THE INDIAN CHILD WELFARE ACT; AN ACKNOWLEDGEMENT OF SOVEREIGNTY IN THE BEST INTERESTS OF THE CHILD

NATIVE AMERICAN RIGHTS, SPRING 2001
FOR GLORIA VALENCIA-WEBER

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April 30, 2001
I. Introduction

Congress passed the Indian Child Welfare Act (ICWA or "the Act") in 1978 for the express purpose of "protect[ing] the best interests of Indian children and to promote the stability and security of Indian tribes and families." Indian tribes were given "exclusive jurisdiction as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe." States, though normally recognized as having jurisdiction over adoption procedures within their boundaries, were faulted with "often fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." As a departure from prior assimilationist policies, and an affirmation of tribal sovereignty and self-determination, ICWA expressly recognized the importance of cultural ancestry and tradition to Indian children. Congress recognized the vested interest that Indian tribes have in their children as essential to their collective existence and created the Act to protect this relationship.

Some of the key provisions of the ICWA are the definitions of "Indian child" and "child custody proceeding" in section 1903. An Indian child is defined as "any unmarried person who is under the age of 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." Child custody proceeding, according to the Act "means and includes (i) foster care placements... (ii) termination of parental rights... (iii) termination of parental rights... (iii) preadoptive

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2 Id. at §1911
3 Id. at §1901(5)
4 Id. at §1903(4)
placement... and (iv) adoptive placement.” The clear language used in these definitions makes it easy to determine to whom and when the Act should apply.

The specific mandate of the Act subject to just two exceptions gives exclusive jurisdiction to the tribes over any child custody proceeding involving an Indian child who resides or is domiciled within his or her tribe’s reservation or is a ward of a tribal court. The only exceptions to this grant of exclusive jurisdiction are in the event that the child custody proceeding involves placement resulting from a divorce or a criminal act. If the child is not domiciled or residing within its tribe’s reservation the Act orders that the state court “shall transfer such proceeding to the jurisdiction of the tribe.” This transfer is subject to objection by either parent, declination by the tribal court or a finding of good cause to the contrary.

Congress developed the Act over several years during which a considerable amount of testimony was heard. This testimony included statistical data as well as pleas for help from the tribes. The data showed an unusually high percentage of adoptions and placements of Indian children, mostly into non-Indian homes. Many of these placements were made without input from the tribes. If Indian children continued to be removed at the present rate the future of many tribes would have been seriously jeopardized. Legislators recognized this threat to Indian families and to the future of Indian tribes and responded with the ICWA. Nevertheless many

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5 Id. at §1903(1)(i) “foster care placement” which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; (ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship; (iii) “preadoptive placement” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and (iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

6 Id. at §1911(a)
7 Id. at §1903(1)
8 Id. at §1911(b)
9 Id.
states have attempted to circumvent the application of the Act continuing to remove Indian children from their homes. This removal continues to threaten the survival of tribes themselves.

Even though it was intended to establish a uniform set of guidelines for the states to use for the adoption and placement of Indian children the ICWA has received different reactions from many states. These reactions are often based on local policies and feelings about Indian tribal authority. Thirty-five states have accepted the provisions of the Act and have incorporated them into their state adoption or dependency codes. The state of Oklahoma passed its own ICWA for the express purpose of clarifying state policies and procedures for the implementation of the federal act and to “cooperate fully with Indian tribes in Oklahoma in order to ensure that the intent and provisions of the federal ICWA are enforced.” Other states have attacked the Act’s provisions both judicially and legislatively making the provisions more convenient and less intrusive on their state sovereignty.

One particular state judicial modification of ICWA, the Existing Indian Family exception (EIF) originated in the Kansas courts and was then adopted by a number of states. This modification excepts the application of the ICWA provisions if the Indian child in question has not lived in a family that is then determined by the court to be sufficiently connected to a tribe.

The Kansas Supreme Court, while admitting that the language in ICWA mandated its
application, refused to apply its provisions. The case involved the adoption of an illegitimate Indian child born to a non-Indian mother who sought to place her son with a non-Indian couple over the objections of the non-custodial Indian father who was incarcerated at the time. Without explicitly overturning ICWA, the courts using the EIF weaken the Act's authority and provide a continued means of attack from its critics. When the U.S. Supreme Court reached its decision in Holyfield the constitutionality of ICWA was not an issue and the existing Indian family exception was neither addressed nor applied. Some jurisdictions saw the lack of any discussion of the EIF as a validation of its continued existence, while others were satisfied that the exception would have been raised if it were valid. The ICWA legislative history and many court opinions question the merits of this judicially created exception that nevertheless continues to be supported.

Only one case questioning the ICWA authority has reached the Supreme Court. *Mississippi Band of Choctaw Indians v. Holyfield* involved a dispute that revolved around the definition of the term “domiciled” as applied to an Indian child who was born outside the tribal reservation. The holding stressed the need to “protect the interests of the Indian community in retaining its children within its society.” It also reaffirmed the Act’s intent to establish some uniformity with regards to the state courts’ handling of adoption and placement of Indian children.

Twenty-three years after the enactment of ICWA the percentage of Indian children being placed into non-Indian homes is still high. Specific data is hard to collect because of the nature of child custody proceedings. States are not required to report adoption statistics and case files are often kept closed. Nevertheless, the ICWA process, if followed, can help ensure that placement has been done with the consent of the tribes and can thus “eventually ensure the

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15 Id. at 31
survival of Indian tribes and cultures. ICWA has created the possibility for some of these adoptions to be “open adoptions” that enable the Indian child to retain contact with their birth parents and/or tribe and thus remain connected to their cultural roots.

Legislation to amend the Act has been proposed by those who oppose it as well as by some who support it. An amendment proposed in 1996 by Senator John McCain would hold those who try to circumvent the Act by fraudulently placing children for adoption criminally liable. Additional legislation has been proposed that would amend the ICWA, to codify the Existing Indian Family exception and also to restrict the rights of tribes to intervene in proceedings. To date, none of these amendments have been approved and ICWA remains unchanged, an indication that the Act, after twenty years is still considered a valid response to the continuing removal of Indian children from their tribes and families.

In part II of this paper the social, legislative, and judicial histories that lead to the situation that the ICWA was designed to correct will be discussed. There was substantial testimony before Congress during the creation of the act and it provides evidence as to the attitude and motives of those involved with the creation of this legislation. The testimony paints a vivid picture of the situation that demanded some sort of action on the part of Congress. The resulting Act is an express affirmation that the United States policy of assimilation and removal of Indian children from the tribes has been replaced with an acknowledgement of a tribe’s sovereign interest in controlling the placement of its most precious resource, its children. The intent of the Act is clear and its language understandable when read in this light. Part III will examine the reaction of the states to the requirements imposed by ICWA. The way that the states have

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17 S.569 105th Cong. (1997)
incorporated ICWA into their adoption policies and/or passed regulations that affected its provisions is indicative of the respect (or lack thereof) by the states for the tribal right of self-determination and self-preservation. Adoption advocates claiming to work for the best interests of Indian children often argue in favor of the Existing Indian Family exception and have gained support from certain members of Congress. Their perspective is often based on racial stereotypes about Indian life that perpetuate the belief that Indian children would be better off raised in non-Indian environments. What can and/or should the tribes do to see that their interpretation of what is in the best interest of Indian children is recognized? Part IV will briefly attempt to answer this question looking to some alternatives that have been successful and others that have not, and others that have not yet been tried.

The future of the Indian nations continues to be threatened by the removal of their children. The ICWA was an acknowledgement of this situation and an attempt to rectify the problem by ensuring that Indian tribes have a voice in decisions involving their own Indian children. The Act’s success or failure is contingent upon an acknowledgement of the tribes’ sovereign rights and interests and a respect for their decisions as to what they feel is in the best interests of their children. As long as state courts and special interest groups continue to ignore the clear language of the Act by relying on judicially created exceptions the purpose of ICWA will not be fulfilled.

II. PRE-ICWA HISTORY AND THE REACTIONS THAT FOLLOWED

A. Tribal Sovereignty and Early Indian Policy

Since the time of the first contact with the original occupants of this country intercourse with the tribes has been rooted in a sovereign-to-sovereign basis. Though this relationship has
changed and has been redefined over the last four or five centuries the principle that the Indian tribes are to be recognized as independent governments has survived. During the founding years of the United States the “formal dealings with Indian tribes... were conducted almost exclusively by treaty-making... this method of dealing itself implied recognition of tribes as self-governing peoples.”19 Article II, section 2 of the U.S. Constitution gives the President the power to make treaties, which under the Supremacy Clause20 are “superior to any conflicting state laws or constitutional provisions.”21 The fact that the founders chose to use treaties to codify their negotiations with the Indian tribes is significant in that it reflects the belief that the tribes were sovereign governments.

Federal Indian policy has evolved over the years by means of treaties, legislation and judicial decisions. Many policy decisions, from those respecting tribal authority to those attacking their continued existence still acknowledge the unique status of the Indian tribes vis-à-vis the United States government. While the purposes behind the policies have changed over time the legislation and judicial decisions continue to recognize of the inherent sovereignty of Indian tribes.

According to Francis Paul Prucha, “the general rule is that a treaty is a formal agreement between two or more fully sovereign and recognized states operating in an international forum.”22 The history of treaty making between the United States and Indian tribes departs from this general rule as a result of the nature of the “forum” involved and the motivation that drove the continued use of the process. While the initial agreements signed with the Indian tribes seemed to fit within the general rule it was not long before the status of the Indian tribes and

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20 U.S. Const. Art. VI, cl. 2
21 FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982)
22 FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES, 2 (1994)
their ownership of land began to change. This change and the almost continual negotiation with
the tribes were motivated by a growing desire for land. The status of the title held by the Indians
was formally changed when the Supreme Court announced its decision in *Johnson v. McIntosh*.23
Justice Marshall declared that the Indians were the rightful occupants of the soil but the power to
convey the lands was limited by the idea that discovery [by the European explorers] had vested
fee title in the government.24 From this point on U.S. Indian policy became even more focused
on Westward expansion and ways to encourage the continued cession of Indian lands. The
method of choice by which the lands were acquired was by treaty. While these treaties often
included provisions for ceding more land they also served to build and support the sovereignty of
the tribes with whom the U.S. continued to negotiate.

While the federal government did not necessarily concern itself about the developing
political status of the tribes it was noticed by many of the states. The states were interested in
expanding their boarders and often came up against the boundaries of Indian territories that had
been established by treaties. In the early part of the 1800’s gold was discovered on land that
belonged to the Cherokee Nation near the state of Georgia. The people of Georgia refused to
respect the Cherokee Nation and its laws and entered the land at will. Georgia even expanded its
criminal authority into what had been designated by treaty as Cherokee country. President
Andrew Jackson, an advocate for Indian removal refused requests from the Cherokee Nation to
enforce its treaty provisions through federal intervention. The President’s support of Georgia’s
activities encouraged them to continue their encroachment. The Supreme Court was ultimately
responsible for the resolution of the dispute.

23 *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 5 L.Ed. 681 (1823)
24 *Id.*
Chief John Ross of the Cherokee Nation sought to enjoin the execution of Georgia’s laws in the Cherokee Nation. *Cherokee Nation v. Georgia* was an original action filed in the Supreme Court under its Constitutional authority to hear controversies between foreign states.\(^{25}\) The theory of the case was that the execution of Georgia’s laws was a violation of federal law and the Cherokee Nation’s treaty rights. The Supreme Court refused to hear the merits of the case finding that the Cherokee Nation was not a foreign nation as intended in the Article III grant of jurisdiction. Nevertheless, the means by which the Court came to their conclusion carried a greater impact than any decision on the merits ever could have: The Cherokee Nation was declared a “domestic, dependent nation” yet they were “recognized [by the United States] as a people capable of maintaining the relations of peace and war...[and] responsible... for any aggression committed on the citizens of the United States by any individual of their community.”\(^{26}\)

One year after *Cherokee Nation*, the application of a Georgia state criminal statute on land belonging to the Cherokee Nation was questioned in *Worcester v. Georgia*.\(^{27}\) Samuel Worcester was a missionary charged with violating a Georgia criminal statute applied to Cherokee land. The statute required whites living in a part of the Cherokee Nation to swear an oath of allegiance to the state of Georgia and to possess a state license. The Supreme Court held that the Georgia law was contrary to the U.S. Constitution, federal laws and the treaty with the Cherokee Nation. The Cherokee Nation was described as “a distinct community, occupying its own territory, with boundaries accurately described, and which the citizens of Georgia have no right to enter.”\(^{28}\) Numerous officials from Georgia, including the governor refused to obey the Court’s decision.

\(^{25}\) *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831)
\(^{26}\) *Id.* at 16
\(^{27}\) *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832)
\(^{28}\) *Id.*
President Jackson in response to the holding allegedly said, "John Marshall has made his law; now let him enforce it." Regardless of whether the statement was actually made or not President Jackson did nothing to enforce the Court's holding, preferring to continue his support for the idea that the Indian tribes should be "removed" to lands west of the Mississippi. For the Indian tribes the choice to be made was between remaining in their homelands to face the risk of being overrun by white opportunists or giving up their land and moving to an unknown area where it was promised that they could live in peace.

B. The Policy of Removal and Indoctrination

As England and Spain began their expansion into the "New World" their initial plan for conquest included replacing the traditional beliefs and way of life of the Indians and removing the Indian children from their culture and family. One of the principal aims of the explorers was "to bring the natives not only to the true Knowledge and Worship of God but to human Civility, and to a settled and quiet government." Religious conversion was directed at the adult population in hopes that they might be convinced to choose a more "civilized" way of life.

Another plan was presented at the first representative assembly meeting in Jamestown wherein "eache towne, citty, Borrough, and particular plantation do obtaine unto themselves by just means a certaine number of the natives' children to be educated by them in the true religion and civile courses of life... As to how these children would be acquired, the suggestion was made in official documents... that they should be kidnapped." Whether this plan was actually carried out or not is unclear. Nevertheless the tenor of its stated objective survives and has been restated through various enactments of federal Indian policy.

30 id. at 41
The removal of Indian children from their homes served two purposes in the minds of those who hoped for the assimilation of the Indian tribes. The first purpose would be to break the continuity of tribal customary existence. The void created by the absence of the Indian children would restrict the ability of the tribes to pass their culture and traditions on to future generations. Secondly, once the Indian children had been sufficiently reprogrammed they could be returned to their communities to erode the traditional cultural stability from within. Many different policies were enacted in furtherance of these goals.

Towards the latter part of the 1800's reformists fought for the creation of off-reservation boarding schools thinking them an ideal method of assimilation. Officially the federal boarding school system was founded in 1879 even though funding had been previously provided for the mission schools. It was believed that the key to the success of these schools was that "the Indian youths were [to be] completely removed from the family and from the barbarism of tribal life." This "success" had little to do with schooling and quite a lot to do with those who wished to "civilize" and "educate" the "Indianness" out of the Indians. In 1885, the federal superintendent of Indian schools, referred to his task of making the Indian "a member of the new social order," and envisioned it thus; "To do this we must recreate him, make him a new personality. Therefore remove the child from the demoralizing influence of their families to the boarding school, the more distant the better." Thus they were taken from their grieving parents and kept up to eight years, punished for speaking their own language, and brainwashed of all traces of Indianness... Most returned suspended in vacancy, separate from both cultures."
Cloaked in the pretext of education, the federal boarding schools advanced a policy of cultural displacement intended to erase the traditions and beliefs of Indian children and replace them with such concepts as citizenship, democracy and manifest destiny. Thomas L. McKenney, of the Office of Indian Affairs saw these “educated Indians ... as a strategic intermediate link between our own citizens, and our wandering neighbors.” Intended to erode and “civilize” the Indian population from within, the federal school system continued to grow. An efficiency argument was made suggesting that “it was less expensive to educate Indians than to kill them.” Either way the same result would be obtained.

The first superintendent of the Carlisle Indian Boarding School in Pennsylvania, Captain Richard Henry Pratt was not reluctant to explain his ideas on Indian education. “A great general had said that the only good Indian is a dead one... I agree with the sentiment, but only in this: that all the Indian that there is in race should be dead. Kill the Indian in him and save the man.” Attendance was made mandatory by the Appropriations Act of July 13, 1892. Failure on the part of Indian families to send their children to government schools was met by legislation that “for a period of time permitted the withholding of treaty-based government rations.”

As this policy of assimilation through education continued, more and more Indian children were taken from their families and sent to schools that were intentionally far enough away so that contact with family and tribe was made nearly impossible. While at school the Indian children were forced to use English as their primary language, their hair and clothing was non-traditional and any communal concepts that they had were replaced with new ideas such as a respect for

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34 COHEN, supra note 21, at 122, quoting OFFICE IND. AFF. ANN. REP., S. DOC. NO. 1. 19th Cong. 2d Sess. 508 (1826)
37 Ch. 164 §1, 27 Stat. 120, 143 (superceded by 25 U.S.C. §282)
private property and manual labor for personal benefit. Captain Henry Pratt testified before Congress that the United States "needed to immerse the Indians in waters of our civilization and when we get them under water, hold them there until they are thoroughly soaked... [and thus] eradicate the Indian but make the man."39 Those with anti-Indian sentiments were not the only ones in favor of the boarding school system. Members of the Indian Reform Movement also thought that Indian children would be made into good American citizens who could happily live in white society. Unfortunately the products of the boarding school system were sent into a white world that did not want them or back to a reservation to which they were now foreign.40

The tribes were aware of what was happening to their future generations and tried to do what they could to affect the situation. As a result of their dissatisfaction with the federal schools the Iroquois and the Cherokee Nation began developing programs that recognized their own cultural needs, including bilingual education. Sitting Bull, in answer to a request for children to be sent to Carlisle said, "I have seen the results of school. The children who return are neither white nor Indian. Nothing is done for them. I love my children too much to let anything like that happen to them."41

When it became apparent to Captain Henry Pratt and his fellow assimilationists that the educational assimilation program was not entirely successful, or at least not as quickly as they would have hoped, they took their campaign to a higher level. In addition to attendance in the boarding school system, Indian children were to be placed in selected white homes as a means of ensuring the complete destruction of any remaining cohesiveness with their Indian families.

39 cited by DELORES J. HUFF, TO LIVE HEROICALLY, 3 (1977)
40 PETER FARO, MAN'S RISE TO CIVILIZATION, 257-59 (1968)
41 Jeffrey Hamley, FEDERAL OFF-RESERVATION BOARDING SCHOOLS FOR INDIANS, 47 (Oct. 1986)
Captain Pratt's ultimate dream was to use this "outing system" to "scatter the entire population of Indian children across the nation, with some 70,000 families each taking one Indian child." 42

"While this dream was not realized during his lifetime, this system of placing American Indian children with white families served as a precursor to the twentieth century massive displacement of American Indian children to non-Indian adoptive homes, foster care and institutions." 43

C. Shifting Policies of the Twentieth Century

1. The Collier Era

For most of the next half-century the pendulum of federal Indian policy began to swing back from the policies of assimilation and allotments. 44 The Snyder Act provided appropriations for "the benefit, care, and assistance of the Indians throughout the United States." 45 The Meriam Report of 1928 46 still relied somewhat on the policies of assimilation and absorption but also brought public attention to poverty, disease and other deplorable living conditions of Indians. "It defined the goal of Indian policy to be the development of all that is good in Indian culture rather than to crush out all that is Indian." 47

42 Adams, supra note 35, at 14
43 Graham, supra note 41, at 12
44 see also The General Allotment, or Dawes Act of 1887, codified as 25 U.S.C. §§331-334 et seq. Authorized the President to divide reservation land into allotments that were either chosen by or assigned to tribal members. The title to these allotments would be held in trust by the United States for twenty-five years. Surplus lands were made available for purchase by the United States and the proceeds would also be held in trust for the tribe's use. Described by President Roosevelt in 1906 as "a mighty pulverizing engine to break up the tribal mass." See COHEN, supra note 21, at 143 note 165.
46 INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (L. Meriam ed.) (Baltimore: The Johns Hopkins Press, 1928)
47 Id. at 22
John Collier was appointed Commissioner of Indian Affairs in 1933. He called for the preservation of Indian heritage and the revival of tribalism and pushed for the passage of the Indian Reorganization Act (IRA) of 1934. He stated that it would “give [the Indian] a chance to develop the initiative destroyed by a century of oppression and paternalism.” The IRA was intended to provide a mechanism for the tribe as a governmental unit to interact with and adapt to a modern society, rather than to force the assimilation of individual Indians. Tribes were encouraged to organize and act similarly to business corporations and not only was the alienation of lands blocked but efforts were made to acquire additional lands as needed for economic development.

While the IRA seemed to express genuine concern for the tribes’ well being, a change from previous legislation, it was similar to much federal Indian legislation in that it was created without much input from the tribes who were the intended beneficiaries. The IRA encapsulated what the federal government thought was best for the Indian tribes. It encouraged the passage of written constitutions, the election and installation of tribal councils and the creation of tribal courts, all modeled after the white system of government. While it might be said that this was in fulfillment of the U.S. government’s trust responsibility to the tribes it is more likely another example of legislation passed under the paternalistic regime of federal Indian policy without consideration of the tribes’ actual needs or preferences.

The economic development and expansion that resulted from the IRA soon made it clear that the limited resources of the reservations could only effectively support a fraction of the members who lived on it. With the onset of World War II the United States’ economy took off and many Indians were able to benefit from jobs that came available in the defense industry as well as

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service in the armed forces. After the war many Indian veterans returned to federal budget cuts for Indian spending, increased support for the authority of local (state) governments, economic development that now required the liquidation of tribal property and the resignation of John Collier from the BIA.

2. Assimilation Revisited

Even though John Collier’s successors tried to ensure the preservation of his policies they were met with continued resistance from Congress as well as the American people. Assimilationist attitudes were revived under the auspices of removing “the restrictions” on Indian property and setting the Indian people free from their tribal cultures so that they could more easily become a part of mainstream culture. The old attitudes were back just packaged and presented in a new look.

As a cost cutting measure and to enable the federal government to more efficiently “discharge its responsibility to the tribes” four criteria were identified that would help Congress determine which tribes’ funds could either be eliminated or reduced: “1.) degree of assimilation; 2.) economic conditions and available resources; 3.) willingness of the tribe to dispense with federal services; 4.) willingness and ability of the states to provide public services.” These criteria would help identify the degree of a particular tribe’s assimilation and whether the tribe was ready to complete the assimilation process.

There were different beliefs as to which means of implementation would be the most effective way to ensure total assimilation of the Indian tribes. In 1949 the Commissioner of an Organization of the Executive Branch of the Government, known as the Hoover Commission

50 COHEN supra note 21, at 147
51 O.K. Armstrong, Set the American Indians Free, Reader’s Digest, August 1945, at 47, see also SZASZ, Education and the Indian, at 112 note 57
52 William Zimmerman Jr., SEC. INT. ANN. REP., 349 (1947)
issued a report supporting the termination of the federal responsibility for Indians.\textsuperscript{54} The report proposed a different and more gradual assimilation that included transferring responsibility to the states, development of Indian self-sufficiency and participation in the economic, social and political life of the states.\textsuperscript{55} Those who were in favor of repealing the IRA in the interests of a more rapid assimilation criticized the Hoover Report’s conclusions and proposed legislation that cut health and social welfare programs and put more authority into the hands of state legislatures and courts. The National Council of Churches campaigned for the removal of the “degrading” trust status of the Indian lands and for the “release [of] the Indian from his wardship” to the federal government.\textsuperscript{56}

Any disputes as to which method of termination would be the most effective were settled when Dillon S. Myer became Commissioner of Indian Affairs in 1950. Myers was the former director of the Japanese internment camps established after the bombing of Pearl Harbor in 1941. He brought the same vigorous and coercive methods of removal and control to the Bureau as he had used against the Japanese. He called the process that he planned on using “withdrawal programming.” Under Myer the two main goals of the BIA were to achieve a “standard of living for Indians comparable with that enjoyed by other segments of the population (based upon non-Indian values and concepts) and the step-by-step transfer of Bureau functions to the Indians themselves or to appropriate agencies of the local, state, or Federal Governments.”\textsuperscript{57} Though Myer’s reign in the Bureau was short-lived a House Concurrent Resolution adopted after his

\textsuperscript{53} Officers and Employees of the Federal Government: Hearings Before the Senate Comm. on Civil Service Pursuant to S.Res. 41, 81\textsuperscript{st} Cong., 1\textsuperscript{st} Sess. 73 (Jan. 22, 1947)

\textsuperscript{54} COMM’N. ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV’T., INDIAN AFFAIRS: A REPORT TO CONGRESS, H.R.DOC. NO. 1, 81\textsuperscript{st} Cong. 1\textsuperscript{st} Sess. 53 (1949), see also COHEN supra note 14, at 158

\textsuperscript{55} Id. at 66, note 67

\textsuperscript{56} DEBO supra note 29, at 349. The wardship status referred to was a common misstatement of the holding in Cherokee Nation \textit{v.} Georgia, supra note 25, which in actuality described the relationship of the tribe to the United States as resembling that of a ward to his guardian (emphasis added)

\textsuperscript{57} SEC. INT. ANN. REP. 353 (1951)
departure demonstrated that his desires for complete and rapid assimilation would survive him. Even though, HCR 108, had no actual standing as law it expressed the intent of Congress "to make the Indians ... subject to the same laws and entitled to the same privileges and responsibilities as ... other citizens ... and to end their status as wards of the United States."\textsuperscript{58} The only way that this intention could actually be achieved would be through termination of the tribes themselves.

The continuing policy of rapid and coercive assimilation through termination opened the door for increased conflict between the tribes and states over Indian child welfare issues. The caseworkers and administrators of the state agencies had no relevant tools for evaluating the cultural values and societal norms of Indian communities. The decisions they were made and the procedures that were put in place were based on values and standards from white society. The cultural misunderstandings that inevitably arose from this lack of knowledge would contribute significantly to the Indian child welfare crisis of the 1970's.\textsuperscript{59}

3. Self Determination and Family Traditions

1958 marked yet another swing of the pendulum of federal Indian policy. Growing public concern and interest in civil rights around the country carried over into legislation affecting the tribes. While no major policy statements were made multiple pieces of legislation over the next ten years indicated that the termination era was coming to a close. Public Law 280, which gave certain states the authority to assert their jurisdiction onto Indian reservations, was amended to require tribal consent before jurisdiction was granted to the state.\textsuperscript{60} When Secretary of Interior

\textsuperscript{58} HCR 108, August 1, 1953, see DEBO supra note 29, at 352, note the continued misstatement of Cherokee Nation v. Georgia

\textsuperscript{59} Graham supra note 41, at 19

Stewart Udall, of the recently elected Kennedy administration was asked about HCR 108 he said that it had died with the 83rd Congress. Other programs that were introduced included the 1962 Employee Assistance Program, the new Division of Economic Development branch at the BIA, and the BIA Housing Improvement Program of 1965.

Representatives of over sixty-seven tribes, sensing that the threat of termination might be waning gathered in Chicago in 1961 and adopted a “Declaration of Indian Purpose” It began with a statement of belief “in the inherent right of all people to retain spiritual and cultural values. The free exercise of these values is necessary to the development of any people.” The Declaration continued stating that the Indians wanted the right to participate in the development of their own programs and solutions. This involvement was something that had been missing from federal Indian legislation since the end of treaty making in 1871.

In 1967 President Johnson appointed Robert Bennett, the first Indian in almost a century, as Commissioner of Indian Affairs. In March of 1968 Johnson delivered a “Special Message to the Congress on the Problems of the American Indian: ‘The Forgotten American.’” He proposed “a new goal for our Indian programs. A goal that ends the old debate about termination of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership and self-help... An opportunity to remain on their homelands, if they choose, without surrendering their dignity; an opportunity to move to towns and cities of America, if they choose, equipped with the skills to live in equality and dignity.” That year the

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61 supra note 58
62 DEBO supra note 29, at 383
63 COHEN supra note 21, at 183, note 26
64 Reprinted in A. JOSEPHY, RED POWER, 49 (1971)
65 Id.
66 Id. at 50
67 COHEN supra note 21, at 185, note 42
68 Id.
Ninetieth Congress approved the largest budget in history for aid to Indians along with the Indian Civil Rights Act.

Even though the formal termination of tribes was ending, Indian children were still being removed from their homes by the thousands each year. The federal legislation and policy statements could not change the attitudes and biases of those who still believed that it was in the best interests of Indian children for them to be raised in a non-Indian environment. Under religious pretexts or as a result of social welfare programs many Indian children were being taken from their homes under the assumption that they could be better cared for elsewhere. The Child Welfare League of America established the Indian Adoption Project in 1959. In the first year of its existence the project coordinated the adoption of almost four hundred Indian children by exclusively non-Indian families. Religious groups also continued their fervent efforts to effect conversions by any means necessary. The Latter Day Saints Placement Program removed as many as two thousand Hopi and Navajo children per year from their homes permanently placing them in Mormon homes throughout the country. The ability of the tribes to control this mass removal of their children was further hindered by deceptive tactics used to “formalize” the adoptions. “[A] clerk came to me about a family who were being talked to by Mormons about their children. They gave the parents a piece of paper and said it was just to let them go to school. But the paper was an adoption form. The clerk and I told the parents what adoption was, and they said they didn’t want that.”

70 R. Weyler, Blood of the Land, the Government and Corporate War Against the American Indian Movement, 149 (1982)
Not everyone who played a part in the removal of Indian children from their homes did so with malicious intent. A disproportionately limited number of Indian foster homes were available for the many Indian children who are in the foster care system. Much of this was due to the fact that the guidelines used to determine eligibility were based on non-Indian standards as to what a stable family environment should be and these often precluded placement in an Indian home. Many of the judges and social workers handling placement decisions regarding Indian children were ignorant of extended family dynamics that often exist in Indian homes.

While the child-rearing techniques of Indian tribes vary greatly, for many tribes the concept of "family" is much more expansive than the typical Anglo-American concept. According to Vine DeLoria, Jr. "it is a multi-generational complex of people and clan and kinship responsibilities that extends to past and future generations. Kinship and clan were built upon the idea that individuals owed each other certain kinds of behaviors and that if each individual performed his or her task properly, society as a whole would function." In addition to biological relationships there exists clan or band relationships. The duty to love and nourish a child (culturally, emotionally, spiritually, and physically) falls on the community as well as on the biological family. Therefore it would not be uncommon for a child to be raised by a grandparent or an Aunt or Uncle or even someone who would not be seen as a family member by someone unfamiliar with tribal custom. This unfamiliarity has often led to the removal and placement of Indian children based on a conclusion that they had been neglected or abandoned when in actuality they were being cared for by a competent and caring member of the child's "Indian family."

4. Development of the Act

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22 VINE DELORIA, INDIAN EDUCATION IN AMERICA, 22 (1991) cited in Graham, supra note 41, at 5, note 19
In 1969 and again in 1974 surveys conducted by the Association of American Indian Affairs produced some results that got Congress' attention.\textsuperscript{73} The data showed that in 1969 approximately eighty-five percent of Indian children in the foster care system were in non-Indian homes.\textsuperscript{74} Removal was most frequently based on findings of "neglect" or "social deprivation."\textsuperscript{75} In Minnesota where Indians comprised seven percent of the state population, the risk of being placed in foster care or in an adoptive setting was five times greater than for non-Indians. In Montana the risk was thirteen times greater for Indian children. In South Dakota where only seven percent of the juvenile population was Indian they accounted for forty percent of all adoptions filed by the State Department of Public Welfare for a ten-year span. In Washington Indian children stood a ten times greater risk of being adopted into non-Indian homes and in Wisconsin the risk faced by an Indian child that they would be separated from their parents was approximately sixteen-hundred percent greater than for non-Indian children.\textsuperscript{76}

An additional survey done in 1974 indicated that on a national scale twenty-five to thirty-five percent of all Indian children were separated from their families and placed in foster homes, adoptive homes or institutions.\textsuperscript{77} To help put this figure into perspective, using data from the 2,000 census, at thirty percent rate of removal, it would be equivalent to another government coming to the United States and permanently removing twenty-four million American children under the age of eighteen from their homes.\textsuperscript{78} These American children would be taken far from their homes to another country. Once there they would be punished for speaking English, they would not be able to retain any of their religious or cultural beliefs and they would be forced to

\textsuperscript{73} reprinted as H.R. No. 95-1386 at 6 U.S. Cong. & Adm. News, 1978
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 10
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Population Projections Program, Population Division, U.S. Census Bureau, 2000census.gov
act, look and live like the other people in their new country. In very few instances would these children ever be allowed to return to their families again. This removal would be supported, as being in the best interests of the children under the claim that they would be better off in their new environment.

The statistics gathered in the 1969 and 1974 surveys provided the impetus for Congress to investigate who should make the decision as to what is in the best interests of a child. Congress began to examine the data that had been collected and heard the testimony that ultimately resulted in the creation of the ICWA in 1978. Some of the testimony included such statements as the one from Chief Calvin Isaac of the Mississippi Band of Choctaw Indians. He said “Indian children are removed from the custody of their natural parents by non-tribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptuous of the Indian way and convinced that removal, usually to a non-Indian household or institution can only benefit an Indian child.”

Congress quickly realized that many agencies were operating on the premise that most Indian children would really be better off growing up non-Indian. This attitude continued to exist even though federal Indian policies were recognizing tribal sovereignty and self-determination. The ICWA was established to guide the actions of courts and agencies away from their traditional methods of removal. The language that Congress used in the Act deliberately directed when it would apply, to whom it would apply and how its provisions were to be applied.

5. The Act

The severity of the crisis that faced the Indian tribes was acknowledged by Congress and is reflected in the structure of the Act. The history that predated the Act, the specific intent behind the Act and the authority Congress used to create the Act are all included in the first two sections of the ICWA. The Act begins with recognition of "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people."80 This affirmation of "a special relationship" is an acknowledgement of Indian tribal sovereignty and the unique status that Indians possess. This acknowledgement makes the Act more than just another legislative enactment. The fact that the ICWA was created for the benefit of the Indian tribes places it on a higher level and subject to different standards of interpretation than other regulations.

The sources of congressional authority are listed in section 1901 under the heading "Congressional findings."81 They begin with yet another reference to the special relationship between the United States and the tribes: "that clause 3, section 8, article I of the United States Constitution provides that 'The Congress shall have Power to regulate Commerce with Indian tribes' and, through this and other constitutional authority, Congress has plenary power over Indian affairs."82 This authority is then applied to a duty "that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources."83

To ensure that there would be no question as to Congress' authority to enact legislation regarding the adoption process (traditionally a state regulated activity) the legislative history cites to several cases for support. The cases range from the distant past, *Gibbons v. Ogden*

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80 25 U.S.C. §1901
81 *Id.*
82 *Id. at (1)*
83 *Id. at (2)*
to the recent past, *Hill v. FLA ex rel. Watson* (1945); to contemporary, *Perez v. Campbell* (1971). All of the cases support the rule that "when Congress legislates pursuant to its delegated powers, conflicting State law and policy must yield." The legislative history of the ICWA also presents several references to the "undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters." 84

The case that best captures the congressional intent as embodied in the legislative history is *Wakefield v. Little Light.* 85 The holding in that case confirmed that "there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the... tribe to govern themselves than to interfere with tribal control over the custody of their children." 86

When this holding is read in consideration of the years of federal Indian policies of assimilation and termination the real impact and need for the ICWA can be understood. The Act was clearly created to give the tribes a voice in the growing number of placements of Indian children.

The parties who are to be the beneficiaries of the Act are included in parts 3-5 of §1901. They are the Indian tribes, Indian families, and Indian children. It is made clear that the United States was making known its direct interest in protecting Indian children and Indian cultures through this federal enactment. In the legislative history it was stated that "the wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of Indian life today." 87 It is interesting to note that the only reference to the states is in reference to their "failure to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 88

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84 supra note 79 at 13
85 276 Md. 333, 347 A.2d 228 (1975)
86 id.
88 25 U.S.C. 1901(5)
The congressional declaration of policy in the section 1902 is an assimilation of the findings and legislative history into a simple, straightforward objective "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." This objective was to be met through the application of the standards and policies within the remainder of the Act. Much of the misinterpretation and misunderstanding of the ICWA provisions result from failure to understand and accept this policy before moving to the other provisions of the Act. Without oversimplifying the entirety of the provisions in ICWA the primary regulations follow the declaration of policy. Located in the first three paragraphs of Subchapter I (Child Custody Proceedings) under section 1911, congress made it clear that decisions made regarding the placement of Indian children are not to be made without some opportunity for tribal input or control. By having this section precede the placement preferences congress indicated that the ICWA's primary purpose was to direct who and where decisions about Indian children should be made (by the tribes in tribal courts). It is only then that regulations regarding how the decisions were to be made are presented. In furtherance of their stated policy "to promote the stability and security of Indian tribes and families" exclusive jurisdiction "as to any State over the child custody proceeding involving an Indian child who resides or is domiciled with the reservation," was given to the Indian tribes. This authority also includes situations where a child is a ward of the court regardless of the residence or domicile of the child.

When proceedings involve Indian children not domiciled or residing within a reservation, ICWA mandates that the State court shall transfer the jurisdiction to the Indian child's tribe. This transfer can be blocked by objection by either parent, declination by the tribal court or by a

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89 Id. at §1902
90 Id. at §1911(a)
finding by the state court of good cause to the contrary. Through this provision congress makes it clear that the tribes are best prepared to make decisions as to the best interests of their own children. They also affirm that in certain situations these best interests can still be advanced within the original jurisdiction receiving the case. In the event that a state court should retain jurisdiction of a case, the ICWA authorizes intervention by the tribe, as a matter of right, at any point in the proceeding. While the time allowed for this intervention might be seen as overly generous it is justified by the long history of deception faced by the Indian tribes in the attempted removal of their children.

A final section, which if applied properly, would make intervention and the transfer of jurisdiction unnecessary is titled “Social and cultural standards applicable” and is located under section 1915 “Placement of Indian children.” Section 1915 provides guidelines to be used by a state court that finds itself handling either the adoption or placement of an Indian child. The guidelines for adoptions give preference “absent good cause to the contrary” to “a member of the child’s extended family, other members of the Indian child’s tribe or other Indian families.” The preferences may be avoided with a finding of “good cause to the contrary.” This good cause must still be in accordance with the provision at §1915(d). This provision simultaneously provides the solution to the problem facing Indian child placement while also providing the opportunity for total disregard of what ICWA stands for. It provides that “the standards to be applied in meeting the preferences requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or

91 Id. at (b)
92 Id.
93 Id. at 1911(c)
94 Id. at 1915(d)
95 Id. similar provisions for temporary and foster care placement follow in the next section.
96 Id. at (a)
97 Id.
which the parent or extended family members maintain social and cultural ties. This requirement asks the state courts to do just what §1901(5) finds them guilty of not doing. The courts are supposed to understand and apply standards and values that they have historically ignored and held in contempt. While the ICWA clearly states its policy and procedures it is vulnerable to attack from those whose prejudices and racist attitudes are precisely what the Act is supposed to remedy. Once the Act became law these attacks came quickly through the courts and through legislative attempts to restrict the Act's application.

III. RESPONSES TO THE ACT

Almost immediately after the creation of the ICWA adoption advocates, state legislatures and state courts began to react. Some states had no problem incorporating the Act's provisions into their adoption and child custody regulations. Others set out to find loopholes that would permit them to avoid having to apply the Act and its subsequent recognition of tribal sovereignty.

A. The Existing Indian Family Exception

In Kansas a case involving the voluntary placement of an Indian child by his non-Indian mother resulted in the birth of the judicially created existing Indian family exception (EIF). When applied by the courts this exception enables them to not have to use the ICWA standards. The EIF continues to be the bane of ICWA's existence even to this day.

In the clear language of the ICWA there are two requirements that mandate the invocation of the Act. The child must be an Indian as defined at §1903(4) and the action must be a child custody proceeding as described at §1903(1). In fact the ICWA legislative history supports

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98 Id. at 1915(d)
decisions not to include an existing Indian family requirement. Congress rejected an earlier version of the Act that would have required, as a prerequisite for tribal court jurisdiction that an Indian child not living on a reservation have “significant contacts” with a tribe. Nevertheless, the EIF implies a third requirement that has no foundation in the Act whatsoever. In deciding whether or not to apply the ICWA standards the court may look to see if the child in question has lived or is connected to a sufficiently Indian family. The Kansas Supreme Court in re Baby Boy L upheld a lower court’s decision that the application of ICWA to a case involving the adoption consent given by a non-Indian mother over the objections of a non-custodial father who happened to be incarcerated at the time of the adoption. The child was an enrolled member of the Kiowa tribe yet the court denied the tribe’s requests for intervention. The Kansas court looked first to see if the child had developed a bond with the Indian parent. Then the court looked to see whether the child had sufficient ties to the tribal culture or reservation. The irony of the EIF is that once the courts begin making inquiries into the degree of tribal connection had by the parties they are doing that which the Act was created to prevent. The Act specifically faults the states for failing “to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”

Nevertheless, the Arizona Supreme Court was the first court after the Kansas Supreme Court to address the exception. Though the Arizona Court distinguished the holding in Baby Boy L., the application of ICWA was denied to a putative Indian father who had not acknowledged his

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101 Id.
102 Id. at 176
103 supra note 79
paternity. Looking to the definition of parent in the Act the court held that the child was not actually Indian by definition and thus refused to apply the ICWA provisions.104

Two years later the Oklahoma Supreme Court relied on the Arizona holding and the rationale from Kansas in deciding two Indian child custody cases. In the first case the application of the Act was denied for an Indian child who had lived exclusively with his non-Indian mother and thus had never resided in an Indian family.105 The second case denied a non-custodial Indian father an opportunity to invoke the Act's provisions based on his failure to financially support his daughter.106 The court found that she had not been a part of an Indian family for those six years and thus would not allow ICWA application.107

While several other jurisdictions also adopted the EIF Indiana was the next jurisdiction to further expand its application. The Indiana Supreme Court applied the EIF to an Indian mother who had voluntarily given up her child for adoption when it was five days old.108 The Indiana court focussed on the bond between the Indian parent and the child holding that five days was insufficient time to be able to say that the child was coming from an existing Indian family and refused to allow ICWA to apply. This standard pretty much gave the court the ability to apply the EIF at will because it created a nearly impossible standard for any non-custodial parent to meet.

The next evolutionary steps for the exception took place in Alabama in 1990 and in Washington in 1992. These courts moved from an inquiry into the parent-child relationships to the cultural ties between the Indian parents and the tribal culture or reservation. This expansion

104 In re Appeal in Maricopa County 667 P.2d 228 (Ariz. 1983)

105 In re Adoption of Baby Boy D. 742 P.2d 1059 (Okla. 1985)

106 In re Adoption of D.M.J. 741 P.2d 1386 (Okla. 1985)

107 Id.

108 In re Adoption of T.R.M. 525 N.E. 2d 298 (Ind. 1988)
again was without support from the provisions of the Act and was contrary to its purposes and history. In Alabama an illegitimate child who was living with its Indian father and paternal grandmother was not deemed as actually living in an Indian family because the father (though enrolled in the Cherokee Nation) did not live on the reservation and the child did not sufficiently participate in tribal customs. Meanwhile the Washington Supreme Court denied an Indian mother’s attempt to revoke her consent to adoption because she was not enrolled until after her consent had already been given. In their opinion the child was never a part of an existing Indian family and thus not protected by the Act. The Washington court did limit this application to the particular facts in the case.

B. The U.S. Supreme Court and Holyfield: ICWA Interpreted

During this period of judicial expansion only one case involving the application of the ICWA reached the U.S. Supreme Court. Although the Court never specifically mentioned the EIF its holding has survived as an affirmation and clarification of the initial purpose and history behind the ICWA. The basic facts of Holyfield involved twin boys who were eligible for membership in the Choctaw tribe. Their parents, members of the Choctaw tribe saw to it that the children were born off of the reservation so that their domicile could be claimed as “off the reservation.” The children were voluntarily given up for adoption and the Mississippi courts refused to apply ICWA using a definition of domicile from their state law. The Supreme Court set aside the Mississippi Supreme Court decree finding the “Chancery court … without jurisdiction to enter

\[\text{References:}\]

110. In re Adoption of Crews 825 P.2d 305 (Wash. 1992)
111. Id.
an adoption decree. Justice Brennan, writing the 6-3 majority opinion addressed two clear
issues in the case. Both issues revolved around the definition of the term domicile. The first
issue involved a determination of how Congress intended for the state courts to define terms not
explicitly defined within the Act. The Court held that even though the term domicile was not
statutorily defined it was not the intent of Congress to have the states define it as a matter of state
law. Adding "it was highly improbable that Congress would have intended to leave the scope
of the statute's key jurisdictional provisions to definition by state courts." The Court
acknowledged Congress' desire for uniformity in application and definition among the states.
The second issue involved a determination of the domicile of the children in this particular case
and an inquiry into how it should be determined. The Court held that the domicile of the
children should be determined according to rules of general common law and thus followed the
domicile of their mother. As none of the parties disputed that both parents were domiciled on the
reservation it was a simple step to then declare the twins domiciled on the reservation as well.
Based upon this declaration the tribal courts would have exclusive jurisdiction in the adoption
pursuant to §1911(a) of the Act.

While the core issues of the Holyfield decision were rather straightforward the explanation by
the Court of its thought processes provided some insight into other applications of the Act. The
court held that absent statutory definition it is generally assumed that the legislative purpose is
expressed by the ordinary meaning of the words used, in light of the statute's object and
policy." The Court found a clearly expressed intent for a uniform federal law of domicile for

112 Id.
113 Id.
114 Id.
115 Id.
116 Id.
117 Id. at 50
the ICWA. The Court had articulated one of the primary criticisms of the EIF without ever mentioning the exception by name. The plain language of the Act creates two threshold questions used to determine whether the Act should be applied. First, is the child in question an Indian child and second is this a child custody proceeding? At this point there is no need nor is there justification for the courts to create another exception that was not originally intended by Congress.

In the instructions that accompanied the Court’s remand of the *Holyfield* case to the tribal courts, Justice Brennan explained “the Supreme Court must defer to the expertise, wisdom, and compassion of the tribal court to fashion an appropriate remedy.” 118 This comment was directed at those who raised questions about the timeliness and potential harm to the children that might result from remanding the decision now that the twins had been allowed to bond with their adoptive family for several years. The court also emphasized “that the tribe has an interest in the child which is distinct from but on a parity with the interests of the parents... Indian children have a corresponding interest in maintaining a relationship with the tribe, even if the parents do not share that interest.” 119

C. Post- *Holyfield* Reactions

1. Judicial Responses

The reactions of the states to the *Holyfield* decision varied. Some states that had previously applied the EIF exception looked at *Holyfield* as a signal that it was time to change their philosophy. Many looked to the plain meaning of the statute rather than continuing to apply their judicially created exceptions. One of the states who explicitly cited *Holyfield* while

118 *Id.* at 1532
119 *Id.* at 1517
reversing a previous decision was South Dakota. The South Dakota Supreme Court overturned a previous application of the existing Indian family exception and ruled in favor of the "interests of the Indian child, the family and the tribe." 120 The court held that "the application of the ICWA should depend exclusively on whether an Indian child is involved, not whether the child has lived in an existing Indian family." 121 Some of the other states that also saw Holyfield as implicitly overruling the EIF include Alaska, Idaho, Michigan, Montana, Oregon, and Utah. 122 The Montana court rejected the exception preferring that "the stability and security of the tribes [be] furthered by... law." 123 The Michigan courts in deciding which line of cases to follow "prefer the view by those courts that have rejected the judicially created existing Indian family exception." 124 The Idaho Supreme Court in its rejection of the exception looked to the plain and unambiguous language of the Act holding that "Congress passed ICWA to limit state courts' power by creating mandatory protective procedures and minimum evidentiary standards that must be applied in child custody proceedings concerning Indian children. In light of the structure and nature of ICWA, it is inappropriate to use a judicially created exception to circumvent [its] mandates." 125

Not all state jurisdictions were as equally prepared to immediately fall in line after the Holyfield decision. California's present policy developed from a series of highly publicized decisions reflecting a split among the appellate districts. In re Bridget R. 126 from the Second District involved Indian parents who lived off a reservation and (following the advice of their

120 In re Baade, 462 N.W. 2d 485, 489 (S.D. 1990)
121 Id.
122 In re Adoption of T.N.F., 781 P.2d 973 (Alaska 1989); In re Baby Boy Doe, 849 P.2d 925 (Idaho 1993); In re Elliott, 554 N.W.2d 32 (Mich. 1996); In re Adoption of Riffle, 922 P.2d 510 (Mont. 1996); In re Adoption of Quinn, 845 P.2d 206 (Or. 1992); In re D.A.C., No. 950573-CA, 1997 LEXIS 17 (Ut. App. Feb. 27, 1997)
123 In re Adoption of Riffle, 922 P.2d 510 (Mont. 1996)
124 In re Elliott, 554 N.W.2d 32 (Mich. 1996)
125 In re Baby Boy Doe, 849 P.2d 925 (Idaho 1993)
lawyer) concealed their Indian heritage from the non-Indian adoptive parents. After the voluntary proceeding for adoption had commenced the court blocked the parents' desire to invalidate the adoption by raising the provisions in ICWA. The court took a major step in its attack of the ICWA claiming that absent "significant connections" with a tribe, application of the Act violated the rights guaranteed by the Fifth and Tenth Amendments.127 This constitutional attack was affirmed and cited in the holding of a subsequent case, In re Alexandria Y.128

Meanwhile the First, Third, and Fifth appellate districts have continued their belief that "judicially-created exceptions to the Indian Child Welfare Act should not be permitted."129 Ultimately, this jurisdictional split among the California courts was reconciled by the California legislature. Assembly Bill 65, an urgency measure effective September 1999 "directed the courts to strive to promote the stability and security of Indian tribes and families and to comply with ICWA in all Indian child custody proceedings, as specified." It also requires that "the Act be applied if the tribe determines that an unmarried person, who is under the age of eighteen years, is a member of the tribe or is eligible for membership and is a biological child of a member of a tribe. Such determination shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act."130 One cannot help but recognize the language of this measure as coming directly from the Act itself. In a sense the California legislature required its courts to do what ICWA had previously attempted.

In 1982 Oklahoma enacted the Oklahoma Indian Child Welfare Act (OICWA) with the express purpose of clarifying state policies and procedures as they applied to the implementation

127 Id.
130 Codified in Fam. Code §7810 and Welf. & Inst. Code §§ 305.5 and 360.6
of the federal ICWA. The OICWA was almost identical to its federal counterpart except that it included a provision requiring application of the ICWA provisions in the event that a divorce resulted in an Indian child being placed with a third party. The OICWA was later amended to prevent the use of the EIF. As amended the Act applies "regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated."33

In the 1983 holding from New Mexico v. Mescalero Apache Tribe the Supreme Court declared that "state jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law [including] the goal of promoting tribal self-government."34 The jurisdiction referred to also includes any attempts to expand or contract the provisions of federal legislation beyond its plain meaning. When the state courts apply judicially created exceptions to federal law as they have done with the EIF they directly interfere with the policy interests stated at the beginning of the Act. Nevertheless they continue to do so.

The courts that raised constitutional challenges in support of their application of the EIF overlook the fact that the Act is special in that it applies to Indian tribes who have been recognized as political rather racial classifications35 and therefore are not subject to the same congressional scrutiny. As a political classification the tribes are also entitled to treatment that is different than the states due to their sovereign status and unique relationship with the United States. They are "unique aggregations possessing attributes of sovereignty over both their

131 10 O.S. §40.1 et seq.
132 12 O.S. Ch. 2, App., Rule 8.2
133 supra note 131 at §40.3(b)
members and their territory." It is an acknowledgement of this sovereignty that the congress included in the purposes behind the Act. Finally, because of the centuries of federal policies that were aimed at tribal termination and assimilation "the protection of the integrity of Indian families is a permissible goal that is rationally tied to the fulfillment of Congress' unique guardianship obligation toward the Indians." 

2. Legislative Responses

The states have but two options before them either comply with the provisions of the Act or seek to have it amended. To abide by the provisions of the Act the state courts would also acknowledge the essential sovereign powers of the tribes to determine [and control] their own membership. By applying the plain meaning of the ICWA provisions the states help affect the goals of the Act and would help slow the removal of Indian children from their homes. The Sixth District Court of California stated it best,

"when statutory language is clear and unambiguous there is no need for construction and courts should not indulge in it. Congress has clearly defined the nature of the relationship an Indian child must have with a tribe in order to trigger application of the Act. There is no threshold requirement in the Act that the child must have been born into or be living with an existing Indian family, or must have some particular type of relationship with the tribe or his or her Indian heritage."

If the states want to change the provisions of the statute they can use legislation and the support of public opinion.

Attempts to amend the Act seem to continue as various pieces of legislation have been moving through both houses of congress since 1987. None of these proposed amendments have actually been ratified so for the moment the ICWA remains unchanged. There seems to be two

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137 In re Angus, 655 P.2d 208, 213 (Or.Ct.App. 1982)
main camps attempting to amend the ICWA. One group seems to want to restrict the Act's 
application and continues attempts to codify various forms of the existing Indian family 
exception. The other group seems to be looking tighten up the application of the Act making it 
more efficient to apply and more difficult to avoid.

Senate Bill 1976 was the first attempt at amending ICWA. It was introduced in the Senate 
Select Committee on Indian Affairs in 1987. The provision sought to limit delays by clarifying 
some of the ambiguities of application as well as strengthening tribal rights by guaranteeing 
application of the Act regardless of whether the child was a member of an existing Indian 
family.140 The amendment strongly favored tribal interests over individual rights. It included 
changes to the ICWA policy statement, application of placement preferences and the definition 
of Indian child.141 State courts would have less freedom to refuse to transfer a case and would be 
required to provide notice to tribes in more situations. Ironically the amendment, intended to 
prevent the continued removal of Indian children was labeled "pure racism"142 by the Reagan 
administration. Even though problems were acknowledged with the Act the bill never made it 
out of committee. Several years passed before another attempt to amend ICWA was made.

In 1995 Representative Deborah Pryce of Ohio introduced House Bill 1448 which would 
have limited the ICWA. An adoptive parent herself, Representative Pryce advanced the interests 
of adoptive parents and adoption agencies. Representative Pryce gave emotional testimony

140 S. 1976, 100th Cong. (1987)
141 The policy statement would read: The Congress hereby declares its intent io protect the right of Indian children to 
develop a tribal identity and to maintain ties to the Indian community within a family where their Indian identity will 
be nurtured. Placement preferences could only be avoided where the child, over the age of twelve and of sufficient 
maturity requested a different placement; or where through expert testimony, it was established that the child had 
extraordinary physical or emotional needs which could not be met through the placement preferences, and where 
after a diligent search, families within the placement preferences could not be located. The definition of Indian child 
would include "of Indian descent and is considered by an Indian tribe to be part of its community..."; if a child is an 
infant he or she is considered to be a part of a tribal community if either parent is so considered. Indian Child 
Welfare Act: Hearing Before the Senate Select Committee on Indian Affairs on S. 1976 to Amend the Indian child 
Welfare Act, 100th Cong., 2d Sess. 64 (1988) at 9-10, 24-26
before the House referring to the lower court ruling in *Bridget R.*

"Yesterday, a judge in California took [children] away from the only family they have ever known and awarded custody to a perfect stranger, the birth grandmother." Her testimony was premature because a California Court of Appeals later reversed the decision applying the existing Indian family exception. House Bill 1448 focussed primarily on the definitions of Indian and membership in a tribe. ICWA would only apply if the Indian child or Indian parent were tribal members at the initiation of the child custody proceedings. Adoption advocates believed that the bill would limit what they saw as instability in the placement system and shorten the length of litigation. Tribal advocates answered this criticism by saying that litigation would be much less lengthy and placements would be much more stable if the ICWA provisions would be applied from the beginning of the custody proceedings. The House Sub-Committee on Native American and Insular Affairs suggested that both factions "work together for a solution."

H.B. 1448 did not pass but some of its provisions were incorporated into part of the Adoption Protection Stability Act of 1996. This act was created without consultation or input from tribal advocates or any of the House Committees with jurisdiction over Indian affairs. Upon its arrival in the Senate it was met with opposition and the Clinton administration "intimated no support" feeling that it could "violate tribes' [rights to] self-governance." The act ultimately passed but only after the Senate Committee on Indian Affairs struck the section that contained the references to the EIF, ICWA and tribes. The Committee stated that "the ICWA recognizes that

142 Letter from Donald Hodel, Secretary of the Interior, to Senator Daniel K. Inouye, Chairman, Senate Select Committee on Indian Affairs (May 11, 1988) supra note 141 reprinted at 113-114
143 supra note 114
145 *Id.*
148 B. Schmidt, Adoption Bill Facing Battle Over Measure on Indians, N.Y. Times, May 8, 1996 at A19
the Federal trust responsibility and the role of Indian tribes as *parens patriae* extended to all children involved in all custody proceedings."^{149}

In July of 1996, Senator John McCain of Arizona introduced Senate Bill 1962. It was reported as a detailed compromise between tribal representatives and adoption advocates.^{150} Amongst other things the bill would require that notice be given to tribes in voluntary placement proceedings but also limited the length of time available for intervention.^{151} There were no provisions regarding the EIF yet criminal penalties were included for attorneys who participated in the concealment of a child’s or parent’s Indian ancestry.^{152} The Senate approved the bill in September 1996 but stalled in the House during the final days of the session. Right-to-life advocates joined the debate claiming that the bill would encourage abortions by those women who felt a threat to their personal control over their pregnancies. The same bill was reintroduced as S. 569 during the next session but it again failed to pass both houses.

Senator McCain has continued his efforts to ensure that any amendments to the ICWA remain true to its original purpose and involve sufficient input from all of the interested parties. During the 106th Congress S. 1213 was introduced and contained the same provisions as S. 569 and 1962. The bill was referred to the Senate Committee on Indian Affairs where it died without comment. Its demise is rather ironic especially since three of its sponsors (Senators McCain, Dominici, and Campbell) are on that Committee and Sen. Campbell is the chair.

Other legislation affecting adoptions has been enacted it remains to be seen what sort of impact it will have on the ICWA provisions. In 1998 the Uniform Child Custody Jurisdiction

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^{149} Report 104-335 accompanying S. 1962, 104th Cong. 2nd Session (1996)


^{151} *Id.*

^{152} *Id.*
and Enforcement Act\textsuperscript{153} (UCCJA) was created and made available to the states for their use. The jurisdiction of the UCCJA is based upon the “child and a contestant living in a ‘home state’ for six months.”\textsuperscript{154} Another provision, sounding very much like the EIF, provides that a “significant connection to the jurisdiction might be in the child’s best interests.”\textsuperscript{155} An optional provision extends the act’s application to Indian tribes within the state.\textsuperscript{156} To date only four states have adopted the UCCJA, Oklahoma, Nevada, Wisconsin and North Dakota. Its impact on the placement of Indian children and potential conflict with ICWA remains to be seen.

IV. The Future of Indian Child Welfare

The testimony provided by Rep. Pryce before the House of Representatives in 1995 is an example of the sort of emotional and often inaccurate statements that quite often are made regarding legislation designed to help tribes. An article in the \textit{Christian Science Monitor} titled “Tribes Dispute Adoption Without Reservation” informed its readers in 1988 that “the congressional statute [ICWA] requires tribal mothers of children with American Indian blood who want to place them for adoption to notify tribal courts first. The courts then attempt to find qualified Indian families to give them homes.”\textsuperscript{157} The article makes no mention of the possibility that the tribe might decide to place the child outside the standard preferences. Nor does it mention the situations where jurisdiction could be refused by the tribal court. Instead it sends a message that the only purpose of the Act is to give tribes absolute control over adoption proceedings. In an article printed in the \textit{Denver Rocky Mountain News} Jane Gorman, attorney of record for the \textit{Bridget R.} case stated “had the ICWA been clarified from the beginning with

\begin{itemize}
\item \textsuperscript{153} UCCJA §§101-405, 9 U.L.A. 242 (Supp. 1998)
\item \textsuperscript{154} \textit{Id.} at §3(a)(1)
\item \textsuperscript{155} \textit{Id.} at (2)
\item \textsuperscript{156} \textit{Id.} at §104
\end{itemize}
respect to adoptive placements, then perhaps challenges to Native American adoptions would not have arisen in the first place. We can only hope that Congress has the foresight to ensure that Native American children are protected and that these challenges never happen again.” The irony of this statement is that it very closely resembles what the Supreme Court said towards the end of Holyfield, “had the mandate of the ICWA been followed in 1986, of course much potential anguish might have been avoided.”\(^{158}\) Many of the objections to ICWA criticize the potential harm that its application might cause to children who have already been placed in non-Indian homes. This neglects to consider the potential harm that the Indian tribes face if the removal of their children is allowed to continue.

Chief Justice Robert Yazzie of the Navajo Nation Supreme Court once said, “ignorance is one of the greatest barriers to understanding between peoples. If we do not understand each other, if we do not know the culture or the history of each other, it is difficult to see the value of and dignity of each other’s societies.”\(^{159}\) Ignorance of the impact that the removal of Indian children has on Indian tribes continues to impede the achievement of the goals behind the ICWA. Much of this ignorance continues from those who maintain their beliefs that removal is in the best interests of Indian children.

\textit{In re Adoption of Halloway}\(^{160}\) was an adoption case involving a Navajo child heard by the Utah Supreme Court in 1986. The Utah court applied the provisions of ICWA and granted exclusive jurisdiction to the Navajo Nation Courts. In their holding they addressed the tribal interest vis-à-vis parental interests in a child. “The tribe has an interest in the child which is distinct from but on a parity with the interests of the parents. This relationship between Indian

\footnotesize{\cite{157} Curtis J. Sitomer, \textit{Tribes Dispute Adoption Without Reservation}, Christian Science Monitor, June 2, 1988, pg. 19
\cite{158} supra note 112
\cite{159} quoted by Lisa Driscoll, \textit{Tribal Courts: New Mexico’s Third Judiciary}, 32 N.M.B. Bull., Feb. 18, 1993, at A5
\cite{160} 732 P.2d 962 (Utah 1986)}
tribes and Indian children finds no parallel in other ethnic cultures found in the United States.\textsuperscript{161}

The court continued, emphasizing the importance of tribal input into the decision process as a means of protecting its own future. “Few matters are of more central interest to a tribe seeking to preserve its identity and traditions than the determination of who will have the care and custody of its children.”\textsuperscript{162}

The Utah Supreme Court remanded \textit{In re Adoption of Halloway} to the Navajo Nation Courts to be decided according to their codes and customs. Upon receiving the news of the remand, the potential adoptive mother expressed her feelings that “I don’t think it’s any good for any of them to live on the reservation. You’ve got drug abuse, alcoholism, [and] teen-age suicide down there.” Her attorney added “the Indian culture is foreign to me, and I don’t think it’s valid.”\textsuperscript{163}

These are the beliefs of the people who were to be deciding what was in the best interests of the Navajo child. This sort of disrespect and ignorance of the culture from which the child was being taken goes directly to the very reasons that ICWA was created.

The Policy on Adoption of Children, from the Navajo Nation Code “neither favors nor disfavors adoption of Navajo children by persons who are not members of the Navajo Nation, but states as its policy that each case shall be considered individually on its own merits.”\textsuperscript{164}

Taking note of the years that the child had already been with the adoptive family the Navajo Nation Family Court decided that it would be in the best interest of the child to not make any changes to the living situation. This sort of result is to be expected when the provisions of ICWA are applied after the fact. Tribal courts are forced to take into consideration the potential damage that they might inflict on a child if they remove him or her from a temporary home, even

\textsuperscript{161} \textit{id. at 969}
\textsuperscript{162} \textit{id. at 966}
if it is outside of the ICWA preferences. Those who avoid applying the Act often are rewarded for their efforts at the tribes' expense.

Misunderstanding as to the impact that is faced by Indian tribes from the many years of removal of children from their homes is not reserved to courts and prospective parents. Christine Bakeis wrote an article for the Notre Dame Journal of Legal Ethics and Public Policy in 1996 where she attacked the ICWA provisions as being in violation of individual Constitutionally guaranteed rights. She questioned the Act's recognition of the tribes' vital interest in deciding whether Indian children should be separated from their families. She also questioned whether protecting the Indian child's relationship to the tribe is really in the child's best interest. Her conclusions come from an individual perspective without any awareness of the nature of tribal families and culture. She criticized the definitions of ICWA as "so broadly framed that children who do not even know of their Indian ancestry can be subject to the rules of the ICWA." These children that she mentions are often the children of Indian parents who have lost their connection with their Indian ancestry. The definition of Indian child under section 1903(4) of the ICWA includes those who are members of an Indian tribe or are the biological children of a member of a tribe and eligible for membership. This definition is intended to close the gap that is created when a generation is removed from its cultural environment. It provides an opportunity for the child to have what was taken away from its parents. This is not without limit, the parent must be enrolled and thus it is important that the break in continuity be mended at the first generation otherwise the connection may be permanently lost. In the North...
Dakota Law Review in 1997 B.J. Jones wrote that it was "the author's experience over twelve years that many of the parents who wish to place their children outside of the tribe for placements, themselves had been reared outside of the tribe and were taught to be ashamed of their status as Indians."  

If the same sort of activity as has taken place in this country were to happen in another country it would be looked at much differently. The systematic removal of Indian children from their families has been done for many years to cause the eventual assimilation of Indian tribes into American society. Even when the official policy leaned the other direction the removal continued. According to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide "forcibly transferring children of the group to another group... with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group" constitutes genocide and is a crime under international law which [the Contracting Parties] undertake to prevent and to punish. The United States is one of the contracting parties to this provision. Nevertheless it is much easier to criticize someone else's actions than to look at your own behaviors. Australia recently apologized to the aborigine people for a campaign of removal that effected the taking of thousands of aborigine children from their homes.

V. Conclusion

The Indian Child Welfare Act was created in 1978 for the express purpose of protecting Indian children and promoting the security and stability of Indian tribes and families. It was created as an acknowledgement of the years of purposeful removal of Indian children from their homes without any consent or input from the tribes. The decisions for removal varied from

171 78 U.N.T.S. 277
172 Id. Articles I and II.
attempts at assimilation to racist notions that the children would be better off in a non-Indian environment. The Act’s success depended upon an acceptance by those who would apply its provisions of its purpose and objectives. The stability and security of Indian tribes cannot be promoted unless the Federal standards included in the Act and the placements of Indian children actually “reflect the unique values of Indian culture” as directed by the Act.

Adoption advocates have criticized the complicated provisions and lengthy adjudicatory processes that result when ICWA is applied. They often neglect to realize that the process would be much simpler if the ICWA was applied from the outset. The Act is quite simple in its directions. If the child involved is Indian and if the proceeding is a child custody proceeding as defined by the Act it applies. Even when it does apply it does not necessarily mean that a tribal court will prevent an Indian child from being placed into a non-Indian home. The Navajo Nation Code specifically adopts this policy of looking at each situation on a case by case basis. The preferences from the Act are just preferences, not mandates, but to apply the preferences the provisions must be read in their entirety. The courts and participants involved just need to become aware that the best interests of an Indian child can be met by placement within his or her own tribe. The option still exists that a child might be placed outside of the tribal setting if a sufficient connection to his or her culture can be ensured or if the tribe (the correct party to make the decision) finds good reason to do so.

If the courts continue to apply judicially created exceptions, ignoring the plain meaning of the Act they will be continuing the slow process of eroding the tribes’ stability from the inside out. This activity is pre-empted by the Act as a federal statute and is also within the definition of the crime of genocide according to the United Nations. Fortunately many states have made ICWA a part of their adoption statutes and look to its provisions when applicable. A continued

171 Supra note 1
awareness and acceptance of the tribes' interest in their children's future is necessary if the tribes' future will be protected. The United States Congress will have the continuing responsibility of ensuring that any amendments to the ICWA are consistent with its original findings and purpose.

Geronimo, looking back on his homeland after years of exile expressed it thus: "For each tribe of men Usen created He also made a home.... Thus it was in the beginning: the Apaches and their homes each created for the other by Usen himself. When they are taken from these homes they sicken and die."174 This also applies to children.

174 supra note 29 at 3