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THE INDIAN CHILD WELFARE ACT OF 1978:
VIOLATING PERSONAL RIGHTS FOR THE SAKE
OF THE TRIBE

CHRISTINE D. BAKEIS*

I. INTRODUCTION

"To live under the American Constitution is the greatest political privilege that was ever accorded to the human race."¹ One of the promises of the American Constitution is that states will not enforce any law that abridges a citizen's privileges.² The American Constitution also guarantees that states will not "deprive any person of life, liberty, or property, without due process of law."³ The American Constitution applies to "[a]ll persons born or naturalized in the United States,"⁴ including American Indians.

In the late seventies, the United States' Congress began investigating child custody proceedings involving Indian children. These investigations culminated in Congress enacting the Indian Child Welfare Act of 1978 (ICWA).⁵ The ICWA purportedly concerns itself with the well-being of Indian tribes and children. Application of the ICWA, however, is denying parents of Indian children the privilege of living under the Constitution.

In the United States, parents enjoy certain rights concerning the upbringing of their children.⁶ Despite the American Constitution's promises, the ICWA requires states to treat parents of children with Indian blood differently than they treat other parents. Parents of children with Indian blood are not afforded the privilege of selecting their child's adoptive parents.⁷ Likewise,

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  3. Id.
  4. Id.
  6. See infra notes 121-39 and accompanying text.
  7. See infra notes 140-57 and accompanying text.
they are not necessarily given a right to remain anonymous in an adoption proceeding. Thus, when Congress enacted the ICWA it took away personal liberties of men and women who have children with Indian blood.

The ICWA also demonstrates Congress’ lack of respect for parents of Indian children. In fact, one of the best examples of such disrespect is the only ICWA case decided by the United States Supreme Court. In *Mississippi Band of Choctaw Indians v. Holyfield*, unwed parents who were expecting twins decided it would be in the children's best interests to give them up for adoption. The parents selected the Holyfields as the family they wanted to adopt and raise their children. Before the twins’ birth the mother arranged to have them at the Gulfport Memorial Hospital, some two hundred miles away from the reservation. After the twins’ birth, the parents consented to the adoption, and an adoption decree was entered in the state court.

Two months later, however, the Indian tribe to which both parents belonged moved the court to vacate the adoption decree on the ground that under the ICWA exclusive jurisdiction was vested in the tribal court. The trial court, respecting the great lengths that the twins’ parents had gone to ensure that their children were born off the reservation and adopted by non-Indian parents, denied the tribe's motion. The Supreme Court, on the other hand, disregarded the parents’ wishes and found that “[t]ribal jurisdiction under [the ICWA] was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves.” The court further illustrated its disrespect for the parents’ choice by stating that “[p]ermitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would . . . nullify the purpose the ICWA was intended to accomplish.”

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8. See infra notes 158-75 and accompanying text.
10. Id. at 37.
11. Id.
12. Id. at 37-38.
13. Id. at 38.
16. Id. at 52.
of disrespect for parents' wishes is not only disheartening, but unconstitutional.

This Article begins by considering some of the historical events that prompted Congress to enact the ICWA. Next, the Article examines whether the ICWA is accomplishing its purpose as stated by Congress. The Article then criticizes the ICWA as a violation of several persons' equal protection rights. The Article then argues that even if the ICWA is constitutional, because it is being applied inconsistently, congressional or judicial direction is needed. Finally, the Article offers a proposal to amend the existing law so that it will achieve the purpose for which it was enacted, without violating personal rights.

II. HISTORICAL BACKGROUND OF THE ICWA

Native Americans have a lengthy history of experiencing problems in preserving their cultural heritage. Some believe that a policy of destroying Indian culture and tribal integrity, by removing Indian children from their families and tribal settings, was set even before the country became a nation. In the nineteenth century, sending Indian children away to distant boarding schools to "civilize" and educate them was customary in this country. In this century, an even greater problem is the large number of Indian children that are removed from their homes for purposes of foster care and adoption.

In 1978, after extended hearings over a number of years, Congress responded to the recommendations of the American Indian Review Commission and enacted the ICWA. Congress made the following findings which formed the basis for the enactment of the ICWA:

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as

17. Culture includes more than artifacts, language, and history, it also includes the members of a tribe. Thus, as the size of the tribe dwindles, its culture is threatened.


19. Studies done in 1969 and 1974 indicated that in states with large Indian populations twenty-five to thirty-five percent of all Indian children were separated from their families and placed in foster homes or institutions. H.R. REP. No. 1386, 95th Cong., 2d Sess., at 9 (1978).

trustee, in protecting Indian children who are members of
or are eligible for membership in an Indian tribe;
(4) 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 agen-
cies and that an alarmingly high percentage of such chil-
dren are placed in non-Indian foster and adoptive homes
and institutions; and
(5) that the States, . . . have often failed to recognize the
essential tribal relations of Indian people and the cultural
and social standards prevailing in Indian communities and
families.\textsuperscript{21}

The ICWA is premised on the government's recognition of
Indian tribes as sovereign governments. As such, the tribes have
a vital interest in deciding whether Indian children should be
separated from their families. The ICWA presumes that protect-
ing the Indian child's relationship to the tribe is in the child's
best interest.\textsuperscript{22}

Under the ICWA, the tribe has, with a few exceptions,\textsuperscript{23}
exclusive jurisdiction over child custody proceedings where an
Indian child is residing or is domiciled on the reservation.\textsuperscript{24}
Also, even when an Indian child is not residing or domiciled on a
reservation, the tribe still has a right to participate in any state
court action.\textsuperscript{25} In either case, parental rights may not be easily
terminated. However, when they are, section 1915 of the ICWA
addresses the adoptive placement of Indian children and pro-
vides that "a preference shall be given, in the absence of good
cause to the contrary, to a placement with (1) a member of the
child's extended family; (2) other members of the Indian child's
tribe; or (3) other Indian families."\textsuperscript{26}

The ICWA provides that an "Indian child" is "any unmarried
person who is under age eighteen and is either (a) a member of
an Indian tribe or (b) is eligible for membership in an Indian
tribe and is the biological child of a member of an Indian

\textsuperscript{21} Id. § 1901.
\textsuperscript{22} See id. § 1902; Chester County Dep't of Soc. Servs. v. Coleman, 372
\textsuperscript{23} The ICWA excludes from its coverage custody pursuant to divorce
and placements based upon criminal acts committed by juveniles. 25 U.S.C.
\textsuperscript{24} Id. § 1911(a).
\textsuperscript{25} Id. § 1911(b).
\textsuperscript{26} Id. § 1915(a).
tribe." Using this definition a child need not be a part of a traditional Indian family to come within the reach of the ICWA. In fact, the child does not even have to be residing with his or her parent who is a member of an Indian tribe. This definition is so broadly framed that children who do not even know of their Indian ancestry can be subject to the rules of the ICWA.

III. IS THE ICWA SERVING ITS PURPOSE?

One author has described the ICWA as standards designed to protect culturally differing child rearing practices. In its official declaration of policy, Congress declares:

[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes . . .

One of the purposes of the ICWA is arguably to fulfill the policy of this Nation. This Part questions whether the ICWA is promoting the policy of this Nation or working against it.

A. Is the ICWA in the Children’s Best Interests?

"[I]t is the policy of this Nation to protect the best interests of Indian children . . ." Among the ICWA has arguably aided in the maintenance of numerous Indian families, the ICWA does not necessarily "protect the best interests" of all Indian children. "The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest . . ." All children, regardless of their race, deserve to be protected from abusive parents. Although it would ignore reality to suggest that ethnic and racial prejudices have been eliminated, such prejudices are impermissible considerations for removal of a child from a parent, and should not be a permissible consideration for placement of a child either.

Although some claim that "placement of an Indian child in a non-Indian home is likely to result in severe psychological

27. Id. § 1903(4).
30. Id.
32. Id.
harm," others disagree. Psychiatrists who testified at the congressional hearings claimed that Indian children were being immersed in white culture without an opportunity to develop a vital Indian identity. Testimony indicated that the lack of Indian identity creates serious problems during adolescence, because this is when Indian children begin experiencing racial discrimination and dating taboos. This viewpoint has been adopted by at least one justice in a reported opinion. Although this may be true, a lack of reliable data on interracial adoptions makes predictions regarding the potential harms to Indian children speculative at best. Furthermore, there are others who argue that placement of an Indian child in a non-Indian home is not harmful to the child.

Professor Elizabeth Bartholet reviewed studies undertaken to assess how well transracial adoptions work from the adoptee's viewpoint. The studies assessed the adoptees' adjustment, self-esteem, racial identity, and integration into the adoptive family as well as the community. She found that the research shows with astounding uniformity... transracial adoption [is] working well from the viewpoint of the children and the adoptive families involved. The children are doing well in terms of such factors as achievement, adjustment, and self-esteem. They seem fully integrated in their families and communities, yet have developed strong senses of racial identity. They are doing well as compared to minority chil-

34. Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs on Problems that American Indian Families Face in Raising Their Children and How these Problems Are Affected by Federal Action or Inaction, 93d Cong., 2d Sess. 45, 46 (1974) (statement of Dr. Joseph Westermeyer, Dept. of Psychiatry, University of Minnesota).
35. Id.
36. See In re Baby Boy D., 742 P.2d 1059, 1075 (Okla. 1985) (Kauger, J., concurring in part, dissenting in part) (finding that separation of Indian children from their Indian culture robs them of their cultural heritage and is detrimental to their later development), cert. denied, 484 U.S. 1072 (1988).
39. Id.
children adopted inracially and minority children raised by their biological parents.\textsuperscript{40} Bartholet's views are also supported by Kim Forde-Mazrui, David Fanshel, and Joseph Westermeyer.\textsuperscript{41} Forde-Mazrui questioned the wisdom of racial-matching policies and concluded that “ignoring race when placing a [minority] child . . . would avoid the concrete harms of current policies without subjecting the child to substantiated risks.”\textsuperscript{42} Fanshel's research suggests that Indian children raised in non-Indian homes develop normally in the cognitive and emotional areas.\textsuperscript{43} Finally, Westermeyer's investigation revealed that Indian children raised in non-Indian homes had secure Indian cultural identities when they had relationships with other Indian children.\textsuperscript{44} These results suggest that although leaving a child with his or her natural parents is normally preferable, Indian children can develop normally in non-Indian homes. Thus, claims that placement of Indian children in non-Indian homes is damaging to their well-being\textsuperscript{45} may need to be re-examined. Regardless of which camp is correct, the ICWA is clearly harming Indian children in other ways. One such example is the heightened standard of proof required by the ICWA.

1. Standard of Proof

In litigation, parties must take into account the margin of error in fact-finding that is always present.\textsuperscript{46} “Standard of proof” functions to instruct the fact-finder as to the degree of confidence society has decided the fact-finder should have in the correctness of its conclusions for the particular adjudication.\textsuperscript{47} In proceedings to terminate parental rights, the Supreme Court has held that before a state may sever the parent-child relationship, the due process clause of the Fourteenth Amendment requires

\begin{itemize}
  \item \textsuperscript{40} Id. at 1209.
  \item \textsuperscript{42} Forde-Mazrui, supra note 41, at 955.
  \item \textsuperscript{43} Bennett, supra note 41, at 971.
  \item \textsuperscript{44} Westermeyer, supra note 41, at 137-39.
  \item \textsuperscript{45} See supra note 33 and accompanying text.
  \item \textsuperscript{46} In re Winship, 397 U.S. 358, 364 (1970) (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).
  \item \textsuperscript{47} Santosky v. Kramer, 455 U.S. 745, 754-55 (1982).
\end{itemize}
that the state support its allegations by at least clear and convincing evidence.\textsuperscript{48} The ICWA permits termination of parental rights only when the evidence establishes, "beyond a reasonable doubt,"\textsuperscript{49} that continued parental custody will cause the child serious emotional or physical damage.\textsuperscript{50} Furthermore, the decision must be supported by the testimony of "qualified expert witnesses."\textsuperscript{51} These standards clearly reject the "best interests of the child" standard used by most states. In fact, the Bureau of Indian Affairs' Guidelines (Guidelines) state that "[a] child may not be removed simply because . . . it would be 'in the best interests of the child' for him or her to live with someone else. . . . It must be shown that . . . it is dangerous for the child to remain with his or her present custodians.\textsuperscript{52}

Although the Supreme Court has held that a child should not be subject to adverse legal discrimination because of factors beyond the child's control,\textsuperscript{53} such a result is occurring because of the heightened standard of proof in ICWA abuse and neglect termination cases.\textsuperscript{54} For example, in \textit{In re N.S.},\textsuperscript{55} a child, N.S., was born to a single Caucasian mother who was experiencing psychiatric problems.\textsuperscript{56} Nine months after N.S. was born, the mother was admitted to the psychiatric unit for the second time.\textsuperscript{57} The mother was diagnosed as having alcohol addiction problems and a borderline personality disorder.\textsuperscript{58} The Department of Social Services (DSS) was contacted after the mother told her counselor that she feared that her brother would sexu-

\begin{footnotes}
48. \textit{Id.} at 769.
49. The stringency of the "beyond a reasonable doubt" standard is usually reserved for criminal actions which deny a defendant liberty or life. \textit{See id.} at 755. Under the "beyond a reasonable doubt" standard, society imposes the entire risk of error upon itself. \textit{Id.}
51. \textit{Id.} § 1912(c)-(f).
54. \textit{See In re D.S.}, 577 N.E.2d 572, 575 (Ind. 1991); \textit{In re M.T.S.}, 489 N.W.2d 285, 288 (Minn. Ct. App. 1992) (holding that Minnesota’s best interest of child standard was preempted by ICWA regardless of the fact that separation from potentially adoptive parents would be painful for the child).
56. \textit{Id.} at 97.
57. \textit{Id.}
58. \textit{Id.} at 98.
\end{footnotes}
ally abuse N.S. The DSS worked with N.S.’s mother for several months, but eventually placed N.S. in foster care when the mother stated she wanted to place N.S. for adoption. Because the mother frequently changed her mind regarding the adoption, supervised visits were arranged. During these visits, the DSS caseworker noted the lack of bonding between N.S. and his mother. She also discovered that N.S. had extreme behavior problems and developmental delays. The DSS caseworker believed that N.S. had been abused and recommended extreme caution in returning N.S. to his mother. The court eventually found N.S. to be an abused and neglected child, and terminated his mother’s parental rights under the state’s clear and convincing burden of proof standard. The mother appealed arguing that because N.S. was one fourth Indian, the heightened standard of the ICWA should have been applied. On appeal, the South Dakota Supreme Court found that even though N.S. was not born into an Indian home and had never had contact with his Indian relatives, the standards of the ICWA should have been applied to the termination of his Caucasian mother’s rights. Therefore, the Court reversed the trial court’s termination and remanded for findings consistent with the ICWA.

Thus, by creating a special federal standard of proof in abuse and neglect termination cases, the government is potentially forcing children who lack ties with traditional Indian society to experience more abuse and neglect before the state can take action on their behalf. Such a result is clearly not beneficial to children with Indian ancestry.

59. Id.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id. at 98-99. Under South Dakota law, the trial court must find “clear and convincing evidence that termination of parental rights is in the child’s best interests and the state must show that there is no narrower means of providing for the best interests and welfare of the child.” Id. at 99, n.4 (citing In re A.D., 416 N.W.2d 264 (S.D. 1987)).
66. Id. at 97. Under the ICWA, a parent’s rights cannot be terminated unless the court finds evidence beyond a reasonable doubt that continued custody “is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(f) (1994).
68. Id.
2. Adoptive Placement Preferences

The ICWA states a clear preference for placing children with Indian blood with Indian families. Specifically, section 1915(a) states:

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families. Because of these special requirements, “caseworkers and attorneys are sometimes reluctant to accept surrenders of, or terminate parental rights to, an Indian child.” Often, this results in Indian children languishing in foster care without permanency, planning, or adoption. Furthermore, when employing placement preferences of the ICWA, courts may be forced to overlook the child’s best interests.

In In re S.E.G., the foster parents of three Indian children petitioned to adopt them. The foster parents were not Indians. The trial court found that the children had bonded with the foster parents and needed stability in their lives. The trial court held that because the children needed stability in their lives and an Indian adoptive home was not available, good cause to deviate from the preferences expressed in the ICWA existed. The Minnesota Supreme Court disagreed. The supreme court found that good cause to place the children in a manner inconsistent with the ICWA had not been established and ordered the children to remain in foster care. Thus, although a family who was willing to adopt all three siblings existed, the children were forced to remain in foster care simply because they were Indian children. Although such a result may be in the best interests of the tribe, it is not in the children’s best interests. When two sets of parents who are willing to adopt Indian children exist, and one set is an Indian couple, it may be in the children’s best interests to follow the preferences established by the ICWA. However, when, after a diligent search, a willing Indian

71. Id.
73. Id. at 359.
74. Id. at 360.
75. Id. at 361.
76. Id. at 366.
family cannot be located, the children should not be forced to wait in parentless limbo for the sake of the tribe.

Another example of a court enforcing the ICWA without considering the children's best interests is *Mississippi Band of Choctaw Indians v. Holyfield.*77 As discussed in Part I, the United States Supreme Court, without considering the parents' wishes or the children's best interests, strictly interpreted the ICWA to give the tribe exclusive jurisdiction regarding placement of the twins.78 The Court did not consider the fact that at the time of its decision, the twins had been in the Holyfields' custody for over two years. Although the tribal court eventually exercised good wisdom and allowed the Holyfields to adopt the twins,79 the fact remains that the Supreme Court applied the ICWA without any consideration for the bonding that had occurred between the twins and the Holyfields or the children's need for stability.

Furthermore, the argument that the placement preferences of the ICWA do not allow for consideration of the children's best interests is also supported by the large number of courts creating good cause to deviate from the ICWA's dictates.80 As discussed in Part V.D.3 of this Article, many courts are disregarding the ICWA's clear placement mandates using the good cause exception. Such a phenomenon clearly indicates that the children's needs and interests must be considered.

Although Congress declared that our Nation's policy is "to protect the best interests of Indian children,"81 the requirements of the ICWA work against, rather than toward the promotion of this policy. The heightened standard of proof that the ICWA forces courts to apply when deciding a termination case may conceivably be forcing Indian children to experience more abuse and neglect. Even if these children are removed from the abusive setting in a timely manner, the standards of the ICWA require them to remain in a state of parentless limbo longer than other children in the same situation. Such outcomes are clearly not promoting Congress' goal of protecting Indian children. Furthermore, the ICWA is likewise ineffective in aiding tribes.

78. Holyfield, 490 U.S. at 52.
80. See infra notes 262-305 and accompanying text.
B. Is the ICWA Being Used by and Aiding Tribes?

According to Robert J. McCarthy, director of the Indian Law Unit of Idaho Legal Aid Services, the ICWA is not having the impact Congress desired.\textsuperscript{82} McCarthy reported that according to the Bureau of Indian Affairs:

[T]he ICWA [has] not reduced the flow of Indian children into foster or adoptive homes. In fact, while the number of children of all races in substitute care decreased in the 1980s, the number of Indian children in care increased by 25 percent. . . . Although 63 percent of all Indian child foster placements are in homes in which at least one parent is Indian, less than half of placements made under state jurisdiction are in Indian homes.\textsuperscript{83}

Although this may be true, one must ask if these statistics are in part the result of the tribe's failure to get involved. The ICWA provides that:

An Indian tribe shall have jurisdiction exclusive as to any State over child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.\textsuperscript{84}

It also provides that in "any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child . . . the Indian child's tribe [has] a right to intervene at any point."\textsuperscript{85} Furthermore, the ICWA orders State courts to transfer foster care placement and termination of parental rights cases involving Indian children not domiciled or residing on an Indian reservation to tribal court absent one of the following situations: (1) "good cause" to the contrary; (2) objection by either parent; or (3) "declination by the tribal court of such tribe."\textsuperscript{86} Thus, tribes are provided ample means of getting involved in cases involving Indian children. Despite this fact, tribes often fail to get involved.

\textsuperscript{82} See McCarthy, \textit{supra} note 33.

\textsuperscript{83} Id. at 864.

\textsuperscript{84} 25 U.S.C. § 1911(a) (1994).

\textsuperscript{85} Id. § 1911(c).

\textsuperscript{86} Id. § 1911(b).
In a surprisingly high number of reported cases, although the tribe was given notice, the tribe chose not to intervene.\textsuperscript{87} If, as Congress stated, “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,”\textsuperscript{88} why are such a high number of tribes not getting involved? Although one could understand a tribe’s hesitation to get involved in jurisdictions clearly recognizing the existing Indian family exception,\textsuperscript{89} a majority of the cases where tribes failed to get involved are from jurisdictions clearly rejecting the existing Indian family exception.

For example, in \textit{In re Bird Head},\textsuperscript{90} the trial court notified the Oglala Sioux Tribe’s prosecutor that one of its children was involved in a neglected and dependent proceeding.\textsuperscript{91} On the date of the adjudicatory hearing, no one appeared on the tribe’s behalf.\textsuperscript{92} Despite this fact, the trial court found that the child involved was an Indian child and continued the matter to allow the child’s tribe to request a transfer of jurisdiction to tribal court.\textsuperscript{93} Although someone from the tribe did file a petition for a change of venue, a tribal representative did not show up to argue the petition at the hearing.\textsuperscript{94} Throughout the trial level proceedings and the appeals, the tribe failed to appeal the court’s decision to retain jurisdiction.\textsuperscript{95}

\begin{footnotes}
\item 89. \textit{See infra} notes 179-207 and accompanying text.
\item 90. 331 N.W.2d 785 (Neb. 1983).
\item 91. \textit{Id.} at 787.
\item 92. \textit{Id.} at 788.
\item 93. \textit{Id.}
\item 94. \textit{Id.}
\item 95. \textit{Id.}
\end{footnotes}
The same lack of interest is exhibited in *In re Maricopa County Juvenile Action No. JS-8287*.96 In Maricopa County, the trial court notified the Pueblo Indian tribe that one of its children was involved in a dependency case.97 The tribe did not get involved.98 The court, however, continued to notify the tribe of all proceedings that took place over the next two years.99 The tribe remained uninvolved. Once the foster parents petitioned to adopt the child, however, the tribe suddenly had an interest in the child.100 The tribe disregarded the fact that the child had bonded with the foster-adoptive family during the two years that she had been with them, and petitioned the court to transfer jurisdiction of the proceeding to the tribal court.101 If this child was such a "valuable resource," why did the tribe wait for over two years before getting involved in her life? At least one commentator blames tardy and sporadic tribal participation in state court ICWA proceedings on tribes' limited financial and technical resources.102 Others imply that a lack of comprehensive training for both state and tribal social workers is partially to blame.103

Also, when tribes do get involved they do not always assert the ICWA's clear placement preferences. For example, after taking the case all the way to the United States Supreme Court, the tribal court involved in the *Holyfield* case allowed the non-Indian mother to adopt the twins.104 Similarly, the tribe responsible for crossing several state lines to gain custody of the Keetso child105 eventually awarded permanent custody to the non-Indian parents.106 Although such decisions show the tribes' ability to recognize the importance of a child's bonding to those who care for it, these cases also reveal the tribes' willingness to release their "valuable resources."

97. Id. at 1246.
98. Id. ("[T]he Pueblo still was considering petitioning for transfer to tribal court . . . ." (emphasis added)).
99. Id.
100. Id. at 1246-47.
101. Id. at 1250.
105. See infra notes 140-47 and accompanying text.
Finally, although tribal utilization of the ICWA is unclear, one thing is clear: the ICWA is not aiding tribes. Alaska is the only state that has reported the number of adoptions and out-of-home placements since the enactment of the ICWA. Out-of-home placements of Alaska Native children, who are considered Indian children under the ICWA, "have significantly increased since the passage of the ICWA." The testimony of the spokesperson for Alaska Federation of Natives is illustrative:

In 1987, 8 years after the passage of the Indian Child Welfare Act, the problems which the Act tried to rectify have worsened in the State of Alaska. The 1976 survey done by the Association on American Indian Affairs which ultimately led to the enactment of the Indian Child Welfare Act found that there was an estimated 395 Alaska Native children in State and Federal out-of-home placement. In 1986 that figure has risen to 1,010, which represents a 256-percent increase. During the same period of time, the total population of Alaska Native children increased by only 18 percent.

As the figures indicate, the removal of our children from our homes and culture continues at a rate that far exceeds our population. The problems in Alaska continue to worsen for Native children. Although no other states have reported the number of Indian adoptions since the passage of the ICWA, it is doubtful that it is achieving the desired effect.

IV. Equal Protection Violations

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

107. Myers et al., supra note 103, at 25.
108. Id.
The Fourteenth Amendment was adopted to protect the rights of individuals against classifications based on race. The United States Supreme Court has stated that "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." This statement appropriately describes the ICWA because the blood ties, or race of the child, dictates whether the ICWA applies. The ICWA does not consider whether a child with the appropriate amount of Indian blood is living with an Indian parent. Likewise, the ICWA does not consider whether the child is living, or has ever lived on an Indian reservation, or in an Indian community. The sole guiding factor is race. Thus, the ICWA can not be reconciled with the Fourteenth Amendment's guiding principle.

As early as 1879 this country recognized that a person born with Indian blood could avoid the reach of the federal Indian power by severing his or her tribal ties and assimilating into society. In United States v. Crook, twenty-five Ponca Indians filed a writ of habeas corpus seeking release from their confinement on a reservation. The court found that an Indian had a "God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence." Although this case has never been overruled, persons with Indian blood no longer have the right to act as though they have never belonged to a tribe.

In 1978, Congress, by enacting the ICWA, went against past Supreme Court decisions and did specifically what the Constitution prohibits States from doing. Whereas States are not permitted to treat citizens differently, Congress disregarded the Fourteenth Amendment and enacted the ICWA, authorizing all States to treat parents of children with Indian blood differently. By so doing, Congress is effectively denying these parents their

111. Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." (citation omitted)).
112. Id.
114. Id.
115. Id. at 699.
116. See Loving v. Virginia, 388 U.S. 1 (1967) (holding that Virginia statute preventing marriages between persons solely on the basis of racial classifications could not stand); Hernandez v. Texas, 347 U.S. 475 (1954) (striking down a Texas law which discriminated against Mexican-Americans in jury selection); Strauder v. West Virginia, 100 U.S. 308 (1879) (striking down a West Virginia law that only permitted white males to serve as jurors).
“liberty” and “property” rights without the process afforded to all other citizens. This continues today despite the Supreme Court's statement in 1981 that “neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.”

The modern rule controlling equal protection analysis of national legislation on Indian affairs was set out by the Court in Morton v. Mancari. In Morton, the articulated standard was close to a rational basis test:

As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

The ICWA violates the standard set forth by the Court in at least two ways which are discussed below. However, before examining how parental rights are being violated by the ICWA, it is important to understand what rights parents have in regard to their children generally.

A. Parental Rights

1. Background of Parents' Rights Historically

Constitutional law scholar Gerald Gunther has written that the Supreme Court has “occasionally protected aspects of liberty even though they were not explicitly designated in the Constitution.” One of these rights is parental rights. Throughout most of history parents have been given a right to raise their child as they see fit. In Europe,

when one was either a Catholic or a Jew... St. Thomas argue[d] that: it would be an injustice to Jews if their children were to be baptized against their will, since they would lose their rights of parental authority over their children as soon as they were Christians.
Likewise, the United States has traditionally upheld parents' rights to control the future of their children.\textsuperscript{123}

The philosophical basis for parental rights have been described by one commentator as follows:

Discovery of the order natural to the family and natural to civil society depends on a prior discovery of the nature of man and its essential properties. We are morally free about many things with the social order; for example, we are free about who we will marry, which society we shall live in, and who will govern our societies, as well as a host of other things. But there are other matters about which we are not morally free, and these have to be determined by an adequate study of the nature of each of the social bodies: the domestic and political societies most notably.

Those who wish to impose an order based on the arbitrary decision of some minority, or even some majority, threaten the peace and freedom of every member of civil society. Above all, under such a social order, a few might temporarily find human happiness, but most members would discover what earlier civilizations found to their great regret, namely, that to live counter to that order best established by nature alone involves enormous cost in human terms.

The enemies of the domestic society demand conformity whereby each person becomes an individual citizen existing solely for the sake of the welfare of the political group to which the family belongs. Although these enemies see the domestic unit standing in their way, human offspring need the family. They ought to be reared in love of the goods most fitting to their natures as persons since, as such, they have a value of their own and not as mere individuals disposable for the good of the social whole.

Of what does education of the young consist? It is movement towards the acquisition of the intellectual and

\textsuperscript{123} Thompson, \textit{supra} note 18, at 5 ("Parents have a natural and fundamental interest in the care, custody, and control of their children. Derived from common law, the care, custody, and control of one's child is a fundamental interest protected by . . . the United States and Oklahoma Constitutions."); Stan Watts, \textit{Note, Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Families, and Tribes}, 63 S. CAL. L. REV. 213, 247 (1989) ("Parents have the authority to make many important decisions affecting their children. . . . [H]istorically this parental power has been virtually unconstrained . . . .")
moral virtues so that the child may become all that he ought to be and capable of all that he ought to do. The parents alone are sufficient guardians of this for their own child. Therefore, they alone have inalienable rights to develop that child to the perfection of full humanity.\textsuperscript{124}

Based upon these beliefs, the Constitutional Framers, without explicitly mentioning parental rights, implicitly deemed parents to have rights concerning their children's upbringing when they drafted the Constitution.\textsuperscript{125} Scholars all agree that "matters touching on natural parent-child relationships . . . are fundamental liberty and privacy interests protected by the Fourteenth Amendment."\textsuperscript{126} This is evidenced by the fact that courts have long recognized "a constitutionally protected parental right to care and custody of children under the Fourteenth Amendment."\textsuperscript{127} Courts have gone so far as to state: "The right to direct the upbringing of one's child 'is one of the most basic of all civil liberties.'"\textsuperscript{128}

More specifically, this country has consistently upheld parents' rights to direct their children's education and religion, as well as their right to discipline their child.\textsuperscript{129} The United States Supreme Court has frequently emphasized that parents' rights to control their children's futures have been deemed "'essential,' 'basic civil rights of man' and '[r]ights far more precious . . . than property rights.'"\textsuperscript{130}

In 1923, the Supreme Court first held that a parent has a right to control his or her child's education.\textsuperscript{131} Two years later, the Court reaffirmed this stance by stating that parents have a

\begin{itemize}
\item \textsuperscript{124} Waters, supra note 122, at 37-38.
\item \textsuperscript{125} Thomas J. Marzen, \textit{Parental Rights and the Life Issues, in Parental Rights: The Contemporary Assault on Traditional Liberties}, supra note 122, at 44, 51.
\item \textsuperscript{126} Marian L. Faupel, \textit{The "Baby Jessica Case" and the Claimed Conflict Between Children's and Parents' Rights}, 40 \textit{Wayne L. Rev.} 285, 289 (1994). See also Gunther, supra note 121, at 492; Marzen, supra note 125, at 54; Thompson, supra note 18, at 5.
\item \textsuperscript{127} Marzen, supra note 125, at 54.
\item \textsuperscript{128} \textit{In re K.L.J.}, 813 P.2d 276, 279 (Alaska 1991) (quoting Flores v. Flores, 598 P.2d 893, 895 (Alaska 1979)).
\item \textsuperscript{129} See Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding parents' right to educate their children); Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding Amish parents' right to educate their children according to their religious beliefs); \textit{Restatement (Second) of Torts} § 147 (1965) ("A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education.").
\item \textsuperscript{130} Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted).
\item \textsuperscript{131} See Meyer, 262 U.S. at 400.
\end{itemize}
liberty right "to direct the upbringing and education of children under their control." In *Pierce* the Court balanced the right of parents to educate and raise their children against the state's interest in a homogeneous population, and found the parents' rights were more vital. The Court stated that a "child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." The Court again reaffirmed parents' right to control their child's future in *Wisconsin v. Yoder*. In *Yoder* the Court found that "[t]o be sure, the power of the parent, . . . may be subject to limitation . . . if it appears that parental decision will jeopardize the health or safety of the child," but permitted Amish families to remove their children from formal education after the eighth grade. Finally, American parents are also given a liberty right to discipline their children as they see fit.

Parents maintain most of these rights even when they give their child up for adoption. In *Dickens v. Ernesto*, the New York Court of Appeals upheld a statute which allowed parents to express their preference that their child be raised in the religion of their choice, even though they were giving the child up for adoption. The court found that a statute which granted birth parents the right to specify the religious affiliation of prospective adoptive parents did not violate the United States or New York Constitutions.

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133. *Id.*
134. *Id.* at 535.
136. *Id.* at 233-34.
137. *Restatement (Second) of Torts* § 147 (1965). Obviously, this discipline must be reasonable and must not harm the child. What is reasonable is determined by each state's law.
139. *Id.* at 156-57. New York is not the only state that considers the birth parents' wishes regarding the religious affiliation of the adopting parents. Illinois, Maryland, Massachusetts, and Ohio have also considered the birth parents' wishes when making adoption decisions. See *Cooper v. Hinrichs*, 140 N.E.2d 293 (Ill. 1957) (considering natural parents' wishes regarding the religious upbringing of their child); *Frantum v. Dep't of Pub. Welfare*, 133 A.2d 408 (Md.) (refusing to grant adoption where Catholic birth mother expressed desire for child to be raised a Catholic and child was placed with a Lutheran family), *cert. denied*, 355 U.S. 882 (1957); *Purinton v. Jamrock*, 80 N.E. 802 (Mass. 1907) (considering natural parents' wishes regarding the religious upbringing of their child); *In re Doe*, 167 N.E.2d 396 (Ohio Juv. Ct. 1956) (same).
When Congress enacted the ICWA it not only gave Indian tribes broader power to control the removal of its children, but also took away personal liberties of men and women who have a child with Indian blood. Thus, Congress effectively created two classes of parents: parents of children with Indian blood and all other parents. Under current law, a parent’s rights vary depending upon the class to which they belong.

2. Examples of How Parents of Indian Children Rights Vary from Everyone Else’s Rights

a. Selection of Adoptive Parents

In today’s media hyped world, all Americans are aware of the fact that birth parents may choose the parents who will adopt and raise their child. Depending on the circumstances, it is not uncommon for the adoptive parents to pay for the birth mother’s medical expenses and be present while she is giving birth. Although the right to choose who will adopt and raise a child is not a right enunciated in the Constitution, it is one that all Americans take for granted. It is also, unfortunately, a right which the ICWA took away from parents of children with Indian blood.

In 1987 Ms. Patricia Keetso, a Navajo woman, decided to give up her child for adoption. She answered an advertisement in an Arizona newspaper and met the prospective adoptive couple, Mr. and Mrs. Richard Pitts. After staying with the Pitts for several months, Keetso formed a close bond with the adoptive couple. Mrs. Pitts even coached Keetso during labor and was present when the baby was delivered.

Some time after the child’s birth, tribal authorities contacted the child’s grandmother who was living on a reservation. According to a newspaper account:

Keetso [the grandmother] said that tribal authorities had frightened her . . . into helping them spirit 8-month-old Allyssa Kristian Keetso from her natural mother, Patricia Keetso, and from the baby’s would-be adoptive parents, Cheryl and Rick Pitts . . . . Keetso and tribal authorities took possession of the baby during a televised airport drama . . . . After they arrived in Arizona for a child custody hearing, the grandmother said that tribal authorities took the child away from her on Friday. Keetso said she

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141. Id.
142. Id.
143. Id.
144. Id.
believes the baby is in the custody of a Navajo social worker, but does not know exactly where.\textsuperscript{145}

The Navajo tribe never permitted the Pitts to adopt the Keetso baby, despite the natural mother’s desire for them to do so.\textsuperscript{146} Unfortunately, this scenario is not an isolated one.\textsuperscript{147} The Keetso case is just one example of how Indian parents are not allowed to exercise the same rights as every other citizen of this country. If Patricia Keetso was not an Indian, such action would have never been permitted and the Pitts would have adopted her baby, as she desired.

For example, in \textit{Kasper v. Nordfelt}, the Utah Court of Appeals held that a mother’s choice to place her child with an adoption agency should not be disregarded simply because the paternal grandparents want to raise the child.\textsuperscript{148} In \textit{Kasper}, the court found that:

Although the Wilson court opined that under some circumstances family relationships might be of such a nature that [grandparents’] application to adopt should be given consideration, \ldots{} we do not find such a circumstance here, where the only living parent of the child deliberately and thoughtfully decided to place the child for adoption with an agency, and not with the paternal grandparents. We think the integrity of such a decision, involving a critically important parental right, must be preserved, not only for the stability and well-being of the child, but also for the protection of the adoption process and its purposes.\textsuperscript{149}

Other courts across the nation have made rulings consistent with \textit{Kasper} when faced with a similar situation.\textsuperscript{150}

\begin{itemize}
\setcounter{enumi}{144}
\item \textit{Kasper v. Nordfelt}, 815 P.2d 747, 749 (Utah Ct. App. 1991).\textsuperscript{148}
\item \textit{Id.} at 747.\textsuperscript{149}
\item \textit{Hayes v. Watkins}, 295 S.E.2d 556, 557 (Ga. Ct. App. 1982) (holding that grandparents do not have a right to intervene in adoption proceeding where at least one natural parent is alive and has consented); \textit{In re Benavidez}, 367 N.E.2d 971, 974 (Ill. App. Ct. 1977) (finding that wishes of mother giving consent to nonrelative adoption should “legitimately be taken into account” because grandparents have no legal right to be preferred over adoptive parents); \textit{In re B.B.M.}, 514 N.W.2d 425, 429 (Iowa 1994) (allowing “grandparents to intervene where parents have voluntarily placed their child for an independent adoption \ldots{} would be to elevate the grandparents’ interests above the interests of the parents”); \textit{Christian Placement Serv. v.} \textit{Navajo Baby is Home For Good in San Jose, S.F. CHRON.}, Apr. 24, 1988, at B3.
\end{itemize}
In the Keetso case, Kathy Youngbear, a representative of the American Indian Center, argued that the Navajo tribe had the right to the return of the child:

While Anglo culture holds parental rights sacred, Indians also value the rights of the extended family and the tribe. The Indian Child Welfare Act allows the tribe to intervene in adoption cases even against a mother's wishes. The reporting has been through the eyes of a white couple whose poor baby is being taken away from them. In actuality it should be from an Indian woman's point of view: this baby's rights as a Navajo baby, a Navajo tribal member and a Navajo woman. These Indian kids are our future leaders.\(^{151}\)

What Youngbear, and many supporters of the ICWA fail to recognize is that by common law, all Americans, regardless of their cultural background, have certain parental rights;\(^{152}\) rights which the ICWA has effectively taken away from parents of Indian children.\(^{153}\) Although Youngbear correctly argued that the Keetso case should have been viewed from an Indian woman's point of view, she missed the point. Both Youngbear and the Navajo tribe completely disregarded Keetso's wishes. Keetso was not forced to put her baby up for adoption and she did not make a rash decision to do so. Keetso made a thoughtful and deliberate choice to place her child with a non-Indian family. Under the ICWA, however, her wishes meant nothing. Therefore, the Navajo tribe did not have to consider, let alone honor, her decision to remove the child from the Indian culture.

American law states that a parent has the right to determine what is best for their child, and the community does not have a right to question that decision if the child is not directly harmed by it.\(^{154}\) The Supreme Court has found that legislation dealing with Indians does not violate equal protection principles so "long as the special treatment can be tied rationally to the fulfillment

Gordon, 697 P.2d 148, 155 (N.M. Ct. App. 1985) (holding that grandmother may not intervene where only living parent had consented to adoption through an agency); In re Peter L., 453 N.E.2d 480, 482 (N.Y. 1983) (finding that recognizing right of grandmother to adopt grandchild where mother voluntarily surrendered the child to an agency for adoption would undermine the mother's decision).

\(^{151}\) Smith, supra note 140, at A1.

\(^{152}\) See supra notes 121-39 and accompanying text.

\(^{153}\) "Tribal jurisdiction under [the ICWA] was not meant to be defeated by the actions of individual members of the tribe . . . ." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).

\(^{154}\) See generally supra notes 121-39 and accompanying text.
of Congress' unique obligation toward the Indians."\textsuperscript{155} Congress enacted the ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."\textsuperscript{156} At least one court has acknowledged that the ICWA "is an intrusion on [a] mother's ability to determine what is in the best interests of her child."\textsuperscript{157} Because this intrusion can not be rationally tied to protecting the best interests of the child nor preserving the Indian family, the ICWA is unconstitutional.

\subsection*{b. Anonymity}

Although adoption is more prevalent and accepted today than it was in the past, giving a child up for adoption remains a rather taboo topic in the American society. This fact is recognized by permitting birth mothers and fathers to remain anonymous until the child turns eighteen. Furthermore, an ever-increasing number of teenage girls are faced with unplanned pregnancies. In such a situation, courts have recognized that not all teens can turn to their families.\textsuperscript{158} When Congress enacted the ICWA it chose to disregard this fact. Under the ICWA, parents of children with Indian blood can be forced to tell their families of the birth to ensure compliance with the ICWA's placement preferences. An example of this is \textit{In re Baby Girl Doe}.\textsuperscript{159}

In \textit{Baby Girl Doe}, the Montana Supreme Court held that a tribe's right to enforce statutory preferences for adoptive placement of an Indian child prevailed over the mother's statutorily recognized interest in anonymity.\textsuperscript{160} In \textit{Baby Girl Doe}, the baby girl's mother expressed her intention to relinquish her parental rights shortly after the birth.\textsuperscript{161} After the statutorily required period of time, the mother filed an affidavit waiving all parental rights and consenting to an adoption without further notice.\textsuperscript{162} In her affidavit, the mother indicated that she had been advised of the ICWA, "but for privacy reasons wished to remain anonymous and requested that the court not contact her family or

\begin{footnotes}
\item[157] \textit{In re Child of Indian Heritage}, 543 A.2d 925, 930 (N.J. 1988).
\item[158] See, e.g., Bellotti v. Baird, 443 U.S. 622 (1979) (holding unconstitutional a Massachusetts statute that required either parental or court consent before a minor may have an abortion).
\item[159] 865 P.2d 1090 (Mont. 1993).
\item[160] \textit{Id.} at 1095.
\item[161] \textit{Id.} at 1090. The mother did not have a specific family picked to adopt her daughter, but clearly expressed her intent to give her daughter to the Department of Family Services for adoptive placement. \textit{Id.}
\item[162] \textit{Id.} at 1091.
\end{footnotes}
Tribe concerning placement."\textsuperscript{165} The district court concluded that the mother's relinquishment was knowingly and freely given and that the temporary order for protective services should remain in effect until the child was placed for adoption.\textsuperscript{164} The court also notified the Chippewa Cree Tribe that a child eligible for enrollment had been placed for adoption.\textsuperscript{165}

The Tribe moved to intervene and requested information regarding the identity of the mother and her family.\textsuperscript{166} Because the Tribe's request conflicted with the mother's request for anonymity, the court ordered a hearing.\textsuperscript{167} After considering both parties' arguments the court concluded that the mother's right to anonymity outweighed the Tribe's interest in enforcing the statutory preferences for adoption.\textsuperscript{168}

The Tribe appealed this order.\textsuperscript{169} The Montana Supreme Court, relying on Holyfield, stated that the principle purposes of the ICWA were to "promote the stability and security of Indian tribes by preventing further loss of their children."\textsuperscript{170} Therefore, the court found that giving "primary importance to the mother's request for anonymity would defeat the Tribe's right to meaningful intervention and possibly defeat application of the clear preference provided by statute for placement of [the child] with a member of her extended family."\textsuperscript{171}

This case is yet another example of how the ICWA permits a tribe to completely disregard the parents' wishes and constitutional rights.\textsuperscript{172} Americans would be outraged if all parents were forced to give up their right to privacy in this situation. Unplanned pregnancies remain such a taboo topic in this country that in most states even minors are permitted to have an abortion without their parents knowing.\textsuperscript{175} Yet, because of the ICWA, the mother in \textit{Baby Girl Doe} could have been forced to have her family find out not only that she was pregnant but that she had given birth and given the child up for adoption. All other American

\begin{itemize}
\item \textsuperscript{163} \textit{Id.} The mother also appeared in court and averred the same. \textit{Id.}
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.} at 1092.
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} \textit{Id.} at 1095.
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} \textit{See generally} \textit{Roe v. Wade}, 410 U.S. 113, 153 (1973) (A woman's right to privacy was clearly set forth by Justice Blackmun in \textit{Roe v. Wade} when he stated that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").
\item \textsuperscript{173} \textit{See generally} \textit{Bellotti v. Baird}, 443 U.S. 622 (1979).
\end{itemize}
parents' request for anonymity would be honored—Indian parents' request should also be.

The ICWA permits tribes and courts to blatantly disregard a natural parent's deliberate and thoughtful decision to have their child adopted by a specific family of their choice. Even more frightening is the fact that under the ICWA courts and tribes can disregard a parent's conscious decision not to have their child raised in the same social setting to which they belong. Economically poor parents would likely be applauded if they placed their child for adoption with a financially stable, educated family in hopes of giving the child what they could not. The ICWA does not allow parents of children with Indian blood to do the same. Parents of children with Indian blood can not decide that they do not want their child to grow up on a reservation and place their child for adoption off of a reservation without the tribe's consent.\textsuperscript{174} Courts have found that parents have certain constitutional rights regarding the upbringing of their children. One of these rights is the right to anonymously place the child for adoption with the family of their choice.\textsuperscript{175} Because the ICWA effectively eliminates those rights for a specific class, parents of children with Indian blood, without any rational tie to Congress' obligation to the Indians, the ICWA is unconstitutional. Furthermore, and more importantly, the ICWA is violating the rights of the innocent children involved.

B. Neglected and Abused Indian Children

The race classification created by the ICWA is harming Indian children in two ways. First, as previously discussed in Part III.A.1. of this Article, most states use "clear and convincing evidence" as their standard of proof in termination of parental rights cases. The ICWA, however, uses the "beyond a reasonable doubt" standard of proof in termination of parental rights cases. This elevated standard of proof is potentially causing Indian children to endure more neglect and abuse for the sake of their tribe's future.

Furthermore, once this heightened standard of proof has been satisfied, Indian children may be forced to remain in an abusive setting longer than children of other racial backgrounds because of concern regarding the mixing of children with parents — be they foster or adoptive — of a different race. As previously discussed in Part III.A. of this Article, experts disagree on

the question of whether placement of Indian children in non-
Indian homes is harmful to their mental well-being. Regardless
of what experts think, the fact is that the ICWA mandates that:

In any foster care . . . placement, a preference shall be
given, in the absence of good cause to the contrary, to a
placement with-

(i) a member of the Indian child’s extended family;

(ii) a foster home licensed, approved, or specified by
the Indian child’s tribe;

(iii) an Indian foster home licensed or approved by
an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian
tribe or operated by an Indian organization which has a
program suitable to meet the Indian child’s needs.176

Thus, when it becomes clear that a child should no longer
remain in an abusive setting, the child will either remain in that
setting until a placement which satisfies the mandates of the
ICWA is available, or be moved from one foster care setting to
another when a placement which satisfies the ICWA is open.
Both options are equally unpalatable.

The United States Supreme Court has held that children
should not be subjected to adverse legal discrimination because
of factors beyond their control.177 The race of a child’s parents
and the culture into which a child is born is clearly a factor
beyond a child’s control. The high standard imposed by the
ICWA is denying Indian children equal protection under the law.
Thus, the ICWA is arguably violating the rights of parents and
children. However, even if the Supreme Court were to somehow
justify the classifications and unequal treatment of the ICWA, the
Court would have to recognize and deal with the inconsistent
application of the Act.

V. IS THE ICWA BEING APPLIED CONSISTENTLY?

C. Steven Hager, a staff attorney with Oklahoma Indian
Legal Services, wrote that “[i]f Holyfield stands for anything, it is
that the states cannot create their own definitions for the
ICWA.”178 Six years after Holyfield, the only Supreme Court opin-
ion to address the law set forth in the ICWA, state courts have

against illegitimate children unconstitutional).
178. C. Steven Hager, Prodigal Son: The “Existing Indian Family” Exception
Holyfield, 490 U.S. at 42-54).
continued creating their own definitions for several of the terms contained in the ICWA. This is significant for two reasons. First, it indicates that the ICWA is not being applied consistently. Second, it signifies that the language of the ICWA is anything but clear, and the inconsistent application will continue until the United States Supreme Court rules on emerging definitions, or Congress amends the ICWA with more explicit definitions.

A. The Existing Family Exception

In 1982, the Supreme Court of Kansas created what is commonly known as the existing Indian family exception. Baby Boy L. was the illegitimate son of a non-Indian mother, and a five-eighths Kiowa Indian father, Carmon Perciado. On the day of Baby Boy L.‘s birth, his mother executed a consent to adoption which was limited to the adoptive parents named therein. On the same day, the adoptive parents filed a petition for adoption. The court granted the adoptive parents temporary custody of Baby Boy L. and served notice of the adoption proceeding on Perciado at the Kansas State Industrial Reformatory. Perciado answered the adoption petition requesting that he be found a fit parent, that his parental rights not be severed, and that he be given permanent custody of his son.

At trial, the court found that because Perciado was an enrolled member of the Kiowa Tribe, the ICWA might apply. Therefore, the court continued the trial to allow notice to be provided to the Kiowa Tribe. The Kiowa Tribe responded by filing petitions to intervene, to change temporary custody, and to transfer jurisdiction. The Kiowa Tribe also enrolled Baby Boy L. as a member of the tribe against the express wishes of his mother. After finding that the ICWA did not apply, and that Perciado was an unfit parent, the trial court granted the adoption of Baby Boy L. to the adoptive parents.

180. Id. at 172.
181. Id.
182. Id.
183. Id.
184. Id. at 173.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id. at 173-74.
The Supreme Court of Kansas affirmed the trial court's conclusion that the ICWA did not apply to this case. In making its decision, the Kansas Supreme Court considered the legislative history and the language of the ICWA. The court found that Congress intended to maintain existing family relationships and concluded that Congress did not intend 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." The court found that the underlying thread which runs throughout the ICWA is the concern with the removal of Indian children from an existing family unit and the resultant breakup of the Indian family. Since the Kansas Supreme Court's holding in Baby Boy L., other states have considered its reasoning with varying degrees of support.

Prior to the Supreme Court's decision in Holyfield, nine state appellate courts considered using the reasoning set forth by the Kansas Supreme Court in Baby Boy L. Of the nine, four adopted the existing family exception and five rejected it. Although Holyfield purportedly implicitly overruled the existing Indian family exception, states continue to apply the excep-

190. Id. at 174.
191. Id. at 175 (citing 25 U.S.C. §§ 1901(4), 1911(a), 1912(d)-(f), 1914, 1916(b), 1920, 1922 (1978)).
192. Id.
193. Id.
194. The jurisdictions rejecting the reasoning of Baby Boy L., do so mainly because of their belief that the plain meaning of the statute does not require the exception. See In re N.S., 474 N.W.2d 96, 101 n.6 (S.D. 1991) (Sabers, J., concurring) ("There is simply no statutory requirement for [a child] to have been born into an Indian home or an Indian community in order to come within the provisions of [the] ICWA, however much one might believe 25 U.S.C. § 1903(4) should have been written that way. No amount of probing into what Congress 'intended' can alter what Congress said, in plain English ...."). Others have found that a mother and child constitute an "Indian family." In re D.S., 577 N.E.2d 572, 574 (Ind. 1991).
196. Hager, supra note 178, at 882.
tion today. In fact, after *Holyfield*, some states changed their prior holdings to recognize the existing family exception which it had previously rejected.197

For example, prior to *Holyfield* the Washington Court of Appeals rejected the existing family exception.198 In 1992, however, the Washington Supreme Court refused to apply the ICWA absent an existing Indian family.199 In *Crews*, a mother who had Indian bloodlines, but was not a member of a tribe, voluntarily gave her child up for adoption.200 After the adoption was final, the mother sought to become a member of the Choctaw Nation for the express purpose of invoking the ICWA to secure her child’s return.201 The Washington Supreme Court found that an “Indian family” did not exist at the time the mother surrendered the child for adoption because she was not a member of a recognized tribe at that time.202 Therefore, the concurrence noted, the child was not an “Indian child” under the Act at the time of adoption.203 Although the Washington Supreme Court stated that its holding in *Crews* is limited to “the narrow circumstances presented by the facts of this case,” the fact remains that the court is willing to use the exception in certain situations.204 Washington is just one of the states that has refused to apply the ICWA absent an existing Indian family. As it currently stands, Alabama, California, Kansas, Louisiana, Missouri, and Oklahoma also recognize the existing Indian family exception to the ICWA.205 Thus, the Supreme Court’s decision in *Holyfield* did not decrease the number of states applying the existing Indian family exception to the ICWA.

Until the Supreme Court or Congress decides whether the ICWA was meant to apply to children who are not a part of an existing Indian family, states will continue to apply the ICWA discordantly. Unfortunately, it does not appear that either the

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197. Both California and Washington rejected the existing family exception before *Holyfield*, but currently accept it. See infra notes 198-205 and accompanying text.
200. *Id.*
201. *Id.*
202. *Id.* at 310.
203. *Id.* at 312-13 (Andersen, J., concurring).
204. *Id.* at 311.
Supreme Court or Congress will resolve the issue of the existing Indian family exception to the ICWA anytime soon. In June of 1993, a child’s would-be adoptive parents appealed to the Supreme Court suggesting that a division existed in the states regarding the existing Indian family exception and asking the Court to rule on the validity of the exception.\textsuperscript{206} The Court, however, declined to grant certiorari.\textsuperscript{207} Thus, a person’s rights, or lack thereof, will continue to vary, depending on which state is interpreting Holyfield’s application to the ICWA.

B. Determining when the Right to Revoke Voluntary Consent to Termination of Parental Rights and Adoption Ends

The ICWA provides:

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.\textsuperscript{208}

This section of the ICWA has been interpreted in two very distinct ways. Some courts find that termination and adoption proceedings are two distinct proceedings; therefore when a final decree of termination is entered, the parent is not entitled to revoke their consent before the adoption decree is entered.\textsuperscript{209} Other jurisdictions, however, permit that parents of an Indian child may revoke their consent at any time prior to the final adoption decree, whether or not a final decree of termination exists.\textsuperscript{210}

The majority of the jurisdictions addressing this issue have held that a parent’s right to withdraw their voluntary consent expires when the final order terminating parental rights is


\textsuperscript{208} 25 U.S.C. § 1913(c) (1994).


entered. In Kiogima, the mother of three Indian children contacted DSS and told them that she wanted to release her children for adoption. Four days later, at a hearing held to execute a release of her parental rights, the mother appeared with her attorney and signed the release. A final order terminating the mother's parental rights was entered the same day. Before the order was entered, however, the court informed the mother that "she had a right to request a rehearing within [twenty] days or to appeal within [twenty-one] days after an order was entered terminating her parental rights." Over six months later, the mother petitioned the court to set aside the order of termination, arguing that pursuant to the ICWA she had an unqualified right to revoke her release at any time prior to adoption. The Michigan Court of Appeals adopted the reasoning of the supreme courts of Alaska and Nebraska and held that the mother's right to withdraw her consent expired twenty-one days after the final order terminating her rights was entered. The court quoted with approval, the Alaska Supreme Court's explanation that section 1913(c) applies to two types of consent: "a consent to termination of parental rights or a consent to adoptive placement." The court went on to say that:

A consent to termination may be withdrawn at any time before a final decree of termination is entered; a consent to adoption at anytime before a final decree of adoption. If Congress had intended consents to termination to be revocable at any time before entry of a final decree of adoption, the words "as the case may be" would not appear in the statute.

A minority of jurisdictions disagree with the Alaska Supreme Court's line of reasoning. For example, in In re K.L.R.F., the
court found that because Pennsylvania law "establishes that consent to adoption may be withdrawn at any time before the entry of the final decree of adoption,"\textsuperscript{221} the mother could withdraw her consent even though her parental rights had already been terminated. The Pennsylvania court approvingly quoted the Arizona Court of Appeals' statement that "[w]hen an Indian child within the purview of the Act is involved, adoption agencies and prospective adoptive parents must be held to assume the risk that a parent such as appellant might change her mind before the adoption is finalized."\textsuperscript{222}

The two interpretations of section 1913(c) are creating unnecessary stress for all parties involved in an adoption proceeding regarding an Indian child. The prospective adoptive parents are forced to wait in nervous anticipation, praying that the natural parent who consented to termination of their parental rights will not revoke their consent before a final adoption decree is ordered. At the same time, in a different state, a natural parent may be heartbroken upon discovering that when they consented to termination of their parental rights they effectively consented to the adoption—despite the ICWA's promise of the right to withdraw their consent "for any reason" prior to the entry of a final decree of adoption. Until the Supreme Court rules on the propriety of the two distinct interpretations of section 1913(c), adoptive parents, natural parents, and the children involved will continue to suffer from the variance. Such a result is unwarranted.

C. Determining who is an Indian

Before the terms of the ICWA will be applied, the child whose placement is at issue must be an "Indian child." The ICWA does not apply merely because the children are "Indian."\textsuperscript{223} The ICWA applies only when there is evidence establishing that the child is an "Indian child" as defined in the act.\textsuperscript{224} An "Indian child" is defined 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."\textsuperscript{225}

\textsuperscript{221} 515 A.2d at 37.
\textsuperscript{222} Id. at 38 (quoting \textit{In re Pima County Juvenile Action No. S-903}, 635 P.2d at 192).
\textsuperscript{224} Id. at 48.
The ICWA, however, contains no definition of membership in an Indian tribe.

Under the ICWA each Indian tribe has sole authority to determine its membership criteria, and to decide who meets those criteria.\textsuperscript{226} Formal membership requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership.\textsuperscript{227} For example, the Yankton Sioux Tribe requires applicants be one-fourth Indian and of that one-fourth, one must be one-eighth Yankton Sioux.\textsuperscript{228} Furthermore, the remaining one-eighth must be Indian blood of a federally recognized tribe.\textsuperscript{229} Thus, when a woman whose father was a full-blooded Ponca Indian and whose mother was one-half Yankton Sioux and one-half Caucasian, attempted to enroll her children (whose father was Caucasian), the Yankton Sioux rejected the application because the Ponca tribe had been dissolved and therefore her children did not meet the tribe's blood requirements.\textsuperscript{230}

Tribes may also have various methods of keeping track of their members. There is no one method of proving tribal membership. Thus, courts are permitted to make this determination as they see fit. The Guidelines, however, state that

\textit{[e]nrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but is not the only means nor is it necessarily determinative.}\textsuperscript{231} Despite the Guidelines, some jurisdictions implicitly require enrollment,\textsuperscript{232} while others do not.\textsuperscript{233} Some courts accept testimony of a representative of the tribal government as probative

\begin{itemize}
\item \textsuperscript{226} Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978); \textit{In re B.W.}, 454 N.W.2d 437, 446 (Minn. Ct. App. 1990) ("[I]t is essential to the purposes of the ICWA to allow appropriate tribal authorities to determine these matters according to tribal law, customs and mores best known to them.").
\item \textsuperscript{227} Martinez, 436 U.S. at 72 n.32.
\item \textsuperscript{228} \textit{In re J.L.M.}, 451 N.W.2d 377, 384 (Neb. 1990).
\item \textsuperscript{229} \textit{Id.} at 385.
\item \textsuperscript{230} \textit{Id.} at 384-85.
\item \textsuperscript{231} Guidelines, \textit{supra} note 52, at 67,586.
\item \textsuperscript{232} \textit{In re Baby Boy W.}, 831 P.2d 643, 647 (Okla. 1992); \textit{In re Quinn}, 881 P.2d 795, 801 (Or. 1994) (finding that the child was not an Indian child because neither father nor child was an enrolled member of an Indian tribe when the mother consented to the child's adoption); \textit{In re Hunter}, 888 P.2d 124, 125-26 (Or. Ct. App. 1995) (same); \textit{In re B.R.B.}, 381 N.W.2d 283, 284 (S.D. 1986) (refusing to accept mother's claim that she was a member of the Cheyenne River Sioux Tribe).
\end{itemize}
evidence of membership. Others reject affidavits stating that a person is a member of the tribe. For example, some courts require an unwed Indian father to acknowledge and establish paternity before declaring the child an Indian child. In *In re Maricopa County Juvenile Action No. A-25525*, the Caucasian mother was uncertain of the paternity of her child, but told the adoption agency that it might be the child of an Indian. Edmund Jackson, an Indian tribe member, was contacted and told that he could be the baby’s father. Jackson went to see the baby but did not acknowledge paternity. The adoption agency later filed a petition to terminate Jackson’s parental rights alleging Jackson had abandoned the child. The petition was granted.

Over a year later, Jackson’s tribe moved to intervene in the adoption proceeding. The tribe alleged that the court had failed to comply with the ICWA placement preferences, claiming that the child was an Indian child. Six days later Jackson acknowledged his paternity of the child. The trial court found that the tribe’s, as well as the father’s, interest came too late, and concluded that good cause to deviate from the ICWA placement preferences existed because the child had been with the adoptive mother for almost three years.

On appeal, the Arizona Court of Appeals first questioned whether the baby was an Indian child. The court found that the trial court should not have applied the ICWA unless evidence established that the child was indeed an Indian child. The court held that because the ICWA’s definition of “parent” does

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233. *In re Baby Boy Doe*, 849 P.2d 925, 930 (Idaho) (“There is no requirement that a tribe must make a conclusive determination of a child’s eligibility for membership in the tribe as proof that the child is an Indian child.”), *cert. denied sub nom.* Swenson v. Oglala Sioux Tribe, 114 S. Ct. 173 (1993).


235. *In re Quinn*, 881 P.2d at 801.


237. *Id.* at 230.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 231.

245. *Id.*

246. *Id.* at 232.

247. *Id.* at 232-33.
not include unwed fathers who fail to acknowledge and establish paternity, the trial court should not have applied the ICWA.248

This same line of reasoning has been used in other states as well.249 For example, in In re Baby Boy D., a seventeen-year-old non-Indian female was pregnant with a nineteen-year-old Indian male's child.250 The male knew that the female was pregnant with his child but did not make any effort to assist the mother in any way.251 The mother told the father that she intended to give the baby up for adoption, and the father did not object.252 Two months after the child was born, however, the father filed suit claiming his rights should not have been terminated under the ICWA.253

The court found that although the father was a registered Indian, the child was not an Indian child because the father had not acknowledged or attempted to establish paternity.254 Thus, in Arizona and Oklahoma, having a child with Indian blood is meaningless until and unless the father acknowledges paternity.255

On the other hand, some jurisdictions have found that regardless of any acknowledgement of paternity, if a child has Indian blood, it is an Indian child under the ICWA.256 In In re N.S., the father never acknowledged paternity in any way, but because the mother told the court that the baby's father was one-fourth Indian, the court found that N.S. was an Indian child.257

Courts are also inconsistent in decisions regarding when a parent must enroll in an Indian tribe to invoke the ICWA. In In re H.D.,258 the mother did not apply for tribal membership until a court date for termination of her parental rights had been set. Although the tribe did enroll her as a member, this enrollment occurred after the court had terminated her parental rights.259

248. Id.
250. In re Baby Boy D., 742 P.2d at 1061.
251. Id.
252. Id.
253. Id.
254. Id. at 1064.
257. Id. at 99.
259. Id.
Nonetheless, on appeal, the court found that the children were indeed Indian children to whom the ICWA applied even though their mother was not an enrolled member of the tribe when the case was heard.\(^{260}\) In contrast, in *In re Johanson*,\(^{261}\) when the mother enrolled herself and her son in the Cherokee nation after the order terminating her parental rights was entered, the court held that the fact that the child had "Indian heritage" during the proceedings did not qualify him as an Indian child under the ICWA.

Once again, application of the ICWA relies not on objective factors, but on each state's subjective interpretation of it. Deciding who is an Indian, a decision which should be simple, varies depending only on the jurisdiction deciding the case. Such a result is clearly unconstitutional. However, until Congress, or the Supreme Court, produces some guidelines as to what is or is not necessary to establish eligibility for tribal membership, due process rights will continue to be violated.

**D. Determining when "Good Cause" to Deviate from the ICWA Exists**

The ICWA provides that:

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 . . . \(^{262}\)

It also provides that:

In any [foster care, preadoptive placement, or] adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.\(^{263}\)

The ICWA does not define the term "good cause." Therefore, courts are permitted to look to other sources for guidance in making the "good cause" determination. What constitutes "good cause" is unique to the individual facts of each case. Not

\(^{260}\) Id. at 1241.


\(^{263}\) Id. § 1915(a) (emphasis added). Subsection (b) enumerates four placement preferences to be given "in the absence of good cause to the contrary" when foster care or preadoptive care is at issue. *Id.* § 1915(b).
surprisingly, courts across the nation are applying different standards when making a "good cause" determination. State courts are also reaching opposite results in cases that are virtually identical factually. Thus, whether "good cause" to deviate exists may be less than a factual decision depending on the jurisdiction hearing the case.

1. Standard of Proof in Making a "Good Cause" Determination

The ICWA is silent regarding the standard of proof courts should apply when making a "good cause" determination. Thus courts are forced to resolve the issue by attempting to discern legislative intent.\(^\text{264}\) Traditionally, legislative silence on standard of proof is viewed as an intention that the preponderance of the evidence standard should be applied.\(^\text{265}\) The only case to squarely address this issue, however, chose not to apply the preponderance of the evidence standard.\(^\text{266}\) Instead, the Minnesota Court of Appeals found that "good cause" to deviate from adoption placement preferences of the ICWA need only be proven by clear and convincing evidence.\(^\text{267}\) However, other jurisdictions have, without discussing their reasons for so doing, applied the preponderance of the evidence standard to a "good cause" finding.\(^\text{268}\)

2. "Good Cause" not to Transfer Jurisdiction

The core of the ICWA is its jurisdictional provisions over child custody proceedings.\(^\text{269}\) Indian tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled on the tribe's reservation.\(^\text{270}\) In cases where the child does not reside on the reservation, however, the state court exercises concurrent jurisdiction with the tribal court.\(^\text{271}\) Nevertheless, the ICWA grants Indian tribes the

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\(^{265}\) Cf. Grogan v. Garner, 498 U.S. 279, 286 (1991) (preponderance of the evidence standard applied when Congress is silent, unless "'particular important individual interests or rights are at stake'" (quoting Herman & MacClean v. Huddleston, 459 U.S. 375, 389-90 (1983))).

\(^{266}\) In re S.E.G., 507 N.W.2d 872, 878 (Minn. Ct. App. 1993), rev'd on other grounds, 521 N.W.2d 357 (Minn. 1994), cert. denied, 115 S. Ct. 935 (1995).

\(^{267}\) Id.

\(^{268}\) In re N.P.S., 868 P.2d 934, 936 (Alaska 1994).


\(^{271}\) Id. Once a petition to transfer to tribal court is filed, the state court should hold a hearing on the petition. In re G.L.O.C., 668 P.2d 235, 236-38
privilege of presumptive jurisdiction over nondomiciliary Indian children and provides a procedure for transferring cases from state court to tribal court. Once a petition to transfer jurisdiction to the tribal court has been received, the state court must transfer the case unless (1) the tribal court declines transfer, (2) either parent objects to the transfer, or (3) the court finds there is “good cause” to retain the case. Because the ICWA is silent regarding the meaning of “good cause” as it is used in section 1911(b), courts are free to make their own decisions.

The Guidelines provide that “good cause” exists if the Indian child’s tribe does not have a tribal court as defined by the ICWA. “Good cause” also exists, under the Guidelines, when the state court proceeding is at an advanced state. Furthermore, “good cause” exists when an Indian child over the age of twelve objects to the transfer. Finally, the Guidelines provide that “good cause” exists when an Indian child is over the age of five, the child’s parents are unavailable, and the child has had little or no contact with his or her tribe.

Courts also turn to the ICWA’s legislative history when deciding if “good cause” exists. The ICWA’s legislative history indicates that the “good cause” exception was formulated to allow state courts to apply a “modified doctrine of forum non conveniens.” Thus, state courts are permitted to decide whether the tribal court is a less convenient forum. Courts across the United States often use the doctrine of forum non conveniens to find good cause not to transfer a case to tribal court. When making a good cause determination based on forum non conveniens considerations, courts sometimes consider, “the practical
factors that make trial of a case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining the attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process.\footnote{281}

In \textit{In re N.L.},\footnote{282} a mother was attempting to transfer the proceedings from the state court of Okmulgee County, Oklahoma, to the tribal court which was located in Kay County, Oklahoma. The mother was residing in Oklahoma County, Oklahoma, but all of the necessary witnesses and the child were residing in Okmulgee County.\footnote{283} The court found that the presence of the witnesses and the child in Okmulgee County constituted "good cause" to deny the transfer to the tribal court.\footnote{284}

State courts have also created their own definitions of what constitutes "good cause." Although the United States Supreme Court has stated that "[i]t is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interests of the Tribe,"\footnote{285} at least two state courts continue to use the "best interests of the child" test in finding good cause not to transfer jurisdiction to a tribal court.\footnote{286} On the other hand, two other states have clearly rejected applying the "best interest of the child" standard when making good cause to transfer decisions.\footnote{287} Arizona and South Carolina have found that "good cause" exists when a tribe does not have a mechanism for handling child custody matters.\footnote{288} South Carolina has also stated that "good cause" exists when there is evidence establishing that removing the children "would be disruptive and detrimental to their best interests."\footnote{289} Still

\begin{footnotes}
\footnotetext[281]{\textit{In re R.N.}, 757 P.2d at 1336.}
\footnotetext[282]{754 P.2d at 863.}
\footnotetext[283]{Id.}
\footnotetext[284]{Id.}
\footnotetext[285]{Id.}
\footnotetext[286]{Id.}
\footnotetext[287]{Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).}
\footnotetext[288]{\textit{Chester County, 372 S.E.2d at 915. In \textit{Chester County}, the children lived in South Carolina, but the tribal court seeking jurisdiction was located in South Dakota. \textit{Id.} at 913.}
\end{footnotes}
other jurisdictions refuse to find "good cause" even when the
child is in the state's jurisdiction at the parents' request. Arizona, New Mexico, and Utah, have held that when a child is born
on a reservation, the reservation retains jurisdiction even if the
child was voluntarily taken off the reservation for adoption, and
has not been on the reservation for over two years. Finally,
Arizona and California have found that "good cause" exists when
a tribe waits an unreasonable amount of time before intervening.

3. "Good Cause" to Deviate from Foster Care and Adoptive
Placement Preferences

The ICWA is also silent regarding the definition of "good
cause" as it is used in section 1915(a) and (b). Thus, courts are
permitted to make their own decisions. Some find guidance in
the Guidelines which provide that in adoptive proceedings, a
determination of "good cause" not to follow the order of prefer-
ence mandated in the ICWA shall be based on any one or more
of the following considerations:

(i) The request of the biological parents or the child
when the child is of sufficient age.
(ii) The extraordinary physical or emotional needs of
the child as established by testimony of a qualified expert
witness.
(iii) The unavailability of suitable families for placement
after a diligent search has been completed for families
meeting the preference criteria.

However, the Guidelines are not regulations and therefore are
neither controlling or binding on a state court's decision. Thus,
courts do not always follow them and have even added sev-
eral other factors to their determination of "good cause." For

295. Id. at 67,584 (conceding that the Guidelines "are not published as regulations because they are not intended to have binding legislative effect").
example, some courts have also considered factors such as “the best interests of the child, the wishes of the biological parents, . . . . the child’s ties to the tribe,”297 the child’s need for stability,298 the child’s bonds to the foster parent or preadoptive family,299 and “the child’s ability to make any cultural adjustments necessitated by a particular placement.”300 Other courts reject these factors.301

Although the Guidelines clearly state that good cause not to follow the order of preference dictated in section 1915 may be based on parental preference, courts hesitate to find good cause based solely on parental preference. For example, in In re F.H.,302 the mother made it clear that she wanted a non-Indian couple to adopt her child, not a member of her tribe.303 Despite this fact, the court found it necessary to list three other reasons that good cause had been established as if to say the mother’s preference was not enough.304 The court even went so far as to say that “[g]iven the possibility of a placement with a relative in [the tribe], this case presented a close question.”305

A “good cause” determination depends more on the court deciding the case than it does on the facts of the case. Until Congress defines “good cause” or adopts the Guidelines’ definition as law, courts will be free to determine “good cause” based on anything they perceive to be relevant. Such a result is an injustice to all involved.

VI. CONCLUSIONS

The ICWA was enacted to prevent the breakup of Indian families and tribes. The ICWA is not serving the purpose for which it was enacted. Worse, it is infringing upon the rights of two groups of people: parents of Indian children and abused

297. In re F.H., 851 P.2d at 1363-64.
298. In re S.E.G., 521 N.W.2d at 358.
299. In re T.R.M., 525 N.E.2d 298 (Ind. 1988), cert. denied, 490 U.S. 1069 (1989); In re C.W., 479 N.W.2d 105, 117 (Neb. 1992) (“[T]ransfer to the tribe and the inevitable grief over losing their psychological parents would compromise the children’s ability to benefit from that culture . . . .”).
300. In re M., 832 P.2d at 522.
301. In re S.E.G., 521 N.W.2d at 362 (“[A] finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child’s best interest.”).
303. Id.
304. Id. The Alaska Supreme Court repeated this act in 1994 when both the child and the mother clearly expressed their preference for a non-Indian to adopt the child. In re N.P.S., 868 P.2d 934, 937-39 (Alaska 1994).
305. In re F.H., 851 P.2d at 1365.
and neglected Indian children. Although the preference given to tribes in the ICWA may be reasonably and rationally designed to promote tribal self-government, it does not excuse the violations of personal protections. Until the Supreme Court rules on this issue, however, the equal protection violations will continue. Even if the Court were to find that the ICWA is constitutional, more law is needed to ensure that it is being applied consistently in every state.

As it stands, the outcome of a case involving an "Indian child" depends not on the facts of the case, but rather the state in which the case is being heard. Several states refuse to apply the ICWA when there is not an "existing Indian family." States also determine when the right to revoke voluntary consent to an adoption ends, by considering state law instead of federal law. Furthermore, a state's determination of who is an "Indian" does not rely on the ICWA, but on factors adopted in each state. Finally, all states create their own definitions of "good cause." Such inconsistent application of the ICWA is not beneficial to tribes, parents, or children and should be stopped.

Several things can be done to ensure that the goals of the ICWA are achieved and at the same time all persons' rights are respected. First, Congress should enact an amendment which requires the ICWA only be applied to those children who are part of an existing Indian family. Such an amendment would do two things. First, it would ensure that parents of children with Indian blood do not have their constitutional rights violated. Second, it would ensure that the heightened standard of proof is only applied to those children who are living on a reservation or in a traditional Indian home.

Congress could also improve the ICWA by amending section 1915(a), which provides that adoptive placement preferences apply to all adoption proceedings involving an Indian child. Section 1915(a) could be strengthened by amending it so that it would only apply in two situations. First, it should apply to all adoption proceedings where the child has been removed by the state from an existing Indian family. Second, it should apply whenever a parent of an Indian child elects. Such an amendment would ensure that Congress' goals are met and guarantee that parents who wish to choose adoptive parents outside the ICWA's preferences have the right to so do. It would also remove the parental anonymity problems.

Congress could further enhance the ICWA by enacting the part of the Guidelines that deals with methods of determining

tribal membership. By making the Guidelines law, Congress could ensure that all courts are respecting a given tribe's method of keeping track of their members. This would in turn secure equal treatment regardless of the state court hearing the case.

Finally, Congress could ameliorate the ICWA by providing a specific list of what does and does not constitute "good cause to the contrary" and what standard of proof should be used when making such a determination. Such a list would, of course, not be exhaustive, but would provide a good basis for ensuring that courts are addressing similar issues in a consistent manner. Thus, parents of children with Indian blood would not need to guess as to how their state court would react to a given set of facts.

As it currently stands, the ICWA is not having the impact Congress desired. This is likely to continue until Congressional amendments or Supreme Court interpretation is given. Thus, action is needed not only to achieve Congressional goals but, more importantly, to ensure its constitutionality.

308. "Good cause to the contrary" is used in 25 U.S.C. §§ 1911(b), 1915(a)-(b) (1994), of the ICWA.
309. See supra notes 82-83 and accompanying text.