

WHERE SOVEREIGNS AND CULTURES COLLIDE:
BALANCING FEDERALISM, TRIBAL SELF-DETERMINATION,
AND INDIVIDUAL RIGHTS IN THE ADOPTION OF
INDIAN CHILDREN BY GAYS AND LESBIANS

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INTRODUCTION.....	327
I. BACKGROUND.....	331
A. ICWA and Adoption.....	331
B. Gay and Lesbian Adoption in the United States.....	333
C. Indian Attitudes Toward Homosexuality and Same-sex Relationships.....	334
II. GAY/LESBIAN ADOPTIONS IN TRIBAL COURT.....	337
A. In Tribal Court, Tribal Law Controls.....	338
B. Full Faith and Credit for Tribal Adoption Decrees.....	339
III. GAY/LESBIAN ADOPTIONS UNDER ICWA IN STATE COURT.....	341
A. Federal Preemption Doctrine.....	341
B. What if State Law Supports Adoption Equality But the Tribe Opposes It?.....	343
C. Does ICWA Override Anti-gay State Adoption Law?.....	347
CONCLUSION.....	352

INTRODUCTION

In the American scheme of federalism, the policies and procedures for adoption, like family law generally, have traditionally been the province of state law.¹ By contrast, Congress has plenary power over Indian tribes and government Indian policy.² These two legal regimes converge in the federal

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1. A growing body of commentary, however, notes that this understanding has changed as scholars explore how the federal government has long been involved in regulating the family and how that involvement has increased. *See generally, e.g.*, Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267 (2009); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297 (1998).

2. *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-65 (1903).

Indian Child Welfare Act (“ICWA”).³ ICWA partially preempts state law in certain proceedings involving Indian children, pursuant to a Congressional policy of preventing the improper removal of these children from Indian homes.⁴ Among other provisions, ICWA specifies that when an Indian child is adopted, preference must be given to a member of the child’s extended family, a member of the child’s tribe, or a member of another Indian tribe.⁵

Hold that thought and consider that adoption by gay men, lesbians, and same-sex couples has become an increasingly mainstream phenomenon. Reliable estimates show that more than 65,000 adopted children are living with a gay or lesbian parent, and some two million gays, lesbians, and bisexuals have considered adopting or would like to do so.⁶ But state adoption policies vary, and so gays and lesbians, or same-sex couples seeking to adopt jointly, face a patchwork of adoption laws ranging from inclusive to hostile to simply unclear.⁷

I could find no reported adoption cases under ICWA where the sexual orientation of the would-be parent(s) was an issue. Yet it seems inevitable such cases will arise.⁸ The phenomenon of sexual and gender diversity has deep roots in Native American history and culture, and contemporary Indian tribes are affected by the same political and legal controversies over same-sex relationships that have occupied American legislators and jurists in recent years.⁹ While there is much evidence that Western culture and religion have eroded tribal traditions once honoring “two-spirit” individuals,¹⁰ one commentator has speculated that “[i]n contrast to the approach of many state courts and legislatures, some tribal communities may be more receptive to adoption by gays and lesbians” because “there is evidence of a greater tolerance in many tribal societies for ambiguity in gender-identification.”¹¹ And although there is apparently no codified tribal law on the question of adoption by homosexuals,¹² at least one tribal court has found a lesbian couple was

3. 25 U.S.C. §§ 1901-1963 (2006).

4. *See infra* Part I.A.

5. 25 U.S.C. § 1915(a) (2006).

6. GARY J. GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 6-7 (The Williams Institute and Urban Institute 2007), <http://www.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf> [hereinafter Williams/Urban Institute Report].

7. *See infra* Part I.B.

8. Indeed, they almost certainly have already, but it is hard to know because most adoption proceedings are confidential and the details are not reported unless they go up on appeal.

9. *See infra* Part I.C.

10. *See infra* notes 54-57 and accompanying text.

11. Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 619 (2000).

12. *Id.* at 620.

“competent and qualified” to adopt and “fit to provide a home environment for the healthy development of the children.”¹³

Quirks of geography might also bring the issue to the fore. For example, California, which has one of the nation’s largest Indian populations,¹⁴ also has the largest number of adopted children living with gay or lesbian parents.¹⁵ Other states with some of the largest Indian populations—North Carolina, Arizona, Oklahoma, New Mexico, Texas, the Dakotas, Alaska, Montana, and Washington¹⁶—are politically diverse on gay/lesbian issues, some conservative and some liberal.¹⁷ Furthermore, a state’s political climate may affect the decision of a family court judge exercising discretion in absence of clear state law.

When a petitioner’s sexual orientation becomes an issue in an adoption proceeding under ICWA, the question will arise: do the federal policies embedded in ICWA ever determine, or at least influence, whether or not such an adoption must be granted or subsequently recognized as valid, *taking into account the petitioner’s sexual orientation*? Even though ICWA makes no mention of sexual orientation and, ostensibly, has nothing to do with gay/lesbian adoption, I will explain the answer is yes: where a prospective parent’s sexual orientation is an issue in the adoption of an Indian child, sometimes ICWA will make a difference in whether the adoption is granted or recognized.

In Part I, I provide some brief background on ICWA’s legislative history, the current status of gay/lesbian adoption in the United States, and Indian attitudes toward homosexuality and same-sex relationships. In Part II, I explore the impact of ICWA on adoption proceedings in tribal court. I explain that, under certain circumstances, ICWA’s requirements might lead to a gay or lesbian individual or couple being denied an adoption in tribal court that they could have obtained in state court.¹⁸ In other circumstances, ICWA will require

13. *In re Adoption of Ashley Felsman*, 23 INDIAN L. RPTR. 6086, 6087 (C.S.&K.T Ct. App. 1996); see also Atwood, *supra* note 11, at 620-21 (discussing this case in more detail).

14. See *Total Native Americans – Kaiser State Health Facts*, THE HENRY J. KAISER FAMILY FOUNDATION, <http://www.statehealthfacts.org/comparetable.jsp?ind=451&cat=9&sub=106&yr=199&typ=1&sort=a&o=a&sortc=1> (last visited Nov 4, 2010) [hereinafter “Native Population Ranking”].

15. Williams/Urban Institute Report, *supra* note 6, at 7.

16. See Native Population Ranking, *supra* note 14.

17. For example, New Mexico, Washington, Wisconsin, and New York prohibit employment discrimination on the basis of sexual orientation, while the other listed states do not. See Human Rights Campaign, *Statewide Employment Laws & Policies* (2010), http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf. New York also will recognize same-sex marriages performed in other jurisdictions (though it will not grant such marriages), while the other listed states, except for New Mexico, maintain statutes or state constitutional amendments prohibiting same-sex marriages. See Human Rights Campaign, *Statewide Marriage Prohibition* (2010), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf and http://www.hrc.org/documents/marriage_prohibitions_2009.pdf.

18. See *infra* Part II.A.

a state to recognize a gay/lesbian adoption finalized in tribal court even though that state would not have granted the placement itself.¹⁹ In Part III, I discuss ICWA's application to adoption proceedings in state court. Specifically, I discuss whether ICWA gives decisive leverage in a state-court adoption proceeding to a tribe's views on homosexuality; I conclude it does not.²⁰ Finally, and perhaps most controversially, I argue that ICWA should override a state's anti-gay adoption policy if such a law would present a roadblock to the placement of an Indian child in an Indian home.²¹

As a federal statute that partially preempts state law for the benefit of Native Americans, ICWA implicates three sovereigns: the United States, the state where the adoption petition is brought, and the tribe whose child is the focus of the proceeding. This interplay of sovereigns in itself makes Indian child welfare law complicated and interesting. Beyond these sovereign interests, also to be considered are the interests and rights of individuals: the child, the birth parents, and the prospective adoptive parent(s).

In cases where the petitioner's sexual orientation is an issue, an Indian child adoption proceeding also holds the potential to become a clash of cultures. A tribe with a tradition of tolerance toward sexual or gender diversity might find its members in the courts of a state with a public policy that disapproves of gays and lesbians as adoptive parents. Or the opposite may occur: a tribe might object based on its cultural beliefs to a child's placement in a gay or lesbian household, even though the state supports adoption equality. Prospective parents who are required to bring a petition in tribal court may find themselves in a legal world that subordinates their interests to those of the child or the tribe, operates by informal rules, and looks to cultural traditions in rendering legal judgments.²²

These scenarios all arise at the tangled intersection of traditional state family law, Indian culture, federal Indian policy, and evolving principles of gay/lesbian equality. They implicate both practical and doctrinal puzzles, but so far scholars have had little or nothing to say about them.

Every adoption case is unique, and so I do not purport to anticipate every possible scenario involving Indian children and prospective gay/lesbian parents. My goal is to highlight a few important principles and sketch several arguments that may be helpful to courts, scholars, tribes, and adoptive families, and to leave the reader with a greater appreciation of the tensions among federalism, tribal self-determination, and individual liberties.

19. *See infra* Part II.B.

20. *See infra* Part III.B.

21. *See infra* Part III.C.

22. *See infra* note 126 and accompanying text.

I. BACKGROUND

A. ICWA and Adoption

Congress enacted ICWA in 1978 after extensive hearings revealed a widespread problem of Indian children being inappropriately removed from their homes and reservations by state child welfare authorities. Specifically, Congress found “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions,”²³ and “that the 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.”²⁴ In ICWA, Congress declared

it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families 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.²⁵

Similarly, in its only decision interpreting the Act, the Supreme Court has described ICWA as “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.”²⁶ ICWA, the Court said, establishes “a Federal policy that, where possible, an Indian child should remain in the Indian community.”²⁷

To address the problems Congress found, ICWA “constructs a statutory scheme to prevent states from improperly removing Indian children from their parents, extended families, and tribes.”²⁸ ICWA partially preempts state law by

23. 25 U.S.C. § 1901(4) (2006).

24. *Id.* § 1901(5).

25. *Id.* § 1902.

26. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

27. *Id.* at 37 (quoting H.R. REP. NO. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.)). For more on ICWA’s legislative history, *see, e.g.*, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 11.01 (Nell Jessup Newton et al. eds., LexisNexis, 2005 Edition) [hereinafter COHEN’S]; 3 ADOPTION LAW & PRACTICE (Joan H. Hollinger ed., Matthew Bender, 2008 Edition) § 15.01[2] [hereinafter Hollinger].

28. COHEN’S, *supra* note 27, at 820.

providing jurisdictional allocations, substantive requirements, and procedural rules for proceedings involving an Indian child²⁹ for foster care placement, termination of parental rights, pre-adoptive placement, and adoption.³⁰ (It does not apply to custody disputes arising from divorce.)

Regarding adoption, ICWA does several things. *First*, it allocates jurisdiction. If the Indian child is domiciled on an Indian reservation or has been made a ward of a tribal court, ICWA gives the tribal court exclusive jurisdiction over all proceedings.³¹ If the child resides *off* the reservation, a state court may exercise its normal jurisdiction.³² However, if the proceeding involves foster care placement or termination of parental rights, ICWA provides that a state court “shall” transfer the matter to tribal court upon petition of either parent, the child’s Indian custodian, or the tribe; the request for transfer may be denied if either parent objects or for “good cause.”³³ Where the adoption is voluntary (*i.e.*, the birth parents freely relinquish their rights over the child), ICWA does not provide for transfer to tribal court.³⁴

Second, ICWA specifies an order of preference for placement of an Indian child. “Before a state court may place an Indian child in a non-Indian adoptive home, the court must give sequential placement preference to, first, the child’s extended family,³⁵ second, to other members of the child’s tribe, and third, to other Indian families”³⁶ The Supreme Court has characterized ICWA’s adoption placement preferences as “[t]he most important substantive requirement imposed on the state.”³⁷ “More than any other substantive requirement,” the placement provision “reflects the underlying assumption of

29. ICWA defines an 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.” 25 U.S.C. § 1903(4) (2006).

30. *See* 25 U.S.C. § 1903(1) (2006) (defining a “child custody proceeding” under ICWA).

31. *Id.* § 1911(a).

32. *See id.* § 1911(b).

33. *Id.* For discussion of how courts have used and abused the “good cause” exception, *see* Hollinger, *supra* note 27, § 15.02[3][b].

34. 25 U.S.C. § 1911(b) (2006) (providing for transfer “[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child”); *see also* STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 337 (3d ed. 2002) (“When removal from the home is voluntary (and the child resides off the reservation) . . . the tribe cannot insist on having the case transferred to tribal court.”); *but see* Hollinger, *supra* note 27, § 15.02[2] (stating that the transfer provisions apply to any “child custody proceedings involving . . . non-reservation children”).

35. ICWA states that an extended family member “shall be as defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.” 25 U.S.C. § 1903(2) (2006).

36. PEVAR, *supra* note 34, at 335; *see also* 25 U.S.C. § 1915(a).

37. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

ICWA that Indian children have a strong interest in preserving their tribal ties, and their best interests coincide with their tribe's.³⁸

Third, where a proceeding is in state court, ICWA gives the child's tribe rights to notice and intervention, but only where the court is adjudicating foster care placement or terminating parental rights.³⁹ Most authorities agree that ICWA does not require notice or provide for tribal intervention as a matter of right in voluntary adoption proceedings.⁴⁰

B. *Gay and Lesbian Adoption in the United States*

As political and legal issues involving sexual orientation have become more mainstream, better data have become available about parenting by gay men, lesbians, and same-sex couples. A 2007 report by researchers at the Williams Institute of UCLA Law School and the Urban Institute, drawing on data from the 2000 Census and other sources, found among other things:

- an estimated 65,500 adopted children and 14,100 foster children were living with gay or lesbian parents;⁴¹
- gay and lesbian parents were raising four percent of all adopted children and three percent of foster children in the United States;⁴² and
- an estimated two million gays, lesbians, and bisexuals were interested in adopting.⁴³

Despite their progress in gaining acceptance for their right to form legal family relationships, gays, lesbians, and same-sex couples face “a patchwork quilt of state adoption laws.”⁴⁴ At present, Arkansas, Louisiana, Mississippi, and Utah restrict adoptions by same-sex couples or individuals in same-sex relationships.⁴⁵ In light of the resurgence of social conservatives and the capture of more state legislatures by Republicans in the 2010 elections, it is possible there will be new efforts to restrict adoptions by gay or lesbian individuals or couples. While no state currently bans adoptions by single gay or lesbians outright,⁴⁶ someone in a same-sex marriage or other partnered relationship may

38. COHEN'S, *supra* note 27, at 842-43.

39. 25 U.S.C. § 1912(a) (2006).

40. *See infra* note 110 and accompanying text.

41. Williams/Urban Institute Report, *supra* note 6, at 7, 15.

42. *Id.*

43. *Id.* at 6.

44. Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1, 13 (2008).

45. *See* ARK. CODE ANN. § 9-9-204 (2009); *See* LA. CHILD. CODE ANN. art. 1221 (2004); MISS. CODE ANN. § 93-17-3 (West 2007); UTAH CODE ANN. §78-30-1(3) (2008).

46. Florida did so for more than 30 years until its ban was struck down in 2010 by a state appellate court. *See* Fla. Dep't of Children & Families v. Adoption of X.X.G. &

face obstacles whether they seek to adopt singly or jointly.⁴⁷ Moreover, in many states the legal status of joint or second-parent adoptions involving same-sex couples is unclear, with individual judges left to consider such petitions on a case-by-case basis.⁴⁸

C. *Indian Attitudes Toward Homosexuality and Same-sex Relationships*

Contemporary Native American attitudes toward homosexuality and same-sex relationships appear to range widely from honor to condemnation, as scholars, tribal leaders, and activists attempt to understand how ancient traditions have been transmitted, reinterpreted, or lost in contemporary Indian societies.

It is well documented that “[b]efore the massive impact of Western culture and its belief systems on North American Indian cultures, gender variance existed in most tribes from Alaska to what is now the border between the United States and Mexico.”⁴⁹ Much anthropological research on sexuality and gender diversity among Indians once focused on the “berdache,” which one scholar has defined as an androgynous, “morphological male who does not fill a society’s standard man’s role, who has a nonmasculine character.”⁵⁰

Such a person has a clearly recognized and accepted social status, often based on a secure place in the tribal mythology. Berdaches have special ceremonial roles in many Native American religions, and important economic roles in their families . . . They are not seen as men, yet they are not seen as women either. They occupy an alternative gender role that is a mixture of diverse elements.⁵¹

And although “[n]early all academic publications investigating Native American sexuality or gender diversity have tended to emphasize male homosexualities or male gender blending,” the existence of “manly women, female homosexualities, or female-bodied third or fourth genders” also “ha[s] been documented in tribes that range from the Southwest through the Plains

N.R.G., No. 3D08-3044, 2010 WL 3655782 (Fla. Dist. Ct. App. Sept. 22, 2010). The state did not appeal to the Florida Supreme Court.

47. See *supra* note 45 and statutes cited therein.

48. For databases of adoption laws by state, see Thomson Reuters, STATE ADOPTION LAWS – STATE LAWS, CODES, <http://law.findlaw.com/state-laws/adoption/> (last visited Oct. 2, 2010) and The Human Rights Campaign, HRC | ADOPTION, http://www.hrc.org/issues/parenting/adoptions/adoption_laws.asp (last visited Oct. 2, 2010).

49. Sabine Lang, *Various Kinds of Two-Spirit People: Gender Variance and Homosexuality in Native American Communities*, in TWO-SPIRIT PEOPLE: NATIVE AMERICAN GENDER IDENTITY, SEXUALITY, AND SPIRITUALITY 100, 107 (Sue-Ellen Jacobs et al. eds., 1997) (citing various studies by anthropologists and sexuality researchers).

50. WALTER L. WILLIAMS, *THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE* 2 (1986).

51. *Id.*

and the Great Lakes to the Subarctic.”⁵² In recent years the label “berdache” has been replaced by the term “two-spirit,” which has come to encompass gays, lesbians, transgender persons, and “traditions wherein multiple gender categories and sexualities are institutionalized in Native American/First Nations tribal cultures.”⁵³

“Although two-spirit individuals and their same-sex relationships seem to have been freely accepted in those Native American cultures that provided multiple genders,” one scholar writes, “the attitude toward sexuality in general and same-sex relationships in particular has changed dramatically in many reservations due to long-term exposure to Western religion, boarding schools, and, more recently, the media.”⁵⁴ Thus, another commentator observes, sexual and gender difference present a “conundrum” for contemporary Indian tribes.⁵⁵

Traditionally, many tribes allowed two-spirit individuals to have relationships with members of the same biological sex, although most tribes still valued heterosexual relationships more than homosexual relationships. Today, however, like other Americans, a large faction of Native Americans condemn homosexuality and completely reject same-sex unions largely because of the influence of European and American religion and culture.⁵⁶

Another scholar asks,

What do the stories of today tell us about tolerance (or intolerance) for gender and sexuality diversity in Native North American communities, as well as communities throughout the world? Ask the people who are openly living their homosexual, gay, lesbian, queer, bisexual, or transgendered lives in their own or other communities. Many will agree with [sexuality researcher Robert] Stoller about “observations long since noted on the deterioration in American Indians of techniques for ritualizing cross-gender behavior. No longer is a place provided for the role—more, the identity—of a male-woman, the dimensions of which are fixed by custom, rules, tradeoffs, or responsibilities. The tribes have forgotten. Instead, the role appears as a ghost.”⁵⁷

52. Sue-Ellen Jacobs et al., *Introduction*, in *TWO-SPIRIT PEOPLE*, *supra* note 49, at 5 (footnotes omitted).

53. *Id.* at 2.

54. Lang, *Various Kinds of Two-Spirit People*, *supra* note 49, at 107-08.

55. Jeffrey S. Jacobi, *Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy*, 39 U. MICH. J.L. REFORM 823, 825 (2006) (footnotes omitted).

56. *Id.* (footnotes omitted).

57. Sue-Ellen Jacobs, *Is the ‘Berdache’ a Phantom in Western Imagination?*, in *TWO-SPIRIT PEOPLE*, *supra* note 49, at 35.

In contemporary Indian legal regimes, there appears to be no consensus about same-sex relationships, to the extent the topic is addressed at all. In 2008, the Coquille Tribe, located in Oregon, became the first, and so far only, Indian tribe “to codify the definition of marriage as a fundamental right regardless of the biological sex of the parties.”⁵⁸ Writing before the Coquille Tribe’s decision, one prominent scholar predicted that “[w]hile the issue of same-sex marriage[] is far from the forefront of tribal governmental issues . . . there remains the distinct possibility that one or more of the 560-plus federally recognized Indian tribes will take action to recognize same-sex marriage in their jurisdictions.”⁵⁹ On the other hand, the nation’s two largest tribes, the Cherokee Nation of Oklahoma and the Navajo Nation, have both approved laws against same-sex marriage (although not before two Cherokee women successfully obtained a marriage license from their tribe).⁶⁰ These developments also have led other tribes to revisit their own marriage policies.⁶¹

The Coquille Tribe’s decision to honor same-sex marriages was expressly rooted in both cultural values and practical concerns. Its tribal code states that “the formation, continuity and recognition [of] domestic relationships are essential to the political integrity, economic security and the health and welfare of the Tribe.”⁶² Tribal officials have characterized the decision as consistent with “the Tribe’s historic tradition of accepting people with different lifestyles—none of [the Tribe’s traditional] mores would have excluded same-sex relations [or marriage].”⁶³

Sexual and gender diversity in Indian culture, both historical and contemporary, is a rich and complex subject, full of its own scholarly disputes, and an in-depth discussion is beyond the scope of this article. Suffice it to say it is impossible to generalize about Indian understandings of, and attitudes toward, homosexuality and same-sex relationships. But controversies over gay/lesbian rights “ha[ve] not stopped at reservation borders,”⁶⁴ and so there is no reason not to assume the issue will inevitably arise in adoption proceedings under ICWA.

* * *

In the following sections I explore what impact ICWA might have on adoption proceedings in tribal court (Part II) and state court (Part III) where the petition is brought by a gay man, lesbian, or same-sex couple. To simplify the

58. Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26 ARIZ. J. INT’L & COMP. L. 509, 509 (2009).

59. Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 55 (2006) (footnote omitted).

60. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 837 & nn.284-85 (2007).

61. See Jacobi, *supra* note 55, at 847.

62. COQUILLE INDIAN TRIBE CODE § 740.010(2) (2008).

63. Bushyhead, *supra* note 58, at 510 (quoting radio interview with Coquille tribal chief Ken Tanner and scholar Brian Gilley) (bracketed alterations in original).

64. Riley, *supra* note 60, at 836.

discussion and eliminate some variables, I assume that the birth parents have voluntarily relinquished their rights. I further assume the prospective adoptive parent (or at least one parent, if a couple is involved) satisfies ICWA's placement preference,⁶⁵ if the proposed adoptive home is non-Indian, I assume no member of the child's extended family, the child's tribe, or another tribe seeks to adopt the child. In short, I assume the child is not being removed from the birth home involuntarily (meaning ICWA's procedural safeguards for termination of parental rights⁶⁶ do not apply) and ICWA's placement preference is satisfied.

II. GAY/LESBIAN ADOPTIONS IN TRIBAL COURT

In this section, I explore how ICWA might make a difference to gay/lesbian adoptive parents who are required to petition in a tribal court.⁶⁷ The key principle at work in this section is the tribe's inherent sovereignty, as recognized by federal law. Where a tribe disfavors homosexuality or same-sex relationships, this sovereignty could operate to deny an adoption to petitioners who would have been qualified to adopt in a state court. On the other hand, where a tribe is willing to grant a gay/lesbian adoption, that same sovereignty means the adoption is entitled to recognition everywhere—even in states that forbid such adoptions.

Recall that a tribal court will have exclusive jurisdiction over an adoption proceeding if the child is domiciled on the reservation; if the child lives off the reservation, the proceeding may have been transferred to the tribal court if it also involved a termination of parental rights.⁶⁸ The form and rules for such a proceeding vary greatly from tribe to tribe, because the diversity among tribal courts is "enormous."⁶⁹ Indeed, it is not entirely clear how many of the 565 federally recognized tribes have a judicial system qualifying as a court. One scholar, relying on government data, puts the number at something over 200.⁷⁰ A prominent Indian jurist and scholar estimates the number is closer to 150.⁷¹ And a 2005 Department of Justice report said that since 1998, government grants had been made to 294 tribes "for planning, improving, and enhancing

65. *See supra* notes 35-38 and accompanying text; 25 U.S.C. § 1915(a) (2006).

66. *See* 25 U.S.C. § 1911(c) (2006) (providing tribal right to intervene); *id.*, § 1912(a) (providing for notice to the tribe); *id.*, § 1912(f) (specifying that the evidentiary standard for termination of parental rights is "beyond a reasonable doubt").

67. ICWA defines a tribal court broadly as "a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings." 25 U.S.C. § 1903(12) (2006).

68. *See supra* notes 31-33 and accompanying text.

69. Atwood, *supra* note 11, at 592.

70. *Id.* (citing United States Department of the Interior, Bureau of Indian Affairs, Directory of Tribal Judiciaries (October 1996)).

71. B.J. JONES, ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM 1 (2000), [http://www.icctc.org/Tribal Courts-final.pdf](http://www.icctc.org/Tribal%20Courts-final.pdf).

tribal justice systems.⁷² Furthermore, adjudication in a tribal court may be relatively informal, relying on customs and traditions rather than written statutes or precedents; judges and counsel may or may not be attorneys.⁷³

A. *In Tribal Court, Tribal Law Controls*

The power of Indian tribes over affairs on their reservations stems from the principle that “American Indian tribes are sovereign nations,” even though, as a practical matter, that sovereignty is problematic and constrained by “[t]he political realities of relations with the federal government, relations with state and local governments, competing jurisdictions, complicated local histories, circumscribed land bases, and overlapping citizenships.”⁷⁴ Accordingly, it is “settled black-letter law . . . that Indian tribes retain plenary and exclusive inherent authority over ‘domestic relations among tribal members.’”⁷⁵ ICWA underscores a federal mandate of respect for child welfare determinations by tribes, and “state laws have never been held to reach further than federal laws into the hard inner core of tribal authority over domestic relations.”⁷⁶

A gay or lesbian individual or couple who satisfy ICWA’s placement preferences and live in a state where they would be eligible to adopt might assume they are in the clear. But a petitioner in a tribal court cannot rely on state law; the relevant law is that of the tribe.⁷⁷ If the proceeding originates in or is transferred to a recognized tribal court exercising proper jurisdiction, and the court refuses to grant the adoption—for whatever reason—that is almost certainly the end of the matter. Thus, we have the first potential gay/lesbian anomaly under ICWA: if a tribal court obtains jurisdiction, and the tribe disfavors the idea of gays or lesbians as parents, an individual or couple could be denied an adoption they might have obtained in state court.

Such an outcome might leave the prospective parent(s) feeling their rights have been violated. But it is important to remember that “tribes cannot be encompassed in the usual constitutional dialogue of individual rights. Tribal sovereignty necessarily situates Indian nations beyond the federal-state paradigm that dominates individual civil liberties discourse within the U.S.”⁷⁸ And although Indian tribes are required, under the federal Indian Civil Rights

72. BUREAU OF JUSTICE ASSISTANCE, UNITED STATES DEPARTMENT OF JUSTICE, PATHWAYS TO JUSTICE 6 (2005), available at http://www.law.und.edu/tji/web_assets/pdf/PathwaysReport.pdf.

73. See JONES, *supra* note 71, at 6; Hollinger, *supra* note 27, § 15.02[1][a] (Even where it has a court, a tribe may waive the right to exercise jurisdiction under ICWA. “This is not an uncommon occurrence, especially in adoptions, because many tribes do not have their own adoption codes or tribal agencies which can supervise adoptive placements.”).

74. DAVID E. WILKINS & K. TSINANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 5 (2001).

75. Fletcher, *supra* note 59, at 54 (quoting COHEN’S, *supra* note 27, § 4.01[2][c]).

76. *Id.* at 80.

77. See *supra* notes 75-76 and accompanying text.

78. Riley, *supra* note 60, at 808 (footnote and internal quotation marks omitted).

Act,⁷⁹ to respect certain federal constitutional rights of any person over whom they have jurisdiction—Indian or non-Indian—including equal protection of the laws and due process,⁸⁰ a federal court of appeals has held the categorical denial of adoption rights to gays and lesbians based on their sexual orientation does not violate the Fourteenth Amendment’s equal protection or due process guarantees.⁸¹

B. Full Faith and Credit for Tribal Adoption Decrees

Now let us reverse the previous scenario. What if a petitioner’s home state law would prohibit an adoption, but a tribal court, acting with proper jurisdiction, was willing to grant it? For the same reasons discussed above,⁸² such an adoption would be valid. And here is the interesting part: ICWA also commands that such an adoption must be recognized not only by the state where it occurs, but by all other states, the federal government, and other Indian tribes. Specifically, ICWA provides that

[t]he United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.⁸³

Such protection of tribal court judgments under full faith and credit flows from the principle that tribes possess inherent sovereignty; their legal regimes are entitled to respect, and their legal determinations are entitled to finality.

While this requirement might at first seem radical, it is really common sense—and in effect, if not by design, a significant protection for the rights of the adoptive parent. Given traditional state authority over family law questions,

79. 25 U.S.C. §§ 1301-1303 (2006).

80. *Id.* § 1302(8).

81. *Lofton v. Dep’t of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004). A Florida state appellate court, relying on its own form of equal protection analysis, later struck down the Florida ban at issue in *Lofton*. See *Fla. Dep’t of Children & Families v. Adoption of X.X.G. & N.R.G.*, No. 3D08-3044, 2010 WL 3655782 (Fla. Dist. Ct. App. Sept. 22, 2010).

82. See *supra* notes 74-76 and accompanying text.

83. 25 U.S.C. § 1911(d) (2006); see also COHEN’S, *supra* note 27, at 833 (“Once a tribal court exercises jurisdiction in an Indian child custody proceeding, all tribal, state, and federal courts must afford full faith and credit to its orders and judgments. Thus, under [ICWA], all forms of government within United States territory are required to recognize and enforce the public acts, records and judicial proceedings of any federally recognized tribe applicable to a custody proceeding for an Indian child. This broad requirement arguably exceeds the Constitution’s requirement of full faith and credit, because it expressly imposes obligations on federal and tribal institutions as well as those of the states.” (footnotes omitted)).

every state is, of course, entitled to maintain its own policies on who is qualified to adopt. But once an adoption becomes final, a parent should be able to move from state to state secure in the knowledge that his or her legal relationship to the child will not change. Even in the non-ICWA context, federal law supports this proposition, as two federal courts of appeals have ruled that states must recognize gay/lesbian adoptions finalized in other jurisdictions.⁸⁴ As the subject is not without controversy, it is worth a brief digression to explain the principle of full faith and credit for adoption decrees.

The starting point is the Constitution's Full Faith and Credit Clause, which provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."⁸⁵ In interpreting the Full Faith and Credit Clause, the Supreme Court has distinguished between the credit one state owes to another state's *laws* (legislative measures or common law), and the credit owed to another state's *judgments*. For laws, the Court has said the Full Faith and Credit Clause "does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"⁸⁶ In other words, a state may invoke its own public policy in refusing to give effect to the laws of another states (as, for example, many states do when they refuse to recognize a same-sex marriage that was performed under the laws of a sister state).⁸⁷

By contrast, judgments get the strongest measure of full faith and credit. Where an issue has been litigated and decided by a court of competent jurisdiction, another state may not refuse to recognize the judgment simply because it disagrees with the outcome or the underlying policy. As the Court underscored in *Baker*, "[a] court may be guided by the forum State's 'public policy' in determining the *law* applicable to a controversy. But our decisions support no roving 'public policy exception' to the full faith and credit due *judgments*."⁸⁸

Because it is finalized by means of a court decree, an adoption is a judgment. Accordingly, relying on *Baker*, two federal circuits recently have held that states may not invoke their own anti-gay public policies in order to refuse to recognize adoptions finalized in other states.⁸⁹ As the Fifth Circuit observed in a case involving a Louisiana child who was adopted in a New York court by a same-sex couple, "[t]he parental rights and status of the Adoptive

84. See *infra* notes 89-90 and accompanying text.

85. U.S. CONST. art. IV, § 1.

86. *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)).

87. See Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 358-59 (2005).

88. *Baker*, 522 U.S. at 233 (citation and footnote omitted).

89. See *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010); *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

Parents, as adjudicated by the New York court, are not confined within that state's borders and do not cease to exist at Louisiana's borders."⁹⁰

To summarize, where ICWA gives jurisdiction over adoption proceedings to a tribal court, it does so with the recognition the court is fully entitled to adjudicate matters of domestic relations, and that Indian courts are entitled to have their judgments recognized and respected by all other court systems within the United States.

III. GAY/LESBIAN ADOPTIONS UNDER ICWA IN STATE COURT

The previous section hypothesized tribal court settings that were either negative or positive toward gay/lesbian adoptions. In this section, I explore how ICWA might affect gay/lesbian adoptions of Indian children in state courts. After a brief overview in Section A of federal preemption doctrine, in Section B I hypothesize a state court that is receptive to gay/lesbian adoptions and consider whether ICWA allows a tribe to veto such an adoption. Then in Section C, I consider whether ICWA makes any difference where a state law forbidding gay/lesbian adoptions would frustrate the placement of an Indian child in an Indian home.

Recall that state court jurisdiction is allowed if the Indian child is not domiciled on the reservation. However, where a case involves terminating parental rights the state court must transfer the matter to tribal court upon petition of either parent, the child's Indian custodian, or the tribe, unless either parent objects or the court finds "good cause" to deny the transfer. ICWA does not expressly provide for transfer in voluntary adoptions.⁹¹

Central to the discussion that follows is the principle that as federal law, ICWA displaces, or "preempts," state law to some extent. Thus, some brief background on the doctrine of federal preemption will be helpful.

A. Federal Preemption Doctrine

The Constitution's Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁹² Because "nearly every federal statute addresses an area in which the states also have authority to legislate,"⁹³ courts have developed the doctrine of federal preemption to "define the sphere of control between federal and state law when they conflict, or appear to conflict."⁹⁴ Specifically, "[w]hen Congress legislates in a field within its enumerated powers, typically under the Commerce Clause, courts must determine how much state law has been

90. *Adar*, 597 F.3d at 708.

91. See *supra* notes 31-34 and accompanying text.

92. U.S. CONST. art. VI, cl. 2.

93. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 (2000).

94. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002).

displaced in the process. Consequently, preemption doctrine is central to the definition of power and control under our federal system of government.”⁹⁵ Federal legislation is often unclear about exactly how Congress wishes federal law to interact with state law, and so “preemption doctrine seeks Congress’s intent on the scope of displacement of state law.”⁹⁶

The Supreme Court has articulated special preemption principles in the context of federal Indian law, noting in *New Mexico v. Mescalero Apache Tribe* that “[t]he unique historical origins of tribal sovereignty” and the federal commitment to tribal self-sufficiency and self-determination make it “treacherous to import . . . notions of preemption that are properly applied to . . . other [contexts].”⁹⁷ Rejecting a “narrow focus on congressional intent to preempt state law as the sole touchstone,” the Court has focused on “the nature of the competing interests at stake” among the tribe, the state, and the federal government.⁹⁸ As the Court has stated the rule, “State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”⁹⁹

It is important to note that *Mescalero Apache Tribe* and the cases it discusses deal with state efforts to regulate affairs on Indian reservations, where there is greater potential the state might infringe on federal and tribal interests. By contrast, Indians living off the reservation generally are “subject to the same state laws as everyone else unless a federal law or treaty grants an immunity.”¹⁰⁰ As the Supreme Court has explained, “Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.”¹⁰¹ If an area of regulation is within the states’ traditional police powers—as is the case with adoption, like all family law—then off-reservation Indians “may be regulated by the State . . . provided the regulation meets appropriate standards and does not discriminate against the Indians.”¹⁰²

95. *Id.* at 969.

96. *Id.* at 969-70.

97. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (ellipses and brackets in original)).

98. *Id.*

99. *Id.*

100. PEVAR, *supra* note 34, at 135.

101. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

102. *Puyallup Tribe v. Dep’t of Game of Washington*, 391 U.S. 392, 398 (1968) (explaining that while a federal treaty may give Indians the right to fish in a state’s waters that are adjacent to a reservation, the state retains the authority to enforce neutral regulations, such as the manner of fishing or the size of the take, against Indian fishermen in the same way as those regulations are enforced against non-Indians); *See also* *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962) (illustrating that even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation).

Most courts have concluded that where ICWA preempts state child welfare law, it does so narrowly and specifically.¹⁰³ Although Congress retains plenary authority over Indian affairs,¹⁰⁴ ICWA is not comprehensive child-welfare legislation, and thus it cannot be said Congress intended to “occupy the field” (in preemption language) where Indian child welfare is concerned. While ICWA gives tribal courts exclusive jurisdiction over Indian children residing on a reservation, its provisions aimed at state courts are measured and specific, and they all relate to one overarching theme: that Indian children should be kept in Indian homes whenever possible.¹⁰⁵ In ICWA’s legislative history, Congress characterized the Act as providing “minimal safeguards” and specifically said it did not intend to “oust the State from the exercise of its legitimate police powers in regulating domestic relations.”¹⁰⁶

In short, where ICWA applies in state court, it does so against a backdrop of traditional state authority to regulate domestic relations, including the power to govern members of Indian tribes living outside a reservation. In assessing whether state law “interferes or is incompatible with federal and tribal interests reflected in [ICWA],”¹⁰⁷ the trick is to neither overread ICWA, thus ceding state authority to a tribe in a way Congress did not intend, nor to underread it, thus rendering its provisions mere suggestions rather than supreme federal law.

With these principles in mind, I consider how ICWA might operate in two more hypothetical settings: first, where a tribe seeks to invoke its disapproval of homosexuality in order to block an adoption state law would permit; second, where a state’s anti-gay adoption policy would prevent an adoption by a family or tribal member whom ICWA presumes to be the best placement.

B. What if State Law Supports Adoption Equality But the Tribe Opposes It?

If state law would authorize an adoption by an otherwise qualified gay or lesbian individual or same-sex couple, and if the tribe is supportive or at least does not object, then there is no issue. The adoption will be approved. But what if the tribe opposes the adoption, asserting that the placement would be inconsistent with its cultural beliefs? The tribe might argue that ICWA’s purpose is to ensure tribal children are raised according to tribal values. After all, ICWA incorporates an express congressional finding that “the States. . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”¹⁰⁸ If a tribe presents evidence that homosexuality or same-sex

103. See *infra* notes 138-140 and accompanying text.

104. See *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-65 (1903).

105. See *supra* notes 25-27 and accompanying text.

106. H.R. REP. NO. 95-1386, at 10 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7540.

107. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

108. 25 U.S.C. § 1901(5) (2006).

relationships are contrary to its cultural and social standards, does ICWA give leverage to the tribe to veto such a placement?

If a heterosexual adoptive parent is available who ranks higher in ICWA's placement preference, then the question can be avoided: ICWA should control and the issue of sexual orientation becomes irrelevant. But what if a more-preferred parent is not available? Should a state court, at the urging of the tribe, engineer some different placement (or even return an Indian child to foster care or an orphanage) rather than placing her with an otherwise qualified gay or lesbian adoptive parent—Indian or non-Indian—solely because the tribe disfavors adoptions by gay or lesbian individuals or same-sex couples? The answer is no.

First, it does not appear Congress intended to give tribes such a formal role in voluntary adoption proceedings where the birth mother is not domiciled on the reservation. By its plain terms, ICWA allows tribes to intervene as a matter of right in proceedings for foster care placement or termination of parental rights; it does not provide for intervention as a matter of right, or even notice to the tribe, in voluntary proceedings.¹⁰⁹ While this interpretation is not universally accepted by courts, it appears to be the majority view,¹¹⁰ and it is the view most faithful to the statutory text. If ICWA does not give the tribe a right to intervene, and thus a formal role in the proceeding, then the tribe's opposition to a particular placement should not be given any special weight. In these circumstances, the tribe has no legally protectable interest.

Of course, ICWA does not *prohibit* tribal intervention in voluntary proceedings, and so the tribe could still seek permissive intervention under state law as an interested party. And the tribe's hand would be stronger in a proceeding where the court was required to terminate parental rights or determine foster care placement, as the tribe clearly does have the right to intervene under those circumstances.¹¹¹

Aside from the procedural question of intervention, there is the more fundamental question of whether Congress intended for Indian law or culture to have determinative weight in state court proceedings. Even if the tribe is allowed to intervene and express its views about the merits of a placement, must a state court defer to those views if it means rejecting a gay or lesbian parent who meets ICWA's placement preferences and is otherwise qualified under state law? ICWA's text and legislative history, as well as the federal

109. See *supra* notes 39-40 and accompanying text.

110. See, e.g., *In re Baby Boy C.*, 805 N.Y.S.2d 313, 328 (N.Y. App. Div. 2005) (finding that the tribe was not entitled to intervene as a matter of right, noting that "[m]ost courts that have considered this issue have agreed with this interpretation," and citing cases from Alaska, California, and Tennessee); but see *In re Desiree F.*, 83 Cal. App. 4th 460, 472-73 (Cal. Ct. App. 2000) (taking the view that ICWA permits tribal intervention in any "child custody proceedings"); COHEN'S, *supra* note 27, at 834 ("[The tribe's] right to intervene exists in both involuntary proceedings and voluntary proceedings in which parents choose voluntary termination of parental rights and adoption.").

111. See 25 U.S.C. § 1911(c) (2006).

preemption principles discussed above, compel the conclusion that the answer is no.

Although “[p]rotection of the tribal interest ‘is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents,’”¹¹² and although ICWA arguably “privileges Native understandings of family relations,”¹¹³ it does so primarily by “acknowledg[ing] broad community connections and obligations to children.”¹¹⁴ Where Congress declared its intention to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families,” it said it was doing so specifically “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.”¹¹⁵ Thus, ICWA’s concern for maintaining a child’s ties to Indian culture is presumed to be satisfied by placement, whenever possible, with a family or tribal member.

As federal legislation, ICWA implicates the Supremacy Clause. But it is the policy of *Congress*, not the policy of the *Indian tribe*, that the Constitution elevates as “supreme.” Congress made clear it did not intend to “oust the State from the exercise of its legitimate police powers in regulating domestic relations,”¹¹⁶ and there is certainly no indication it intended to displace a state’s substantive law of adoption, root and branch, and substitute tribal law. In voluntary adoptions, the extent of ICWA’s preemption of state adoption law is to specify a sequence of placement preferences.¹¹⁷ ICWA does not provide any other substantive qualifications for adoptive parents, nor does it take a position on gay/lesbian family households.¹¹⁸

ICWA’s adoption section states that “[t]he standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.”¹¹⁹ Although an advocate in court might press on this language to argue that ICWA requires a state court to defer to the tribe’s cultural values in granting or denying an adoption, such a broad reading is not supported by the legislative history. In explaining this passage, the House

112. COHEN’S, *supra* note 27, at 825 (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989)).

113. *Id.* at 820.

114. *Id.* (citing tribal court opinions articulating such an understanding of family and community).

115. 25 U.S.C. § 1902 (2006).

116. H.R. REP. NO. 95-1386, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7540.

117. *See* 25 U.S.C. § 1915(a) (2006).

118. Though, as I will argue *infra*, there is a good argument that ICWA should override a state’s anti-gay adoption law if such a law presents a roadblock to placement of an Indian child in an Indian home.

119. 25 U.S.C. 1915(d) (2006).

ICWA report states only the following: “All too often, State public and private agencies, in determining whether or not an Indian family is fit for foster care or adoptive placement of an Indian child, apply a white, middle-class standard which, in many cases, forecloses placement with the Indian family.”¹²⁰ Thus, in this provision Congress was reiterating its dismay that state courts and child welfare workers, applying their own notions of proper families and households, were going out of their way to avoid placing Indian children in Indian homes. The “standards to be applied” provision means state judges and other officials must not impose their own preconceptions to avoid following ICWA’s placement preferences. It does not mean Congress was authorizing state courts to import substantive tribal law or culture into their own adoption proceedings.

In addition, Congress could not have intended state courts to get in the middle of disputes among Indians about Indian culture. If an Indian petitioner who happens to be gay or lesbian steps forward to adopt an Indian child, it is reasonable to presume he or she is aware of tribal debates about sexuality and gender but has concluded his or her sexual orientation would not prevent him or her from being a good parent. Intra- or inter-tribal differences regarding sexuality and gender may be appropriate for resolution in a tribal court. But a court sitting in a state that allows adoptions by qualified gays, lesbians, or same-sex couples should not be expected to weigh anthropological, historical, or religious evidence about tribal culture.¹²¹

Giving the tribe an adoption veto would, in effect, transform its role from intervenor to ultimate adjudicator, exercising power tantamount to that of a tribal court. In *In re Laura F.*,¹²² a tribe argued a state court could not authorize any adoption involving the tribe’s minor children because such adoptions ran contrary to its “child-rearing practices and longstanding custom and tradition.”¹²³ Analyzing the question as one of the full faith and credit owed to a tribe’s laws,¹²⁴ a California appellate court concluded that “ICWA does not require a state court to apply a tribe’s law in violation of the state’s own legitimate policy nor does it empower a tribe to control the outcome of the state court proceedings.”¹²⁵ Where a state court is allowed to exercise jurisdiction under ICWA, the state court is obligated to apply its own state’s law; the sovereignty of the tribe must yield to the sovereignty of the state.

Finally, allowing a third party’s views about sexuality and gender to control an adoption proceeding also would have implications for the rights of

120. H.R. REP. NO. 95-1386, at 24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.

121. *See* Riley, *supra* note 60, at 847 (“[B]ecause Indian tribes vary dramatically in their governmental structures, cultures, and contemporary lives, Congress and the Supreme Court have recognized that the federal courts are ill-equipped to differentiate between them”). The same is true, of course, about state courts.

122. *In re Laura F.*, 83 Cal. App. 4th 583 (Cal. Ct. App. 2000).

123. *Id.* at 591 n.3.

124. Which must be distinguished from the full faith and credit owed to tribal court judgments. *See supra* Part II.B..

125. *Laura F.*, 83 Cal. App. 4th at 586.

the prospective parents. Whereas tribal court proceedings may be more likely to subordinate the rights of prospective adoptive parents because children are seen as the responsibility of the entire community, a state court must be sensitive to individual liberties.¹²⁶ In *Lofton v. Department of Children and Family Services*, the Eleventh Circuit held that a Florida statute barring adoption by gays and lesbians did not violate the Fourteenth Amendment's equal protection or due process clauses.¹²⁷ The court reasoned that adoption is a statutory privilege, not a right,¹²⁸ foster parenting did not create an expectation of permanency that would implicate the fundamental right to family integrity,¹²⁹ and laws disadvantaging gays were subject only to rational-basis review, which the Florida statute met.¹³⁰ But even assuming the Eleventh Circuit's decision was sound, it cannot mean a court may give determinative weight to an intervening *party's* views about the merits of gay/lesbian parents and thereby deny an adoption its own state law would allow. As the Supreme Court observed in *Palmore v. Sidoti*, a case involving race and child custody, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."¹³¹

While a state law disadvantaging gays and lesbians may be upheld if it advances some legitimate *state* interest, that principle does not license a court to decide a family law matter based on a third-party's anti-gay prejudice, even if that prejudice is grounded in legitimate cultural traditions that are entitled to respect. ICWA does not import tribal law into state court adjudication, and therefore, a ruling based on negative tribal attitudes toward homosexuality or same-sex relationships would have no "rational relationship to legitimate state interests."¹³²

C. Does ICWA Override Anti-gay State Adoption Law?

For our final hypothetical, suppose we are in a state that restricts gay/lesbian adoptions.¹³³ Further suppose the most-preferred parent for an ICWA adoption (*i.e.*, a family or tribal member) also happens to be gay or lesbian or part of a same-sex couple with a marriage or civil union. To comply with state law, the court may have to refuse the adoption. Can ICWA help? I believe the answer should be yes. I will first sketch the opposing argument, then explain what I think is the better view.

126. See Atwood, *supra* note 11, at 608-18 ("At the very least, one can surmise that the cultural importance of children among Indian tribes may inform tribal court adjudication in ways that distinguish it from adjudication in the state court systems").

127. *Lofton v. Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004); *but see supra* note 46 (the statute at issue was later struck down by a state appellate court).

128. *Id.* at 809.

129. *Id.* at 811-17.

130. *Id.* at 817-27.

131. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

132. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

133. See *supra* notes 44-48 and accompanying text.

The argument against using ICWA to override a state's anti-gay adoption law would begin by noting that ICWA works only a partial preemption of state law; it does not displace a state's entire adoption regime.¹³⁴ A court may ignore ICWA's placement provisions for "good cause",¹³⁵ surely compliance with a state's law on who is qualified to adopt (as long as the law is neutral as to Indians) constitutes "good cause." Whether or not adoption restrictions are wise or well-considered, they reflect the state's view about the relative merits of gay and lesbian family households. And in any case, Congress did not intend to make a blunderbuss of its placement preferences.¹³⁶ No one would argue, for example, that an Indian child's 10-year-old brother should be granted an adoption if he is the only available extended family member (and thus is most-favored under ICWA), because adoption laws often include minimum age requirements¹³⁷ (and as a matter of common sense, no one would thrust parenting responsibilities onto a 10-year-old).

Moreover, courts generally have applied ICWA preemption narrowly. As one state high court recently observed, "Congress . . . contemplated that procedures in Indian child custody cases would vary among the states."¹³⁸ Another state high court takes a similar view that "ICWA is not pervasive, all-encompassing legislation, but rather sets forth minimum standards that must be followed," and thus, state "statutes can be read so as to harmonize them with the ICWA."¹³⁹ And yet another state court has observed Congress has not "stated an intention for the ICWA to occupy the area of child custody proceedings completely."¹⁴⁰ These readings are supported by ICWA's legislative history, which states explicitly that the Act "do[es] not oust the state from the exercise of its legitimate police powers in regulating domestic relations."¹⁴¹

These are all reasonable arguments. Should a petitioner's sexual orientation or relationship status become an issue in an ICWA adoption, the view I have sketched above represents a safe, conventional position: that Congress could not have intended ICWA to override a state's view about gay/lesbian adoptions. But I think a better, more persuasive argument can be made on the other side. The argument in favor of displacing the state's law would go as follows.

134. See *infra* notes 138-141 and accompanying text.

135. See 25 U.S.C. § 1915(a) (2006).

136. See *supra* note 106 and accompanying text.

137. Many states, *e.g.*, Texas, provide that an adoptive parent must be an "adult," which presumably means 18 or older. TEX. FAM. ANN. CODE § 162.402(5) (Vernon 2007). Other states, *e.g.*, Delaware, set a minimum age of 21. DEL. CODE ANN. TIT. 13 § 903 (2009). Illinois says an adoptive person must be "[a] reputable person of legal age," but allows minors to adopt "by leave of court upon good cause shown." 750 ILL. COMP. STAT. ANN. 50/2-2 (a)-(b) (West 1993).

138. *Valerie M. v. Arizona Dept. of Economic Sec.*, 198 P.3d 1203, 1207 (Ariz. 2009).

139. *In re D.S.P.*, 480 N.W.2d 234, 238 (Wis. 1992).

140. *In re J.J.C.*, 302 S.W.3d 896, 899 (Tex. App. 2009).

141. H.R. REP. NO. 95-1386, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7540.

Gays and lesbians are not and cannot be categorically banned from parenting children. A state cannot criminalize homosexuality,¹⁴² prevent gays and lesbians from producing their own biological children, or, absent evidence of harm, remove a child from a gay or lesbian parent for no reason other than the parent's sexual orientation. The issue of gay/lesbian parenting has arisen frequently in litigation in recent years, but states defending restrictions on adoptions or marriage by same-sex couples generally have not attempted to argue that gays and lesbians are categorically *unfit* as parents.¹⁴³ An anti-gay adoption law should not be understood as a finding that gay/lesbian parents pose harm to children that the state must prevent (a proposition that, in any event, is not supported by credible social science research).¹⁴⁴ Rather, a prohibition on gay/lesbian adoption is simply a statutory expression of the state's view that heterosexual homes should be privileged because they are *better*.

The *Lofton* litigation over Florida's former adoption law confirms this understanding. In defending its adoption ban before the Eleventh Circuit, Florida did not argue gays and lesbians made unfit parents—indeed, it could hardly have done so, since Florida allows gays and lesbians to serve as foster parents.¹⁴⁵ Instead, Florida argued it was entitled to determine “what adoptive home environments will *best* serve all aspects of the child's growth and development.”¹⁴⁶ As the Eleventh Circuit noted,

Florida argues that the statute is rationally related to Florida's interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers. Such homes, Florida asserts, provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization. In particular, Florida emphasizes a vital role that dual-gender parenting plays in

142. *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating state sodomy laws).

143. *See, e.g., Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G.*, No. 3D08-3044, 2010 WL 3655782 (Fla. Dist. Ct. App. Sept. 22, 2010) (noting, in a decision striking down Florida's ban on adoptions by gays or lesbians, that “no one attempts to justify the prohibition on homosexual adoption on any theory that homosexual persons are unfit to be parents”).

144. *See, e.g., AMERICAN PSYCHOLOGICAL ASSOCIATION, ANSWERS TO YOUR QUESTIONS: FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION AND HOMOSEXUALITY 5* (2008), available at <http://www.apa.org/topics/orientation.pdf> (“[S]ocial science has shown that the concerns often raised about children of lesbian and gay parents—concerns that are generally grounded in prejudice against and stereotypes about gay people—are unfounded.”).

145. *See Lofton v. Dep't of Children and Family Servs.*, 358 F.3d 804, 823-24 (11th Cir. 2004).

146. *Id.* at 810 (emphasis added).

shaping sexual and gender identity and in providing heterosexual role modeling.¹⁴⁷

Fine (our argument would continue), a state is entitled to its view that two opposite-gendered heterosexuals constitute the best home for a child, and the law as determined by the Eleventh Circuit is that such a policy does not violate the federal constitutional rights of gays and lesbians. But the issue here is not individual liberties, it is federal preemption. Therefore, the relevant question is whether *a state's definition* of the “best” adoptive home (*i.e.*, the absence of homosexuals) frustrates the federal policy of placing an Indian child in the best home *as determined by Congress* and specified in ICWA’s placement preferences—that is, an Indian home. In this case, it does. State law “interferes or is incompatible with federal and tribal interests reflected in [ICWA]”¹⁴⁸ if the state allows its view of a child’s best interests (that is, heterosexual parents) to negate ICWA’s view of a child’s best interests (placement in an Indian home).

Indeed, the view that children are best raised in two-parent, dual-gender households evokes the same kind of family stereotypes that state courts and child-welfare workers were imposing on Indian communities prior to ICWA—“a white, middle-class standard” that “foreclose[d] placement with [an] Indian family.”¹⁴⁹ In its official guidelines on ICWA, the Bureau of Indian Affairs (“BIA”) echoes this point: “The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian’s ability to provide the necessary care, supervision and support for the child *rather than on preconceived notions of proper family composition.*”¹⁵⁰

Finally, what about the loophole in ICWA allowing states to deviate from its placement preferences for “good cause”?¹⁵¹ ICWA does not define “good cause”; the BIA guidelines “suggest several possible bases for finding good cause, including request of the biological parents or children of suitable age, the child’s extraordinary physical or emotional needs as established by qualified experts, and the unavailability of suitable families meeting the preference criteria despite ‘diligent search.’”¹⁵²

Whatever “good cause” means, it cannot mean the state simply gets to substitute its view of a child’s best interests—here, that a heterosexual household would be better than a gay or lesbian household—for ICWA’s placement preferences. As one commentator has noted: “Conspicuously absent from the list of justifications for deviating from the placement preferences is a

147. *Id.* at 818-19.

148. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

149. H.R. REP. NO. 95-1386, at 24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.

150. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, F.1. (Nov. 26, 1979) (emphasis added).

151. *See* 25 U.S.C. § 1915(a) (2006).

152. COHEN’S, *supra* note 27, at 844 (quoting and citing Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, F.3.(a) (1979)).

determination that adherence to the preferences would not be within the child's best interests—presumably because the BIA did not wish to invite state courts to engage in a highly discretionary and potentially biased analysis.¹⁵³ At least one state supreme court has made the same point, observing that “a finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interests.”¹⁵⁴

The tendency of some state courts to use the traditional best-interests standard as a loophole to avoid complying with ICWA has been a recurring theme in ICWA litigation and commentary. Commentators have criticized such manipulation of the best-interest standard where it “only serve[s] to further the abuses in state court proceedings that Congress sought to eliminate through the enactment of ICWA.”¹⁵⁵

Such use of a traditional “best interests” standard is in direct conflict with the Act. The “best interests of Indian children” must be viewed within the context of ICWA. The explicit policy statement in the Act is to “protect the best interests of Indian children . . . 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.” This statement mandates consideration of the Indian cultural value system as central to the determination of what is in the best interest of an Indian child.¹⁵⁶

And so, our argument would conclude, a state's adoption restriction cannot override ICWA if that means denying the adoption to an extended family member, member of the child's tribe, or member of another tribe who simply happens to be gay or lesbian or partnered with a member of the same sex. The state's view that a heterosexual household would be *better* for the child does not constitute good cause to deviate from Congress's view that an Indian home would be *best* for the child. Such an outcome would frustrate the federal objective of keeping Indian children with Indian families, impose inappropriate preconceptions about proper family composition, and turn the Supremacy Clause on its head by allowing the state's view of an Indian child's best interests to frustrate the will of Congress.

153. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 643-44 (2002).

154. *In re S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994).

155. Denise L. Stiffarm, Note & Comment, *The Indian Child Welfare Act: Guiding the Determination of Good Cause to Depart from the Statutory Placement Preferences*, 70 WASH. L. REV. 1151, 1168 (1995).

156. *Id.* at 1162-63 (footnotes omitted).

CONCLUSION

In a speech he gave in 1973 when he was a relatively new judge on the Seventh Circuit Court of Appeals, John Paul Stevens, who would later become one of this nation's most distinguished Supreme Court justices, told an audience of law students he had been "surprised to note how often the outcome" of a typical appellate case "depends, not on our appraisal of the merits, but rather on our identification of the proper decision maker."¹⁵⁷

Every decision maker—whether he be an umpire in the World Series, a legislator, a corporate manager, a member of a school board, or a federal judge—is fallible. But if he has earned the right to make decisions through an acceptable selection process, it is safe to predict that most of his decisions will be acceptable.¹⁵⁸

The same can be said of adoptions under ICWA; contemporary controversies over gay/lesbian rights only add an additional dimension to an already challenging subject. Where tribal courts act within their sphere of jurisdiction, their family law decisions are entitled to respect as a matter of inherent sovereignty. Where state courts have jurisdiction, the legitimacy of their decisions depends on proper application of state law, subject to supreme requirements of federal law and tempered by respect for individual liberties guaranteed by the Constitution. And where Congress has specifically spoken, the Constitution requires that federal policy—properly interpreted and applied—must control. These principles are not controversial. The difficult task is to identify, in any given case, which sovereign holds the right to decide and whose law must prevail.

157. John Paul Stevens, *The Education of a Judge*, Address to Northwestern University School of Law (1973), *quoted in* BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 168 (2010).

158. *Id.* (citation omitted)