

## Response to: The Indian Child Welfare Act: In the Best Interests of Children?

*Matthew L.M. Fletcher, JD*  
*Kathryn E. Fort, JD*

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The “solutions” provided in the article by Dr. Kathryn Piper, while well meaning, demonstrate a fundamental misunderstanding of tribes, the federal government, and the application of the Indian Child Welfare Act (ICWA). There is no data available anywhere that demonstrates Native children are kept in foster care longer than non-Native children because of ICWA, that they are harmed more than other non-Native children in foster care due to the heightened standards for removal or termination, or that applying the placement preferences, with their good cause exception, delays placement for Native children. Instead, the limited data we have on foster care generally shows that placing children in foster care has overwhelmingly negative outcomes, that kinship placements tend to help children, and that keeping children connected to their culture helps with creating resiliency factors they need to overcome early childhood trauma (Gallegos & Fort, 2017-2018; Pecora, 2006). ICWA does not hurt children—it’s the one law out there trying to address the very issues foster care creates.

ICWA applies in state courts alongside state law. There is no “federal bureaucracy” that cases must wind through. Dr. Piper’s solution of ordering the Bureau of Indian Affairs (BIA) to maintain a current list of all the Indian people in the country who are tribal members is fundamentally impractical in that the Bureau is not competent to maintain such a list. From a privacy perspective, a federal list of tribal members is a chilling idea, and would recreate an Orwellian bureaucracy Indian people and Indian tribes fought against generations ago in the assimilation and boarding school eras, ended by the rise of the current tribal self-

determination era in the 1970s.

Dr. Piper recommends resuscitating the judicially created “existing Indian family” (EIF) theory of ICWA that the BIA formally repudiated in 2016 (25 C.F.R. § 23.2). That theory enabled non-Native judges to determine whether a family is “Indian enough” for ICWA to apply, focusing on hair and eye color, skin color, cheekbones, and other irrelevant factors (Maillard, 2003). The state court that first adopted this theory, Kansas, forcefully overruled itself in 2009, a decade ago (*In re A.J.S.*, 2009). Other states followed (Erler, 2018). ICWA requires states to determine only whether a child is a tribal member or eligible for membership, not whether a state judge thinks a child looks or acts like an Indian. Tribal citizenship is not an operation of race, it is a fundamentally political determination (*Morton v. Mancari*, 1974).

Finally, we must address the most pernicious talking point of anti-ICWA advocates—that the removal of Native children was a problem of past generations that is now over. No. ICWA has been in existence for one generation—the generation of the authors of this article. In 1977, a church group coerced Fletcher’s future mother-in-law (a Michigan tribal citizen) to give up her daughter for adoption to a white couple (Fletcher & Singel, 2017). Indian removal is an ongoing concern. Indian children born prior to 1978 were removed from their families and communities with stunning rapidity and lack of due process. They were often placed with non-Native adoptive couples with no paperwork or information. ICWA tries to address generations, even centuries, of federal and state policies designed to destroy Native families, and

has only been operational for one generation. Every tribe that has spoken on this issue (more than 300 tribes signed the tribal amicus brief in the *Brackeen v. Bernhardt* litigation) (Brief of Amicus Curiae 325 Federally Recognized Tribes, 2019), and a vast majority of Native people, child welfare organizations and professionals, and child welfare judges all agree that ICWA is a beneficial law designed to provide higher levels of services and protections to children and families. We should be supporting those efforts, not seeking an easy way out of responsibility to those children.

### About the Authors

**Matthew L.M. Fletcher, JD**, is Professor of Law at Michigan State University College of Law and Director of the Indigenous Law and Policy Center. He is a member of the Grand Traverse Band of Ottawa and Chippewa Indians. He graduated from the University of Michigan Law School in 1997.

**Kathryn (Kate) E. Fort, JD**, is Director of the Indian Law Clinic at Michigan State University College of Law. In 2015, she started the Indian Child Welfare Act Appellate Project, which assists tribes in ICWA cases across the country. She graduated magna cum laude from Michigan State University College of Law.

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