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## ICWA International: The Benefits and Dangers of Enacting ICWA-Type Legislation in Non-U.S. Jurisdictions

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# ICWA INTERNATIONAL: THE BENEFITS AND DANGERS OF ENACTING ICWA-TYPE LEGISLATION IN NON-U.S. JURISDICTIONS

MARCIA ZUG<sup>†</sup>

## ABSTRACT

For decades, the Indian Child Welfare Act (ICWA) has been considered the “gold standard” in Indigenous child protection. As a result, Indigenous advocates around the world have sought the passage of similar legislation. However, it is far from clear that the benefits of the ICWA are easily exported. The ICWA is based on a recognition of tribal sovereignty. Unfortunately, many of the countries that could benefit from ICWA-type protections do not recognize the sovereignty of their Indigenous populations.

This Article explores how the ICWA would have to be adapted to work in such countries and whether the needed changes would reduce, or possibly even eliminate, the Act’s benefits. Ultimately, this Article concludes that, in the absence of recognized sovereignty, the ICWA would need significant modifications, but that these modifications would not negate the overall benefit of such legislation. In fact, the Article argues that some of these changes may provide surprising advantages.

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## INTRODUCTION

Few recent custody cases have been more contentious, or garnered more national attention, than the case of Veronica Capobianco. The case lasted four years, cost hundreds of thousands of dollars, and eventually reached the Supreme Court.<sup>1</sup> The custody case of Veronica Capobianco also involved community protests, national television appearances, political posturing, and arrest threats.<sup>2</sup> Above all, the custody case of Veronica Capobianco exposed the deep and continuing controversy surrounding the Indian Child Welfare Act (ICWA or the Act)—the federal law at the heart of Veronica’s custody case.

The ICWA was enacted in 1978 in response to the generations-long practice of separating Indian children from their families and tribes.<sup>3</sup> The Act sought to reduce the likelihood of future removals by ensuring tribes

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1. Michael Overall, *Dusten Brown Makes First Comments Since ‘Baby Veronica’ Custody Battle*, TULSA WORLD (May 15, 2015), [https://www.tulsaworld.com/news/local/dusten-brown-makes-first-public-comments-since-baby-veronica-custody/article\\_b9da8f5f-7aa1-55d4-a960-39b2fc2add05.html](https://www.tulsaworld.com/news/local/dusten-brown-makes-first-public-comments-since-baby-veronica-custody/article_b9da8f5f-7aa1-55d4-a960-39b2fc2add05.html).

2. *Id.*

3. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (“The Indian Child Welfare Act of 1978 (ICWA) . . . was the product of rising concern in the mid-1970’s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.”).

had greater control over custody decisions involving tribal children.<sup>4</sup> Congress believed the Act was needed to protect the best interest of Indian children and tribes, while also recognizing that principles of tribal sovereignty required implementation of the Act.<sup>5</sup> The precise contours of tribal sovereignty are undefined but, at a minimum, tribal sovereignty encompasses a tribe's right to control internal relations including the care and protection of tribal children.<sup>6</sup> Consequently, the Act is essential to the continuation of meaningful tribal sovereignty in the United States.<sup>7</sup> However, whether the reverse is true—whether the success of Indian child welfare legislation requires tribal sovereignty—is less clear. It is possible that some—or even many—of the Act's protections could exist in the absence of recognized tribal sovereignty. Determining the precise relationship between Indigenous sovereignty and child protection is important because the plight of American Indian families is not unique. Many countries have a similar history of Indigenous child removals; yet, most countries do not recognize the sovereignty of their Indigenous populations. Whether these communities could benefit from ICWA-type legislation is the subject of this Article.

This Article examines the intersection between Indigenous sovereignty and the ICWA. It shows why sovereignty is vital to successful Indigenous child-protection legislation and demonstrates the significant problems with a nonsovereignty-based approach to child protection—an approach which delegates rather than recognizes rights. This Article also acknowledges that though tribal-sovereignty-based provisions are the greatest strength of the Act—the tribal-sovereignty-based provisions also constitute a significant weakness of the Act; the Act's sovereignty-based provisions have raised fierce opposition, hindered its general acceptance, and now threaten its future.

This Article ultimately concludes that a sovereignty-based approach to Indigenous child protection is strongly preferable to a nonsovereignty-based approach; however, this Article acknowledges that a nonsovereignty-based approach may offer Indigenous families significant protections and even some advantages. This Article suggests that Indigenous people outside the United States would benefit from the enactment of ICWA-type legislation—even if the legislation must be grounded in dele-

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4. See H.R. REP. NO. 95-1386, at 15 (1978) (“[T]here can be no greater threat to ‘essential tribal relations’ and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children.” (quoting *Wakefield v. Little Light*, 347 A.2d 228, 237–38 (1975)) (alteration in original)).

5. See *infra* Part III.A.

6. See *Holyfield*, 490 U.S. at 34; see also *Wisconsin Potowatomies of Hannahville Indian Cmty. v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973) (“If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity.”).

7. *Houston*, 393 F. Supp. at 729–30.

gated powers rather than sovereign powers. In addition, this Article examines whether there are benefits to a nonsovereignty-based approach to Indigenous child protection within the United States and, whether these arguments should be further explored.

Part I of this Article describes the history of Indian child removals in the United States and compares this history to similar policies enacted outside the United States. Part I demonstrates that government removal of Indigenous children is a worldwide phenomenon, and many communities could benefit from protective legislation similar to the ICWA. Part II examines the connection between tribal sovereignty and child protection. Part III examines the benefits of a sovereignty-based approach to Indigenous child protection and concludes that the most important protections of the Act require recognition of tribal sovereignty. Part IV explores how the Act would work in the absence of recognized sovereignty and the weaknesses of this approach. Part V assesses why the Act's recognition of tribal sovereignty has created opposition to the ICWA; Part V also assesses how a nonsovereignty approach could avoid creating similar opposition and, instead, provide more widely accepted and less vulnerable protections than the Act's current protections.

## I. AN INTERNATIONAL HISTORY OF INDIGENOUS CHILD REMOVALS

### A. *The United States*

Congress passed the ICWA to address the devastating legacy of Indian child removals.<sup>8</sup> These removals were part of the U.S.'s decades-long policy of promoting Indian assimilation.<sup>9</sup> Beginning in the nineteenth century, “humanitarian reformers’ began advocating for [policies to] absorb[] American Indians into mainstream American society.”<sup>10</sup> Land-hungry settlers—who believed assimilated Indians would require less land—and states, which opposed tribal sovereignty, both supported these policies.<sup>11</sup>

A system of federally operated Indian-boarding schools implemented the U.S. policy of assimilation by forcibly separating thousands of Indian

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8. See *Holyfield*, 490 U.S. at 32.

9. The “assimilation policy period” is usually characterized as lasting from approximately 1871 (the end of treaty making) until 1934 (when the Indian Reorganization Act was enacted). However, assimilationists’ practices continued for decades after and many argue that assimilationists pressures still continue today. See, e.g., Dean B. Suagee, *The Supreme Court's "Whack-A-Mole" Game Theory in Federal Indian Law, a Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 93–94 (2002) (“For modern-day tribal members, many assimilationist forces are pervasive in American society, from the widespread sense that the American way of life is the crowning achievement of western civilization to the amazing array of material possessions available to all those who can afford to buy them.”); see also Jon Reyhner, *Promoting Human Rights Through Indigenous Language Revitalization*, 3 INTERCULTURAL HUM. RTS. L. REV. 151, 160 (2008) (describing the “assimilationist pressures” that exist even in tribally controlled schools).

10. Lorie M. Graham, “*The Past Never Vanishes*”: *A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 13–14 (1998) (quoting FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 128 (1982 ed.)).

11. *Id.* at 14.

children from their families and communities.<sup>12</sup> At these schools, Indian students were instructed to value manual labor and private property, and that they must accept the superiority of American democracy and the policy of Manifest Destiny. Indian students were also forcibly converted to Christianity<sup>13</sup> and immersed in Western ideology on gender roles. Indian boys learned manual labor or farming<sup>14</sup> while Indian girls were taught domestic work such as ironing, sewing, and washing.<sup>15</sup> Indian students were also forbidden to speak their native languages, practice their religion, or take part in cultural practices.<sup>16</sup> Students who violated these rules were subject to severe punishments.<sup>17</sup>

The purpose of these schools was to destroy the connection between Indian children and their culture and communities.<sup>18</sup> In addition, proponents of these schools believed that once the Indian students were successfully assimilated, many would return home and help change the culture and practices of their tribes and families.<sup>19</sup>

Eventually, both the cruelty and failure of the boarding school method was exposed. However, rather than abandoning these assimilative efforts, new methods of Indian assimilation were proposed. The notion that Indian children need to be permanently separated from their families

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12. DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928*, at 97–101 (1995) (examining how boarding schools were used to assimilate American-Indian children into “American” culture); *see also* Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 52 (2008) (“A primary example of this [assimilation] policy was the federal boarding school system, in which Native American children were taken from their homes and placed in federal and church-run institutions around the country.”).

13. *See* Graham, *supra* note 10, at 14–15.

14. ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* 37 (2005).

15. Robert A. Trennert, *Educating Indian Girls at Nonreservation Boarding Schools, 1878-1920*, 13 WESTERN HIST. Q. 271, 277–78 (1982) (noting that girls were expected to absorb the patriarchal norms and desires and bring them back to their previously nonpatriarchal communities, thus, ensuring that Native women would lose their traditional places of leadership in their communities).

16. *See* DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 185 (W. Grp. 4th ed., 1998); *see also* RECOVERING NATIVE AMERICAN WRITINGS IN THE BOARDING SCHOOL PRESS 14 (Jacqueline Emery ed., 2017) (noting that the purpose of these programs was to “eradicate ‘from students every available trace of Native Identity and replac[e] it with a facsimile of whiteness.’” (quoting ROBERT WARRIOR, *THE PEOPLE AND THE WORD: READING NATIVE NONFICTION* 112 (2005))).

17. CLIFFORD TAFZER ET AL., *BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES* 21 (2006) (describing the myriad forms of punishment Indian students were forced to endure including whippings, beatings, starving, and humiliation).

18. *See* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 201 (2001) (“[B]oarding schools (where they were forbidden to speak their languages and, in many cases, to see their relatives), were constructed to obliterate Indian cultures and, in the process, destroy the separate political identity of Indian people.”).

19. *See* RECOVERING NATIVE AMERICAN WRITINGS IN THE BOARDING SCHOOL PRESS, *supra* note 16, at 59–60 (quoting an Indian school editorial stating, “[W]hen these children go back to their homes far west if they act right and show the Indians about the way they learned at school the old Indians will see that is the best way to do.”); *see also* B.J. Jones, *In Their Native Lands: The Legal Status of American Indian Children in North Dakota*, 75 N.D. L. REV. 241, 247–48 (1999) (noting that “federal policymakers targeted Indian children as the agents of change in an era when Indian people were perceived as ‘savages’ who needed to be rehabilitated and Christianized.”).

and communities gained particular support<sup>20</sup> and, by the mid-twentieth century, Indian reformers began advocating for the wide-scale adoption of Indian children by white families.<sup>21</sup>

In 1959, the Indian Adoption Project was created to promote adoption of Indian children by non-Indian families. It was believed Indian children would receive better care in these homes than with their birth families and that such adoptions would also allow them the opportunity to acquire the skills needed to fully assimilate into American society.<sup>22</sup> During this period, which covered most of the 1950s and 1960s, state child-welfare workers became increasingly focused on the suitability of Indian families,<sup>23</sup> and many state child-welfare workers began removing Indian children from families who had not adopted western values and social norms.<sup>24</sup>

By the 1970s, these removal policies had decimated Indian communities. Between 25%–35% of all American Indian children were being separated from their families,<sup>25</sup> and the majority were placed in non-Indian homes—cut off from both their tribes and their culture.<sup>26</sup> Many of these removals were based on cultural biases and stereotypes rather than actual evidence of abuse. However, the effects of these removals were real. After closely examining the issue, Congress determined removal of Indian children from their families posed a substantial threat to the health of Indian children and the future of Indian tribes; Congress passed the ICWA to stop these removals.<sup>27</sup>

### *B. The Purpose of ICWA*

When Congress passed the ICWA in 1978, Congress declared:

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20. See Graham, *supra* note 10, at 18.

21. *Id.* at 22.

22. *Id.*; Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 106 (2012) (noting that this program was intended to replace the boarding school system but continue its assimilationist purpose by helping “facilitate the adoption of Indian children by non-Indian families.”).

23. *Id.* at 106 n.305 (noting that the Indian Adoption Project was strongly supported by child welfare workers and the Child Welfare League).

24. *Id.* at 105–06.

25. H.R. REP. NO. 95-1386, at 9 (1978) (“[S]urveys of states with large Indian populations conducted by the Association of American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions.”). It should also be noted that this rate was substantially higher than the removal rates for non-Indian children. In Minnesota, Montana, South Dakota, and Washington the removal rates for Indian children compared with non-Indian children was five to nineteen percent higher. In Wisconsin, the rate of removal for Indian children was 1,600 times greater. Graham, *supra* note 10, at 24.

26. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 30 (1989) (“On the basis of extensive evidence indicating that large numbers of Indian children were being separated from their families and tribes and were being placed in non-Indian homes through state adoption, foster care, and parental rights termination proceedings, and that this practice caused serious problems for the children, their parents, and their tribes, Congress enacted the Indian Child Welfare Act of 1978.”); David Woodward, *The Rights of Reservation Parents and Children: Cultural Survival or the Final Termination?*, in *NATIVE AMERICAN CULTURAL AND RELIGIOUS FREEDOMS* 101, 101–02 (John R. Wunder ed., 1999) (noting that 85% of Indian children placed in foster care were placed in non-Indian homes).

27. See *Holyfield*, 490 U.S. at 32.

[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.<sup>28</sup>

As the above statement indicates, the purpose of the ICWA was three-fold: (1) to reverse the historical practices and policies that led to the high rate of Indian child removals and retract the government's past assumption that Indian children were better off outside their families and communities; (2) to recognize and protect Indian family structures and traditions and to ensure, as much as possible, that Indian children were raised within their birth family and tribe; (3) to recognize the doctrine of tribal sovereignty and tribes' inherent right to make decisions concerning the care and custody of their children.<sup>29</sup>

When addressing the Senate during ICWA hearings, Chief Calvin Isaac of the Mississippi Band of Choctaw Indians epitomized this multi-purpose view of the ICWA:

Culturally, the chances of Indian survival are significantly reduced if our children, the only 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. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.<sup>30</sup>

The survival of an entire people is an incredibly heavy burden to place on any one law; yet, the ICWA has largely lived up to its promise.<sup>31</sup>

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28. 25 U.S.C. § 1902 (2018).

29. See *id.* § 1901 (finding that the ICWA is needed because the states have “failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families” during child custody proceedings); see also *Holyfield*, 490 U.S. at 32; H.R. REP. NO. 95-1386, at 8–9 (describing the background of the ICWA as “wholesale separation of Indian children from their families” which is considered “the most tragic and destructive aspect of American Indian life today[.]”).

30. See *Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Pub. Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 193 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, appearing on behalf of the National Tribal Chairmen's Association).

31. See Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward A New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 621 (2002) (“The ICWA has achieved considerable success in stemming unwarranted removals by state officials of Indian children from their families and communities.”); Christine Basic, *An Overview of the Indian Child Welfare Act of 1978*, 16 J. CONTEMP. LEGAL ISSUES 345, 349 (2007) (“[T]he Act is a success with regard to its goal of giving Indian tribes more power over their members in general, over their children in particular.”); Graham, *supra* note 10, at 34 (“[T]here is a general consensus among Native American nations and organizations that the ICWA provides ‘vital protection to American-Indian children, families and

In 1997, the National Indian Child Welfare Association testified before Congress on the overwhelming success of the Act:

The Indian Child Welfare Act has provided much needed protection and hope to thousands of Indian children since its enactment. What many people do not know is that this law has also given Indian communities hope for a better future. It is not uncommon to find Indian people in communities all across the country that have either found their own identity because of the ICWA or have a family member that was reunited because of the ICWA. These collective experiences which are shared every day provide the healing that is needed for Indian communities ravaged by federal policies that were designed to isolate and assimilate Indian people. In many of these cases, the discovery of their lost identity has enabled them to fill an emptiness inside themselves and find support and understanding they never had. This is the ICWA that we know, and when allowed to work properly, provides security and certainty in Indian children's lives.<sup>32</sup>

### *C. International Interest in the ICWA and the Shared History of Indigenous Child Removals*

Given<sup>33</sup> the success of the ICWA,<sup>34</sup> it is not surprising that countries with a similar history of Indigenous-child removals—particularly Canada and Australia—have looked to the Act for guidance.<sup>35</sup> Like the United

tribes.”); Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska's Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, 19 ALASKA L. REV. 57, 59 (2002) (describing the ICWA as “one of the most important and far-reaching pieces of legislation protecting Indian tribes”); Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 284–85 (2010) (describing the ICWA as “perhaps the most important legislation enacted during this era”).

32. *Indian Child Welfare Act: Joint Hearing on S. 569 and H.R. 1082 Before the Comm. on Indian Affairs*, 105th Cong. 153 (1997); see also Sarah Krakoff, *They were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 508–09 (2017) (“[T]here is ample social science support for the conclusion that ICWA is indeed serving its congressional purpose.”).

33. In this Article, I use the words “First Nations” to describe the Indigenous peoples of Canada; “Indian” and “American Indian” to describe the Indigenous people of the United States; and “Aboriginal” to describe the Indigenous peoples of Australia. I use these words as generally accepted terms while recognizing that they have been conferred by non-Indigenous sources and may imply a non-existent commonality.

34. See 149 CONG. REC. 161, 2282 (daily ed. Nov. 7, 2003) (statement of Rep. Young) (On the twenty-fifth anniversary of the ICWA's enactment, Representative Don Young of Alaska spoke before the House of Representatives and described the Act as “the most important Indian law the Congress has enacted.”).

35. Richard Chisholm, *Towards an Aboriginal Child Place Principle: A View from New South Wales*, in INDIGENOUS LAW AND THE STATE 323 (Bradford W. Morse & Gordon R. Woodman eds., 1988) (“Aboriginal people in Australia have expressed great interest in the Indian Child Welfare Act 1979, because, whatever its limitation in practice, it is an example of a federal law which . . . gives legal recognition to the right of indigenous people to play a responsible part in the child welfare system.”); see, e.g., Graham, *supra* note 12, at 49–50 (“[C]ountries like Australia and Canada are grappling with their own comparable legacies of forcible removal of indigenous children. The ICWA may well serve as an important guidepost to countries looking to address similar types of human rights violations. It demonstrates the potentially broad contours of future reparation plans (beyond mere compensation)”; see also Terri Libesman, *Child Welfare Approaches for Indigenous Communities: International Perspectives*, CHILD ABUSE PREVENTION ISSUES, no. 20, 2004, at 7 (“The ICWA is often

States, Canada and Australia also supported decades-long assimilationist policies focusing on the removal of Indigenous children.<sup>36</sup> These policies devastated generations of native families, and their harmful effects continue to be felt.<sup>37</sup> Although both Canada and Australia have enacted various measures to help address the legacy of removal, these laws fall far short of the protections afforded to Indian children by the ICWA.<sup>38</sup> Consequently, Indigenous advocates in both Canada and Australia repeatedly suggest the need for a federal law similar to the ICWA.<sup>39</sup>

### 1. Canada

From the mid-1800s through 1970,<sup>40</sup> up to one-third of all Canadian First Nations children were removed from their families and placed in residential schools.<sup>41</sup> The schools were run as a collaborative effort between the state and the church and were intended to “civilize” First Nations children.<sup>42</sup> While attending, students were forbidden from using their language, religion, culture, or even names.<sup>43</sup> Many Indian students were also subject to severe physical and sexual abuse, and thousands died of disease and starvation.<sup>44</sup> Eventually, in the second half of the twentieth century,

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referred to as a model for consideration by Indigenous peoples in other countries. The legislation transfers legislative, administrative and judicial decision making to Indian bands where children domicile on a reserve.”).

36. See Graham, *supra* note 12, at 49–50.

37. See *infra* notes 42–43, 58–59 and accompanying text.

38. See *infra* notes 45–51, 61–63 and accompanying text.

39. LINDA BRISKMAN, *THE BLACK GRAPEVINE: ABORIGINAL ACTIVISM AND THE STOLEN GENERATIONS* 111–19 (2003) (discussing the various efforts to secure national legislation similar to ICWA); Brian Butler, *Aboriginal Child Protection*, in *THE PRACTICE OF CHILD PROTECTION: AUSTRALIAN APPROACHES* 14, 19 (Gillian Calvert et al. eds., 1992) (“Our organisation also seeks the enactment of national legislation along the lines of the Indian Child Welfare Act.”); Richard Chisholm, *Aboriginal Child Welfare and the Legal Possibility of Federal Laws*, *ABORIGINAL LAW BULL.*, no. 6, 1982, at 6 (noting that he was asked by representatives of Aboriginal Child Care Agencies “whether it would be possible for the Commonwealth Parliament to pass legislation similar to the *Indian Child Welfare Act*”) (emphasis added).

40. S. James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in Canada*, 32 *ARIZ. J. INT’L & COMP. L.* 143, 145 (2015) (noting some schools were operating until 1996).

41. SUZANNE FOURNIER & ERNIE CREY, *STOLEN FROM OUR EMBRACE* 54 (Barbara Pulling ed., 1997) (In 1889, the Indian Affairs Department was created, and Indian agents were dispatched to Aboriginal communities where they would threaten to withhold money from Aboriginal parents if they did not send their children to school. Parents were even imprisoned if they resisted schooling their children. Indian agents prepared lists of children to be taken from reserves and organized fall round ups (at the commencement of the school year)); SAGE, *NEEDS AND EXPECTATIONS FOR REDRESS OF VICTIMS OF ABUSE AT RESIDENTIAL SCHOOLS* 12–13 (1998).

42. FOURNIER & CREY, *supra* note 41, at 53–54; see also JOHN S. MILLOY, “A NATIONAL CRIME”: THE CANADIAN GOVERNMENT AND THE RESIDENTIAL SCHOOL SYSTEM, 1879 TO 1986 52 (1999) (By 1896, the Canadian government had funded forty-five church-run residential schools.).

43. Tonya Kowalski, *The Forgotten Sovereigns*, 36 *FLA. ST. U. L. REV.* 765, 778–79 (2009) (noting that “[i]n such schools, children’s names were changed, their language was forbidden, and their hair was cut short, ‘sometimes as part of a public ritual in which they renounced Indian origins.’” (quoting NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-2000, at 216 (Peter Nabokov ed., Viking Penguin 1999) (1978))).

44. CELIA HAIG-BROWN, *RESISTANCE AND RENEWAL: SURVIVING THE INDIAN RESIDENTIAL SCHOOL* 115 (Canadian First ed., 2002); Vandna Sinha & Anna Kozlowski, *The Structure of Aboriginal Child Welfare in Canada*, 4 *INT’L INDIGENOUS POL’Y J.*, no. 2, 2013, at 3 (“One estimate suggests that 50% of children attending residential school in the early [twentieth] century died as a result of poor conditions.”).

the boarding-school system was phased out and the provincial or territorial child welfare system became responsible for the welfare of First Nations children.<sup>45</sup> Following this change, there was a sharp increase in the number of First Nations children taken into state care and ultimately adopted;<sup>46</sup> between 1960 and 1990, over 11,000 children were adopted, and some First Nations communities lost up to a third of their children.<sup>47</sup>

Today, the legacy of forced removals continues to impact Canada's Indigenous families. First Nations' children are disproportionately represented in the state welfare system and significantly more likely to remain in state care than their non-native peers.<sup>48</sup> In addition, the majority of First Nations' children in foster care continue to live with non-native families.<sup>49</sup>

The Canadian government has long acknowledged the harm caused by the removal of Indigenous children; yet, the response of the Canadian government has been limited. Unlike the United States, which passed a federal law (the ICWA), to combat the legacy of Indigenous child removals, Canada's laws addressing the removal of First Nations children are at the provincial level and lack uniformity.<sup>50</sup> Currently, there are more than 100 Indigenous child welfare agencies.<sup>51</sup> However, these child welfare

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45. See Sinha & Kozlowski, *supra* note 44.

46. See Marlee Kline, 'Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations', in *LAW AND FAMILIES* 303 (Susan B. Boyd & Helen Rhoades eds., 2006) (noting that as provinces began to take over Indigenous child welfare "the proportion of First Nations children in care began to increase dramatically." By 1977, almost 20% of the total number of children in state care were Indigenous, and in some areas the numbers were as high as 85%).

47. See *id.*

48. See Nico Trocmé et al., *Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System*, 78 *SOC. SERV. REV.* 577, 577-78.

49. The same pattern applies to adoption as well. See Keri B. Lazarus, *Adoption of Native American and First Nations Children: Are the United States and Canada Recognizing the Best Interests of the Children?*, 14 *ARIZ. J. INT'L & COMP. L.* 255, 277 (1997) ("[F]or the ten year period from 1969 [to] 1979 an average of slightly more than seventy-eight per cent of status Indian children placed for adoption each year were adopted by non-Indian families." (quoting Patrick Johnston, *The Crisis of Native Child Welfare*, 2&3 *Canadian Legal Aid Bull.* 177, 176 (1982)); see also Anaya, *supra* note 40, at 152 (noting "Aboriginal children continue to be taken into the care of child services at a rate eight times higher than non-indigenous Canadians").

50. For example, most but not all provinces and territories require courts to notify First Nations bands when there is a hearing involving an Aboriginal child. In addition, fewer than half prioritize kinship care or the continuation of the child's cultural connection. Sinha & Kozlowski, *supra* note 44, at 8-10.

51. TRUTH AND RECONCILIATION COMM'N OF CAN., 1 FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 141 (2015) (noting that there are over 300 Indigenous child welfare agencies and that the Canadian government provides funding to "over 100 agencies delivering child and family services to First Nations families under the framework of provincial legislation").

agencies are not free to make their own laws or decisions on child welfare.<sup>52</sup> Instead, with two exceptions,<sup>53</sup> these agencies must apply the province's child welfare legislation.<sup>54</sup> As a result, Canada's provinces play the primary role in Indigenous child welfare decisions:<sup>55</sup> Canada's provinces have led and, continue to lead, many First Nations advocates to push for the passage of a national law (similar to the ICWA) that eliminates provincial control over Indigenous child welfare and returns the control to First Nations groups.<sup>56</sup> Recently, the Canadian government indicated receptiveness to these requests.<sup>57</sup>

In February 2019, the government proposed Bill C-92: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families (C-92).<sup>58</sup> The stated purpose of C-92 is to cede to First Nations communities jurisdiction over Indigenous child welfare. Should C-92 pass, C-92 will be an important step towards protecting First Nations' children and families. Unfortunately, the protections of C-92 remain significantly weaker than those under the ICWA.<sup>59</sup>

In an examination of the difference between the Canadian and U.S. approaches to Indigenous child protection, the Canadian Truth and Rec-

52. See Sinha & Kozlowski, *supra* note 44, at 5–6.

53. These exceptions are the Nisga Lisims First Nations Band and the Spallumcheen First Nations Band. However, only the latter is independent of provincial laws and standards. The Nisga Lisims may make child welfare laws, but only so long as they are comparable to provincial standards, and they must still have their laws federally or provincially approved. *Id.* at 6, 8.

54. *Id.* at 6, 9 (noting that many provinces do have provisions specifically relating to First Nations).

55. In 1985, Manitoba issued the first Indigenous child protection law when it enacted a moratorium on the adoption of First Nations children. Other Canadian provinces followed shortly thereafter. Ronald M. Walters, Comment, *Goodbye to Good Bird: Considering the Use of Contact Agreements to Settle Contested Adoptions Arising Under the Indian Child Welfare Act*, 6 U. ST. THOMAS L.J. 270, 281 (2008). Today, long-term foster care has been the norm in most provinces.

56. Libesman, *supra* note 35, at 4 (“Some First Nations organisations have called for national umbrella legislation which would provide a framework for the delivery of all child welfare services to First Nations communities [similar to the ICWA] . . . To date, no such legislation has been passed.”).

57. An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, S.C. 2019, c 92 (Can.).

58. *Id.*

59. C-92 does not eliminate provincial control over Indigenous child welfare, and it does nothing to ensure the primacy of First Nations' values and beliefs. The provinces would control the majority of the funding under the bill and, thus, there is the very real concern that that the provinces will have the ability to dictate how First Nations must apply their child welfare laws and policies. Moreover, the bill also fails to address the lack of Indigenous judicial decision-making. See Mark Blackburn, ‘We Cannot have Canada’s Commitment Die on the Order Paper’: MPs Hear the Last Arguments for and Against Child Welfare Legislation, APTN NAT’L NEWS (May 9, 2019), <https://aptnnews.ca/2019/05/09/we-cannot-have-canadas-commitment-die-on-the-order-paper-mps-hear-the-last-arguments-for-and-against-the-child-welfare-legislation> (noting how many First Nations' leaders do not “trust the province to hand over power to First Nations and [don’t] believe [the] bill will make it happen”); see also Amber Bernard, *Best Interest of the Child Needs to be Re-Defined, Before Passing Bill C-92*, APTN NAT’L NEWS (April 11, 2019), <https://aptnnews.ca/2019/04/11/best-interest-of-the-child-needs-to-be-re-defined-before-passing-bill-c-92-says-child-advocate>; *First Nations Chiefs Call for Protests to Oppose Indigenous Child Welfare Bill*, CBC NEWS (May 8, 2019, 6:00 AM), <https://www.cbc.ca/news/canada/edmonton/bill-c-92-first-nations-alberta-edmonton-1.5127025> (quoting Chief Craig Makinow of Ermineskin Cree Nation, “Until the provinces are out of the picture, nothing will change.”).

conciliation Commission (the Commission) concluded that the greater success of the U.S. approach was due to the recognition of tribal sovereignty.<sup>60</sup> The Commission stated, “[t]he American model has one key difference: it places judicial control over child welfare in the hands of tribal courts.”<sup>61</sup> C-92 purports to recognize tribal sovereignty and return child welfare control to the tribes; however, control under C-92 is limited. As a result, many First Nations leaders oppose the bill.<sup>62</sup>

The enactment of a Canadian ICWA may offer a better solution. However, Canada’s First Nations do not enjoy the same degree of recognized sovereignty as U.S. tribes.<sup>63</sup> As a result, despite the seeming promise of a Canadian ICWA, one cannot assume that a Canadian version of the ICWA would actually result in benefits comparable to the U.S. ICWA legislation.<sup>64</sup> Moreover, this concern is even more pronounced when considering the applicability of ICWA-type legislation to many Indigenous communities with little-to-no state-recognized sovereignty—most notably, the aboriginal and Torres Strait Islander communities of Australia.

## 2. Australia

Australia engaged in many of the same assimilationist child-removal policies as the United States and Canada; however, unlike the United States and Canada, Australia has yet to recognize its Aboriginal people as sovereign.<sup>65</sup> Consequently—although Australian-Aboriginal advocates have long sought ICWA-type legislation—few Australian advocates have

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60. See TRUTH & RECONCILIATION COMM’N OF CAN., 5 CANADA’S RESIDENTIAL SCHOOLS: THE LEGACY: THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 55 (2015).

61. *Id.*

62. See *supra* note 5 and accompanying text.

63. See *supra* note 60 and accompanying text.

64. See ANTHONY J. CONNOLLY, INDIGENOUS RIGHTS 312 (2009) (“Historically, Canada denied the legal existence of First Nations’ sovereignty independent of delegated authority . . . any power enjoyed by First Nations to pass laws and exercise jurisdiction over their internal affairs was viewed by Canadian law as a delegation or grant of authority from the Canadian state . . . Compared to American states, provincial legislatures in Canada have greater constitutional authority to pass laws that affect First Nations.”); see also STEVEN DANVER, NATIVE PEOPLES OF THE WORLD: AN ENCYCLOPEDIA OF GROUPS, CULTURES AND CONTEMPORARY ISSUES 398 (2015) (explaining that “[i]n the early twentieth century, the first efforts towards a renewal of sovereignty were taken by Canadian First Nations . . . the federal government began working with specific First nations groups to implement limited sovereignty agreements”).

65. See, e.g., Amanda Porter, *Non-State Policing, Legal Pluralism and the Mundane Governance of "Crime"*, 40 SYDNEY L. REV. 445, 445, n.1 (2018) (noting “Notwithstanding the reality of Aboriginal sovereignty, currently the Australian legal system affords recognition to the operation of Indigenous laws in extremely narrow circumstances; namely, in the context of native title, as a mitigating factor in sentencing and with respect to Torres Strait Islander traditional adoption.”); see also Chisholm, *supra* note 35, at 318 (noting the commonly held view that “the only future that Aboriginal people can or should have is as ordinary members of the Australian community, with exactly the same legal rights and responsibilities”). Despite this lack of recognition, Australia’s Indigenous people have never ceded their sovereignty. STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, TWO HUNDRED YEARS LATER § 2.6 (1983) (Austl.) (stating “We have never conceded defeat and will continue to resist this ongoing attempt to subjugate us . . . The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all of Australia lies with them . . . We demand that the colonial settlers who have seized the land recognize this sovereignty and on that basis negotiate their right to be there.”).

considered how the lack of recognized sovereignty might complicate this request.<sup>66</sup>

Like Canada and the United States, Australia attempted to “civilize” its Aboriginal people by separating children from their families.<sup>67</sup> Throughout much of the twentieth century, children as young as four years old were taken from their homes and sent to live in Australian-government dormitories.<sup>68</sup> Many of these children were abused, both physically and sexually, and few Aboriginal children received a meaningful education.<sup>69</sup>

Aboriginal children of mixed descent were especially targeted by these removal policies. Australian-Aboriginal policy was focused on ways to “absorb” these communities into mainstream society.<sup>70</sup> The government viewed “full-blood” Aboriginal people as a dying race but believed that mixed-race children—with their lighter skin color—could be assimilated into non-Indigenous society.<sup>71</sup> In 1937, A.O. Neville—a government administrator from Western Australia—articulated the government’s Aboriginal policy:

[T]he destiny of the natives of aboriginal origin, but not of the full-blood, lies in their ultimate absorption by the people of the Commonwealth . . . . Are we going to have a population of 1,000,000 blacks in the Commonwealth, or are we going to merge them into our white community and eventually forget that there ever were any aborigines in Australia?<sup>72</sup>

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66. See *supra* text accompanying note 56 (noting the many Indigenous advocates suggesting the need for ICWA type legislation); see also Paul Gray, *Protecting Indigenous Children: 3 Lessons Australia Could Learn from the United States*, MEDIUM (Oct. 29, 2017), <https://medium.com/@Ab-SecNSW/protecting-indigenous-children-3-lessons-australia-could-learn-from-the-united-states-5b4e076c10d9> (asking the Australian government to pass legislation similar to ICWA to strengthen protections for aboriginal families).

67. AUSTRALIAN HUMAN RIGHTS COMM’N, BRINGING THEM HOME REPORT (1997) (“One principal effect of the forcible removal policies was the destruction of cultural links. This of course was their declared aim. The children were to be prevented from acquiring the habits and customs of the Aborigines . . . the young people will merge into the present civilisation and become worthy citizen . . . . Culture, language, land and identity were to be stripped from the children in the hope that the traditional law and culture would die by losing their claim on them and sustenance of them.”).

68. *Id.* (noting that children were removed “from their mothers at about the age of four years and place[d] . . . in dormitories away from their families.”)

69. As they got older, many of these children were placed in training institutes before they were sent away to work. See *id.*

70. Chisholm, *supra* note 35, at 319 (For example, in 1914, The Aborigines Protection Board described how “[s]everal [Aboriginal children] . . . were handed over to the State Children’s Relief Department as neglected children. These will not be allowed to return to their former associations, but will be merged into the white population.”); see also MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERIALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880-1940 65–66 (2011) (noting that to “‘absorb’ Aborigines into the majority population . . . [meant they] needed to become white, in some sense of the word”).

71. JACOBS, *supra* note 70, at 68–69 (“Not only did Australian authorities believe that ‘full-blood’ Aborigines were a dying race, but many actually seemed to believe that such a fate was desirable.”).

72. Robert Manne, *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History*, in 6 STUDIES ON WAR AND GENOCIDE 217, 219 (A. Dirk Moses ed., 2012).

From 1910 and 1970, between 10%–33% of all Indigenous Australian children were removed from their families; in certain states, the numbers were even higher.<sup>73</sup> Moreover, the effects of the Australian Government's removal policies were long lasting, similar to the impact of removal policies the United States and Canada.<sup>74</sup> Decades after the removal policies officially ended, Aboriginal children are still removed at much higher rates than their non-Aboriginal peers.<sup>75</sup>

In 1980, the federal government responded to the disproportionality in removal by articulating the Aboriginal Child Placement Principle (ACPP).<sup>76</sup> The ACPP asserts Aboriginal children are better off when cared for within their own Aboriginal families and communities<sup>77</sup>; the ACPP sets out an order of preference for the adoptive or foster care placement of Aboriginal children. The ACPP is modeled on the ICWA,<sup>78</sup> but the ACPP is much weaker as it provides Aboriginal families and communities few enforceable rights.<sup>79</sup> This difference led many Indigenous advocates to call

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73. Chisholm, *supra* note 35, at 320 (“[T]he total number of Aboriginal children removed in New South Wales alone is approximately 5,625. The actual population of Aborigines under 15 years was about 2,800 from 1910 to 1920, and had risen to 4,400 in 1936. Thus, the impact of the system, in numerical terms, was considerable.”); *see also* Manne, *supra* note 72, at 225 (noting that “by the mid-1930s more than half of the Territory’s identified half-caste children were housed in one of the special-purpose institutions run by the state”).

74. Chisholm, *supra* note 35, at 321 (“There appears to have been inadequate recognition of the importance and value of Aboriginal methods of child rearing, and especially the importance of the extended family . . . a case where a child was removed because she was declared to be an ‘orphan.’ In fact, she had a father, several aunts and uncles and eight brothers and sisters ranging in age from seven to twenty-nine years . . . removal of children from their communities on the Board’s reserves was seen as a positive virtue in that it removed the children from patterns of child care which were assumed to be barbarous and harmful.”); *see also* *Removal of Aboriginal Children at Crisis Point and Rising*, NEW MATILDA (Nov. 20, 2014), <https://newmatilda.com/2014/11/20/removal-aboriginal-children-crisis-point-and-rising/> (“That means the gap between Aboriginal and non-Aboriginal children jumped from 8.7 to 43.6 care and protection orders per 1000 children.”).

75. *See* Chisholm, *supra* note 35, at 323 (By 1980, Aboriginal children comprised 15% of children in substitute care but were only 1.5% of the population.). Today they represent over 20% of children in out-of-home care, and this number expected to triple in the next twenty years. JOHN BURTON, POL’Y OFF. SECRETARIAT OF NAT’L ABORIGINAL AND ISLANDERS CHILD CARE (SNAICC), *Whose Voice Counts?: Aboriginal and Torres Strait Islander Participation in Child Protection Decision-Making* 7 (2013); FIONA ARNEY ET AL., AUSTRALIAN INSTITUTE OF FAMILY STUDIES, *ENHANCING THE IMPLEMENTATION OF THE ABORIGINAL AND TORRES STRAIT ISLANDER CHILD PLACEMENT PRINCIPLE* 1, 8 (2015) (discussing rates of Indigenous child removal and barriers to compliance with the Child Placement Principle).

76. MARGARET JACOBS, *A GENERATION REMOVED: THE FOSTERING & ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD* 248 (2014) (“Activists first articulated the [Child Placement] principle at the 1976 Conference of Adoption. In 1980, they succeeded in getting the [Department of Aboriginal Affairs] at the federal level to adopt it.” A version was eventually passed in all Australian states and territories.).

77. ARNEY ET AL., *supra* note 75, at 1 (“The fundamental goal of the Principle is to enhance and preserve Aboriginal children’s connection to family and community, and sense of identity and culture.”).

78. CLARE TULBURY, POL’Y OFF. SECRETARIAT OF NAT’L ABORIGINAL AND ISLANDERS CHILD CARE (SNAICC), *ABORIGINAL AND TORRES STRAIT ISLANDER CHILD PLACEMENT PRINCIPLE: AIMS AND CORE ELEMENTS* 5 (2013) (“Inspired by the ICWA, AICCA’s were successful in advocating for the adoption of a Child Placement Principle for Aboriginal and Torres Strait Islander Children, which incorporated the comprehensive approach apparent in the ICWA.”).

79. TERRI LIBESMAN, POL’Y OFF. SECRETARIAT OF NAT’L ABORIGINAL AND ISLANDERS CHILD CARE (SNAICC), *CULTURAL CARE FOR ABORIGINAL AND TORRES STRAIT ISLANDER*

for a new federal law that more closely tracks the ICWA.<sup>80</sup> Moreover, recent state<sup>81</sup> and federal proposals<sup>82</sup> aimed at easing long-standing restrictions on adoption—including the adoption of Aboriginal children—have made the need for strong ICWA-type legislation even more pressing.<sup>83</sup> However, because Australia has yet to recognize Indigenous sovereignty, the feasibility and effectiveness of an ICWA-type law remains uncertain.

#### D. An International Need for ICWA

Like the United States, Canada, and Australia both have large Indigenous populations and a long, devastating history of child removals.<sup>84</sup> Thus, it is not surprising that Canada and Australia would look to the ICWA for possible solutions to their legacies of Indigenous child removal. Importantly, the potential international benefits of the ICWA are not limited to Canada and Australia. Many other countries have a comparable history of Indigenous child removals;<sup>85</sup> although removals differ in scale, the effects are often as severe. ICWA-type legislation might also benefit Canadian and Australian Indigenous populations, but how ICWA-type legislation would operate in practice remains unclear because most of these communities lack recognized sovereignty.

##### 1. The Sámi

The Sámi are the Indigenous peoples of Northern Scandinavia and Northwest Russia. The total Sámi population is estimated to be 100,000.<sup>86</sup>

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CHILDREN IN OUT OF HOME CARE 56–57 (2011) (“If a child or young person is placed in out of home care with a non-Aboriginal and Torres Strait Islander carer there are few formal processes to ensure that they remain in contact with their family and culture and we found no evidence of processes to monitor compliance with this legislative requirement.”).

80. See *supra* notes 35 and 63 and accompanying text (discussing Indigenous advocates’ request for an ICWA to offer stronger protections); see also TRACEY SMITH, QATSICPP & GRIFFITH UNIVERSITY, POSITION STATEMENT FOR ABORIGINAL KINSHIP CARE 18 (2018) (calling for the implementation of an “active efforts requirement” similar to the ICWA.).

81. In November of 2018, the New South Wales government passed the Children and Young Persons (Care and Protection) Amendment Bill of 2018. This Act expands the ability of family and community services to permanently remove children and, most worryingly, places a two-year time limit on finding a permanent placement for children. See *Children and Young Persons (Care and Protection) Amendment Bill 2018* (NSW) (Austl.).

82. See BREAKING BARRIERS: A NATIONAL ADOPTION FRAMEWORK FOR AUSTRALIAN CHILDREN, at xvii (2018) (noting that although “family preservation and cultural considerations are important,” such concerns are “not more important than the safety and wellbeing of the child” and, thus, recommending that the proposed National adoption law apply to all Australian children).

83. See *supra* Section I.C.

84. See *supra* Section I.C.

85. See *infra* Section I.D.

86. Exact estimates can be difficult. Norway, for example, does not collect data on its population by race or ethnic group. See Katrine Fangen & Ferdinand Andreas Mohn, *Norway: The Pitfalls of Egalitarianism*, in INCLUSION AND EXCLUSION OF YOUNG ADULT MIGRANTS IN EUROPE: BARRIERS AND BRIDGES 145 (Katrine Fangen et al. eds., 2010) (explaining that “the Norwegian register data contain information about country of origin, but not of ethnic group membership.”); *Sámi in Sweden*, SWEDEN, <https://sweden.se/society/sami-in-sweden/> (last visited May 22, 2018) (describing the population as being around 80,000 people, spread over four countries with 20,000 in Sweden; 50,000 in Norway; 8,000 in Finland; and 2,000 in Russia).

Sámis do not share a common land but, generally, refer (in their own languages) to traditional Sámi regions as Sápmi. There are ten distinct Sámi groups, distinguished primarily by their distinct language.<sup>87</sup> The Sámi are not organized into tribes, nor are they enrolled in tribal communities with governing rights.<sup>88</sup> Instead, Sámi are solely considered citizens of their respective nations—Norway, Sweden, Finland, and Russia—that all have differing laws regarding the Sámi and their legal rights.<sup>89</sup>

Like other Indigenous people, Sámi children were subject to forced removals and the suppression of their culture.<sup>90</sup> In early twentieth-century Norway, the government forced Sámi children to attend boarding schools to “Norwegianise” them.<sup>91</sup> At these schools, the Sámi children’s connection to their culture and communities was destroyed.<sup>92</sup> In her essay, *No Beginning, No End: The Sámi Speak Up*, Kerttu Vuolab describes how Sámi children were harmed by the boarding schools’ assimilation process:<sup>93</sup> “[A] the age of seven, [the children] were torn away, uprooted from [their families and] homes.”<sup>94</sup> Afterwards, the Sámi children rarely saw their families; when the Sámi children did return home, Vuolab writes that they felt awkward and foreign “after having been all the time speaking

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87. See STEVEN DANVER, NATIVE PEOPLES OF THE WORLD: AN ENCYCLOPEDIA OF GROUPS, CULTURES, AND CONTEMPORARY ISSUES 369 (2013).

88. Bent Ole Gram Mortensen & Markku Suksi, *Respecting Autonomies and Minorities*, 73 IUS GENTIUM 61, 71 (2019) (noting that “[n]either in Finland, Norway or Sweden do the Sami enjoy territorial self-government, but instead a non-territorial cultural autonomy.”); see also Report of the Special Rapporteur on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/18/35/Add.2, 10–11 (June 6, 2011). (describing the limited attempts to secure cross-border rights as well as the limited degree to which the Sámi parliaments within each of these countries can genuinely influence decision-making power.).

89. Report of the Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 88.

90. Other scholars have also made the connection between the treatment of Sámi and American-Indian children. For example, in their article, *Child Welfare Services for Indigenous Populations: A Comparison of Child Welfare Histories, Policies, Practices and Laws for American Indians and Norwegian Sámis*, Mary Ann Jacobs and Merete Saus note that “[b]oth the United States and Norway still have segments of their Indigenous populations that are distinct from their majority populations in terms of language, lifestyle and homeland; both their Indigenous groups that have intermarried are largely phenotypically indistinguishable from non-Indigenous citizens. Both countries have areas of land that were retained by these populations after their political subjugation. Both countries had a boarding-school history followed by a period of child removal, and each of these periods represents negligence and shifting child welfare policies. While both of those early periods were rife with social and legal discrimination, both countries later adopted policies that included ethnic, cultural and political rejuvenation according to the Indigenous peoples a semi-sovereign status, including cultural protections for Indigenous children while in care.” Mary Ann Jacobs & Merete Saus, *Child Welfare Services for Indigenous Populations: A Comparison of Child Welfare Histories, Policies, Practices and Laws for American Indians and Norwegian Sámis*, 18 CHILD CARE PRACTICE 271, 272 (2012).

91. Henry Minde, *Assimilation of the Sámi—Implementation and Consequences*, 3 J. INDIGENOUS PEOPLES RIGHTS, no. 3, 2005, at 1, 17–20 (discussing schools as a method of forced assimilation).

92. Rauna Kuokkanen, “Survivance” in *Sami and First Nations Boarding School Narratives: Reading Novels by Kerttu Vuolab and Shirley Sterling*, 27 A. INDIAN Q. 697, 706 (2003) (noting that the purpose of the school system was to “‘make the Sami as Norwegian as possible’. The aim of the system was to assimilate Sami children into the majority cultures, ‘in language, culture, and in their overall view of themselves.’” (quoting Jon Todal, *Minorities with a Minority: Language and the School in the Sami Areas of Norway*, LANGUAGE CULTURE AND CURRICULUM 11, 357 (1998))).

93. Kerttu Vuolab, *All Situations Were Occasions for Stories*, in NO BEGINNING, NO END: THE SÁMI SPEAK UP 49–50 (Elina Helander & Kaarina Kailo eds., 1998).

94. *Id.* at 49.

some other language than Sámi, after having eaten other types of foods.”<sup>95</sup> After attending these schools, many Sámi children never returned home, and large numbers eventually abandoned their Sámi heritage.<sup>96</sup>

Today, Norway, Sweden, and Finland strongly condemn their previous policies of forced assimilation, and all have passed laws protecting the Sámi’s right to maintain their language and culture.<sup>97</sup> In 1988, Norway amended its constitution to state, “It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”<sup>98</sup> Since then, Finland<sup>99</sup> and Sweden<sup>100</sup> also have passed similar protections aimed at preserving Sámi linguistic and cultural autonomy. Together, these laws are an important step in helping to protect the Sámi language but they do little to prevent the breakup of Sámi families.<sup>101</sup> Instead, the role of preventing such breakups is ostensibly filled by international human rights laws.<sup>102</sup> However, whether general international law can serve as an effective substitute for direct protections—like the ICWA—appears dubious.

95. *Id.* at 50.

96. In addition to the similarities between American Indian and Sámi children regarding boarding schools there were also similarities regarding the custody and adoption of Indigenous children. In Norway, the Child Welfare Care (CWC) agencies running orphanages and other childcare institutions were used in the same way as the Indian adoption project, i.e., both were used to facilitate the assimilation of Indigenous children. *See* Jacobs & Saus, *supra* note 90, at 275–76.

97. *See infra* notes 98–100 and accompanying text.

98. GRUNNLOV [CONSTITUTION] art. 110a (Nor.); *see also* Lorie M. Graham, *A Right to Media?*, 41 COLUM. HUM. RTS. L. REV. 429, 498 (2010) (discussing how these legislative and constitutional initiatives “are important steps to promoting substantive cultural and linguistic rights for the Sámi.”); Anna Moyers, Note, *Linguistic Protection of the Indigenous Sámi in Norway, Sweden, and Finland*, 15 TRANSNAT’L L. & CONTEMP. PROBS. 363, 372 (2005) (discussing the protection of Sámi cultural and linguistic rights. “The Sámi Act in Norway created the Samediggi, the Sámi Parliament in the country.” The Act declares that “[t]he Sámi people shall have their own nation-wide Sameting elected by and among the Sámi people.” (quoting *The Sámi Act 1987* (Cth) s 1-2 (Austl.))).

99. CONST. OF FINLAND § 17 (1999) (“The Sami, as an indigenous people . . . have the right to maintain and develop their own language and culture”); *see also* ACT ON THE SÁMI PARLIAMENT, No. 974 § 9 (1995) (Fin.) (providing that the national authorities have an obligation to “negotiate with the Sámi Parliament on all far-reaching and important measures which may directly and in a specific way affect the status of the Sámi as an indigenous people.”). In addition, an amended Section 51 u (t)73/95 was also added that gave the Sámi people cultural autonomy—with respect to their language and culture—within the Sámi homelands. In 2000, a new Finnish Constitution was adopted incorporating these protections. *See* CONST. OF FINLAND § 17 (1999) (“The Sami, as an indigenous people . . . have the right to maintain and develop their own language and culture.”); *Id.* § 121 (“In their native region, the Sami have linguistic and cultural self-government, as provided by an Act.”).

100. Sweden’s 1974 Constitution stated that linguistic minorities should be given the opportunity to develop their culture and social life. However, the Sámi were not recognized as an Indigenous people within the Swedish Constitution until January 1, 2011. The Constitution now states that opportunities for “the Sami people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.” REGERINGSFORMEN [RF] [CONSTITUTION] 1:2 (Swed.).

101. *See, e.g.*, Graham, *supra* note 98, at 498 (noting that “[t]hese legislative and constitutional initiatives are important steps to promoting substantive cultural and linguistic rights for the Sami[]” while also noting the obstacles that remain).

102. *See, e.g.*, Jacobs & Saus, *supra* note 90, at 282 (arguing that Indigenous rights apply to social work and, thus, “international laws give the child protection services [] the responsibility to include cultural accommodation in every case involving a Sámi child or family”).

International laws, including the Indigenous and Tribal Peoples Convention<sup>103</sup> and the Convention on the Rights of the Child,<sup>104</sup> should obligate state child welfare departments to provide culturally sensitive service to Sámi families.<sup>105</sup> Nevertheless, without a national law setting out the methods for protection, these international obligations are difficult to ensure, and violations are likely proceeding unchecked.<sup>106</sup> For instance, the treatment of Sámi families in Norway by state child welfare workers has not led to any challenges under these Conventions;<sup>107</sup> yet, there remain strong reasons to suspect Sámi family rights are not protected.

Norwegian law requires child welfare workers to serve all families regardless of ethnic and cultural backgrounds, but there are no laws requiring specific protections for Sámi families or sensitivity to Sámi cultural practices. Consequently, despite international obligations to protect these families, there is a high likelihood that Norwegian welfare workers are failing to protect Sámi families and may be punishing them for their differences.<sup>108</sup> Studies showing significant differences between Sámi child-rearing practices and Norwegian child-rearing practices substantiate this likelihood.<sup>109</sup>

According to these studies, common differences between Sámi and Norwegian culture include views on parental permissiveness, co-sleeping, discipline, and children's independence.<sup>110</sup> One Sámi mother provided her perspective on childhood independence and the differences between the Sámi and Norwegian views on this issue:

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103. International Labor Organization: Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries art. 1(a), June 27, 1989, 28 I.L.M. 1382, 1384.

104. United Nations Convention on the Rights of the Child, Nov. 20, 1989 (Article 30 states that the children of minorities and Indigenous groups shall not be denied the right to their own cultures).

105. See Jacobs & Saus, *supra* note 90, at 283.

106. In other contexts, the difficulties in ensuring the protections of these international laws is well documented. See, e.g., Laura M. Seelau & Ryan Seelau, *When I Want Your Opinion, I'll Give It to You: How Governments Support the Indigenous Right to Consultation in Theory, but Not in Practice*, 23 CARDOZO J. INT'L & COMP. L. 547, 548–49 (2015) (discussing the difficulty in enforcing the Indigenous and Tribal Peoples Convention requirement of consultation with Indigenous people with regard to land rights).

107. Jacobs & Saus, *supra* note 90, at 281.

108. Ketil Lenert Hansen, *Ethnic Discrimination and Bullying in Relation to Self-Reported Physical and Mental Health in Sámi Settlement Areas in Norway* 51 (Mar. 2011) (unpublished Ph.D. dissertation, University of Tromsø) (noting the high rates of discrimination against Sámi in Norway and other Scandinavian countries despite “relatively comprehensive legislation designed to combat ethnic discrimination”); see also Jacobs & Saus, *supra* note 90, at 282 (noting that the “main concern is not that the law does not give a legal response to Indigenous children . . . but rather that the lack of actual transcription of these rights into the national law makes their implementation vague and indistinct”).

109. See generally Cecilie Javo et al., *Child-rearing in an Indigenous Sámi Population in Norway: A Cross-cultural Comparison of Parental Attitudes and Expectations*, 45 SCANDINAVIAN J. PSYCHOL. 67 (2004) (describing the different child-rearing practices and perspectives of Sámi families).

110. The study involved semistructured interviews of “76 Sámi mothers and 58 Sámi fathers, and 86 Norwegian mothers and 58 Norwegian fathers of four-year olds, revealed consistent cross-cultural differences in parenting.” *Id.* at 67.

I think Norwegian parents are more niggling, not allowing their children to do things . . . they might hurt themselves. I do not think that matters . . . For instance, I let him use the Sámi knife. These Norwegian four-year-olds are not allowed to. And I let him climb trees; many Norwegian parents do not permit this, they are afraid the child might fall down and hurt himself. I do not think it matters if he falls down and gets hurt. I could always comfort him afterwards. I want him to discover that there are dangers . . . And I notice that he is not as clumsy as his Norwegian peers—he is much more independent.<sup>111</sup>

Another Sámi mother emphasized the significant differences between Sámi and Norwegian parenting philosophies:

I take them into my bed. They are allowed to sleep there. Many of my Norwegian friends have said to me: ‘My God, are they still sleeping with you? [sic] But they are four and five years old! Are you going to keep them there until they reach puberty?’ And I use to answer: ‘Yes, if they want to.’ (laughs). They think it is outrageous, but I want it that way. I was raised that way myself. And I think love has to be learned from childhood on. If a child does not experience this, he will become destroyed.<sup>112</sup>

Both mothers have strong parental and cultural reasons for employing child-rearing practices that differed from those of their non-Sámi peers.<sup>113</sup> Nevertheless, studies repeatedly demonstrate differences in child-rearing practices between Indigenous and non-Indigenous cultures—including harmless differences—can create the perception of harm and lead to child removals.<sup>114</sup> Consequently, the fact there are significant differences in Norwegian and Sámi child-rearing practices suggests that, despite the

111. Cecilie Javo et al., *Parental Values and Ethnic Identity in Indigenous Sámi Families: A Qualitative Study*, 42 *FAM. PROCESS* 151, 155, 157 (2003). Another mother gave similar reasons for why she intentionally frightened her children. She stated: “One has to start training for independence as early as possible . . . When I was little, we had to be very independent—before school age. We had to take care of smaller siblings. Also, my parents frightened us with supernatural beings so that we should take care of ourselves and not get lost or go too near the water. I use it too.” *Id.* at 155. Another mother echoed these sentiments stating, “I was told by my mother why it was necessary to do this. It was done so that we should not become frightened or intimidated, because if we did, others would bully us and we could become victims of bullying. But, if you have been trained by being teased from childhood on, then others will realize that you do not bother if they start bullying you, and they stop doing it. And this is my reason for doing this, too. I do it to toughen them, so that they become psychologically capable of handling problems outside their home, and are able to endure hardships when they meet the world.” *Id.* at 157.

112. *Id.* at 158. Another Sámi mother explained why she sometimes ridiculed her son. She stated, “[M]y children sleep when they are tired and eat when they are hungry. I too was raised that way. Nobody said: Dinner is ready, it is three o’clock! We ate when we were hungry. So it was, and so it still is. And that goes for bedtime, too. I have tried, like modern people, to put them to bed at eight o’clock, but it did not work out—they went to bed when they got sleepy. And they are allowed to be out until dark, and then they come home by themselves because they are afraid of the ‘darkness troll.’” *Id.* at 157.

113. *Id.* at 158.

114. See Raman, Shanti & Deborah Hodes, *Cultural Issues in Child Maltreatment*, 48(1) *J. PAEDIATRICS & CHILD HEALTH* 30, 30–37 (2011) (noting that differences regarding the definition of maltreat are often the source of tension and confusion in multicultural societies when these definitions run counter to culturally acceptable practices of child-rearing.); see also *infra* note 162 and accompanying text (discussing the studies that led to the passage of the ICWA).

dearth of Convention challenges, Sámi families may face state welfare bias and would likely benefit from national-protective legislation akin to the ICWA.<sup>115</sup>

Moreover, while a lack of data makes it difficult to demonstrate the influence of child-rearing biases on Sámi child removals,<sup>116</sup> documentation of general bias against Sámi people exists throughout Scandinavia. Within the Sámi homelands in Finland, some non-Sámi people have organized into a registered group called “*Lappalaiskulttuuri - ja perinnedyhdistys r.y.*”<sup>117</sup>

## 2. Lappalaiskulttuuri

According to a report from the Finnish Sámi Parliament, the purpose of the *Lappalaiskulttuuri* is to “work systematically against the Sámi population and against cultural autonomy for the Sámi people.”<sup>118</sup> This report asserts that members of these organizations “attempt[] to prove [they are] the real Sámi and [that] the [actual] Sámi people [are] self-seekers and fakes. The [goal of this group] is to undermine the identity of the Sámi minority and to obscure and deny the existence of the Sámi culture.”<sup>119</sup>

At the moment, neither Norway, Finland, nor Sweden have considered passing national Indigenous child welfare legislation. Nevertheless, the history of child removals in these countries, coupled with significant child-rearing differences and a growing opposition to protecting Sámi culture, strongly suggests that current methods of protecting Sámi families may not be sufficient, and that other means of protection should be considered.<sup>120</sup> Implementing ICWA-type protections is one possibility, but only if ICWA-type protections can be successful in the absence of recognized sovereignty.

## 3. Russian Federation

The Russian Federation contains more than 100 Indigenous groups, many of which also experienced child removals and forced assimilation.<sup>121</sup>

115. The purpose of the ICWA is to reduce the harm of state biases against Indigenous families. See *infra* note 160 and accompanying text.

116. The authors of this article do not explicitly argue for the adoption of a Norwegian version of ICWA. However, many of the issues they identify as problematic for the protection of Sámi children, notably, the lack of a national law and decision-making authority wielded by non-Indigenous welfare workers, are addressed through the ICWA. See Jacobs & Saus, *supra* note 90, at 282 (“Except for child welfare workers that know about and feel some responsibility to their Indigenous clients, it is not clear who is in charge of assuring Sámi children’s cultural rights are protected.”).

117. FINNISH SÁMI PARLIAMENT, LAND RIGHTS, LINGUISTIC RIGHTS, AND CULTURAL AUTONOMY FOR THE FINNISH SÁMI PEOPLE 5 (1997).

118. *Id.*

119. *Id.*

120. See *supra* notes 106–14 and accompanying text.

121. There are over one hundred identified ethnic groups in Russia, forty of which are legally recognized as Indigenous small numbered people of the North, Siberia and the Far East. See Tamara Semenova, *Russian Indigenous Peoples of the North as Political Actors*, RUSSIAN RES. INST. FOR CULTURAL AND NAT. HERITAGE MOSCOW 1 (stating, “[T]here are over 100 ethnic groups and nationalities living in the territory of the Russian Federation” and that forty are officially recognized).

These policies were initiated shortly after World War II, when the USSR began forcibly moving Indigenous groups into mixed areas to assimilate them and foster Russian unity.<sup>122</sup> Children—as young as two years old—were forced to attend boarding schools, taught in Russian, and were prohibited from speaking their native languages.<sup>123</sup> Sending children to these schools weakened traditional family structures and left many Indigenous children without the skills needed to survive in their communities.<sup>124</sup> Importantly, the boarding-school era continues for Russia’s Indigenous children.<sup>125</sup> Not only do boarding schools remain common in Russia, the number of Indigenous children attending these schools is growing.<sup>126</sup>

In recent years, Russia closed large numbers of school in Indigenous settlements.<sup>127</sup> As a result, Indigenous parents must increasingly send their children to distant boarding schools that have little concern for cultural needs. This separation has caused significant unhappiness for many Indigenous children and also threatens the transfer between generations of culture, knowledge, language, and skills.<sup>128</sup> A report issued by the International Work Group for Indigenous Affairs (IWGIA) highlighted the severe unhappiness of many of Russia’s Indigenous children, particularly the children of the Tundra dwellers of Northern Russia. The report noted: “The [Indigenous] children want to go home; over the last year, more children have run away from the boarding school.”<sup>129</sup>

Russia’s assimilationist policies have devastated its Indigenous communities.<sup>130</sup> Today, the Indigenous peoples of the Russian North suffer higher infant mortality rates; lower life expectancy; higher homicide rates, suicide and substance abuse problems than their non-Indigenous peers.<sup>131</sup>

122. Secretariat of the U.N. Permanent Forum on Indigenous Issues, *Indigenous Peoples and Boarding Schools: A Comparative Study*, at 21, U.N. Doc. E/C.19/2009/CRP. 1 (2009).

123. The development of a school system which included sixty-two boarding schools (which housed twenty percent of all Northern minority children). By 1970, no Indigenous languages were being taught in schools. *Id.* at 20–21.

124. *See id.* at 21 (“The education was of poor quality so that Northern peoples could not find jobs, but their traditional livelihoods were also undermined.”); *see also* ENDANGERED PEOPLES OF THE ARTIC: STRUGGLES TO SURVIVE AND THRIVE 65 (Milton Freeman ed., 2000) (noting that “Soviet planners had expected that office jobs and technical labor would soon replace traditional skills. However, the sad irony of the market reforms is that the only sustainable economy [in many of these areas] is hunting, trapping and reindeer herding . . .”).

125. *See* JOHANNES ROHR, IWGIA REPORT 18: INDIGENOUS PEOPLES IN THE RUSSIAN FEDERATION 33 (Diana Vinding & Kathrin Wessendorf eds., 2014) (noting that “567 schools in indigenous territories were closed between 2003 and 2009”).

126. *See id.*

127. *Id.*

128. *See id.* at 33–34.

129. *Id.* at 33.

130. Andrey N. Petrov, *Lost Generations? Indigenous Population of the Russian North in the Post-Soviet Era*, 35 CANADIAN STUD. POPULATION 269, 274 (2008) (“Annual statistics indicate that over the entire period between 1989 and 2002, only 2 of 26 northern Indigenous nations experienced natural decline.”).

131. A report from the Indigenous rights group, IWGIA, made the following connection between assimilationist policies and problems within Indigenous families and communities. It noted:

Indigenous families deprived of their traditional livelihoods are often dysfunctional. Men, who have lost their traditional role as breadwinners due to the destruction of their means

They also continue to face significant discrimination.<sup>132</sup> On top of all this, the economic collapse of many communities incorporating the relocated Indigenous groups have exacerbated these social problems, leading to an intensification of the government's "protective" role.<sup>133</sup> Consequently, although there is little data available on the rates of child removals within Russia's Indigenous communities, the aforementioned factors—a history of removing children, disrespect and discrimination by the non-Indigenous authorities, and the increasing involvement of state welfare authorities—are all suggestive of high rates of Indigenous child removals.

In addition, the current legal protections afforded Russia's Indigenous families are inadequate to address the problem of high rates of Indigenous child removals.<sup>134</sup> Article 69 of the Russian Constitution states, "The Russian Federation shall guarantee the rights of indigenous [minority] people[] in accordance with the universally recognized principles and norms of international law and international treaties of the Russian Federation."<sup>135</sup> Despite this provision, Russia has repeatedly been accused of failing to comply with its international obligations, and there are indications that Russia's lack of compliance is increasing.<sup>136</sup> In addition, Rus-

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of existence, often fail to adapt to the changed conditions and plunge into alcoholism and inertia. Women are frequently more adaptive to changed external conditions. As a result, women in rural settlements often have to shoulder the burden of sustaining their families alone, with their men having abandoned their families. An alternative strategy which many women choose is to marry non-indigenous men, who are more successful in mainstream society.

ROHR, *supra* note 125, at 32–34.

132. The difference in living standards between the Indigenous and the non-Indigenous peoples is vast. Currently, over thirty percent of the Indigenous population lives in substandard housing or traditional tents, often because housing in rural areas and along migration routes is not available. One of five unemployed in Russia is a resident in the North and death rates among Indigenous of the North are one and one-half times the average in the country. The disparity in wages and unemployment, in mortality and death statistics, and in social benefits confirm the existing patterns of discrimination. In 1999, the U.N. Committee on the Rights of the Child referred to the growing incidence of societal discrimination against children belonging to ethnic minorities, including Indigenous peoples, and asked the Russian Federation to take all appropriate measures to improve the situation Indigenous rights. Alexandra Xanthaki, *Indigenous Rights in the Federation: The Case of Numerically Small Peoples of the Russian North, Siberia, and Far East*, 26 HUM. RTS. Q. 74, 75 (2004).

133. *E.g.*, ELENA KHLINOVSKAYA ROCKHILL, LOST TO THE STATE: FAMILY DISCONTINUITY, SOCIAL ORPHANHOOD AND RESIDENTIAL CARE IN THE RUSSIAN FAR EAST 63 (2010) (describing the district of Magadan as "one of the extreme examples constituted by a combination of factors characteristic of remote northern communities: the fragmented family structure with the lack of extended family support; geographic isolation that aggravated the effects of state withdrawal, leaving fewer resources and still fewer alternatives; the partial collapse of social safety networks and industries and the relatively low penetration of family and child-focused NGOs, which constitute gaps in the system of prevention; increase in the rate of alcoholism, suicide, homicide and mortality among Native and non-Native population who could not leave the region . . . . However, parts of the state child welfare infrastructure remained in place. Their 'protective' role had only intensified.").

134. *See* IWGIA, *The Indigenous World 2012* 29–30, 33, 38 (2012) (discussing Russia's failure to protect its Indigenous people).

135. KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 69 (Russ.).

136. *See* IWGIA, *supra* note 134, at 29–39.

sia's political history demonstrates a particular aversion to protecting Indigenous rights,<sup>137</sup> further suggesting that specific, national legislation similar to the ICWA may be necessary to fully protect Russia's Indigenous families. ICWA-type legislation, however, would have to work in the absence of recognized Indigenous sovereignty.<sup>138</sup>

## II. ICWA AND THE ROLE OF SOVEREIGNTY

As Part I one of this Article demonstrates, many Indigenous populations could benefit from protective legislation like ICWA, but few of populations possess recognized sovereignty as enjoyed by American-Indian tribes.<sup>139</sup> Consequently, before advocating outside of the United States for the adoption of the ICWA, it is important to consider: whether an ICWA-type law could work in the absence of recognized sovereignty, and what the law would look like.

### A. American-Indian Sovereignty

The traditional conception of sovereignty is of "a single nation with complete authority over its territory and peoples, free from interference

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137. Gretchen Kaapcke, *Indigenous Identity Transition in Russia: An International Legal Perspective*, 18 CULTURAL SURVIVAL Q. MAG., no. 2, 1994, at 1, 2 (The Soviet Union adopted Marx and Engels position on sovereignty namely, that "people[] only had the right to [sovereignty] if they were populous in number, had a developed civilization (as defined by Europeans), and [were economically self-sufficient]." Russia's Indigenous peoples were therefore not seen as possessing a right to self-determination.).

138. See *infra* Part II (describing the connection between the ICWA's protections and recognized Indigenous sovereignty).

139. The above list is far from exhaustive. There are many other Indigenous groups who could also potentially benefit from ICWA-type protections. For example, in 1950s Peru, the Arakmbut peoples were obliged to attend mission schools far away from their parents and forced to learn Spanish. See Sheila Aikman, *Language, Literacy and Bilingual Education: An Amazon People's Strategies for Cultural Maintenance*, 15 INT'L J. EDUC. DEV. 411, 415–17 (1995). From the 1920s through 1970s, they set up boarding schools and day schools for the Warao peoples of Venezuela. See Werner Wilbert, *Warao Spirit Ecology*, in INDIGENOUS TRADITIONS AND ECOLOGY: THE INTERBEING OF COSMOLOGY AND COMMUNITY 382, 404 n.20 (John A. Grim ed., 2001) (noting "[t]he missionaries . . . disrupted indigenous family life by forcing parents to send their children to the mission boarding schools where many became thoroughly acculturated."). In Colombia the "State funded nine different Catholic orders so that they would Christianize and 'civilize' Indian groups . . ." The education "was characterized by its brutality and its attack on Indian cultures . . ." Children were separated from their parents as young as five, and were forbidden from speaking their native language, wearing traditional clothing, or visiting family. Javier Saenz Obregon & Oscar Saldarriaga Velez, *Schooling in Colombia*, in GOING TO SCHOOL IN LATIN AMERICA 97, 104 (Silvina Gvirtz & Jason Beech eds., 2008). In Brazil, the Jesuits opened up a mission post among the Manoki peoples in 1949 and relocated the children to Utiariti. Others followed to escape the devastation wrought by massacres and disease. The Manoki peoples were divided into groups based on age and gender and supervised by a priest or a nun in all activities. They were prohibited from speaking their own languages and were encouraged to intermarry. See Rinaldo S.V. Arruda, *Iranxe Manoki*, INDIGENOUS PEOPLES IN BRAZIL, [http://pib.socioambiental.org/en/Povo:Iranxe\\_Manoki](http://pib.socioambiental.org/en/Povo:Iranxe_Manoki) (last visited Sept. 29, 2019); see also Stefan Kirchner, *Conceptions of Indigeness in the Case Law of the European Court of Human Rights*, 38 LOY. L.A. INT'L & COMP. L. REV. 169, 169–70, 172–73 (2016) (describing the thousands of European citizens who are also Indigenous, including many citizens of Greenland, French Guiana, and French Polynesia, and have human rights claims similar to the Sámi).

[by] other[s].”<sup>140</sup> This is not the type of sovereignty possessed by American-Indian tribes.<sup>141</sup> American-Indian tribes have sovereignty over tribal land and members, and the right to control their internal affairs.<sup>142</sup> In these ways, tribes are similar to foreign countries, but there are also significant differences. The federal government deals with foreign nations at arm’s length; whereas, Indian tribes are subject to its ultimate sovereignty.<sup>143</sup> In *Cherokee Nation v. Georgia*,<sup>144</sup> Chief Justice John Marshall described this unique relationship between Indian tribes and the federal government: “[P]erhaps unlike that of any other two people in existence . . . marked by peculiar and cardinal distinctions which exist no where else.”<sup>145</sup>

The relationship between the United States and tribes is based on the federal government’s recognition of inherent tribal sovereignty.<sup>146</sup> According to this doctrine, unless or until sovereignty has been extinguished, Indian tribes possess all the attributes of sovereignty.<sup>147</sup> Fundamental to this concept is the principle that sovereign powers exist outside of the Constitution; the federal government does not delegate sovereign power to Indian tribes.<sup>148</sup> As the distinguished, Indian-law scholar, Felix S. Cohen, observed: “[T]he most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by an express acts of Congress . . . .”<sup>149</sup>

140. Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered*, 2005 UTAH L. REV. 443, 448–49 (2005) (noting that this definition is “less true today than it was as short as a half century ago[.]” but that the term “sovereignty” has always been “murky”).

141. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831) (describing the unique sovereign status of Indian tribes whom Marshall referred to as “domestic dependent nations”).

142. See *United States v. Kagama*, 118 U.S. 375, 381–82 (1886) (noting that although tribes are “within the borders of the United States” they nonetheless remain “a separate people, with the power of regulating their internal and social relations”).

143. See *Cherokee Nation*, 30 U.S. at 13 (describing the relationship between Indian tribes and the U.S. government as resembling that “of a ward to his guardian”).

144. 30 U.S. 1 (1831).

145. *Id.* at 12.

146. Some scholars have suggested that a stronger basis for this government-to-government relationship might be to rely on the various treaties that were entered into between the two groups. For example, Professor Frank Pommersheim has argued, Indian treaties “provide the primary doctrinal grounding for the recognition of tribal sovereignty. These agreements between mutual sovereigns provide the foundational basis for the recognition of a government-to-government relationship.” Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 242 (1991). However, other scholars have noted the potential problems with this treaty-based approach. See, e.g., Bryan H. Wildenthal, *How the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence—and Has so Far Gotten Away with It*, 2008 MICH. ST. L. REV. 547, 577–79 (2008) (“*Coeur d’Alene* improperly suggested that the many federally recognized Indian tribes lacking treaties with the United States therefore also lack the full basic measure of tribal sovereignty.”); see also Babcock, *supra* note 140, at 468 (describing that the problem with a treaty-based approach to sovereignty is that “even though Indian treaties reflect the principle that tribes possess some measure of retained sovereign authority, the fact that this principle is set out in a federal treaty does little to strengthen the principle itself.”).

147. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”).

148. See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1982 ed.).

149. *Id.*

Tribal sovereign powers are, instead, “inherent powers of a limited sovereignty which has never been extinguished.”<sup>150</sup>

The doctrine of inherent-tribal sovereignty was first set out in the Marshall trilogy. In these cases, Chief Justice John Marshall established that after European “discovery,” Indian tribes were no longer in possession of full sovereignty,<sup>151</sup> but, nonetheless, remained a distinct and separate society, capable of self-government.<sup>152</sup> Chief Justice Marshall coined the term “domestic dependent nations” to describe the status: tribes are subject to the sovereignty and dominion of the United States, but also possess powers of self-government,<sup>153</sup> and are not under the jurisdiction of any state.<sup>154</sup>

In Cohen’s Handbook of Indian Law, Cohen further explained the legal basis for inherent authority writing:

(1) an Indian tribe possesses . . . all the inherent powers of any sovereign state; (2) a tribe’s presence within the territorial boundaries of the United States subjects the tribe to federal legislative power and precludes the exercise of external powers of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe; and (3) inherent tribal powers are subject to qualification by treaties and by express legislation of Congress, but except as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.<sup>155</sup>

The contours of Indian sovereignty have changed overtime.<sup>156</sup> However, the right to determine the care and control of tribal members has always remained one of the core attributes of tribal sovereignty.<sup>157</sup> Professor

150. *Id.*

151. *See Johnson v. M’Intosh*, 21 U.S. 543, 572–74 (1823).

152. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), *superseded by statute*, 43 U.S.C. § 666 (2018), *as recognized in Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (stating “Indian nations ha[ve] always been considered as distinct, independent political communities, retaining the original natural rights, as the undisputed possessors of the soil . . .”).

153. *See Worcester*, 31 U.S. at 572–74.; *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831).

154. *Worcester*, 31 U.S. at 561 (holding states have no jurisdiction over tribal lands).

155. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §4.02(1) (Nell Jessup Newton ed., 2012). Professor Kevin Naud has also noted that “[s]ince Cohen first published his handbook in 1941, the Supreme Court added the third way a sovereign power is removed from a tribe: as a necessary implication of its dependent status.” Kevin Naud, Jr., Comment, *Fleeing East from Indian Country: State v. Eriksen and Tribal Inherent Sovereign Authority to Continue Cross-Jurisdictional Fresh Pursuit*, 87 WASH. L. REV. 1251, 1251 n.2 (2012) (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

156. *See, e.g., Wheeler*, 435 U.S. at 326 (“The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.”); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211–12 (1978) (holding that sovereignty is divested in criminal cases over non-Indians).

157. *See United States v. Quiver*, 241 U.S. 602, 603–04 (1916) (“At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws.”); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 26 (1st Cir. 2006) (describing “the regulation of domestic relations” as one of the “core group[s] of sovereign functions”); *see also COHEN, supra* note 148, at 122 (noting that “Indian self-government . . . includes the power of an Indian tribe to adopt and operate under a form of government

Patrice Kunesh noted: “The welfare of Indian children lies at the heart of tribal sovereignty.”<sup>158</sup> The ICWA recognizes the connection between Indian child welfare and tribal sovereignty, and the Act was passed to protect both Indian families and tribal sovereignty.

### *B. ICWA and the Protection of Tribal Sovereignty*

The ICWA’s goal is to stop the widespread termination of Indian parents’ rights and reduce the number of Indian children placed with non-Indian foster and adoptive families.<sup>159</sup> To achieve this goal, the ICWA guarantees tribes (1) exclusive jurisdiction over removal and termination cases involving Indian children domiciled on the reservation<sup>160</sup> and (2) concurrent jurisdiction with the state courts over cases involving Indian children domiciled off the reservation.<sup>161</sup> Remarking on this jurisdictional compromise, Professor Alex Tallchief Skibine states: “The ICWA model is interesting because it represent[s] Congress’s attempt to protect tribal sovereignty in an area otherwise ruled by state law and state institutions.”<sup>162</sup>

As Professor Skibine notes, family law is typically state law.<sup>163</sup> Nevertheless, when enacting the ICWA, Congress recognized the connection between tribal sovereignty and Indian child welfare implies deviation from typical practices as justified. As Professor Stacy Leeds explains, “[T]he very heart of sovereignty is the power to provide a safe environment for all citizens and to restore harmony when breakdowns occur.”<sup>164</sup> Congress demonstrated its understanding of the connection between tribal well-being and sovereignty in the legislative history of the ICWA: “[T]here can be no greater threat to essential tribal relations and no greater infringement on the right of the . . . tribe[s] to govern themselves than to interfere with tribal control over the custody of their children . . . .”<sup>165</sup> The ICWA ensures tribes control; there is little question that the ICWA is integral to meaningful tribal sovereignty.<sup>166</sup> However, recognition of sovereignty in

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of the Indians’ choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes,” and the like).

158. Patrice H. Kunesh, *Borders Beyond Borders – Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act*, 42 NEW ENG. L. REV. 15, 78 (2007).

159. See *supra* Section I.B (describing the purpose of the ICWA).

160. 25 U.S.C. § 1911(a) (2018).

161. See *id.* § 1911(b).

162. Skibine, *supra* note 31, at 285.

163. See *id.* at 284–85.

164. Carrie A. Martell & Sarah Deer, *Heeding the Voice of Native Women: Toward an Ethic of Decolonization*, 81 N.D. L. REV. 807, 822 (2005) (quoting Stacy L. Leeds, *Tribal Court Stature and the Protection of Indian Women*, 13 PERSP. PROFESSION, no. 4, 2005, at 3, 3).

165. Sandra C. Ruffin, *Postmodernism, Spirit Healing, and the Proposed Amendments to the Indian Child Welfare Act*, 30 MCGEORGE L. REV. 1221, 1262 (1999) (alteration in original) (quoting H.R. REP. NO. 95-1368, at 15 (1978)).

166. Christina Lewis, *Born Native, Raised White: The Divide Between Federal and Tribal Jurisdiction with Extra-Tribal Native American Adoption*, 7 GEO. J.L. & MOD. CRITICAL RACE PERSP. 245, 261 (2015) (arguing that a “[s]trict application of the ICWA” is necessary to preserve tribal sovereignty); see also *John v. Baker*, 982 P.2d 738, 752 (Alaska 1999) (noting that “adjudication of child

the ICWA does not mean recognition of sovereignty is necessary for the ICWA or similar legislation to be effective. Part III of this Article will examine sovereignty's role in the operation of the ICWA.

### III. IS SOVEREIGNTY NECESSARY?

#### A. ICWA and the Role of Tribal Sovereignty

Tribal sovereignty affects the ICWA in two important and specific ways. First, tribal sovereignty supports the constitutionality of the Act by preventing ICWA from being a race-based law.<sup>167</sup> Second, tribal sovereignty justifies the removal of Indian child welfare decisions from state jurisdiction.<sup>168</sup>

#### 1. Equal Protection

The ICWA is not a race-based law because Indian tribes—as sovereign entities—are a political, not racial, group.<sup>169</sup> In *Morton v. Mancari*,<sup>170</sup> the U.S. Supreme Court confirmed the distinction between political and racial groups; the Court upheld Congress's ability to pass special laws for the benefit of Indian tribes and its members.<sup>171</sup> The Court emphasized the “unique legal status of Indian tribes” and held that the Indian preference at issue “does not constitute ‘racial discrimination.’”<sup>172</sup> In fact, the Court held it was not even a racial preference because it “[wa]s not directed towards a ‘racial’ group consisting of ‘Indians’” but “only to members of ‘federally recognized’ tribes.”<sup>173</sup> Moreover, the fact that tribal membership might include a genetic component does not change the political meaning of tribal membership.<sup>174</sup> As Professor Atwood notes: “However determined, membership will entitle the member to exercise rights vis-à-vis the tribe, and the fact that genetic heritage is a component of membership does not transform membership from a political classification into a racial classification.”<sup>175</sup>

The ICWA applies to children based on a child's eligibility for membership in a federally recognized tribe. Many tribes have membership criteria that contain genetic components, but genetic components do not make Indian preferences race-based.<sup>176</sup> Consequently, tribal sovereignty prevents the ICWA, as well as most federal Indian legislation, from being

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custody disputes over member children is necessary ‘to protect tribal self-government or to control internal relations’” (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

167. See *infra* Section III.A.1.

168. See *infra* Section III.A.2.

169. See *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

170. *Id.*

171. *Id.* at 551–53.

172. *Id.*

173. *Id.* at 553 n.24.

174. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (explaining that “[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community”).

175. Atwood, *supra* note 31, at 631.

176. See *id.*

designated “unconstitutional racial preferences”: preferences that violate the Equal Protection Clause of the Fourteenth Amendment.

## 2. Ensuring Tribal Decision-Making and Removal from State Jurisdiction

Tribal sovereignty is also essential in removing Indian child welfare decisions from state or federal control. This role is particularly clear in sections 1903, 1911 and 1912 of the Act.<sup>177</sup>

### a. 1903 Definition of Indian Child

Section 1903 of the Act 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.”<sup>178</sup> This definition of Indian child, which looks to the tribe rather than the state or federal government, is required under principles of tribal sovereignty.<sup>179</sup> As Professor Atwood explains: “The power of self-definition—the right to define one’s constituents and survive as a collective entity—lies at the core of tribal sovereignty and self-determination.”<sup>180</sup> Thus, the ICWA recognizes tribal sovereignty by affirming that it is the tribes—not the states—that have the right to define Indian child under the Act.<sup>181</sup>

The importance of possessing authority over the definition of Indian child under ICWA is significant. Tribes and states do not always agree on the “Indianness” of a particular child.<sup>182</sup> If states had the power to make Indian child determinations, many children who are now covered—children with low-blood quantum or from assimilated families—would be denied the protections of the ICWA.<sup>183</sup> This would undermine the goal of ICWA to reserve the legacy of the government-assimilationist policies.<sup>184</sup> Section 1903 of the ICWA relies on tribal sovereignty to avoid this outcome and ensures only tribes have the right to define Indian child for purposes of the ICWA.<sup>185</sup>

177. See *infra* Sections III.A.2 (discussing the role of sovereignty in these sections of the ICWA).

178. 25 U.S.C. § 1903(4) (2018).

179. See, e.g., Kevin Noble Maillard, *Parental Ratification: Legal Manifestations of Cultural Authenticity in Cross-Racial Adoption*, 28 AM. INDIAN L. REV. 107, 125 (2004) (describing the right to define “membership for themselves as an exercise of tribal sovereignty”).

180. Atwood, *supra* note 31, at 654.

181. See *id.*

182. See *infra* notes 327–29 and accompanying text (discussing the *Baby Girl* case and Justice Alito’s questioning whether the child should be considered Indian, despite the fact the Cherokee Nation decided she was eligible for membership in the tribe).

183. See *infra* Sections V.A.1–2 (discussing the state-court-created exceptions used to avoid applying the ICWA to children that state courts have deemed not Indian enough).

184. See Cheyanna L. Jaffke, *Judicial Indifference: Why Does the “Existing Indian Family” Exception to the Indian Child Welfare Act Continue to Endure?*, 38 W. ST. U. L. REV. 127, 145 (2011) (noting that “[p]re-ICWA child welfare practices resulted in significant numbers of American Indians being removed from their American-Indian heritage and have now created a generation of American-Indian parents who have been assimilated into non-American Indian culture”).

185. See *supra* notes 176–79 and accompanying text.

b. Tribal Jurisdiction, Sections 1911(a) & (b)

The jurisdictional provisions in Sections 1911(a) and (b) reduce or remove state control over Indian custody cases and are arguably one of the most important provisions of the ICWA.<sup>186</sup> These two sections recognize inherent tribal sovereignty over domestic issues<sup>187</sup> and provide that a tribe has, depending on the circumstances, either exclusive or concurrent jurisdiction over Indian-child-custody determinations.<sup>188</sup>

Section 1911(a) provides for exclusive tribal-court jurisdiction over any child-welfare proceeding involving an Indian child who resides or is domiciled on a reservation or is a ward of tribal court.<sup>189</sup> In these cases, the tribe's authority is paramount and cannot be defeated by a parent whom might prefer state court proceedings. Individual actions cannot change the powers of sovereignty.<sup>190</sup>

Section 1911(b) applies to instances when Indian children are not domiciled on the reservation. In instances where Indian children are not domiciled on the reservation, the state and tribal court have concurrent jurisdiction.<sup>191</sup> However, upon the request of the child's parents or the tribe, and absent an objection by either parent, Section 1911(b) requires the state court to transfer the proceeding to tribal court—thereby establishing a preference for tribal courts.<sup>192</sup> Section 1911(b) protects tribal sovereignty by demonstrating that domicile is less important than the child's

186. See Addie Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. ST. L. REV. 727, 740 n.50 (2017) (noting that “[i]t is the jurisdictional provisions [of section 1911] that have had the greatest impact, giving tribal communities control over what happens to thousands of Indian children, including children for whom removal from home was necessary because of actual or potential harm”).

187. See, e.g., *Wis. Potowatomies of Hannahville Indian Cmty. v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973) (“If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a sine qua non to the preservation of its identity.”); see also *Yavapai–Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. Ct. App. 1995) (noting that “the sovereignty of Indian tribes in custody matters” is “the very idea for which the ICWA was enacted”).

188. 25 U.S.C. § 1911(a) (2018) (providing for exclusive tribal jurisdiction); *id.* § 1911(b) (providing for concurrent tribal and state court jurisdiction).

189. “In part ICWA merely codified *Fisher v. District Court*, a case which affirmed, as a manifestation of inherent tribal sovereignty, tribes’ exclusive jurisdiction over on-reservation child custody disputes involving tribal members.” John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen’s Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 774 n.289 (2006) (discussing *Fisher v. Dist. Court of the Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 386–89 (1976)) (emphasis added).

190. Thus, as Professor Barbara Atwood has noted, Section 1911(a) represents Congress’s decision not “to give parents a right to subvert the tribe’s essential role in child welfare proceedings involving domiciliary children.” Instead, Congress decided that tribal sovereignty trumps individual choice. Atwood, *supra* note 31, at 611–12.

191. 25 U.S.C. § 1911(b).

192. *Id.* (requiring that “in the absence of good cause to the contrary, [a state court with jurisdiction] shall transfer such proceeding to the jurisdiction of the tribe . . . upon the petition of either parent or the Indian custodian or the Indian child’s tribe.”). The state court may refuse to transfer only if (i) the tribal court declines jurisdiction; (ii) a parent objects to the transfer; or (iii) the state court finds ‘good cause’ not to transfer. In addition to this safeguard, Section 1912(a) requires that the Indian child’s parent or custodian and tribe be notified of the proceedings and that no termination of parental

status or membership in the tribe.<sup>193</sup> The ICWA uses tribal sovereignty to extend tribal court jurisdiction outside the boundaries of the reservation to cases in which the state has a strong interest in deciding.

### *B. Tribal Sovereignty and the Effectiveness of the ICWA*

Tribal sovereignty provides the legal basis for the ICWA's constitutionality and for removing the majority of Indian child custody cases from state jurisdiction.<sup>194</sup> The importance of the former—tribal sovereignty as a legal basis for constitutionality—is clear: If the ICWA is deemed unconstitutional, its provisions have no force. However, removal of Indian child custody cases from state jurisdiction is just as important to the successful functioning of the ICWA; removal reduces the likelihood of state bias and encourages Indian difference.<sup>195</sup>

#### 1. Preventing State Bias

Congress enacted the ICWA to combat the long and unjustified history of Indian child removals by state authorities.<sup>196</sup> Before the ICWA was passed, state welfare workers and state courts routinely approved Indian child removals based on bias toward or unjustified assumptions of Indian families.<sup>197</sup> During the ICWA's congressional hearings, significant testimony presented accused state courts and agencies of ignorance, poor training, and cultural bias in deciding Indian child welfare matters.<sup>198</sup> Congress's formal findings acknowledged: "[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."<sup>199</sup> The report noted state welfare workers almost uniformly viewed Indian families and child-rearing

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rights or removal from the home take place until ten days after the notice was received. Theoretically, these rules will allow tribes the time and notice to address child custody proceedings taking place outside of tribal court and, if necessary, remove that proceeding to tribal court. *Id.*

193. Patrice Kunesh-Hartman, *The Indian Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. COLO. L. REV. 131, 151 (1989).

194. See *supra* Section III.A.1 (discussing *Morton v. Mancari*, 417 U.S. 535, 554 (1974)).

195. See *infra* Section III.B.1–2.

196. As the Supreme Court once said, "Because of the local ill feeling, the people of the states where [Indian tribes] are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

197. For example, Congress suggested that what social workers commonly determine to be neglectful, leaving of children with adults outside of the nuclear family, is reliance in Indian culture upon a large group of very extended relatives. Furthermore, non-Indian social workers get the wrong impression when Indian parents continue to rely upon the welfare department, which usually appears quite willing to provide competent help in child-rearing. H.R. REP. NO. 95-1386, at 10 (1978).

198. See generally *Indian Child Welfare Act of 1978, Hearings Before the Subcomm. on Indian Affairs and Public Lands of the Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. (1978) [hereinafter *1978 Hearings*]; *Indian Child Welfare Act of 1977: Hearing Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. (1977); *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93rd Cong., 2d Sess. (1974); AM. INDIAN POL'Y REV. COMM'N, REP. ON FED., ST., AND TRIBAL JURISDICTION, 79–80 (1976).

199. 25 U.S.C. § 1901(5) (2018).

practices as backward and uncivilized.<sup>200</sup> This perception greatly affected their child welfare determinations.<sup>201</sup> In addition, further examination into many of these removals revealed that a significant number of children were being removed from homes their tribal communities regarded as “excellent caregivers.”<sup>202</sup> According to Senator James Abourezk—one of the main sponsors of the ICWA—congressional findings demonstrated that many Indian children were not removed due to abuse or neglect; instead, child removals occurred because the state welfare agencies were “operat[ing] on the premise that most Indian children would really be better off growing up non-Indians.”<sup>203</sup>

The ICWA’s legislative history details the numerous and varied ways cultural bias has influenced child welfare decisions.<sup>204</sup> For example, state social workers considered childcare—provided by extended family members—irresponsible and neglectful despite the fact extended family care is a common and important aspect of traditional Indian child rearing.<sup>205</sup> American-Indian families were also penalized for not using physical punishment to discipline their children;<sup>206</sup> state caseworkers claimed a lack of physical punishment was an indication that the children lacked parental supervision and appropriate discipline.<sup>207</sup> In addition, Congress found that cultural biases and stereotypes were particularly evident in cases involving

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200. See 1978 Hearings, *supra* note 198, at 190, 192 (testimony of Calvin Isaac, the Tribal Chief of the Mississippi Band of Choctaw Indians, stating that “[m]any of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.”).

201. See H.R. REP. NO. 95-1386, at 10 (finding that “the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.”).

202. H.R. REP. NO. 95-1386 at 10.

203. Graham, *supra* note 10, at 27 (“In one 1977 California case, a child was removed from the custody of her aunt by a social worker on the sole ground that ‘an Indian reservation is an unsuitable environment for a child and that the pre-adoptive parents were financially able to provide a home and a way of life superior to the one furnished by the natural mother.’” (quoting ASS’N ON AM. INDIAN AFF., THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 3 (Steven Unger ed., 1977))).

204. See *supra* notes 200–03 and accompanying text; see also *infra* notes 205–07 and accompanying text.

205. In one case, a Sisseton-Wahpeton Sioux mother faced termination of her parental rights “on the grounds that she often left [her son] with his sixty-nine-year-old great grandmother.” In a second case, an Indian mother from Oregon faced termination because her son went to live with his aunt while she recovered from a broken leg. Graham, *supra* note 10, at 25–26.

206. See H.R. REP. NO. 95-1386, at 10 (stating that “Indian child-rearing practices are also misinterpreted in evaluating a child’s behavior and parental concern. It may appear that the child is running wild and that the parents do not care. What is labelled ‘permissiveness’ may often, in fact, simply be a different but effective way of disciplining children.”).

207. Despite these criticisms, it is telling that few American-Indian children were removed from their homes due to physical abuse. See, e.g., Graham, *supra* note 10, at 25–28.

alcohol use.<sup>208</sup> Even in areas where the Indian and non-Indian rates of alcohol abuse were equal, Indian families were more likely to have their children removed than non-Indian families—Indian families were also less likely to receive unification services.<sup>209</sup>

The reports documenting the biased removals of Indian children convinced Congress that evaluation of Indian families according to western values and norms is incredibly harmful.<sup>210</sup> Consequently, Congress included jurisdictional provisions in the ICWA to reduce state control over Indian child custody cases and ensure evaluation of Indian families was in accordance with Indian values and culture.<sup>211</sup> Moreover, these provisions imply that Congress does not expect Indian families to choose between Indian culture and Indian children.<sup>212</sup> In fact, by ensuring tribal jurisdiction over the majority of Indian child custody cases, Congress indicated its will to support and encourage Indian difference.

## 2. Encouraging Indian Difference

The ICWA's jurisdictional provisions rely on tribal sovereignty to justify removal of a significant proportion of Indian-child-welfare decisions from state control.<sup>213</sup> This reduces the impact of state bias while also allowing tribes to use the laws and customs they believe will best protect

208. H.R. REP. NO. 95-1386, at 10 (noting, "One of the grounds most frequently advanced for taking Indian children from their parents is the abuse of alcohol. However, this standard is applied unequally. In areas where rates of problem drinking among Indians and non-Indian are the same, it is rarely applied against non-Indian parents.").

209. Graham, *supra* note 10, at 26.

210. See H.R. REP. NO. 95-1386, at 19 (noting that "[w]hile the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.").

211. See *Id.* at 19.

212. Erik W. Aamot-Snapp, Note, *When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements*, 79 MINN. L. REV. 1167, 1185 n.95, 1196 (1995) (It should be noted that the need for these provisions remains strong and such biases can still impact compliance. As "[o]ne legal service attorney surveyed by the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System reported that 'the misapplication or nonapplication of the ICWA is appalling. Fourteen years after passage, county workers are still culturally ignorant at best and racist at worst.'" (quoting Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, *Final Report*, 16 HAMLIN L. REV. 477, 631 (1993))); see also Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 244 n.157 (2013) ("Notwithstanding the fact that the Indian Child Welfare Act (ICWA) was passed in 1978, full compliance with the Act remains elusive . . . ." (quoting Wash. State Racial Disproportionality Advisory Comm., *RACIAL DISPROPORTIONALITY IN WASHINGTON STATE: REPORT TO THE LEGISLATURE, CHAPTER 465, LAWS OF 2007 (SHB 1472) 17* (2010))); Marcia Zug, *Traditional Problems: How Tribal Same-Sex Marriage Bans Threaten Tribal Sovereignty*, 43 MITCHELL HAMLIN L. REV. 761, 796 (2017) ("As recently as 2015, South Dakota was held to have violated ICWA by disproportionately removing Indian children from their families and placing them in white homes. In one particularly telling example, South Dakota Judge Jeff Davis was found to have removed Indian children from their families one hundred percent of the time. Matthew Newman, an attorney at the Native American Rights Fund, stated, 'We're often finding states inventing any reason under the sun . . . not to place [the] child with [his or her] family.'").

213. See *supra* Section III.A.2.b.

the welfare of their children.<sup>214</sup> As sovereign entities, tribes have no obligation to enact child-welfare codes that mirror those of the surrounding states.<sup>215</sup> Instead, tribes can make welfare decisions based on their own beliefs about the best interest of tribal children and families.<sup>216</sup> Tribal laws may differ, or even contradict, state family law, but that is expected and supported under the ICWA.<sup>217</sup>

The differences between Indian and non-Indian perception of child custody can be significant.<sup>218</sup> In matriarchal tribes—like the Hopi<sup>219</sup> or Navajo—the father is not considered part of the child’s family.<sup>220</sup> As a result, the father has few custody rights upon divorce.<sup>221</sup> In other Indian tribes, a biological mother and her biological sisters share the same parental status.<sup>222</sup> This means both biological mothers and sisters are considered “mothers”<sup>223</sup> and may possess equally strong custody claims.<sup>224</sup>

Before the ICWA, cultural differences between Indian and non-Indian family structure and parenting norms could be cited by state welfare

214. See *supra* Section III.B.1.

215. See *Williams v. Lee*, 358 U.S. 217, 220 (1959) (“Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”).

216. *Id.*; see also Dennis Puzs, Jr., *Untangling the Jurisdictional Web: Determining Indian Child Welfare Jurisdiction in the State of Wisconsin*, 36 WM. MITCHELL L. REV. 724, 736 (2010) (noting that “[d]ue in part to the federal government’s policy of supporting tribal self-governance, tribal governmental structure has flourished in the last couple of decades. One area of dramatic growth and development has been in the area of child welfare.”).

217. This is true not just regarding child custody but also marriage and divorce. For example, “customary law for dividing property on divorce often conflicts with modern concepts of equality, as illustrated by Navajo common law. According to Navajo court records, custom prescribes that the husband comes to live with his wife’s family. Similarly, custom prescribes that a wife divorces the husband by leaving his belongings at the hogan’s door.” Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509, 540 (1998); see also Zug, *supra* note 212, at 763–70 (discussing tribal same-sex marriage laws).

218. See *infra* notes 219–223 and accompanying text.

219. The general rule is that custody of the child will go to the mother. However, as one Hopi judge noted, this rule is flexible and may be circumvented if the court believes doing so is in the best interest of the child. Cooter & Fikentscher, *supra* note 217, at 543. In White Mountain, custody determinations will be based on how traditional the family is. One juvenile judge noted that in “strict traditional” families she will assign custody to the mother or maternal grandparents but will not grant custody to grandparents in “modern” families. *Id.* at 544.

220. See Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 41 (2008) (noting that “[a] Navajo acquaintance once remarked to us, ‘Although he’s not my relative, I like my father.’”).

221. This can also create difficulties with regard to child support payments. “Navajo courts have found traditional grounds for ordering divorced fathers to make child support payments, although some Navajos deny that such obligations exist in Navajo tradition.” See Cooter & Fikentscher, *supra* note 217, at 541–43.

222. As Professors Robert Cooter and Wolfgang Fikentscher have noted, “The Cherokees use the same word for ‘biological mother’ and ‘biological maternal aunt’ because the child is supposed to feel the same way towards them, and they are supposed to feel the same way towards the child.” Cooter & Fikentscher, *supra* note 220, at 41.

223. *Id.*

224. See *id.* Other examples of differences include child support. See Scott J. Horenstein, *Native American Dissolutions*, 20 WASH. PRAC., FAM. & COMMUNITY PROP. L. § 30:14(5) (noting that “[m]any tribes have their own child support enforcement mechanism. Generally, their child support guidelines are lower than state court guidelines.”).

workers as evidence of parental unfitness, which was used to justify removing Indian children from homes.<sup>225</sup> This threat of child removal encouraged Indian families to assimilate and conform with western child-rearing norms.<sup>226</sup> However, the ICWA protects Indian families from biased perceptions and encourages difference.<sup>227</sup>

#### IV. IMAGINING A NONSOVEREIGNTY-BASED ICWA

Tribal sovereignty forms the basis for the ICWA's constitutionality and the removal of the majority of Indian child welfare cases from state jurisdiction. The question is whether the benefit of removing cases from state jurisdiction—to facilitate protection from bias against Indian difference—actually requires recognition of tribal sovereignty, or whether there are other means to achieve similar safeguards and protection of Indian peoples.

##### A. Equal Protection

The ICWA is a set of rules that only apply to Indian children and families.<sup>228</sup> Nevertheless, the law does not violate the Constitution's equal protection mandates because—although ICWA specifically and intentionally differentiates Indian from non-Indian families—ICWA differentiates based on political affiliation with a recognized Indian tribe and not race.<sup>229</sup> Differentiation by political affiliation rather than race is constitutionally significant because it means that challenges to the ICWA's constitutionality are not subject to strict scrutiny; instead, challenges must meet only rational basis review—a lower standard.<sup>230</sup> If the federal government did not recognize tribal sovereignty, then Indian tribes could not be described as a political group,<sup>231</sup> and if Indian tribes could not be classified as a political group, this would make it harder—although not impossible—to defend the ICWA as a nonrace-based law.

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225. H.R. REP. NO. 95-1386, at 10 (1978).

226. *AALA and Devils Lake Sioux Protest Child Welfare Abuses*, INDIAN AFFAIRS, June–August 1968, at 95–96 (“[N]othing exceeds the cruelty [to children] of being unjustly and unnecessarily removed from their families . . . ‘Today in this Indian community a welfare worker is looked on as a symbol of fear rather than of hope’ . . . ‘The Devil’s Lake Sioux people and American Indian tribes have been unjustly deprived of their lands and their livelihood,’ . . . ‘and now they are being dispossessed of their children’ . . . ‘[C]ounty welfare workers frequently evaluate the suitability of an Indian child’s home on the basis of economic or social standards unrelated to the child’s physical or emotional well-being and that Indian children are removed from the custody of their parents or Indian foster family for placement in non-Indian homes without sufficient cause and without due process of law.’”).

227. See *supra* Section III.B.1–2.

228. See 25 U.S.C. § 1901 (2018).

229. See *supra* Part III.A.1.

230. See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) (When a distinction is “political rather than racial in nature,” the Court has held it does not trigger strict scrutiny, because it “applies only to members of ‘federally recognized’ tribes,” and was “not directed towards a ‘racial’ group consisting of ‘Indians.’”).

231. See *id.* at 553–54.

Even if Indian tribes were not classified as a political group, this would not necessarily transform them into a racial group.<sup>232</sup> As long as tribes included nonracial criteria for membership, special laws, such as the ICWA, which only apply to tribal members, would remain constitutional.<sup>233</sup> Australian law provides one example. It demonstrates how a lack of political recognition does not automatically mean Indigenous classification must be race based.

Unlike the United States, Australia does not recognize its Aboriginal people as sovereign.<sup>234</sup> Consequently, designation as an Aboriginal or Torres Strait Islander person cannot be based on political affiliation with a tribe or clan. Instead, Australian law defines an Aboriginal or Torres Strait Islander as a person:

1. Who is of Aboriginal or Torres Strait Islander descent;
2. Identifies as an Aboriginal or Torres Strait Islander person; and
3. Is accepted as an Aboriginal or Torres Strait Islander person by the Aboriginal or Torres Strait Islander community.<sup>235</sup>

Race is part of this definition but is insufficient. In addition to possessing some racial connection, a person wishing to claim Indigenous status also must identify as Indigenous, and the community must accept the person as an Aboriginal or Torres Strait Islander person.<sup>236</sup> As a result, this definition requires the person claiming Indigenous status to make an affiliative choice to identify as an Indigenous Australian and become part of an Aboriginal or Torres Strait Islander community; only after taking such steps can such a person qualify for the rights and protections that may come with Indigenous classification.<sup>237</sup>

232. See Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 456 (2002) (noting that nonrecognized tribes often define their membership by “close family ties and actual involvement in ceremonies, political meetings, and social gatherings” rather than descent).

233. Some legal scholars have suggested that, even in the United States, the diminishment of tribal sovereignty means that nonracial-tribal-membership criteria should be substituted for racial criteria to remain constitutional. See, e.g., L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 772 (2001) (concluding that the continued existence of most tribes may depend on eliminating race as an essential membership criterion); Mark Neath, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U. CHI. L. SCH. ROUNDTABLE 689, 708–09 (1995) (stating that if tribes continue abiding by racial membership requirements, they may face stricter federal court scrutiny of their laws).

234. See *supra* note 65 and accompanying text.

235. *Commonwealth v. Tasmania* (1983) 158 CLR 1, ¶50 (Austl.); see also *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, ¶83(6) (Austl.) (stating that “[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.”).

236. See Denis Foley, *Jus Sanguinis: The Root of Contention in Determining What is an Aboriginal Business*, 8 INDIGENOUS L. BULL. 25, 28 (2013) (“As aboriginal people can now accordingly choose to identify as Aboriginal if they are accepted by the local Aboriginal community . . .”).

237. Legal scholar, Rebecca Tsosie, and former Comanche Tribal Chair, Wallace Coffey, have suggested Indian tribes include similar membership requirements to make “cultural sovereignty” as

Race is an immutable characteristic, and individuals cannot choose whether they are ethnically Aboriginal or Torres Strait Islander. However, individuals can and must choose whether to identify as Indigenous and seek community recognition before they are eligible for the benefits and regulations that accompany Indigenous status.<sup>238</sup> For these reasons, designation as Aboriginal or Torres Strait Islander would not meet the definition of a racial classification under U.S. constitutional law.<sup>239</sup> Consequently, the Australian example demonstrates—even in the absence of recognized sovereignty—it is possible to have a definition of indigeneity that does not violate U.S. principles of equal protection.<sup>240</sup>

Although the relationship between the ICWA and race is incredibly important under U.S. constitutional jurisprudence, many other countries do not share this same level of concern—especially when race-based legislation remedies damage done by previous government policies.<sup>241</sup> As Australian law professor Garth Nettheim explains:

The issue is not solely to do with principles of non-discrimination. It relates to equality rights generally, and, to the specific rights of ethnic

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their highest priority. According to Tsosie and Coffey, “cultural sovereignty” is a tribal citizenry committed to engagement with a living tradition and includes “[r]estoration of language, spirituality, and Native educational systems.” See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 207, 209 (2001).

238. Although the ability to define one’s membership is a right of sovereignty, this right is not contingent on sovereignty. Australian Aboriginal groups lack recognized sovereignty but retain the right to define their membership.

239. This is further exemplified by the fact that there are many fair-skinned people who identify as Aboriginal, a fact which has caused significant controversy in Australia. See Adrienne Stone, *The Ironic Aftermath of Eatock v. Bolt*, 38 MELB. U. L. REV. 926, 928–30 (2015) (describing the case of *Eatock v. Bolt* (2011) 197 FCR 261 (Austl.), which was brought against a Melbourne newspaper for a series of articles criticizing light-skinned Aboriginal people and accusing them of taking government benefits away from “real” Aboriginal people).

240. See *Eatock*, 197 FCR 261 at ¶188 (noting that the authorities “make it clear that a person of mixed heritage but with some Aboriginal descent, who identifies as an Aboriginal person and has communal recognition as such, unquestionably satisfies what is conventionally understood to be an ‘Aboriginal Australian.’”); see also *Shaw v. Wolf* (1998) 83 FCR 113 (Austl.) (holding that descent alone was not a sufficient criterion for recognition as an Aboriginal person. Instead, he stated, “[I]n truth, the notion of ‘some’ descent is a technical rather than a real criterion for identity, which after all in this day and age, is accepted as a social, rather than a genetic, construct.”); Robert French, *Aboriginal Identity—the Legal Dimension*, 15 AUSTL. INDIGENOUS L. REV., no. 1, 2011, at 18 (reflecting “upon the interaction between identity and law in relation to Aboriginal people.”).

241. For example, India’s Constitution explicitly requires affirmative action. It states that the government must “reserv[e]” public “appointments or posts” for members of “any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.” INDIA CONST. art. 16, § 4; see Treaty of Amsterdam Amending the Treaty on European Union, Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, art. 6(a), <http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf> (Similarly, the European Union requires the European Parliament to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”); see also Ron Merkel, *The Right to Difference*, 3 N.Y. CITY L. REV. 81, 84 (1998) (quoting Australian Justice Gaudron’s observation: “[T]here are two aspects to equality. The first requires that artificial and irrelevant distinctions be put aside; the second requires that distinctions which are genuine and relevant be brought to account.”). For a U.S. example of this view, see Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 995 (2011) (suggesting that a racial classification singling out Indians might be permissible if it was “carefully designed to undo the historical damage wrought by specific federal policies . . .”).

minorities and Indigenous peoples. True equality requires measures (a) to ensure that members of racial minorities are placed in every respect on a footing of perfect equality with other citizens and (b) to ensure for the minority means for the preservation of their particular characteristics and traditions.<sup>242</sup>

For countries that subscribe to this view, a lack of recognized sovereignty does not prevent the enactment of ICWA-type legislation, which helps rather than harms racial equality. However, the bigger problem—and the problem that may ultimately be insurmountable—concerns the relationship between sovereignty and Indigenous decision-making.

### *B. Indigenous Decision-Making*

One of the ICWA's greatest strengths is that it both protects and encourages Indian family difference.<sup>243</sup> The ICWA recognizes that failure to respect the difference between Indian and non-Indian families results in significant injustice, which the ICWA seeks to remedy through jurisdictional provisions supporting tribal decision-making and limiting state influence.<sup>244</sup> Nevertheless, because the provisions limiting state jurisdiction over Indian child cases are grounded in the recognition of tribal sovereignty, it is unlikely that a nonsovereignty-based ICWA could offer similar protections.<sup>245</sup>

Under Sections 1911(a)–(b) of the ICWA, tribes have the exclusive right to determine child custody cases for children domiciled on the reservation and they have concurrent jurisdiction, with a preference of tribal jurisdiction, in custody cases concerning children domiciled off-reservation. In a nonsovereignty-based system, the state or federal government may delegate judicial powers and a similar jurisdictional right to tribal courts; yet, then tribal courts would not be independent of state or federal control, and one of the primary benefits of ICWA would disappear.<sup>246</sup>

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242. Garth Nettheim, *The International Implications of the Native Title Act Amendments*, 4 INDIGENOUS L. BULL. 12, 14 (1998).

243. See *supra* Section III.B.2.

244. For a discussion of the harms caused by a failure to recognize Indigenous difference, see INDIGENOUS LAW, *supra* note 35, at 317 (noting the Australian policies of Aboriginal assimilation, “once seen as liberal because they seemed to give equality to Aboriginal people, are now widely seen as fundamentally wrong and, in a subtle way, racist, since they give no recognition to the right of Aboriginal people to retain their own identity; they implicitly identify the good life with life in the non-Aboriginal community.”).

245. See *infra* Section IV.B.1–3.

246. If tribal power is expressly delegated by Congress, then it is a federal power created under the Constitution and subject to constitutional limitations. See *Talton v. Mayes*, 163 U.S. 376, 382 (1896). A delegated power will also be subject to the express limitations of the particular delegating legislation. See, e.g., *United States v. Lara*, 541 U.S. 193, 207 (2004); *Nevada v. Hicks*, 533 U.S. 353, 358–59 (2001); *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408, 454 (1989); *Montana v. United States*, 450 U.S. 544, 564 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

### C. The ATSIC Experiment

The history of Australia's Aboriginal and Torres Strait Islander Commission (ATSIC) demonstrates the weakness of a nonsovereignty-based approach to Indigenous rights and suggests many of the difficulties to a nonsovereignty-based ICWA.

The ATSIC was established in 1989 and sought to provide an Indigenous voice in the federal government.<sup>247</sup> However, the ATSIC was not independent of federal control.<sup>248</sup> Although the ATSIC included an elected branch, the Minister for Aboriginal Affairs remained at the top of the legislative structure and retained significant power over decisions made by the elected representatives.<sup>249</sup> Consequently, there was tension between the ATSIC's responsibilities to the Australian Commonwealth and its duties to Indigenous constituents.<sup>250</sup> In addition, although the ATSIC was given "a broad legislative mandate to formulate and implement programs for Indigenous Australians" and "to develop policy proposals at all levels"<sup>251</sup>—problems arose when the ATSIC's strategies and policies conflicted with the federal government's positions.<sup>252</sup> One area of conflict was the ATSIC's focus on recognizing specific Aboriginal rights, which differed from the government's policy of "practical reconciliation." The ATSIC was interested in increasing Aboriginal self-determination, while

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247. Larissa Behrendt, *Representative Structures—Lessons Learned from the ATSIC Era*, 10 J. INDIGENOUS POL'Y 35, 36 (2009) ("The objects and function, when read together, established a framework of responsibilities that conferred to ATSIC the *primary role* of advising the Federal Government on any matters relating to Aboriginal and Torres Strait Islander peoples and for the oversight of all government effort in policy development and the provision of services to Aboriginal and Torres Strait Islander peoples.").

248. See Joshua M. Piper, *Australia's "New Arrangements in Indigenous Affairs": A New Approach or a New Paternalism?*, 15 PAC. RIM L. & POL'Y J. 265, 272 (2006) (explaining that "ATSIC contained a dual system of accountability, uniquely responsible to both its constituents and the Government. It was committed to the ideology of self-determination while also being an institution of the Government, responsible for the development and implementation of public policy.").

249. See Justice Catherine Branson, *More Than Money*, 24 FORDHAM INT'L L.J. S17, S18 n.28 (2000) (describing the representative, policymaking, and administrative structure of the ATSIC).

250. The combination of these roles created tension between its advocacy and services-delivery roles. Specifically, ATSIC was to be accountable to the federal government in its service-delivery and monitoring role while its elected arm was to be accountable to its Indigenous constituency. See Angela Pratt, *Make or Break? A Background to the ATSIC Changes and the ATSIC Review* (May 26, 2003), [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/CIB/cib0203/03cib29](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03cib29) (discussing "the potential that has always existed for tensions between ATSIC's advocacy and service delivery roles: while ATSIC is accountable to the government, particularly in its role as deliverer and overseer of some indigenous-specific government programs, it is also accountable to its indigenous constituency for its performance in advocating the recognition of indigenous rights."); see also Piper, *supra* note 248, at 268 (noting that "due to structural conflicts created at its inception and frequent amendments, ATSIC failed to achieve broad, meaningful results for Indigenous Australians.").

251. Tim Goodwin, *A New Partnership Based on Justice and Equity: A Legislative Structure for a National Indigenous Representative Body*, 10 J. INDIGENOUS POL'Y, 2009, at 1, 4.

252. See *supra* notes 246–250 and accompanying text (describing the conflicts inherent in the ATSIC's structure).

the government was primarily concerned with overcoming the disadvantages Indigenous people faced.<sup>253</sup> As a result of the misalignment between ATSIC and the government, the ATSIC never received full support from the government and was left unable to effectively represent the needs of Australia's Indigenous communities.<sup>254</sup>

Although the ATSIC was created to increase Aboriginal self-determination, the ATSIC was unable to increase self-determination without the approval of the Commonwealth.<sup>255</sup> The ATSIC lacked independent authority and leverage to ensure the cooperation of the Commonwealth or the state and territorial governments.<sup>256</sup> As a result, many of ATSIC's policy suggestions were dismissed or ignored, which rendered the ATSIC ineffective.<sup>257</sup> It is possible this problem could have been remedied through a further delegation of power to the ATSIC. However, rather than giving the ATSIC this additional power, the Commonwealth chose to shut down the ATSIC and transfer ATSIC's functions to the state and commonwealth.<sup>258</sup>

Prime Minister John Howard was one of the ATSIC's staunchest opponents during this period.<sup>259</sup> Even before becoming Prime Minister, Howard vehemently opposed the ATSIC because he believed the ATSIC gave Indigenous peoples "separate" status.<sup>260</sup> In a 1989 parliamentary debate, Howard expressed his strong opposition to the creation of the ATSIC:

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253. See Behrendt, *supra* note 247, at 37 (noting that "ATSIC's position had always been that the recognition and enjoyment of rights are required if any real, meaningful and sustainable progress is to be attained.").

254. ATSIC had a number of roles. It maintained regional councils, elected bodies established to represent the needs of their local communities, and an administrative branch to monitor the effectiveness of other agencies and develop programs and policies to help Aboriginal people. See *Id.* at 35–40 (discussing the difficulties ATSIC faced).

255. See *id.* at 35, 40; see also *supra* notes 247–250 and accompanying text.

256. See Goodwin, *supra* note 251, at 5 (noting that the "ATSIC did not have the power under s 7 of the ATSIC Act to act in a specific coordinating role, or ensure the cooperation of the Commonwealth, State, and Territory governments" and that "[i]n 2003, the first independent review of ATSIC broadly recommended that more power be shifted to regional councils and that ATSIC be given greater ability to develop more effective relationships with State and Territory governments through multilateral agreements" (alteration in original)).

257. See *ATSIC Threatens Govt over New ATSI*, SYDNEY MORNING HERALD, (Mar. 12, 2004, 5:05 PM), <https://www.smh.com.au/national/atsic-threatens-govt-over-new-atsis-20040312-gdiiwf.html> (describing a challenge by ATSIC's elected body against the federal agency that controlled its budget because, as one ATSIC Commissioner, Llynton Wanganeen, explained, if there is no method to ensure the agency "will follow through the directions as set by the elected arm, then they've virtually taken away our power to make decisions on behalf of our people and taken away our right to self-determination and self management.").

258. See Michael Blakeney, *Protecting the Spiritual Beliefs of Indigenous Peoples—Australian Case Studies*, 22 PAC. RIM L. & POL'Y J. 391, 416 (2013) (describing the transfer of the ATSIC's functions to other government departments); see also Piper, *supra* note 248, at 272, 288 (describing the end of ATSIC).

259. See Jane Robbins, *The Howard Government and Indigenous Rights: An Imposed National Unity?*, 42 AUSTL. J. POL. SCI. 315, 315–316, 318 (2007) (describing the Howard government's opposition to the ATSIC and Indigenous rights in general).

260. See Commonwealth, *Parliamentary Debates*, House of Representatives, 11 April 1989, 1330 (John Howard, Bennelong—Leader of the Opposition) (Austl.) (discussing his opposition to the creation of the ATSIC).

I take the opportunity of saying again that if the Government wants to divide Australian against Australian, if it wants to create a black nation within the Australian nation, it should go ahead with its Aboriginal and Torres Strait Islander Commission (ATSIC) legislation . . . . The ATSIC legislation strikes at the heart of the unity of the Australian people. In the name of righting the wrongs done against Aboriginal people, the legislation adopts the misguided notion of believing that if one creates a parliament within the Australian community for Aboriginal people, one will solve and meet all of those problems.<sup>261</sup>

Thus, it is not surprising that, as Prime Minister, Howard continued his attacks on the ATSIC. Because the ATSIC powers were delegated by the government, it was easy for the government to repeal these powers.<sup>262</sup>

The history of the ATSIC demonstrates both the limitations of delegated Indigenous rights and the precariousness of delegated rights. The ATSIC was never given sufficient power to be effective. The ATSIC's dependence on the federal government limited its ability to advocate for Indigenous policies, and the ATSIC was highly vulnerable to changes in government.<sup>263</sup> Unfortunately, these problems are inherent to the ATSIC. In fact, any Indigenous decision-making body relying on delegated powers is likely to face similar problems.<sup>264</sup>

#### *D. Delegated Power and Indigenous Decision-Making*

In order for the ICWA to truly work, Indigenous communities need significant power over child custody decisions. For groups without recognized sovereignty, this power can be delegated,<sup>265</sup> but, as the ATSIC case study demonstrates, delegated powers can be problematic.<sup>266</sup> Delegated powers may not include sufficient enforcement power, can be undermined

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261. *Id.* at 1330, 1332.

262. On April 15, 2004, Howard announced his intention to abolish the ATSIC stating, “[W]hen Parliament resumes in May, we will introduce legislation to abolish ATSIC. ATSIC itself will be abolished with immediate effect from the passage of the legislation.” ANGELA PRATT & SCOTT BENNETT, PARLIAMENT OF AUSTRALIA, THE END OF ATSIC AND THE FUTURE ADMINISTRATION OF INDIGENOUS AFFAIRS (2004). However, even before this legislation was passed, the organization's power was removed. *Govt Abolishes ATSIC*, SYDNEY MORNING HERALD (Mar. 17, 2005), <https://www.smh.com.au/national/govt-abolishes-atsic-20050317-gdkxz7.html>; *see also supra* note 246 and accompanying text (describing why delegated powers are less robust).

263. The commission was abolished in 2005, which “marked [the] end of a representative structure at the national level chosen by Indigenous people” and a return to handpicked appointments. *See* Behrendt, *supra* note 247, at 35; *see also* Eddie Cubillo, ‘The Nine Most Terrifying Words in the English Language Are: ‘I’m From the Government and I’m Here to Help’’, 13 FLINDERS L.J. 137, 145 (2011) (noting that since the abolition of ATSIC in 2005 “there has been no National Aboriginal voice”).

264. *See infra* Section IV.B.2.

265. For example, because Australian Aboriginal groups do not enjoy recognized sovereignty, any rights they have regarding the custody and control of Aboriginal children are delegated rights. *See, e.g., Children and Young Persons (Care and Protection) Act 1998* (NSW) ch 2 pt 2 s 11(2) (Austl.) (stating that the “Minister may negotiate and agree with Aboriginal and Torres Strait Islander people to the implementation of programs and strategies that promote self-determination”); *Children and Community Services Act 2004* (WA) pt 2 div 3 s 13 (Austl.) (stating, “Aboriginal people and Torres Strait Islanders should be allowed to participate in the protection and care of their children with as much self-determination as possible”).

266. *See supra* Section IV.B.2.

by conflicting mandates, and can be reduced or eliminated by routine changes in government.<sup>267</sup> Moreover, unlike sovereignty-based rights, which are inherent rights and independent of any outside authority, delegated rights require the involvement of the non-Indigenous government.<sup>268</sup> As a result, instead of insulating Indigenous communities from government control and interference, delegated decision-making rights depend on it.<sup>269</sup>

In the United States, ICWA removes the majority of Indian child custody cases from state jurisdiction, but an ICWA-type law, created through delegated authority, could not create a similar level of independence.<sup>270</sup> Even if the government delegated significant child custody decision-making authority to Indigenous groups, non-Indigenous government would still determine the scope and effect of the delegated authority. As a result, Indigenous decision-makers might feel obligated to tailor their decisions to western norms and values out of fear that controversial decisions could result in reduction or rescindment of their decision-making rights.<sup>271</sup> Moreover, even if Indigenous decision-makers were not influenced by these concerns, their decisions would almost certainly be subject to appeal and potential reversal by a non-Indigenous tribunal.<sup>272</sup> Consequently, an ICWA created through delegated authority would lack the teeth of one of the ICWA's most important protections: the removal of most Indian child welfare cases from state court jurisdiction and subsequent review.

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267. See Peter Jull, *Powerful Trouble: Australian Politics in the Cauldron of Aboriginal Administration*, 8 AUSTL. INDIGENOUS L. REP. 20, 20–21 (2004) (noting, “ATSIC has been a scapegoat for anti-Indigenous feeling among the public and frustration with persistent Indigenous socio-economic ills. ATSIC’s visibility has made it a convenient target for many reasons, few of which have anything to do with its actual role or performance”).

268. See *supra* note 246 and accompanying text (describing the structure and limitations of delegated rights).

269. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197–199, 208, 212 (1978) (explaining that tribes were divested of their inherent sovereignty over nonmembers and, thus, any authority they have requires express congressional delegation).

270. See cases cited *supra* note 246 (describing the structure and limitations of delegated rights).

271. Even the U.S. Supreme Court has been threatened with a diminishment of its power after issuing controversial decisions. See Daniel S. Holt, *Debates on the Federal Judiciary: Documentary History Volume II: 1875-1939*, 2013 WL 5594723, for a discussion on how the Court’s controversial decisions between the 1890s and 1920s “led to proposals to limit or abolish the power of federal courts to declare Congressional legislation unconstitutional.”)

272. Such an Indigenous tribunal would be acting as an arm of the federal or state government that had delegated it this adjudicatory power. In the United States, an analogous situation might be the right to appeal from bankruptcy decisions. Bankruptcy courts were created by Congress under its Article I powers, but bankruptcy court decisions are appealable to an Article III court. Moreover, such a review may be constitutionally required. See *In re Axona Int’l Credit & Commerce, Ltd.*, 924 F.2d 31, 35 (2d Cir. 1991) (“Article III review of bankruptcy court decisions removes any constitutional concerns”). As the Supreme Court observed in *Den Ex Dem. Murray v. Hoboken Land and Improv. Co.*, there are limits on what cases Congress can withdraw from judicial review. See 59 U.S. 272, 284 (1855) (stating, “[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty . . .”).

*E. Slippery Slope*

The previous Section suggests that an ICWA-type law, enacted in the absence of recognized Indigenous sovereignty, is unlikely to provide effective protection of Indigenous difference. However, ineffectiveness is not the only problem with a nonsovereignty-based ICWA. There is also the concern that enacting ICWA-type legislation in jurisdictions that do not recognize Indigenous sovereignty could actually lead to increased government intervention and even less Indigenous control.

In passing the ICWA, Congress acknowledged the U.S.'s failure to protect Indian children and sought to correct that failure by recognizing that Indian sovereignty requires returning control of Indian child welfare decisions to American-Indian tribes. A nonsovereignty-based ICWA could also return decision-making control to Indigenous groups. However, delegated authority presents risks to Indigenous child protection—risks that are absent from a sovereignty-based approach.<sup>273</sup>

The ICWA recognizes that American-Indian tribes possess the inherent right to make decisions concerning the welfare of tribal members.<sup>274</sup> In the absence of recognized sovereignty, the assumption—of an inherent right to decision-making—does not exist. Consequently, when Indigenous groups are delegated decision-making rights, the delegation becomes a case study of Indigenous governance; with its potential or perceived failure serving as leverage for greater government intervention.<sup>275</sup> The Australian government's post-ATSIC actions demonstrate this possibility.

The ATSIC was the first instance of the Australian government granting Indigenous people real decision-making power, and the fact that this attempt was considered a failure had significant repercussions.<sup>276</sup> Specifically, the perceived failure of the ATSIC was used to justify abandonment of the concept of separate Aboriginal rights.<sup>277</sup> After the ATSIC was disbanded, Indigenous programs were moved to mainstream federal agencies, and the ideology of assimilation gained momentum.<sup>278</sup> During this period, the federal government increasingly abandoned the belief that the government ought to consult with Aboriginal people about programs and policies affecting Aboriginal lives.<sup>279</sup>

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273. See *supra* note 272 and accompanying text; see *infra* notes 274–82 and accompanying text.

274. See *supra* Part II (discussing the role of the ICWA and sovereignty).

275. See *supra* Section IV.B.1 (describing the ATSIC experiment with Indigenous governance); see also JOHN HOWARD, JOINT PRESS CONFERENCE WITH SENATOR AMANDA VANSTONE PARLIAMENT HOUSE, CANBERRA (2004) (specifically referring to the ATSIC as a failed experiment).

276. See Commonwealth, *Parliamentary Debates*, Senate, 1 Dec. 2004, 2 (Senator Ellison, Minister for Justice and Customs).

277. See HOWARD, *supra* note 275.

278. Jon Altman, *Neo-Paternalism: Reflections on the Northern Territory Intervention*, 14 J. INDIGENOUS POL'Y 31, 32–33 (2013) (discussing how the growing ideology of assimilation was used to justify abandoning the principle of consultation with Aboriginal communities on the issue affecting them).

279. See *id.*

The changing view on Aboriginal consultation and self-determination was apparent in the government's response to the *Little Children Are Sacred* report, which was released just two years after the ATSIC was disbanded. The report documented the widespread sexual abuse of Aboriginal children.<sup>280</sup> However, rather than working with Aboriginal communities to address the sexual abuse problem, the government unilaterally decided that extreme intervention was required.<sup>281</sup> This intervention involved military mobilization and "a set of power moves granting the government direct control of the targeted communities, for [] five years."<sup>282</sup> These measures were instituted without consulting impacted communities.<sup>283</sup> Aboriginal activist, Eduard Cubillo, remarked on the lack of consultation: "[W]e members of the First Nations were expected to defer to the wisdom of the colonisers."<sup>284</sup>

When first instituted, the "National Emergency" was described as a response to child sex abuse.<sup>285</sup> Nevertheless, the national emergency quickly focused on the issue of alleged-Aboriginal dysfunction and the government's desire to assimilate Indigenous Australians living in the most remote and least assimilated parts of the country.<sup>286</sup> The government's refocusing on the "problems" with Aboriginal separateness, and the perceived need for assimilation, was aided by the failure of the ATSIC.<sup>287</sup> As Cubillo noted, the abolition of the ATSIC "marginalised Aboriginal interests" and left Aboriginal people with "the inability to

280. NORTHERN TERRITORY GOVERNMENT, REPORT OF THE NORTHERN TERRITORY BOARD OF INQUIRY INTO THE PROTECTION OF ABORIGINAL CHILDREN FROM SEXUAL ABUSE 16–17 (2007) (Austl.).

281. Cubillo, *supra* note 263 ("The Northern Territory National Emergency Response Act . . . supposedly was drafted and enacted in only 10 days - without consultation with Aboriginal communities.").

282. Rebecca Stringer, *A Nightmare of the Neocolonial Kind: Politics of Suffering in Howard's Northern Territory Intervention*, 6 BORDERLANDS, no. 2, 2007, at 1, 2 ("The intervention involve[d] a historically significant domestic deployment of the Australian Army, combined with weakening of the permit system by which Aboriginal communities c[ould] restrict entry to their land, a programme to conduct medical inspection of Aboriginal children under the age of sixteen, the imposition and enforcement of bans on alcohol and pornography, blanket 'quarantining' of welfare payments, and a wide range of land tenure, governance and labour-related changes instituted through follow-up emergency legislation. Howard described the intervention as 'radical, comprehensive and highly interventionist' []. He also stated, 'We can do something about the Northern Territory because we have the power and that's why we're doing it.'").

283. *Id.* at 2, 4. The Prime Minister justified the government's actions as "exceptional measures to deal with an exceptionally tragic situation." John Howard, *Duty of Care Justifies Government's Action*, SYDNEY MORNING HERALD (June 26, 2007, 10:00 AM), <https://www.smh.com.au/national/duty-of-care-justifies-governments-action-20070626-gdqh0x.html>.

284. Cubillo, *supra* note 263, at 148.

285. See Allison Vivian & Ben Schokman, *The Northern Territory Intervention and the Fabrication of 'Special Measures'*, 13 AUSTRALIAN INDIGENOUS L. REV. 78, 78–80 (2009) (describing how child sex abuse was used as the justification for the intervention, but noting that "despite the Government's justifications for the Intervention, the terms 'children' or 'sexual abuse' do not appear in any of the legislative instruments.").

286. See, e.g., Stringer, *supra* note 282 (stating that Prime Minister Howard's defense of the Intervention "casts remote communities as heretofore insufficiently colonised zones to which the sovereign's rule of law must now finally be extended.").

287. Altman, *supra* note 278, at 32 (noting that "[a]fter the abolition of ATSIC the central terms of policy were changed from something loosely termed 'self-determination' to such phrases as 'mutual obligation', 'shared responsibility', 'mainstreaming' and 'normalisation'").

speak with a coherent national voice when contentious policies such as Intervention arose.”<sup>288</sup> In addition, the history of the ATSIC gave rise to the government’s argument that Indigenous decision-making and self-determination had been attempted and failed.<sup>289</sup> Consequently, intervention and assimilation were presented as the only options for protecting Aboriginal people.<sup>290</sup>

As the Australian case study demonstrates, there is a danger—in countries where Indigenous communities lack recognized sovereignty—that ICWA-type laws will be used to justify increased government intervention. If ICWA-type legislation is seen as fostering controversial or unjust child welfare decisions, Indigenous decision-making will be framed as a “failed experiment”—demonstrating the need for greater assimilation efforts.<sup>291</sup> If this occurs, Indigenous communities will be worse off than before the enactment of ICWA-type legislation.<sup>292</sup>

#### V. THE BENEFITS OF A DELEGATED ICWA

As Part IV demonstrates, a nonsovereignty-based ICWA would face serious challenges and fall short of the protections afforded by a child welfare statute based on recognized Indigenous sovereignty. Nevertheless, the ICWA’s recognition of Indian sovereignty has created its own problems, including significant non-Indian resistance to the Act.<sup>293</sup>

The majority of challenges to the ICWA are meritless, yet, relentless and as these challenges continue to grow, so does the threat they pose. The recent Texas case of *Brackeen v. Zinke*<sup>294</sup> highlighted the threat,<sup>295</sup> the district court ignored decades of U.S. Supreme Court precedent and declared the ICWA unconstitutional, racial discrimination.<sup>296</sup> The *Brackeen* decision was shocking, unsupportable, and was, not surprisingly, overturned by the Fifth Circuit.<sup>297</sup> However, the case is now before the Fifth Circuit En Banc and even if they affirm the *Brackeen* reversal, there is little doubt

288. Cubillo, *supra* note 263.

289. *Id.* at 143 (noting the damage done to Aboriginal self-determination and engagement by the abolition of ASTIC and then the implementation of the Northern Territory Intervention); *see also* Stringer, *supra* note 282 (stating the Intervention policy was “[o]penly adopting the politics of assimilation and the de-realisation of Aboriginality it entails . . . to transform ‘failed societ[ies]’ in which there is ‘no natural social order of production’ into ‘normal suburbs’” (quoting Mal Brough, Northern Territory National Emergency Response Bill 2007 – Second Reading Speech (Aug. 7, 2007), <https://formerministers.dss.gov.au/2929/northern-territory-national-emergency-response-bill-2007-second-reading-speech/>); J.C. ALTMAN, THE HOWARD GOVERNMENT’S NORTHERN TERRITORY INTERVENTION: ARE NEO-PATERNALISM AND INDIGENOUS DEVELOPMENT COMPATIBLE? 2 (2007) (arguing the abolition of ATSIC helped pave the way for Intervention through an increased emphasis on “normalisation” for Indigenous Australians).

290. *See* Cubillo, *supra* note 263, at 151–152.

291. *See supra* note 275 and accompanying text.

292. *See supra* Section IV.C (discussing the Northern Territory Intervention).

293. *See infra* Section V.A (describing the exceptions that have been created to avoid the application of the ICWA).

294. 338 F. Supp. 3d 514 (N.D. Tex. 2018), *rev’d by*, 937 F.3d 406 (5th Cir. 2019).

295. *Brackeen*, 338 F. Supp. 3d at 533, 539.

296. *Id.* at 536.

297. *See generally Brackeen*, 937 F.3d at 406.

the attacks on ICWA will continue.<sup>298</sup> Consequently, although a sovereignty-based law like the ICWA offers Indigenous families much stronger protections than similar legislation based on delegated rights, nonsovereignty-based, Indigenous child-protection legislation will have certain advantages: Most notably, acceptance by the non-Indigenous population and greater stability.<sup>299</sup> Moreover, since a sovereignty-based approach to Indigenous child welfare is not feasible in many countries, the question is not whether a nonsovereignty-based, Indigenous-child-welfare legislation is preferable; the question is whether there are potential benefits to this alternative method that might counterbalance the risks and limitations.

#### A. ICWA Loopholes

The ICWA protects the right of Indian nations and tribal members to be different.<sup>300</sup> The Act provides protection by recognizing the inherent authority of Indian tribes.<sup>301</sup> Unfortunately, difference is not always applauded, particularly when it is viewed as subversive or incorrect and has caused issue for the ICWA.<sup>302</sup> Professor Judith Resnik explores the issue of sovereignty and tribal difference in her article “Dependent Sovereigns.”<sup>303</sup> Resnik notes that the strongest definition of tribal sovereignty would result in “divergent, idiosyncratic expressions,” which, according to Resnik, raises the question: “From the perspective of the dominant society, . . . how much ‘subversion’ and ‘invention’ should be tolerated and encouraged[?]”<sup>304</sup> The ICWA arguably sits at the very edge of non-Indians’ tolerance.<sup>305</sup> This is demonstrated in extreme cases like *Brackeen*, but also in the numerous judicially created exceptions that courts have constructed to allow states to assert jurisdiction over Indian child cases.<sup>306</sup>

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298. See *infra* Section V.A.3 (describing the many recent challenges to the ICWA).

299. See *infra* Section V.A (discussing why a delegated ICWA might have greater stability and acceptance than a sovereignty-based act).

300. See *supra* Section III.B.2 (explaining how the ICWA protects Indian difference).

301. See *supra* Section II.B (discussing how the ICWA recognizes the inherent authority of tribes).

302. See, e.g., Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 691–92 (1989).

303. *Id.* at 676–78.

304. *Id.* at 750, 755.

305. See, e.g., Atwood, *supra* note 31, at 590 (describing such critics as possessing “entrenched Anglo-American bias and wooden resistance to cultural difference”); see also Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 610–11 (1994) (stating that “[t]he test of Native American subjectivity was whether self-government could survive when the subordinate and dominant cultures clashed, and one culture had to defer to the other”).

306. See Michael Connelly, *Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1978: Are the States Respecting Indian Sovereignty?*, 23 N.M. L. REV. 479, 480 (1993) (analyzing how state courts have increasingly not transferred Indian child-custody proceedings to the tribes but, rather, have exercised their concurrent jurisdiction over Indian child-custody cases in violation of ICWA’s mandates); see also Maire Corcoran, *Rhetoric Versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L. 415, 438 (2009) (noting that “too often state courts work around the provisions of ICWA to ensure that Indian child custody cases remain with the state”).

The ICWA provisions removing child welfare decisions from the state are typically the most controversial provisions.<sup>307</sup> State courts have repeatedly undermined<sup>308</sup> these provisions removing child welfare decisions from the state by creating loopholes allowing states to retain jurisdiction.<sup>309</sup> As a result, some of the most important provisions of the Act—Sections 1903, 1911(a), and 1911(b)—are the most frequently ignored provisions.<sup>310</sup> Court-created work-arounds limit the protections of the ICWA and have the potential to undermine the ICWA entirely.<sup>311</sup> However, because many of the criticisms of the ICWA are directly related to Indian sovereignty,<sup>312</sup> it is possible Indian-sovereignty-based attacks on the ICWA would disappear if its protections were nonsovereignty-based.<sup>313</sup> Elimination of Indian-sovereignty-based attacks is a significant benefit of a nonsovereignty-based ICWA-type legislation.

### 1. Section 1903 and the Definition of “Indian Child”

As discussed in Part II, one of the core aspects of sovereignty is the right to define membership.<sup>314</sup> Section 1903 protects this right by ensuring the child’s tribe authors the definition of “Indian child.”<sup>315</sup> Nevertheless, leaving the determination of “Indian child” to tribal governments has led

307. See Barbara Ann Atwood, *Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1082–86 (1989) (describing the disputed cases as those that occupy “the vast gray area,” in which both the tribe and the state have a strong interest).

308. See Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 469 (1998) (detailing the “abuses of the ICWA by state courts over the last two decades”).

309. See Corcoran, *supra* note 306.

310. See 25 U.S.C. §§ 1903, 1911(a)–(b) (2018). It should be noted that the “active efforts” requirement in Section 1912(d) of the ICWA is also frequently ignored or subverted by courts. However, discussion of that provision is beyond the scope of this Article. Megan Scanlon, *From Theory to Practice: Incorporating the “Active Efforts” Requirement in Indian Child Welfare Act Proceedings*, 43 ARIZ. ST. L.J. 629, 646 (2011).

311. See, e.g., Zug, *supra* note 212 (noting that in one particularly egregious case, South Dakota judge Jeff Davis removed Indian children in 100% of the ICWA cases that came before him).

312. See Carriere, *supra* note 305, at 610 (arguing that the Act only confirms sovereignty in a haphazard fashion and, as a result, is responsible for much of the conflict between tribes and states regarding the Act. She notes that “tension in Euro-American thinking manifests itself throughout the Act in the form of vacillations between the conceptualization of the Native American as tribal sovereign and the Native American as a dependent and disempowered individual. As a result, the Act contains many lacunae that implicitly or explicitly invite the states to retain their traditional dominance.”).

313. *Id.* at 611 (“The Native American children in these cases stand at the intersection of the Euro-American and the Native American worlds: though they are Native American, they do not live in ‘Indian country.’ Thus, the state courts exercising jurisdiction over their custody must consider two cultures’ competing claims for their membership. The dominant culture allows the tribunal of either culture to hear an action. Its rationales for showing (or not showing) deference to the subordinate culture’s courts in child welfare cases reveal the limits of its regard for the subordinate subjectivity.”).

314. See *supra* Section III.A.2.a.

315. See 25 U.S.C. § 1903(4).

to significant criticisms.<sup>316</sup> Opponents of the Act claim—often successfully—tribally determined membership criteria means the ICWA often applies to children whom are not “real” Indians.<sup>317</sup>

Many state courts have avoided applying the ICWA by either refusing to recognize the validity of a tribal membership determination<sup>318</sup> or creating a state definition of “Indian child.”<sup>319</sup> A state definition led to one of the most significant exceptions to the Act: the Existing Indian Family Exception (EIF). Under EIF, a child who meets the legal definition of an “Indian child” under the ICWA—meaning the child is “enrolled or eligible for enrollment in a federal recognized tribe”—may be exempted from the ICWA’s requirements if the court determines the child is not being removed from an “existing Indian” family.<sup>320</sup> The assumption underlying EIF is the belief that, when a tribe’s definition of “Indian child” conflicts with the state’s definition, the state’s definition shall prevail.<sup>321</sup> As Professor Atwood noted, the EIF cases are those in which “multiple claims of identity exist as to particular children,” and state courts are unwilling to agree that the tribe has a superior right to pick amongst them.<sup>322</sup> In EIF cases, state courts refuse to recognize the sovereignty of Indian tribes and, in refusal to recognize, undermine the protections of the ICWA.

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316. See *supra* Section III.A.2.a; see also *infra* note 318 and accompanying text.

317. See Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 31 (2008) (suggesting that the existing Indian family doctrine is based on non-Indian stereotypes “about who is a ‘real’ Indian”).

318. *In re Matter of Quinn v. Walters*, 845 P.2d 206, 209–10 (Or. Ct. App. 1993), *rev’d by*, 881 P.2d 795 (Or. 1994) (finding the affidavit of the Registrar of the Cherokee to be hearsay and thus inadmissible as proof of membership).

319. See Metteer, *supra* note 308, at 429 (noting that in construing the ICWA, state courts have devised tests “to manipulate the application and implementation of the Act by variously defining their own criteria for ‘Indian-ness’”).

320. The doctrine was first applied in the Kansas case of *Baby Boy L.* See *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), *overruled by* 204 P.3d 543 (Kan. 2009). The child in that case was 5/16th Kiowa, which qualified him for membership under the Kiowa Tribe’s membership rules and meant he met the definition of Indian child under ICWA. *In re Adoption of Baby Boy L.*, 643 P.2d at 173, 176. Nevertheless, the Kansas court found the Act inapplicable to the child based on its determination that “effect 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;” and because the court concluded that the child had never lived with his Indian family, the ICWA did not apply to his situation. *Id.* at 175–76.

321. See Cheyanna, *supra* note 184, at 143 (stating that “[i]n order to apply the existing Indian family exception, these state court judges must rely on their predetermined notions of what an American Indian is or should be.”); see also 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, 397 (1997) (describing the “existing Indian family” exception as the doctrine “whereby state courts unilaterally decide who is a real Indian child”); Maldonado, *supra* note 317.

322. See Atwood, *supra* note 31, at 660. It should also be noted that in the non-ICWA context, tribal membership decisions have raised equal protection concerns, due to the fact that they may be based on racially or sexually discriminatory criteria, and this fact has been used as an argument against tribal sovereignty. See, e.g., Robert C. Jeffrey, Jr., *The Indian Civil Rights Act and the Martinez Decision: A Reconsideration*, 35 S.D. L. REV. 355, 370 (1990) (arguing that the “‘right of self-determination’ in domestic matters can be seen as a stratagem to defeat civil rights because in each case these causes reject the teaching on natural rights which lies at the heart of the American regime, with all the consequences which that rejection implies”).

The impact of the EIF line of decisions can be seen in the most recent Supreme Court ICWA case: *Adoptive Couple v. Baby Girl*.<sup>323</sup> *Adoptive Couple* was not an EIF case.<sup>324</sup> Still, the Court's decision was clearly influenced by the EIF line of decisions.<sup>325</sup> In *Adoptive Couple*, the child's father was an enrolled and active member of Cherokee Nation.<sup>326</sup> Consequently, Baby Girl unquestionably met the ICWA's definition of an Indian child.<sup>327</sup> Nevertheless, skepticism regarding her "Indianness" pervades the Court's entire decision.<sup>328</sup> The first line of the decision by Justice Alito provides: "[T]his case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."<sup>329</sup> The decision reiterates this question of Indianness again when Alito notes concern that the ICWA might be applied to a child "solely because an ancestor—even a remote one—was an Indian."<sup>330</sup>

It is also clear that Justice Alito's concern over Indianness is shared by other members of the Court: both Justice Breyer and Chief Justice Roberts expressed strong skepticism about Baby Girl's Indian ancestry.<sup>331</sup> During oral arguments, Roberts presented the question:

If—if you had a tribe, is there at all a threshold before you can call, under the statute, a child an 'Indian child'? 3/256ths? And what if the tribe—what if you had a tribe with a zero percent blood requirement? They're open for, you know, people who want to apply, who think culturally they're a Cherokee or—or any number of fundamentally accepted conversions.<sup>332</sup>

Roberts then returned to the question a few moments later stating, "I'm just wondering is 3/256ths close—close to zero?"<sup>333</sup> Justice Breyer also echoed the concern, stating that the potential application of the ICWA in this case was due to the fact that Baby Girl's "[Biological Father] had three Cherokee ancestors at the time of George Washington's father."<sup>334</sup>

Although the Court did not use the EIF exception to deny the father's custody claim, at least some members of the Court were clearly influ-

323. 570 U.S. 637, 641–42 (2013); *see also supra* notes 1–4 and accompanying text (describing the controversy surrounding the *Adoptive Couple* case).

324. *See* Marcia A. Zug, *The Real Impact of Adoptive Couple v. Baby Girl: The Existing Indian Family Doctrine is Not Affirmed, but the Future of the ICWA's Placement Preferences is Jeopardized*, 42 CAP. U. L. REV. 327, 338 (2014).

325. *See Adoptive Couple*, 570 U.S. 637, 641–42 (2013).

326. *Id.* at 643.

327. *See id.* at 641.

328. *See supra* notes 326–27 and accompanying text; *see also infra* notes 328–32 and accompanying text.

329. *See Adoptive Couple*, 570 U.S. at 641.

330. *See id.* at 655.

331. Transcript of Oral Argument at 38–40, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399).

332. *Id.* at 38–39.

333. *Id.* at 42.

334. *Id.* at 40.

enced—as evinced by the questions presented—by concerns of Indian-ness.<sup>335</sup> The result was a U.S. Supreme Court decision that severely undermines the ICWA’s protections.<sup>336</sup>

Nonsovereignty-based, Indigenous-child-welfare legislation could avoid undermining the ICWA protections because—unlike the current ICWA that requires recognition of each individual tribe’s definition of an “Indian child”—nonsovereignty-based legislation could include a single, specific and uniform definition of Indigenous child, which conforms to general, non-Indigenous perceptions of an Indigenous child.<sup>337</sup> As previously noted, there are significant exclusionary problems with a general and uniform definition of Indigenous child.<sup>338</sup> However, a general definition would eliminate many of the ICWA cases proven most problematic in the United States: cases involving children or families deemed by the non-Indian population as “insufficiently Indian.” By eliminating these cases, a nonsovereignty-based ICWA is less controversial and enjoys greater acceptance than the current sovereignty-based Act. Thus, a nonsovereignty-based ICWA—for Indigenous communities that do not enjoy recognized sovereignty—covers a more limited range of cases but provides more robust protections within that range of cases.

## 2. The Good Cause Exception: Differing State and Tribal Standards

Concerns regarding tribal sovereignty have also led to the expansion of the ICWA’s “good cause” exception.<sup>339</sup> Sections 1911(a)–(b) protect Indian tribes’ sovereign right to make child welfare decisions—free of state influence or oversight.<sup>340</sup> The ICWA contemplates the possibility of child welfare determinations made in ways that appear to conflict with state laws or values.<sup>341</sup> The ICWA permits this conflict, recognizing that meaningful tribal sovereignty requires tribes have the right to make their own child welfare decisions—even if these decisions differ from state child welfare decisions.<sup>342</sup> However, the ICWA also assumes that tribal-

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335. See *supra* notes 325–30 and accompanying text.

336. See Barbara A. Atwood, *A Response to Professor Berger’s ‘In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl’*, 67 FLA. L. REV. F. 1, 1 (2015) (sharing the “concern that the Court’s decision will undermine enforcement of ICWA”); see also Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 317 (2015) (arguing *Adoptive Couple* will undermine enforcement of the ICWA).

337. This could be a definition based on significant blood quantum or any other definition likely to garner widespread acceptance.

338. See *supra* pp. 240–43 (discussing the importance of tribes being able to define their membership).

339. See *supra* note 337 and accompanying text; see also *infra* notes 340–46 and accompanying text (explaining how and why state courts employ the good cause exception).

340. See *supra* Section III.A.2.b.

341. See *supra* Section III.B.1 (discussing how the ICWA was enacted to prevent state biases concerning what constitutes good parenting from influencing Indian child-welfare decisions).

342. See *supra* Section III.A.2.b.

child-welfare decisions will protect Indian children's best interests.<sup>343</sup> Unfortunately, not everyone believes tribes will effectively protect the best interests of Indian children. Those holding this belief often view the ICWA as favoring the best interests of the tribe over the best interests of Indian children.<sup>344</sup> When state courts presume that ICWA favors the best interest of the tribe over tribal children, they often employ the ICWA's the good cause exception.<sup>345</sup> The good cause exception permits courts to refuse transfer upon a finding of "good cause"—despite the presumption of transfer in Section 1911(b).<sup>346</sup>

The ICWA does not define good cause, and the variety of reasons used to prevent transfer under this provision are numerous.<sup>347</sup> However, the primary reason state courts provide when denying transfer under the good cause exception is that tribal courts will not adequately protect the Indian child's best interest.<sup>348</sup> Such concerns are unfounded. Professor Jeanne Carriere notes: "The notion that Native American tribal courts are more likely than state courts to neglect or inflict suffering on Native American children is grounded in suspicion, not in objective evidence."<sup>349</sup> In

343. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49–50, n.24 (1989) (stating that the ICWA is based on "the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected" (quoting *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981))).

344. *See Holyfield*, 490 U.S. at 52–53 (finding the Act favors the interests of the tribe, at least where the tribal member is a domiciliary of the reservation); *see also Atwood*, *supra* note 31, at 657–58 (discussing the "perceived conflict between the goals of promoting tribal survival and the child's interest in becoming or remaining a member of the tribal community, on the one hand, and that same child's pressing interest in continuity of care"). The Act also contemplates potential conflicts between the desires of the tribe and that of individual tribal parents.

345. For examples of courts employing the good cause exception, *see 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 the ICWA placement preferences); *In re Maricopa County Juvenile Action No. Js-8287*, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991) (finding best interests applicable in determining good cause); *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983) (finding emotional attachment to a caregiver constitutes good cause) (holding best interests of the child constitute good cause); *In re M.E.M.* 635 P.2d 1313, 1316–17 (Mont. 1981) (finding best interests constituted good cause); *Carney v. Moore*, 754 P.2d 863, 869 (Okla. 1988) (finding both presence of witnesses in Oklahoma and child's best interests supported good cause denial of transfer).

346. *See In re F.H.*, 851 P.2d at 1364; *see also In re Maricopa Cty. Juv. Action*, 828 P.2d at 1248.

347. *See Carriere*, *supra* note 305, at 614 (stating, "The interpretive variations indicate the breadth of discretion that state courts have enjoyed in making decisions under section 1911(b).").

348. *See Jill E. Adams, The Indian Child Welfare Act of 1978: Protecting Tribal Interests in a Land of Individual Rights*, 19 AM. INDIAN L. REV. 300, 323 (1994) (noting that "[s]tate courts frequently have interpreted the 'good cause' provision broadly by finding that transfer should not occur because it would be counter to 'the best interest of the child.' This approach ignores the competence of the tribal court to act in the best interests of the child . . . ."); *see also Carriere*, *supra* note 305, at 615 (noting, "[T]he standard is so embedded in Euro-American values that, unless it is radically redefined, cultural bias inescapably results from its application").

349. *See Carriere*, *supra* note 305, at 629, 649–50 (noting that despite such fears, the evidence indicates the native tribunals "bring both Euro-American and Native American values to bear on custody decisions," but warning that "for as long as we insist on representing the Native American, rather than on letting Native Americans represent themselves, we are hard put to discern the interference of our own romantic cultural bias with our positive knowledge and its interpretation."). It should be noted that this objection is not limited to ICWA cases. It is common for non-Indians to object to tribal court jurisdiction based on a perceived fear of tribal justice systems as inherently unfair. *See Zug*, *supra* note 212, at 792–93 (discussing how fear of tribal justice influences objections to tribal court jurisdiction).

*Yavapai-Apache Tribe v. Mejia*,<sup>350</sup> the Texas Court of Appeals echoed this sentiment deeming the assumption that tribal courts would harm tribal children an “arrogant idea that defeats the sovereignty of Indian tribes in custody matters; the very idea for which ICWA was enacted.”<sup>351</sup>

Moreover, in addition to the inherent arrogance and unjustness of the concerns, the available evidence indicates that the concerns are simply wrong.<sup>352</sup> When Professor Bethany Berger examined Navajo-tribal-court-child placements involving mixed-status children, she found no evidence of decisions favoring Indian parties.<sup>353</sup> According to Professor Berger, “[N]ot one of the 534 Navajo appellate cases online arises under ICWA.”<sup>354</sup> A lack of evidence suggests that when “the Navajo Nation trial courts exercise jurisdiction in custody cases involving nonmembers, parties do not perceive the results as stark violations of the law.”<sup>355</sup> In contrast, when a New Mexico court was asked to consider whether application of the Navajo custom of grandparent custody is in the child’s best interest, the court refused and stated: “New Mexico need not subordinate its own policy to a conflicting Navajo custom.”<sup>356</sup>

Courts that employ the good cause exception fear tribal courts are unfair and will fail to protect the best interests of Indian children.<sup>357</sup> This fear is baseless, but unfortunately widespread, and exacerbated by the fact that tribal sovereignty means there is an absence of state oversight over tribal-court decisions.<sup>358</sup> State courts cannot overturn tribal-court decisions, and state welfare workers cannot enter the reservation to “checkup”

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350. 906 S.W.2d 152 (Tex. App. 1995).

351. *Id.* at 170.

352. See, e.g., Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1088 (2005).

353. *Id.* (stating that “[t]he Navajo Nation Court has declared that ‘the most precious resource of the Navajo Nation is indeed its children,’ and interprets the Navajo Nation Children’s Code as designed ‘to protect this vital resource of the Navajo Nation.’ It would not be surprising if this concern resulted in a bias against non-Navajo parents when they seek custody of children born in relationships with Navajos, or in favor of the jurisdiction of Navajo courts over custody determinations.” (quoting *Navajo Nation v. O’Hare*, 5 Navajo Rptr. 121, 124 (1987))).

354. Berger, *supra* note 352, at 1089.

355. Presumably, if non-Indians believed the custody determination was unfair, at least some would appeal. Instead, the non-ICWA custody cases that were appealed demonstrate no bias against non-Indians. *Id.* at 1090 (noting that of these non-ICWA appellate custody cases, only six were between Navajo and non-Navajo parents, and the non-Navajo parent won four times); see also Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 311, 336 (2015) (discussing the public perception of tribal court fairness).

356. See *In re Adoption of Doe*, 555 P.2d 906, 914 (N.M. Ct. App. 1976) (In such cases, the courts ignore the value to the child of his extended family or cultural heritage.).

357. See Carriere, *supra* note 305, at 614–15.

358. See John J. Harte, *Validity of A State Court’s Exercise of Concurrent Jurisdiction over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 AM. INDIAN L. REV. 63, 87–88 (1997) (explaining that “state courts cannot review tribal court decisions as can federal courts. State courts simply are not authorized to act as appellate courts for disputed tribal court decisions.”); see also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987) (explaining that federal courts may review tribal court assertions of jurisdiction but only after exhaustion of tribal remedies).

on tribal children.<sup>359</sup> When state courts view these prohibitions on state oversight as problematic, state courts will use the good cause exception to get around the ICWA prohibitions on state oversight and, thus, retain control over Indian-child-custody cases.<sup>360</sup>

The good cause exception limits tribes' right to make child welfare decisions according to their laws and customs and undermines the ICWA's fundamental premise that protecting tribal decision-making is in the best interest of Indian children.<sup>361</sup> A nonsovereignty-based ICWA might avoid these problems.

In countries where Indigenous sovereignty is not recognized by the government, Indigenous decision-making may be subject to non-Indigenous appellate review. As discussed previously,<sup>362</sup> non-Indigenous appellate review is problematic because it limits the decision-making authority of Indigenous tribunals—especially the ability of Indigenous tribunals to counteract long-standing, cultural biases. Nevertheless, the availability of non-Indigenous appellate review is beneficial because it could avoid replicating the situation in the United States: a lack of state appellate review creating strong resistance to tribal-court jurisdiction and loopholes like the “good cause” exception.

By including the possibility of non-Indigenous appellate review, a nonsovereignty-based ICWA garners greater public support for Indigenous decision-making because the non-Indigenous public is reassured that a “wrongly decided” case can be reversed. In addition, as non-Indigenous appellate courts become more familiar with Indigenous decision-making, it is possible that the judicial fear and distrust of Indigenous decision-makers, entrenched in the United States, will not develop in foreign jurisdictions.

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359. See, e.g., Dennis Puzz, Jr., *Indian Law: Untangling the Jurisdictional Web: Determining Indian Child Welfare Jurisdiction in the State of Wisconsin*, 36 WM. MITCHELL L. REV. 724, 732 (2010) (describing how “Wisconsin law requires the state agency to investigate any reports received about child abuse or neglect . . . within the state's jurisdiction. The state was not granted jurisdiction over child welfare or child protective services (CPS) issues within reservations located in the State of Wisconsin. The ICWA does allow for emergency removal or placement of a child, but only when the emergency removal is of an Indian child who is a resident of or is domiciled on a reservation but temporarily located off the reservation.”). For an example of such an agreement, see *In re Fair Hearing of Hanna*, 227 P.3d 596, 599–600 (Mont. 2010) (finding a state agency had authority to investigate allegations of abuse and neglect of an Indian child on reservation by an Indian foster mother only because there was an agreement between a tribe and the state).

360. See *supra* Section V.A.2.

361. See *supra* notes 338–41 and accompanying text.

362. See *supra* Section III.A.2 (discussing how a lack of state court oversight is essential to effectuating the ICWA's goal of eliminating cultural bias in decisions affecting Indian children and families).

*B. Bias, Equal Protection, and Due Process*

The good cause exception<sup>363</sup> is based on the belief that tribal control over India-child-welfare cases may subject Indian children to unjust custody determinations.<sup>364</sup> For some critics of the ICWA, the possibility of unjust custody determinations renders the entire ICWA unconstitutional.<sup>365</sup> These critics argue that the ICWA subjects Indian children to different and harmful custody laws based on race—violating Indian children’s due process and equal protection rights.<sup>366</sup> As discussed above, these objections have little legal or factual merit but pose a real threat to the future of the ICWA.<sup>367</sup>

Professor Sarah Krakoff notes: “Treating children differently based on their eligibility for tribal membership is, of course, precisely what ICWA requires.”<sup>368</sup> Under *Mancari*, distinguishing between children based on tribal membership raises no due process or equal protection concerns.<sup>369</sup> However, the ICWA’s critics frame this distinction between children eligible and not eligible for tribal membership as a distinction based on ancestry and race. *Adoptive Couple* demonstrates the success of critics’ strategy: at least some of the Justices conflated the role of ancestry and tribal membership and chose to limit the Act’s application as a result.<sup>370</sup> Shortly after *Adoptive Couple*, and seemingly emboldened by Court’s statements on ancestry, the Goldwater Institute initiated a class action—*A.D. v. Washburn*<sup>371</sup>—against the ICWA.<sup>372</sup> In *Washburn*, the Goldwater Institute alleged that the application of the ICWA to Indian children violated Indian children’s equal protection rights; Goldwater claims that “[m]ost Indian tribes have only blood quantum or lineage requirements as prerequisites for membership.” By defining “Indian child” in relation to tribal membership, Goldwater claims the ICWA’s definition of Indian

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363. See, e.g., *In re Bridget R.*, 41 Cal. App. 4th 1483, 1491–92 (Cal. Ct. App. 1996) (finding that if the Existing Indian Family Exception was applied, then the ICWA was constitutional and did not violate the Equal Protection or Due Process Clause).

364. See *supra* Section V.A.2.

365. See, e.g., Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD LEGAL RTS. J. 1, 65 (2017) (arguing the Act is racially discriminatory and fosters a system of legal segregation akin to Japanese internment during WWII).

366. See *id.*

367. See *supra* Section III.A.1.

368. Krakoff, *supra* note 32, at 512.

369. See *supra* Section III.A.1 (discussing *Morton v. Mancari* and the constitutionality of the ICWA).

370. See *infra* pp. 257–58 (describing the *Adoptive Couple* Court’s ancestry concerns).

371. *A.D. v. Washburn*, No. CV-15-01259-PHX-NVW, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017).

372. One particular impetus may have been Justice Alito’s suggestion that allowing the ICWA to apply to a child “solely because an ancestor—even a remote one—was an Indian[] . . . would raise equal protection concerns.” *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655–56 (2013).

child “is based solely on the child’s race or ancestry” and is unconstitutional.<sup>373</sup>

*Washburn* was the sixth attempt since *Adoptive Couple* to overturn the ICWA.<sup>374</sup> Though *Washburn* was dismissed in March of 2017, *Brackeen* court—less than eighteen months later—utilized nearly identical arguments to hold the ICWA amounted to unconstitutional racial discrimination.<sup>375</sup> The *Brackeen* decision was reversed by the Fifth Circuit; thus, the ICWA remains good law for now.<sup>376</sup> Nevertheless, as long as critics continue to raise the equal protection challenges to the ICWA, its future remains in doubt. Thus, a substantial benefit of a nonsovereignty-based ICWA is that it could eliminate the threat posed by these equal protection challenges.

The ICWA permits a different set of rules to govern Indian child custody determinations than those applying to non-Indian custody determinations.<sup>377</sup> These two sets of governing rules exist because the U.S. government recognizes tribal sovereignty and tribes’ right to make their own laws and be governed by them.<sup>378</sup> In countries that do not recognize Indigenous sovereignty, this conflict over the governing law would not occur. In the absence of recognized Indigenous sovereignty, any ICWA-type legislation would be based on delegated powers and Indigenous tribunals exercising delegated power, must apply the same laws, and be governed by the same legal restrictions, as non-Indigenous tribunals.<sup>379</sup> This means that in countries like Australia, Norway, Finland, and Russia, where Indigenous sovereignty is not recognized, an Indigenous tribunal could only apply race-based distinctions to Indigenous child welfare determinations if such distinctions were permissible in non-Indigenous child welfare cases.<sup>380</sup> As a result, the racial discrimination criticisms of *Carter* and *Brackeen* would be inapplicable and, one of the biggest threats to the ICWA in the United States, could be avoided abroad.

373. Complaint at 9, *A.D. v. Washburn*, No. 2:15-cv-01259-DKD, 2017 WL 1019685 (D. Ariz. July 6, 2015). Goldwater Vice President, Timothy Sandefur, expounded on this point in his article, *supra* note 366, at 58, in which he argued, “The government may not force one group of citizens, defined by ancestry, to obtain citizenship from another sovereign and thereby submit to a change in their legal rights and obligations.”

374. Other challenges had been filed in South Carolina, Virginia, Oklahoma, and Minnesota. See Suzette Brewer, *ICWA: Goldwater Case Thrown out of Federal Court*, INDIAN COUNTRY TODAY (Mar. 21, 2017), [https://newsmaven.io/indiancountrytoday/archive/icwagoldwatercasethrown-outoffederalcourt\\_RAMRUiYHUiSp1ffZ4JROQ/](https://newsmaven.io/indiancountrytoday/archive/icwagoldwatercasethrown-outoffederalcourt_RAMRUiYHUiSp1ffZ4JROQ/).

375. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 533, 536 (N.D. Tex. 2018) (holding the ICWA was an unconstitutional racial preference because it found that “eligibility . . . for . . . tribal membership” is akin to saying, “one is an Indian child if the child is related to a tribal ancestor by blood.”).

376. On November 7, 2019, the Fifth Circuit agreed to rehear the case en banc. See Katie Mettler, *Tribal Families. Get Priority in Native American Adoptions. An Appeals Court Will Decide Whether That’s Fair.*, WASH. POST (Nov. 9, 2019), <https://www.washingtonpost.com/dc-md-va/2019/11/09/tribal-families-get-priority-native-american-adoptions-an-appeals-court-will-decide-whether-thats-fair/>.

377. See 25 U.S.C. § 1901 (2018).

378. See *supra* note 214 and accompanying text.

379. See *supra* note 245 and accompanying text (discussing the limitations of delegated rights).

380. See *supra* note 245 and accompanying text.

## CONCLUSION

Sovereignty and self-determination are desired by most Indigenous groups but are often unrealized.<sup>381</sup> Consequently, it is important to understand the scope of Indigenous rights of groups unable or denied the right to exercise their sovereignty. This Article examines how the existence and absence of sovereignty affects Indigenous peoples' right to determine care for and control over Indigenous children. It argues that a peoples' ability to determine the care for and control over Indigenous children is essential to meaningful recognition of sovereignty. This Article also recognizes Indigenous sovereignty is the most effective means—but not exclusive means—to protect Indigenous families and children.

A nonsovereignty-based approach to Indigenous child protection has significant weaknesses but also specific advantages. For Indigenous peoples living in countries where sovereignty-based Indigenous-child-protection legislation is not feasible, acknowledging the benefits to a nonsovereignty-based approach is an important step in protecting Indigenous families.

There are also benefits to be gained by American-Indian families in examining the benefits of a nonsovereignty-based approach. Indian communities have the sovereign right to make child welfare decisions for tribal children. However, as the history of the ICWA demonstrates, when Indian communities make decisions that are unpopular with the non-Indian public, these decisions threaten to destabilize, or even destroy, the ICWA's protections.<sup>382</sup> Understanding the relation between Indigenous sovereignty and Indigenous-child-protection law is essential to combating threats to the ICWA<sup>383</sup> and enacting and maintaining effective Indigenous-child protection-legislation in the United States and abroad.

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381. See *supra* Part II (discussing the fight for Indigenous rights in Canada, Australia, Scandinavia, and Russia).

382. See *supra* Section V.A (discussing the *Brackeen* and *Goldwater* challenges to the ICWA).

383. Part II of this Article will explore how ICWA supporters can advocate for the protection of Indian children and families in a potentially post-*Brackeen* world by relying on many of the nonsovereignty based arguments first explored in this Article. See Marcia Zug, *Goodbye ICWA?* (forthcoming 2020).