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The Supreme Court's Revitalization of the Dying "Existing Indian Family" Exception

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The Supreme Court’s Revitalization of the Dying “Existing Indian Family” Exception

Shawn L. Murphy*

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I. INTRODUCTION

In 1978, Congress passed the Indian Child Welfare Act (ICWA), which was intended to prevent wholesale removal of Indian¹ children from their families after years of abusive assimilation policies.² The American historical narrative is replete with examples of forced removal of Indian children by social, political, and religious organizations for the sole purpose of westernizing and civilizing Indian tribes and children.³ ICWA, however, was not without its critics, and courts have struggled in implementing the legislation that likely exceeds Congress' enumerated powers.⁴ In trying to limit the application of ICWA to those cases that implicated the break-up of Indian families,⁵ courts adopted the “Existing Indian Family” Exception (EIFE).⁶ Indian advocacy groups have criticized the EIFE, a judicially created bar to parts or all of ICWA, and courts throughout most of the country use the EIFE infrequently.⁷ However, the decision in *Adoptive Couple v. Baby Girl*,⁸ only the second case by the Supreme Court to address ICWA, appears to finally signal the highest Court’s endorsement of the EIFE.⁹

This Comment will argue, despite claims to the contrary, that the Supreme Court endorsed a limited application of the “existing Indian family” exception in

1. This Comment uses the word “Indian,” rather than the preferred term “Native American.” The purpose for this is to avoid mixed nomenclature as the term “Indian” is used exclusively in the Indian Child Welfare Act as well as in Constitutional Jurisprudence. See U.S. CONST. art. I, § 2, cl. 3.

2. *Infra* Part II.A.

3. See, e.g., Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR, (May 12, 2008, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=16516865> (on file with the *McGeorge Law Review*) (detailing the experiences of children placed in boarding schools, sometimes forcibly, to meet quotas).

4. *Infra* Part III.

5. *Infra* Part II.D

6. *Infra* Part II.D.1.

7. *Infra* Part II.D.2.

8. In *Adoptive Couple*, the Supreme Court held that the Indian Child Welfare Act should not apply to Indian children who are voluntarily placed for adoption by a custodial parent, despite objections by a non-custodial, Indian parent. 133 S.Ct. 2552 (2013).

9. *Infra* Part IV.

the recent ruling of *Adoptive Couple*,¹⁰ signaling to lower courts that the EIFE should apply in cases that implicate a violation of Indian children’s equal protection rights. Part II explores the historical background of ICWA, examines the Act’s key provisions and explains the “existing Indian family” exception. Part II also discusses the decline of the “existing Indian family” exception across jurisdictions and state codifications of ICWA in statutory law. Part III explains the questionable constitutionality of ICWA, and explores how the language in *Adoptive Couple* illustrates these constitutional concerns and supports the need to revitalize the “existing Indian family” exception. Part IV analyzes how the Supreme Court has essentially given the green light to lower courts to use the “existing Indian family” exception. Part IV also examines how the decision in *Adoptive Couple* parallels the reasoning behind the “existing Indian family” doctrine as originally articulated by the Kansas Supreme Court in *Adoption of Baby Boy L*. Finally, this Comment concludes that, in light of the debatable legality of ICWA and the recent developments from the Supreme Court, state courts should adopt the “existing Indian family” exception.

II. BACKGROUND: WHAT IS THE INDIAN CHILD WELFARE ACT AND THE “EXISTING INDIAN FAMILY” EXCEPTION ?

This section begins by detailing the legal landscape of Indian Law jurisprudence, the historical background of ICWA and the key provisions of the Act. This section then discusses the “existing Indian family” exception and its decline. Finally, this section examines the impacts of state codifications of ICWA in statutory law.

A. History of ICWA

In 1978, the United States Congress passed the Indian Child Welfare Act¹¹ as a solution to decades of abusive state and federal assimilation policies¹² that resulted in “an alarmingly high percentage of Indian families . . . broken up by the . . . often unwarranted . . . [removal] of [Indian] children . . . by nontribal public and private agencies”¹³ One such program, considered by child welfare advocates to be an “example of enlightened adoption practice[s],” was the Indian Adoption Project (Project).¹⁴ The goal of the Project was to place

10. *Infra* Part IV.

11. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2004) [hereinafter ICWA].

12. See Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 600 (1994) (observing that European cultural bias powered assimilationist state policies to justify the removal of Indian children from their families).

13. 25 U.S.C. § 1901(4).

14. Ellen Herman, *Indian Adoption Project*, ADOPTION HIST. PROJECT (Feb. 24, 2012), <http://pages.uoregon.edu/adoption/topics/IAP.html> (on file with the *McGeorge Law Review*).

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Indian children in adoptive homes “across lines of nation, culture, and race.”¹⁵ Administered by The Child Welfare League of America and funded by the Bureau of Indian Affairs (BIA), the Project placed over 395 Indian children in non-Indian homes between 1958 and 1967.¹⁶ This program was unique at a time during the twentieth century when the philosophy of race matching dominated adoption proceedings in the United States.¹⁷

Tribes and Indian activists roundly criticized the Project as genocidal.¹⁸ In support of cultural genocide claims, members from the Association on American Indian Affairs (AAIA) testified before the United States Senate that Indian children in California were “removed from their homes and placed in adoptive homes and foster homes 6.1 times (610 percent) more often than non-Indian children”¹⁹ The AAIA also reported high removal rates of Indian children from their homes in most other states.²⁰

Acting on calls for action, Congress recognized that “there [was] no resource . . . more vital to the continued existence and integrity of Indian tribes than their children”²¹ ICWA declared that the Indian Commerce Clause gave Congress “plenary power over Indian affairs,”²² and thus justified Congressional authority to regulate state Indian child welfare proceedings.²³ States are free to adopt stronger protections for Indian children in such proceedings, and indeed many have by codifying ICWA in their state laws;²⁴ however, minimum federal standards under ICWA will always apply to Indian children, regardless of their domicile.²⁵

B. To Whom and When Does ICWA Apply?

ICWA applies to Indian children, statutorily defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Comm. on Indian Affairs, 95th Cong., 1st Sess., 549 (August 4, 1977).*

20. *See id.* at 538 (finding, for example, that in Maine the removal rate was 19 times greater, and in South Dakota the rate was 22 times greater than the rate of non-Indian children).

21. *See* 25 U.S.C. § 1901(4) (2004) (finding a high percentage of Indian child removal to non-Indian homes).

22. *Id.* § 1901(1).

23. *See generally id.* §§ 1901–1963 (delineating federal requirements for child custody proceedings, Indian family program requirements, and record keeping requirements).

24. *See, e.g.* CAL. WELF. & INST. CODE § 224 (West 2008) (adopting federal ICWA language into state law and refusing to acknowledge the EIFE, thus making California state law more protective of Indian children).

25. *See generally* 25 U.S.C. §§ 1901–1963 (delineating federal requirements for child custody proceedings, Indian family program requirements, and record keeping requirements).

(b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”²⁶

ICWA only applies to Indian children when they are the subject of a custody hearing, defined as any hearing that contemplates adoptive and pre-adoptive placements, foster care placements, or any termination of parental rights.²⁷ The Act specifically exempts itself from application in custody proceedings that are the result of divorce or parents’ legal separation.²⁸

C. What Does ICWA Provide?

ICWA is unique because it serves as a procedural jurisdictional statute²⁹ and provides statutory “minimum [f]ederal standards for the removal of Indian children from their families” and subsequent placement of the children on the basis of race.³⁰

1. ICWA as a Jurisdictional Statute

Jurisdiction of child custody proceedings under ICWA can be exclusive or concurrent.³¹ When an Indian child is domiciled on a tribe's reservation, and is either a member of that tribe or eligible for membership, that tribe has “[exclusive] jurisdiction . . . over any child custody proceeding involving [the] Indian child.”³² When the child is domiciled off the reservation, “absence of good cause to the contrary” or objections by either parent, the court must transfer Indian child custody proceedings to tribal jurisdiction.³³ The Supreme Court has interpreted the transfer requirement to mean that tribal courts have concurrent jurisdiction over any child protected under ICWA.³⁴ Additionally, “the Indian child’s tribe . . . [has] a right to intervene at any point” during a defined child custody proceeding.³⁵

26. *Id.* § 1903(4).

27. *Id.* § 1903(1).

28. *Id.*

29. *See id.* § 1911 (outlining when tribes have exclusive and concurrent jurisdiction over Indian child custody proceedings).

30. *Id.* § 1902; *see also* Joanna L. Grossman, *Solomon’s Child: How Baby Veronica Came to Be Returned Home After a Long Legal Battle*, FAM. L. BLOG (July 23, 2013), <http://verdict.justia.com/2013/07/23/solomons-child> (on file with the *McGeorge Law Review*) (“In adoption law, ICWA is unique in its focus on the rights and well-being of an ethnic or racial group as a whole, rather than on the best interests of individual children.”).

31. 25 U.S.C. § 1911(a); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989) (holding that section 1911(b) “creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on [a] reservation”).

32. 25 U.S.C. § 1911(a).

33. *Id.* § 1911(b).

34. *Holyfield*, 490 U.S. at 36.

35. 25 U.S.C. § 1911(c).

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The consequences of failing to notify the Indian child’s tribe of custody proceedings that fall under ICWA vary among jurisdictions, from invalidation of court orders to remanding proceedings in order to determine whether failure resulted in prejudice to any of the parties.³⁶ ICWA provides that any custodial parent or the child’s tribe may petition the court to invalidate any placement or termination of parental rights that violate its provisions.³⁷

2. ICWA Provides Special Protections for Indian Parents and Families

Laws regulating the voluntary termination of parental rights vary considerably across the United States.³⁸ However, ICWA provides the strongest uniform protections for Indian parents regardless of which state they reside in.³⁹ The voluntary termination of parental rights or consent to foster care placement is only valid if made in writing before a judge.⁴⁰ Additionally, the consent must be “accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.”⁴¹

Voluntary consent to “termination of parental rights . . . or adoptive placement of . . . an Indian child . . . may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption.”⁴² Furthermore, an Indian parent has up to two years after a final adoption decree to file a petition seeking to vacate the adoption due to fraud or duress.⁴³ This two-year window exceeds the typical statute of limitations requiring that parents file claims within one year.⁴⁴

A court may only involuntarily terminate parental rights relating to an Indian child if “the continued custody of the child by the parent . . . is likely to result in

36. Compare *In re Desiree F.*, 83 Cal. App. 4th 360 (Ct. App. 2000) (holding failure to give notice to the tribe was grounds to render the proceedings void) with *In re M.S.S.*, 936 P.2d 36 (Wash. Ct. App. 1997) (holding that failure to give tribal notice required remand to determine whether the proceedings were prejudiced, and if so would be found invalid).

37. 25 U.S.C. § 1914.

38. CHILD WELFARE INFO. GATEWAY, CONSENT TO ADOPTION, STATE STATUTES, 5 (2013), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/consent.pdf [hereinafter STATE STATUTES] (on file with the *McGeorge Law Review*). For example, California requires consent to be signed in the presence of an Adoption Service Provider. CAL. FAM. CODE §§ 8801.3, 8700 (West 2013). However in Idaho, consent must be signed before a judge or magistrate on the required Idaho form. IDAHO CODE ANN. § 16–1506 (2009).

39. See generally STATE STATUTES, *supra* note 38, at 8–92 (listing state statutes most of which do not require a parent to appear before a judge to effectuate voluntary consent to terminate parental rights).

40. 25 U.S.C. § 1913(a).

41. *Id.*

42. *Id.* § 1913(c).

43. *Id.* § 1913(d).

44. See, e.g. COLO. REV. STAT. § 19-5-104(7)(a) (West 2013) (allowing only ninety-one days to establish fraud in an adoption proceeding); WASH. REV. CODE ANN. § 26-33-360 (West 2005) (providing one year to petition the court to set aside an adoption).

serious emotional or physical damage.”⁴⁵ The recent Supreme Court ruling in *Adoptive Couple v. Baby Girl*, also known as “the Baby Veronica case,” limited this clause to cases where the Indian parent already has custody of the child.⁴⁶

In addition to a showing of harm from continued custody, involuntary termination of parental rights under ICWA requires a showing “that active efforts have been made to provide remedial services . . . designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”⁴⁷ Interpreting these clauses barring involuntary termination of parental rights is at the heart of the “existing Indian family” exception as decided in both *Baby Boy L.* and *Adoptive Couple*.⁴⁸

3. ICWA Protects Tribal Interests and Subsumes Individual Interests of Children in Placement Preference Decisions

Under ICWA, the tribal nations’ interests are inextricably linked to the best interests of Indian children.⁴⁹ While the provisions of ICWA focus predominantly on child custody proceedings, a desire to protect and preserve Indian culture drove the Act’s passage.⁵⁰

ICWA requires “placement . . . in . . . homes [that] . . . reflect the unique values of Indian culture.”⁵¹ In adoptive or foster care placements, ICWA gives preference to “a member of the child’s . . . family, [followed by] other members of the Indian child’s tribe, [and finally to] other Indian families.”⁵² An Indian child should be placed in a non-Indian home only if all other options yield no suitable placements.⁵³ In instances where a child cannot be placed with members of his or her tribe, ICWA mandates that the child be placed with an Indian family from any other tribal nation, regardless of cultural differences, before being placed with a non-Indian family.⁵⁴

45. 25 U.S.C. § 1912(f).

46. 133 S.Ct. 2552, 2560 (2013).

47. 25 U.S.C. § 1912(d).

48. See *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2557 (2013) (holding that the ICWA provisions barring involuntary termination of parental rights do not apply to Indian parents who never had custody of their children); *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982) (holding that the ICWA provision barring involuntary termination of rights applies only to parents who have custody of their children).

49. See 25 U.S.C. § 1901(3) (“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”).

50. See *id.* (. . . “[T]he United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”); *id.* § 1902 (“The 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 . . .”).

51. 25 U.S.C. § 1902.

52. *Id.* § 1915(a)–(b).

53. See *id.* (delineating placement preferences of Indian children).

54. *Id.*

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Notably, nothing in ICWA requires that a court consider the best interests of the Indian child when determining placement preferences.⁵⁵ As a result, states have utilized the good cause exception to these placement preferences to effectuate the best interest of children subject to ICWA.⁵⁶ Under the good cause exception, courts may refuse to follow placement preferences only where there is good cause to do so.⁵⁷ However, the lack of definition of what constitutes good cause has spawned extensive litigation.⁵⁸

D. Exception to ICWA: The Existing Indian Family Exception

"The ‘existing Indian family’ exception is" a court made doctrine that exempts "application of the ICWA" in those cases where the Indian child’s family has not “maintained a significant social, cultural, or political relationship with [their] tribe.”⁵⁹ State courts applying the EIFE rely on legislative intent,⁶⁰ reasoning that Congress enacted ICWA to prevent the breakup of Indian families.⁶¹ Where there is no Indian family to break up, either because it never existed or had already broken apart prior to the custody proceedings, courts reason that ICWA does not apply.⁶²

55. *Id.* § 1901(3); *see also id.* §§ 1915–1923 (delineating placement preference requirements for Indian children).

56. *Id.* § 1915(a). Case law amply supports this. *See, e.g., In re Adoption of F.H.*, 851 P.2d 1361, 1363–64 (Alaska 1993) (holding that the best interests of the child supports good cause to decline to follow ICWA placement preferences).

57. 25 U.S.C. § 1915(a).

58. *See id.* (stating placement preferences should apply except upon good cause, which is not defined in the Act). ICWA does not define “good cause” and courts have come to vastly differing opinions as to what constitutes good cause in declining to apply placement preferences. NATIVE AM. RIGHTS FUND, A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT 125–126 (2007), available at <http://narf.org/icwa/print/all.pdf> [hereinafter GUIDE] (on file with the *McGeorge Law Review*). Compare *In re Baby Boy Doe*, 902 P.2d 477, 487 (Idaho 1995) (upholding the trial court’s use of the best interest of the child in the good cause calculus and refusing to follow ICWA placement preferences) with *In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994) (“[A] finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child’s best interests.”).

59. Barbara Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 625 (2002).

60. *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) (holding ICWA should only apply to prevent the “removal of Indian children from an existing Indian family unit”). The holding of *Baby Boy L.* and the EIFE was recently overturned by the Kansas Supreme Court in *In re A.J.S.*, 204 P.3d 543, 544 (Kan. 2009).

61. *See* 25 U.S.C. § 1901(4) (“[A]n alarmingly high percentage of Indian families are broken up by the removal . . . of their children.”).

62. Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465, 476 (1993); *see e.g. In re Adoption of Baby Boy L.*, 643 P.2d 168, 188 (Kan. 1982) (holding ICWA does not apply because there is no Indian home to break up).

1. *History of the Existing Indian Family Exception*

The Kansas Supreme Court first recognized and articulated the EIFE in *Adoption of Baby Boy L.*⁶³ In that case, the non-Indian mother sought to place her baby with a non-Indian adoptive couple after the Indian father was incarcerated for battery, assaulting police officers, and inciting a riot.⁶⁴ Although the child was a qualified member of the Kiowa tribe, the Court concluded that the child was not raised in an Indian family, and thus ICWA did not apply because there was no Indian family to break up.⁶⁵ The Court emphasized the fact that the mother would revoke her consent for any adoption that might lead to placement in an Indian home, and would instead raise the child herself.⁶⁶ Further, because the Court decided the father did not have, nor did he ever have, custody of the child, the child was not part of an Indian family, and thus ICWA did not apply.⁶⁷

2. *Exception in Decline, But Not Dead Yet*

Of all the court decisions and interpretations of ICWA, adoption of the EIFE is the most controversial⁶⁸ and varies among jurisdictions.⁶⁹ At its zenith, just twelve states contemplated the EIFE⁷⁰, and even fewer ultimately adopted it in one form or another.⁷¹ Currently, the EIFE is on the decline, and only six states still apply it.⁷²

63. 643 P.2d 168, 175 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009) (holding ICWA should only apply to prevent the “removal of Indian children from an existing Indian family unit”).

64. *Id.* at 178–79.

65. *Id.* at 174–175, 177.

66. *Id.* at 177.

67. *Id.* at 174.

68. STEPHEN PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 303 (4th ed. 2012).

69. At one time, nearly half the states accepted the EIFE; however, currently only six states apply the EIFE. 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 a Dying Doctrine*, 36 WM. MITCHELL L. REV., 684, 686–87 (2009–2010). The states still applying the EIFE include Tennessee, Indiana, Missouri, Alabama, Kentucky, and Louisiana. *Id.* at 687 n.10.

70. States rejecting the EIFE by statute or through case law are: Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Montana, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Dakota, Utah, and Washington. Tana M. Fye, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 37 FAM. L. REP. 1352 (May 24, 2011), available at <http://www.jdsupra.com/legalnews/the-existing-indian-family-exception-to-53130/> (on file with the *McGeorge Law Review*). Illinois is curious in that sources report that the state rejected the EIFE in *In re S.S.*, 657 N.E.2d 935 (Ill. 1995), yet the majority actually failed to endorse or reject the doctrine. *See id.* at 946 (“The majority is remiss for its failure to address . . . the primary issue raised by the parties . . . i.e., the validity . . . of the existing Indian family doctrine.”).

71. States that applied the EIFE are: Alabama (*S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990)), Kentucky (*Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996)), Louisiana (*Hampton v. J.A.L.*, 658 So. 2d 331, 335 (La. Ct. App. 1995)) Tennessee (*In re Morgan*, No. 02A01- 9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997)), Washington (*In re Adoption of Crews*, 825 P.2d 305, 311 (Wash. 1992), *abrogated by* WASH. REV. CODE ANN. § 13.34.040(3) (West 2013)); Indiana (*In re Adoption of T.R.M.*, 525 N.E.2d 298,

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The U.S. Supreme Court ruling in *Mississippi Band of Choctaw Indians v. Holyfield*⁷³ created a turning point in judicial acceptance of the “existing Indian family” exception.⁷⁴ Before *Holyfield*, most courts refusing to apply the EIFE cited the congressional intent to promote tribal interests and maintain tribal membership, finding that to apply the EIFE would negate tribal interests.⁷⁵ After *Holyfield*, more courts aligned with this reasoning, and pointed to language in *Holyfield* emphasizing tribal preservation to justify invalidating the EIFE.⁷⁶

Critics of the EIFE assert that it is a bald attempt to circumvent the requirements of ICWA and impose white, middle class cultural values on Indian children and their families.⁷⁷ However, in an increasingly multi-ethnic and multi-cultural modern America, the fear of acculturation of Indians into the dominant westernized culture is no longer so simple.⁷⁸ These detractors fail to consider that white, middle class America is being subsumed through diffusionism,⁷⁹ and just because an Indian child is not being raised in an Indian home does not mean the child is being raised in a white, middle class home either.⁸⁰ The United States, through immigration and cultural diffusion, is experiencing rapid changes in

303 (Ind. 1988)), Missouri (In Interest of S.A.M., 703 S.W.2d 603, 609 (Mo. Ct. App. 1986)), Kansas (*In re Adoption of Baby Boy L.*, 643 P.2d 168, 177 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009)), South Dakota, (*Claymore v. Serr*, 405 N.W.2d 650, 654 (S.D. 1987), *abrogated by In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990)), Oklahoma (*In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1064 (Okla.1985), *abrogated by OKLA. STAT. ANN.* tit. 10, §§ 40.1,40.3 (West 2009)). California adopted the EIFE only in the Second Appellate District, which was subsequently abrogated by statute. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 516 (Cal. Ct. App. 1996), *abrogated by CAL. WELF. & INST. CODE* § 224(a)(1) (West 2008).

72. These states are: Alabama (S.A. v. E.J.P., 571 So.2d 1187, 1189 (Ala. Civ. App. 1990)), Indiana (*In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind.1988)), Missouri (*In Interest of S.A.M.*, 703 S.W.2d 603, 609 (Mo. Ct. App. 1986)), Kentucky (*Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996)), Louisiana (*Hampton v. J.A.L.*, 658 So. 2d 331, 335 (La. Ct. App. 1995)), and Tennessee (*In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997)).

73. 490 U.S. 30 (1989).

74. *Infra* Part IV.D.

75. *See, e.g.*, A.B.M. v. M.H., 651 P.2d 1170, 1172–1173 (Alaska 1982) (rejecting the “existing Indian family” exception since ICWA preserves not only family relationships, but also tribal interests).

76. *Infra* Part IV.D.2.

77. *See* Cheyanna 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, 741 (2006) (contending the abuses ICWA was passed to prevent continue with the use of the “Existing Indian Family” exception in state courts).

78. *See* John W. Berry, *Immigration, Acculturation, and Adaptation*, 46 APPLIED PSYCHOL. 5, 6 (“[T]here is now substantial evidence to document [that] . . . individuals generally act in ways that correspond to cultural influences and expectations,” and individuals change their behavior in response to dominant cultural influence).

79. Diffusionism, or cultural diffusion, is the process of one culture both shaping and being shaped by other cultures. *See* Derek H. Alderman, *Cultural Change and Diffusion: Geographic Patterns, Social Processes, and Contact Zones*, in 21ST CENTURY GEOGRAPHY: A REFERENCE HANDBOOK 123, 126 (Joseph P. Stoltman ed., 2012) (“[S]ociety . . . is characterized by diversity and multiple interests rather than being a common, unitary whole.”).

80. *See, e.g.*, U.S. DEPT. OF COMM., STATE AND COUNTY QUICKFACTS: CALIFORNIA (Dec. 17, 2013), available at <http://quickfacts.census.gov/qfd/states/06000.html> (on file with the *McGeorge Law Review*) (reporting that non-Hispanic whites only comprise 39.4% of the total California population).

societal composition,⁸¹ and the oppression that Congress designed ICWA to eliminate may be less concerning today.⁸²

III. THE UNCONSTITUTIONALITY OF ICWA AND THE "EXISTING INDIAN FAMILY" EXCEPTION AS A REMEDY

The modern trend is to reject the “existing Indian family” doctrine,⁸³ and in those states that have either statutorily rejected the EIFE or adopted ICWA through state legislation,⁸⁴ the opinion in *Adoptive Couple* is probably of little consequence.⁸⁵ States are not bound to apply the EIFE and are free to pass more restrictive laws to protect Indian family rights.⁸⁶ However, in those states that have not statutorily adopted ICWA, the Court in *Adoptive Couple* warns that constitutional violations may occur when applying those provisions implicated in the “existing Indian family” exception to situations where there is no Indian family to breakup.⁸⁷ Further, there is ample evidence to suggest that ICWA itself, with or without the “existing Indian family” exception, is unconstitutional, both as a violation of the Fourteenth Amendment and the Tenth Amendment. However, states should still adopt and apply the EIFE because it helps avoid violating the equal protection rights of Indian children, as discussed in Part A. Additionally, as discussed in Part B of this section, application of the “existing Indian family” exception provides states latitude to limit ICWA in cases where there is no existing Indian family to breakup.⁸⁸

81. See generally Alderman, *supra* note, at 79 (“[S]ociety . . . is characterized by diversity and multiple interests rather than being a common, unitary whole.”).

82. See, e.g., Elizabeth Bartholet, Race & Child Welfare: Disproportionality, Disparity, Discrimination: Re-Assessing the Facts, Re-thinking the Policy Options 8, 13–14 (July 2011) (unpublished manuscript), available at <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd-conference-papers/rdconceptpaper-final.pdf> (on file with the *McGeorge Law Review*) (arguing that low socio-economic status and the need to protect children from abuse drive children into foster care, rather than race or discrimination).

83. See *supra* Part II.D.2.

84. See, e.g., MICH. COMP. LAWS ANN. § 712B.1 (West Supp. 2013) (codifying ICWA into Michigan state law by way of the Michigan Indian Family Preservation Act).

85. See ASS’N ON AM. INDIAN AFFAIRS, A GUIDE TO THE SUPREME COURT DECISION IN ADOPTIVE COUPLE V. BABY GIRL 11–14 (2013), available at <http://www.indian-affairs.org/Analysis%20of%20Adoptive%20Couple%20v%20%20Baby%20Girl%20-%20final.pdf> [hereinafter GUIDE TO ADOPTIVE COUPLE] (on file with the *McGeorge Law Review*) (arguing the impact of *Adoptive Couple* in those states with greater protections for Indian families will likely be minimal).

86. *Id.*; See, e.g., A.B.M. v. M.H., 651 P.2d 1170, 1172–1173 (Alaska 1982) (rejecting the “existing Indian family” exception because ICWA preserves not only family relationships, but tribal interests).

87. *Infra* Part IV.E.

88. *Infra* Part IV.

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A. ICWA Violates the Equal Protection Clause Under the Fourteenth Amendment

The Equal Protection Clause affords all persons within the United States the right to equal protection under the law,⁸⁹ and all laws based on racial categories violate the Constitution unless they meet strict scrutiny.⁹⁰ Because the Supreme Court has concluded that the term “Indian” refers to a political affiliation, not an ethnic or racial group,⁹¹ some courts have concluded that laws such as ICWA are constitutional.⁹² But Congress did not pass ICWA to protect the political affiliation of Indians; Congress enacted it to protect Indian culture and families, which are generally established through familial heritage, and consequently, race.⁹³ The legal fiction that “Indian” is a political affiliation and not a racial category is further discredited in that Indian tribes do not enroll members on the basis of member agreement with the politics of the tribe, but on the basis of blood quantum and familial ancestry.⁹⁴ Even the U.S. Census Bureau defines “American Indian” as a racial category.⁹⁵

Further, the law bars state courts from changing or establishing a child’s custodial arrangement based solely on racial or ethnic reasons, because doing so violates the Equal Protection Clause.⁹⁶ Yet, ICWA requires states to place Indian children in Indian homes.⁹⁷ The California Second District Court of Appeal agrees that ICWA placement preferences are racially determined, and has held

89. U.S. CONST. amend. XIV, § 1.

90. See *Korematsu v. United States*, 323 U.S. 214, 215–16 (1944) (“It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that . . . equal protection of the laws has not been infringed.”).

91. See *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (holding that the Bureau of Indian Affairs did not violate the due process rights of non-Indian employees when it gave employment preference to Indians because “Indian” is a political affiliation).

92. See, e.g., *In re Vincent M.*, 59 Cal. Rptr. 3d 321, 335–36 (holding that ICWA does not violate the constitution because it does not classify children based on race, but upon political affiliation and eligibility for tribal membership).

93. See 25 U.S.C. § 1901(3)–(5) (2004) (finding the U.S. has an interest in protecting Indian culture, families, and tribal integrity).

94. See, e.g., *Tribal Citizenship*, CHEROKEE NATION, <http://www.cherokee.org/Services/TribalCitizenship.aspx> (last visited Jan. 2, 2014) (on file with the *McGeorge Law Review*) (“To be eligible for Cherokee Nation citizenship, individuals must provide documents connecting them to an enrolled direct ancestor who is listed on the Dawes Roll with a blood degree.”); Davis, *supra* note 62, at 469 (“Since the status of a child as an Indian under ICWA is dependent upon tribal membership, which in turn depends on racial heritage, ICWA gives sanction to racial considerations in . . . custody matters.”).

95. See KAREN R. HUMES, ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 2 (2011) (listing five racial categories of “White, Black or African American, American Indian or Alaska Native, Asian, and Native Hawaiian or Other Pacific Islander” for the 2010 census).

96. *Palmore v. Sidoti*, 466 U.S. 429, 432–34 (1984).

97. See, e.g., 25 U.S.C. § 1915(a)–(d) (2004) (requiring Indian children be placed with members of the child’s tribe or other Indian families before non-Indians).

that ICWA runs afoul of the Fourteenth Amendment without the “existing Indian family” exception, stating that:

[A]ny application of ICWA which is triggered by an Indian child’s genetic heritage, without substantial social, cultural or political affiliations between the child’s family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the Equal Protection Clause . . . [I]t is clear that ICWA’s purpose is not served by an application of the Act to children who are of Indian descent, but whose parents have no significant relationship with an Indian community. If ICWA is applied to such children, such application deprives them of equal protection of the law.⁹⁸

Because ICWA requires placement preferences based upon race, Indian children are sometimes denied the right to permanent placement and a stable environment, as the number of adoptive homes available to Indian children are fewer than those for non-Indian children.⁹⁹ Further, in cases such as *Holyfield*¹⁰⁰ and *Adoptive Couple*,¹⁰¹ Indian children can be removed from stable adoptive placements under ICWA solely on the basis of race—an unfortunate outcome not experienced by non-Indian children.¹⁰² Thus, while the legal community plays a game of semantics, concluding that “Indian” denotes a political affiliation in order to avoid constitutional concerns, tribal membership requires ancestry, which is rooted in genetic and racial ties, implicating equal protection concerns.¹⁰³ Courts should take note of *Adoptive Couple*’s concern with the potential violation of Indian children’s constitutional rights when applying ICWA to preserve tribal interests over the best interest of the child.¹⁰⁴

98. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 528 (Cal. Ct. App. 1996).

99. *See id.* at 527 (finding that Indian children have limited options compared to non-Indian children in finding homes).

100. *Infra* Part IV.D.1.

101. *Infra* Part IV.A.

102. *See* U.S.C. § 1914 (2004) (allowing invalidation of any action, including adoptive placements, that violates the requirements of sections 1911–1913).

103. *See, e.g., Tribal Citizenship, supra* note 94 (“To be eligible for Cherokee Nation citizenship, individuals must provide documents connecting them to an enrolled direct ancestor who is listed on the Dawes Roll with a blood degree.”); *see also Bridget R.*, 49 Cal. Rptr. at 527 (finding that Indian children have limited options compared to non-Indian children in finding homes).

104. *See* 133 S. Ct. 2552, 2565 (2013) (noting equal protection concerns when applying ICWA in a manner contrary to a child’s best interest).

B. ICWA Violates the Tenth Amendment

Among those states that have not statutorily adopted ICWA,¹⁰⁵ there is a strong argument that federal application of ICWA violates state sovereignty under the Tenth Amendment.¹⁰⁶ ICWA’s constitutionality in this regard rests on the congressional assertion that ICWA is a permissible regulation of Indian affairs under the Indian Commerce Clause.¹⁰⁷ Courts have interpreted the Indian Commerce Clause broadly, extending beyond the traditional definition of commerce, to include congressional plenary control over all areas of Indian affairs.¹⁰⁸ Without this overly broad definition, it is impossible to conceive how the adoption and custody of children, a power exclusively within the sphere of state control, qualifies as a commercial transaction.¹⁰⁹ As Justice Thomas laments in his concurring opinion in *Adoptive Couple*, the original construction of the Indian Commerce clause was to regulate and limit state trading with Indian tribes.¹¹⁰

However, even if Congress has plenary control over Indian affairs, it is hard to conceive of how this power extends beyond control of custody cases within tribal jurisdiction to those in state courts.¹¹¹ When Congress legislates matters that are traditionally under state control (e.g. domestic relations), there must be a substantial relationship between the law enacted (e.g. ICWA) and the enumerated power given to Congress (e.g. Indian Commerce Clause) justifying the law.¹¹² There is very little nexus between the power to regulate trade with tribes and adoption and custody proceedings involving Indian children.¹¹³ Thus, ICWA itself

105. Kentucky and Missouri, for example have not adopted ICWA statutorily. Some states have codified ICWA language into their state laws voluntarily. See, e.g., CAL. WELF. & INST. CODE § 224 (West 2008) (incorporating federal ICWA language into state law).

106. See *Adoptive Couple*, 133 S. Ct. at 2566–67 (Thomas, J., concurring) (stating that the Constitution does not permit the federal government to intrude upon state sovereignty in the area of domestic relations).

107. See 25 U.S.C. § 1901(1) (2004) (“[C]ause 3, section 8, article I of the United States Constitution provides that ‘The Congress shall have Power [t]o regulate [c]ommerce with Indian tribes’ and, through this and other constitutional authority, Congress has plenary power over Indian affairs . . .”). But see *United States v. Morrison*, 529 U.S. 598, 614 (2000) (holding that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”).

108. Marcia Zug, *Adoptive Couple v. Baby Girl: Two-And-A-Half Ways to Destroy Indian Law*, 111 MICH. L. REV. 46, 50 (2013).

109. See *Adoptive Couple*, 133 S.Ct. at 2567 (Thomas, J., concurring) (lamenting that commerce traditionally meant trade with Indian tribes, not “noneconomic activity such as the adoption of children”).

110. *Id.*

111. See 25 U.S.C. § 1911(a) (“An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation . . .”).

112. See *Morrison*, 529 U.S. at 611 (holding that a substantial nexus is required between legislation enacted and the enumerated power allowing the legislation).

113. See *Adoptive Couple*, 133 S.Ct. at 2571 (Thomas, J., concurring) (stating that commerce and tribal trade are within the nexus of the Indian Commerce Clause).

is an overreach of Congressional power that invades state sovereignty in the area of domestic relations, and courts should limit ICWA accordingly.¹¹⁴

IV. SUPREME COURT JURISPRUDENCE SUPPORTS LIMITING ICWA THROUGH USE OF THE “EXISTING INDIAN FAMILY” EXCEPTION

While most jurisdictions do not recognize the “existing Indian family” exception,¹¹⁵ the Supreme Court has never struck it down and has denied multiple petitions for certiorari to decide the matter.¹¹⁶ The failure of the Supreme Court to tackle the EIFE,¹¹⁷ combined with its recent decision in *Adoptive Couple*, compels the conclusion that the Court supports state action to limit the reach of ICWA in cases that do not implicate the break-up of an existing Indian family unit through the EIFE.¹¹⁸ Part A will explain how *Adoptive Couple* supports the “existing Indian family” exception, providing state courts the necessary authority to use the exception. Part B will explain how *Adoptive Couple* only applies to specific subsections of ICWA, and not the entire act. Part C will elucidate how *Adoptive Couple* mirrors the policy-based reasoning and analysis found in *Baby Boy L*. Part D will explain how *Holyfield* did not hold the “existing Indian family” exception invalid, and thus does not negate Supreme Court approval of the EIFE. Lastly, Part E will argue that the Court’s failure to grant certiorari to any cases challenging the “existing Indian family” exception indicates a willingness to accept the doctrine.

A. How Adoptive Couple Supports the “Existing Indian Family” Exception

Baby Boy L and *Adoptive Couple* are nearly factually identical, and the Supreme Court’s reasoning in *Adoptive Couple* closely parallels the reasoning in *Baby Boy L*. It is therefore logical to infer that *Adoptive Couple* actively endorses the application of the “existing Indian family” exception, as created in *Baby Boy L*, where a non-Indian custodial parent initiates a voluntary custody placement

114. *See id.* (stating that “application of ICWA to . . . [adoption] proceedings would be unconstitutional”).

115. *See supra* note 69 and accompanying text.

116. *See, e.g.* *Hampton v. J.A.L.*, 658 So. 2d 331 (La. Ct. App. 1995), *cert. denied*, 517 U.S. 1158 (1996) (denying review on whether the application of the EIFE is permissible); *Hoots ex rel. A.B. v. K.B.*, 663 N.W.2d 625 (N.D. 2003), *cert. denied*, 541 U.S. 972 (2004) (refusing to review whether failure to apply the EIFE violated the minor’s constitutional rights).

117. *Infra* Part IV.D; *see, e.g., Hampton*, 658 So. 2d at 331 (denying review on whether the application of the EIFE is permissible); *Hoots*, 663 N.W.2d 625 (refusing to review whether failure to apply the EIFE violated the minor’s constitutional rights).

118. *Infra* Part IV.A.2.

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I. Adoptive Couple v. Baby Girl—*Background and Factual Similarities to Baby Boy L.*

Baby Veronica, the child at the center of the custody dispute in *Adoptive Couple*, was born in 2009 to a non-Indian, Hispanic mother and a tribally enrolled Cherokee Indian father.¹¹⁹ The mother became pregnant following the couple’s engagement.¹²⁰ After the father “refused to provide any financial support” to the mother during her pregnancy, the relationship soured and the mother broke off the engagement.¹²¹ When given the option of paying child support or relinquishing his parental rights, the father opted to relinquish his rights.¹²² The mother, unable to care for the child without support, put the child up for adoption and selected a non-Indian family with whom to place the child.¹²³ Four months after the child’s birth, the father received notice of the impending adoption; he signed the papers indicating he was not contesting the adoption, though he later testified that he believed he was merely signing away his parental rights to the mother.¹²⁴

The father later contested the adoption claiming that as a member of the Cherokee Nation, ICWA provisions limiting involuntary terminations applied, and the document he signed did not satisfy the requirements of section 1913(a) effecting a voluntary relinquishment of his parental rights.¹²⁵ The Cherokee Nation, which had been unaware of the adoption proceeding prior to this point due to a misspelling of the birth father’s name, also moved to intervene.¹²⁶ Nearly twenty-seven months after the adoptive couple took Baby Veronica home as their daughter,¹²⁷ the Supreme Court of South Carolina determined that the biological father had not voluntarily relinquished his rights and ordered Baby Veronica into his custody.¹²⁸ Further, the court determined that section 1912(f), barring involuntary termination of parental rights absent a showing of “serious emotional or physical damage to the child,” applied, and that the adoptive couple failed to make such a showing.¹²⁹

The adoptive couple appealed, and the Supreme Court granted certiorari as to “[w]hether a non-custodial [Indian] parent can invoke ICWA to block an

119. 133 S.Ct. 2552, 2558 (2013).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 561 (S.C. 2012), *rev’d*, 133 S. Ct. 2552 (2013).

126. *Adoptive Couple*, 731 S.E.2d at 554–555.

127. *Adoptive Couple*, 133 S. Ct. at 2556.

128. *Adoptive Couple*, 731 S.E.2d at 567.

129. *Id.* at 564, 580.

adoption voluntarily . . . initiated by a non-Indian parent”¹³⁰ The Court assumed the father was an Indian parent under ICWA and held that even though Baby Veronica was an Indian child under the same, sections 1912(f) and 1912(d), barring involuntary termination of parental rights, did not apply where the Indian parent never had custody.¹³¹

The factual circumstances surrounding both *Baby Boy L.* and *Adoptive Couple* are nearly identical.¹³² In both cases, an unwed, non-Indian mother sought to place her baby with carefully chosen adoptive parents.¹³³ In both cases, each father was an enrolled member of a federally recognized Indian tribe in Oklahoma.¹³⁴ Neither of the fathers had custody of their children under state law—the father abandoned the child before birth in *Adoptive Couple*, and the father was incarcerated for domestic abuse at the time of birth in *Baby Boy L.*¹³⁵ And in both cases, the Indian fathers sought to block the adoptions by invoking sections 1912(f) and 1912(d) of ICWA.¹³⁶ It is not surprising then that both courts came to the same conclusion—that ICWA should not be used to block the decision by a non-Indian custodial mother to voluntarily place her baby up for adoption simply because her child has a small quantum of Indian blood.¹³⁷ Because the facts of these two cases are so analogous, *Adoptive Couple* essentially decided the same issue decided in *Baby Boy L.*—to limit certain provisions of ICWA to “existing Indian families.”¹³⁸

B. Limited Scope of the "Existing Indian Family" Exception as Applicable to Sections 1912(d) and 1912(f).

In many jurisdictions, when the “existing Indian family” exception applies, the courts have used broad language implying that the EIFE acts as a complete bar to applying any portion of ICWA.¹³⁹ Because the Supreme Court’s holding in *Adoptive Couple* applied only to sections 1912(d) and (f), the Court failed to

130. Petition for Writ of Certiorari at i, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399).

131. *Adoptive Couple*, 133 S. Ct. at 2555, 2560.

132. See *id.* at 2558–59 (detailing the factual circumstances of the case); *In re Adoption of Baby Boy L.*, 643 P.2d 168, 172–73 (Kan. 1982) *overruled by In re A.J.S.*, 204 P.3d 543, 544–45 (Kan. 2009) (detailing the factual circumstances of the case).

133. *Adoptive Couple*, 133 S. Ct. at 2558; *Baby Boy L.*, 643 P.2d at 172.

134. *Adoptive Couple*, 133 S. Ct. at 2558; *Baby Boy L.*, 643 P.2d at 172.

135. *Adoptive Couple*, 133 S. Ct. at 2558; *Baby Boy L.*, 643 P.2d at 172.

136. *Adoptive Couple*, 133 S. Ct. at 2555; *Baby Boy L.*, 643 P.2d at 175.

137. See *Adoptive Couple*, 133 S. Ct. at 2556 (stating that just because Baby Girl is 3/256 Cherokee does not mean that ICWA should apply); *Baby Boy L.*, 643 P.2d at 172 (noting that while the child is five-sixteenths Kiowa, ICWA should not be used to prevent the custodial mother from choosing adoption).

138. *Id.*

139. See, e.g., *Baby Boy L.*, 643 P.2d at 173, 176 (“We conclude the trial court was correct in its determination that ICWA, by its own terms, does not apply”); *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. 1990) (holding, without qualifying to what extent, that ICWA is not applicable).

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adopt a broad application of the “existing Indian family” exception.¹⁴⁰ However, this does not preclude the conclusion that the Court endorsed the “existing Indian family” exception given its early historical application.¹⁴¹ The “existing Indian family” exception, as cited in early cases, appears only to apply to involuntary termination of parental rights under 1912(d) and 1912(f)—the same sections at issue in *Adoptive Couple*.¹⁴²

Courts initially applied the EIFE only in cases where involuntary termination of parental rights of Indian parents were at issue, though the courts were not specific as to what parts of ICWA the EIFE applied.¹⁴³ However, the specific sections that implicate ICWA with regard to involuntary termination of parental rights are 1912(f) and 1912(d)—the very sections the Court addressed in *Adoptive Couple*.¹⁴⁴ While the language used by these courts implies the EIFE bars the application of all of ICWA, this is not a forgone conclusion, as in each case the courts limited their holding (the inapplicability of ICWA) to the facts of the case (involuntary termination of the Indian parents’ rights).¹⁴⁵

In *Baby Boy L.*, the court addressed the issue of involuntarily terminating the parental rights of the putative father—the same question sections 1912(f) and 1912(d) address.¹⁴⁶ Likewise, the Alabama Supreme Court adopted the EIFE to prevent an Indian father from invoking ICWA and terminating his right to block a voluntary adoption proceeding initiated by the mother.¹⁴⁷ The court did not specifically reference section 1912(f) or 1912(d) when terminating the father’s right to object, but these sections are implied because they are relevant to whether the father’s consent was necessary to proceed with the adoption.¹⁴⁸ The court noted that “[t]he ‘Existing Indian Family’ exception has been applied to those fact[ual] situations involving the voluntary relinquishment of an

140. See 133 S. Ct. at 2560, 2562 (2013) (holding that sections 1912(d) and (f), as well as section 1915(a), were specifically inapplicable).

141. See, e.g., *Baby Boy L.*, 643 P.2d at 176 (determining whether ICWA barred involuntary termination of parental rights).

142. 133 S. Ct. 2552 (2013).

143. See, e.g., *E.J.P.*, 571 So. 2d at 1189 (“The “Existing Indian Family” exception has been applied to those fact situations involving the voluntary relinquishment of an illegitimate Indian child by its non-Indian mother.”); *In re Adoption of D.M.J.*, 741 P.2d 1386, 1389 (Okla. 1985), *overruled by In re Baby Boy L.*, 103 P.3d 1099, 1103 (Okla. 2004) (holding ICWA does not apply where the Indian parent does not have custody, and remedial measures are not required when the family has already broken up).

144. 25 U.S.C. § 1912(d), (f) (2004); *Adoptive Couple*, 133 S. Ct. at 2559–64.

145. See *Baby Boy L.*, 643 P.2d at 175 (“[W]e are of the opinion that to apply the Act to a *factual situation such as the one before us* would be to violate the policy and intent of Congress rather than uphold them.”) (emphasis added); “[I]t was never the intent of Congress that the Act would apply to a *factual situation such as is before the court.*” (emphasis added) *Id.*

146. *Id.*; see 25 U.S.C. § 1912(d)–(f) (outlining the procedures for involuntary termination of parental rights).

147. See *E.J.P.*, 571 So. 2d at 1188 (stating “[t]he father appeal[ed] and assert[ed] that the trial court erred in refusing to follow specific procedures outlined in the [ICWA]”).

148. *Id.*

illegitimate Indian child by its non-Indian mother.”¹⁴⁹ Further, the court limited the EIFE stating, “[w]e find the facts of this case lend themselves to the application of an ‘Existing Indian Family’ exception”—that is, to involuntary terminations, which would be governed by sections 1912(f) and 1912(d).¹⁵⁰

Additionally, some early courts did specifically evaluate sections 1912(f) and 1912(d) to conclude that the EIFE applied.¹⁵¹ For example, the Missouri Supreme Court determined that the “existing Indian family” exception blocked invocation of sections 1912(f) and 1912(d) to prevent the involuntary termination of parental rights and subsequent adoption of the child where there was no custody by the Indian parent and Indian family to breakup.¹⁵²

While the “existing Indian family” exception expanded with various court interpretations to apply to custody situations beyond involuntary termination and subsequent adoption, courts did not intend that the original doctrine, as articulated in *Baby Boy L.*, apply so broadly.¹⁵³ A more limited application of the “existing Indian family” exception finds support in *Adoptive Couple*.¹⁵⁴ Thus, it is reasonable to conclude the Supreme Court has embraced the EIFE as it was originally articulated—that the “existing Indian family” exception applies to those factual situations involving the voluntary relinquishment of an illegitimate Indian child by a custodial non-Indian parent.¹⁵⁵

C. *The Policy-Based Reasoning and Analysis of Adoptive Couple Mirror Baby Boy L.*

The policy rationale driving the outcome in both *Baby Boy L.* and *Adoptive Couple* is the same—to effectuate Congress’ intent to protect Indian families.¹⁵⁶ The statement of congressional intent¹⁵⁷ prefacing ICWA provides the rationale

149. *Id.* at 1189.

150. *Id.*; see 25 U.S.C. § 1912(d)–(f) (outlining the procedures for involuntary termination of parental rights).

151. *In Interest of S.A.M.*, 703 S.W.2d 603, 607 (Mo. Ct. App. 1986) (holding section 1912(f) does not apply where the Indian father never had custody of the child).

152. *Id.*

153. See *Rye v. Weasel*, 934 S.W.2d 257, 264 (Ky. 1996) (holding the “existing Indian family” doctrine applies to bar transfer of jurisdiction to tribal court in a divorce action).

154. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2555, 2560–62 (2013) (holding sections 1912(d) and 1912(f) do not apply to block a voluntary adoption where a non-custodial Indian parent abandons the child before birth).

155. See *Adoption of Baby Boy L.*, 643 P.2d 168, 176 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543, 550 (Kan. 2009) (holding a non-custodial Indian parent cannot invoke ICWA to prevent the voluntary adoptive placement by a custodial non-Indian parent where no familial unit existed to be broken up); *Adoptive Couple*, 133 S.Ct. at 2560–62 (holding sections 1912(d) and 1912(f) do not apply to block a voluntary adoption where a non-custodial Indian parent abandons the child before birth).

156. *Adoptive Couple*, 133 S. Ct. at 2557; *Baby Boy L.*, 643 P.2d at 175.

157. 25 U.S.C. § 1902 (2004).

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behind this policy-based exception.¹⁵⁸ The Kansas Supreme Court in *Baby Boy L.* articulated and relied on this rationale stating “[a] careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes”¹⁵⁹ As in *Baby Boy L.*, *Adoptive Couple* begins its analysis with a discussion of ICWA’s purpose.¹⁶⁰ The majority opinion specifically references the importance of preventing the unwarranted “removal of Indian children from their homes,” and explicitly holds that the primary goal of the statute is “to counteract the unwarranted *removal* of Indian children from Indian *families*,” just like in *Baby Boy L.*¹⁶¹ The majority in *Adoptive Couple* came to the same conclusion, finding that the legislative intent of “the Act was primarily . . . to stem the unwarranted removal of Indian children from *intact Indian families*.”¹⁶² The Court in *Baby Boy L.* argued that Congress, as stated in ICWA, was concerned with safeguarding families from involuntary removals, but declared that “[t]hese issues are not present in an adoption proceeding instituted on the voluntary consent of a non-Indian unwed mother of an illegitimate child, where that child’s care and custody has, with the natural mother’s permission, been with non-Indian proposed adoptive parents since the child’s birth.”¹⁶³

In *Baby Boy L.*, the Court stated that it would violate the intent of Congress to apply ICWA under those factual circumstances.¹⁶⁴ This is similar to *Adoptive Couple*, where the Court articulated its belief that the provisions of ICWA do not demand the unjust result of removing a child from the only parents she has known simply because she has Indian heritage.¹⁶⁵ The Court in *Adoptive Couple* acknowledged the need to preserve Indian heritage, but felt it would violate congressional intent to put children at a “disadvantage solely because an ancestor . . . was an Indian.”¹⁶⁶

While the U.S. Supreme Court uses the word “intact” to describe which Indian families ICWA applies to, this language is nearly identical to the language used in *Baby Boy L.* to describe the “existing Indian family” exception.¹⁶⁷ “Intact”

158. See *Baby Boy L.*, 643 P.2d at 187 (finding “a statute apparently void on its face may be constitutional when limited” to an interpretation that will carry out legislative intent).

159. *Id.* at 175.

160. *Adoptive Couple*, 133 S. Ct. at 2557; *Baby Boy L.*, 643 P.2d at 175.

161. 133 S. Ct. 2552, 2557, 2561 (2013) (emphasis added).

162. *Id.* at 2561.

163. *Baby Boy L.*, 643 P.2d at 175.

164. *Id.*

165. 133 S. Ct. 2552, 2556 (2013).

166. *Id.* at 2565.

167. See *id.* at 2557, 2561 (holding that ICWA was designed to prevent the unwarranted removal of Indian children); *Baby Boy L.*, 643 P.2d at 175 (holding that ICWA is not implicated when an existing Indian family is not being broken up).

and “existing” are virtually synonymous in this context.¹⁶⁸ In *Adoptive Couple*, the majority holds that section 1912(f), barring “termination of parental rights . . . in the absence of [evidence] . . . that the *continued custody* of the child . . . is likely to result in serious emotional or physical damage,” requires the Indian parent had custody prior to termination.¹⁶⁹ The Court further stated that continued custody is defined as one that “refers to a *pre-existing* state,” or in other words, an existing familial relationship or family.¹⁷⁰ Like *Baby Boy L.*, which implicitly held that section 1912(f) barring involuntary termination should only apply where there is a “removal . . . from an *existing* Indian family unit,”¹⁷¹ *Adoptive Couple* holds that 1912(f) should only apply where there is an issue of “unwarranted *removal* of Indian children from *Indian families*.”¹⁷² Therefore, according the Supreme Court, when a non-Indian parent arranges for the adoption of a child with Indian heritage, an intact or existing Indian family is required prior to applying the involuntary termination sections of ICWA.

In determining whether an existing family exists, both *Baby Boy L.* and *Adoptive Couple* hold that ICWA does not apply when the Indian parent has not had custody under state law.¹⁷³ Like the Indian father in *Adoptive Couple*, the Indian father in *Baby Boy L.*, under state statute, did not have custody of his child at the time of birth.¹⁷⁴ Where there is no custody by the Indian parent, there is no removal from an Indian family, and thus according to *Adoptive Couple*, the “ICWA’s primary goal is not implicated” (i.e. preventing the break-up of an existing Indian family).¹⁷⁵

While the South Carolina Supreme Court dismissed the idea that the “existing Indian family” exception should apply in South Carolina,¹⁷⁶ and “summarily dismissed the position . . . that ICWA’s parental termination provision, [section 1912(f)] does not apply to the voluntary adoption of an . . . Indian child under the sole custody of a non-Indian parent (known as the ‘existing Indian family doctrine’),” the U.S. Supreme Court appears to

168. See *Adoptive Couple*, 133 S. Ct. at 2557, 2561 (holding that ICWA was designed to prevent unwarranted removal of Indian children); *Baby Boy L.*, 643 P.2d at 175 (holding that ICWA is not implicated where an existing Indian family is not being broken up).

169. 133 S. Ct. 2552, 2560 (2013).

170. See *id.* at 2560 (emphasis added) (holding that section 1912(f) of ICWA does not apply when the Indian parent never had custody of the Indian child).

171. 643 P.2d at 175 (emphasis added).

172. 133 S. Ct. 2552, 2561 (2013) (emphasis added).

173. *Baby Boy L.*, 643 P.2d at 175–76; *Adoptive Couple*, 133 S.Ct. at 2560.

174. *Baby Boy L.*, 643 P.2d at 174; *Adoptive Couple*, 133 S.Ct. at 2562.

175. *Adoptive Couple*, 133 S. Ct. at 2555, 2561; see *Baby Boy L.*, 643 P.2d at 175 (holding ICWA is not implicated where an existing Indian family is not being broken up).

176. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 558 n.17 (S.C. 2012), *rev’d*, 133 S. Ct. 2552 (2013) (“Given that its policy conflicts with the express purpose of ICWA, we take this opportunity to reject the ‘Existing Indian Family’ doctrine . . .”).

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disagree.¹⁷⁷ On appeal, it found that “ICWA’s primary goal [to prevent unwarranted removal of Indian children from Indian families] is not implicated when an Indian child’s adoption is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights.”¹⁷⁸

Baby Boy L. and *Adoptive Couple* also found that ICWA’s other parental termination provision, which requires offering remedial services prior to termination,¹⁷⁹ does not apply unless the termination of parental rights would break up an Indian family.¹⁸⁰

Section 1912(d) provides that efforts should be made to prevent the breakup of the Indian family . . . [and] reflect[s] the underlying thread that runs throughout the entire Act . . . that the Act is concerned with the removal of Indian children from an *existing Indian family* unit and the resultant breakup of the Indian family.¹⁸¹

Adoptive Couple, observing that the father had abandoned the family prior to Baby Veronica’s birth, held that where “the ‘breakup of the Indian family’ has long since occurred . . . [section] 1912(d) is inapplicable” because it is designed to prevent the breakup of existing relationships.¹⁸² Conversely, *Adoptive Couple* notes that “Indian parents who are already part of an ‘Indian family’ are provided with access to remedial services . . . under § 1912(d) so that their ‘custody’ might be ‘continued’ in a way that avoids . . . termination of parental rights under § 1912(f).”¹⁸³ Thus, where there is no existing Indian family to break up, there is no application of ICWA section 1912(d), and that is the very definition of the “existing Indian family” exception.¹⁸⁴

While the “existing Indian family” exception has been cited as a complete bar to the application of ICWA, the failure of *Adoptive Couple* to hold the same does not refute the endorsement of the EIFE.¹⁸⁵ Because the original manifestation of the EIFE focused solely on the applicability of the involuntary termination provisions, and the language and rationale of *Adoptive Couple* is nearly identical to that in cases applying the EIFE, it is rational to view *Adoptive Couple* as an endorsement of the doctrine as it was originally articulated.¹⁸⁶

177. Petition for Writ of Certiorari at 8, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2555 (2013).

178. *Adoptive Couple*, 133 S. Ct. at 2555.

179. 25 U.S.C. § 1912(d) (2004).

180. *Baby Boy L.*, 643 P.2d at 175; *Adoptive Couple*, 133 S. Ct. at 2555.

181. *Baby Boy L.*, 643 P.2d at 175.

182. 133 S. Ct. 2552, 2562 (2013).

183. *Id.* at 2563.

184. *See id.* (holding section 1912(d) only applies where the father had custody at some point); *Baby Boy L.*, 643 P.2d at 175 (holding ICWA only applies when there is an existing Indian family unit to breakup).

185. *See supra* Part IV.B

186. *Id.*

D. Holyfield Did Not Overturn the "Existing Indian Family" Exception

Many scholars and state courts interpret the Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield* to hold the "existing Indian family" exception invalid.¹⁸⁷ To justify this interpretation, they rely on the factual circumstances in the case, the Court's focus on the importance of tribal interests,¹⁸⁸ and Congressional intent to limit state discretion.¹⁸⁹ However, the Supreme Court did not grant certiorari to *Holyfield* to determine the validity of the "existing Indian family" exception, but rather to determine which court had jurisdiction over the custody proceeding at issue.¹⁹⁰ At most, the case stands for the proposition that children who are domiciled on reservations are under the jurisdiction of their tribes, and thus the "existing Indian family" exception does not apply where the state does not have jurisdiction.¹⁹¹

1. Mississippi Band of Choctaw Indians v. Holyfield: *Factual Background and the Supreme Court Analysis*

In *Holyfield*, an unwed Indian couple sought to place their twin infants in a voluntary adoptive placement.¹⁹² Both parents were "enrolled members of . . . [the] Mississippi Band of Choctaw Indians and were residents and domiciliaries of the Choctaw Reservation."¹⁹³ The parents left the reservation for the express purpose of giving birth in order to avoid application of ICWA, and subsequent tribal jurisdiction.¹⁹⁴ The couple sought to place the infants with an adoptive family of their choice without tribal intervention.¹⁹⁵ The twins were placed with the Holyfields immediately after birth, and resided with them for three years before the Supreme Court vacated the adoption and ordered their case remanded to tribal jurisdiction.¹⁹⁶

187. See B.J. JONES ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK 31 (2d ed. 2008) (stating *Holyfield* clearly repudiated the "existing Indian family" exception); GUIDE, *supra* note 58 at 4 (claiming "Holyfield . . . implicitly rejected the EIFE"); *In re Adoption of Baade*, 462 N.W.2d 485, 489-490 (N.D. 1990) (citing *Holyfield* to overturn the "existing Indian family" exception in North Dakota).

188. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 58 (1989) (reasoning that the intent of Congress was "to preserve tribal sovereignty over the domestic relations of tribe members").

189. *Id.* at 45 (reasoning that the purpose of ICWA is to "make clear that in certain situations the state courts d[o] not have jurisdiction over [Indian] child custody proceedings").

190. *Id.* at 42 (declaring the sole issue was whether the children "were 'domiciled' on the reservation for the purpose of determining which court should have jurisdiction).

191. *Id.* at 53.

192. *Id.* at 37-38.

193. *Id.* at 37.

194. *Id.* at 39.

195. *Id.*

196. *Id.* at 53.

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The sole issue on appeal was whether the twins were domiciled on the reservation at birth, even though they were not born on tribal land.¹⁹⁷ The Holyfields argued that the twins were not domiciled on the reservation, as they had never physically resided there, and thus the state court had jurisdiction over the matter.¹⁹⁸ The Supreme Court disagreed and held that because the mother was domiciled on the reservation at the time of the birth, so were the twins.¹⁹⁹ The Court reasoned that “[s]ince most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents . . . even though they themselves had never been there.”²⁰⁰

2. *Erroneous Reliance on Holyfield to Justify the Rejection of the “Existing Indian Family” Exception*

The *Holyfield* Court vacated the adoption of two twin Indian babies, even though they had never been raised with an Indian family and had never lived on a reservation.²⁰¹ Some scholars see this as striking down the “existing Indian family” exception.²⁰²

This interpretation is flawed, however, because it fails to consider the real issue of jurisdiction that was before the court.²⁰³ Furthermore, portions of ICWA can apply even when the “existing Indian family” exception blocks invocation of sections 1912(f) and 1912(d).²⁰⁴

Courts citing *Holyfield* to strike down the “existing Indian family” exception rely not only on the factual circumstances of the case, but also on the language in *Holyfield* emphasizing Congressional intent to protect the interests of the tribes.²⁰⁵ For example, South Dakota, which had previously endorsed the “existing Indian

197. *Id.* at 42.

198. *Id.* at 39.

199. *Id.* at 48–49.

200. *Id.*

201. *Id.* at 53; see also Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 433–434 (1997–1998) (discussing how state courts use *Holyfield* to justify striking down the “existing Indian family” exception).

202. See GUIDE, *supra* note 58 at 4 (concluding *Holyfield* implicitly rejects the EIFE because the children at issue were never in an Indian home despite the Court applying ICWA).

203. See *Holyfield*, 490 U.S. at 42 (1989) (declaring the sole issue was whether the children at issue “were ‘domiciled’ on the reservation” for the purpose of determining which court should have jurisdiction).

204. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2564 (2013) (finding that section 1915(a) of ICWA, detailing placement preferences, did not apply only because no other party had sought to adopt the child); *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) (creating the “existing Indian family” exception to avoid applying ICWA’s restrictions on involuntary termination of parental rights).

205. See *In re Adoption of Baade*, 462 N.W.2d 485, 489 (S.D. 1990) (citing the purpose of ICWA in protecting tribal interests to support overruling previous application of the “existing Indian family” exception); *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989) (noting that Congress intended ICWA to protect tribes as well as parents).

family” exception,²⁰⁶ reversed course and cited *Holyfield* when it refused to apply the EIFE in *Adoption of Baade*.²⁰⁷ *Baade* relied on *Holyfield*’s focus on the importance of tribal interests,²⁰⁸ stating “[i]n light of the United States Supreme Court decision in . . . *Holyfield* . . . it is incorrect, when assessing ICWA’s applicability to a particular case, to focus only upon the interests of an existing family.”²⁰⁹ However, while *Holyfield* extensively details the intent of Congress to protect tribal interests, it does so to justify why the tribe should have had jurisdiction, not to strike down the “existing Indian family” exception.²¹⁰ If courts want to avoid applying the EIFE using congressional intent and concern for tribal interests, they need only cite to those provisions of ICWA, which mention tribal interests, directly.²¹¹ For example, courts can cite to section 1902, which declares Congressional intent “to promote the stability and security of Indian tribes,” though ICWA.²¹²

Lastly, the *Holyfield* Court details the congressional intent of ICWA to limit state discretion,²¹³ which courts have capitalized on to justify the refusal to apply the “existing Indian family” exception.²¹⁴ *Holyfield* declared that the states did not have the discretion to define “domicile” as a key term in ICWA because “the statute demonstrates that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.”²¹⁵ Thus definitions of critical terms cannot be dependent on state interpretations.²¹⁶ Using this language, lower courts have held that *Holyfield* struck down the “existing Indian family” exception because what constitutes an “existing Indian family” is a matter of state discretion.²¹⁷

206. *Claymore v. Serr*, 405 N.W.2d 650, 653 (S.D. 1987), *abrogated by In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990).

207. *Baade*, 462 N.W.2d at 489.

208. *See Holyfield*, 490 U.S. at 49 (“Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.”).

209. *Baade*, 462 N.W.2d at 489.

210. *See* 490 U.S. at 41–42 (noting the central focus of ICWA is to protect tribes and the “exclusive tribal jurisdiction provision” within the Act).

211. *See* 25 U.S.C. § 1901(3) (2004) (“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”); *Id.* § 1902 (“The Congress . . . 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”) (emphasis added).

212. *Id.* § 1902.

213. *See* 490 U.S. at 44–45 (finding that because ICWA was enacted to prevent states from having discretion in Indian custody proceedings, it is logical to presume they did not intend the states to have the right to define key terms within the Act).

214. *See In re Adoption of T.N.F.*, 781 P.2d 973, 977–78 (Alaska 1989) (noting the purpose of ICWA was to limit state discretion and counter prejudicial treatment of Indian children in refusing to apply the “existing Indian family” exception).

215. 490 U.S. 30, 45.

216. *See id.*

217. *See T.N.F.*, 781 P.2d at 977–78 (noting the purpose of ICWA was to limit state discretion and

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The discretionary nature of the “existing Indian family” exception appears to place it at odds with the Act, the primary purpose of which was to strip states of the right to determine the outcomes of custody decisions involving Indian children.²¹⁸ In addition to stripping the states of discretion, the ultimate goal of ICWA is to protect both tribes *and* Indian families—two entities whose best interest may not always coalesce.²¹⁹ In those cases, the factual circumstances should determine whose interests prevail. Viewing the case as jurisdictional in nature, the Court focused on tribal interests in *Holyfield*,²²⁰ but that focus does not preclude the use of the “existing Indian family” exception in situations that do not implicate jurisdictional questions.²²¹

Holyfield is ultimately a jurisdictional case.²²² Although the children at issue in *Holyfield* had never been in the custody of Indian parents nor lived on the reservation, the Court did not make its decision on the basis of those facts.²²³ While scholars and courts may cite *Holyfield* when refusing to apply the “existing Indian family” exception, the case does not strike down the EIFE.²²⁴

E. The Supreme Court Has Never Granted Certiorari to a Case Challenging the “Existing Indian Family” Exception

It is worth noting that the Supreme Court has never granted cert to any case challenging the application of the “existing Indian family” exception.²²⁵ It is possible the Court agrees with the EIFE but has been unwilling to tackle it

counter prejudicial treatment of Indian children in refusing to apply the “existing Indian family” exception).

218. *Id.*

219. Compare 25 U.S.C. § 1901(3) (2004) (“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”) with 25 U.S.C. § 1902 (“The Congress . . . declares that it is the policy of this Nation to protect the best interests of Indian children . . . and security of Indian . . . families by the establishment of minimum Federal standards for the removal of Indian children from their families”); compare also *Holyfield*, 490 U.S. at 35 (considering the importance of children to the preservation of tribes as stated in ICWA) with *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) (stressing ICWA goal of preserving Indian familial units).

220. See 490 U.S. at 42 (declaring the sole issue was whether the children “were ‘domiciled’ on the reservation for the purpose of determining which court should have jurisdiction).

221. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2555 (2013) (holding ICWA provisions barring involuntary termination of parental rights do not apply to Indian parents who never had custody of their children).

222. 490 U.S. at 42 (declaring the sole issue was whether the children “were ‘domiciled’ on the reservation for the purpose of determining which court should have jurisdiction).

223. *Id.*

224. *Id.*

225. See, e.g. *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986) (refusing to grant *cert.* upon the federal court’s upholding of *Baby Boy L.*); *In re Bridget R.* 41 Cal.App.4th 1483 (Cal. Ct. App. 1996), *cert. denied* 519 U.S. 1060 (1997). It is worth noting that the Court has never granted *cert.* to cases challenging the refusal to apply the EIFE either. See *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993), *cert. denied*, 510 U.S. 860 (1993) (holding the “existing Indian family” exception does not apply in Idaho).

because doing so would implicate a discussion of the constitutional validity of ICWA as a whole.²²⁶ While failing to strike down the EIFE is not necessarily evidence of Court approval, the Roberts Court has intimated that failing to apply the “existing Indian family” exception²²⁷ in those cases where parents voluntarily place Indian children in adoptive homes may violate the Equal Protection Clause.²²⁸ In refusing to apply sections 1912(d) and (f) in *Adoptive Couple*, the Court reflects:

The [ICWA] was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court’s reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As [South Carolina interpreted sections] 1912(d) and (f), [an] Indian father could abandon his child . . . refuse any support for the birth mother . . . and then could play his ICWA trump card at the eleventh hour to override the mother’s decision and the child’s best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under ICWA. Such an interpretation would raise equal protection concerns.²²⁹

The Court does acknowledge the importance of culture and heritage, but also recognizes that these aspects do not always take precedence over a child’s best interests and right to equal protection in custody proceedings.²³⁰

Thus, while failing to grant certiorari does not necessarily mean that the Court endorses the lower courts’ holdings, there is evidence that the “existing Indian family” exception implicates an equal protection issue that the Court is unwilling to deal with.²³¹ The language in *Adoptive Couple* hints that, where the “existing Indian family” exception applies, requiring the application of ICWA provisions barring involuntary termination would violate the constitutional rights of Indian children.²³² It stands to reason that the Court would not want to strike

226. See Zug, *supra* note 108, at 48, 50 (discussing the constitutional implications of ICWA, and possible future Court action); Craig B. Paynter, *Container Legislation - Equal Protection - Commerce Clause: Minnesota v. Clover Leaf Creamery Company Recent Case*, 15 AKRON L. REV. 390, 390–391 (1981–1982) (noting that the Supreme Court tends to avoid questions that implicate equal protection concerns).

227. As defined and explained in Part IV.B–C.

228. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013) (stating that where ICWA places Indian children at a disadvantage in placement options “raises equal protection concerns”).

229. *Id.*

230. *Id.*

231. See Paynter, *supra* note 226, at 391 (noting that the Supreme Court tends to avoid questions that implicate equal protection concerns).

232. See 133 S. Ct. at 2565 (discussing the constitutional concerns of applying certain ICWA provisions to children not in the custody of an Indian parent).

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down the EIFE, and instead endorsed it, if the EIFE facilitates keeping ICWA constitutional as applied.

V. CONCLUSION

The Indian Child Welfare Act was passed during an era of nationwide assimilation practices that were designed to separate Indian children from their families with the intent to westernize them.²³³ Congress designed the statute to preserve Indian families and tribes by limiting the ability of states to remove Indian children from their homes.²³⁴ However, despite these laudable goals, ICWA is an unconstitutional piece of legislation that violates the equal protection rights of Indian children²³⁵ and impinges on state sovereignty over domestic relations.²³⁶ The “existing Indian family” exception as adopted in *Baby Boy L.* helps ameliorate the violation of Indian children’s rights to equal protection by limiting ICWA provisions that place restrictions on involuntary parental termination of rights.²³⁷

The Court in *Adoptive Couple* recognized the need for the EIFE in this limited way, and using language akin to that in *Baby Boy L.*, has revived the EIFE.²³⁸ The *Baby Boy L.* and *Adoptive Couple* decisions are strikingly similar: the facts are analogous, the issue of involuntary termination of parental rights is the same, and the language used by both Courts to limit the application of ICWA is nearly identical.²³⁹ It is therefore logical to conclude that, while the Court in *Adoptive Couple* did not use the term “existing Indian family” exception, *Adoptive Couple* endorses the EIFE, at least in those cases where a non-Indian parent chooses a non-Indian adoption and the biological, Indian parent has never had custody. Even sources denying that *Adoptive Couple* endorses the “existing Indian family” exception acknowledge that the rationale in the case is similar to that articulated in “existing Indian family” exception cases.²⁴⁰ Those denying that the Supreme Court adopted the EIFE rely on the fact that the exception, as articulated in *Adoptive Couple*, does not act as a complete bar to application of

233. Ellen Herman, *Indian Adoption Project*, ADOPTION HIST. PROJECT (Feb. 24, 2012), <http://pages.uoregon.edu/adoption/topics/IAP.html> (on file with the *McGeorge Law Review*).

234. 25 U.S.C. § 1902 (2004) (“The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and promote the stability and security of Indian tribes.”) (emphasis added).

235. See *Adoptive Couple*, 133 S. Ct. at 2565 (noting equal protection concerns when applying ICWA in a manner contrary to a child’s best interest).

236. See *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 528 (App. 4th Dist. 1996) (“Jurisdiction over matters of family relations is traditionally reserved to the states.”).

237. See *supra* Parts II.D. and IV.E.

238. See *supra* Part IV.

239. See *supra* Part IV.

240. See GUIDE TO ADOPTIVE COUPLE, *supra* note 85, at 7 (claiming *Adoptive Couple* does not endorse the “existing Indian family” exception).

ICWA.²⁴¹ But as discussed earlier, the EIFE can still exempt application of specific portions of ICWA without implicating the need to address any other portion.²⁴² Thus, in light of the questionable constitutionality of ICWA, and the recent holding in *Adoptive Couple*, state courts should reevaluate their rejection of the “existing Indian family” exception and apply it where failing to do so would result in a violation of Fourteenth Amendment.

241. *Id.*

242. *See supra* Part IV.B.

* * *