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# Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters

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# Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters

*State courts have historically exercised jurisdiction over family law cases. However, under the Indian Child Welfare Act (ICWA), Indian child custody and adoption cases have been taken out of state jurisdiction and placed with Indian tribal governments. State courts have pushed back against proper deference to ICWA and violate ICWA by misapplying its provisions and refusing to transfer custody and adoption cases to tribal courts. This Note analyzes the state-tribal tensions surrounding ICWA and argues that the primary reason for the lack of full state acceptance of ICWA is that, historically, states have had nearly total jurisdiction over family law disputes, particularly those that go to the core of ICWA – child custody and adoption. In recent years, some states have changed their tune and have sought to appropriately apply ICWA. Even so, misapplication of the law remains a problem in many state courts. In December 2016, for the first time since ICWA was enacted, the Bureau of Indian Affairs published updated rules and guidelines to clarify ICWA requirements. This is a major step toward full compliance of ICWA in state courts, despite the resistance of states to relinquish their jurisdiction over Indian family law cases.*

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## I. INTRODUCTION

State courts have historically exercised jurisdiction over family law issues.<sup>1</sup> The federal government has in most cases left the determination of domestic relations disputes to state courts and legislatures due to state court expertise in the area and the federal government's dislike of deciding family law cases.<sup>2</sup> However, through the Indian Child Welfare Act (ICWA or the Act) enacted in 1978, Indian child custody and adoption issues have been taken out of state jurisdiction and placed with Indian tribal governments.<sup>3</sup> Before ICWA, Indian children faced risk of removal from their homes at disproportionately high rates and were typically placed in non-Indian homes which contributed to the breakup of Indian families and ultimately the loss of tribal members.<sup>4</sup> The

1. Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1073 (1994).

2. *Id.* at 1073-74.

3. *In re M.M.*, 154 Cal. App. 4th 897, 907 (2007).

4. Thomas R. Myers & Jonathan J. Siebers, *The Indian Child Welfare Act: Myths and Mistaken Application*, 83 MICH. B.J. 19 (2004). Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901 (2006); see also Jessica Di Palma, *Adoptive Couple v. Baby Girl: The Supreme Court's Distorted Interpretation of the Indian Child Welfare Act*, 47 LOY. L.A. L. REV. 523, 525-26 (2014).

purpose of ICWA is to reverse the historic and recent effects of removal of Indian children from their homes and tribal communities<sup>5</sup> through both procedural and substantive protections in custody proceedings<sup>6</sup> so that “where possible, an Indian child should remain in the Indian community.”<sup>7</sup>

Not all state courts have easily parted with this portion of family law.<sup>8</sup> State courts have pushed back against full implementation and support of ICWA because of their traditional jurisdiction over family law matters. From the early years of the existence of the United States, states have struggled against the sovereignty of Indian tribes.<sup>9</sup> Instead of accepting tribes as third sovereigns, as the federal government dictates, states often view tribal jurisdiction as an intrusion into state authority.<sup>10</sup> In recent decades, the federal government has begun to federalize certain aspects of family law, taking matters such as abortion and the definition of marriage out of the hands of states and into the regulation and constitutional determination of the federal government.<sup>11</sup> Many states have found ways to skirt around tribal jurisdiction where ICWA should apply and make Indian child custody determinations in state court.<sup>12</sup> Two prominent state court misapplications of ICWA include the best interest of the child exception and the existing Indian family exception.<sup>13</sup>

The result of state violations of ICWA is that the purpose of ICWA in keeping Indian children in their homes and communities is not met.<sup>14</sup> Some states have taken steps to ensure the proper

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5. See STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 1, 292 (2012).

6. Myers, *supra* note 4, at 20.

7. H.R. REP. NO. 95-1386, at 23 (1978).

8. See Patrice Kunesh-Hartman, *The Indian Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. COLO. L. REV. 131, 140 (1989) (discussing *In re Lelah-Puc-Ka-Chee*, the earliest reported case involving tribal-state family law tensions).

9. See generally *id.* at 139–40.

10. See *id.* at 140.

11. LYNN D. WARDLE, MARK P. STRASSER & LYNNE MARIE KOHM, *FAMILY LAW FROM MULTIPLE PERSPECTIVES: CASES AND COMMENTARY* ch. 1 § D (2014); see also discussion *infra* Section III.B.

12. Suzanne L. Cross, Angeliqne G. Day & Emily C. Proctor, *Working on the Front Lines*, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT THIRTY* 3, 5 (Matthew L.M. Fletcher, Wenona T. Singel & Kathryn E. Fort eds., 2009).

13. *Id.*

14. *Id.*

application of ICWA; however, the most important response to the inconsistent state court application of ICWA has come from the Bureau of Indian Affairs (the BIA). In 2015 and 2016, the BIA published new ICWA guidelines and revised rules.<sup>15</sup> These new regulations were designed to improve the proper and consistent application of ICWA across the country, thus protecting Indian children and communities.<sup>16</sup>

This note will examine the lack of state acceptance of ICWA, arguing that this lack of acceptance stems primarily from states seeking to maintain control over child custody family law matters that have traditionally been left to state courts to decide. ICWA is the main intrusion into their jurisdiction in this area, and state courts are reluctant to recognize tribal sovereignty, especially in difficult and emotionally charged child custody disputes. Part II reviews the history and nature of tribal sovereignty and the relationship between the three sovereigns: the federal government, states, and tribes. This background is important to understanding the sovereignty of tribes and the tension between tribal and state jurisdiction. Part III discusses the history of state family law jurisdiction. Part IV analyzes the purposes and provisions of ICWA. Part V examines state court misapplication or lack of application of ICWA. Part VI discusses the recent ICWA rules and guidelines implemented by the BIA and the potential future impact of those regulations on state court ICWA implementation. Part VII concludes.

## II. HISTORY OF TRIBAL SOVEREIGNTY

### A. *Discovery and Settlement*

The United States recognizes tribal sovereignty. The Supreme Court in *Worcester v. Georgia* stated that “Indian nations had always been considered as distinct, independent political

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15. See Suzette Brewer, *BIA Releases New ICWA Guidelines to Protect Native Families and Children*, INDIAN COUNTRY TODAY (Feb. 26, 2015), <https://indiancountrymedianetwork.com/news/politics/bia-releases-new-icwa-guidelines-to-protect-native-families-and-children/> [hereinafter Brewer, *New ICWA Guidelines*]; Suzette Brewer, *Breaking: BIA Publishes Final ICWA Rule*, INDIAN COUNTRY MEDIA NETWORK (June 8, 2016), <https://indiancountrymedianetwork.com/news/politics/breaking-bia-publishes-final-icwa-rule/> [hereinafter Brewer, *Final ICWA Rule*]; 25 C.F.R. § 23 (2016).

16. See sources cited *supra* note 15.

communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”<sup>17</sup> However, those nations who “discovered” America and its indigenous peoples did not always subscribe to the idea that Indian nations are sovereign and retain rights.<sup>18</sup>

The lack of recognition of tribal sovereignty began during the discovery of the Americas with European efforts to convert the native population. The Catholic Crusades of the eleventh through thirteenth centuries were the beginning of an effort to bring Christianity to non-Christian peoples outside Europe.<sup>19</sup> These holy wars were justified because the pope had the responsibility to lead the “infidels” to Christian conversion.<sup>20</sup> This attitude carried on during the European settlement of the Americas. Conversion was seen as necessary because the natives did not have a common religion or law; did not have normal social intercourse, money, metal, or writing; did not have European-style clothing; and “lived like animals.”<sup>21</sup> According to Pope Innocent IV, “[t]he pope can order infidels to admit preachers of the Gospel” and “if the infidels do not obey, they ought to be compelled by the secular arm and war may be declared against them . . . .”<sup>22</sup>

The European’s perceived right to settlement was based on the Doctrine of Discovery.<sup>23</sup> The Doctrine of Discovery posited that the first European, Christian nation to discover new lands automatically gained exclusive property rights of the non-Christian nation, even though the natives already occupied those lands.<sup>24</sup> England claimed rights of first discovery through John Cabot’s discoveries of the east coast of North America.<sup>25</sup> France’s

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17. *Worcester v. Georgia*, 31 U.S. 515, 519 (1832).

18. PEVAR, *supra* note 5, at 4.

19. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 44–45 (7th ed. 2011).

20. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 *IDAHO L. REV.* 1, 9–10 (2005).

21. *Id.* at 10.

22. Innocent IV, *Commentaria Doctissima in Quinque Libros Decretalium*, in *THE EXPANSION OF EUROPE: THE FIRST PHASE 191–92* (James Muldoon ed., 1977); see also Miller, *supra* note 20, at 11 (“[T]he pope had authority to deprive pagans of their property and sovereignty when they failed to admit Christian missionaries or violated natural law.”).

23. See Miller, *supra* note 20, at 5.

24. *Id.*

25. *Id.* at 16.

contestation of England's claims ultimately led to the French and Indian War, after which France ceded its claims east of the Mississippi to England and west of the Mississippi to Spain.<sup>26</sup> Jamestown was the first permanent English colony in North America, and justification for its establishment was that the English were bringing the glory of God and civility to people who lived in darkness and ignorance.<sup>27</sup> In *Calvin's Case*, one of the most important English cases of this period, England's Lord Chief Justice Edward Coke stated that Indians are perpetual enemies to Christians.<sup>28</sup> The court adopted the Doctrine of Discovery and stated that "if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated."<sup>29</sup>

Many European nations issued grants and charters to their subjects, asserting jurisdiction over discovered lands.<sup>30</sup> For example, Columbus was given permission for an Atlantic crossing by the Spanish Crown in 1492.<sup>31</sup> Peaceful means of settlement between European nations occurred "principally because it was more expedient for the individual nations to compromise their exaggerated claims than to fight over them."<sup>32</sup> It was easier to give up some land rather than war with other nations. In voyage accounts, Indians were seen as mere objects of European desires: for labor, wealth, or from which to gain land.<sup>33</sup>

Not every European believed that the Indians lacked land rights, however. During the time of colonial settlement, Spanish legal theorists questioned the authority of the Crown's rights against the Native Americans.<sup>34</sup> The most famous of these theorists

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26. *Id.*

27. GETCHES ET AL., *supra* note 19, at 55.

28. Miller, *supra* note 20, at 28.

29. *Calvin v. Smith* (*Calvin's Case*), 77 Eng. Rep. 377, 398 (K.B. 1608); 7 Co. Rep. 1 a, 17 b.

30. WILCOMB E. WASHBURN, RED MAN'S LAND WHITE MAN'S LAW 27-33 (2d ed. 1995).

31. *Christopher Columbus*, BRITANNICA ONLINE ENCYCLOPEDIA, <https://www.britannica.com/print/article/127070> (last visited Jan. 23, 2018).

32. WASHBURN, *supra* note 30, at 32.

33. *Id.* at 28.

34. Miller, *supra* note 20, at 13.

was Franciscus de Victoria (c. 1483–1546).<sup>35</sup> Victoria developed three arguments relating to Spanish explorations, later adopted as the “Law of Nations” on Indian rights and status.<sup>36</sup>

The first argument was that because Indians were rational beings, they possessed natural legal rights.<sup>37</sup> The Indians “undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners.”<sup>38</sup> His second argument was that Spanish claim to title of land in the Americas through papal grant could not affect the Indian’s inherent rights.<sup>39</sup> Indian refusal to accept the Christian faith did not create justification for waging war on them or seizing their land.<sup>40</sup> Although Victoria believed that Indians had inherent rights, his third argument mirrored the basic European presumption that Indians were inferior to their conquerors. Victoria’s third argument was that the Indians’ violations of the Law of Nations “might . . . justify a Christian nation’s conquest and colonial empire.”<sup>41</sup> If the Indians violated the natural law rights of the Spanish, which included the right to travel to foreign lands, engage in trade and commerce, and send missionaries to teach the gospel, then Spain had the right to defend itself through a lawful and just war.<sup>42</sup>

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35. See Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 11–12 (1942); Susan L. Piepke, *Francisco de Vitoria*, SALEM PRESS BIOGRAPHICAL ENCYCLOPEDIA (2013).

36. Miller, *supra* note 20, at 14.

37. *Id.*

38. FRANCISCI DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 128 (Ernest Nys ed., John Pawley Bate trans., 1917). “Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant . . . . And so, as the object in question was not without an owner, it does not fall under the title which we are discussing . . . . [B]y itself it gives no support to a seizure of the aborigines any more than if it had been they who had discovered us.” *Id.* at 139.

39. Miller, *supra* note 20, at 14.

40. VICTORIA, *supra* note 38, at 137–39.

41. Miller, *supra* note 20, at 14 (internal citation omitted).

42. *Id.* at 14–15; VICTORIA, *supra* note 38, at 154.

If the Indians—whether it be their lords or the populace—prevent the Spaniards from freely preaching the Gospel, the Spaniards, after first reasoning with them in order to remove scandal, may preach it despite their unwillingness and devote themselves to the conversion of the people in question, and if need be they may then accept or even make war, until they succeed in obtaining facilities and safety for preaching the Gospel . . . if there is no other way to carry on the work



*B. Tribal Sovereign Nations*

The roots of the tension between state and tribal sovereignty began with the United States' dealings with the tribes as sovereign nations, illustrated by the negotiation of treaties and the guardian-ward relationship.<sup>43</sup> This section provides background and context of U.S.-tribal relations.

*1. British-tribal dealings*

Throughout early discovery and settlement, the Doctrine of Discovery and the protectionist relationship were relied upon to deny Indians' rights to their territory.<sup>44</sup> Under the Doctrine of Discovery, the Crown could unilaterally take Indian lands; however, in practice "the colonies frequently obtained the consent of the tribes through treaties and purchases in order to settle Indian-claimed lands."<sup>45</sup> When they could not obtain consent, sometimes colonists turned to fraud, duress, or confiscation to acquire the desired lands.<sup>46</sup>

After the French and Indian War, according to King George III's Royal Proclamation of 1763, territory east of the mountains was off limits to settlement and reserved for the tribes in order to avoid another costly war.<sup>47</sup> The proclamation stated that the British had control over Indian land and had the right to extinguish Indian title, and in exchange, Britain would protect the Indians as wards.<sup>48</sup> George Washington refused to accept the King's proclamation and ordered surveys of the tribes' land.<sup>49</sup> Colonists did not believe the Crown had a right to restrict land

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of religion, this furnishes the Spaniards with another justification for seizing the lands and territory of the natives and for setting up new lords there and putting down the old lords and doing in right of war everything which it is permitted in other just wars . . . .

*Id.* at 157.

43. JASON EDWARD BLACK, *AMERICAN INDIANS AND THE RHETORIC OF REMOVAL AND ALLOTMENT* 22, 23 (2015); see generally Kunesh-Hartman, *supra* note 8, at 140-41.

44. See Miller, *supra* note 20, at 28.

45. GETCHES ET AL., *supra* note 19, at 57.

46. *Id.*

47. *Id.* at 60.

48. BLACK, *supra* note 43, at 22.

49. GETCHES ET AL., *supra* note 19, at 60.

sale transactions between themselves and the Indians and therefore continued to speculate in Indian lands.<sup>50</sup> Many Indians also challenged the Crown's governing and met with the British to discuss grievances.<sup>51</sup>

## 2. United States-tribal dealings

After the colonists defeated the British in the Revolutionary War, the United States continued the British tradition of dealing with the tribes through treaties.<sup>52</sup> "The government promised security to American Indians in exchange for safe passage through Indian territory and the surrender of Native lands."<sup>53</sup> The tribes were regarded as sovereign nations with the right to govern their people, and all formal negotiations between the tribes and the governments were accomplished through treaties.<sup>54</sup>

Although the Indian tribes were considered sovereign nations, they did not have full rights to their lands.<sup>55</sup> In the seminal case on Indian land ownership, *Johnson v. McIntosh*, the Supreme Court of the United States accepted the Doctrine of Discovery as the root of all land titles in the United States and held that, under this doctrine, Indians did not have the right to sell their land.<sup>56</sup> The rights of the British government of title to all lands occupied by the Indians passed to the United States,<sup>57</sup> and "the Indian inhabitants [were] to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be

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50. *Id.* at 61.

51. *Id.* at 22-23.

52. BLACK, *supra* note 43, at 23.

53. *Id.*

54. PEVAR, *supra* note 5, at 5-6.

55. See GETCHES ET AL., *supra* note 19, at 62.

56. *Johnson v. McIntosh*, 21 U.S. 543 (1823).

57.

The British government, which was then our government, and whose rights have passed to the United States, asserted title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

*Id.* at 588-89 (1823).

deemed incapable of transferring the absolute title to others.”<sup>58</sup> “[D]iscovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest . . . .”<sup>59</sup> In *McIntosh*, the Supreme Court also determined that land transfers made before the Revolution were invalid.<sup>60</sup> The consequence of *McIntosh* was that Indians had legal right of occupancy, but the U.S. government owned the land. Therefore, the tribes’ rights as completely independent, sovereign nations were diminished.<sup>61</sup>

Even though treaties between the United States and tribes set aside Indian reservations and explicitly provided that the land set aside was not to be encroached upon by non-Indians, white settlers continued to intrude on Indian land.<sup>62</sup> Rather than enforce boundaries and remove settlers from Indian lands, the United States continually renegotiated treaties with tribes, resulting in diminished tribal territory.<sup>63</sup> For example, Cherokee Nation land once covered five states, but by the Era of Removal, the tribe’s only land lay in Georgia.<sup>64</sup> Despite failing to deal fairly with the Indian tribes, the United States continued to make treaties with the tribes, thereby showing that it continued to recognize them as sovereign nations.<sup>65</sup> This recognition has been relied upon to assert tribal sovereignty in later Supreme Court cases.<sup>66</sup> Additionally, support for enacting ICWA came from the determination “that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources.”<sup>67</sup>

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58. *Id.* at 584, 591.

59. *Id.* at 591.

60. *Id.* at 543.

61. BLACK, *supra* note 43, at 34–35.

62. See GETCHES ET AL., *supra* note 19, at 96.

63. *Id.*

64. *Id.*

65. Miller, *supra* note 20, at 22.

66. See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

67. 25 U.S.C.A. § 1901(2) (West 2006). “[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.” *Id.* § 1901(3).

### C. Removal

U.S.-tribal dealings through treaties resulted in loss of land owned by Indians. A continuing desire for more land drove the Removal Era. Removal was a way the U.S. government could move the tribes who lived east of the Mississippi River to the west by exchanging their current lands. This practice opened the eastern lands to further white settlement.<sup>68</sup> Removal began when efforts to assimilate the Indian into American agriculture, trading, education, and domestication failed.<sup>69</sup> Numerous justifications were relied upon for the removal of tribes, including the assumed inferiority of Indians and their inability to assimilate into white civilization.<sup>70</sup> The principal motivating factor to the whites, however, was to obtain more land.<sup>71</sup>

The Era of Indian Removal began with President Thomas Jefferson, and in 1830 President Andrew Jackson encouraged Congress to pass the Indian Removal Act.<sup>72</sup> President Jackson held the view that tribes should not be treated as independent nations and that they could not exist independently within the states. It was thus believed that Indians must assimilate and submit to the laws of the state or move west.<sup>73</sup> The Removal Act provided that land west of the Mississippi that was not part of a territory or state would be available for tribes should they choose to exchange their current lands and move west.<sup>74</sup> The Removal Act also provided that the new land in the West would be guaranteed by the federal government to the Indians and their heirs.<sup>75</sup>

Several Supreme Court cases decided during the Removal Era shed light on the scope of jurisdiction and sovereignty between the states and the tribes.<sup>76</sup> Relying on federal policy, Georgia

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68. PEVAR, *supra* note 5, at 7.

69. BLACK, *supra* note 43, at 27.

70. GETCHES ET AL., *supra* note 19, at 94.

71. PEVAR, *supra* note 5, at 7.

72. *Id.*; Indian Removal Act of 1830, 21st Cong. Sess. I. Ch. 148, 411-12 (1830), <https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=004/llsl004.db&recNum=458>.

73. GETCHES ET AL., *supra* note 19, at 100.

74. *Id.* at 98.

75. *Id.* (noting that the Removal Act also provided that "such lands shall revert to the United States, if the Indians become extinct, or abandon the same").

76. *E.g.*, Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

passed a law that added Cherokee lands to state lands.<sup>77</sup> The tribe appealed to the federal government for intervention; however, their plea fell on deaf ears.<sup>78</sup> In *Cherokee Nation v. Georgia*, the Supreme Court provided an explanation of tribal sovereignty.<sup>79</sup> Chief Justice John Marshall explained that Indian tribes are distinct political societies based on the relationship of trust between the tribes and the federal government.<sup>80</sup> A tribe's relation to the United States is that of a ward to his guardian.<sup>81</sup> Although they have "unquestioned right to the lands they occupy," they are not fully sovereign nations but "domestic dependent nations."<sup>82</sup> Similarly, in *Worcester v. Georgia*, Marshall held that Georgia laws had no effect within the Cherokee territory.<sup>83</sup> However, Georgia refused to obey the Court's mandate, and President Jackson supported Georgia's "claimed sovereignty over Cherokee lands."<sup>84</sup> Although the Cherokee challenged the removal policy, in 1838, thousands of Cherokee were forcibly removed from Georgia on the Trail of Tears to what is present-day Oklahoma.<sup>85</sup>

#### D. Allotment and Assimilation

Allotment forced assimilation of Indians into white culture and further diminishment of tribal lands. Further expansion westward meant that tribes who had removed to the West were soon surrounded by settlers, whose thirst for land did not stop at the Mississippi.<sup>86</sup> The Allotment policy, beginning in 1887, served to open up even more land for white settlement.<sup>87</sup> The General Allotment Act, known as the Dawes Act, allotted the reservations

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77. GETCHES ET AL., *supra* note 19, at 100.

78. *Id.*

79. *Cherokee Nation*, 30 U.S. at 16–20.

80. *Id.* at 17–18.

81. *Id.* ("Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.")

82. *Id.* at 17.

83. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

84. GETCHES ET AL., *supra* note 19, at 122–23.

85. See generally BLACK, *supra* note 43, at 59; ANDREW DENSON, MONUMENTS TO ABSENCE: CHEROKEE REMOVAL AND THE CONTEST OVER SOUTHERN MEMORY (2017).

86. BLACK, *supra* note 43, at 81.

87. See PEVAR, *supra* note 5, at 8–9.

to individual tribal members in order to further the objectives of assimilating Indians and extinguishing tribal sovereignty.<sup>88</sup> The reservation lands were divided, with some sections going to Indians and the rest being sold to non-Indian farmers and ranchers.<sup>89</sup> It was thought that the tribes would soon dissolve and the Indians would be absorbed into the settler community.<sup>90</sup> With the loss of land due to Allotment, the tribes lost their ability to be self-sufficient and became more dependent on the federal government for rations and services.<sup>91</sup>

Judicial decisions and legislation passed around the Allotment Era continued to have conflicting outcomes regarding tribal sovereignty and federal power over tribes. In *Ex Parte Crow Dog*, the Supreme Court affirmed the principle of tribal sovereignty.<sup>92</sup> The issue in *Crow Dog* was whether the federal government had jurisdiction to try an Indian man for murdering another Indian man in Indian country.<sup>93</sup> The Court held that the tribe, not the federal government, had jurisdiction.<sup>94</sup> In discussing the general policy of the government toward the Indians, the Court stated that the Indian tribes were

semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, State and national, deal . . . in their national or tribal character . . . .<sup>95</sup>

The Court reasoned that tribes have their own sovereignty and unless there is a clear expression by Congress indicating otherwise, statutes and treaties should be read narrowly to avoid abridgment of that sovereignty.<sup>96</sup>

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88. *Id.* at 8-9.

89. *Id.* at 9.

90. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998).

91. *GETCHES ET AL.*, *supra* note 19, at 140-41.

92. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

93. *Id.* at 557.

94. *Id.* at 571-72.

95. *Id.* at 572 (quoting *United States v. Joseph*, 94 U.S. 614, 617).

96. *Id.* at 572.

On the other hand, some subsequent federal actions served to undermine tribal sovereignty. Congress reacted to *Crow Dog* by enacting the Major Crimes Act in 1885, which gave the United States jurisdiction over certain serious crimes committed by an Indian against another Indian, in Indian country.<sup>97</sup> In *United States v. Kagama*, the Supreme Court upheld the constitutionality of the Major Crimes Act based on the trust relationship, which maintains that Indians are wards of the nation and are dependent on and need protection from the United States.<sup>98</sup> Although the Supreme Court reinforced the plenary power of Congress to abridge tribal criminal jurisdiction, the Court also noted the lack of state jurisdiction over the tribes<sup>99</sup>: “These Indian tribes *are* the wards of the nation . . . . They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.”<sup>100</sup>

In addition to taking away criminal jurisdiction from tribal governments in cases in which Indians commit certain crimes on reservations, “Congress placed federal agents on reservations to supervise tribal activities more closely.”<sup>101</sup> Although the Supreme Court recognized tribal sovereignty in *Crow Dog*, in *Lone Wolf v. Hitchcock*, the Court held that Congress has the power to abrogate treaties.<sup>102</sup> The Court held that legislation that allowed Congress to divest tribes of their lands, in breach of the terms of a treaty, was constitutional.<sup>103</sup> The Court reasoned that Congress has exercised plenary power over tribal relations from the beginning of their relationship and this was a political power, not to be questioned by the judiciary.<sup>104</sup>

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97. GETCHES ET AL., *supra* note 19, at 157; 18 U.S.C. § 1153 (2012).

98. *United States v. Kagama*, 118 U.S. 375, 383–85 (1886); *see also* BLACK, *supra* note 43, at 99.

99. *Kagama*, 118 U.S. at 383–84.

100. *Id.*

101. PEVAR, *supra* note 5, at 8.

102. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *see also* PEVAR, *supra* note 5, at 50 (“According to the Court, a federal treaty and a federal law have equal authority. In the same way that Congress may pass a federal law that amends or repeals an earlier law, Congress may also pass a law that amends or repeals an earlier treaty.”).

103. *Lone Wolf*, 187 U.S. at 566.

104. *Id.* at 565.

### E. Boarding School Era

Throughout the history of the conquest of Indian lands and the U.S. government's dealings with Indian tribes, the tribes became weak and were forced into dependence.<sup>105</sup> The federal government's use of Indian boarding schools added to the weakening of tribes and contributed to the need for safeguarding Indian children and tribes through legislation such as ICWA.

The Boarding School Era began in the Allotment Era, during which Indian children were taken from their homes and sent to boarding schools where they were stripped of their culture and "civilized."<sup>106</sup> The boarding schools were run by government and private missions and generally located far from the reservations.<sup>107</sup> More than 200 boarding schools had been established by 1887 with more than 14,000 Indian children, who had largely been forcibly removed from their homes.<sup>108</sup>

Like the General Allotment Act, the goal of the boarding schools was to assimilate and civilize the Indians.<sup>109</sup> Captain Richard Henry Pratt, the founder of the Carlisle Indian boarding school in Pennsylvania said, "all the Indian there is in the race should be dead. Kill the Indian in him and save the man."<sup>110</sup> The boarding schools were based on this premise.<sup>111</sup> The children were typically not allowed to speak their native language, practice their

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105. *Kagama*, 118 U.S. at 383-84 ("These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.").

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

107. *Id.*

108. PEVAR, *supra* note 5, at 8-9.

109. *Id.*

110. N. SCOTT MOMADAY, *THE MAN MADE OF WORDS* 101 (1997); ROBERT ALLEN WARRIOR, *THE PEOPLE AND THE WORD: READING NATIVE NONFICTION* 96 (2005) ("Pratt's famous educational philosophy was to prohibit the use of Native languages, creating a linguistic distance from students' home communities to parallel the physical distance the was already enforced by being at the boarding school.").

111. See generally DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION* (1995); WARD CHURCHILL, *KILL THE INDIAN, SAVE THE MAN* (2004).



religion, or participate in cultural ceremonies.<sup>112</sup> In fact, they were often severely punished or whipped if they spoke their native language or practiced their religion.<sup>113</sup> Harry Saslow, a clinical psychologist of the Albuquerque Boarding School, noted the depersonalization and impersonalization of these boarding schools and found that depression among the students was prevalent.<sup>114</sup> The children were taken away from their homes at a young age, and some did not see their families for the entire year.<sup>115</sup> The children felt lonely and deprived of their culture and did not fully understand either their Indian culture or white man's culture.<sup>116</sup>

*F. Reorganization, Termination, and Self-Determination*

In response to the failure of Allotment to wipe out Indian culture, Congress passed the Indian Reorganization Act (the IRA) in 1934.<sup>117</sup> The purpose of the IRA was to recognize and rejuvenate tribal self-government.<sup>118</sup> The IRA ended the policy of Allotment, returned surplus Indian lands that were open for sale back to the tribes, authorized tribes to obtain loans for economic development, encouraged tribes to adopt their own constitutions,<sup>119</sup> and limited the power of the BIA to micromanage tribal governance.<sup>120</sup> Even so, this did not fix many of the issues that came from having an outside source—the federal government—dictate Indian affairs. The BIA still had close control over tribal government,<sup>121</sup> and the IRA promoted an idea of government that was inconsistent with traditional Indian values;<sup>122</sup> nevertheless, the IRA was a step in the right direction. Although the IRA did not bestow on the tribes powers they did not have, it did recognize their inherent sovereignty and right to self-governance.<sup>123</sup>

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112. Atwood, *Flashpoints*, *supra* note 106, at 602.

113. PEVAR, *supra* note 5, at 8.

114. See WASHBURN, *supra* note 30, at 220–23.

115. PEVAR, *supra* note 5, at 8.

116. *Id.*

117. *Id.* at 10.

118. *Id.*

119. See WASHBURN, *supra* note 30, at 79.

120. See GETCHES ET AL., *supra* note 19, at 190–91.

121. *Id.* at 192.

122. PEVAR, *supra* note 5, at 11.

123. *Id.*

After the Reorganization Era, the federal Indian policy pendulum swung back, and Termination was implemented in the 1950s.<sup>124</sup> The idea behind Termination was to repeal the IRA and move to a federal policy of “complete integration” and full U.S. citizenship of Indians.<sup>125</sup> The purpose was to terminate the trust relationship between the federal government and the tribes and therefore eliminate “federal benefits and support services to the terminated tribes.”<sup>126</sup> Upon termination, tribes were ordered to cease exercising governmental powers and give all tribal land to tribal members.<sup>127</sup> Tribal reservations were eliminated,<sup>128</sup> and tribal members were to be subject to the same laws and entitled to the same rights and privileges as other United States citizens.<sup>129</sup> Author Wilcomb E. Washburn explained Termination as a way to “[w]ipe the slate clean” after years of sins committed against the Indians.<sup>130</sup> However, he noted that “our rhetoric of freedom and liberation for the Indian at home was more a concern for freeing our own conscience and our society of a burden, not so much of meeting the needs and aspirations of the Indians.”<sup>131</sup>

Termination transferred power and many responsibilities from the federal government to the states and did nothing to help free the Indians.<sup>132</sup> The states acquired full jurisdiction over previous reservation land and tribal members.<sup>133</sup> Public Law 280 was passed, which extended state civil and criminal jurisdiction into Indian country.<sup>134</sup> This legislation “transfer[red] responsibility for the maintenance of law and order on certain reservations to state and local authorities.”<sup>135</sup> The educational responsibilities that were previously regulated by the federal government and the tribes

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124. *Id.*

125. GETCHES ET AL., *supra* note 19, at 200.

126. PEVAR, *supra* note 5, at 11.

127. *Id.* at 12.

128. *Id.*

129. WASHBURN, *supra* note 30, at 87.

130. *Id.* at 83.

131. *Id.* at 84.

132. GETCHES ET AL., *supra* note 19, at 205.

133. PEVAR, *supra* note 5, at 12.

134. GETCHES ET AL., *supra* note 19, at 203; WASHBURN, *supra* note 30, at 86–87.

135. WASHBURN, *supra* note 30, at 86.

were transferred to the states.<sup>136</sup> States also had increased legislative power over the tribes.<sup>137</sup> In addition to educational authority, the states would have authority over adoptions, alcoholism, land use, and other social and economic areas.<sup>138</sup>

The Era of Self-Determination is the modern era. After the disastrous effects of Termination on the tribes, federal Indian policy again shifted in the late 1960s.<sup>139</sup> President Nixon advanced a new federal Indian policy of “self-determination.”<sup>140</sup> The purpose of self-determination was to “strengthen the [Indians’] sense of autonomy without threatening [their] sense of community.”<sup>141</sup> Congress supported the rejection of Termination, which had discouraged self-sufficiency, and instead supported tribal control over federal programs and education.<sup>142</sup> Nearly all of the previously terminated tribes have been restored to recognition.<sup>143</sup> Legislation favorable to Indian tribes was passed, including the Indian Self-Determination and Education Assistance Act, the American Indian Religious Freedom Act, and the Indian Child Welfare Act.<sup>144</sup>

### III. STATE FAMILY LAW JURISDICTION

The federal government’s decision to give tribal governments jurisdiction over domestic cases falling in the bounds of ICWA directly contrasts with the general principal that family law

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136. GETCHES ET AL., *supra* note 19, at 203.

137. *Id.* at 206.

138. *Id.*

139. PEVAR, *supra* note 5, at 12.

140. *Id.* at 12–13.

141. *Message from the President of the United States Transmitting Recommendations for Indian Policy*, H.R. DOC. NO. 91-363, 91st Cong. (2d Sess. July 8, 1970) (statement of Pres. Richard Nixon).

142. GETCHES ET AL., *supra* note 19, at 218–19 (“In my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service program which is presently administered by a Federal agency. . . . [W]e believe every Indian community wishing to do so should be able to control its own Indian schools.”).

143. PEVAR, *supra* note 5, at 13.

144. GETCHES ET AL., *supra* note 19, at 220–21; PEVAR, *supra* note 5, at 13. See GETCHES ET AL., *supra* note 19, at 220–24 for a list of prominent Self-Determination Era legislation that favored Indian tribes (noting, however, that the American Indian Religious Freedom Act was largely a policy statement and did not provide much religious protection for tribes). The Indian Child Welfare Act of 1978 was codified as 25 U.S.C. §§ 1901–1963.

matters are left to the states to determine. The federal government has been hesitant to resolve domestic issues and leaves family law matters to the states, even though the Constitution does not explicitly prohibit federal courts from hearing family law issues.<sup>145</sup> This federalism division is based on the idea that federal courts should exercise limited jurisdiction and defer to state courts where state courts have developed an expertise in domestic relations issues.<sup>146</sup> States generally decide cases involving marriage validity, divorce grounds, adoption procedures, paternity claims, and custody standards.<sup>147</sup> This opposition to considering family law issues has developed through both legislation and judicial decision-making.<sup>148</sup> The federal government desires to keep family law issues under state jurisdiction because “[f]amily law is a traditional area of state regulation, and it should be kept separate from the national business of the federal courts.”<sup>149</sup> However, there are some aspects of family law that have become “federalized.”<sup>150</sup> This section will address Supreme Court cases that illustrate the state court jurisdiction over family law issues as well as briefly address the federalization of certain family law cases.

#### A. Supreme Court Decisions

There are several Supreme Court cases that illustrate the federal government’s reluctance to decide family law matters. One of the earliest cases involving jurisdiction of family law issues is *Barber v. Barber*.<sup>151</sup> The issue in *Barber* was whether a divorced wife could have a different domicile from her ex-husband, which would allow her to sue in federal court based on diversity jurisdiction to recover for alimony due.<sup>152</sup> The Court held that a wife could establish a separate domicile from her husband.<sup>153</sup> Although

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145. Cahn, *supra* note 1, at 1073.

146. *Id.* at 1073–74.

147. WARDLE ET AL., *supra* note 11.

148. Cahn, *supra* note 1, at 1073.

149. *Id.*

150. See Linda D. Elrod, *The Federalization of Family Law*, 36 ABA HUM. RTS. MAG. 3 (2009), [https://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol36\\_2009/summer2009/the\\_federalization\\_of\\_family\\_law.html](https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law.html).

151. *Barber v. Barber*, 62 U.S. 582 (1858).

152. *Id.* at 584.

153. *Id.* at 597–98.

the issue involved payment of alimony, the Court clarified that the issue was not about whether alimony would be allowed, but whether this was a family law issue.<sup>154</sup> The Court determined that it was not.<sup>155</sup> It stated, “this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. . . . We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony.”<sup>156</sup> The federal government should not have jurisdiction over family law matters.<sup>157</sup> Although the majority and dissent disagreed over whether the issue at hand was a family law matter, they both agreed that family law disputes should be left to the jurisdiction of the state.<sup>158</sup>

Similarly, in *Ankenbrandt v. Richards*, the Supreme Court upheld federal jurisdiction because it determined that the dispute in question was a tort, not a family law matter.<sup>159</sup> The Supreme Court held that federal jurisdiction was proper in a domestic relations torts case, where the lawsuit was not seeking a decree of divorce or alimony or child custody orders, but rather was alleging that the father committed torts against his daughters.<sup>160</sup> The Court asserted that federal jurisdiction was correct in this case because domestic torts are not a traditional family law state matter.<sup>161</sup>

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154. *Id.* at 584.

155. *Id.*

156. *Id.*

157. *Id.* at 602.

158. However, the dissenters in *Barber* (Chief Justice Taney, Justice Daniel, and Justice Campbell), argued that a wife could not have separate domicile from her husband and that the Court was encroaching on domestic relations matters best left to the states. *Id.* at 602 (Taney, J., dissenting) (“It is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society; should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families . . .”). The dissenters in *Barber*, citing *Coke* and *Blackstone*, asserted the common law principle that through marriage, a husband and wife become one person and the wife has no legal identify separate from her husband. *Id.* at 600. They argued that the federal government has jurisdiction in the same way English courts of chancery did. Cahn, *supra* note 1, at 1077. Chancery courts did not have jurisdiction over divorce and alimony; these family matters were left to ecclesiastical courts. *Id.* at 1089.

159. *Ankenbrandt v. Richards*, 504 U.S. 689, 706-07 (1992).

160. *Id.*

161. *Id.*

A more recent case that discusses family law jurisdiction is *Elk Grove Unified School District v. Newdow*.<sup>162</sup> In *Newdow*, a father sued the school district, alleging that recital of the Pledge of Allegiance in his daughter's school violated the Establishment Clause of the First Amendment.<sup>163</sup> The Court declined to rule on the constitutional question and held that the father lacked prudential standing to sue because he did not have custody over his daughter, and it is not for the federal courts to determine issues of constitutional law when "hard questions of domestic relations are sure to affect the outcome."<sup>164</sup>

### B. Federalization of Family Law

Although the Supreme Court largely leaves family law matters to the states, it is important to point out that there has been a trend toward federalization of family law.<sup>165</sup> Despite not addressing the constitutional question in *Newdow*, federal courts have taken jurisdiction of family law matters with a constitutional element. For example, in *Meyer v. Nebraska*, the Supreme Court held that a Nebraska statute that only allowed foreign languages to be taught to children who had passed the eighth grade violated the liberty guaranteed by the Due Process Clause.<sup>166</sup> More recent Supreme Court decisions have involved traditional state family law matters, including *Roe v. Wade* and *Obergefell v. Hodges*.<sup>167</sup>

Even though family law has been federalized to a greater degree than in the past, issues of child custody and adoption—barring a constitutional element—still fall squarely within the

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162. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

163. *Id.* at 5.

164. *Id.* at 17 ("In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.").

165. See WARDLE, ET AL., *supra* note 11; see generally Elrod, *supra* note 150.

166. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923). The educating of children is viewed as a family law issue and is left primarily to parents to decide.

167. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (deciding the constitutionality of state marriage restrictions); *Roe v. Wade*, 410 U.S. 113 (1973) (deciding the constitutionality of state abortion restrictions).

boundaries of traditional family law disputes left to states. However, with the passage of ICWA, the federal government has given jurisdiction that would normally fall to the states instead to the Indian tribes in Indian child custody cases.

#### IV. ICWA PURPOSES

##### *A. ICWA as a Remedy for Removal*

ICWA was enacted in 1978 to address the significant problem of Indian children being removed from their homes and placed in non-Indian boarding schools and homes.<sup>168</sup> “Extensive congressional hearings on the topic of Indian child welfare in the 1970s established 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>169</sup> A high percentage of Indian child placements were in non-Indian homes and this removal was threatening the survival of the tribes because they were losing so many members.<sup>170</sup> ICWA was a recognition by the federal government of the importance of cultural identity for Indian children.<sup>171</sup> The purpose of ICWA was to protect Indian culture, limit state jurisdiction, and recognize tribal authority over adoption and custody issues involving Indian children.<sup>172</sup> ICWA shows concern for the interests of Indian children individually as well as the tribe as a whole.<sup>173</sup> Congressional findings state that “there is no resource that is more vital to the continued existence

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168. See PEVAR, *supra* note 5, at 292.

169. Atwood, *Flashpoints*, *supra* note 106, at 601 (quoting H.R. REP. NO. 1386, 95th Cong. 9, reprinted in 1978 U.S.C.A.N. 7530, 7531).

170. *Id.* at 601–02. “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. . . . Indian families suffered from the loss of their children, and tribes, in turn, lost their membership.” *Id.* at 602, 604.

171. Aliza G. Organick, *Holding Back the Tide*, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT THIRTY* 221, 222 (Matthew L.M. Fletcher, Wenona T. Singel & Kathryn E. Fort eds., 2009).

172. Kunesch-Hartman, *supra* note 8, at 132.

173. BARBARA ANN ATWOOD, *CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN* 163 (2010) [hereinafter *ATWOOD, CHILDREN*]; Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 *NEV. L.J.* 141, 145 (2004) (“ICWA, through its promotion of parental rights and tribal sovereignty, aims to protect the very civil existence of Native Americans and tribal governance.”).

and integrity of Indian tribes than their children.”<sup>174</sup> During this modern era, Congress has made it clear through the passing of this Act 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. . . .”<sup>175</sup>

### B. Modern Era Removal

The Boarding School Era was the predecessor to later removal efforts. Although removal of Indian children as an attempt to “civilize” them is no longer an official U.S. policy as it was during the Allotment Era, Indian children are still removed from their homes at higher rates than those of other groups.<sup>176</sup> In the mid-1970s, between 25% and 35% of all Indian children had been removed from their homes by states and placed in foster homes, adoptive homes, or residential institutions.<sup>177</sup> In one study involving sixteen states, 85% of the Indian children removed from their families were placed in non-Indian homes.<sup>178</sup>

Some factors contributing to the high rate of removal involve socioeconomic problems that are prevalent in Indian communities. Many Indian communities suffer from disproportionately high rates of poverty, unemployment, substance abuse, and domestic violence.<sup>179</sup> These factors increase the likelihood that children will be removed from their home by the state or tribes.<sup>180</sup> While these factors contributed, the majority of removals of Indian children when ICWA was passed did not occur as a result of physical abuse or neglect of the child, but rather because of cultural differences and bias.<sup>181</sup> Additionally, the lack of state understanding of Indian culture has contributed to Indian children being removed from their homes at higher rates.<sup>182</sup> Even

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174. 25 U.S.C. § 1901(3) (2012).

175. *Id.* § 1902.

176. ATWOOD, CHILDREN, *supra* note 173, at 12-13; Kunesh-Hartman, *supra* note 8, at 131.

177. PEVAR, *supra* note 5, at 291.

178. *Id.*

179. ATWOOD, CHILDREN, *supra* note 173, at 13.

180. *See id.*

181. Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back*, 33 AM. INDIAN L. REV. 329, 361 (2008-09).

182. *Id.*



though ICWA standards are meant to “reflect the unique values of Indian culture,” states still often view Indian culture as a detriment to children.<sup>183</sup> Prior to the passage of ICWA, child state welfare officials were insensitive to the cultural family practices of Indians, including the involvement of extended family to care for children.<sup>184</sup> These tribal norms were even viewed as neglect or abandonment.<sup>185</sup> Removals often occurred because a social worker or judge assumed a child was being neglected if they were being cared for by an extended family member instead of a nuclear family member.<sup>186</sup> Even now, many social workers are unfamiliar with ICWA and social work students are rarely required to take courses on ICWA.<sup>187</sup>

### C. ICWA Provisions

To address these problems, ICWA establishes procedures state courts must follow when dealing with Indian child custody proceedings.<sup>188</sup> ICWA applies only if the child is Indian. ICWA defines an Indian child as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”<sup>189</sup> The general premise of ICWA is that it “establishes a preference for tribal court jurisdiction.”<sup>190</sup> ICWA procedures include the following:

First, tribal courts have exclusive jurisdiction over Indian children who reside or are domiciled within the reservation and

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Many judges and social workers simply did not comprehend or appreciate the value American Indians placed on the holistic tribe and extended kin. Indeed, tribal leaders pointed out that removals occurred because a social worker or judge presumed neglect when childcare was performed by a member of the child’s extended family outside the child’s nuclear family.

*Id.* at 361–62.

183. *Id.* at 383.

184. Atwood, *Flashpoints*, *supra* note 106, at 603.

185. *Id.*

186. Painter-Thorne, *supra* note 181, at 362.

187. Cross, et al., *supra* note 12, at 3.

188. Kunesh-Hartman, *supra* note 8, at 132.

189. 25 U.S.C. § 1903(4) (2012).

190. *In re M.M.*, 65 Cal. Rptr. 3d 273, 280 (Cal. Ct. App. 2007).

concurrent tribal-state jurisdiction over Indian children who do not live on the reservation.<sup>191</sup>

Tribal courts have exclusive jurisdiction over Indian children who are wards of a tribal court, whether they live on or off the reservation.<sup>192</sup>

If a foster care placement or termination of parental rights proceeding for an Indian child originates in state court, in the absence of good cause, the court shall transfer the proceeding to tribal court if the tribe or either parent requests the transfer, absent an objection by either parent.<sup>193</sup>

If a child custody proceeding originates in state court, notice of the proceeding must be given to the child's tribe, and the tribe has a right to intervene in the proceeding.<sup>194</sup>

The United States, the states, and every Indian tribe are to give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe regarding Indian child custody proceedings.<sup>195</sup>

For those cases regarding Indian children that remain in state court, termination of parental rights requires proof beyond a reasonable doubt, and foster care placement requires a showing of clear and convincing evidence.<sup>196</sup>

Finally, "[i]n an adoptive placement of an Indian child under state law, preference for placement must be given in the following order, unless the court can show good cause to the contrary: (1) a member of the child's extended family, (2) other members of the child's tribe, (3) other Indian families."<sup>197</sup>

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191. § 1911(a)-(b); Kunesh-Hartman, *supra* note 8, at 132.

192. § 1911(a); Kunesh-Hartman, *supra* note 8, at 132.

193. § 1911(b); Kunesh-Hartman, *supra* note 8, at 133.

194. § 1911(c); Kunesh-Hartman, *supra* note 8, at 132-33.

195. § 1911(d).

196. § 1912(e); Kunesh-Hartman, *supra* note 8, at 133.

197. § 1915(a).

V. STATE COURT CLASHES<sup>198</sup>

The application of ICWA from the time of its passage has been inconsistent and unpredictable.<sup>199</sup> Although some state courts attempt in good faith to apply ICWA, other state courts seek to find ways around ICWA through its ambiguous language such as “good cause.”<sup>200</sup> State court clashes against ICWA are shown through judicially created exceptions to ICWA, which include the best interest of the child exception and the existing Indian family exception.<sup>201</sup>

Since the beginning of the federal-tribal relationship, the United States has dealt with tribes as sovereign nations.<sup>202</sup> Although federal Indian policy has swung back and forth with regard to tribal rights and sovereignty, in our modern era, the federal government has landed on the policy of self-determination and support of tribal self-governance.<sup>203</sup> State courts, however, have historically refused to accept tribal sovereignty and have pushed for authority over Indian tribes and their lands.<sup>204</sup> For example, in *Worcester v. Georgia*, missionaries who were living on the reservation without state permission were arrested by the state of Georgia.<sup>205</sup> The Court held that the state laws did not apply within the reservation and ordered Georgia to release the missionaries.<sup>206</sup> Chief Justice John Marshall declared that Indian nations

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198. Several ICWA scholars have used the term “clash” to characterize a number of tensions involved in ICWA and tribal sovereignty, including but not limited to the following: state and tribal tensions; tensions between ICWA, parental, and child rights; and cultural tensions dealt with in ICWA cases. I follow their lead and use the term “clash” to characterize the state-tribal conflict because it illustrates the heightened tension and jurisdictional struggle between state courts and tribes regarding the application and administration of ICWA. See Atwood, *Flashpoints*, *supra* note 106; Philip (Jay) McCarthy, Jr., *The Oncoming Storm: State Indian Child Welfare Act Laws and the Clash of Tribal, Parental, and Child Rights*, 15 J.L. & FAM. STUD. 43 (2013).

199. Kunesh-Hartman, *supra* note 8, at 134.

200. *Id.* at 134; see also 25 U.S.C. §§ 1911(b), 1915(a) (2012) (examples of the “good cause” language).

201. Cross, et al., *supra* note 12 at 5.

202. See *supra* Part II.

203. See *supra* Section II.F.

204. Kunesh-Hartman, *supra* note 8, at 138.

205. *Worcester v. Georgia*, 31 U.S. (6 pet.) 515, 529 (1832).

206. *Id.* at 562.

are inherently sovereign, independent political communities.<sup>207</sup> Georgia refused to comply with the Supreme Court's determination that the state did not have authority to regulate Cherokee land.<sup>208</sup>

Recognition of tribal sovereignty by the states is not the root of the problem. As in the past, some states continue to refuse to accept tribal sovereignty. This trend is even more prominent in cases involving child custody because these cases are family law matters in addition to being civil disputes.<sup>209</sup> Because child custody issues involving ICWA would normally fall squarely within traditional family law disputes left to states, many states have pushed back against tribal jurisdiction in these family matters.<sup>210</sup> ICWA poses an obstacle to state courts' exclusive jurisdiction.<sup>211</sup> The failure of state courts to properly apply ICWA undermines the goal of the Act, which is to give tribes exclusive jurisdiction to determine the best interests of Indian children.<sup>212</sup> If a tribe is not given notice about an Indian child custody proceeding, they do not have a voice in the proceeding and do not have the opportunity to express their determination of the child's best interest.<sup>213</sup> Even if the tribe is given notice, a state court could still choose to violate ICWA by refusing to transfer jurisdiction of the proceeding to tribal court.<sup>214</sup>

States' jurisdiction over family law, and not tribal sovereignty, seems to be the main reason states violate ICWA provisions. Even states that do recognize the sovereignty of Indian tribes in ICWA matters may not always do so, especially when faced with difficult child custody and adoption determinations.<sup>215</sup> These difficulties stem in part from the increase of interracial marriages between Indians and non-Indians.<sup>216</sup> "Children who . . . have blended or multiple cultural identities seem to trigger the most

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207. *Id.* at 515, 559.

208. *Id.* at 515.

209. See generally Kunesh-Hartman, *supra* note 8, at 133; Painter-Thorne, *supra* note 181, at 380.

210. See Kunesh-Hartman, *supra* note 8, at 133.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. ATWOOD, CHILDREN, *supra* note 173, at 201, ch. 5.

216. *Id.* at 6-7.

contentious battles under the Indian Child Welfare Act of 1978 and the most difficult jurisdictional contests in interparental disputes.”<sup>217</sup> This is due to the fact that a non-Indian parent may feel that the tribe will “side” with the Indian parent regarding custody disputes, whereas an Indian parent may feel that his or her concerns are not heard in state court. Another situation in which a state court might refuse tribal jurisdiction is when a child is in a stable home environment, has bonded with his or her caretaker, and might suffer emotional and psychological harm if that home placement is disrupted.<sup>218</sup> However, even under difficult circumstances such as these, Congress has laid out its intent in ICWA and state courts are obligated to apply ICWA. The following sections explain two common “exceptions” state courts have implemented in their desire to circumvent proper application of ICWA.

*A. The Best Interest of the Child Exception*

One example of these state-tribal court clashes is the apparent “best interest of the child” standard<sup>219</sup> used by many state courts to justify placing or keeping children in non-Indian adoption or foster-care families. Tribal courts generally believe that the best interest of Indian children is to stay within their culture, whereas state courts could easily promote a different perspective, based on a “white, middle-class standard.”<sup>220</sup> States have used the best

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217. *Id.* at 7.

218. *Id.* at 202.

219. The best interest of the child standard is a general standard that guides courts to some degree in family law cases including child custody, divorce, adoptions, visitation, emancipation proceedings, etc. See John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. POL’Y 51, 67 (2014). “[T]he best interest standard attempts to impress upon the court the importance of viewing the facts, circumstances, and law of the case by the subjective needs of the child . . .” *Id.* The standard is often vague and not easily defined. For example, before allowing termination of parental rights, some states require a finding that “termination is in the best interest of the child.” *Id.* at 69. However, a vague definition is somewhat necessary. Halloran points out that “a universal proactive statutory definition of what is in a child’s best interest may run contrary to the purpose of the best interest standard in the first place because it seeks to impose specific guidelines on a condition that is as varied as human experience.” *Id.* at 71.

220. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (quoting H. R. REP. NO. 95-1386, at 24 (1978)) (internal citations omitted).

interest of the child standard as “good cause” to retain jurisdiction over an ICWA matter rather than transferring the case to tribal court.<sup>221</sup> ICWA provides:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, *in the absence of good cause to the contrary*, shall transfer such proceeding to the jurisdiction of the tribe.<sup>222</sup>

States also justify the use of this standard through language in ICWA.<sup>223</sup> Section 1902 of ICWA states that the policy underlying the Act is “to protect the best interests of Indian children.”<sup>224</sup> Problems with state court implementation of the best interest standard is that it is indeterminate.<sup>225</sup> The vagueness and case-by-case analysis required coupled with state unfamiliarity and distrust of Indian culture present a threat to the purposes of the Act.<sup>226</sup>

Research shows that state courts and judges use the Anglo-American standard of psychological parent theory to determine the child’s best interests.<sup>227</sup> This theory involves bonding of children to their caregiver and the principle that children require continuity in those relationships for proper intellectual, emotional, and social development.<sup>228</sup> In states using this theory, unless jurisdiction is transferred immediately to tribal court, state court placement of Indian children in non-Indian homes creates greater possibility and more time with which the child may bond with his or her foster parent.<sup>229</sup> However, the accuracy of the theory is not established and “[a]pplying its already doubtful conclusions to Native American families is questionable in light of testimony in

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221. Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 615 (1994).

222. 25 U.S.C. § 1911(b) (2012) (emphasis added).

223. Carriere, *supra* note 221, at 616–17.

224. § 1902.

225. Carriere, *supra* note 221, at 617.

226. *Id.* at 618.

227. *Id.*

228. *Id.* at 618–20 (noting that this theory was used to analyze the best interest in cases in which the court ultimately found good cause to deny transfer to tribal court, including *In re C.W.* 479 N.W.2d 105 (Neb. 1992), *In re J.J.* 454 N.W.2d 317, 331 (S.D. 1990), and *In re T.R.M.* 525 N.E.2d 298, 307–08 (Ind. 1988)).

229. Carriere, *supra* note 221, at 622–23.

the legislative history as to differences in Euro-American and Native American child-rearing practices and values."<sup>230</sup>

In Anglo-American culture and state and federal judicial determinations, parental rights are fundamental, and parents are seen as having nearly absolute rights to rear their children as they see fit.<sup>231</sup> In *Troxel v. Granville*, the Supreme Court held that a Washington statute that allowed any person to petition for child visitation with a showing of the child's best interest was unconstitutional because it violated the mother's fundamental liberty interest "in the care, custody, and control of [her] children."<sup>232</sup>

In Indian culture, however, extended family members play a much larger role in visitation and sometimes in custody awards.<sup>233</sup> In fact, some tribes have enacted grandparent visitation provisions.<sup>234</sup> One reason for this cultural difference is that the community plays an important role in Indian tribes.<sup>235</sup>

[T]he voice of the collective—the Tribe—is a powerful force of cultural identity and survival that may trump the individual parent's choice in child rearing. In the traditions of many Indian tribes, kinship systems—including uncles, aunts, grandparents, and other extended family members—play an essential role in the care and education of children.<sup>236</sup>

ICWA accounts for Indian culture and its language reflects the value of tribal community over individual rights in making child custody determinations.<sup>237</sup> ICWA's purpose not only includes

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230. *Id.* at 623.

231. ATWOOD, CHILDREN, *supra* note 173, at 134.

232. *Troxel v. Granville*, 530 U.S. 57, 65, (2000).

The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters.

*Id.* at 69–70 (internal citation omitted).

233. ATWOOD, CHILDREN, *supra* note 173, at 139, 132–42.

234. *Id.* at 137 ("The Rosebud Sioux Tribe, for example, has given its tribal court the power to grant reasonable rights of visitation to grandparents with or without a petition of the grandparents, so long as the court finds that visitation is in the best interests of the children.").

235. *Id.* at 136.

236. *Id.* at 136–37.

237. Painter-Thorne, *supra* note 181, at 363.

protecting the “best interests of Indian children” but also promoting “stability and security of Indian tribes and families.”<sup>238</sup>

### B. The Existing Indian Family Exception

The existing Indian family exception is a court-created doctrine that circumvents the purpose behind ICWA, despite the fact that the plain language of ICWA does not provide for this exception.<sup>239</sup> Under the existing Indian family exception, if a court deems that a child is not part of a sufficiently Indian family,<sup>240</sup> the court may refuse to apply ICWA in that case.<sup>241</sup> ICWA defines “Indian child” as an unmarried person under eighteen years old and either a tribal member of a federally recognized tribe or eligible for membership in a tribe and the biological child of a tribal member.<sup>242</sup> Tribes, not states, have the right to determine tribal eligibility and membership. The existing Indian family exception is applied in a minority of states, but in those states the application of this exception undermines ICWA and denies Indian children a right to their cultural identity.<sup>243</sup> The Kansas Supreme Court created the existing Indian family exception in 1982.<sup>244</sup> In *In re Baby Boy L.*, a non-Indian mother sought to allow a non-Indian couple to adopt her child.<sup>245</sup> The father was a member of the Kiowa Tribe of Oklahoma, and the tribe intervened and sought to place the child with extended family or the tribe.<sup>246</sup> The court held

238. *Id.* at 358 (quoting 25 U.S.C. § 1902 (2012)).

239. Organick, *supra* note 171, at 222; Painter-Thorne, *supra* note 181, at 332.

240. Under the existing Indian family exception, state courts give themselves the power to determine whether an individual should be considered Indian or not, taking that decision away from the tribes. Cheyafina L. Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interest in Indian Children*, 66 LA. L. REV. 733, 748 (2006).

Despite the fact that a tribe can recognize a person as a member, thereby making them American Indian within the definitions of the ICWA, under the exception, a state court ultimately determines if the member acts American Indian enough to appease their perception of what an American Indian should do or be.

*Id.*

241. Painter-Thorne, *supra* note 181, at 367.

242. 25 U.S.C. § 1903(4) (2012).

243. Organick, *supra* note 171, at 222.

244. *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982).

245. *Id.* at 173.

246. *Id.*



that ICWA's purpose "was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother."<sup>247</sup> The court reasoned that Congress did not intend ICWA to apply to cases in which the child is not part of an Indian home or culture.<sup>248</sup> Other state courts have held similarly, reasoning that if the child is not part of a recognizable Indian family, has not been exposed to Indian culture, or does not have significant ties to the tribe, then the purposes of the Act are not served and ICWA does not apply.<sup>249</sup>

States that apply the existing Indian family exception ignore the plain language of ICWA.<sup>250</sup> ICWA was intended to focus not solely on the individual family, but to take into account the tribe's interest because of the impact of removal on the survival of tribes.<sup>251</sup>

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247. *Id.* at 175.

248. *Id.*

249. See *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 516 (Cal. Ct. App. 1996) ("We hold that under the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural or political relationship with their tribe."); *In re Adoption of Crews*, 825 P.2d 305, 311 (1992) ("[W]hether or when a child meets the definition of 'Indian child' under ICWA is not controlling."); *In re Santos Y.*, 92 Cal. App. 4th 1274, 1315-16 (2002) ("We do not, however, see that interest being served by applying the ICWA to a multiethnic child who has had a minimal relationship with his assimilated parents, particularly when serving the tribal interests can serve no purpose which is sufficiently compelling to overcome the child's fundamental right to remain in the home where he . . . is loved and well cared for," and attached to his foster parents.) (internal quotations omitted). But California later passed Family Code section 170, which codified ICWA into state law in order to abolish the existing Indian family exception.

250. Painter-Thorne, *supra* note 181, at 373-74; *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989) ("The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, [e.g., §§ 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over nondomiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with States)] must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.").

251. B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 421-22 (1997) (noting that the existing Indian family exception "circumvent[s] the intent of

## VI. NEW ICWA GUIDELINES AND REGULATIONS

To fully realize the purposes of ICWA, state court deference must be improved and violations must cease. To that end, the most important recent development in promoting the purposes of ICWA are the new guidelines and rules which went into effect on December 12, 2016.<sup>252</sup> Additionally, state courts have previously taken steps to promote the purposes of the Act and are continuing to do so now. In recognizing the responsibility to correctly implement ICWA, one Montana state court noted that the court has a “duty to preserve the unique cultural heritage and integrity of the American Indians.”<sup>253</sup> Some states have even passed their own versions of ICWA that in some cases exceed the Indian child protections of ICWA.<sup>254</sup>

### A. ICWA Guidelines

In February 2015, former assistant secretary of Indian Affairs Kevin Washburn announced that the BIA had published revised ICWA guidelines to protect the rights of Indian families and children under the Act and to prevent the breakup of Indian families and destruction of tribes.<sup>255</sup> Washburn stated that these updates have become necessary due to the continued noncompliance of ICWA by state and federal courts.<sup>256</sup> Two major situations have pushed the government to find better ways to enforce ICWA: the Supreme Court decision in *Adoptive Couple v. Baby Girl*, and the consistent ICWA violations in South Dakota.<sup>257</sup>

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Congress to ameliorate the almost 100 year history of the displacement of Indian children . . . .”); Painter-Thorne, *supra* note 181, at 375.

252. See U.S. DEPT. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT (2016), <https://www.indianaffairs.gov/cs/groups/public/documents/text/idc2-056831.pdf> [hereinafter BIA, GUIDELINES]; U.S. DEPT. OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, RIN 1076-AF25, INDIAN CHILD WELFARE ACT PROCEEDINGS, <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc1-034238.pdf> [hereinafter BIA, PROCEEDINGS]; Brewer, *Final ICWA Rule*, *supra* note 15; Brewer, *New ICWA Guidelines*, *supra* note 15.

253. *In re Riffle*, 922 P.2d 510, 514 (Mont. 1996).

254. PEVAR, *supra* note 5, at 305.

255. Brewer, *New ICWA Guidelines*, *supra* note 15.

256. *Id.*

257. *Id.*

In *Adoptive Couple*, the Supreme Court held that ICWA did not apply when the Indian father had never had custody of the child.<sup>258</sup> Some of the facts in *Adoptive Couple* illustrate how ICWA can be intentionally bypassed. In *Adoptive Couple*, the non-Indian mother, who was not married to the Indian father, placed the child for adoption without the consent of the father.<sup>259</sup> When the mother asked him via text message if he would rather pay child support or terminate his parental rights, the father responded that he relinquished his parental rights.<sup>260</sup> The attorney of the mother contacted the Cherokee Nation to determine if the father was enrolled in the tribe.<sup>261</sup> However, the attorney misspelled the father's name and incorrectly stated his birthday, and therefore, the Cherokee Nation responded that it could not verify the father's membership.<sup>262</sup> Four months after the baby was born, the adoptive couple served the father notice of the adoption proceedings for the first time.<sup>263</sup> The father promptly contacted an attorney, and in the proceedings, he sought custody of the child and stated that he did not consent to the adoption (regardless of the fact that he told the mother earlier that he would relinquish his parental rights).<sup>264</sup> After the South Carolina Supreme Court awarded custody of the child to the biological father, the adoptive couple appealed, and the United States Supreme Court granted certiorari.<sup>265</sup>

The Supreme Court held that several provisions in ICWA did not apply and reversed the South Carolina Supreme Court, ordering the child to be returned to the adoptive parents. First, the Court held that the ICWA provision requiring that active efforts be made to prevent the breakup of Indian families before termination of parental rights can be ordered does not apply where the

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258. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013); see also Kathryn E. Fort & Peter S. Vicaire, *The Invisible Families: Child Welfare and American Indian Active-Duty Service Members and Veterans*, FED. LAW., Apr. 2015, at 40, 41.

259. *Adoptive Couple*, 133 S. Ct. at 2558–59.

260. *Id.* at 2558.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 2558–59.

265. *Id.* at 2559.

child has never been in the custody of the Indian parent.<sup>266</sup> Second, the Court held that the provision requiring a heightened showing of harm to the child before parental rights can be involuntarily terminated does not apply where the child has never been in the custody of the Indian parent.<sup>267</sup> Finally, the Court held that the placement preferences required by ICWA do not prevent a non-Indian adoptive couple from adopting an Indian child when no eligible Indian candidates have come forward.<sup>268</sup>

The Court's confusing interpretation of ICWA in *Adoptive Couple* parted with previous interpretations of the Act<sup>269</sup> and seemed in fact to endorse the existing Indian family exception used by state courts.<sup>270</sup> Assistant Secretary Washburn noted that after the Supreme Court decided *Adoptive Couple*, tribal leaders across the nation began to look for better ways to enforce ICWA and protect Indian tribes.<sup>271</sup> Washburn stated that, although the Supreme Court decision in *Adoptive Couple* could not be reversed, something needed to be done to address ICWA misapplications.<sup>272</sup> In fact, the new guidelines confirm that state courts are prohibited from using the existing Indian family exception, including whether the Indian parent ever had custody of the child.<sup>273</sup>

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266. *Id.* at 2557 (noting that § 1912(d) "conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the 'breakup of the Indian family' . . ."); 25 U.S.C. § 1912(d) (2012).

267. *Adoptive Couple*, 133 S. Ct. at 2557 (noting that § 1912(f) "bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's 'continued custody' of the child"); 25 U.S.C. § 1912(f) (2012).

268. *Id.* (referring to 25 U.S.C. § 1915(a) (2012)).

269. Shreya A. Fadia, Note, *Adopting "Biology Plus" in Federal Indian Law: Adoptive Couple v. Baby Girl's Refashioning of ICWA's Framework*, 114 COLUM. L. REV. 2007, 2008-09 (2014). Fadia labels the Court's decision "confusing," given "[t]he Court effectively ruled that an individual is a parent under one of ICWA's provisions, but that the same individual is *not* a parent under two other ICWA provisions." *Id.* at 2009.

270. Shawn L. Murphy, Note, *The Supreme Court's Revitalization of the Dying "Existing Indian Family" Exception*, 46 MCGEORGE L. REV. 629, 630-31 (2014).

271. Brewer, *New ICWA Guidelines*, *supra* note 15.

272. *Id.*

273. See BIA, GUIDELINES, *supra* note 252, at 15. The "Existing Indian Family" exception is listed in the guidelines under "Factors that May Not Be Considered."

If a child-custody proceeding concerns a child who meets the statutory definition of "Indian child," then the court may not determine that ICWA does not apply based on factors such as the participation of the parents or the Indian child in Tribal, cultural, social, religious, or political activities, the relationship

Assistant Secretary Washburn identified ongoing ICWA violations by the state of South Dakota as a second concern that prompted government action to reinforce ICWA provisions.<sup>274</sup> Although many states continue to ignore or misapply ICWA provisions and purposes, South Dakota is one of the worst offenders.<sup>275</sup> The Indian child population in South Dakota is only nine percent; however, Indian children make up about fifty-three percent of the total number of children in foster care in the state.<sup>276</sup>

Upon moving to South Dakota, Patrice Kunesh investigated the state's inadequate social welfare and criminal justice systems as they relate to Indians and tribal communities.<sup>277</sup> She found that Indians are highly overrepresented in South Dakota's welfare and criminal justice systems.<sup>278</sup> South Dakota has utilized the best interest of the child exception to refuse transfer of Indian child custody proceedings to tribal court.<sup>279</sup> The South Dakota Supreme Court has held that the needs and interests of the children must prevail and that ICWA is not meant as a shield to allow Indian children to be abused by their parents.<sup>280</sup> However, this line of reasoning reveals that the state may believe the tribe will not consider these factors or do what is in the best interest of Indian children.<sup>281</sup>

The BIA responded to *Adoptive Couple* and consistent ICWA violations by holding listening sessions and gathering comments. In 2014, the BIA held five listening sessions with tribes, judicial

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between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum . . . .

*Id.*; NAT'L INDIAN CHILD WELFARE ASS'N, SUMMARY OF THE 2016 ICWA GUIDELINES 2, <https://www.nicwa.org/wp-content/uploads/2016/11/2017ICWAGuidelinesSummary-1.pdf>.

274. Brewer, *New ICWA Guidelines*, *supra* note 15.

275. *Id.*

276. *Id.*

277. Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247, 247 (2007).

278. *Id.* at 249-50.

279. Amanda B. Westphal, *An Argument in Favor of Abrogating the Use of the Best Interests of the Child Standard to Circumvent the Jurisdictional Provisions of the Indian Child Welfare Act in South Dakota*, 49 S.D. L. REV. 107, 125 (2003).

280. *In re S.G.V.E.*, 634 N.W.2d 88, 94 (S.D. 2001) ("We have always recognized that the needs of the children are paramount and that their best interests must prevail."); *In re S.D.*, 402 N.W.2d 346, 351 (S.D. 1987) ("Children should not be abused, neglected, or forlorned under the guise of cultural identity.").

281. Westphal, *supra* note 279, at 127.

organizations, and child welfare professionals to understand custody situations and decide how best to address ICWA violations.<sup>282</sup> The BIA also gathered hundreds of comments from tribes, child welfare professionals, and state court judges.<sup>283</sup> The vast majority of comments submitted in response to the BIA's request asked the agency to update the ICWA guidelines,<sup>284</sup> which had not been updated since they were first published in 1979.<sup>285</sup> Washburn stated:

For too many years, some of Indian country's youngest and most vulnerable members have been removed from their families, their cultures, and their identities . . . . Congress worked hard to address this problem by enacting the Indian Child Welfare Act. Yet, today too many people are unaware of this important law and, unfortunately, there are some that work actively to undermine it. Our updated guidelines for state courts will give families and tribal leaders comfort that the Obama Administration is working hard to provide better clarity so that the courts can carry out Congress' intent to protect tribal families, preserve tribal communities, and promote tribal continuity now and into the future.<sup>286</sup>

### B. ICWA Rule

The new ICWA regulations and guidelines went into effect on December 12, 2016.<sup>287</sup> The regulations are binding law on state courts, whereas the guidelines are recommendations to assist state courts in implementing ICWA.<sup>288</sup> ICWA had not been revised since its enactment in 1978 until the BIA published the new federal regulations in June 2016.<sup>289</sup> Principle Deputy Assistant

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282. Brewer, *New ICWA Guidelines*, *supra* note 15 (noting that three listening sessions included tribes and two included judicial organizations).

283. Brewer, *Final ICWA Rule*, *supra* note 15.

284. *Id.*

285. Press Release, U.S. Dep't of the Interior, Office of the Assistant Sec'y-Indian Affairs, Principal Deputy Assistant Sec'y Roberts Announces Updated BIA Guidelines That Strengthen Implementation of the Indian Child Welfare Act with Focus on Family Unification (Dec. 30, 2016), <https://www.bia.gov/cs/groups/public/documents/text/idc2-058432.pdf>.

286. Brewer, *New ICWA Guidelines*, *supra* note 15.

287. See BIA, *GUIDELINES*, *supra* note 252, at 4.

288. *Id.*

289. 25 C.F.R. § 23 (2016); Brewer, *Final ICWA Rule*, *supra* note 15.

Secretary Lawrence S. Roberts<sup>290</sup> announced that the new rule would deliver a more consistent interpretation and application of ICWA for child welfare workers, judges, state agencies, and state courts.<sup>291</sup>

According to Roberts, “the new rule advances the highest ideals of the federal trust responsibility in protecting and promoting cohesiveness for Indian children and their families.”<sup>292</sup> The rule clarifies ICWA’s requirements, fosters consistency in Indian child custody proceedings, and promotes the purposes of the Act, which are to maintain Indian family and community.<sup>293</sup> Under this new rule, when state courts encounter cases dealing with foster-care, parental-rights-termination, and adoption proceedings, the courts will now be required to determine whether the child is an Indian child under ICWA definitions.<sup>294</sup> State courts will be required to give prompt notice of involuntary proceedings and minimize unnecessary separations between Indian children and their families.<sup>295</sup> The rule also updates and clarifies ICWA definitions.<sup>296</sup>

Tribes and other commentators nearly universally noted the lack of ICWA compliance and consistency in state courts.<sup>297</sup> During public meetings held throughout the country, including in Rapid City, South Dakota, comments from the tribes and members of the adoption industry conflicted over what constitutes the “best interests” of Indian children.<sup>298</sup> However, Roberts noted that reunification with the child’s family is the gold standard of ICWA, and the new rule strives to correct the disparities among Indian children in state custody.<sup>299</sup> Sally Jewell, chair of the President’s White House Council on Native American Affairs stated, “ICWA

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290. Roberts served as acting Assistant Secretary of Indian Affairs from January 1, 2016, to July 28, 2016, following Kevin Washburn.

291. Brewer, *Final ICWA Rule*, *supra* note 15.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. See SUMMARY OF THE 2016 ICWA GUIDELINES, *supra* note 273.

297. Brewer, *Final ICWA Rule*, *supra* note 15; see also Allison E. Davis, *Roadway to Reform: Assessing the 2015 Guidelines and New Federal Rule to the Indian Child Welfare Act’s Application to State Courts*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 91 (2016).

298. Brewer, *Final ICWA Rule*, *supra* note 15, at ¶ 13.

299. *Id.*

was designed to safeguard Native children from undue separation from their families and cultural identity. This rule will achieve consistent implementation of a law that remains critical to protecting the best interest of Native children and promoting successful Native communities . . . .”<sup>300</sup>

*C. Potential Effects of These Guidelines and Rules*

Although it remains to be seen what effects the new regulations will have, the new rules and guidelines provide a reasonable expectation of improvement in state ICWA application because they clarify ICWA procedures. At the very least, state courts may have a more difficult time using ICWA’s ambiguities to support violations of the Act. However, the best interest of the child exception may continue to be used as a state court exception because the new rule fails to specify a definition for “best interests of the Indian child.”<sup>301</sup> In response to commentator request for a “best interest” definition, the BIA stated that it is not necessary to define this term because it does not appear in the final ICWA rule.<sup>302</sup> It is the BIA’s contention that a definition is not needed because “ICWA was specifically designed to protect the best interests of Indian children. . . . through specific provisions that are designed to protect children and their relationship with their parents, extended family, and Tribe.”<sup>303</sup> Furthermore, these procedures and objective rules avoid court decisions being made based on subjective values.<sup>304</sup>

Although the new rule does not use the nomenclature of the existing Indian family exception,<sup>305</sup> the rule is likely adequate to discontinue the use of the exception in the few states that continue its practice. The BIA refused to explicitly include a provision in the rule that states there is no existing Indian family exception because ICWA already defines an Indian child based on the

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300. *Id.*

301. BIA, PROCEEDINGS, *supra* note 252, at 74.

302. *Id.*

303. *Id.* at 74–75.

304. *Id.* at 75.

305. *See id.*



child's political affiliation with a tribe.<sup>306</sup> ICWA does not include a provision that allows a court to determine whether a child is Indian based on the child's or parent's social, cultural, or geographic ties to the tribe.<sup>307</sup> In fact, Congress expressly recognized that state courts were ill equipped to make determinations of the tribal relations of Indian people.<sup>308</sup> The BIA noted that only a handful of courts continue to apply the existing Indian family exception and the great majority of states have affirmatively rejected it, including South Dakota.<sup>309</sup> However, the BIA did decide to include in the rule a "mandatory prohibition on consideration of certain listed factors, because they are not relevant to the inquiry of whether the statute applies."<sup>310</sup> Prohibited factors include "the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum."<sup>311</sup>

Revised definitions address ambiguities in the Act. For example, one concern is that states have identified a foster home as an "Indian home" under ICWA because an Indian child is placed there, regardless of whether the foster parents were Indian.<sup>312</sup> The new rule clarifies that an "Indian foster home" is one where one or more of the foster parents is Indian.<sup>313</sup>

Although not likely to completely eliminate future state violations of ICWA, the new rule and guidelines are a big step forward in addressing ICWA ambiguities and state court misapplication of the Act.

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306. *Id.* at 91.

307. *Id.*

308. *Id.* at 91-92.

309. *Id.* at 92.

310. *Id.* at 93.

311. *Id.* at 93-94.

312. *Id.* at 78.

313. *Id.*; *see also* 25 C.F.R. § 23.2 (2016) ("Indian foster home means a foster home where one or more of the licensed or approved foster parents is an 'Indian' as defined in 25 U.S.C. 1903(3).").

## VII. CONCLUSION

The Indian Child Welfare Act has shed light on issues of state and tribal sovereignty as well as the failure of state courts to recognize tribal jurisdiction in Indian child custody cases that fall under ICWA. Throughout the history of U.S. and Indian tribal relations, the federal government has recognized the inherent sovereignty of tribes yet diminished their power. Modern federal Indian policy, though, seeks to promote tribal self-governance. One response to modern federal Indian policy is the passing of ICWA to reverse the negative effects of widespread removal of Indian children from their homes. ICWA provides tribal courts with jurisdiction over custody and adoption proceedings involving Indian children.

However, states have pushed back against the federal government taking domestic relations matters out of their hands. Traditionally, the federal government has allowed state courts the authority to determine family law disputes. However, ICWA is a major wrench in state court jurisdiction over family law matters. Since the passage of ICWA, states have used a number of judicially created exceptions to get around proper application of ICWA. Although some states have reversed their noncompliance with the Act, inconsistent application continues to be problematic. In 2015 and 2016, the Bureau of Indian Affairs finally addressed these issues by passing revised ICWA guidelines and rules to clarify ICWA procedures and definitions. The hope is that the rules will better promote the purposes of ICWA in providing protection and cohesiveness for Indian children, families, and communities.

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