A NATION AND CULTURE'S FIGHT FOR SURVIVAL: HOW THE EXISTING INDIAN FAMILY EXCEPTION RENDERS ICWA INAPPLICABLE

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I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption court, erase all of their records and send them off to some nebulous family . . . residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think . . . they destroy him.

—As Louis La Rose (Winnebago Tribe of Nebraska)[1]

I. Introduction

Various state courts have created a judicial exception without express statutory authority known as the "Existing Indian Family" (EIF) exception to override the Indian Child Welfare Act (ICWA). The ICWA was passed to curtail the appalling rate of Indian children being removed from their families and tribes and to promote the security and stability of tribes.[2] Congress faced the following question: Can a Nation and culture survive when its children are removed?[3] Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians during Congressional hearings, stated that "[c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People."[4] Although the ICWA was enacted to promote

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[1] Trace Hentz, *ICWA and The States with Existing Indian Family Exception*, PRESSBOOKS (2016), https://stolengenerations.pressbooks.com/back-matter/timeline/.

[2] 25 U.S.C. § 1901(4)-(5) (2010); 25 U.S.C. § 1902 (2010).

[3] 25 U.S.C. § 1901(3) (2010).

[4] *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. on Indian Affs. and Pub. Lands of the House Comm. on Interior and Insular Affs.*, 95th Cong. 193 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians regarding the crisis tribes faced due to separation of Indian children from their families and tribes).

the survival of tribes, states have used the EIF exception to justify the continuous removal of Indian children from their tribes and families—the exact opposite of why the ICWA was ratified.

A survey conducted in 1969[5] indicated 25–35 percent of Indian children were placed temporarily or permanently with non-Indian families or institutions.[6] "The adoption rate of Indian children was eight times that of non-Indian children . . . [and] approximately 90% of Indian placements were in non-Indian homes."[7] In response to the disproportionate removal and adoption rate, Congress enacted the ICWA to help safeguard the future of Indian tribes and culture.[8] The ICWA establishes minimum federal standards for the removal of Indian children from their families and established that Indian children, if removed, should be placed in foster or adoptive homes that reflect the unique values of Indian culture.[9] In short, Congress recognized that Indian children are essential to a tribe's survival and that tribes should have the opportunity to determine what is best for their children.[10]

Despite the ICWA's existence and Congress's intent, states continue to remove Indian children pursuant to the EIF exception, which lacks express statutory authority and is instead a judicially created exception. The ICWA applies to Indian children.[11] However, the EIF exception has been used to avoid the ICWA in proceedings involving Indian children. The EIF exception allows state courts to acquire jurisdiction over child custody proceedings when Indian children are not part of an "existing Indian family."[12] The ICWA does not require a child be removed from an

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[5] H.R. REP. NO. 95-1386, at 9 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7531 (Congressional report from the Committee on Interior and Insular Affairs).
[6] Meg Devlin O'Sullivan, *More Destruction to These Family Ties: Native American Women, Child Welfare, and the Solution of Sovereignty*, 41 J. FAM. HIST. 19 (2015).
[7] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989).
[8] H.R. REP. 95-1386, at 9.
[9] *Id.* at 9–10.
[10] *Id.*
[11] *See infra* note 73 and accompanying text.
[12] Charmel L. Cross, *The Existing Indian Family Exception: Is It Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?*, 26 CAP. U.L. REV. 847, 849 (1997).

existing Indian family; it only requires that there be an Indian child.[13] Yet, various state courts have interpreted Congress's intent as requiring there to be an existing Indian family for the ICWA to apply.[14] As a result, state courts have created ambiguous criteria to curtail the ICWA and to remove Indian children from their families and tribes.

State courts have defined "existing Indian family" in various ways. Alabama found that a child born out of wedlock to a non-Indian mother and an Indian father, who had no contact with the child, was not a part of an Indian family environment and therefore the ICWA did not apply.[15] Kentucky determined the ICWA was not applicable when an Indian mother never contacted her child after voluntarily giving the child up for adoption, and the child was subsequently raised in a non-Indian home with no Indian culture or practices.[16] Similarly, Indiana found the ICWA was not applicable when the child was abandoned by her Indian mother five days after birth and subsequently raised in a non-Indian home.[17] Indiana determined, based on the circumstances, that no Indian family existed and applying ICWA was therefore inappropriate.[18] The EIF, although defined and applied differently in different states, has one common goal—render the ICWA inapplicable.

To understand how the EIF exception renders the ICWA inapplicable, it is critical to understand *why* states want to avoid the ICWA. Part II of this paper will provide a big-picture, historical overview of state and tribal relations and elaborate on why the ICWA was enacted as well as its effects. Part III will analyze the EIF exception by exploring how it was created, the various ways it has been applied, and its effects. Finally, Part IV will explore possible solutions to

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[13] *See id.*
[14] Wendy Therese Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 384 (1997).
[15] S.A. v. E.J.P., 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990).
[16] Rye v. Weasel, 934 S.W.2d 257, 263 (Ky. 1996).
[17] *In re* Adoption of T.R.M., 525 N.E.2d 298, 303 (Ind. 1988).
[18] *Id.*

stop the persistent removal, by use of the EIF exception, of Indian children from their families and tribes. The continuous use of the EIF exception advances the destruction of tribes. As Congress acknowledged almost 50 years ago, a Nation and culture cannot survive without its children.

II. The Indian Child Welfare Act

This section begins with a historical overview of federal and state policies that effected Indian children and their tribes. The historical policies feed into the tension, in relation to the ICWA, amongst states and tribes that exists today. Finally, this section will address the relevant statutory provisions of the ICWA in relation to the EIF exception.

A. Historical Overview of Indian Removal

Indian children have long been subject to inhumane practices and policies since the introduction of European colonists. "It has been posited that children are the most 'logical targets of a policy designed to erase one culture and replace it with another' since they are the most 'vulnerable to change and least able to resist it.'"[19] Family separation began in the 1600s with Christian missionaries who believed that separating Indian children from their tribes would lead to the Christianization and civilization of Native Americans.[20] The separation was later codified into law with the Indian Civilization Fund Act in 1819.[21] The Act provided financial support to missionary schools that intentionally promoted English, religion, and other Western morals.[22] As noted by the Commissioner of Indian Affairs in 1885, "it is cheaper to give [Indians] education than to fight them."[23]

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[19] Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 10 (1998).
[20] *Id.* at 10–11.
[21] *Id.* at 14.
[22] *Id.* at 14–15.
[23] Becky Little, *How Boarding Schools Tried to 'Kill the Indian' Through Assimilation*, HISTORY, https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation (Nov. 1, 2018).

Indian boarding schools had similar philosophies to missionary schools—assimilation.[24] The Indian Boarding School Era lasted between 1860 and 1970,[25] and Congress began federally funding the program in 1891.[26] The government intentionally withheld rations from Indian parents who refused to send their children to boarding schools.[27] Parents were soon left with a stark reality—send their children to boarding schools or let their children starve. Once Indian children arrived at boarding school, they were stripped of their identities.[28] Indian boys, whose long hair was a tradition of their forefathers, had their heads shaved.[29] All children were stripped of their clothing and belongings, which were replaced with uniforms to remove any sense of individuality.[30] The children's Indian names, which were given to them to pass along traits of honored relatives or leaders, were taken from them and replaced with first and last names of white people.[31] This era has been described as an "'ideological and psychological' war 'waged against [Indian] children.'"[32]

Starting in the 1960s and 1970s, state welfare workers began removing Indian children from their families and tribes at alarming rates.[33] State personnel pointed to poverty rates,

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[24] Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 150 (2007).
[25] Jane Burke, *The "Baby Veronica" Case: Current Implementation Problems of the Indian Child Welfare Act*, 60 WAYNE L. REV. 307, 311 (2014); Haag, *supra* note 24, at 150–54.
[26] Haag, *supra* note 24, at 152.
[27] *Id.* at 153. Congress officially codified the Bureau of Indian Affairs to withhold rations and other goods from "Indian parents or guardians who refuse or neglect to send and keep their children of proper school age in some school a reasonable portion of each year." Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 56 (2006).
[28] Curcio, *supra* note 27, at 59.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] Haag, *supra* note 24, at 151.
[33] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 735–36 (2006).

alcoholism, unemployment, and various other "issues" to justify the removal of children.[34] Patrice Kunesh noted that

> Cruelly, the very real effects of the poverty and dependence created by the reservation system, and the corresponding debilitation caused by the diseases and chronic health problems associated with poverty, were used against Indian people as evidence that they were unfit parents and as grounds for the removal of their children.[35]

Alcoholism, mixed with cultural biases, was frequently cited as a justification for removing Indian children.[36] House Reports indicate that where alcohol rates of Indian and non-Indian parents were the same, alcoholism rarely justified removal against non-Indian parents.[37] "When judging the fitness of an American Indian parent, many social workers made decisions based on white middle class norms that were not appropriate in the context of an American Indian family."[38]

In particular, social workers failed to acknowledge family dynamics associated with tribes.[39] Many Indian homes consist of extended family such as grandparents, aunts, uncles, and cousins.[40] Social workers equated leaving children in the care of extended family members with neglect, thus creating grounds for parental termination.[41] These misconceptions led to the Indian Adoption Project, a policy created by the Bureau of Indian Affairs and Child Welfare League of America that lasted from 1959 through 1967.[42] "The policy mandated that Indian children were to be adopted out to primarily non-Indian families in order to reduce the populations of Indian reservations, lower federal education costs, and address the growing demand for adoptive

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[34] *Id.*
[35] Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17, 24 (1996).
[36] H.R. REP. 95-1386, at 10 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.
[37] *Id.*
[38] Jaffke, *supra* note 33, at 735–36.
[39] H.R. REP. No. 95-1386, at 10.
[40] Graham, *supra* note 19, at 6.
[41] H.R. REP. No. 95-1386, at 10.
[42] DAVID H. GETCHES ET. AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 688 (7th ed. 2017).

children."[43] The result of the Indian Adoption Project was an additional layer of historical policies and cultural misconceptions that led to the systematic removal of Indian children and the ultimate enactment of the ICWA.

B. State and Tribal Relations Surrounding Sovereignty

States and tribes had a strained relationship before the systemic removal of Indian children and the enactment of the ICWA. The policies leading up to the ICWA and misconceptions of Indian culture, however, are part of the larger issue surrounding tribal sovereignty. "[T]he co-existence of independent sovereigns—one within the geographical borders of another or others—creates a tension in which disputes naturally arise."[44] Tribal sovereignty was first acknowledged by the Supreme Court in 1831 when Indian tribes were deemed to be "domestic dependent nations."[45] Although tribes were given this designation, Georgia refused to recognize the Court's opinion and continued to claim control over Cherokee land.[46] Four years later, in *Worcester v. Georgia*, the Court recognized tribes as sovereign and therefore found that tribes cannot be regulated by states.[47] The Court held that the federal government alone had authority in Indian territory and state law had no effect within those bounds.[48] In recognizing sovereignty, the Court noted tribes are responsible for governing their people, communities, and land.[49] Since the

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[43] *Id.*

[44] Allison Fabyanske Eklund, *When Losing Is Winning: American Indian Tribal Sovereignty Versus State Sovereignty After* Seminole Tribe v. Florida - *116 S. Ct. 1114 (1996)*, 20 HAMLINE L. REV. 125, 148 (1996).

[45] Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831) (finding that the Cherokee Nation lacked standing to sue as a foreign nation for an injunction against the State of Georgia to protect their tribal lands because they were a dependent nation).

[46] GETCHES ET. AL., *supra* note 42, at 4445.

[47] Worcester v. Georgia, 31 U.S. 515, 536 (1832), *abrogated by* Nevada v. Hicks, 544 U.S. 353 (2001).
In *Worcester*, Georgia brought suit against a non-Indian living within the Indian reservation. The non-Indian, enjoined by the Cherokee, challenged whether Georgia could impose its laws in Indian country. *Id.* at 529–31.

[48] *Id.* at 561.

[49] *Id.* (noting the federal government has authority in Indian country over certain subject matters).

Court's earliest decisions regarding tribal sovereignty, tribes and states have continually clashed over *who* governs and *what* they govern.[50]

Jurisdictional matters have also resulted in increased tension between states and tribes. Family law matters have largely been left to the states rather than the federal government.[51]

> States generally decide cases involving marriage validity, divorce grounds, adoption procedures, paternity claims, and custody standards. This opposition to considering family law issues has developed through both legislation and judicial decision-making. The federal government desires to keep family law issues under state jurisdiction because "[f]amily law is a traditional area of state regulation, and it should be kept separate from the national business of the federal courts.[52]

Tension amongst states and tribes regarding family law matters arose in 1899 in *In re Lelah-Puc-Ka-Chee*[53] when Iowa appointed a non-Indian guardian to an Indian child that lived on the reservation.[54] The federal court determined that the state lacked jurisdiction because of the child's ethnicity and residence, and therefore the guardianship had no effect.[55] Similar to the aftermath of *Worcester*, "the federal court's ruling in *Lelah-Puc-Ka-Chee* was of relative insignificance to state courts who rejected tribal sovereignty and denied independent tribal authority to the Indian nations."[56] The tension between tribes and states regarding family law matters is relevant today as some states, through use of their courts, find ways to avoid the ICWA. One of the ways states have avoided the ICWA is through the use of the judicially created exception known as the EIF

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[50] *Cherokee Nation*, 30 U.S. at 2 (whether the State of Georgia's laws applied within Cherokee territory); *Worcester*, 31 U.S. at 531 (whether the state could regulate the intercourse of non-Indian citizens in Cherokee territory); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (whether tribes have tribal sovereignty).

[51] Elizabeth MacLachlan, *Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters*, 2018 BYU L. REV. 455, 473 (2018).

[52] *Id.*

[53] Patrice Junesh-Hartman, *The Indian Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. COLO. L. REV. 131, 140 (1989) (citing *In re* Lelah-Puc-Ka-Chee, 98 F. 429 (N.D. Iowa 1899)).

[54] *In re Lelah-Puc-Ka-Chee*, 98 F. at 433.

[55] *Id.*

[56] Junesh-Hartman, *supra* note 53, at 140.

exception. To fully understand the EIF exception, an overview of the ICWA's statutory provisions is necessary.

C. Statutory Provisions of the Indian Child Welfare Act

Native women activists, who understood the cultural and familial crisis first-hand, led the charge in raising awareness about the disproportionate, systemic removal of Indian children.[57] Awareness of such removal led Indian families and tribes to the realization that this was not happening only to their tribe or only to one Indian family; it was happening to *all* tribes and *all* Indian families across the United States.[58] The Devil's Lake Sioux in North Dakota, in response to the removal of most of their children, asked the Association on American Indian Affairs for support.[59] This spring boarded awareness and eventually led to the ICWA.[60] The ICWA, which was passed in 1978, sets forth procedures that private agencies and state courts must follow when dealing with certain child custody proceedings relating to Indian children.[61]

Child custody proceedings involve foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.[62] Pursuant to 25 U.S.C. § 1903, a child custody proceeding includes the termination of parental rights, which means "any action resulting in the termination of the parent-child relationship."[63] The statutes mandate that tribes have exclusive jurisdiction over child custody proceedings regarding Indian children who either live or are domiciled within the reservation.[64] In other words, the tribe and its affiliate tribal court have control

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[57] O'Sullivan, *supra* note 6, at 19–20 (discussing how Native women began fighting adoption proceedings). Native women acknowledged the challenges in Indian country such as poverty rates and alcoholism but argued Indians are in a better position to determine the need for removal than non-Indians.
[58] Jad Abumrad, *Adoptive Couple v. Baby Girl*, MORE PERFECT (June 17, 2016) (downloaded using Spotify).
[59] O'Sullivan, *supra* note 6, at 26.
[60] *Id.* at 26–30.
[61] Gregory D. Smith, *ICWA Adoptions an Indian Child Welfare Act Primer*, 5 ACCORD, LEGAL J. FOR PRAC. 81, 86 (2016).
[62] 25 U.S.C. § 1903(1) (2010).
[63] *Id.*
[64] 25 U.S.C § 1911(a) (2010).

over custody proceedings involving Indian children who are located on the reservation. "The publicly avowed purpose of the ICWA was to end forced acculturation of Native American children into Euro-American society by recognizing a predominantly tribal jurisdiction over tribal child welfare cases."[65] Thus, Congress recognized the need for tribes to govern their own people.

In scenarios where Indian children are located off of the reservation, state courts *must* transfer the Indian child's case to the tribe unless one or both parents object.[66] If the parents object and the case remains in state court, tribes have the authority to intervene at any point in state proceedings.[67] This means the tribe, who is a third party but claims legal interest in the suit because the child is Indian, has the opportunity to participate in the child custody proceeding.[68] The justification for tribal intervention is two-fold. First, it aligns with the spirit of the ICWA as it emphasizes the tribe's interest in keeping children connected to their heritage.[69] Second, it prevents states from making ill-informed decisions to remove children based on cultural ignorance.[70] When custody proceedings involving Indian children take place in state court, active efforts must be made to "prevent the breakup of the Indian family."[71]

The ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[72] In addition, the term "parent" under the

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[65] Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 589 (1994).
[66] 25 U.S.C. § 1911(b).
[67] Under 25 U.S.C. § 1911(c), the proceedings here only include foster care placement or termination of paternal rights. This differs from "child custody proceeding" found in 25 U.S.C. § 1903(1).
[68] *A Practical Guide to the Indian Child Welfare Act: Intervention*, NAT'L INDIAN L. LIBR. (2021), https://narf.org/nill/documents/icwa/faq/intervention.html#Q1.
[69] *Id.*
[70] *Id.*
[71] 25 U.S.C. § 1912(d) (2010).
[72] 25 U.S.C. § 1903(4). "'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians." 25 U.S.C. § 1903(4).

ICWA is defined as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom."[73]

Although the definition of "parent" neither requires the parent to have sufficient connections to their tribe nor custody of the Indian child, courts have used such to justify the EIF exception. There are two exceptions to the application of the ICWA when there is a custody proceeding involving an Indian child: (1) certain juvenile offenses; and (2) divorce cases where custody is at issue.[74] Notably, nowhere in the ICWA is there a definition or exception for "Indian family" or "existing."[75] In fact, the ICWA never mentions the term "existing Indian family" at all.[76] Because there is no language, or definition, in the ICWA pertaining to an existing Indian family or what qualifies as one, the EIF exception is alarming. The EIF exception is a judicial doctrine created by state courts that have historically removed Indian children from their tribes and homes. States that have enacted the EIF exception attempt to retain control over Indian children, which is contrary to the ICWA.

III. The Existing Indian Family Exception

The spirit of the ICWA continues to be dismantled as Indian children are removed from their tribes and families through the creation, and use, of the EIF exception. Although the Bureau of Indian Affairs (BIA) issued regulations in 2016 barring application of the EIF by state courts,[77] there is considerable debate regarding whether the BIA's regulations are *actually* binding. If binding, the regulations would prevent state courts from considering whether the ICWA is applicable to Indian child custody proceedings based on "participation of the parents or the Indian

[73] 25 U.S.C. § 1903(9).
[74] 25 U.S.C. 1903(1).
[75] *In re* Adoption of T.A.W., 383 P.3d 492, 504 (2016).
[76] *Id.*
[77] GETCHES ET. AL., *supra* note 42, at 688.

child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum."[78] In essence, the various factors found in the regulations ban the EIF exception. On April 6, 2021, the Fifth Circuit ruled in *Brackeen v. Zinke*[79] that the BIA regulations are binding.[80] However, this decision will likely be appealed to the United States Supreme Court. Therefore, *Brackeen*[81] requires further discussion.

The trial court in *Brackeen*[82] reviewed a commandeering[83] challenge to the ICWA and whether the BIA had authority to issue binding regulations.[84] The court determined the ICWA was unconstitutional and that the 2016 regulations exceeded the BIA's authority.[85] The court found that the BIA, an administrative agency, violated the Constitution's non-delegation clause, which "prohibits an executive branch administrative agency from exercising legislative powers that the Constitution reserves to Congress."[86]

Although the Fifth Circuit agreed with the trial court that the BIA can issue binding regulations, a potential appeal to the United States Supreme Court leaves the constitutionality of

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[78] 25 C.F.R. § 23.103 (2016).
[79] Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021).
[80] *Id.* at 361.
[81] *Id.* at 267.
[82] Brackeen v. Zinke, 338 F. Supp. 3d 514, 519 (N.D. Tex. 2018), *rev'd*, 937 F.3d 406 (5th Cir. 2019), *rev'd en banc*, 994 F.3d 249 (5th Cir. 2021).
[83] The anti-commandeering principle is based upon the idea that Congress does not have the power to issue orders directly to the states. The Constitution grants Congress the authority to govern people, not states. Here, the plaintiff argued the ICWA as enacted by Congress required states to apply federal law to state child welfare claims. *Id.* at 538–39.
[84] *Id.* at 536–37.
[85] *Id.* at 519. The trial court found the ICWA, with regard to the placement preference requirement, violated the equal protection clause as it is a racial classification and fails under strict scrutiny. In addition, the court found the provision of the ICWA that granted tribes authority to reorder congressionally enacted placement preferences violated the non-delegation doctrine. The court also determined the anti-commandeering clause, under the Tenth Amendment, was violated as states were required to apply federal standards to state-created claims. *Id.* at 534–36.
[86] Frank E. Vandervort, *The Indian Child Welfare Act: A Brief Overview to Contextualize Current Controversies*, TURTLE TALK BLOG (Nov. 19, 2019), https://turtletalk.files.wordpress.com/2019/11/icwa-full.pdf.

the ICWA and authority of the BIA questionable. Three states[87] and seven individuals brought suit against the Government in *Brackeen*.[88] Of those three states, two still have caselaw supporting the EIF exception.[89] It follows that the states who have previously used the EIF exception or that want to use the EIF exception may do so if the BIA regulations are non-binding. Thus, it is necessary to understand the following questions: How did the EIF exception originate and how has it been implemented? What are the arguments as to its continued use and its elimination? What effect does the exception have on the ICWA?

A. Origins of the Existing Indian Family Exception

The EIF exception was created by state courts; it does not have a basis in the ICWA. "Congress enacted the ICWA to remedy abuses of state courts' traditional discretion over adoption cases involving Native American children."[90] However, state courts have used judicial activism[91] to create a loophole to the ICWA. Judge Diarmuid, a Senior Judge on the Ninth Circuit Court of Appeals, stated that "[j]udicial activism means not the mere failure to defer to political branches or to vindicate norms of predictability and uniformity; it means only the failure to do so in order to advance another, unofficial objective."[92] Through cultural misconceptions and outdated notions discussed in Part II, state courts have been able to disregard the spirit and plain language of the ICWA to retain jurisdiction of child custody proceedings involving Indian children. State courts

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[87] Texas, Louisiana, and Indiana were named parties in this litigation. Brackeen v. Haaland, 994 F.3d 249, 265 (5th Cir. 2021).
[88] *Id.*
[89] *See In re* Adoption of T.R.M., 525 N.E.2d 298, 309 (Ind. 1988); Hampton v. J.A.L., 658 So. 2d 331, 335 (La. Ct. App. 1995).
[90] Erik W. Aamot-Snapp, *When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements*, 79 MINN. L. REV. 1167, 1193 (1995).
[91] Black's Law Dictionary defines judicial activism as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents." *Judicial Activism*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[92] Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CALIF. L. REV. 1441, 1475–76 (2004).

have relied upon statutory interpretation to read into the ICWA the requirement that an Indian family be present for the ICWA to apply.[93] Their actions have reached "beyond the clear mandates of the Constitution to restrict the handiwork of the other government branches."[94] Inevitably, states and tribes have clashed over the exception, its effects on the ICWA, and its effects on tribal sovereignty.

Generally, there are two main ways the judicial exception has been justified: (1) tribal cultural, social, religious, or political activities; and (2) parental relationship with the child. The subsections that follow include examples of cases that highlight the justifications states use in avoiding the ICWA. Although state courts have arrived at the EIF exception in different ways, the outcome has remained the same—avoid the ICWA.

1. Tribal Cultural, Social, Religious, or Political Activities

Several courts have used the EIF exception upon determining an Indian child and/or Indian parent does not have sufficient cultural, social, religious, or political tribal connections. Reliance upon this category of EIF exception cases means non-Indians are once again determining what happens to Indian children—similar to the boarding school and assimilation era discussed above. State personnel are evaluating the sufficiency and "Indianness" of Indian children and Indian parents before applying the ICWA, which is contrary to Congress's intent. The ICWA applies to all Indian children—not to Indian children or Indian parents with "sufficient" cultural ties.

The Kansas Supreme Court, in *In re Adoption of Baby Boy L.*,[95] was the first court to uphold the EIF exception.[96] The ICWA was interpreted as applying *only* to Indian children that grow up

[93] Dustin C. Jones, Adoptive Couple v. Baby Girl*: The Creation of Second-Class Native American Parents Under the Indian Child Welfare Act of 1978*, 32 L. & INEQ. 421, 445 (2014).
[94] Kmiec, *supra* note 92, at 1464–65.
[95] *In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982), *overruled by In re* A.J.S., 204 P.3d 543 (Kan. 2009).
[96] *Id.* at 176.

in an Indian environment that practices tribal culture.[97] Here, a child was born to an unwed non-Indian mother and Indian father, who was incarcerated and had never cared for the child.[98] The non-Indian mother relinquished rights to the child the day the child was born.[99] Although the child was enrolled as a member of the Kiowa Tribe of Oklahoma, the child was raised by non-Indian parents that did not participate in tribal culture.[100] The ICWA was therefore inapplicable as there was no Indian family or home to preserve.[101]

The court reviewed 25 U.S.C. § 1902, which emphasizes Congress's intent to adopt minimum federal standards "for the removal of Indian children from their families."[102] In focusing on this section, the court replaced "their families" with "Indian families."[103] Thus, the court concluded that Congress enacted the ICWA to prevent the breakup of Indian families.[104] "It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultur[e] . . . ."[105]

Although the reasons for overturning *In re Adoption of Baby Boy L.* is set forth in greater detail below, other state courts have utilized the EIF exception based on a similar analysis. For example, in Kentucky, when a child resides in a non-Indian home that did not adopt tribal culture and customs as a day-to-day way of life, after the mother voluntarily gave the child up after eight months and where paternity was never established, the ICWA does not apply.[106] Thus, even when

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[97] *Id.* at 172. The Court relied heavily upon section 25 U.S.C. § 1902 of the ICWA. This section reads that "[t]he Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families . . . ." 25 U.S.C. § 1902.
[98] *Baby Boy L.*, 643 P.2d at 172.
[99] *Id.* at 174.
[100] *Id.*
[101] *Id.* at 175.
[102] 25 U.S.C. § 1902.
[103] *Baby Boy L.*, 643 P.2d at 174–75.
[104] *Id.*
[105] *Id.* at 175.
[106] Rye v. Weasel, 934 S.W.2d 257, 259–60 (Ky. 1996).

a child has an Indian parent, is a member of a recognized tribe, resided on the reservation for eight months, and speaks words and phrases in the Indian language, a child is not part of an existing Indian family.[107] In short, being Indian by birth does not equate to being part of an Indian family.[108]

State courts establish no specific time frame as to how long an Indian child must reside with Indian parents or in an Indian home to have sufficient cultural, social, or religious ties to Indian heritage. In Indiana, an Indian child who is given up for adoption at the earliest practical moment after childbirth does not qualify as having been a part of an existing Indian family.[109] "[E]xcept for the first five days after [the Indian child's] birth, her entire life of seven years to date [of lawsuit] has been spent with her non-Indian adoptive parents in a non-Indian culture." [110] Therefore, the ICWA was inapplicable as the child had never been part of an existing Indian family and did not participate in Indian culture.[111]

In interpreting Congress's intent as requiring an existing Indian family under 25 U.S.C. § 1912(d),[112] courts have not only looked to the child's cultural, social, religious, and political connection to the tribe, but also to the parents' connections.[113] Pursuant to *In re Adoption of Crews*,[114] an Indian parent that has shown no interest in their Indian heritage, and who indicates that will not change,[115] cannot be said to have sufficient connections to an Indian family.[116] As

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[107] *Id.*
[108] *Id. at* 264.
[109] *In re* of T.R.M., 525 N.E.2d 298, 303 (Ind. 1988).
[110] *Id.*
[111] *Id.*
[112] When the State has jurisdiction over an Indian child proceeding, active efforts must be made to ensure remedial and rehabilitative programs were used to prevent the breakup of Indian families. 25 U.S.C § 1912(d) (2010).
[113] *In re* Adoption of Crews, 825 P.2d 305, 308 (Wash. 1992) (en banc), *overruled by In re* Adoption of T.A.W., 383 P.3d 492 (Wash. 2016); *In re* Bridget R., 49 Cal. Rptr. 507, 520 (Cal. Ct. App. 1996), *superseded by statute*, 25 U.S.C. 1912, *as recognized in In re* Isaiah W., 175 Cal. Rptr. 3d 754 (Cal. Ct. App. 2014).
[114] *Crews*, 825 P.2d at 307–08.
[115] The Indian parent in this case stated in a deposition that she only researched her Indian heritage to reinstate parental rights. She had no previous ties to her Indian heritage and did not participate in any Indian practices or events. Further, there was no indication she would change participation level in the future. *Id.* at 308.
[116] *Id.* at 310.

recent as 2005, Missouri held that Indian parents who do not reside on the reservation and who do not have substantive ties to a specific tribe are not afforded the protections in the ICWA because there is no existing Indian family.[117] Other courts that have considered whether a child's parents are Indian enough for the ICWA to apply weighed the following factors: (1) whether the parents privately identified themselves as Indians; (2) whether the parents observe tribal customs; (3) whether the parents voted in tribal elections or participated in tribal politics; (4) whether the parents contributed to Indian charities; (5) whether the parents subscribed to Indian newsletters or periodicals; (6) whether the parents participate in Indian religious or cultural events; and (7) whether the parents maintained social contacts with other tribal members.[118] The result of cases in this category is an ambiguous set of factors used to determine whether Indian children and parents are "Indian enough" before determining whether the ICWA applies. The determination of whether an Indian child or parent is sufficiently Indian is not only ambiguous; it lacks foundation in the ICWA and is instead a judicial creation.

2. Parental Relationship with the Child

In determining whether there is an existing Indian family, courts have also looked to whether the Indian parent has, or has attempted to have, custody of the Indian child. This category of cases mostly concerns whether Indian fathers have retained *enough* custody for the ICWA to apply in parental termination cases. However, questions surrounding whether Indian mothers have adequate custody have also arisen. The ICWA does not set forth whether legal[119] or physical custody[120] is necessary in order for the ICWA to apply.[121] In fact, the ICWA uses the term custody

[117] *In re* T.C.T., 165 S.W.3d 529, 533 (Mo. Ct. App. 2005).
[118] *Bridget R.*, 49 Cal. Rptr. at 531.
[119] Legal custody involves decision making authority. *Custody*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[120] Physical custody involves caregiving authority. *Id.*
[121] *In re* Adoption of a Child of Indian Heritage, 543 A.2d 925, 937 (N.J. 1988).

broadly and in various contexts.[122] In effect, this ambiguity created a loophole to the ICWA and gave rise to this category of EIF exception cases. The loophole, however, neither aligns with the spirit nor the intent of the ICWA and is instead another power grab by states who want to avoid the ICWA.

Generally speaking, most courts fail to make a distinction between legal and physical custody. Thus, some courts have required physical custody while others only require legal custody for the Indian parent to be able to utilize the protections set forth in the ICWA. In a particularly troubling case out of Kansas that has since been overturned, it was determined that a father who never had physical custody of his child due to his incarceration could not utilize the ICWA because the child was not part of an existing Indian family.[123] The child was born in January, and on the same date of the child's birth, the non-Indian mother executed a consent for adoption.[124] The court granted the adoptive parents temporary care and custody of the child.[125] Because the father never had physical custody of the child, there could not be an existing Indian family to prevent the breakup of.[126] In Indiana, parents that retain physical custody for a period of time, however, are not automatically awarded the ICWA's protections.[127] Indian mothers who retain legal and physical custody of their children for a few days after birth do not retain physical or legal custody long enough to establish an existing Indian family.[128]

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[122] The court in *Child of Indian Heritage* noted that the phrase "custody" in the ICWA has "something of a chameleon-like quality, with its meaning changing to adapt to a particular textual context." *Id.* (comparing 25 U.S.C. § 1912(f) that "us[ed] 'custody' to refer to a parent's legal relationship with his or her child," with 25 U.S.C. § 1916 where custody "refer[s] to [the] return of physical custody of an Indian child following a vacation of adoption pursuant to § 1912.").

[123] *In re* Adoption of Baby Boy L., 643 P.2d 168, 175 (Kan. 1982), *overruled by In re* A.J.S., 204 P.3d 543 (Kan. 2009).

[124] *Id.* at 172.

[125] *Id.*

[126] *Id.* at 175.

[127] *In re* Adoption of T.R.M., 525 N.E.2d 298, 303 (Ind. 1988).

[128] *Id.*

In addition to the length of custody, the ICWA was inapplicable where the Indian parent failed to have physical custody and financially support the Indian child.[129] Full physical custody of D.M.J, an Indian child, was awarded to D.M.J.'s non-Indian mother during the 1976 divorce of the parents.[130] Seven years later, the non-Indian mother consented to the adoption of D.M.J. by a non-Indian couple, and a petition for adoption was filed.[131] The natural, Indian father attempted to use the ICWA to stop the adoption.[132] Because the Indian father failed to have physical custody of the child for nearly a decade and willfully failed to make child support payments, the ICWA did not apply because the child was not part of an existing Indian family.[133] Similarly, an Indian father cannot use the ICWA to prevent the adoption of his child when he never attempted to exercise any parental responsibilities.[134]

In Alabama, fathers who refuse to acknowledge paternity on the child's birth certificate and who minimally support the child financially cannot use the ICWA to void termination of his parental rights.[135]

> The child may be an Indian child, as defined in the act, by virtue of her biological father. However, since birth, she has either resided with her non-Indian mother or her non-Indian great-aunt and great-uncle—except for a period of four weeks when she lived with her father and paternal grandmother. The mother and father were never married and never lived together. The father never supported the mother or the child financially. The child has had minimal contact with the father. She has had no involvement in tribal activities or any participation in Indian culture. The evidence reflects that the father has had only minimal contact with the reservation. The father never exercised his parental responsibilities and never attempted to become a part of the child's life.[136]

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[129] *In re* Adoption of D.M.J., 741 P.2d 1386, 1387 (Okla. 1985), *overruled by In re* Baby Boy L., 103 P.3d 1099 (Okla. 2004).
[130] *D.M.J.*, 741 P.2d at 1387.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] S.A. v. E.J.P., 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990).
[135] *Id.*
[136] *Id.*

Where there is no acknowledgment of paternity or parental responsibilities, there is no existing Indian family to salvage or prevent the breakup of.[137] Parental responsibilities include financial support, and interestingly enough, the court acknowledges earlier in the opinion that the father made small financial contributions to the child over three years.[138] Yet, the court later states the father never supported the mother or child.[139] The court failed to address, however, what kind of contributions are adequate to establish *enough* financial support to meet the "parental responsibilities" standard. By looking at a parent's length of custody and financial support, courts have read into the ICWA arbitrary criteria to determine whether Indian parents have sufficient custody for the ICWA to apply.

Although most courts under this category have looked to the arbitrary criteria discussed above to avoid the ICWA, the New Jersey Supreme Court took a slightly different approach in carving out its EIF exception—standing.[140] Indian fathers who lack legal custody of children do not have standing under the ICWA.[141] 25 U.S.C. § 1914 provides that "any parent or Indian custodian *from whose custody such child was removed*" may petition the court to invalidate the action.[142] In this case, the Indian father's attitude surrounding the child was in dispute.[143] The biological mother claimed the father offered her $300 for an abortion, whereas the father claims he verbally acknowledged paternity to the mother and his desire to keep the child.[144] The father left to visit relatives upon the mother going into labor and did not return until one month after the mother had placed the child with the adoptive parents.[145] The father was not listed on the birth

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[137] *Id.* at 1189–90.
[138] *Id.* at 1188.
[139] *Id.* at 1189.
[140] *In re* Adoption of a Child of Indian Heritage*,* 543 A.2d 925, 937 (N.J. 1988).
[141] *Id.*
[142] 25 U.S.C. § 1914 (2010) (emphasis added).
[143] *Child of Indian Heritage,* 543 A.2d at 928.
[144] *Id.*
[145] *Id.*

certificate and never petitioned to be.[146] Neither the Indian father nor his extended family saw the child before the child's fourth birthday.[147]Therefore, the father lacked standing because he failed to acknowledge his paternity in a way that creates parental rights.[148]

Where the separation of an Indian family has since long occurred due to an Indian father abandoning his child before its birth and neither obtaining legal nor physical custody, the ICWA does not apply.[149] Relying upon 25 U.S.C. § 1912(d),[150] the Court in *Adoptive Couple v. Baby Girl*[151] held that remedial services "are intended 'to alleviate the need to *remove* the Indian child from his or her parents or Indian custodians,' not to facilitate a *transfer* of the child *to* an Indian parent."[152] Read in relation to 25 U.S.C. § 1912(e)[153]–(f),[154] remedial measures are only available to Indian parents to *continue* custody and not to Indian parents who have *never* established custody.[155] "In other words, the provision of 'remedial services and rehabilitative programs' under § 1912(d) supports the 'continued custody' that is protected by § 1912(e) and § 1912(f)."[156]

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[146] *Id.* at 936
[147] *Id.* at 928.
[148] *Id.* at 936.
[149] Adoptive Couple v. Baby Girl, 570 U.S. 637, 651–52 (2013).
[150] "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d).
[151] *Adoptive Couple*, 570 U.S. at 669. Justice Sotomayor, who dissented, argued that the majority's decision would undermine the overriding purpose of the ICWA, which was to afford parents ICWA protections.
[152] *Id.* at 652 (quoting Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979)).
[153] Foster care placement may not "be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." § 1912(e).
[154] The termination of parental rights may not "be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).
[155] *Adoptive Couple*, 570 U.S. at 652–53.
[156] *Id.*

The Indian father in *Adoptive Couple* neither supported the mother and child during pregnancy nor after the child's birth.[157] Prior to unknowingly relinquishing custody of his child, the baby went to the non-Indian adoptive home where she resided for 27 months.[158] The Court does not mention, however, the suspicious actions surrounding the parental termination. The non-Indian mother asked the father to sign termination papers six days before his deployment to Iraq.[159] The father agreed to terminate his custody because he was scared of dying during deployment and believed he was giving full custody to the mother.[160] After signing the papers, the father learned the mother had placed the child in an adoptive home.[161] It was then that he sought application of the ICWA.[162] The trial court and state Supreme Court found the ICWA applicable because it was a child custody proceeding involving an Indian child.[163] In addition, the lower courts found that the father was a "parent" pursuant to the ICWA.[164] The adoptive couple appealed, and the Supreme Court reversed.[165] When discussing why they overturned the decision, the Supreme Court elaborated that while this father was never given the opportunity to participate in remedial services, such services are not necessary when there is no Indian family unit to prevent the breakup of.

Although the Court in *Adoptive Couple* did not explicitly adopt the EIF exception like the state court in *Baby Boy L.*, the two cases are nearly identical.[166] Both cases involved un-wed, Indian fathers who never had physical custody of their children.[167] The Indian father in *Adoptive Couple*

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[157] *Id.* at 644.
[158] *Id.* at 641.
[159] Abumrad, *supra* note 58.
[160] *Id.*
[161] *Adoptive Couple*, 570 U.S. at 644–45.
[162] *Id.* at 645–46.
[163] *Id.* at 645.
[164] *Id.* at 646.
[165] *Id.* at 656.
[166] Kathleena Kruck, *The Indian Child Welfare Act's Waning Power After* Adoptive Couple v. Baby Girl, 108 NW. UNIV. L. REV. 445, 468-69 (2015).
[167] *Adoptive Couple*, 570 U.S. at 643; *In re* Adoption of Baby Boy L., 643 P.2d 168, 172 (Kan. 1982).

had abandoned the child pursuant to state law, and the Indian father in *Baby Boy L.* lacked physical custody due to incarceration.[168] Both cases involved un-wed, non-Indian mothers who consented to adoption.[169] Both courts determined that Indian fathers could not use the ICWA to prevent the involuntary adoptions of their Indian children.[170] Therefore, the Court in *Adoptive Couple* reinstated the EIF exception used in *Baby Boy L.* to override the ICWA.

In sum, this category relies upon the parental relationship with the Indian child. Indian parents who never had legal or physical custody of their child are not afforded the ICWA protections because the child and parent cannot be said to be part of an existing Indian family. Courts have upheld the validity of the exception through this category in various ways. However, the effects are the same—the ICWA does not apply unless a court's judicial, arbitrary standard is met.

B. Different Opinions Surrounding the Existing Indian Family Exception

The cases discussed above highlight the clashes amongst states and tribes surrounding the EIF exception.[171] Although the ICWA has been coined the "gold standard,"[172] Indian children are still "four times more likely to be removed by state child welfare systems than non-[Indian] children."[173] Studies estimate that 56% of Indian children in the child welfare system are adopted by non-Indian families.[174] The EIF exception contributes to the continued disproportionate removal and placement rate of Indian children. Those that oppose the EIF exception view it as an

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[168] *Adoptive Couple*, 570 U.S. at 641; *Baby Boy L.*, 643 P.2d at 173.
[169] *Adoptive Couple*, 570 U.S. at 644; *Baby Boy L.*, 643 P.2d at 172.
[170] *Adoptive Couple*, 570 U.S. at 656; *Baby Boy L.*, 643 P.2d at 182–83.
[171] MacLachlan, *supra* note 51, at 480.
[172] *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, NAT'L INDIAN CHILD WELFARE ASS'N (2018), https://www.nicwa.org/wp-content/uploads/2018/10/Setting-the-Record-Straight-2018.pdf.
[173] *Id.*
[174] *Id.*

impermissible judicial creation, whereas those that support it view it as a pre-requisite for application of the ICWA.[175]

The EIF exception has two main criticisms. First, it is in direct conflict with the spirit of the ICWA and is not found in any of the statute's text.[176] Second, the EIF exception is based on Anglo-American views of tribes.[177] The ICWA was enacted with the purpose of keeping Indian children with their tribes and families to promote the stability of tribes.[178] The ICWA acknowledges tribes' authority to govern their own people and to prevent states from overriding such authority. State courts, however, have attempted to supersede such authority by ignoring the ICWA's plain language. State courts have ignored the definition of "Indian child" set forth in the ICWA and have instead read ambiguous factors into the definition.[179] In practice, this means non-Indians are determining whether Indian children and parents are "Indian enough" before applying the ICWA. The various factors courts have read into the ICWA do not align with the intent of the statute, which is evident in the statute's definition of "Indian child."

As discussed in section II.C, the definition for "Indian child" provides a simple either/or test that emphasizes the *only* relationship requirement in the ICWA is membership.[180] This definition neither leaves room for factors such as the child's cultural, social or political ties to the tribe nor inquiry into the parent's relationship with the child. "No additional requirements can be

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[175] State in Int. of D.A.C., 933 P.2d 993, 998 (Utah Ct. App. 1997).
[176] Cheyañna L. Jaffke, *Judicial Indifference: Why Does the "Existing Indian Family" Exception to the Indian Child Welfare Act Continue to Endure in the Age of Obama?*, 38 W. ST. UNIV. L. REV. 127, 142 (2011).
[177] Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 353 (2009).
[178] 25 U.S.C. § 1902.
[179] MacLachlan, *supra* note 51, at 486.
[180] Jaffke, *supra* note 176, at 142–43.; *see supra* note 72 and accompanying text.

grafted on to the definition of 'Indian child,' because '[n]o amount of probing into what Congress "intended" can alter what Congress said, in plain English.'"[181]

The reliance upon whether a child or parent has sufficient Indian culture for the ICWA to apply is furthermore misguided in that there is not one "Indian culture."[182] "[I]n ascertaining whether a family is sufficiently 'Indian,' courts have required that the parent or child participate in a laundry list of tribal activities."[183] There are 574 federally recognized tribes in the United States, all of which are ethnically, culturally, and linguistically diverse.[184] Therefore, tribes themselves are the best situated to determine where a child or parent is "Indian"—not state courts.[185]

> Further, state courts should not be in the business of crafting lists of indicia of tribal affiliation that are devoid of any tribal input. In so doing, these states are substituting their judgment for that of the tribe and imposing an outsider view of Indian culture that may have little relevance to the tribe itself. Indeed, there is no suggestion by the court that [factors] listed are significant to the tribe's culture or to its determinations of tribal membership.[186]

State courts that utilize the EIF exception therefore interfere with tribes' rights to define membership[187] and read ambiguous factors into an unambiguous definition.[188]

The desire by states to create the judicial exception is due in large part to cultural misconceptions and the distrust of tribal courts.[189] The exception allows for non-Indian judges to determine, based on their preconceived notions, what Indian families look like.[190] Non-Indian

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[181] *Id.*
[182] Painter-Thorne, *supra* note 177, at 377.
[183] *Id.* at 377–78.
[184] *Tribal Nations and the United States: An Introduction*, NAT'L CONG. OF AM. INDIANS (Feb. 2020), https://www.ncai.org/about-tribes.
[185] Painter-Thorne, *supra* note 177, at 377.
[186] *Id.* at 378.
[187] B. J. Jones, *The Indian Child Welfare Act: In Search of A Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 429 (1997).
[188] 25 U.S.C. § 1903(4).
[189] Painter-Thorne, *supra* note 177, at 378–79.
[190] Jaffke, *supra* note 176, at 143.

judges are ill-equipped to do this, especially given the over 560 federally recognized tribes, many of whom live in the same state and have different cultural practices from one another.[191] "Moreover, the assumption that tragic outcomes will more likely occur when jurisdiction lies with tribal courts rather than with state courts bespeaks a blindness both to the values and to the level of efficiency attained by the Euro-American child welfare system."[192] The notion that tribal courts will neglect children under the ICWA defeats the purpose of the ICWA.[193]

The tribe in *Mississippi Band of Choctaw Indians v. Holyfield* used the ICWA to intervene in a state child custody proceeding involving a set of Indian twins who were domiciled on the reservation and voluntarily given up for adoption.[194] The tribe was granted exclusive jurisdiction pursuant to the ICWA and determined that the Indian children should remain with the non-Indian family.[195] The holding in *Holyfield*, although not directly dealing with the EIF exception, has been used to support and criticize the EIF exception. Those that criticize the EIF exception claim *Holyfield* confirmed states cannot create their own definitions under the ICWA.[196] The Court rejected the state's argument that state law should determine the twins' domicile and noted that 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."[197] Although the particular statement was in regard to the definition of "domicile," critics of the EIF exception argue the statement applies to all definitions in the ICWA and "should dissuade state courts from reinterpreting [the] ICWA in a

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[191] *Id.*
[192] Carriere, *supra* note 65, at 629.
[193] *Id.* at 631.
[194] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 38 (1989).
[195] Solangel Maldonado, *The Story of the Holyfield Twins:* Mississippi Band of Choctaw Indians v. Holyfield, FAM. L. STORIES 113, 121 (2008), https://turtletalk.files.wordpress.com/2016/08/family-law-stories-113-137.pdf.
[196] Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 420 (1998) (stating that "most analysts of the Act agree that '[i]f Holyfield [sic] stands for anything, it is that states cannot create their own definitions for the ICWA.'")
[197] Jones, *supra* note 187, at 409.

manner that minimizes its employment."[198] In this context, it follows that state courts should not be able to reinterpret Indian child, parent, or custody.

Proponents for the EIF exception argue *Holyfield* should either be construed narrowly or that it reinforces the EIF exception all together.[199] Alabama bypassed the holding in *Holyfield* by finding it only applied in voluntary termination proceedings, not in scenarios where Indian children never resided in "Indian" families.[200] Similarly, Louisiana applied *Holyfield* narrowly and found that it only dealt with jurisdictional issues, not the definition of Indian child.[201] Washington used the following quote from *Holyfield* to support its EIF exception: "[T]he '[r]emoval of Indian children from their cultural setting . . . seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children."[202] The court stated that it "supports our conviction that [the] ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation."[203]

Proponents of the EIF exception have relied on arguments beyond *Holyfield* to justify their holdings. Oklahoma held that the EIF exception based on lack of custody was not a judicial exception but rather something the ICWA contemplated.[204] The court reviewed the proposed 1987 amendments presented by the BIA to Congress.[205] Had the amendments passed, the ICWA would

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[198] *Id.*
[199] Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20,* In the Matter of A.J.S.*, and the Last Gasps of the Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 703 (2010).
[200] S.A. v. E.J.P., 571 So. 2d 1187, 1190 (Ala. Civ. App. 1990).
[201] Hampton v. J.A.L., 658 So. 2d 331, 335 (La. Ct. App. 1995).
[202] Lewerenz & McCoy, *supra* note 199, at 703–04.
[203] *In re* Adoption of Crews, 825 P.2d 305, 310 (Wash. 1992).
[204] *In re* S.C., 833 P.2d 1249, 1255 (Okla. 1992), *overruled by In re* Baby Boy L., 103 P.3d 1099 (Okla. 2004).
[205] *Id.* The court reviewed 133 Cong. Rec. S.1976 (daily ed. Dec. 19, 1987) (proposed amendment to 25 U.S.C. § 1903(1)).

have applied to Indian children and Indian parents regardless of whether the parent ever had custody of the child.[206] Although the amendments failed in Senate committee, the court noted that "Congress, being aware of this Court's decision in *In re D.M.J.,*[207] as well as decisions from other states using similar reasoning, has refused to change the statutory language to do away with this interpretation."[208] Thus, Oklahoma argued the EIF exception was substantiated. Proponents of the EIF exception further argue that the ICWA acknowledges the importance of tribal culture and heritage, but that those goals do not always align with the child's best interests[209]—especially when a child may be removed from a stable, non-Indian home. "[I]n practice, ICWA often harms children, by delaying or denying them placement in stable and loving homes, compelling their reunification with abusive birth parents, and mandating procedures that deprive them of the legal protections they need."[210]

Many state courts have rejected the EIF exception. Idaho, when determining a jurisdictional question pertaining to Indian children, held that the ICWA applies regardless of whether the Indian child "had never been on the reservation, with their Indian parents, or within the Indian culture."[211] Similarly, Michigan determined the EIF exception undercut the purpose of the ICWA and that it fails to consider the interests of the Indian tribes themselves.[212] Alaska determined the *only* exceptions to the ICWA are those set forth in statute—certain juvenile offenses and divorce cases where custody is at issue.[213] New York noted that "[b]ecause Congress

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206 *S.C.*, 833 P.2d at 1255.
207 *In re* Adoption of D.M.J., 741 P.2d 1386 (Okla. 1985).
208 *S.C.*, 833 P.2d at 1255.
209 Shawn L. Murphy, *The Supreme Court's Revitalization of the Dying "Existing Indian Family" Exception*, 46 MCGEORGE L. REV. 629, 655 (2014).
210 Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD'S LEGAL RTS. J. 1, 3 (2017).
211 *In re* Baby Boy Doe*,* 849 P.2d 925, 931 (Idaho 1993).
212 *In re* Elliott, 554 N.W.2d 32, 36 (Mich. Ct. App. 1996).
213 25 U.S.C. § 1903(1); A. B. M. v. M. H., 651 P.2d 1170, 1173 (Alaska 1982).

has clearly delineated the nature of the relationship between an Indian child and tribe necessary to trigger application of the Act, judicial insertion of an additional criteria for applicability is plainly beyond the intent of Congress and must be rejected . . . ."[214] The court further emphasized how the additional criterion for applicability, which is based on subjective factual determinations, required states courts to test the "Indian-ness" of Indian children and parents—"a determination that state courts are 'ill-equipped to make.'"[215]

Even courts that previously utilized the EIF exception to override the ICWA have overturned their cases. Notably, Kansas overruled *In re Adoption of Baby Boy L.*[216] and found the ICWA does not require Indian children or parents to have sufficient social, cultural, or political connections to their tribe.[217] South Dakota followed Kansas's lead and relied upon the reasoning set forth in *In re Adoption of Baby Boy L.* to overturn its previous use of the EIF exception, noting the ICWA protects Indian children and families as well as tribes.[218] Similarly, Oklahoma overturned its use of the EIF exception, which prevented Indian parents from utilizing the ICWA when they did not have physical or legal custody of the child and held that the ICWA applies to Indian children and parents regardless of custody.[219] The charge to overturn cases that previously relied upon the EIF exception in some fashion turn upon the fact that state court judges, who lack an understanding and knowledge of Indian culture, should not determine what it means to be Indian. Outsiders determining what happens to Indian children, coupled with the spirit of the ICWA and its plain language, have led some courts to conclude the EIF exception is inexcusable.

IV. Potential Solutions

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[214] *In re* Baby Boy C., 805 N.Y.S.2d 313, 323 (N.Y. App. Div. 2005).
[215] *Id.* at 324.
[216] *In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982).
[217] *In re* A.J.S., 204 P.3d 543, 546 (Kan. 2009).
[218] *In re* Adoption of Baade, 462 N.W.2d 485, 489 (S.D. 1990).
[219] *In re* Baby Boy L., 103 P.3d 1099, 1105–06 (Okla. 2004).

Non-Indian individuals have been given the reins to Indian affairs for centuries. Whether that be unequal treaties that favored non-Indians, the removal era, the boarding school era, assimilation, the Indian Adoption Project, or even the ICWA, it is critical to note the proposed solutions that follow are simply that—proposals. The solutions are merely suggestions and are built upon the notion that non-Indians should act as allies, rather than oppressors, to Indian people and tribes. Indian tribes, as sovereign nations, are equipped to handle the ICWA and all that flows from it. That said, there are three potential solutions tribes may consider with regard to the EIF exception: (1) Congress amends the ICWA to ban the EIF exception; (2) states adopt their own ICWA with protections against the EIF exception; and (3) society changes the narrative surrounding the ICWA. These potential solutions are not independent of one another and can be initiated together.

In the absence of an amendment to the ICWA, children will continue to be removed from their tribes and families under the EIF exception. Thus, Congress can amend the ICWA to ban the EIF exception. This solution would provide the most protection to tribes as the EIF exception ban would be applied uniformly across the entire United States and would prevent state courts from utilizing the EIF exception altogether.[220] Specifically, the amendment would insert new text into the ICWA to ban the EIF exception. The language of the amendment could closely follow the 2016 BIA regulation and would fit into the text of the ICWA under 25 U.S.C. § 1903(4), the definition of Indian child. As discussed in Part III, the BIA attempted to ban use of the EIF exception by providing various factors courts cannot rely on in determining whether an Indian child meets the appropriate definition.[221] The amendment would also need to include new text under 25 U.S.C.§

[220] Samuel Prim, *The Indian Child Welfare Act & the Existing Indian Family Exception: Rerouting the Trail of Tears?*, 24 L. & PSYCH. REV. 115, 123–24 (2000).
[221] *See supra* note 78 and accompanying text.

1912(d), which discusses the remedial and rehabilitative programs designed to prevent the breakup of the Indian family. The new language must contain something to the effect of "an Indian child meets the definition of 'Indian family' if the child is an 'Indian child' pursuant to 25 U.S.C. § 1903(4)." Amended text in these two locations would ban the EIF exception.

The difficulty with an amendment is the ICWA is a hot political issue—especially in the Spring 2021. As mentioned earlier, the Fifth Circuit decided an important ICWA case, and the likelihood of appeal makes future of the ICWA as a whole is uncertain. Thus, garnering congressional support to amend the ICWA will be difficult at best—especially when there are powerful lobbyists pushing for its demise.[222]

The second proposed solution, states enacting their own ICWA with a provision banning the EIF exception, would protect tribes regardless of whether the ICWA is upheld at the federal level. Various states have enacted their own ICWA,[223] most of which include additional protections beyond the federal ICWA. Iowa's ICWA provides that "[a] state court does not have discretion to determine the applicability of the federal Indian Child Welfare Act or this chapter to a child custody proceeding based upon whether an Indian child is part of an existing Indian family."[224] Minnesota's ICWA, which is called the Minnesota Indian Family Preservation Act, reads similarly to Iowa's ICWA. In Minnesota, a court cannot determine whether the ICWA is

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[222] The Goldwater Institute, which is a Republican think tank named after Barry Goldwater, has been vocal in its distain of the ICWA. The website frames the ICWA as harming Indian children by making it nearly impossible to protect, by removal, Indian children from abuse and neglect on the reservation. Further, the Goldwater Institute highlights various provisions in the ICWA and alleges the provisions are unconstitutional. As noted on the website, the Institute is "fighting in courts nationwide to ensure that Indian children have the same constitutional protections afforded their peers of other races." The Institute lists various cases in which they are involved and noted that "[t]he Institute is also fighting back against a northern California tribe that is trying to take three orphaned children from their non-Native relatives and send them to live with Native relatives, simply because of the children's ethnicity." *Ensuring Equal Protection for Native American Children: Challenging the Indian Child Welfare Act*, GOLDWATER INSTITUTE, https://goldwaterinstitute.org/indian-child-welfare-act/ (last visited Apr. 19, 2021).

[223] Twelve states have adopted their own version of the ICWA. Teresa Wiltz, *Indian Child Welfare Act Likely Headed to Supreme Court*, INDIANZ (Mar. 19, 2019), https://www.indianz.com/News/2019/03/19/stateline-indian-child-welfare-act-likel.asp.

[224] Indian Child Welfare Act, IOWA CODE § 232B.5(2) (2005).

applicable to an Indian child based upon whether the child is part of an existing Indian family or "based upon the level of contact a child has with the child's Indian tribe, reservation, society, or off-reservation community."[225]

Unlike Iowa or Minnesota, Nebraska's ICWA does not explicitly bar the EIF exception. Nebraska passed LB 566 in 2015, enacting its own ICWA.[226] This bill was proposed by Senator Colby Coash but was a cumulative effort between Mr. Coash, Nebraska tribes, the Nebraska ICWA Coalition, county attorneys, and other advocates.[227] Nebraska's ICWA emphasizes that Indian tribes have a compelling governmental interest in an Indian child regardless of whether the child is in the physical or legal custody of a parent.[228] An additional protection of tribal culture under the Nebraska ICWA is that, in the event adoptive placement is with a non-Indian family, the adoptive family must commit to enabling the child to have extended family time and to participate in Indian cultural and ceremonial events.[229] Following enactment of Nebraska's ICWA, the disproportionate removal rate of Indian children from their homes and tribes decreased.[230] Unfortunately, states that enacted their own ICWA only track the overarching removal of Indian children. State statistics neither focus explicitly on the EIF exception nor whether banning the EIF exception correlates to the decreased removal rates. Regardless, states that have enacted their own ICWAs have seen positive effects.

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[225] MINN. STAT. § 260.771(2) (1985).
[226] Becca Brune, *Working Together to Protect Native Children and Families*, NEB. APPLESEED BLOG (June 5, 2015), https://neappleseed.org/blog/19107.
[227] *Id.*
[228] NEB. REV. ST. § 43-1502 (2015) (Reissue 2016).
[229] NEB. REV. ST. § 43-1508(1)(d) (2015) (Reissue 2016).
[230] Today, Indian children in Nebraska make up one percent of the population; however, Indian children are two and a half times more likely to be in foster care. Further, Indian children are represented in foster care at a rate more than five times their proportion of the population. *The Nebraska Foster Care Review Quarterly Report*, STATE OF NEB. FOSTER CARE REV. OFF. (Mar. 1, 2021), https://nebraskalegislature.gov/FloorDocs/107/PDF/Agencies/Foster_Care_Review_Office/584_20210301-130002.pdf. Prior to the state enacting its own ICWA, Indian children made up one percent of the state's population but eight percent of total children in foster care. Robert McEwen, *Interim Study to Assess State's Compliance with the Indian Child Welfare Act*, NEB. APPLESEED BLOG (Sep. 25, 2015) https://neappleseed.org/blog/6923.

Finally, changing the narrative surrounding the ICWA will foster better state and tribal relations. Such relations will make the EIF exception moot. As noted above, there is an assumption tribes and tribal governments lack the same level of legitimacy as state courts. This is due to cultural misconceptions and biases. In addition, this viewpoint fails to take into account that the widespread poverty and dependence found on many reservations stemmed directly from federal and state policies such as the EIF exception. Better communication amongst parties and education surrounding tribal culture could bolster the relationship between states and tribes. In addition, an accurate narrative of what the ICWA does is essential.

The narrative surrounding the ICWA needs to reflect what is *actually* occurring. Tough cases[231] dominate the headlines; however, the reality is that more good than bad comes from the ICWA. Further, tribes and states have a common interest—determining what is best for the child. The narrative that irreconcilable differences exist is far from the truth and leads to harmful practices such as the EIF exception. As seen in *Holyfield*, just because a tribe retains jurisdiction over Indian children does not mean children will be kept in abusive, Indian homes.[232] It only means that tribes have the capacity and unquestioned right to choose what happens to their children. Regardless of whether Congress amendments the ICWA to ban the EIF exception or states enact their own ICWA protections, improved state and tribal relations will help all of the parties involved.

V. CONCLUSION

The ICWA was enacted to curtail the removal of Indian children from their tribes and families by allowing tribes to have jurisdiction over custody proceedings involving Indian

[231] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).
[232] *Holyfield*, 490 U.S. 30.

children; it ensured the security of tribes by allowing them to pass Indian culture down from one generation to the next. The chances of Indian survival, as noted by Calvin Isaac, are significantly reduced when Indian children are raised in non-Indian homes or denied exposure to their heritage.[233] Although some states have complied with the spirit of the ICWA, other states have created the EIF exception to avoid it altogether. The EIF exception runs afoul to the ICWA and risks a return to the pre-ICWA era, where Indian children were intentionally taken from their homes to dimmish tribal nations. To ensure the survival of Indian tribes and compliance with the ICWA, federal and state legislation should be passed to protect Indian children, their families, and tribes. The EIF exception is in direct conflict with the ICWA and threatens the future of Indian tribes everywhere.

[233] *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the Subcomm. on Indian Affs. and Public Lands of the House Comm. on Interior and Insular Affs.*, 95th Cong. 193 (1978).