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In Re Phoenix L., 270 Neb. 870, 708 N.W.2d 786 (2006): An Analysis of Parental Rights and the Nebraska Indian Child Welfare Act

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Note*

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I. INTRODUCTION

As early as 1923, the United States Supreme Court held that a parent's right to make decisions concerning the upbringing of their children is a liberty interest protected by the Constitution.[1] A state is not to inject itself into the private realm of family to question the ability of a parent to make decisions concerning the rearing of their children so long as the parent is fit and adequately responsible to provide

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1. Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that fundamental parental rights prevent the state from denying children access to foreign language instruction despite the demands of their parents).

for the care of their children.[2] However, if a parent is unable to take care of their child, the state has an obligation to remove that child.[3] In the 2006 case, *In re Phoenix*, Sonya, a mother of three children, had her parental rights terminated after it was shown by clear and convincing evidence that her continued custody would result in harm to the children.[4] On appeal, the mother challenged the termination as a violation of her Equal Protection rights. As the mother of non-Indian children, her parental rights could be terminated by a showing of clear and convincing evidence[5] while the Nebraska Indian Child Welfare Act ("NICWA" or "Act") requires a showing of evidence beyond a reasonable doubt before the rights of a parent of an Indian child can be terminated.[6] Sonya claimed that the differing standards of proof were based upon an impermissible racial classification in violation of both the Equal Protection Clause of the U.S. Constitution and the Nebraska Constitution.[7]

The Nebraska Supreme Court held that there was no equal protection claim since the classification of "Indian" was a political classification, not a racial one, based upon the historic sovereignty of Indian tribes.[8] While the Nebraska Supreme Court was correct in following a long line of historic precedent upholding legislation which singled out Indians for special treatment under the law, the Court only addressed how the NICWA impacts parents of non-Indian children in its analysis. The other side of the issue is how the NICWA impacts the constitutional rights of parents of Indian children.

This Note focuses on how the statutory provisions of the NICWA potentially infringe upon the rights of Indian children's parents. Specifically, this Note explores where parental rights currently stand in America's jurisprudence and how a potential substantive due process claim by the parent of an Indian child may be analyzed by a Nebraska court. Part II of the Note discusses the legal and historical background of the federal and Nebraska Indian Child Welfare Act and offers and an explanation of the Nebraska Supreme Court's decision in *Phoenix*. Part III is an analysis of how the rights of parents of Indian children differ from that of parents of non-Indian children when it comes to voluntarily placing their child up for adoption and why the restrictions on the rights of parents of Indian children violates the Due Process Clause. Part III also discusses how a Nebraska court may analyze a due process claim brought by the parents of an Indian

2. NEB. REV. STAT. § 43-292 (Reissue 2005).
3. *Id.*
4. 270 Neb. 870, 708 N.W.2d 786 (2006).
5. NEB. REV. STAT. § 43-279.01(3) (Reissue 2005).
6. *Id.* § 43-1505(6).
7. *Phoenix*, 270 Neb. at 875, 708 N.W.2d at 792.
8. *Id.* at 882, 708 N.W.2d at 797.

child by looking at whether there is a due process right to be protected, what level of protection the parental right should receive, and what countervailing interests the State may have in upholding the NICWA. While this Note does not provide a definitive conclusion to the parental rights issues outline, hopefully the Note will encourage readers to consider the ramifications of the NICWA and will show the NICWA is actually harming those it was, in part, designed to help.

II. BACKGROUND

A. The Indian Child Welfare Act

The Indian Child Welfare Act ("ICWA" or "the Act")[9] was enacted on the federal level in 1978 in response to tribal outcry concerning the high rate of removal of Indian children from their homes and tribes. The separation of Indian children from their families started in the 1800s when Indian children were placed in boarding schools run by whites in an effort to assimilate them into mainstream white society.[10] Tribes claim that this "assimilation" policy was sustained through the 1960s and 1970s, when, prior to the passage of the ICWA, twenty-five to thirty-five percent of all Indian children were separated from their families and placed into foster care or adoptive homes through state court proceedings.[11] By 1978, evidence revealed that eighty-five percent of Indian children in foster care were placed in non-Indian foster care homes and ninety percent of adopted Indian children were adopted by non-Indian families.[12] By the 1970s, Indian children faced a disproportionate risk of being placed in foster care or adopted by persons of different ethnic backgrounds. As summarized in a House Report on the ICWA, "The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."[13]

The biggest concern with the high rate of removal of Indian children from their homes was the devastating impact it could potentially have on the future of the tribe. During the congressional hearings on the ICWA, Calvin Issac, tribal chief of the Mississippi Band of Choctaw Indians, testified as follows:

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9. 25 U.S.C. §§ 1901–63 (2000).
10. Barbara Ann Atwood, *Flashpoints Under the Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 602 (2002).
11. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 821 (Nell Jessup Newton ed., LexisNexis 2005) (1941) (citing H.R. REP. NO. 95-1386, at 9 (1978)) [hereinafter COHEN'S]. Note that most of the evidence presented at the congressional hearings was conducted by the Association of American Indian Affairs.
12. Jill E. Adams, *The Indian Child Welfare Act of 1978: Protecting Tribal Interest in a Land of Individual Rights*, 19 AM. INDIAN L. REV. 301, 305 (1994); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989).
13. *Id.*

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. 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.[14]

Evidence presented at the congressional hearings pointed to ignorance and hostility of state child social workers and judges towards Indian cultures and beliefs.[15] Particularly, "the failure of non-Indian social workers to understand the role of the extended family in Indian society" concerned tribal authorities.[16] State social workers might view a child as abandoned—grounds for terminating the parental rights—if the child is placed with persons outside the nuclear family. But, Indian culture considers all members of the tribe as "family" to care for the child and would claim that an Indian child can never in fact be "abandoned."[17]

Through the creation of the ICWA, Congress hoped to impart the importance of sensitivity to tribal culture on state social agencies when rendering child welfare decisions and also to respect tribal sovereignty. The ICWA declares that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[18] The ICWA states further that its purpose is

> 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 . . . .[19]

To protect both Indian families and the future of the tribe, the ICWA was designed to regulate proceedings for the termination of parental rights, adoptions, and foster care placement of Indian children.[20] The ICWA is unique in that it places federal and tribal law into family law

14. *Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public 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). *See also* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34–35 (1989) (It was noted in the House Report that "[a]n 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.") *Id.*
15. *Holyfield*, 490 U.S. at 34–35.
16. *Id.* at 35 & n.4.
17. *Id.*
18. 25 U.S.C. § 1901 (2000).
19. *Id.* § 1902.
20. *See Id.* § 1903.

which is traditionally an area reserved for the state governments.[21] The overriding goal of protecting, preserving, and advancing the integrity of America's Indian tribes is promoted by the ICWA through provisions relating to (1) jurisdiction and tribal participation in child custody proceedings,[22] (2) heightened standards for foster care placement and for termination of parental rights,[23] (3) preferences for placement of American Indian children,[24] and (4) support of American Indian children and family programs.[25]

The statutory provisions of the ICWA operate under the assumption that keeping Indian children within their native community is not only in the best interest of the child, but also compatible with the goal of protecting and promoting tribal integrity.[26] As one court has stated, "The Act is based on the assumption that protection of the Indian child's relationship to the tribe is in the child's best interest."[27] Evidence has shown that Indian children placed in non-American Indian homes have serious adjustment problems and struggle to cope in white society despite being raised in a purely white environment without exposure to any of their cultural identity.[28] In contrast, Indian children who grow up within their native tribe are exposed to the tribe's language, culture, economic activity, and the values and activities that constitute the tribe's distinct way of life.[29] New generations of Indian children make it possible for the Indian tribes and families to maintain their survival as a unique tribe and self-governing community.[30] The ICWA, while designed to keep Indian families intact, is subject to the overarching goal of promoting "the stability and security of Indian tribes."[31]

B. The Nebraska Indian Child Welfare Act

The high number of Indian child removals which plagued the country during the 1960s and 1970s could also be found within the State of Nebraska. Statistics showed that within Nebraska, one of every nine Indian children was removed from his or her parents or guardians and

21. COHEN'S, *supra* note 11, at 820.
22. Adams, *supra* note 12, at 306-07; 25 U.S.C. § 1903–04 (2000).
23. Adams, *supra* note 12; 25 U.S.C. § 1912(e)–(f).
24. Adams, *supra* note 12; 25 U.S.C. § 1915.
25. Adams, *supra* note 12.
26. COHEN'S, *supra* note 11, at 823. *See also* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30,37 (1989) (explaining that the ICWA purports to protect the rights of Indian children and the Indian tribe by keeping Indian children within the Indian community).
27. Chester County Dep't of Soc. Servs. v. Coleman, 372 S.E.2d 912, 914 (S.C. Ct. App. 1988) (internal citation omitted).
28. *Holyfield*, 409 U.S. at 33.
29. COHEN'S, *supra* note 11, at 824.
30. COHEN'S, *supra* note 11, at 834.
31. 25 U.S.C. § 1902 (2000).

placed, overwhelmingly, in a non-Indian home in the years preceding the enactment of the ICWA.[32] In contrast, during the same time period, only one in fifty-five white children in Nebraska were removed from their homes.[33] None of the white children removed from their natural homes were placed in homes of a different racial identity.[34]

Most states incorporated the federal ICWA into their jurisprudence through judicial interpretation. Nebraska is one of the few states to incorporate the Act through its own statutory version in 1985.[35] The Nebraska Indian Child Welfare Act ("NICWA" or "Nebraska Act") states that its purpose "is to clarify state policies and procedures regarding the implementation by the State of Nebraska of the [F]ederal Indian Child Welfare Act."[36] The Nebraska Act is unique in that it states that "[i]t shall be the policy of the state to cooperate fully with Indian tribes in Nebraska in order to ensure that the intent and provisions of the [F]ederal Indian Child Welfare Act are enforced."[37] Other than this policy statement, the NICWA is identical to the federal statute.

C. The Collectivist Goals of the NICWA

The NICWA was designed "to promote the stability and security of Indian tribes."[38] To achieve this goal, Congress looked to Indian children to continue the legacy of America's Indian tribes. The provision of the NICWA at issue in *Phoenix* was the increased burden of proof required before parental rights to an Indian child can be terminated. This provision was designed not only to keep the Indian family together, but also, perhaps more importantly, keep Indian children within the tribal culture.

To protect the existence and future of America's Indians, the ICWA makes no secret that it is willing to place the interests of the tribal community above the individual interests of parents of American Indian children.[39] When the ICWA was introduced as legislation, House Representative Morris Udall of Arizona emphasized the tribal interests sought to be protected by the ICWA when he asked, "What resource is more critical to an Indian tribe than its children? What is more vital to the tribes' future than its children?"[40]

32. Catherine M. Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, a Foundation for the Future*, 27 CREIGHTON L. REV. 661, 663 (1994).
33. *Id.* at 664.
34. *Id.*
35. *Id.* at 669.
36. NEB. REV. STAT. § 43-1502 (Reissue 2005).
37. *Id.*
38. 25 U.S.C. § 1902 (2000).
39. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50 (1989).
40. Adams, *supra* note 12, at 312 (internal citation omitted).

While family law regulates the "collective family" unit, the language which the courts use to discuss issues is in the form of individual and not collective rights.[41] The ICWA is recognition by the United States government of the collectivist nature that is dominant in Native American culture; through the Act, the government holds the collective interest to protect the continued existence Indian tribes as more important than the individual rights of Indian parents.[42] This is perhaps the most controversial aspect of the ICWA—it is a federal law which holds the collective interests of the tribe above individual parental rights. The provisions of the ICWA are designed to keep Indian children, if not within their family, at least within the child's tribe. This is accomplished through several procedural safeguards within the ICWA, found in Title 25 of the United States Code:

> § 1911(a) grants the tribal court exclusive jurisdiction over any Indian child custody proceeding who resides or is domiciled within the reservation of such tribe;[43]
>
> § 1911(b) requires a transfer of custody proceedings for an Indian child who is not domiciled on the reservation in absence of good cause to the contrary;[44]
>
> § 1911(c) allows the American Indian child's tribe the right to intervene at any point in state court proceedings concerning foster care placement or termination of parental rights;[45]
>
> § 1912(a) requires the notification of the Indian child's tribe of any involuntary proceedings concerning an Indian child;[46]
>
> § 1915 provides for preferences for placement of Indian children when they are removed from their natural home and placed into foster care or adoptive care. Note that all of the preferences involve either an extended Indian family member, a member of the Indian tribe, or any Indian family.[47]

These provisions apply to all state court proceedings involving an Indian child who either (a) is a member of an Indian tribe or (b) is eligible for membership in a federally recognized Indian tribe and is the biological child of a member of an Indian tribe.[48] The underlying connection between all of these provisions is that the child's tribe has the ability to take an active role in custody proceedings and, ultimately, to trump the decisions made by the child's parent(s).

D. Parental Rights and Non-Indian Children: *In re Phoenix*

In furthering the ultimate goal of keeping Indian children within their tribal culture, one of the provisions of the NICWA establishes a

41. Adams, *supra* note 12, at 301.
42. Adams, *supra* note 12, at 301–03.
43. 25 U.S.C. § 1911(a).
44. *Id.* § 1911(b).
45. *Id.* § 1911(c).
46. *Id.* § 1912(a).
47. *Id.* § 1915.
48. *Id.* § 1903.

higher standard of proof before the parental rights to an Indian child can be terminated.[49] By requiring a higher standard of proof for Indian children, the NICWA hopes to end the practice of removing Indian children from their homes simply because the Indian child's home does not conform with non-Indians' stereotypes of the "correct" family and home environment to raise a child.[50] The increased burden of proof allows Indian children to be raised by their natural parents within tribal culture in order to pass down traditions for future generations of Indians.

Section 43-1505(6) of the Nebraska Revised Statutes, requires a showing beyond a reasonable doubt that the continued custody of the Indian child by the parent or Indian custodian "is likely to result in serious emotional or physical damage to the child."[51] In comparison, section 43-279.01(3) only requires a showing by clear and convincing evidence that a non-Indian child will be subject to further harm if their natural parents or guardians retain custody.[52] The higher burden of proof required for Indian children should, in practice, result in fewer parents of Indian children having their parental rights terminated in situations where the rights of parents of non-Indian children would be subject to termination.

In the 2006 case of *In re Phoenix*, Sonya, the mother of three non-Indian children, brought an equal protection claim that the lower standard of proof required for the termination of her parental rights violated the Nebraska Constitution and the U.S. Constitution.[53] Sonya's parental rights to her three non-Indian children, Hunter, Jagger, and Phoenix, had been terminated through two orders from the Lancaster County juvenile court issued on March 30 and 31, 2005.[54] With respect to Hunter and Jagger, Sonya was found by clear and convincing evidence to have neglected her children, to have failed to correct home conditions which led to the adjudication of her parental rights; indeed, her incapacities as a parent had led to the children being placed in out-of-home care for fifteen of the prior twenty-two months.[55] Sonya's parental rights to Phoenix were terminated after a showing of clear and convincing evidence that Sonya had neglected her.[56]

49. *Compare* NEB. REV. STAT. § 43-1505(6) (Reissue 2005), *with* NEB. REV. STAT. § 43-279.01(3) (Reiusse 2005).
50. COHEN'S, *supra* note 11, at 839.
51. NEB. REV. STAT. § 43- 1505(6) (Reissue 2005).
52. *Id.* § 43-279.01(3).
53. 270 Neb. 870, 708 N.W.2d 786 (2006).
54. *Id.* at 872, 708 N.W.2d at 790. Note that the two orders terminating Sonya's parental rights, one concerning Hunter and Jagger, and the second concerning Phoenix, were consolidated for appeal purposes.
55. *Phoenix*, 270 Neb. at 878, 708 N.W.2d at 794.
56. *Id.*

Sonya appealed the termination orders, claiming that the clear-and-convincing standard of proof required to terminate parental rights to non-Indian children set forth in section 43-279.01(3), to which Sonya was subject, violated her equal protection rights since the standard of proof was less than what would have been required to terminate her parental rights if the children had been Indians.[57] Sonya argued she was being racially discriminated against because, as the mother of non-Indian children, her parental rights could be terminated by a lower showing of evidence.[58]

The juvenile court of Lancaster County denied Sonya's equal protection claim, and Sonya appealed the issue to the Nebraska Supreme Court in 2006. On appeal, Sonya claimed the juvenile court erred in failing to find that section 43-279.01(3) violated her equal protection rights pursuant to the Fourteenth Amendment to the U.S. Constitution and article I, section 3, of the Nebraska Constitution.[59] The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges, preventing the government from treating differently persons who are, in all relevant aspects, alike.[60]

The Court's initial inquiry into the equal protection claim was whether Sonya, the mother of non-Indian children, was similarly situated to parents of Indian children.[61] Absent this baseline determination, Sonya lacked a viable equal protection claim. The Nebraska Supreme Court held that, "as to the termination of parental rights legislation at issue, the parents of non-Indian children are not similarly situated to the parents of Indian children and, therefore, the parents of non-Indian children lack a viable equal protection claim."[62]

The Court's decision was neither unexpected nor unfounded as the Court had decades of U.S. Supreme Court precedent to guide its holding. At the core of the Nebraska Supreme Court's decision was the determination that distinctions between Indian and non-Indian individuals are not based upon racial classification but are "attributable to and [are] an incident of the historical sovereignty of Indian tribes."[63]

That Indian tribes are regarded by courts as individual sovereigns within the borders of the United States is not a new concept. As first discussed by the U.S. Supreme Court in its 1832 decision *Worcester v. Georgia*, Indian tribes had been recognized by the United States as

57. *Id.* at 875, 708 N.W.2d at 792.
58. *Id.*
59. *Id.* at 878, 708 N.W.2d at 794.
60. *Id.* at 880–81, 708 N.W.2d at 795–96.
61. *In re* Phoenix L., 270 Neb. 870, 881, 708 N.W.2d 786, 796 (2006).
62. *Id.*
63. *Id.* at 882, 708 N.W.2d at 797.

"distinct, independent political communities."[64] Indian tribes are qualified to exercise powers of self-government not because they had been delegated power by the U.S. government, but rather through their original tribal sovereignty which was not extinguished through their inclusion within the United States.[65] Indians lived within the territorial boundaries of the United States before it was even a country. Through treaties and agreements, the various American Indian tribes came within the jurisdiction of the United States.[66] Yet, from the beginning, the United States has allowed the tribal nations to maintain power to regulate their internal and social structures.[67] The power of Indian tribes to maintain a sovereign existence has not diminished nor abandoned through the passage of time or the assimilation of the people into mainstream culture. Rather, it exists so long as the federal government recognizes the sovereignty of each individual Indian nation.[68]

The sovereignty of American Indian nations provides them with the power to regulate their own internal governments, but they are still subject to the overall, plenary power of the federal government.[69] For this reason, all Indians gain the protection of the U.S. Constitution to protect their fundamental liberties from governmental action. This Note is specifically with the equal protection component of the Due Process Clause contained in the Fifth Amendment. The Nebraska case of *In re Phoenix* was not the first time that legislation singling out Indians for different treatment had come before the courts.

In fact, the U.S. Supreme Court had already faced an equal protection claim concerning American Indian classifications in the case *United States v. Antelope*.[70] In that case, members of the Coeur d'Alene Tribe were convicted of first-degree murder under the felony murder provisions of the federal murder enclave statute which provided that any Indian which committed murder within Indian country shall be subject to the same laws and provisions as other persons who committed the same offense within the jurisdiction of the United

64. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

65. COHEN'S, *supra* note 11, at 205.

66. COHEN'S, *supra* note 11, at 206.

67. COHEN'S, *supra* note 11, at 206.

68. COHEN'S, *supra* note 11, at 206.

69. COHEN'S, *supra* note 11, at 206. Note that the U.S. Constitution mentions Indians in two places: the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the exclusion of "Indians not taxed" from those defined as "free Persons" to be counted in determining representation in the government and for tax purposes, U.S. CONST. art. I, § 2, cl. 3. These two references show that the founders recognized the independence of the Indian nations but understood that United States jurisdiction would still have to include power over the Indian tribes.

70. 430 U.S. 641 (1977).

States.[71] The Indians challenged their convictions claiming racial discrimination as the case would have been tried under the law of the state in which the reservation was located if a non-Indian had committed the crime rather than under federal law.[72] The U.S. Supreme Court, in a unanimous decision, stated that the equal protection requirements of the Due Process Clause of the Fifth Amendment had not been violated for two reasons: (1) the federal statutes under which the Indians were prosecuted were not based upon a racial classification since the defendants were subject to the statutes not because of their Indian blood but because they were enrolled members of the Coeur d'Alene Tribe;[73] and (2) that there was no equal protection claim since any individual, regardless of ancestry or tribal enrollment, would be subject to the same federal statute had they been charged with murder within a federal enclave.[74] In similar fashion, the Nebraska Supreme Court in *Phoenix* stated that federal laws which regulate Indian affairs are not based upon a racial classification, but rather, are "rooted in the unique status of Indians as 'a separate people' with their own political institutions."[75]

In the *Phoenix* decision, the Nebraska Supreme Court went on to quote the U.S. Supreme Court when it noted that the Court had previously upheld federal legislation singling out Indians for specific treatment.[76] In reality, had the U.S Supreme Court decided that such legislation was an invidious racial classification and therefore unconstitutional, an entire title of the United States Code would be ineffective "and the solemn commitment of the Government toward the Indians would be jeopardized."[77]

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71. *Id.* at 642–43 & n.1.
72. *Id.* at 643–44.
73. *Id.* at 646.
74. *Id.* at 648.
75. *In re* Phoenix L., 270 Neb.870, 883, 708 N.W.2d 786, 797 (2006) (quoting *Antelope*, 430 U.S.at 646).
76. *Id. See also* United States v. Wheeler, 435 U.S. 313 (1978) (holding that the federal prosecution of a member of the Navajo Tribe was not in violation of the Double Jeopardy Clause of the Fifth Amendment despite the fact that the member had already been prosecuted under tribal law since the tribe was acting as an independent sovereign and not as an arm of the federal government); United States v. Antelope, 430 U.S. 641 (1977) (holding that the prosecution of members of the Coeur d'Alene Tribe for a murder committed on an Indian reservation under federal law was not in violation of the Equal Protection Clause since the defendants were not subject to federal jurisdiction because they were of the Indian race but because they were enrolled members of the tribe and because the murder had occurred within a federal enclave); Morton v. Mancari, 417 U.S. 535 (1974) (holding that the employment preferences of the Bureau of Indian Affairs which favored applicants of Indian ancestry for employment and promotions was not considered contrary to the antidiscrimination provisions of the Equal Employment Opportunity Act of 1972).
77. *Morton*, 417 U.S. at 552.

By the time that the Nebraska Supreme Court was confronted with the equal protection claim in *Phoenix*, the issue had already been decided. Sonya had no valid equal protection claim because she was not similarly situated to the parents of Indian children. The standard of proof in section 43-279.01(3) does not violate equal protection guarantees of parents of non-Indian children since the classification of "Indian" is a political and not a racial classification.[78] The higher standard of proof required to terminate parental rights over Indian children under the NICWA is based upon the nation's commitment to continue the legacy of America's Indian tribes by reducing the number of Indian children who are removed from their homes and tribes through state court proceedings.[79] Since the differing standards of proof are based upon the historical sovereignty of the Indian tribes, the termination of Sonya's parental rights to her three children was affirmed by the Nebraska Supreme Court.[80]

III. ANALYSIS

The NICWA was challenged in *Phoenix* as allegedly violating the Equal Protection Clause of the Nebraska Constitution and the U.S. Constitution because the Act treats parents of Indian children differently than parents of non-Indian children for the purpose of parental rights termination proceedings. The decision of the Nebraska Supreme Court to deny the equal protection claim raised in *Phoenix* is correct and indisputable since it is based upon the sovereignty of Native Americans. The U.S. Supreme Court has also opined that it is the sovereignty of American Indians, and not their race, that allows Congress to single out Indians for different treatment under the law without violating the Equal Protection Clause.[81]

While it is clear that the NICWA can survive an equal protection challenge from the parents of non-Indian children, *Phoenix* leaves open the question of how the NICWA impacts parents of Indian children. While all parental rights termination proceedings result in children being permanently separated from their birth parents, parents of Indian children, unlike parents not affected by the NICWA, have lim-

78. *Phoenix*, 270 Neb. at 882–84, 708 Neb. at 797.
79. 25 U.S.C. § 1902 (2000).
80. *Phoenix*, 270 Neb. at 885, 708 N.W.2d at 798.
81. *Morton*, 417 U.S. 535. It is important to note the U.S. Bill of Rights does not apply to Indians on the reservation and within tribal courts. Indians living on a reservation receive civil liberties protection through the 1968 Indian Civil Rights Act which adopts some, but not all of the provisions of the U.S. Bill of Rights. *See* 25 U.S.C. §§ 1301-03 (2007). However, if an Indian appears in federal or state court, they receive the full protection of the U.S. Bill of Rights. The analysis in this Note focuses on the application of the ICWA in state and federal courts which means that both the Due Process Clause and Equal Protection Clause are applicable to the analysis.

ited abilities to determine the care, custody, and future permanent home of their children.[82] The immense restrictions placed upon parents of Indian children on this issue potentially runs afoul of the Due Process Clause. The Due Process Clause, as interpreted by the Court, vests in all parents the fundamental liberty to make decisions concerning the care, custody, religion, education, and future of their children.[83] The NICWA is designed in part to offer increased protection to parents of Indian children by increasing the burden of proof required before their parental rights can be terminated; however, the NICWA is also designed to protect the collective interests of the Indian tribe.[84] These two goals arguably cannot co-exist without one of the interests suffering. In the case of the NICWA, it is the private, parental rights of the Indian parents which are sacrificed for the collective interests of the tribe.

The analysis section of this Note is broken into two sections. Section III.A demonstrates how the ICWA's primary goal of protecting the integrity of Indian tribes results in encroachment of the rights of parents of Indian children. Specifically, the ICWA limits a parent's ability to make decisions concerning the future of their children when they voluntarily place their children up for adoption. Section III.B puts forth the argument that the limitations placed upon parents of Indian children by the ICWA infringes upon their fundamental parental rights protected by the Due Process Clause. Section III.B also provides commentary by the author which argues that the collective goal of the Indian tribe, while a valid and important goal, should never be placed above the fundamental rights each parent has to make decisions concerning the future of their child.

A. Parental Rights under the ICWA

Historically, parental rights have been a class of rights that, while not enumerated within the Constitution, have found basic protection under the Due Process Clause of the Fifth and Fourteenth Amendments. Specifically, a parent's right to direct their children's education and religion have been upheld as protectable interests by the United States Supreme Court.[85] A parent's right to establish a home

82. *See generally* 25 U.S.C. § 1901–63 (2000).

83. *See infra* note 85.

84. 25 U.S.C. § 1902.

85. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding the right of Amish parents to educate their children according to their religious beliefs); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding an Oregon statute which prevented parents from choosing to have their children educated in a private school unconstitutional); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that fundamental parental rights prevent the state from denying children access to foreign language instruction).

and bring up children has been deemed "essential"[86] and marriage and procreation have been considered among the most "basic civil rights of man."[87] Part of a parent's right is to control the child's future by placing him or her up for adoption. Parents of non-American Indian children maintain theses rights even as they are placing their children up for adoption. For example, the New York Court of Appeals upheld a New York statute which allowed parents who were placing their children up for adoption to select the religion by which the child would be raised.[88]

In contrast, the ICWA restricts the decisionmaking capabilities of parents of Indian children who have chosen to place their child up for adoption. Through the tribal notification and tribal intervention requirements of the ICWA, along with preferences for placement of American Indian children, parents of American Indian children find themselves limited when it comes to making decisions regarding adoption; parents of non-Indian children are not subject to the same limitations.[89] The ICWA has in fact created two categories of parents: those who have children who are American Indian and those who do not. Depending upon what class a parent falls into, their capability to make decisions concerning the adoptive future of their child is differs significantly.

Proceedings in which parents of American Indian children choose to voluntarily terminate their rights to the children are one area where the conflict between individual parental rights and collectivist tribal rights may be the largest. If a parent of an American Indian child subject to the ICWA decides to place her child up for adoption, that parent, though voluntarily choosing adoption, must still comply with the provisions of the ICWA. Voluntary termination proceedings are first subject to issues of jurisdiction. A parent desiring confidentiality may want to leave the reservation in order to place the child up for adoption in state court proceedings rather than the tribal court. However, the parent of an Indian child is unable to make such a decision since the ICWA gives jurisdiction to the tribal court, and the state court, absent a showing of good cause, is required to move the proceedings to tribal court.[90]

86. *Meyer*, 262 U.S. at 399 (internal citations omitted).

87. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

88. Dickens v. Ernesto, 281 N.E.2d 153 (N.Y. 1972).

89. 25 U.S.C. § 1911(c) (tribal intervention); § 1912(a) (tribal notification); § 1915 (preference for placement) (2000).

90. *Id.* § 1911. The tribal court has exclusive jurisdiction over Indian children domiciled on the reservation. If an Indian child not domiciled on the reservation, section 1911(b) requires that the child custody proceedings which have initially been brought in state court be transferred to the tribal court absent a showing of good cause.

In *Mississippi Band of Choctaw Indians v. Holyfield*, the U.S. Supreme Court held the jurisdictional provisions of the ICWA directing the voluntary termination proceedings to the tribal court must be enforced despite the wishes of the birth parents to have their twins adopted by a family off of the reservation.[91] The birth parents specifically chose to have their twins off the reservation in an attempt to defeat the jurisdictional requirements of the ICWA out of fear that the tribal court would require that their twins be placed in a home on the reservation rather than with the non-Indian family the parents had pre-selected to adopt their children.[92] The U.S. Supreme Court stated that the goal of the ICWA was to protect the integrity of the tribe; thus, the tribe had a protectable interest in the Indian children which trumped the interests of the birth parents.[93] The order of the state court was terminated and the adoption proceedings moved to the tribal court.[94] Adoption proceedings that are governed by the ICWA are unique as they are the only adoption proceedings where, pursuant to federal law, the birth parent's wishes may be entirely overruled by the tribe's interest in the children.

Voluntary termination proceedings also raise questions as to the tribe's right to notice and to intervene in the adoption proceedings. Often times, parents voluntarily placing their child up for adoption wish to remain anonymous not only to their child but also their community. Yet, the provisions of the ICWA limit the ability of parents of Indian children to successfully place their child up for voluntary adoption while still remaining anonymous.[95]

The ICWA grants tribes the right to intervene in child custody proceedings involving an Indian child who is either a member of their tribe or is eligible for membership, as is more often the case.[96] The provision defining the tribe's right to intervene in child custody proceedings makes no distinction between involuntary child custody proceedings initiated by the state and voluntary proceedings initiated by the child's parents.[97] This leaves open the question whether, in voluntary proceedings, the tribe has a right to intervene in order to have their interests in the future of the Indian child represented in the adoption proceedings. In contrast, the tribe's right to notice of child custody proceedings is limited by the ICWA to notice only for involun-

91. 490 U.S. 30, 53 (1989).
92. *Id.* at 40.
93. *Id.* at 49–51.
94. *Id.* at 53–54.
95. 25 U.S.C. § 1917. *See* Adams, *supra* note 12, at 333.
96. *Id.*; 25 U.S.C. § 1911(c). In addition to the mandatory notice requirements for involuntary termination proceedings, in any State court proceeding for the termination of parental rights to an Indian child, the Indian child's tribe has the right to intervene at any point in the proceedings. *Id.* § 1911(c).
97. *Id.* § 1911(c).

tary proceedings.[98] The uncertainty raised by this apparent inconsistency is, if the tribe has no right to notice in voluntary proceedings, should that also mean that the tribe has no right to intervene in voluntary proceedings?[99] The U.S. Supreme Court addressed this issue, to a degree, in a footnote of the *Holyfield* decision.[100] The Court implied that since the ICWA gives the tribe the right to intervene in *any* termination proceeding, the tribe has the right to intervene in a voluntary termination proceeding despite the fact there is no provision requiring notice of the voluntary proceeding be given to the tribe.[101] In effect, this means that despite the desire of the birth parent not to have their tribe notified of or to be present at the termination proceeding, the tribe has the right to intervene under the ICWA.[102] Therefore, if the tribe is made aware of custody proceedings involving an Indian child, they have the ability to become a part of the proceedings at any point in the proceeding and have their interests represented.[103]

The tribe also has the ability to petition a state court to invalidate any action which violates sections 1911, 1912, or 1913 of the ICWA.[104] Thus, if a state court fails to notify the tribe of an involuntary parental rights termination proceeding or if the state court fails to transfer a child custody case to the tribal court when statute demanded that it should, the tribe can independently appeal to have the decision of the state court invalidated.[105] The tribe's ability to petition to have state decisions invalidated is most at issue in circumstances where the birth mother of an Indian child wishes to remain anonymous and therefore, does not notify anyone in her tribe that she is placing her child up for adoption. While there is no statutory requirement that the state court notify the tribe, the jurisdictional requirements might require that the state court transfer the proceedings to the tribal court—in effect, com-

98. *Id.* § 1912(a).

99. For a general discussion on the ICWA's goal of protecting tribal interests see Adams, *supra* note 12 at 328–34.

100. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 38–39 n.12 (1989).

101. Adams, *supra* note 12, at 331–32. *See Holyfield*, 490 U.S. at 38–39 & n.12. The ICWA defines "termination of parental rights" as "any action resulting in the termination of the parent-child relationship". 25 U.S.C. § 1903(1)(ii) (2000).

102. *Holyfield*, 490 U.S. at 49. *See also* 25 U.S.C. § 1911(c) (2000) (granting an Indian child's tribe the right to intervene at any point in the proceeding).

103. 25 U.S.C. § 1911(c).

104. *Id.* § 1914.

105. *Id.* Also note that another common issue involving the ICWA is that the state court is not made aware the child subject to the proceedings is either an Indian child or eligible for enrollment in a tribe. While that discussion is outside the scope of this Note, § 1914 does not grant a tribe independent grounds to relitigate a state court decisions based upon the jurisdictional requirements of § 1911 to determine the custody of the child and the tribe is also estopped from relitigating the custody issue. Comanche Indian Tribe v. Hovis, 53 F.3d 298 (10th Cir. 1995).

pletely overriding the birth mother's desires for confidentiality in adoption proceedings.[106]

If the tribe has the right to become involved in any custody proceeding involving an Indian child of their tribe, the ability of birth parents to make decisions, confidentially or otherwise, regarding their child's future is restricted. With notification provisions and the jurisdictional requirements that the custody proceedings take place within the tribal courts, parents of Indian children find themselves denied the right to make independent decisions involving the future of their children; in essence, they share that power with the entire tribe. One of the most important decisions in an adoption proceeding is the ability of the birth parent to chose the adoptive family of their child. Yet the ICWA also limits the ability of parents of American Indian children to make this decision.

The ICWA specifically states that an Indian child being removed from his or her birth home should be placed with (a) an extended family member, (b) an Indian family within the tribe, or (c) any Indian family, in that order of preference.[107] The general phrase "adoptive placement," as defined in the ICWA, applies to *all* "actions resulting in a final decree of adoption."[108] Thus, the birth parents of an Indian child are not only denied the right to choose a family off the reservation to raise their child, but also may face the possibility that their child will be raised by an extended family member or a member of their community.[109]

The potential for conflict between the confidential desires of the biological parent and the tribal interests in an Indian child has primarily been resolved in favor of the tribe.[110] The Montana Supreme Court has upheld a tribe's right to enforce the statutory preferences for adoptive placement of an Indian child over the birth mother's statutorily recognized interest in anonymity.[111] In *In re Baby Girl Doe*, the birth mother specifically stated that she wished to remain anonymous and requested that her tribe not be notified.[112] The district

106. 25 U.S.C. § 1911(a)–(c) (2000). Note that this was exactly the decision of the U.S. Supreme Court in *Holyfield*. There the Court explicitly stated that the individual wishes of the birth parents are trumped by the statutory goals of the ICWA.

107. *Id.* § 1915(a).

108. *Id.* § 1903(1)(iv) (emphasis added).

109. *See id.* § 1915(a).

110. While some courts have acknowledged that the ICWA may be an intrusion upon a mother's decision to determine what is in the best interest of her child, the federal government's trust relationship with America's Indian tribes and Congress' goal of preventing Indian children from being removed from their reservation homes has proven to override the desires of biological parents. For a general discussion on the government's commitment to protecting the integrity of the nation's Indian tribes see COHEN'S, *supra* note 11, at 820–25.

111. *In re* Baby Girl Doe, 865 P.2d 1090 (Mont. 1993).

112. *Id.* at 1091.

court, on the premise that the mother's relinquishment of parental rights was voluntary, chose to notify the tribe that there was a child custody proceeding involving a child eligible for membership within their tribe.[113] The tribe intervened and requested that the statutory placement provisions of the ICWA be enforced.[114] The Montana Supreme Court, relying on *Holyfield*, denied the mother's request for anonymity, stating that the request could not be allowed to defeat the ICWA's primary goal of promoting the stability and the future of the Indian tribes by restricting the loss of their children to homes outside the reservation.[115]

Through the placement preference provisions of the ICWA, there is little hope that a biological parent of an Indian child will be able to anonymously place that child up for voluntary adoption. While a parent may desire to remain anonymous to their community, parents also have the right to remain anonymous to their biological children which are placed up for adoption. If, by some chance, the birth parents do manage to have their Indian child placed according to the preferences of the ICWA and still retain their anonymity, section 1917 of the ICWA allows any Indian child who was subject to an adoption placement to obtain information of their biological parent's tribal affiliation and "such other information as may be necessary to protect any rights flowing from the individual's tribal relationship."[116] This may result in such specific information being given to an adopted Indian child that they are able to seek out their biological parents even though the parents wish to remain anonymous.

The ICWA has created two classes of parents: those who have children of Indian heritage and those who do not. While parents of non-Indian children have the right to make decisions concerning the voluntary adoption of their child without interference by governmental interests, the rights of parents of Indian children are severely limited. The principal goal of the ICWA to "promote the stability and security of Indian tribes by preventing the further loss of their children" comes at the price of restricting the liberties of the parents of Indian children.[117] In enacting the ICWA, Congress has placed the collectivist interest of the tribe above those of the individual liberties of parents of Indian children. While the goal of continuing the traditions and cultures of American Indian tribes is a vital goal and one that Congress should be committed to, the price of such a goal is the violation of parental rights of Indian children which are protected under the Due Process Clause.

113. *Id.*
114. *Id.* at 1091–92.
115. *Id.* at 1093.
116. 25 U.S.C. § 1917 (2000).
117. *In re* Baby Girl Doe, 865 P.2d 1090, 1095 (Mont. 1993).

B. Does the NICWA violate fundamental rights of parents of Indian children?

The U.S. Supreme Court has long recognized that the Fourteenth Amendment's Due Process Clause, and its Fifth Amendment counterpart, "guarantees more than fair process" and includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interest."[118] The liberty interest potentially infringed upon by the NICWA is the interest of parents in the care, custody, and control of their Indian children. Recognized by the U.S. Supreme Court in *Troxel v. Granville* as "perhaps the oldest of the fundamental liberty interests recognized by this Court," the right of parents to direct the upbringing of their children has long been held to have a constitutional dimension.[119] A child is not "a mere creature of the State," and courts have protected parental rights from excessive interference from the State for decades when making decisions involving their children's future.[120]

The statutory provisions of the NICWA are principally designed to protect the integrity of the tribal community; as a result, parents of Indian children find their parental rights suffering. By limiting the rights of parents of Indian children to make decisions involving the voluntary relinquishment of their parental rights, the NICWA arguably runs afoul of the Due Process Clause's traditional protection of the parental right to make decisions concerning the care, custody, and control of their children.[121] In order to determine whether a due process claim against the NICWA could succeed, there must first be a "careful description" of the right asserted by the parents of Indian children.[122] Next, there must be a review of Supreme Court decisions concerning various parental rights in order to ascertain exactly how much protection a Nebraska court might give the specific right claimed by parents of Indian children. Finally, the collective interests of the tribe as promulgated in the NICWA must be weighed against the individual parental rights of Indian parents.[123]

A parent's right to control the voluntary adoption proceeding of their Indian children is based on the concept that parents have a rec-

118. Troxel v. Granville, 530 U.S. 57, 65 (2000) (quoting Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997)).
119. *Id.*
120. *Id.* at 65 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).
121. *See supra* note 85.
122. *Glucksberg*, 521 U.S. at 721.
123. Note that in addition to the potential due process claim which is the focus of this Note, there may also be a viable equal protection claim as well. That discussion is outside the scope of this Note though, and if an equal protection claim were to be brought, it could potentially be disposed of as quickly and with the same reasoning as was seen in *Phoenix*.

ognized constitutional right to direct the upbringing of their children.[124] While parents of Indian children may be asserting what is generally classified as a "parental right," it is vital to have a careful description of the asserted parental right so that a court can tailor its analysis to the specific substantive due process right asserted.[125] In this case, parental rights within the context of voluntary adoption proceedings are at issue. If the parent of an Indian child brought a substantive due process claim, it would need to be distinguished from those cases which have defined parental rights in terms of *involuntary* termination proceedings, which were at issue in *In re Phoenix*.[126]

In order to maintain parental rights to a child, the Supreme Court requires that parents fulfill some basic responsibilities. As seen in *Phoenix*, if a parent fails to assume parental responsibilities, the state permits a court to permanently terminate a biological or guardian parent's rights.[127] The mother in *Phoenix* raised an equal protection claim and objected to the lower standard of proof required for the termination of her parental rights as opposed to the parent of an Indian child.[128] By involuntarily terminating the mother's rights to her non-Indian children, regardless of the standard of proof required, the state has removed her right to make decisions involving the future of her children because she has failed as a parent. Involuntary terminations are founded in the *parens patriae* power of the state which obligates state agencies and courts to look out for the children of the state.[129]

The due process claim that the parent of an Indian child would have to bring is that he or she has not been irresponsible in the care of the child and, therefore, should have the parental right to make decisions concerning the future of the protected child despite the fact the parent is terminating the relationship. While the decision the parent would want protected is not based on the education or religion of the child, it is a decision that the parent is not in a position to raise the child, and as such, the parent wants to have the child voluntarily placed for adoption.

In bringing a claim, the parent of an Indian child would have to focus the allegations that he or she has been denied the parental right

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124. *See supra* note 85.

125. *See, e.g.*, *Glucksberg*, 521 U.S. at 720–21.

126. *See In re* Phoenix L., 270 Neb. 870, 708 N.W.2d 786 (2006); Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 FAM. L.Q. 245 (1985).

127. *Phoenix*, 270 Neb. at 877–78, 708 N.W.2d at 793–94. Failure in parental responsibilities can include abandonment, neglect, failure to fix home conditions, and extended removal from the home. NEB. REV. STAT. § 43-247 (Reissue 2005).

128. *Phoenix*, 270 Neb. at 872, 708 N.W.2d. at 790.

129. *See* NEB. REV. STAT. § 43-247(3). "*Parens patriae*" is defined as "the state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

to decide whether it is in the best interest of the child to be adopted by a selected family off of the reservation.[130] As seen in the preceding section, parents of Indian children lack many of the basic protections that parents of non-Indian children receive, including the ability to place their child with the family of their preference, the ability to chose state court versus their tribal court, and the ability to go through the proceedings without notification of a third-party.[131] Parents of Indian children would likely claim that their protected due process right to make decisions concerning the upbringing of their children is being violated by the provisions of the NICWA. The parents' allegations would emphasize that their parental rights should take priority over the tribe's interest in the proceedings and that the tribe's ability to completely overrule choices made by parents goes too far.[132]

Some attention needs to be drawn to the fact that parents of Indian children are *voluntarily* choosing to place their child up for adoption and therefore voluntarily choosing to end their parental responsibilities. Following this line of thought, should parents who are voluntarily choosing to place their child for adoption have restricted rights or similar due process protection as parents subject to involuntary terminations? It appears that courts in non-ICWA cases are willing to protect parental decisionmaking capabilities even as those parental rights are being terminated. For example, the New York Court of Appeals upheld a statute which gives parents the right to choose their child's religion when placing him or her up for adoption, and the Utah Court of Appeals upheld a mother's decision to place her child with a stranger rather than the child's grandmother.[133] It is also important to note that in involuntary proceedings, the U.S. Supreme Court has clearly stated that procedures to terminate parental rights must meet due process requirements.[134] Voluntary proceedings which terminate parental rights should also be protected by due process requirements; similarly, the parents of Indian children should have their right to make decisions protected.

130. *See, e.g.*, Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 697–98 (N.D. Tex. 2000).

131. *See* 25 U.S.C. §§ 1901–1963 (2000).

132. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 54 (1989) (Stevens, J., dissenting).

133. Dickens v. Ernesto, 281 N.E.2d 153, (N.Y. 1972) (upholding a statute which allowed parents to express a preference that their child be raised in the religion of their choice, even though they were giving the child up for adoption); Kasper v. Nordfelt, 815 P.2d 747 (Utah Ct. App. 1991) (holding that the mother's choice to place her child with an adoption agency should not be disregarded simply because the paternal grandparents want to raise the child). *See supra* section III.A.

134. *See infra* note 157.

The next issue in the due process analysis is what level of protection a Nebraska court could offer parents of Indian children based upon how the courts have classified parental rights.[135] Recently, the U.S. Supreme Court and lower federal courts have left open the question as to whether parental rights should, in every or under any circumstance, be considered fundamental and receive the highest level of protection from the court.[136]

The foundation of parental rights is the *Meyer/Pierce/Yoder* trilogy—three historical cases which are considered the touchstone for parental rights receiving substantive due process protection.[137] While these cases lay the foundation for parental rights, it is important to note that these decisions were based upon parental right claims challenging states statues concerning public education, an interest that is very different than the parental right at interest here.

The *Meyer v. Nebraska* decision laid the foundation for the Supreme Court's protection of the right of parents to direct the upbringing and education of their children. In that case, a teacher who gave student lessons in the German language was prosecuted under a Nebraska law prohibiting educational instruction to children in any language other than English.[138] While it was the teacher who was in violation of Nebraska law, the parents expressly requested that the lessons be taught to their children in German, which implicated their parental right to make educational choices for their children.[139] The Court found that parents' liberty interest in the upbringing and education of their children was within the parameters of rights protected by the Due Process Clause.[140]

Two years later in *Pierce v. Society of Sisters*, the Court held a state statute prohibiting parents from sending their children to private schools unconstitutional.[141] Expressly relying upon their decision in *Meyer*, the Court held that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and edu-

135. *See infra* note 156.

136. For a discussion of parental rights see Troxel v. Granville, 530 U.S. 57 (2000); Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 697–703 (N.D. Texas 2000).

137. *Littlefield*, 108 F. Supp. 2d at 697–98. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding the right of Amish parents' to educate their children according to their religious beliefs); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding as unconstitutional an Oregon statute which prevented parents from choosing to have their children educated in a private school); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that fundamental parental rights prevent the state from denying children access to foreign language instruction).

138. Meyer v. Nebraska, 262 U.S. 390, 397 (1923).

139. *Id.* at 400.

140. *Id.* at 399–400.

141. 268 U.S. 510, 534–36 (1925).

cation of children under their control."[142] In *Yoder v. Wisconsin*, parents of Amish children challenged a Wisconsin statute requiring all children to attend school until the age of sixteen.[143] The parents challenged the statute based on their religious belief that their children should not be required to attend school past the eighth grade.[144] In holding that the Amish children were not required to attend school for the statutory period, the Court reaffirmed that parental rights are a protected liberty interest.[145] Other courts have noted that *Yoder* "recognized the 'high responsibility' and regulatory power of the state in matters of public education," which implies that the state's power to regulate public education is also a highly protected right of the state and should not automatically be pushed aside in favor of the right of parental choice.[146]

While all three of these foundational cases expressly note that parents have a constitutionally protected right to make decisions involving the upbringing of their children, all three cases applied rational basis review based on the parents' secular assertion of parental rights under the Due Process Clause.[147] The Court in *Yoder* clearly premised its holding in part on the "interests of parenthood" but other courts have expressly noted that "the secular aspect of [a] claim (implicating due process) will not overcome a reasonable educational regulation."[148] This implies that in order to achieve strict scrutiny analysis, there will likely have to be a religious-based challenge to statutes infringing upon parental rights concerning the education of children.

Thus, it appears that the parental right's foundation of the *Meyer/Pierce/Yoder* trilogy may only hold that the Due Process interest of parents to direct the upbringing and education of their children, standing alone, warrants no more than rational basis review. These three cases have two important implications for a parent challenging the NICWA. First, the cases establish that while parental rights may receive constitutional protection, in order to receive strict scrutiny analysis, a parent's claim against a state statute may necessitate a First Amendment element. Secondly, since these cases involve paren-

142. *Id.* at 534–35.
143. 406 U.S. 205, 208–09 (1972).
144. *Id.* at 214.
145. *Id.* at 235–36.
146. Littlefield Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 699 (N.D. Texas 2000).
147. *Yoder*, 406 U.S. at 215 ("A way of life . . . may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . ."); *Pierce*, 268 U.S. at 534–35 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)); *Meyer*, 262 U.S. at 399–400 (the interference by the state must not be "arbitrary or without reasonable relation to some purpose within the competency of the state to effect."). *Id.* at 400.
148. *Littlefield*, 108 F. Supp. 2d at 699.

tal rights within the educational field, it might be that *Meyer*, *Pierce*, and *Yoder* fail to help establish a due process challenge to the NICWA. If a Nebraska court were to use these cases as the defining precedent, then that may spell disaster for a parent's claim since a challenge of the NICWA would likely be secular in nature and receive only rational basis scrutiny, which would likely result in the parent's claim being defeated.

Fortunately for parents of Indian children, parental rights and the *Meyer / Pierce / Yoder* line of cases have recently been addressed by the U.S. Supreme Court in the context of custody and visitation rights, which are situations that would be much more applicable to a challenge of the NICWA. In *Troxel v. Granville*, the mother of two minor children challenged a Washington state visitation statute which permitted "[a]ny person" to petition a court for visitation rights and empowered courts to grant visitation whenever it "may serve the best interest of the child."[149] In holding the statute unconstitutional, the four justice plurality that expressly referred to parental rights as fundamental stated that the Washington statute interfered with the mother's "fundamental constitutional right to make decisions concerning the rearing of her own daughters."[150] In his concurrence, Justice Thomas stated that he agreed with the plurality in their "recognition of a fundamental right of parents to direct the upbringing of their children," but he also noted that the opinion of the plurality, along with Justice Souter's concurrence and Justice Kennedy's dissent, fails to articulate the appropriate standard of review.[151] Thus, in *Troxel*, the Court expressed a majority opinion that parental rights in the context of visitation and custody are considered fundamental but left open the issue of whether the Court's fundamental language was meant to imply a strict scrutiny analysis.[152]

149. 530 U.S. 57, 60 (2000).

150. *Id.* at 70. The plurality was written by Justice O'Connor and included Justices Ginsburg and Breyer and Chief Justice Rehnquist. *Id.* at 60.

151. *Id.* at 80 (Thomas, J., concurring). The plurality along with Justice Thomas' concurrence in *Troxel* results in five Justices stating that parental rights under the Due Process Clause are considered fundamental. Justice Souter, concurring, stated that the Washington statute simply sweeps too broadly in whom and under what circumstances the statute allows non-biological individuals to have visitation rights. Souter further states that "[c]onsequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections." *Id.* at 77 (Souter, J., concurring). Justice Stevens, in dissent, makes no argument that parents lack a fundamental liberty interest in determining the care an upbringing of their children. However, Stevens feels that this liberty interest is neither absolute nor without boundaries. *Id.* at 87 (Stevens, J., dissenting). Justice Scalia, in dissent, stated that unenumerated parental rights should receive very little *stare decisis* protection and also asserted that parental rights are in no way absolute. *Id.* at 92 (Scalia, J., dissenting).

152. *Id.* at 70 (majority opinion).

The sweeping statement by the plurality—that parental rights are a "fundamental" liberty interest—was a point of concern for other members of the Court as it implied that parental rights should receive strict scrutiny. In his concurrence, Justice Souter stated that while the Court has "long recognized that a parent's interest in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause," the court has never fully defined the scope of parental rights which will receive constitutional protection.[153]

Justice Stevens, in dissent, also criticized the plurality's broad protection of parental rights and remarked that a parent's interest in caring for and guiding their children may be encroached upon by state action in "exceptional circumstances."[154] In a separate dissent, Justice Kennedy stated that the *Meyer/Pierce/Yoder* cases which the Court had based their fundamental language upon all articulated a broad fundamental parental right but that the right had been narrowly applied to the specific circumstances of each case. The complete diversity between the claims presented in those cases made them, in Justice Kennedy's opinion, poor precedent for the visitation issue presented in *Troxel*.[155]

Not to be left out of the parental rights discussion is the U.S. Supreme Court's review of parental rights in the context of terminating parental rights. Unfortunately, most of the discussion has focused on *involuntary* termination of parental rights. In *Santosky v. Kramer*, the U.S. Supreme Court established a constitutional requirement that a court must find by clear and convincing evidence that a biological parent's continued custody will result in emotional or physical harm to the child before a parent's rights can be terminated.[156] While not discussing voluntary termination, the Court affirmed that state intervention to terminate a parent-child relationship must satisfy the requirements of due process.[157] Besides acknowledging that proceedings terminating parental rights require due process protection, the Court's majority opinion, without qualification, boldly states that the Court has historically recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."[158]

Considering the decades of parental rights precedent and the relatively recent discussion of parental rights in both *Santosky* and *Troxel*,

153. *Id.* at 77 (Souter, J., concurring).
154. *Id.* at 87 (Stevens, J., dissenting).
155. *Id.* at 95–96 (Kennedy, J., dissenting).
156. 455 U.S. 745, 768–70 (1982).
157. *Santosky*, 455 U.S. at 753 (citing Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 37 (1981) (Blackmun, J., dissenting)).
158. *Santosky*, 455 U.S. at 753 (internal citations omitted).

what level of protection could a Nebraska court offer the parent of an Indian child against infringement of their constitutional rights by the NICWA? Ultimately, it would appear that the U.S. Supreme Court's classification of parental rights as "fundamental" would require that a Nebraska court apply strict scrutiny analysis to the NICWA if it were to be challenged by parents of Indian children as violating their rights protected by the Due Process Clause.

Even if a Nebraska court afforded fundamental protection to a claim by parents of Indian children against the NICWA, there is obviously some discourse between members of the U.S. Supreme Court. The concurring and dissenting opinions in *Troxel* make evident that some Justices would allow parental rights to be abridged if there is a sufficient state interest.[159] If strict scrutiny analysis was applied to a claim by the parent of an Indian child, the challenged provisions of the NICWA may not be struck down if the state can show that the NICWA is designed to achieve a compelling goal and that its statutory provisions are the least restrictive means to achieve that goal.[160] As outlined in Part II, the NICWA is designed to protect not only the best interest of the Indian children by reducing the number of Indian children who are removed from their tribal homes, but also to "promote the stability and security of Indian tribes and families."[161]

The high percentage of Indian children who were removed and placed in non-Indian homes through state court proceedings during the 1960s and 1970s caused alarm among the Indian community.[162] The Indian nations feared that continued removals would result in a complete depletion of tribal children, resulting in the tribes' inability to carry on their traditions and culture. Relying upon the trust relationship between the sovereign Indian tribes and the federal government, Congress enacted the ICWA explicitly for the purpose of protecting the integrity of the Indian tribes through procedures designed to keep Indian children on the reservation.[163] While some of these provisions are directed at the parent-child relationship, others

159. *See supra* notes 152–53 and accompanying text.

160. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (holding the right to marry as fundamental and striking down a statute which prevented non-custodial parents, who were behind in child support, from marrying); Loving v. Virginia, 388 U.S. 1 (1967) (holding Virginia's miscegenation laws to strict scrutiny analysis after declaring the right to marry fundamental); Griswold v. Connecticut, 381 U.S. 479 (1965) (applying strict scrutiny analysis to a doctor's challenge to a Connecticut provisions which prevented married couples from using contraception).

161. 25 U.S.C. § 1902 (2000); NEB. REV. STAT. § 43-1502 (stating that the purpose of the NICWA "is to clarify state policies and procedures regarding the implementation by the State of Nebraska of the Federal Indian Child Welfare Act").

162. *See supra* notes 11–14 and accompanying text.

163. 25 U.S.C. § 1902.

are directed at the child-tribe relationship.[164] For the most part, it is the child-tribe provisions that potentially invade the rights of parents of Indian children to make decisions in voluntary adoption proceedings.

Almost thirty years ago, Congress concluded that the ICWA was necessary to protect the future of Indian tribes. Today, if the parent of an Indian child would challenge the NICWA, key among the court's assessment would be whether the NICWA is still necessary to protect the future Indian tribes and whether that protection validates the potential infringement upon the rights of parents of Indian children through application of the NICWA. Current statistics tracking the number of Indian children that were removed from their homes and placed in non-Indian homes since the enactment of the NICWA would be a good start in this analysis; unfortunately, no group has current statistics on how many Indian children are being taken from their reservation home and placed in non-Indian homes.[165] Without these statistics, it is difficult to determine whether the policy goals of the NICWA have resulted in reducing the number of children removed from the tribes and whether all provisions of the NICWA are still necessary.

In addition to Indian child adoption statistics, courts should also remember that America's Indian tribes control the ability to determine their own tribal membership requirements.[166] As a result, tribes have the ability to include or exclude individuals, which directly impacts the number of individuals who could potentially identify themselves as members of an Indian tribe. Tribes are not powerless to protect their community against state government and may adjust their tribal membership requirements when they feel threatened with extinction. However, with the prosperity of tribal casinos, some tribes are finding membership overloads and are restricting membership.[167]

All of these issues would be central to the analysis of current tribal integrity and the need for federal protection of Indian tribes and any Nebraska court faced with a parental challenge to the NICWA would

164. *Compare* 25 U.S.C. § 1912(f) (requiring a showing of evidence beyond a reasonable doubt that the parents continued custody of the Indian child will result in emotional and/or physical harm to the child), *with* § 1912(a) (requiring that notice be sent to the child's tribe if there is a state court proceeding involving the termination of parental rights involving a child that is either a member of an Indian tribe of eligible for membership).

165. *See supra* note 32.

166. U.S. Department of the Interior, Indian Ancestry - Enrollment in a Federally Recognized Tribe, http://www.doi.gov/enrollment.html (last visited September 2, 2007).

167. Ted Hillock, *Injustice on the Reservation*, CALIFORNIAN, March 31, 2004, at B4, *available at* http://www.nctimes.com/articles/2004/04/01/opinion/3_31_0422_01_44.txt.

have to consider. These issues also highlight that the status of many Indian tribes may have changed since the enactment of the NICWA and specific provisions, especially those involving voluntary termination proceedings, may need to be reconsidered in light of such changes.

Despite all these policy considerations, it must be emphasized that the government's interest in preserving Indian tribes does not extinguish the potential violation of the rights of parents of Indian children to make many decisions concerning the upbringing of their children. While it is questionable whether a challenge to the NICWA would succeed, the parents of Indian children clearly have a protected liberty interest in making decisions concerning the future and upbringing of their children.[168] As the foregoing analysis concluded, current parental rights law should allow parents of Indian children to bring a due process challenge against the NICWA. Strict scrutiny analysis of the NICWA would require a compelling state interest in maintaining the current provisions of the NICWA despite the fact that they may violate parental rights to Indian children.[169] The success of a parent's challenge will be greatly influenced by whether the governmental interests that prompted the enactment of the NICWA in 1978 are still viable reasons for the continuation of America's policy in protecting tribal integrity.

The NICWA clearly appears to infringe upon the right of parents of Indian children to make decisions concerning the voluntary termination of their parental rights, and, despite their tribal membership, parents of Indian children must receive the same constitutional protection as all other parents. Therefore, the question is whether the collectivist interests of Indian tribes are compelling enough to justify the continued violation of the rights of parents of Indian children.

IV. CONCLUSION

Parental rights have received constitutional protection since the 1923 landmark case *Meyer v. Nebraska*.[170] While all parents have a right to make decisions concerning the care, custody, and control of their children, this right can be taken away if a parent fails to responsibly care for their children. In the 2006 case *In re Phoenix*, the mother of three non-Indian children had the decision of the juvenile court terminating her parental rights affirmed by the Nebraska Supreme Court after a finding of clear and convincing evidence that continued custody with the mother would result in emotional and

168. *See supra* section III.A.

169. Troxel v. Granville, 530 U.S. 57 (2000).

170. Meyer v. Nebraska 262 U.S. 390 (1972) (holding that fundamental parental rights prevent the state from denying children access to foreign language instruction despite the demands of their parents).

physical harm to the children.[171] The mother claimed that her right to equal protection under the law was violated as her parental rights could be terminated by a lower showing of evidence than parents of Indian children pursuant to the provisions of the NICWA. While the Nebraska Supreme Court was able to deny the equal protection claim based upon the historic sovereignty of Indians, the case leaves open the question of how the NICWA impacts parents of Indian children.

Careful analysis of the NICWA makes it obvious that parents of Indian children lack the ability to make many decisions concerning the control and upbringing of their children. This is especially evident in the restrictions faced by parents of Indian children when voluntarily placing their children up for adoption. The provisions of the NICWA which restrict the rights of parents of Indian child arguably run afoul of the Due Process Clause's protection of parental rights.

If a parent of an Indian child were to challenge the provisions of the NICWA as unconstitutional, the first questions concern whether the parental right asserted is considered fundamental and the level of scrutiny the court should use to evaluate the right. The precedent set forth in *Troxel* and *Santosky* would appear to classify the right claimed by a parent of an Indian child as fundamental; accordingly, strict scrutiny analysis would apply.[172] The next question is whether the overarching NICWA goals of protecting the integrity and future of the tribe would be a compelling interest and override the rights of the parents to make decisions concerning the involuntary adoption of their Indian child.

Regardless of the outcome, the provisions of the NICWA definitely infringe upon the rights of parents of Indian children. While the Nebraska Supreme Court has already ruled against a non-Indian parent's challenge to the NICWA in *Phoenix*, this should not discourage parents of Indian children from challenging the NICWA as a violation of their due process rights. While the NICWA may serve the important goal of protecting Nebraska's Indian tribes, the survival of the tribe cannot come at the price of violating the personal rights of the parents of Indian children.

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171. 270 Neb. at 885, 708 N.W.2d at 798.
172. *See supra* section III.B.