee child after a voluntary relinquishment in Utah state court. In that case, the child's membership status was inconclusive at the time of the state court proceeding since the child was not enrolled in any tribe and the child's mother was not a tribal member. The child's grandmother, however, did allude to her own tribal enrollment in somewhat vague terms. Concluding that ICWA did not apply, the state court finalized the adoption.<sup>126</sup> A few months later, the mother challenged the adoption in federal court, arguing that her infant had been a member of the Cherokee tribe at the time of the relinquishment proceeding according to Cherokee law, a premise not presented to the state court.<sup>127</sup> Accepting the argument and the evidentiary showing, the federal judge invalidated the adoption.<sup>128</sup>

The *C.D.K.* case is revealing on two levels. First, the child's membership in the tribe derived from her lineage, separate from any action her mother might have taken. In effect, the Cherokee Nation's approach to membership signaled its strong sovereign interest in tribal children from the moment of birth. That link between tribe and child, however unsettling to the adoptive parents, triggered the application of ICWA. Second, the case highlights the importance of timing. Had the child's mother delayed for several years in asserting the child's "automatic" membership in the Cherokee Nation, an invalidation would have entailed significantly greater emotional costs for the child and the adoptive parents.<sup>129</sup> The decision underscores the need for state courts to ensure ICWA compliance in voluntary proceedings where Native mothers may be ambivalent. Not only should state judges inquire as to tribal enrollment but, under *C.D.K.*, they also should pursue the question of tribal membership with appropriate tribal authorities whenever Indian heritage comes to light.

rights of a Navajo father left the subject children in limbo "without the permanence and stability they deserve," more than three years after the agency initiated its dependency action. *Id.* at 652.

125. 629 F. Supp. 2d 1258 (D. Utah 2009).

126. *Id.* at 1260.

127. *Id.* at 1261 (Cherokee National Membership Act provides for automatic admission into Cherokee Nation of "every newborn child who is a Direct Descendant of an Original Enrollee...").

128. *Id.* at 1264.

129. See, e.g., *In re Derek W.*, 86 Cal. Rptr. 2d 742 (Ct. App. 1999) (Indian father did not assert rights under ICWA until nine years after child was placed in state custody).

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or tribes—may bring their challenge *Adoption of C.D.K.*,<sup>125</sup> the federal CWA to invalidate an adoption of a child in Utah state court. In that case, conclusive at the time of the state court proceeding in any tribe and the child's grandmother, however, did allude to the same terms. Concluding that ICWA applied to the adoption.<sup>126</sup> A few months later, the state court, arguing that her infant had been removed from the relinquishment proceeding not presented to the state court.<sup>127</sup> In that showing, the federal judge inval-

First, the child's membership in any tribe from any action her mother might take to approach to membership signaled from the moment of birth. That the child's relationship to the adoptive parents, triggering the importance of the case highlights the importance of several years in asserting the child's tribal membership, an invalidation would have been for the child and the adoptive parents. For state courts to ensure ICWA's purposes, Native mothers may be ambivalent about enrollment but, under *C.D.K.*, tribal membership with appropriate tribal approval is light.

tribe "without the permanence and stability of an agency initiated its dependency action."

ICWA provides for automatic admission of a child who is a Direct Descendant of an Original Indian Child.

In *Adoption of C.D.K.* (Ct. App. 1999) (Indian father did not object to child was placed in state custody).

#### iv. Placement Preferences

The Act's most important substantive provision is § 1915. In that provision, the Act sets out guidelines for state courts to follow when they retain jurisdiction over child custody proceedings for foster and adoptive placements. In this regard, Congress was pursuing its stated goal of promoting the "placement of [Indian] children in foster or adoptive homes which will reflect the unique values of Indian culture."<sup>130</sup> The hearings established that a majority of Indian children removed from their homes were placed in non-Indian settings, and testimony vividly portrayed the host of problems engendered by that practice. As a result, Congress mandated a preference for Indian placements—a statutory policy understandable in historical context but clearly at odds with current federal policy on interracial adoption. Through § 1915, ICWA requires that state courts give a preference to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families," for adoptive placements<sup>131</sup> and imposes a similar set of preferences for foster care placements.<sup>132</sup> The placement priorities establish "a Federal policy that, where possible, an Indian child should remain in the Indian community," and attempts to ensure that Indian child welfare decisions are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."<sup>133</sup> To achieve that goal, the Act further directs state courts, in meeting the preference requirements, to apply "the prevailing social and cultural standards of the Indian community . . . with which the parent or extended family members maintain social and cultural ties."<sup>134</sup> This provision assumes

130. 25 U.S.C. § 1902 ("Congressional declaration of policy").

131. 25 U.S.C. § 1915(a).

132. *See id.* at § 1915(b), requiring that:

in any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

The section also specifies that the placement must be "the least restrictive setting which most approximates a family and in which his special needs, if any, may be met," and "within reasonable proximity to his or her home, taking into account any special needs of the child."<sup>*Id.*</sup>

133. H.R. Report No. 95-1386, *supra* note 3, at 24.

134. 25 U.S.C. § 1915(d).

that state courts can analyze child placements through a tribal lens, something that is surely easier said than done.<sup>135</sup>

Importantly, the placement preferences need not be followed by state courts "in the absence of good cause to the contrary."<sup>136</sup> As with the good cause exception to transfer under § 1911(b), the Act's inclusion of a good cause exception in the placement guidelines has generated controversy and bitter litigation. Unlike the jurisdictional and procedural provisions of ICWA, § 1915 speaks to the state court's authority to substantively assess the child's circumstances and decide the child's future. The determination of good cause to diverge from ICWA's placement preferences, one of the selected "flashpoints" for discussion in Chapter Five, often interjects state courts into a problematic and unsatisfactory balancing of tribal interests "against" children's interests.

### C. Mississippi Band of Choctaw Indians v. Holyfield

The Act's recognition of exclusive tribal authority over child custody proceedings involving an Indian child domiciled on a reservation provided the backdrop to the only case under the Act that has been reviewed by the United States Supreme Court. In *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>137</sup> the Court confronted a dispute in which state judicial power and parental autonomy were aligned against tribal power. In invalidating a state-decreed adoption of twin Choctaw infants who were born off the reservation, the Supreme Court held that the Act's exclusive tribal jurisdiction provision applied. As a result, the state court adoption was void.

Writing for the majority, Justice Brennan rejected the contention that the state's definition of domicile or the wishes of the children's mother should defeat the tribal court's exclusive authority. Noting that "Congress perceived the States and their courts as partly responsible for the problem it intended to correct,"<sup>138</sup> the Court concluded that a uniform federal law of domicile for ICWA was necessary. Relying on common law understandings of the concept of domicile for the content of that federal law, the Court held that since the mother was domiciled on the Choctaw reservation, the children likewise were deemed to

135. Congress seemed to assume that tribal culture and tradition could be easily ascertained and then followed as a monolithic set of customs. Recent work by Indian law scholars suggests otherwise. See, e.g., Christine Zuni Cruz, *Shadow War Scholarship, Indigenous Legal Tradition, and Modern Law in Indian Country*, 47 WASHBURN L.J. 631, 649 (2008).

136. 25 U.S.C. § 1915(a), (b).

137. 490 U.S. 30 (1989).

138. *Id.* at 45.

ents through a tribal lens, something need not be followed by state courts rarely.<sup>136</sup> As with the good cause exception of a good cause exception generated controversy and bitter procedural provisions of ICWA, §1915 tentatively assess the child's circumstances of good cause to determine of the selected "flashpoints" for state courts into a problematic and against" children's interests.

### Indians v. Holyfield

authority over child custody provided on a reservation provided the has been reviewed by the United States in *Choctaw Indians v. Holyfield*,<sup>137</sup> judicial power and parental authority validating a state-decreed adoption off the reservation, the Supreme Court provision applied. As a re-

jected the contention that the children's mother should decide that "Congress perceived the problem it intended to correct the law of domicile for ICWA findings of the concept of domicile held that since the mother was children likewise were deemed to

and tradition could be easily ascertained recent work by Indian law scholar Andrew War Scholarship, *Indigenous* ASHBURN L.J. 631, 649 (2008).

possess reservation domiciles, despite the fact that the mother had traveled off the reservation to give birth and had immediately placed the children for adoption with a non-Indian couple.<sup>139</sup> The Court endorsed the Act's recognition of the superiority of tribal authority as against the desires of an individual member, at least as to the question of exclusive tribal jurisdiction. Brennan wrote:

Nor can the result be any different simply because the twins were "voluntarily surrendered" by their mother. Tribal jurisdiction under Sec. 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.<sup>140</sup>

The Court thus made clear that at least as to the exclusive jurisdiction requirement, individual tribal members have no right to circumvent the Act and cannot do so by the simple expedient of traveling off the reservation to give birth. In this regard, Brennan noted that "[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."<sup>141</sup>

In *Holyfield* the Supreme Court acknowledged that nullification of the state-court adoption was occurring over three years after the infants had been placed in the adoptive home, and that "a separation at this point would doubtless cause considerable pain."<sup>142</sup> The Court continued with an important observation about the conflict between the children's interests and those of the tribe:

Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked

139. Justice Brennan, writing for the majority, assumed that he was being faithful to congressional intent in subordinating the individual tribe member's desires to ICWA's mandate for exclusive tribal jurisdiction. In contrast, the dissent argued that the majority's approach "distorts the delicate balance between individual rights and group rights recognized by the ICWA." *Id.* at 55 (Stevens, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.). In the dissent's view, Congress did not intend the result reached by the majority. To the contrary, the dissenting Justices argued that "when an Indian child is deliberately abandoned by both parents to a person off the reservation, no purpose of the ICWA is served by closing the state courthouse door to them." *Id.* at 63.

140. *Id.* at 49.

141. *Id.* at 52 (quoting *In re Adoption of Hallaway*, 732 P.2d 962, 969-70 (Utah 1986)).

142. 490 U.S. at 53.

to decide the legal question of who should make the custody determination concerning these children—not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court.... It is not ours to say whether the trauma that might result from removing these children from their adoptive families should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community. Rather, “we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy.”<sup>143</sup>

*Holyfield* thus constitutes an emphatic endorsement of the federal policy of protecting tribal authority in child welfare proceedings affecting Indian children, even when the tribal will is ostensibly in conflict with parental choice. The opinion articulates respect for the competence (and compassion) of tribal courts, a view that informs ICWA. The majority opinion conspicuously avoids confronting directly the clash between individual and collective rights, since the Court’s institutional role required deference to congressional intent. In that sense, *Holyfield* may have been an easy case after all, since the Act mandated an unambiguous jurisdictional result. In any event, the *Holyfield* Court read the Act to endorse the superiority of tribal authority *vis a vis* individual tribal members living within the tribe’s reservation.<sup>144</sup>

*Holyfield* points to a core tension underlying ICWA—the potential clash between tribal rights and individual rights. In selecting its jurisdictional approach and in subordinating domiciliary tribal members to the will of the tribe, Congress provided a clear rule of decision but did not, and could not, dispel the tension. In the view of Martha Minow,

[*Holyfield* reveals] the central dilemma posed by the Indian Child Welfare Act; do the children have the same interests as the tribe, and if

143. *Id.* at 53–54 (quoting *In re Adoption of Holloway*, 732 P.2d 962, 972 (Utah 1986)). Subsequent events demonstrated that the Court’s articulated confidence in the “compassion” of the tribal court was well-placed. After the Choctaw court assumed jurisdiction in the matter, it decreed the Holyfields’ adoption as a matter of tribal law, the tribal judge deciding that it was in the children’s best interest to remain in the adoptive home. Solangel Maldonado, *The Story of the Holyfield Twins: Mississippi Band of Choctaw Indians v. Holyfield*, in *FAMILY LAW STORIES* 113, 121–22 (Carol Sanger ed., 2008).

144. Opposition to this recognition of tribal power over the will of individual parents took the form of proposals introduced in Congress to limit ICWA to involuntary child welfare proceedings. See, e.g., H.R. 1957, 105th Cong., 1st Sess. (1997) (exempting voluntary child custody proceedings from coverage of ICWA).

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not, should the group’s interests prevail? ... Does the case stand as a victory for group identity as a principle but a victory for individualized judgments in practice? A hypocritical pretense of respect for group identity? A signal to lower courts to enforce more vigorously the group identity dimensions of the Indian Child Welfare Act? The case is arguably all of these, and also manifests the grave difficulties involved in assigning race, family, and tribal status by law.<sup>145</sup>

The *Holyfield* decision makes clear that the Act’s mandate for exclusive tribal jurisdiction governs voluntary terminations by Indian parents with respect to children domiciled on their tribe’s reservation. In cases involving children with more attenuated ties to their tribes, however, state courts possess concurrent jurisdiction as delimited by §1911(b). In those cases, state judiciaries continue to confront the tensions underlying the Act. These tensions come into play when state judges question the legal, social, and cultural meaning of Indian identity and the propriety of assigning a single identity to children. The tensions also surface when state judges inquire into the meaning of an Indian child’s best interests, the nature of the tribe’s collective will, and the significance of individual parental choice. To the extent that the Act is founded on categories that essentialize Indian children, the tensions are inevitable.

## Part Two. Debating ICWA Policy

### A. The Question of Race and Individual Rights

One critique of ICWA comes from those who resist race-matching in adoption.<sup>146</sup> Proponents of interracial adoption point to social science evidence sug-

145. MARTHA MINOW, NOT ONLY FOR MYSELF—IDENTITY, POLITICS, AND THE LAW 76 (1997).

146. While the policy objections to race-sensitive adoptive placements would seem relevant to ICWA, the proponents of transracial adoption have focused primarily on the placement of African-American children. See generally Elizabeth Bartholet, *Where Do Black Children Belong: The Politics of Race-Matching in Adoption*, 139 U. PA. L. REV. 1163, 1207–23 (1991) [hereinafter *Race-Matching in Adoption*]. For a thoughtful analysis of the role of racism in the transracial adoption debate, see Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L & SOC. CHANGE 33 (1994) [hereinafter *Transracial Adoption Controversy*]. Professor Perry turned her attention to the role of feminism in the same debate in *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101 (1998) (arguing that