

# **What is an Indian Family? The Indian Child Welfare Act and the Renascence of Tribal Sovereignty**

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It is now almost three decades since the United States Congress enacted the groundbreaking Indian Child Welfare Act (ICWA), which gives tribal courts jurisdiction over custody matters involving many American Indian and Alaskan Native children.<sup>1</sup> The act also permits Indian tribes to intervene in state custody proceedings when Indian children are involved. In enacting the ICWA, Congress responded to evidence that generations of American Indian and Alaskan Native children had been removed from their relatives and communities by state and church officials convinced that assimilation into the dominant society through adoption, foster care, or education in off-reservation boarding schools was in the Indian child's best interest (Adams 1995).<sup>2</sup>

The use of boarding schools had decreased by the mid-1970s, but not the widespread practice of placing Indian children in non-Indian foster and adoptive families, often without notice or hearings for the child's family and tribe. According to a study conducted by the Association on American Indian Affairs (Unger 1977), in the mid-1970s one-quarter to one-third of all Indian children were separated from their families, the adoption rate for Indian children was twenty times the national rate, and adoptive and foster families for Indian children were largely non-Indian. Congressional hearings on the proposed statute indicated the deceptive, coercive, and discriminatory practices through which Indian children were often separated from their families, as well as the extent to

which indigenous patterns of kinship and child-rearing were disregarded in officials' judgments regarding neglect, abuse, and abandonment.<sup>3</sup>

To remedy this situation the ICWA vests jurisdiction of custody matters involving Indian children who reside on Indian lands in tribal courts, allows tribes the right to intervene in state court custody proceedings when the child does not live on Indian land, and provides guidelines for the placement of Indian children in foster care and adoptive families. The guidelines give clear preference to placement within the child's extended family, followed by placement within families in the child's tribe, and, finally, placement in other Indian homes or group homes for Indian children. Placement within a non-Indian family, previously the most common placement, is a last resort under the ICWA.

In the statute Congress declares its intent to "protect the best interest of Indian children" and cites as a justification for federal action the failure of state courts "to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."<sup>4</sup> In requiring that state courts give tribes notice of custody proceedings concerning their children and permit tribes to intervene in or take jurisdiction of these proceedings, the ICWA both recognizes a tribe's interest in its children and acknowledges that tribal involvement in custody proceedings is in the Indian child's best interest. This is a dramatic way of re-conceptualizing who possesses an interest in a child as well as a significant reframing of the guiding principle of U.S. adoption law: the best interest of the child.

Enacted on November 8, 1978, the Indian Child Welfare Act anticipated developments in the areas of children's rights, adoptees' rights, and cultural rights as well as indigenous rights. This article focuses in particular on the challenges the ICWA poses to hegemonic conceptions of the family and a child's best interest. I will also consider how legal and legislative challenges to the ICWA have attempted, albeit unsuccessfully, to limit the impact of the statute by re-invoking hegemonic definitions of biologically-based identity and the nuclear family while at the same time challenging the principle of tribal sovereignty. While these attempts have, in the main, been unsuccessful, they indicate the extent to which the strong sovereignty claims of the ICWA remain, a quarter century after its passage, in tension with taken-for-granted views of the individual, the family, the state, and Indian identity in the dominant American culture.

### **The "American Indian Renaissance" and the Indian Child Welfare Act**

Forty years ago anthropologist Nancy Lurie (1965) called attention to what she termed "an American Indian renaissance," referring to a diffuse political movement that developed in opposition to the U.S. government's termination and relocation policies of the 1950s but expanded to include a variety of initiatives for tribal self-determination.<sup>5</sup> Although not among the developments con-

sidered in Lurie's or other contributions to the landmark edited volume, "The Indian Today" (published in revised form as *The American Indian Today*), the Indian child welfare movement was part of the same renaissance—one Lurie viewed as involving "a heightened desire for Indian identity coupled with vocalized insistence on recognition of the right of Indian groups to persist as distinctive social entities" (Lurie 1965, 35). There is, of course, nothing more crucial for cultural persistence than the right to control the upbringing of a community's children—a point implicitly made in Shirley Hill Witt's discussion of "nationalistic trends among American Indians" in "The Indian Today." Witt emphasized the importance of the extended family, calling it "a major and persistent cultural difference between Indians and non-Indians" and "the basic building block of tribal organization;" she considered it "directly related to tribal vitality" (1965, 70-71). This was exactly the rationale of the activists and organizations that advocated the passage of the Indian Child Welfare Act.

The ICWA was enacted after more than a decade of intensive work by the Association of American Indian Affairs (AAIA) and other Indian rights organizations. The San Juan Pueblo anthropologist Alfonso Ortiz presided over the Association on American Indian Affairs when the Indian Child Welfare Act was passed, and he considered the legislation one of his most significant accomplishments.<sup>6</sup> The Act addresses what an AAIA publication called the "destruction of Native American families" (Unger 1977) primarily through buttressing the sovereignty of Indian tribes over their members. As codified in the ICWA, tribal sovereignty challenges legal notions of the child's best interest grounded in the dominant society's ideologies of possessive individualism, exclusive citizenship, and the primacy of the nuclear family.<sup>7</sup>

In keeping with the centrality of tribal sovereignty in the formulation, interpretation, and implementation of the Indian Child Welfare Act, I have coined the term "extra-tribal adoption" to refer to the placement of an Indian child with adoptive parents who are not members of a tribe to which the child belongs (or is entitled to belong). This term serves to distinguish the issues involved in the adoption of Indian children from those involved in transracial adoption within the United States. The ICWA is grounded in the legal status of Indian tribes as sovereign nations, which brings the issues involved in extra-tribal adoption closer to those encountered in transnational adoptions than in transracial domestic adoptions. While cultural identity and cultural survival are at stake in both extra-tribal and transracial adoption, extra-tribal and transnational adoptions share the additional issues of citizenship and self-determination.<sup>8</sup>

Any discussion of adoption within the United States must begin with the guiding principle of "the best interest of the child."<sup>9</sup> According to this principle, adoption involves moving a child from "unfit" parents to "fit" ones, and from an "unstable" to a "stable" home (Modell 1994, 28-29, 41-42). There is clearly a great deal of room here for ethnocentric judgment and misrepresentation. High levels of intervention in Indian families, as in Native Hawaiian families (Modell

1998), reflect the imposition of ethnocentric principles of fitness and stability upon families organized according to culturally distinct principles. As Steven Unger of the Association on American Indian Affairs argued in advocating passage of the Indian Child Welfare Act:

The continuing bias of government policy is to coerce Indian families to conform to non-Indian child-rearing standards. Indian tribes are asking state and federal governments to stop “saving” Indian families in this way and, instead, recognize and respect the rights and traditional strengths of Indian children, families, and tribes (Unger 1997, iii).

Interpreting extra-tribal adoption as a threat to tribal sovereignty and survival, Unger called governmental interference with family life “perhaps the most flagrant infringement of the rights of Indian tribes to govern themselves in our time and the most tragic aspect of contemporary Indian life” (Unger 1977, iii).

During legislative hearings, advocates of the Indian Child Welfare Act pointed out not only the disproportionate percentage of Indian children separated from their natal families, but also that many of these separations were carried out without regard to the rights of either birth parents or tribes. Often the birth parents did not understand the documents or proceedings, were threatened with the loss of welfare benefits, or were neither represented by counsel nor advised of their rights. Tribal authorities and community agencies were frequently not consulted. Nor were “Indian children’s right to live with their families” taken into account (Unger 1977, 59). Children were removed for conditions that were not demonstrably harmful to the child, were removed before supportive services were extended to families experiencing problems, or were removed for a specific purpose and never returned—as in the case of John Wayne Cly, whose case is documented in the recent film, “The Return of Navajo Boy” (Spitz and Klain 2000). Few children were removed from their families because of physical abuse: most often they were removed for “neglect,” “abandonment,” or “social deprivation,” which might consist of simply living on a poverty-stricken reservation; being under the care of grandparents, siblings, or other members of an extended family; or being raised under less restrictive conditions than those tolerated in the dominant society (Unger 1977, iii, 4). Likening the “epidemic” of extra-tribal adoptions to a “modern Trail of Tears” (a reference to the removal of the “Five Civilized Tribes” from the Southeast in the 1830s), psychiatrist Joseph Westermeyer noted “a social imperative operating against Indian families in our institutions. The result is a *de facto* ethnocide of values, attitudes, and customs” (54-55).

Evelyn Blanchard, a Laguna-Yaqui social worker who has been called the “mother of the Indian Child Welfare Act” (Johnson 1991, 149), criticized “culture of poverty” theories for ignoring the U.S. government’s role in destroying Indian family life. She told Congress:

Indian families are continually subjected to theories of child abuse and neglect that have been developed in the non-Indian community. The basis for those positions is that people who abuse and neglect their children are people who themselves have been abused and neglected. We do not deny that there are many Indian parents who live in neglectful situations. However, we do contest the interpretation and the application of that theory . . . [because] we can clearly demonstrate that the circumstances in our lives that have contributed to the presence of abuse and neglect in our communities have been directly caused by activities, policies, and regulations of the federal government. It has consistently sought to destroy the Indian family (Myers 1981, 87).

Acknowledging abusive situations on reservations, Blanchard argued successfully for providing Indian tribes the power and resources to address the abuses, rather than continuing with destructive policies destined to compound them by breaking up families and disrupting patterns of socialization.<sup>10</sup> She and other proponents of the Indian Child Welfare Act also offered a cogent and far-reaching critique of a universalizing and ethnocentric interpretation of the principle of “best interest of the child.” As Navajo legal specialist Leonard B. Jimson put it:

A judge who thinks in term of the comfort and stability of a middle-class Anglo home may unconsciously think about this when he looks at a Navajo hogan where people do not have these same comforts. He may not see the importance of raising children to speak Navajo or to know their own culture and religion, because he assumes that all Navajos want to speak and think like Anglos, and this is best for them. In short, the way that the caseworker and judge look at family life may be so different that Navajo people cannot ever satisfy them, even though they also want to do what is in “the best interests” of the children (quoted in Unger 1977, 69).

Senator James Abourezk of South Dakota, who chaired the Subcommittee on Indian Affairs and ran the Senate hearings on the ICWA, made a similar point, noting that “public and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian” (quoted in Unger 1977, 12). This was, indeed, the premise: off-reservation placements were one of the main ways of implementing governmental policies of “terminating” Indian tribes and assimilating Indian children to the Euro-American value of possessive individualism.

A dramatic example of this is the American Indian Adoption Project, initiated in 1958 as a joint program of the Bureau of Indian Affairs and the Child Welfare League of America. During the ten years in which this experiment in so-called “transracial adoption” was in effect, 395 Indian children were placed in non-Indian families, generally in the East and Midwest. On the basis of interviews with the adoptive parents, the project was declared a success, in large part because Indian children were relatively easy to place because of Euro-Americans’ idealization of the country’s original inhabitants. Shockingly, researchers did not interview the children’s Indian families, nor follow the development of the children beyond the first five years (Fanshel 1972; Johnson 1991, 22).

Evelyn Blanchard went beyond the notion of culturally-determined best interest in asserting that “the question of best interest is much broader in Indian country than it is elsewhere. Termination hearings sever not only rights of parents but rights of children and rights of tribes” (quoted in Unger 1977, 60). She is referring here, like Jimson, to the right of parents to follow culturally-specific child-rearing practices, but also to the right of children to be affiliated with their tribes and the right of tribes to ensure their cultural and demographic survival—that is, in Lurie’s terms, the right “to persist as distinctive social entities (Lurie 1965, 35).”<sup>11</sup> The spirit of the Indian Child Welfare Act is not only to broaden the principle of best interest beyond its individualistic basis but also to assert that the balancing act that any determination of best interest entails should be the responsibility of the tribal community in question.

Blanchard, Jimson, Abourezk, and others argued that the best interest of the Indian child could only be ascertained in tribal terms, not in the individualistic terms of the dominant society. While arguments for the passage of the Indian Child Welfare Act stressed primarily the destructive consequences of extensive extra-tribal adoptions upon children, the devastating impact of these adoptions upon families and tribes was also emphasized. Building on the principle of tribal self-determination, the ICWA offered a radical challenge to an individualistic conception of best interest by recognizing the interest of tribes in their children and of children in their tribes. In order to underscore the political significance of the re-conceptualization of best interest embodied in the ICWA, it is useful to employ models formulated by feminist anthropologists for analyzing the politics of kinship (Franklin and Ragoné 1998; Ginsberg and Rapp 1995; Strathern 1992). In these terms the Indian Child Welfare Act establishes:

- the right of Native American children to have their best interest understood *relationally*, that is, in terms of *culturally-constructed personhood*;
- the right of Native American parents, children, and families to have the *dispersed nature of their modes of social and cultural reproduction* taken into account (also known as extended kinship); and

- the right of Indian tribes as sovereign nations to *control their social and cultural reproduction*.

When stated in these ways, the counter-hegemonic nature of the Indian Child Welfare Act is evident. Like the concept of tribal sovereignty itself, the ICWA establishes collective rights that are in considerable tension with hegemonic constructions of possessive individualism and the liberal state. In the quarter century since its passage, however, the Act has successfully withstood several constitutional challenges based on claims that it legislated “disparate treatment of parties in state courts based on the parties’ race” (Jones 1995, 8). The failure of these challenges is largely based on courts finding that the classification “Indian child” is “not based upon race but on the unique legal status of Indians and the political relationship between the quasi-sovereign tribes and the federal government” (Myers 1981, 53; Hager 1997, 1-70). In other words, for the purposes of the Act an “Indian child” is any child who is potentially a member of any federally-recognized Indian tribe—a designation that is defined differently from tribe to tribe but has a political rather than a purely biological basis. This bears repetition because it is so often misunderstood: just as “Indian” is a *political* category in the United States, “Indian child” is a political, not a racial, identity.<sup>12</sup>

The Indian Child Welfare Act is far from being fully implemented, especially in urban areas (largely because of inadequate resources and expertise), and it has continued to be challenged in state and federal courts, in Congress, and in the court of public opinion. A handbook published by the American Bar Association notes that “the custodial fight between biological parents as opposed to psychological parents is a common thread woven through many of the ICWA cases involving adoption and foster placement” (Jones 1995, viii). Such disputes occur in a small minority of cases, generally in voluntary adoptions that are completed without involvement of the tribe in question (due to ignorance of the law, negligence, misrepresentation, or because the child has not been identified as a tribal member or potential member). But these rare cases, which pit a tribe’s interest in a child against the emotional bond that has developed between the child and the child’s adoptive parents, are most prominent in public discourse and in the developing case law.<sup>13</sup>

### **Family and Parenthood Under the Indian Child Welfare Act**

The tribal interest recognized by the ICWA results from the status of Indian tribes as nations within a nation—the members of which are accorded treaty rights that supplement and sometimes limit the individual rights held by all U.S. citizens. The United States has alternately advanced and retreated from the limited political sovereignty accorded to “domestic dependent nations” in the early 1830s by the U.S. Supreme Court under Chief Justice John Marshall. Such offi-

cial policies as land allotment, tribal termination, urban relocation, education in boarding schools, and extra-tribal adoption have attempted, with some success, to constitute Native Americans as individuals rather than as members of sovereign tribes. However, many Native American groups have effectively resisted these policies, and in the 1930s, under Franklin Roosevelt's "Indian New Deal," and again in the last third of the twentieth century, the political and cultural sovereignty of Indian tribes has been reaffirmed by Congress and the Supreme Court.<sup>14</sup> The ICWA is a particularly significant reaffirmation, one that is oriented as much toward the right of a tribe to determine its own membership and be governed by its own laws as toward the best interest of the Indian child. While this has been challenged as a violation of the principle of best interest (e.g., Kennedy 2003), it is more accurately understood as a non-individualistic redefinition of a child's best interest.

Like the Supreme Court's contemporaneous (and also controversial) decision in *Santa Clara Pueblo v. Martinez* (1978)—which granted tribes sovereign immunity from law suits challenging tribal membership criteria—the ICWA safeguards the right of a tribe to be governed by its own laws and to determine its own membership even when these conflict with civil rights guaranteed by the Constitution. One way the statute affirms tribal sovereignty is by requiring states to give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe that are applicable to a child custody proceeding. Further, the applicability of the statute is contingent on the child in question being an "Indian child" as defined by an Indian tribe itself. That is, the ICWA applies to a child who is either a member of an Indian tribe, or "a biological child of a member of an Indian tribe" who is "eligible for membership."<sup>15</sup> Thus, if a tribe's public acts or records indicate that a child is a member or a potential member of the tribe, the statute requires states to give that determination full faith and credit. As we shall see, however, this is one of the areas in which the statute has been contested.

In addition to vesting the determination of tribal membership within Indian tribes, the ICWA also recognizes Indian definitions of parenthood and family. While these vary over time and across cultures, commonly they entail some form of the extended family.<sup>16</sup> The report by the House Interior and Insular Affairs Committee on the bill that ultimately became the ICWA indicates that Congress aimed to enact standards that take into account dispersed parenthood and the patterns of care-giving that accompany it in order to prevent a finding of neglect or abandonment "where none exists."<sup>17</sup> Specifically, the Committee Report recognized that Indian notions of family can cover "scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family," and that under this care-giving pattern it is considered normal and acceptable to leave a child with any of these family members. Congress made clear that in giving the tribes jurisdiction of many child welfare cases, and in providing "minimum federal standards and procedural safeguards" in custody cases involving Indian children that are heard in state courts, it intended to



prevent situations where a social worker or judge sought to terminate the parents' rights simply because that official was unfamiliar with or unwilling to accept dispersed patterns of care-giving.<sup>18</sup>

Congress also recognized Native American conceptions of family and parenting by requiring that notice of a foster or adoptive placement be given not only to the Indian child's parents and to the child's tribe, but also to any Indian custodian of the child. The ICWA further requires that the court both notify an Indian custodian of involuntary proceedings and find by clear and convincing evidence that serious harm would result if a child were not removed from an Indian custodian—just as would be required in order to take a child away from a parent. "Indian custodian" is here defined broadly: it includes not only an Indian person with legal custody under state law or under tribal law or custom, but also any Indian person whom the parent has given "temporary physical care, custody, and control" of the child.<sup>19</sup> The Committee Report explains the need for that provision, noting that given the "extended family concept in the Indian community, parents often transfer physical custody of the Indian children to [an] extended family member on an informal basis, often for extended periods of time." These extended family members "have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interests of the parent."<sup>20</sup> In sum, the ICWA assumes the existence and legitimacy of extended families, validates the informal care-giving and fostering arrangements employed by extended family members, and grants rights to culturally-appropriate caregivers that are virtually identical to those of parents. The Indian Child Welfare Act is a strong affirmation of culturally-constructed kinship and tribal sovereignty alike.

### **Cultural Rights, Individual Rights, and the Best Interests of the Indian Child**

In addition to expanding conventional notions of the parent and family, the ICWA interprets the guiding principle of adoption in the U.S.—"the best interest of the child"—in ways that reflect Native American values and practices. First, the statute forbids an involuntary foster care placement of an Indian child, or involuntary termination of parental rights, without clear and convincing evidence, including expert testimony, that "continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."<sup>21</sup> This provision amounts to a presumption against outplacement and reflects the determination of Congress that the best interest of an Indian child is almost always furthered by retaining the custody of the parent or Indian custodian. Typically, legal presumptions regarding custody only run in favor of the child's parent, not an appointee of the parent.<sup>22</sup> Thus, by including Indian custodians in that presumption, the statute treats the custodian as a parent.

Next, the ICWA presumes that it is better for an Indian child to grow up in an Indian culture, preferably that of his or her own tribe, than to be reared by

non-Indians—even if that means assuming a lower socioeconomic status. The statute establishes an order of preference for placement decisions, privileging, first, members of the Indian child's extended family, then a foster or adoptive home within the Indian child's tribe, then Indian homes, and, finally, Indian group homes over non-Indian placements.<sup>23</sup> By favoring an Indian placement over a non-Indian one, and a tribal placement over a non-tribal one, the statute forces courts to acknowledge the importance of cultural affiliation and contact for an Indian child when determining that child's best interest. The importance Congress accorded to cultural affiliation is most strikingly demonstrated by the fact that the statute favors placement within an Indian group home over placement with a non-Indian nuclear family. The relegation to second best of what the dominant culture perceives as preferable clearly shows the extent to which the statute redefines "best interest." Contrary to some misunderstandings of the statute, however, this redefinition does not put the child's interests behind those of the tribe. Rather, in emphasizing the child's right to a cultural identity, the ICWA recognizes the harm that can be done to a child by denying knowledge of and access to that identity. Influenced by the children's rights movement, the ICWA anticipated the 1989 United Nations' Convention on the Rights of the Child in recognizing a child's right to a cultural identity—understanding that identity primarily in tribal terms.<sup>24</sup>

Finally, as mentioned earlier, the ICWA guarantees Indian children who have been adopted out of their tribes the right to information on their heritage. This is true even if state law protects the right of the birth parents to anonymity and the interest of the adoptive parents in secrecy in order to ensure the finality of the adoption. Though it does not entirely open records that the birth parent(s) have requested be kept confidential, the ICWA does require the state to share with the Department of the Interior (in which the Bureau of Indian Affairs is housed) identifying information, including the name and tribe of the child, the names and addresses of the birth parents, and the identity of any agency that has files or information relating to the adoption. Both a tribe and an adopted Indian child who has reached age eighteen can request disclosure of whatever information is necessary to facilitate the child's enrollment in the tribe. If confidentiality has been requested by the birth parent(s), the child's interest in enrolling in the tribe and the tribe's interest in the child becoming a member still take precedence. Though the Department of the Interior will not release information wholesale when the birth parents have requested confidentiality, if the information warrants it the Secretary of the Interior must certify to the tribe that the adopted child's parentage and other circumstances of birth entitle the child to enrollment.<sup>25</sup>

At the time Congress passed the ICWA, adoptions made through an adoption agency were handled under strict confidentiality "to insure that the natural parents can never determine the identity of a child relinquished for adoption; and the adopted child, even as an adult, cannot find out the identity of the natural parents." Further, even where private or independent adoptions were permit-

ted under state law, most states sealed adoption records “and allow[ed] disclosure only by court order based on some urgent necessity.”<sup>26</sup> The rationales given for these policies usually include the privacy of the birth parents, but also the states’ interest in encouraging adoption by offering assurance to the adoptive parents that the birth parents will not return to reclaim the child or otherwise involve themselves in the affairs of the adoptive family.<sup>27</sup>

The ICWA, in contrast, takes a view of the Indian child’s best interest that departs from elements within the conventional notion of parentage that resemble the parent having property ownership in the child. While respecting the birth parents’ desire for confidentiality, the statute lays any privacy concerns of the adoptive parents aside in favor of protecting the Indian adoptee’s right to discover and participate in his or her heritage as an Indian. In recognizing the importance of cultural rights, community ties, and connections to heritage, as well as the claim of an Indian tribe upon its members, Congress departed from the hegemonic view of the autonomous individual, which assumes that the best interest of a child are independent of his or her ancestry. This was both a departure from the assimilationist policies of the past and an anticipation of the more general recognition of the rights of U.S. adoptees to information about their birth parents (Modell 2002).

### **The Existing Indian Family Exception and Other Attacks on the Indian Child Welfare Act**

In the three decades since the ICWA was enacted, state and federal courts have grappled with the practical application of its provisions. In doing so, they have not always fully appreciated or respected the values that Congress intended to codify through the statute. Most notably, a number of states have curtailed tribal rights over members (or prospective members) by applying what has come to be known as the Existing Indian Family Exception (or the “Significant Ties Exception”).<sup>28</sup>

The Existing Indian Family Exception is a court-created exception to the application of the ICWA maintaining that even if the statute would otherwise apply to a child, the courts need not apply it if the birth parents of the child in question did not actually constitute an “Indian family”—typically because the custodial parent was not an active member of an Indian tribe at the time of the adoption.<sup>29</sup> Courts utilizing this exception argue that following the procedures established by the ICWA in such a case would not serve the purposes of the statute: 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.”<sup>30</sup> The courts argue, in other words, that the ICWA’s aim of preventing the destruction of Indian families would not be furthered if the statute was applied in a case in which the family from which the child is taken is not what the court recognizes as an “Indian family.”

In treating Congress's intent as simply the protection of "Indian families," these courts have disregarded not only the statute's goal of protecting the child's interest in tribal affiliation but also the goal of promoting the "stability and security of Indian tribes." The courts are, in effect, reading out of the statute the ICWA's conception of extended parenthood—one that includes the tribe as a close equivalent of a parent. In fact, courts that have rejected the Existing Indian Family Exception have criticized it on precisely these grounds. For instance, the Alaska Supreme Court refused to interpret the ICWA as permitting an Indian family exception, arguing that doing so "would undercut the interests of Indian tribes and Indian children that Congress sought to protect." The Alaska court specifically recognized that in enacting the ICWA "Congress did not seek simply to protect the interest of individual Indian parents. Rather, Congress sought to also protect the interest of Indian tribes and communities, and the interests of the Indian children themselves."<sup>31</sup>

Another problem with the Existing Indian Family Exception is revealed in a prominent 1996 case, *In re Bridget R.*<sup>32</sup> In this case the California appellate court held that if the application of the ICWA was based "solely on [the child's] biological heritage" as an Indian, then the statute would contravene the due process and equal protection provisions of the Fourteenth Amendment by institutionalizing a race-based classification (507). Following this reasoning, the court applied the Existing Indian Family Exception to save the statute from unconstitutionality. This case merits close scrutiny because of the constitutional issues involved and the heated public debates it has engendered.

The case arose soon after Richard Adams and Cindy Ruiz gave up their twin daughters for adoption. Adams was the son of a Pomo Indian, although at the time of the adoption he was not an enrolled member. Three months after the adoption, Adams and Ruiz attempted to withdraw their consent to the adoption on the grounds that the adoption had not followed the ICWA's procedures and placement preferences. The Pomo tribe, at the request of Adams's mother, intervened in the case. The California courts were asked to determine whether the adoption was valid, given that Adams (on the advice of his attorney) had not revealed his Pomo background.

The trial court held that the ICWA did, indeed, apply to the case, and that the statute's provisions required that the twins be reunited with their birth parents. On appeal, however, the California appellate court reversed the trial court's decision, ultimately remanding the case for further consideration by the trial judge. In rejecting the trial court's position, the appellate court held that if the ICWA infringed on the twins' constitutionally protected interest in the relationships they had developed with their adoptive family without "serv[ing] a compelling governmental purpose," the Fourteenth Amendment's due process requirements would invalidate the statute. Similarly, the appellate court argued that the twins' right to equal protection under the Fourteenth Amendment prohibited a race-based classification (that is, one based on "Indian blood") that

was not “narrowly tailored” to further a “compelling” governmental interest. Unless the ICWA’s application was limited to situations in which the child’s family had sufficient social, cultural, or political affiliation with an Indian tribe, ruled the court, the classification “Indian child” was race-based; furthermore, applying the ICWA under these circumstances would not further Congress’s purpose of preserving Indian culture and its unique values. Under this reasoning, the statute would interfere, without justification, with the girls’ interest in the family relationships they had developed with their adoptive family, thus violating their constitutional rights (526-27).

Because the trial court had not considered whether the twins’ birth family was an “Indian family,” the appellate court sent the case back for consideration of that issue. In doing so, the appellate court directed the lower court to consider whether the birth parents had sufficient social, cultural, and political ties or relations with the tribe for the court to consider them an “Indian family.” Moreover, the appellate court told the trial court to “focus upon the biological parents’ . . . relationship with the Tribe,” and to consider the extended family’s relationship with the Pomo tribe only as it “bears on the issue of the biological parents’ relationship” (531, emphasis in original). Such a mandate directly contradicts the notions of extended family and tribal determination of membership that the ICWA was seeking to validate and protect.

The appellate court decision in *Bridget R.* clearly demonstrates the problems that arise when a court attempts to apply the Existing Indian Family Exception. Specifically, the exception allows state courts to determine who is Indian enough to receive protection under the ICWA by making the determination of which families are Indian families a factual question for the court to resolve.<sup>33</sup> Since Congress was attempting to limit the state court’s ability to make ethnocentric value judgments about Indian families by enacting the ICWA, bringing state courts back into such a position through the Existing Indian Family Exemption directly violates Congressional intent. Indeed, applications of the Existing Indian Family Exception result in court decisions and rationales that run contrary to the intent of the ICWA.

For example, in *Bridget R.* the court explicitly rejected the Pomo tribe’s and the birth parents’ argument that the extended family’s ties to the tribe should be given consideration if the ICWA’s valuing of the tribal kinship system were to be respected. Instead, the court said that the nuclear family was the proper unit for determining whether an Indian family existed, explaining—incredibly—that when the ICWA referred to an “Indian family,” it must have meant the nuclear family, which is “the fundamental social unit in civilized society” (531). Comments such as this show that the court did not simply misunderstand the Indian family structures that Congress intended the ICWA to recognize, but rejected and impugned them, in effect labeling them “uncivilized.” It was precisely to avoid decisions based on such prejudicial attitudes that Congress enacted the statute.

Moreover, that holding was completely unnecessary to the appellate court's stated purpose of saving the statute from unconstitutionality. The designation "Indian child" is not primarily a biological classification but rather a political classification that entails membership, or the possibility of membership, in a sovereign nation entitled, under U.S. law, to determine its own membership. It is no more a biological classification than is U.S. citizenship, and it does not necessarily entail a particular degree of participation in tribal customs and affairs, but rather the *possibility* of such participation. Similarly, under ICWA the classification "Indian family" is neither a race-based classification nor one that is dependent upon meeting a set of court-imposed cultural criteria. An "Indian family" under ICWA is a family in which the potential for tribal membership exists, according to the membership requirements of the tribe in question. It is also a classification that explicitly recognizes the significance of extended families in socializing and caring for Indian children. In rejecting the relevance of the extended family's connections to the tribe and in requiring the court to focus on the birth parent's ties to the tribe at the time of the adoption—without recognizing that tribal membership and participation may be initiated at any stage in the life cycle, and may skip generations—the appellate court in effect denied the political status of Indian tribes as sovereign nations with the right to control their own social and cultural reproduction. It appears, indeed, that the appellate court came close to ruling that Indian tribes may themselves be unconstitutional (530-31).<sup>34</sup>

### **Interpretations of the Indian Child's Best Interest in the Public Sphere**

The news coverage surrounding the *Bridget R.* case and subsequent commentary, like the decision itself, indicates the extent to which the perspective of the ICWA challenges hegemonic notions of family and personhood. For example, a *Los Angeles Times* article (Rainey 1996), published between the trial and appellate courts' decisions, framed the debate as one "over adoption, Indian sovereignty, and children's rights." In opposing tribal sovereignty to children's rights, the author, James Rainey, misconstrues the statute and its conception of a child's best interest. As discussed earlier, the provisions of the ICWA make it clear that Congress understood a child's best interests as *including* the right to remain in his or her extended family, to maintain an affiliation with his or her tribe, and to have knowledge of his or her heritage. Only when one fails to acknowledge such interests will the tribe's interest in an Indian child appear inconsistent with the child's rights. Rainey's framing of the case demonstrates that he is operating from the hegemonic perspective in which the rights of Indian children are understood as those of autonomous individuals who have little need for affiliation with the group with whom they share a cultural heritage. In other words, he is construing children's rights as excluding what has come to be known as a child's right to his or her culture.

Quotes from others close to the case indicate the distance between hegemonic and tribally-centered perspectives. For instance, the adoptive mother is quoted as asking “What about what is in the best interests of the kids? Who is paying attention to that?” It is understandable that, from her perspective, the best interest of the twins centers around the attachment they have formed to their adoptive parents, rather than their long-term interest in attachment to the Pomo tribe. In contrast, however, a statement by the twins’ Pomo aunt highlights the importance of “a sense of belonging” or “roots.” She argues that such grounding is “important for a person’s identity and self-esteem. It’s who they are.” The two sides in this adoption dispute appear to be interested in the same thing—the wellbeing of the children— but they conceive of that goal and how best to achieve it quite differently. While the way each side approaches the issue is indicative of their opposing positions in the litigation, it is also indicative of competing cultural perspectives on family and personhood—one grounded in the individualism of the dominant society, the other in the more sociocentric views and practices of Native American cultures. Although the latter is embodied in the ICWA, it remains foreign to many members of the dominant society engaged in adoption and child welfare cases involving Indian children—even, scholars have found, to some professionals involved in custody cases involving Indian children (Brown and Rieger 2001).

Rainey’s description of the identity of the birth parents also demonstrates competing views of who warrants the ICWA’s protection. Rainey notes that according to the adoptive parents, Jim and Colette Rost, the birth father “is about one-sixteenth Pomo, which would make his daughters one-thirty-second.” Numerous other articles on the case also refer to Richard Adams’s percentage of “Indian blood.”<sup>35</sup> In contrast, Rainey reports that members of the Pomo tribe refuse “to discuss percentages, saying that they are a concern of an alien culture.” In other words, Pomo spokespersons are rejecting the biologically-based definition of Indian identity characteristic of the dominant society, utilizing instead a definition based on a concept of social belonging (Strong and Van Winkle 1996).<sup>36</sup>

Media coverage of the *Bridget R.* case clearly reveals two opposing perspectives. On the one hand, the adoptive family and the media are concerned with how Indian (or not) the girls and their birth parents are, and define their Indian identity in relation to the “blood quanta” and life style of the birth parents. Tribal members, on the other hand, focus on the relationship of the girls to an extended set of relatives who belong to the tribe. This is also the perspective of the ICWA, which defines an “Indian child” as one who is “the biological child of a member of an Indian tribe,” but ultimately leaves the determination of tribal identity up to the tribe by requiring that the child be a tribal member or “eligible for membership.” The statute indicates no concern with a child’s blood quantum—a biological measure of Indianness imbued with racist notions of purity and contamination—but rather with cultural definitions of relatedness

and belonging. That the social and political definition of Indian identity codified in the ICWA is difficult for many members of the dominant society to understand or accept reflects the extent to which the Indian Child Welfare Act—like tribal sovereignty itself—embodies powerful counter-hegemonic principles.

### Attempts to Amend the Indian Child Welfare Act

The Adams and Rost families settled their dispute when the *Bridget R.* case was on remand to the trial court, agreeing that the girls would live with their adoptive family and allowing the Adams family visitation rights and other contacts (Rainey 1997). The settlement left conflicting court interpretations intact—in particular those involving the Existing Indian Family Exemption—and the conflicts have not been resolved in Congress, which neither codified the exemption, nor specifically rejected it when amendments were proposed to do so between 1996 and 2003.<sup>37</sup> Debates on these and subsequent amendments, both within Congress and in the media, further illustrate the competing notions of family and best interest involved in the interpretation and implementation of the statute.

An initial bill, filed by Representatives Deborah Pryce of Ohio and Todd Tiahrt of Kansas in 1996, sought to amend the ICWA by codifying the Existing Indian Family Exception. The amended statute would have only applied to cases in which one of the child's parents was of Indian descent, a member of an Indian tribe, and "maintain[ed] significant social, cultural, or political affiliation" with that tribe.<sup>38</sup> The bill was vigorously opposed by Indian groups and died in the Senate.

During the next session, in 1997, Representative Pryce's bill was reintroduced, but the bill that got the most support and was voted out of committee was one that worked against attempts to codify the Existing Indian Family Exemption. House Resolution 1082, introduced by Representatives Don Miller of California and Don Young of Alaska, sought to clarify the procedures for notifying tribes, to impose more finality on adoptions of Indian children, and to criminally penalize attorneys and officials who tried to circumvent the requirements of the ICWA by hiding a child's heritage.<sup>39</sup> Representative Miller explained his bill as "intended to strengthen the act," and "to protect the lives and future of Indian children . . . first by ensuring that they will have as equal a chance as any other children at having a loving family and home and second, by protecting their interest in their own culture and heritage."<sup>40</sup> He also noted that the bill would "protect the fundamental rights of tribal sovereignty."<sup>41</sup>

Representative Pryce opposed the bill in favor of her own approach, arguing, as the California appellate court had, that without an Existing Indian Family Exception "the ICWA flies in the face" of the constitutional principles protecting "the rights of individuals against classifications based on race" and "the rights of parents to control their children's upbringing." She argued that "fundamental liberty and privacy issues" were at stake, suggesting that the pro-



visions of the ICWA might deprive a non-Indian woman of her freedom to place her child for adoption or to select particular adoptive parents “solely because her child has Indian blood.”<sup>42</sup>

There could be no clearer statement of the challenge posed by the ICWA to possessive individualism, and vice versa. Reducing the tribe’s interest in the hypothetical child to a matter of “Indian blood,” the example appears to constrain a mother’s right to decide what is best for her child on the basis of a race-based classification. As we have seen, however, the woman’s decision is actually constrained by the child’s interest in tribal membership and affiliation, as well as by the tribe’s interest in the welfare of its members and potential members. Even if the rights of the tribe are set aside, Representative Pryce’s example demonstrates a remarkable disregard for the best interests of the child, broadly construed, in favor of parental rights.

Furthermore, on a practical level such a situation is only likely to arise when the child’s father or another paternal relative has requested that the tribe get involved. If the father is acknowledging paternity, the mother’s decision to place the child for adoption could not be made without terminating his paternal rights. The same constitutional principles Representative Pryce cites forbid such a termination without the father’s consent or his involuntary forfeiture of his rights. Representative Pryce presumably would not dispute the father’s right to “interfere” in the mother’s decision regarding the adoption of his child. There would then seem to be only two possible objections: either Representative Pryce objects to the father pursuing his interests through his tribe, or she objects to the ICWA’s provisions that allow the tribe to protect its interest in children who are its members or potential members. In either case, her argument is an outright rejection of the ICWA’s determination that the tribe should have an interest in the child that is on par with that of a parent. Moreover, the tribe’s intervention differs little from how any sovereign might act when one of its citizens is brought before a foreign tribunal. Therefore, Representative Pryce’s argument fundamentally denies the tribal sovereignty that the ICWA upholds and reinforces.

Media accounts of the competing bills also illustrate a conflict in conventional conceptions of best interest and those codified in the ICWA. During the period the Pryce-Tiaht bill was pending before Congress, Jennifer Dokes (1996), a columnist for *The Arizona Republic*, argued against the bill, cautioning that while extra-tribal adoptions offer the possibility that children will “thrive in loving homes,” they also involve the risk of the children “losing something of themselves, of becoming something they are not, of becoming lost, disconnected from their cultural heritage.” In response, a letter to the editor chastised the columnist for worrying that the legislation would weaken tribal ties when the ICWA was blocking adoptions of children with “only a fraction of Indian blood and whose families have no cultural ties in their Indian heritage.” The authors of the letter, Beth and Bob Joice (1996), complained that the ICWA and courts “treat children like chattel,” and that the Pryce-Tiaht bill would make it more likely that the children “grow up in a loving family that can provide for them.”

The letter, once again, reduces the relationship of the Indian child to his or her tribe to one of blood or ethnicity, failing to acknowledge the political dimension of the relationship. For the Joices (1996) and those of like mind, “the ethnicity of the child and parent should not be an issue” in adoptions. All that should be taken into account is the “possibility of forming a loving family.” The letter goes beyond this position, however, in arguing that following the provisions of the ICWA is to treat Indian children as “chattel,” i.e., as property. Presumably, this serious charge relates to the tribe’s right to intervene and claim an interest in its members or potential members. In U.S. law, however, all relations between parents and their children have elements of property interests—from the exclusivity of parental rights, to invocations of “liberty and privacy issues,” to discussions of “possession” or “custody.” In claiming that the ICWA leads to treating children like chattel, the Joices appear not to be taking exception to parental rights per se, but rather to the statute’s view of who may properly exercise parental rights over a child—that is, whether parental rights are restricted to the nuclear family and adoptive parents or whether they may be vested in the extended family and tribe. Ultimately, it is not the existence of property rights in children that is in dispute, but their breadth.

There have been two further attempts to amend the ICWA, although neither passed out of committee. In 2002 Representative Young introduced another resolution in the House that addressed continuing problems with the interpretation and implementation of the ICWA, including a special set of problems related to Alaska Natives and non-federally recognized tribes.<sup>43</sup> The next year Representative Young and several co-sponsors introduced a resolution that offered an expanded set of proposals. Both of these bills sought to strengthen the ICWA through nullifying the Existing Indian Family Exception, among other provisions.<sup>44</sup>

Since 2003 there have been no further attempts to amend the Indian Child Welfare Act, so the Existing Indian Family Exception has been neither definitively codified nor nullified. However, at the request of House Majority Leader Tom DeLay, the Government Accountability Office (2005) conducted a study of several aspects of the implementation of the Act. The report focuses on three aspects, including, first, the various factors that influence placement decisions for children subject to ICWA (such as how long it takes to determine if a child is subject to ICWA, the availability of Indian foster homes or adoptive parents, and the level of state and local cooperation with tribes). The study found disparate state-by-state conditions in all these factors, depending on such things as the relative size of the Indian population, the number of federally recognized Indian tribes in a state, and the kinds of cooperative relationships necessary for implementing the Act (e.g., between Indian tribes and local, state, and federal agencies).

Second, the study looked at whether placements for children subject to ICWA are delayed in comparison to other placements. Using data from four

states with large Indian populations that maintained records identifying children subject to ICWA, the study found that the length of stay of Indian children in foster homes was not significantly different from that of children not subject to the ICWA, although differences existed among the four states (Oklahoma, Washington, Oregon, and South Dakota).

Finally, the report examined federal oversight of states' implementation of the ICWA. The ICWA has no provision for direct oversight of the implementation of the law by states (this, in fact, was one of the provisions of Representative Young's 2003 resolution). The Administration for Children and Families of the Department of Health and Human Services does, however, review and collect limited information about the ICWA in its annual Child and Family Services Reviews. The Government Accountability Office recommended that the Secretary of Health and Human Services direct the Administration for Children and Families to review the available ICWA implementation information and "require states to discuss in their annual progress and services reports any significant ICWA issues not addressed in their program improvement plans" (GAO 2005, 5). The Secretary of Health and Human Services, however, disagreed with the GAO's conclusions and recommendations, pointing out that the department had neither the authority, the resources, nor the expertise to address the concerns raised in the Report and suggesting that perhaps the Bureau of Indian Affairs was the appropriate agency to provide oversight on the implementation of the ICWA. The BIA, however, said that it "had no comments on the report as it has no oversight authority for states' implementation of ICWA" (GAO 2005, 59).

The impasse that appears to have been reached regarding both oversight responsibility and the Existing Indian Family Exception is instructive. We have seen, with respect to the latter, that the Existing Indian Family Exception appeals to those who reject the ICWA's challenge to hegemonic notions of possessive individualism and the nuclear family. The impasse on oversight responsibility, on the other hand, would seem to support those who criticize the interpretation of tribal sovereignty in the neoliberal age as one that tends toward the "offloading of obligations for the welfare of Indian people from the federal or state governments" (Biolsi 2004:244). While ICWA has had a salutary effect on tribal families, communities, and governments in many respects, the inadequate provision for monitoring its implementation by states indicates that it is likely that in some cases (and without monitoring it is impossible to say how many) the welfare of Indian children and families has fallen between the cracks of various tribal, state, and federal bodies. It is also undoubtedly the case, as Randall Kennedy (2003) charges, that Indian children continue to be harmed through living in poverty and suffering other forms of deprivation not addressed by the ICWA. Rather than constitute an argument against the ICWA, this should, instead, be a rationale for directing additional resources to its implementation and to providing social services for Indian children and families.

## Conclusion

When Congress enacted the Indian Child Welfare Act nearly three decades ago, it maintained that state courts had often failed to recognize the “essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”<sup>45</sup> Given the radical challenge that the ICWA poses to hegemonic conceptions of individual rights and the primacy of the nuclear family, it is not surprising that some state courts have continued to follow the standards of the dominant society rather than tribal standards in interpreting the best interest of the Indian child. Moreover, given the ICWA’s strong recognition of tribal sovereignty—always contested in the dominant society, and increasingly so at the turn of the century—it is also not surprising that some state courts and representatives to Congress have attempted to reinstate state and federal jurisdiction over crucial matters such as the determination of what constitutes an “Indian family.” The unique political status of Indian tribes is poorly understood and unevenly accepted in the dominant society, lending plausibility—if not success—to attempts to consider the categories “Indian child” and “Indian family” as race-based classifications and the ICWA a “race matching” regime (Kennedy 2003, 518).

More significant than the inevitable court and legislative challenges to the ICWA is its success in returning jurisdiction over Indian children living on tribal lands to their tribes. Opposition to the ICWA has focused on the small number of difficult cases in which adoption is contested, often because a child’s Indian ancestry was not revealed at the time of the adoption. A great number of uncontested adoptions have been conducted under the ICWA, dramatically reversing a centuries-old pattern of attempting to assimilate Indian children to the values and institutions of the dominant culture by removing them from their families. Tribal responsibility for adoption and child welfare has required the expansion of tribal courts and welfare systems, the training of Native American professionals, and the development of working relationships between state and tribal officials. Scholarly and media attention to contested cases (and even to fictional ones) should not obscure the importance of the more routine engagement of Indian courts, welfare agencies, and communities in the practice of protecting tribal sovereignty, Indian families, and the best interest of Indian children.<sup>46</sup> The Indian Child Welfare Act, no less than the better known gaming and repatriation acts of recent years (Johnson 1999), is a significant achievement of the “American Indian renaissance” of the last third of the twentieth century.

## Notes

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Kinship Study” (see Strong 2001). The author is grateful to Susan Sterett for the invitation to participate in the first session, to Karen Engle and Gerald Torres for the second invitation, and to Sarah Franklin and Susan MacKinnon for the third invitation. The editors of this special issue also provided helpful comments and suggestions.

1. For the text of the Indian Child Welfare Act, PL 95-608, 92 Stat. 3069, see the National Indian Child Welfare Association’s web site (<http://www.nicwa.org/policy>), which also provides current information on the interpretation and implementation of the ICWA. See also Myers 1981, 177-186.

2. Kennedy (2003) disputes the validity of the evidence presented to Congress regarding extra-tribal adoption. His critique, however, downplays the extent to which extra-tribal adoption is part of a longstanding pattern of forced removal of Indian children from their homes. For an overview of this pattern, see Lomawaima (2002), who recounts that her own grandmother, labelled an “unfit mother,” lost two sons to a boarding school and a daughter to an orphanage (433).

3. See Carriere 1994; Mannes 1995; Simon, Altstein and Melli 1994; Unger 1977. During this period, seven of every ten thousand Indians placed in non-Indian homes committed suicide; this is six times the suicide rate of the general population, and four times the rate of the most suicide-prone tribe (Johnson 1991, vi, 153).

4. 25 U.S.C. 1901(e) and 1902 (1978).

5. Cornell (1988) and Nagel (1996) offer more recent assessments of this movement. See McNickle (1966) for an interesting contemporary commentary, which includes a review of Lurie’s (1965) and other authors’ contributions to “The Indian Today.”

6. Personal communication, 1978. *Indian Affairs and Indian Family Defense*, published by the Association of American Indian Affairs, Inc. (New York, NY), document AAIA activities in support of the ICWA; see also Carriere (1994), Mannes (1995), and Unger (1977).

7. For possessive individualism, see Handler 1988; Macpherson 1962. For hegemonic conceptions of the family in the United States, see Modell 1994; Schneider 1980, 1984. For various recent interpretations of tribal sovereignty, see Alfred 2002, Biolsi 2004, Hanson 2004, Haring 2002, Ruble and Torres 2004, Tsosie 2002, Wilkins 1997, Wilkins and Lomawaima 2001. For the tension between tribal sovereignty and possessive individualism, see Strong and Van Winkle (1993) and, specifically in the context of the ICWA, Goldsmith (1990).

8. In contrast to the approach taken here and in Strong (2001), a number of authors—including Fanshel (1972), Kennedy (2003, 480-518), Simon, Altstein, and Melli (1993), and Ward (1984)—consider the adoption of Native American children by Whites as transracial or interracial adoptions. In the absence of political sovereignty, African Americans have been unsuccessful in opposing the adoption of African American children by Whites, a point emphasized by Gailey (2000a, 2000b, 2002); see also Kennedy (2003, 367-479) and Simon, Altstein, and Melli (1993). Volkman (2005) is a collection of recent articles on transnational adoption.

9. A classic discussion of “best interest” is by Hillary Rodham (1973). For critiques, see Goldstein, Freud, and Solnit (1973) and, specifically in relation to the ICWA, Carriere (1974) and Voss (1993).

10. Other notable accounts of the genealogy and consequences of abuse on reservations are O’Neill (1996), Shkilnyk (1985), and Dorris (1989), which recounts the adoption of a child with fetal alcohol syndrome.

11. Interestingly enough, nearly four decades after Lurie penned these words, Randall Kennedy (2003, 512) would explicitly ground his critique of the ICWA in an opposition to what he called “the ideology of cultural preservation.”

12. Kennedy (2003, 518) argues that the placement hierarchy demonstrates that ICWA involves “race matching” because it favors placement in an Indian home over placement in a non-Indian home. This, however, is to occur only if it is not possible to place the child within a family of his or her own tribe. The ICWA institutes a policy of “tribal matching,” to be sure, but not “racial matching.” Even placement within an Indian family not of the child’s tribe comes into play only when a child has been identified as a member or potential member of an Indian tribe, which is a political identity, not a racial one. See Meetter (1999).

13. The most significant court cases to date are *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989), in which the U.S. Supreme Court affirmed the jurisdiction of a tribal court over a child who had never lived on a reservation (Carriere 1994, Monsivais 1997); and *In re Bridget R.*, 49 Cal. Rptr.2d 507 (Cal. App. 2 Dist. 1996), discussed below.

14. See *Mississippi Choctaw Indian Band v. Holyfield* and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

15. 25 U.S.C. §1911(d) and §1903(4).

16. See Strong (2001, 2002) and Miller (2002) for further discussions of the cultural and political basis of Native American identity and kinship.

17. House Report 95-1386, PL 95-608 at 7532: 11 (hereafter, Committee Report). Fonseca (2005) discusses the need for taking alternative patterns of parenthood into account in international child welfare; in this as in several other respects, the ICWA was ahead of the curve.
18. Committee Report 7532-33, 7541: 10-11, 19.
19. 25 U.S.C. §1912 (a), (e), and (f), §1903(f).
20. Committee Report 7543: 21.
21. 25 U.S.C. 1912(e) & (f).
22. See, for example, Texas Family Code §153.131; California Family Code §§3040 and 3041; 750 Illinois Compiled Statutes 5-602.
23. 25 U.S.C. §1915.
24. For the children's rights movement, see Minow 1997; Ranjani, Mann, and Ledeward 2000; Rodham 1973; Stephens 1995. For the text of the United Nations Convention on the Rights of the Child (which the United States has not ratified), see Stephens 1995, 335-352, especially Articles 5, 8, 20, and 30. For a critical discussion of the Convention's framing of a child's right to a cultural identity, see Stephens (1995, 37-39).
25. 25 U.S.C. §1951 and 1951(b).
26. Mnookin 1978, 624-25; 620 n119. In 1975, apparently only two states allowed adult adoptees access to their adoption records upon request (*In re Adoption of Female Infant*, 105 Daily Wash. Law Rep. 245 [Sup. Ct. of D.C. 1997], citing "Project, Government Information and the Rights of Citizens," 73 *Michigan Law Review* 1269-70 [1975]).
27. See *In re Adoption of Female Infant*: 105; Mnookin 1978, 621; Carp 1998, 104-113.
28. See also Metteer 1997 and Myers, Thorington, and Myers 1998.
29. See *In re the Matter of the Adoption of Baby Boy L.*, 692 P.2d 168, 175 (Kan. 1982); *In re the Matter of S.C. and J.C.*, 833 P.2d 1249, 1254-55 (Okl. 1992); *In re the Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988); *In the Matter of the Adoption of Infant Boy Crews*, 825 P.2d 305, 310 (Wash. 1992).
30. 25 U.S.C. §1902.
31. *In re the Matter of the Adoption of T.N.F.*, 783 P.2d 973, 977 (Alaska 1989).
32. *In re Bridget R.*
33. For astute analyses of the pitfall of allowing a court to determine whether an individual, family, or community is "Indian enough," see Campisi (1991) and Clifford (1988).
34. See Kennedy (2003) for an opposing view of the Existing Indian Family Exception. Kennedy supports codifying this exception to "minimize racialist opportunism" through which tribes "capture children" (518). This rhetoric seems to play on the longstanding typification of the Indian captor in Anglo-American captivity narratives (Strong 1999, 2001, 2002).
35. See, for example, "Appeals Court" 1996; Edwards 1995; Narciso 1996; Rainey 1997.
36. See Sarris (1993) for an interpretation of Pomo identity that focuses on shared narratives and social networks.
37. See S.1976, 100th Cong., 1st Sess., 133 *Congressional Record* S18532, S18533 (daily ed. Dec. 19, 1987).
38. H.R. 3275 104th Congress, 4/18/96.
39. H.R. 1082 105th Congress, 1st Session, 3/13/97.
40. *Congressional Record-Extension* 105th Congress, 1st Session (3/13/97); 143 *Congressional Record* E. 462.
41. 143 *Congressional Record* E462; 105 H.R. 1082, sec. 6.
42. *Federal News Service*, "Prepared Testimony of Rep. Deborah Pryce Before the Senate Indian Affairs Committee and House Resources Committee," 6/18/97.
43. H. R. 4733, 107th Cong., 2nd Sess. (2002). For the interpretation and implementation of ICWA in Alaska, see Brown 2004, 261-265; Brown and Morrow 2001.
44. H. R. 2750 108th Cong., 1st Sess. (2003). The other provisions include: extending the ICWA to cover children of state-recognized Indian tribes and children who live on a reservation and are a child or grandchild of a member even if they are not eligible for membership; giving parents the right to withdraw consent to an adoption up to six months after relinquishment of the child; clarifying that the ICWA applies to all children involved in child custody proceedings; clarifying the rights of Indian tribes to intervene in child custody proceedings and clarifying some issues of tribal governance in Alaska, including the rights of tribes without reservations; clarifying the rights of tribal courts and tribal governments vis-à-vis state courts and governments; defining the minimum active efforts that must be undertaken to prevent the breakup of an Indian child's family; defining under what circumstances state ICWA violations may be reviewed by federal courts and establishing a federal review system of state ICWA compliance; requiring detailed notice to Indian tribes, parents, and extended family members in voluntary and involuntary adoption proceedings; requiring attorneys and agencies to provide detailed information to Indian parents of their rights under the ICWA; making it easier for Indian adoptees to obtain access to their birth records; and providing criminal sanctions for lying about Indian ancestry with regard to the ICWA (National Indian Child Welfare Association 2004).
45. 25 U.S.C. 1901(e) (1978).

46. Barbara Kingsolver's novel *Pigs in Heaven* (1993) offers an insightful exploration and a fictional resolution of opposing perspectives on ICWA; see Metteer 1996 and Strong 2001.

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