

Race, Law and Family Formation in the United States: The Legal Construction of Race in
Transracial Adoption Case Law

By

Emma S. Shakeshaft

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The dissertation is approved by the following members of the Final Oral Committee:

Pamela E. Oliver, Professor, Sociology
Christine Schwartz, Professor, Sociology
Joseph A. Conti, Assistant Professor, Sociology
Joan Fujimura, Professor, Sociology
Gwendolyn Leachman, Assistant Professor, Law

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ABSTRACT AND/OR DEDICATION

This dissertation examines transracial adoption legislation and case law to better understand how the legal system defines the relationships among race, culture, and family formation. The analysis focuses on two federal laws that address transracial adoption with very different viewpoints: (1) The Howard M. Metzenbaum Multiethnic Placement Act (MEPA) and its subsequent amendment, the Interethnic Adoption Provisions (IEAP), and (2) the Indian Child Welfare Act (ICWA). The ICWA requires that race, culture and political status be considered when placing Native American children into homes based on a hierarchy of placement preferences. The MEPA-IEAP, on the other hand, prohibits race-matching tactics by adoption agencies when placing children with prospective adoptive parents.

This research is guided by four questions: first, how do judges define and understand race? Second, how do judges use their understandings of race to make placement decisions in transracial adoption cases after the MEPA-IEAP? Are there similarities in judicial definitions and understandings of race between ICWA cases and MEPA-IEAP cases? Finally, what theoretical contributions can be gained by comparing and contrasting ICWA and MEPA-IEAP analyses?

My findings demonstrate that despite the differences between the legislative mandates of ICWA and MEPA-IEAP-- including different legislative purposes, procedural requirements, tribal sovereignty, sources of racial evidence and the distinct histories of the minority groups these laws govern -- there are also many similarities. State and federal judges in the United States are using similar processes and racial ideologies to evaluate the legal formation of interracial families.

After analyzing 161 legal decisions and congressional hearing transcripts using mixed methods of content analysis, I identified three processes of judicial decision-making: racial identification & labeling, examination of cultural competency and cultural authenticity, and the evaluation of cultural literacy and contacts. Therefore, when examined side by side, ICWA and MEPA-IEAP reveal a productive site to investigate the definitions of racial group membership.

INTRODUCTION

Veronica Capobianco, now almost 8-years old, was the center of a long legal battle that involved discussions about race, culture, political status, and ultimately family formation. Veronica was born on September 15, 2009 to Christy Maldonado, a predominately Latina woman with no tribal affiliation. She decided to put her daughter up for adoption after talking to her ex-boyfriend and Veronica's biological father Dustin Brown, a member of the Wolf Clan of the Cherokee nation (Maldonado 2013).

Christy reviewed multiple files on potential adoptive couples until she found Matt and Melanie Capobianco, a white middle class couple in their mid-thirties who lived in South Carolina. The Capobiancos were present at Veronica's birth and three days later filed for adoption (Maldonado 2013).

However, Dustin was only given notice of the adoption proceedings four months after Veronica was born and less than a week before he was to be deployed to Iraq. Dustin explained that when he signed an agreement form, he had no idea that Veronica was not in the custody of her biological mother and that he had legally consented to adoption (Abumrad, Krulwich, and Howard 2013). He then hired a lawyer immediately, and on January 14, 2010 he filled for custody under the Indian Welfare Act, a federal law which aims to protect Indian families by acknowledging a tribe's interest in children eligible for membership in their federally recognized tribe. Veronica was an Indian child based on her 3/256 Cherokee blood (Abumrad et al. 2013).

After a year, the South Carolina family court ruled in Dustin Brown's favor. The Capobiancos appealed to the South Carolina Supreme court who also ruled in Dustin Brown's favor. The Capobiancos transferred custody to Dustin Brown on December 31, 2011 (*Adoptive Couple v. Baby Girl* 731 S.E.2d 550 (S.C. 2012)).

After the South Carolina Supreme Court decided to place Veronica with her biological father, Christy Maldonado, Veronica's biological mother, wrote in the opinion section of the Washington Post,

I will never forget the night Matt and Melanie had to turn Veronica over to her biological father: He put Veronica in his truck, drove her to Oklahoma and never looked back. The next day, he let her have one brief phone call with her parents. Then nothing. Matt, Melanie and I have not seen or talked to our daughter in 18 months. My heart aches for her every day¹ (Maldonado 2013).

Under ICWA, the tribe can intervene in adoption proceedings in order to maintain a cultural connection with their children. This connection is for the well-being of not only "indian" children but also of the tribe itself. In this case, the Navajo Nation was involved in the proceedings. Ben Shelly, the President of the Navajo Nation, stated in the Washington Post

For decades, many of our young people were denied the right of cultural inheritance because of programs and adoptions eager to take American Indian children and assimilate them into the larger, dominant American society. Most of these efforts probably stemmed from people's desire to help children. In reality however, these actions resulted in confusion and mental trauma about identity, and many American Indians lost a basic sense of self. The tribes' fundamental right to determine the best teachings for our children were denied. This is why the Indian Child Welfare Act continues to play such an important role for American Indian tribes. Whether the children are Potawatomi, Seneca, Umatilla, Navajo or Cherokee, the law allows tribes to give our children the opportunity to experience the beauty of their culture and to ensure that we as a people survive.

...American Indian people have long fought for our rights and practices to have a place in U.S. society. Our language, culture and traditions are as sacred as the air we breathe. Despite attempts to remove us in one form or another, we remain intact and culturally strong as ever. The chance to teach our children the ways of our ancestors is a sacred honor and duty (Shelly 2013).

¹ Maldonado, with a group of nine other women, filed a federal lawsuit in South Carolina seeking to overturn the Indian Child Welfare Act because of its "race-based" placement preferences (Maldonado 2013).

The Capobiancos appealed this decision and the U.S. Supreme Court took the case. On June 25, 2013, the U.S. Supreme Court ruled that ICWA did not apply to fathers who had abandoned their children and remanded the case back to the South Carolina state courts for a re-evaluation of placement (*Adoptive Couple, 404 S.C.*). By this time, Veronica was almost 4 and had been living with her biological father for a year and a half.

The South Carolina Court then ruled that Veronica should be placed with the Capobiancos again and finalized the plans for adoption.

Dustin turned Veronica over to the Capobiancos on Sept. 23, 2013 after filing appeals in Oklahoma. Dustin stated that he discontinued the legal battle for the well-being of his daughter who had just turned four. He claimed that he had a tentative non-legal understanding that the Capobianco's would let him be a part of Veronica's life (Abumrad et al. 2013).

During this case, tribal advocates were forming social movements around Veronica and Dustin Brown. "Stand Our Ground for Veronica Brown" began as a Facebook page where supporters of the Brown family vented their outrage (Abumrad et al. 2013). Over time, it evolved into an organized movement that staged rallies and protests. The group eventually dropped Veronica's name and refashioned itself as Stand Our Ground for Children, advocating for broad adoption reforms — not just for Native Americans, but for all children (Abumrad et al. 2013)

This court case not only involves an interpersonal legal battle between a biological father and prospective adoptive parents, it also represents the interests of federally recognized tribes, the discussion of cultural belonging and socialization, and the role of advocacy groups and public opinion.

Transracial adoption cases that fall under the Multiethnic Placement Act & the Interethnic Adoption Provisions are similarly complex. The *Adoption of Vito* case focuses on a

young boy named Vito born in January 1992. He had many medical complications and tested positive for cocaine when he was born. After he was let out of the hospital a month later, he began living with his foster parents who are from the Dominican Republic and did not speak English. He never lived with his biological mother who is African American (*Adoption of Vito* 47.Mass.App.Ct. 349 (1999)).

This case focuses on the question of post-adoption contact between a child and a biological parent. The trial level judge mandated post-adoption visitation for Vito and his biological mother because she was concerned about Vito's... "future racial and cultural development and adjustment", based on the guardian ad litem's testimony that transracial adoptees, generally speaking, often have adjustment problems that emerge in adolescence (In re *Adoption of Vito*, 47 Mass.App.Ct. at 1195). She ordered that the department's plan must include eight daytime visits annually (In re *Adoption of Vito*, 47 Mass.App.Ct. at 1195).

The appellate court agreed and found that the trial court judge properly considered the difficulties Vito may face in the future, not to alter Vito's racial identity but to ensure that he would have contact with African Americans who could answer questions and serve as Vito's link to his ancestry and heritage" (*Adoption of Vito* 712N.E.2d 1188 (Mass.App.Ct 1999): 1195)).

However, the Massachusetts Supreme Court judge found that the judge improperly relied on this information to speculate about Vito's future potential adjustment issues. The Supreme Court judge therefore ruled that any concerns about Vito's identity was best left up to Vito's adoptive family (*Adoption of Vito* 728 N.E.2d 292 (Mass. 2000)). At the time of this case, Vito was eight years old, identified as Latino, and spoke Spanish fluently (*Adoption of Vito* 728 N.E.2d 292 (Mass. 2000)).

This political and social-legal battle reflects many societal tensions and uncovers important areas of inquiry. First, how does society think about family formation and biological relationships? Who gets to make decisions about placement? Tribes, biological parents, unrelated prospective adoptive parents or the courts?

Family law, particularly adoption law, is arguably one of the most intimate and interpersonal areas of legal debate. Transracial adoption law specifically involves the psychological and physical evaluation of children to determine their best interest. This evaluation is called the “best-interest of the child” analysis and often includes conversations about a child’s racial, ethnic and cultural belonging. Transracial adoption mirrors larger theoretical disagreements over how to conceptualize race and ethnicity. At the same time, adoption policies prompt a unique set of socio-legal questions because they intervene directly in the lives of children and family formation. The interpretation of the federal legislation and case law that pertain to transracial adoption can give insight into the current processes involved in the legal construction of race and the potential impact on children and families.

Transracial adoption is not only about an adoption process that involves individuals of different races; it is also a racialized process. The importance of law, legal institutions, legal proceedings, case workers, lawyers and judges should not be underestimated in the socio-legal phenomenon of transracial adoption and the process of race-making generally (Papke 2014). Adoption entails the establishment of a socially and legally sanctioned relationship of a parent and child. Though adoption is a universal social institution, the actual practice and norms of adoption can vary in each society or community (Momin 2008). The meaning of these differences is reflected in the cultural meaning of adoption, including its social significance and function (Momin 2008).

The term transracial adoption refers to the “joining of racially different parents and children together in adoptive families” (Silverman 1993:104). For the purposes of this dissertation, the definition of transracial adoption includes all categories considered by courts to be racially different, more specifically, children adopted by parents of any racial or ethnic category that is different than their own. Thus, the definition includes children and parents who are Black/African American², Latino/a/Hispanic³, White/Caucasian/Anglo-Saxon, Native American/Indian/Alaskan Native, non-Indian, Asian (Chinese, Filipino, Vietnamese, Cambodian), Middle Eastern, biracial, or multiracial, that are adopted either through domestic or international adoption.

Analyzing transracial adoption cases allows us to observe how the state defines race as well as the relationship between race and family formation. Legislators and courts have historically addressed the creation of families especially when race is involved⁴ The Indian Child Welfare Act (ICWA), the Howard M. Metzenbaum Multiethnic Placement Act (MEPA) and its subsequent Amendment the Interethnic Adoption Provisions (IEAP) are no exception. ICWA and MEPA-IEAP are two federal laws that address transracial adoption with very different viewpoints. The ICWA requires that race be considered when placing Native American children into homes. Additionally, ICWA’s placement preferences mandate that efforts be made to place the child with a Native American relative, the tribe of the child’s biological parent or parents, or any other tribe before they are placed with a parent of a different race or ethnic group.

MEPA-IEAP, on the other hand, requires that adoption agencies do *not* delay placement

² In this paper, I use Black and African American interchangeably. While it is very clear to me that many Black children may not identify as being African American, nothing in the case law sample data suggests that these terms need to be distinguished. Therefore, I will use the categories used in the case law and the academic literature.

³ The court also uses these terms interchangeably

⁴ *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); MEPA, ICWA

by race-matching children to prospective adoptive parents. Since the MEPA was passed in 1994 and amended in 1996, state statutes relating to transracial adoption became racially neutral, using almost identical wording⁵. Recent case law has not been analyzed to uncover how judges are defining race and using these definitions to govern the formation of the family.

This dissertation problematizes the way judges define race and utilize racial concepts to make custody decisions in transracial adoption cases after the MEPA-IEAP enacted in 1996. Specifically, I ask four questions: first, how do judges define and understand race? Second, how do judges use their understandings of race to make placement decisions in transracial adoption cases after the MEPA-IEAP? Are there differences in judicial definitions and understandings of race between ICWA cases and MEPA-IEAP cases? Finally, what theoretical and empirical contributions can be gained by comparing and contrasting ICWA and MEPA-IEAP analyses? Analyzing transracial adoption cases allows sociologists to observe how judges define race as well as how they understand the relationship between race and family formation.

I find that while there are many differences between the legislative mandates of ICWA and MEPA-IEAP, including different legislative purposes, procedural requirements, racial definitions, and sources of racial evidence, there are also many similarities. State and federal judges in the United States are using similar processes and ideologies to evaluate the legal formation of multiracial families. The case law under these two federal acts reveal similar

⁵ Simon & Altstein found that in 1996 (prior to the enforcement of the MEPA) the majority of state statutory statements did not mention race in connection with the adoption process, but a substantial minority of states (19 state jurisdictions) did refer explicitly to race in their adoption laws (1996). Six states -- Connecticut, Kentucky, Maryland, New Jersey, Pennsylvania, and Wisconsin -- had statutory provisions that prohibited the use of race to deny an adoption or placement.⁵ In contrast 3 states -- Arkansas, California, and Minnesota -- had laws that specifically required that preference be given to adoptions within the same racial group. In all three jurisdictions the first preference was for a blood relative, the second for a family of the same race as the child, and the last for placement with a family "knowledgeable and appreciative of the child's racial or ethnic heritage" (Simon and Alstein 1996:10).

judicial processes of decision-making through racial identification, examination of cultural authenticity and an evaluation of cultural contacts, despite the presence of tribal sovereignty, different legislative mandates, and the distinct histories of these minority groups.

My findings suggest that even when “race conscious” legislation is enacted, judicial understandings of race and culture are primarily biological in nature. Instead of focusing on the structural issues that cause racial inequality in the child welfare system-- the way that the social constructivist understanding of race demands--judges instead rely on folk notions of race to address the legislature’s concerns.

This analysis blends both sociological and legal contributions to the question of race, racial formation, and the formation of the family. Using transracial adoption case law brings both visibility and awareness to this category of children within a sociological context and allows for an analysis of the process of race-making by the state using legal materials. This study uncovers the practical application of some of the racial concepts that have been utilized by the state to racially categorize people and demonstrates how the courts use race in their placement decisions.

Chapter 1 reviews the social construction of race literature and the legal construction of race literature that guides the theoretical framing of this dissertation. Currently, there is movement towards collaboration between critical race theory and the social construction of race paradigms in society and law scholarship. While the benefits of blending these two frameworks are debated, I argue that there is tremendous value in utilizing both approaches to study the legal construction of race. I use both critical race theory and the social construction of race sociology literature to organize and guide my analysis. Specifically, I use the racial theories of sociologists Omi, Winant, Loveman, Bonilla-Silva, Emirbayer, Desmond, and Brubaker and put them in discussion with legal scholars and critical race theorists Haney

López, Harris, and Gotanda to understand the role of race in law. Specifically, I apply the concepts of biological race, colorism, blood quantum, hypodescent, formal race, historical race, cultural race, and cultural competency to examine the MEPA-IEAP, the ICWA, and the case law that is governed by these two acts.

Chapter 2 discusses the methodological approach I used to analyze both case law and legislative data. Specifically, I used quantitative and qualitative methods of content analysis on 161 contested appellate court transracial adoption cases from 1997-2016.

Chapter 3 includes an in-depth discussion of the best interest of the child analysis, constitutional standards, the Indian Child Welfare Act and the Multiethnic Placement Act/Interethnic Adoption Provisions. This chapter focuses on the legal terminology, procedural mandates and the larger socio-political context that surrounds these two pieces of legislation. I find that the ICWA and the MEPA-IEAP are based on historical and cultural concerns centered on the best interest of the child. However, my findings expose tensions between the different race conscious ideals that drove these two pieces of legislation and the use of definitions of race that are biological in nature and thus repeat prior legal conventions that promote white supremacy. In this chapter, I argue that while the legal requirements and procedures of these laws are almost the opposite of one another, the social context surrounding these two Acts were very similar.

Chapter 4 addresses the questions, how do judges define and understand race in ICWA case law? And how do judges use their understandings of race to make placement decisions in ICWA cases? I find that race is most often defined biologically through blood quantum tribal eligibility rules. Additionally, judges frequently evaluate the cultural competency of the biological parents in relationship to their tribe and then, if adequate, find that minimal contact with members of the

tribe will suffice. A full analysis of the cultural competency of the non-Indian prospective adoptive parents predominately occurs when a tribe is also involved in the proceeding. However, I also find that there is a lack of compliance with ICWA's procedural mandates. Over the years, courts have weakened the legal strength of ICWA requirements through the state made "Existing Indian Family" exception and the U.S Supreme Court.

In Chapter 5, I address the following questions: how do judges define and understand race in MEPA-IEAP cases? How do judges use their understandings of race to make placement decisions in MEPA-IEAP cases? My findings demonstrate that concepts of colorism based on skin tone are often perpetuated in MEPA-IEAP cases. Judges frequently use skin-tone to make these determinations, not historical narratives or cultural understandings. Skin-tone, race and culture are often used and seemingly thought of as synonymous monolithic categories, where each race has one ascribed culture that mandates certain cultural activities. While there was little to no discussion of cultural diversity within racial groups, judges frequently weighed the importance of cultural belonging against the physical appearance of the child and the prospective adoptive parents. Alternatively, Whiteness was often understood as the lack of culture and race, but was often overcome by an adoptive parent's demonstration of cultural competency or contact with those who share the child's race.

Finally, Chapter 6 describes the legal debates surrounding racial understandings of federally recognized tribes and discusses the benefits of using a comparative approach. Specifically, I address the following questions: Are there similarities in judicial definitions and understandings of race between ICWA and MEPA-IEAP cases? What empirical contributions can be gained by comparing the ICWA and MEPA-IEAP? I argue, as have many scholars before me, that political status and racial categories are not mutually exclusive. I assert that great

theoretical and empirical value can be gained by comparing the Indian Child Welfare Act, the Multiethnic Placement Act, and the Interethnic Adoption Provisions case law because these laws are a productive site to investigate the processes of racialization and political group membership. When examined side by side, the case law under these two federal acts reveal similar judicial processes of decision-making: racial identification, examination of cultural authenticity and an evaluation of cultural contacts. These processes occur despite the presence of tribal sovereignty, different legislative mandates, and the distinct histories of these minority groups.

CHAPTER 1: THE LEGAL CONSTRUCTION OF RACE

The United States was founded along racial lines and has operated as a racialized state since its inception (Collins 1998:75). Additionally, the concept of race has gone hand in hand with the concept of America as a national category (Calvita 2016). For most of U.S history the country's racial policy was based on repression and exclusion, and today race remains a fundamental principal of U.S. social organization (Collins 1998; Omi and Winant 1994).

Law is also one of the most powerful mechanisms by which any society creates, defines, and regulates itself (Haney López 2006). It follows then, that to say race is socially constructed is to conclude that race is at least partially legally produced (Haney López 2000). Ian Haney López, in his book *White By Law*, found that “law does more than simply codify race in the limited sense of merely giving legal definition to pre-existing social categories. Instead, legislatures and courts have served not only to fix the boundaries of race in the forms we recognize today, but also to define the content of racial identities and to specify their relative privilege or disadvantage in U.S. society” (Haney López 2006:7). The state is inherently racial and is composed of racial institutions, including the legal system (Omi and Winant 1994). Through policies and law, state institutions continuously organize and enforce racial policies. Racialized policies are then encoded into law and enforced through the justice system. These laws not only enforce racial categories but they also re-define them. Therefore, it is because race matters in structuring our society that the various locations and processes of racialization within the legal system must be examined.

The social construction of race refers to the processes by which people, both individually and collectively, negotiate their identities and related interests in an environment of scarce resources (Zuberi and Bonilla-Silva 2008). This means that race is real, however at

the same time, racialized groups have socially constructed identities that vary across time, space, situation, and perception (Bonilla-Silva 1999). Race often acts as a proxy for a common set of historical experiences and contemporary interests shared by individuals (James 2001). Therefore, believing that race is a social construction requires the understanding that racial categories are built within a social, political, economic, and historical context.

Analyzing the “role of law in the construction of race becomes, then, an examination of the possible ways in which law creates differences in physical appearance, of the extent to which law ascribes racialized meanings to physical features and ancestry, and of the ways in which law translates ideas about race into the material societal conditions that confirm and entrench those ideas” (Haney López 2006:10). I apply this analytical approach to examine the ways judges understand racial concepts and categories when making decisions about child placement in transracial adoption case law. This constructivist understanding of law, race and family allows me to uncover contemporary racialized processes that impact family structure.

There is movement towards collaboration between critical race theory and the constructivist theories of race in law and society literature. While the benefits of blending these two frameworks are debated, I argue that there is tremendous value in utilizing both approaches to study the legal construction of race. I use both critical race theory and social construction of race literature to organize and guide my analysis. Specifically, I use the racial theories of sociologists Omi, Winant, Loveman, Bonilla-Silva, Emirbayer, Desmond, and Brubaker and put them in discussion with legal scholars and critical race theorists Haney López, Harris, and Gotanda to understand the role of race in law. Specifically, I apply the concepts of biological race, colorism, blood quantum, hypodescent, formal race, historical

race, cultural race, cultural competency and cultural authenticity to transracial adoption case law under the ICWA and the MEPA-IEAP.

One critique that sociologists and critical race theorists discuss, is the frequent measurement of race as an independent variable which assumes that race is easily measurable, static, and monolithic (Gómez 2012:456; Zuberi and Bonilla-Silva 2008). Critical race scholars go even farther and assert that they remain “deeply skeptical of any disciplinary methodology that purports to describe social facts about race as objective, political neutral, and unmediated by contemporary social projects” (Carbado and Roithmayr 2014:158).

My research does not ask questions like, “do judges make placement decisions based on race? Or do placement outcomes vary by race?” because those questions lend themselves to a quantitative analysis that would result in using race as an independent variable. Instead, I ask the question “*how* do judges define race?” A more precise way to state this question is, what *work* is race, ethnicity, culture, and political identity doing in the specific context of transracial adoption legislation and case law? These questions allow me to focus attention on rules and actors, in order to suggest essential lines of inquiry that will engage the close examination of the processes involved in the legal construction of race (Haney López 2006). As such, these questions focus on processes of race-making within the specific context of transracial adoption laws. Various racial concepts observed in law by sociologists and critical race theorists guide my empirical framework. Specifically, I utilize aspects of Gotanda, Omi and Winant, Haney López, Bonilla-Silva, and Harris’ theoretical and empirical work to guide my analysis.

Omi and Winant define race as “a concept which signifies and symbolizes social

conflicts and interests by referring to different types of human bodies” (Omi and Winant 1994:55). Therefore, they argue that race is an element of social structure and a dimension of human representation created through a process called racial formation (Omi and Winant 1994). Racial formation is “the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed” (Omi and Winant 1994:55). From a racial formation perspective race is a matter of both social structure and cultural representation (Omi and Winant 1994). It invokes the human body although the selection of human features for purposes of racial signification is always a social and historical process (Omi and Winant 1994). Therefore, racial formation is a macro-level social process, a political process, as well as an everyday lived experience.

race is not an immanent phenomenon located only in our heads, but an injurious material reality that constantly validates the common knowledge of race. These material differences are in large part the creations of law: the segregation that confirms racial differences was and is legally fashioned and legally maintained. Through law, race becomes real becomes law becomes race in a self-perpetuated pattern altered in a myriad of ways but never broken (Haney López 2006:93).

Ian Haney López and Audrey Smedley agree that race both incorporates and partially stems from cultural prejudice.

At no time in the history of its use for human beings was the term ‘race’ reserved for groups based solely on their biophysical characteristics. From the start it was a cultural construct composed of social values and beliefs synergistically related in a comprehensive worldview, integral to the cognitive perceptions that the Europeans and white Americans had of themselves and the rest of the world (Haney López 2006:40)

Haney López (2006) suggests that law can both be seen as a coercive force and as an ideology. Law is coercive in three ways. First, legal rules have shaped physical appearances therefore influencing the basic material on which racial meaning systems are built (Haney López 2006). Second, law has created the racial meanings that attach to physical features, and, third,

law contributes the construction of race by establishing the material conditions that often code for race (Haney López 2006).

Law also operates on the level of cognitive ideology (Haney López 1994). It does not exist as a phenomenon separate from society but as an integral part of society and an essential component in the social production of knowledge. Haney López argues that the law produces racial knowledge in three ways, by legitimating race, by enabling racial categories to transcend the sociohistorical contexts in which they develop and, and by the process of reification (1994). Understanding the role of law in the creation of racial hierarchies thus requires examining the cognitive significance of legal images and categories of race. Legal rules and decisions construct races through legitimation, affirming the categories and images of popular racial beliefs and making it nearly impossible to imagine non-racialized ways of thinking about identity, belonging, and difference (Haney López 2006). As Haney-López notes,

the pursuit of universality in law can make it a profoundly conservative force in racial construction. The role of precedent is particularly important. Racial lines are prevented from shifting to the extent that past definitions control decisions about race in the present...by relying on precedent, the law often fails to grasp new forms of identity, imposing with sometimes destructive old folk notions of race and thereby allowing racial categories to transcend their local settings” (2006:89-90).

Freeing racial categories from their local settings may also provide new language with which to construct racial differences (Haney López 2006). For example, overt legislative and judicial racism has been replaced with what Neil Gotanda (1999) calls “formal race” understandings or what Bonilla-Silva calls “colorblind racism,” and is thus crucial to the legal construction of race in the contemporary United States (Bonilla-Silva 2006b; Gotanda 1991; Haney López 2006).

The law’s ability to provide seemingly neutral synonyms for race may be one of the most important legal mechanisms in the current processes of racial construction (Haney López 2006).

Laws that have racially neutral language but clear racial disparate effects, silently promote the current definitions of race and fosters culturally biased views regarding racial groups (Haney López 2006). Therefore, “reifying racial categories is more than just reusing certain forms of categorization, instead it means transforming them into concrete things, making the categories seem natural, rather than human creations” (Haney López 2006:91). Other critical race scholars agree and further assert that the legal framework of equality itself, which often purports to be colorblind, “reinforces racial privilege as part of a broader conservative project to limit a wide-ranging redistribution of resources along racial lines” (Carbado and Roithmayr 2014:157).

As such, I take a critical theory⁶ approach to understanding legal indeterminacy, which argues that legal doctrine alone is not an adequate explanation of legal results (Yablon 1984). Instead we must also look at the motivations of decision-makers within the context of social and political structures. As Charles Yablon states,

...to the Critical theorists, [doctrinal explanations] are no more adequate than the explanation that the fire started because of the presence of oxygen in the air. Just as the investigator of a fire knows that he will find oxygen at the site, the investigator of judicial decisions knows that he will find doctrinal justifications (Yablon 1984:930).

However, this does not mean that doctrinal rules should not be considered, as judicial motivation is embedded within each doctrinal rule they choose to follow. Critical theorists view judicial choices as the result of social and political structures. They argue that by focusing on these structures, scholars can provide a more adequate analysis of the legal process and the societal structures it reflects (Yablon 1984).

⁶ As opposed to legal realism, which takes a more extreme approach to legal realism and finds doctrine to be of even less value; and the law and economics approach, which understands efficiency to be a determinate explanation for legal results (Yablon 1984).

Similarly, in order to focus scientific inquiry on the fluid nature of race, race scholars must rigorously analyze the cultural structures of racial fields without accepting specific racial groups as the basic unit of analysis (Desmond and Emirbayer 2009). An effort must be made to understand race as an unstable and decentered system of social meanings constantly being transformed by political struggle (Omi and Winant 1994).

One productive way to look at the process of racialization in legal institutions and family formation is to look at transracial adoption case law. I investigate transracial adoption legislation and case law as a contemporary racial project. Racial projects “connect the meanings we give to race and racial groups with the way racial categories structure institutions, experiences, and lives” (Woodward 2016:487).

My research adds to both sociology and critical race theory literature by focusing on the processes of racialization as well as the placement outcomes of these transracial adoption cases. A critical analysis of the racial discourse judges employ when making decisions about family formation is especially informative for understanding racial categorization. This dissertation suggests that congressional and judicial discussions surrounding transracial adoption is an important site of racial formation where racial categories are created, contested, negotiated, reproduced, and assigned. In this project, I focus on how judicial legal analysis defines and reifies racial categories and determines the boundaries of racial “otherness” in adoption—via the current legislation, policies, and case law. These judicial forms of analysis impose racial and ethnic categories on children, document them in official records, and legally sanction families based on these official identities (Brubaker, Loveman, and Stamatov 2004). To understand how the court is defining the relationships among race, ethnicity, culture and political status and using these definitions to racially categorize

children, considering different types of racial definitions and understandings, is important.

Critical race theory scholarship has been particularly interested in legal definitions of race and the legal construction of race as a process of racial formation (Crenshaw 1995:xxv). Critical race scholars illuminate how law makes race, while law and society scholars often follow the traditional approach of demonstrating how racial inequality makes law or produces legal outcomes (Gómez 2012:456). Ian Haney López argues that legal academics and judges do not have a clear understanding of race and instead rely on problematic “common sense” and “folk” notions of race (1994). Neil Gotanda argues that the United States Supreme Court primarily discusses race in four different ways formal race, status race, historical race, and cultural race (1991).

I compare and combine concepts from Haney López (1994) and Gotanda (1991) to analyze three racial concepts in transracial adoption law: what I call biological race, historical race, and cultural race. However, these concepts are not solely unique to Haney López or Gotanda. I expand on many of these concepts by using the work of race and ethnicity scholars that study boundary-making and the construction of racial and ethnic categories (Brubaker et al. 2004; Loveman and Muniz 2007). Therefore, it is important to go through the different types and understandings of race as described by these scholars to form a potential typology of definitions of race. I use these understandings of race to inform my coding scheme. Additionally, because many of these definitions of race mean little without context, I will provide a legal but non-adoption related example for each type of racial concept to demonstrate how these definitions are enacted in judicial practice.

Biological Race

The United States justice system has solidified certain racial classifications in the law

that are based on biological understandings of race using the ideas of colorism and blood quantum rules. Biological race is the belief that there are natural, physical divisions among humans that are hereditary, reflected in morphology and roughly but correctly captured by terms like Black, White and Asian (Haney López 1994:6). Starting in the 19th century, racial types were hierarchically ordered but the hierarchy was thought of in terms of innate differences in biology (Wade 1997). Scientific theories emerged relating to innate and permanent inferiority of minorities, including “Blacks, Native Americans, Asians and Orientals” (Wade 1997:11). Both López (1994) and Gotanda (1991) discuss the frequent legal reference to race as a biological reality, meaning that there are natural physical and perhaps even genetic differences between groups of humans that fall along the lines of racial categories, like black, white, Native American, Asian, Latino, etc. Under this view, one’s physical characteristics with a specific focus on skin tone and color, hair type, and other facial features determine membership in a genetically defined group. These biological understandings are also designated through lineage or descent, meaning that all that is necessary to be counted as a member of a racial or ethnic group is a claim to be an immediate descendent from other members of the group (Chandra 2006).

Colorism

Colorism and racism in the United States are regularly entangled but are two different concepts that should be separated analytically (Harris 2008). Colorism is the prejudice or discrimination against person based on their physical characteristics regardless of their perceived racial identity (Harris 2008). Both race and colorism are ways to assign status and stigma but colorism focuses on hierarchies of privilege and disadvantage within racialized groups rather than just between them (Harris 2008). The hierarchy that applies to systems of

racial oppression also applies to colorism, light skin is prized over dark skin, and certain white “European” facial features and hair types are prized over others. (Harris 2008:52). Harris argues that traditional racism places a higher value on ancestry and lineage whereas colorism places people on a hierarchical spectrum from dark to light (2008:61).

In her study of census categories, Sharon Lee finds that the historical separation of the U.S. population into white and non-white categories by skin tone is “perhaps the most enduring theme reflected in the census classifications of race” (Lee 1993:81). She also finds that the census perpetuates the concept of “pure” races, created pan-ethnic groups, and conflates race and ethnicity (Lee 1993). It is important to note that the creation of the census is a political and legal process. As Lee explains, it is Congress who makes the final decisions regarding the content and form of the census questionnaire (1993). Furthermore, the Bureau of the Census proposals to Congress must comply with Direct Number 15 after various task forces and advisory panels provide advice and input (Lee 1993). Therefore, I argue that it is also important to look at the legal procedures and doctrine surrounding racial categorization, as this is also a site of political, ideological, and social contestation.

Historically, we have seen the courts play a large role in defining and solidifying these racial categories and hierarchies. For over 120 years the United States denied citizenship to those who were not considered white (Desmond and Emirbayer 2010). Citizenship was therefore granted based on physical factors that indicated whiteness. For example, in 1910 the judge in *U.S v. Dolla* determined that Indian Americans were deemed white by law and Mr. Dolla was granted citizenship (Desmond and Emirbayer 2010).

It was shown to the satisfaction of the court that the said Abba Dolla was in all respects qualified to become naturalized as a citizen of the United States, the only question at issue being as to whether or not he was a white person within the meaning of naturalization laws. It appeared that the said

Abba Dolla was born and reared in Calcutta, India. His father and mother were natives of Afghanistan. Prior to the applicant's birth they removed to Calcutta from Kabul, the capital of Afghanistan. The applicant's complexion is dark, eyes dark, features regular and rather delicate, hair very black, wavy and very fine and soft. On being called on to pull up the sleeves of his coat and shirt, the skin of his arm where it had been protected from the sun and weather by his clothing was found to be several shades lighter than that of his face and hands, and was sufficiently transparent for the blue color of the veins to show very clearly. He was about medium or a little below medium in physical size, and his bones and limbs appeared to be rather small and delicate. Before determining that the applicant was entitled to naturalization the presiding judge closely scrutinized his appearance and himself propounded the questions relating to the various requirements of the naturalization statutes, giving the applicant a rigid and detailed examination *United States v. Dolla*, 177 F. 101, 102 (5th Cir. 1910).

In this case, concepts of colorism are employed rather than concepts of ancestry. At this time, immigrants from India did not fit within the contemporary racial hierarchy. Therefore, the court used physical features to determine Mr. Dolla's race and ultimately citizenship status. Mr. Dolla's light arm skin, hair texture, and physical size all led the court to decide that he was white. However, this changed 13 years later in the *U.S. v. Bhagat Sing Thind* case, which labeled immigrants from India as non-white and resulted in the denial of Mr. Bhagat Sing Thind's citizenship (Desmond and Emirbayer 2010).

What we now hold is that the words "free white persons" are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white *United States v. Bhagat Singh Thind*, 261 U.S. 204, 43 S. Ct. 338, 67 L. Ed. 616 (1923).

Here, the judge decides that physical features rather than ancestry, group belonging, and culture are the most important factors when considering racial categorization. In this

case, Mr. Bhagat Sing Thind was identified as Hindu, distinguishable from white in the United States, and was therefore denied citizenship. While Hinduism is also a religion, the judge presiding over this case made it clear that Hinduism was being used as physical indicator of difference and relied mostly on principles of colorism to withhold legal status. This interpretation of Hindu as a racial category is also supported by the 1930 U.S. census, which included Hindu as a racial category for the first time (Lee 1993).

The pervasive social effects of colorism would indicate that certain racialized processes of judicial-decision making would vary according to children's skin tone. As Burton et al. point out, "family researchers interested in the study of racial socialization would be remiss not to examine the possible effects of colorism in family processes and outcomes" (2010:453).

Angela Harris argues and I agree that we must look more closely at processes of colorism because color itself is often used as a code for a complex intersection of perceived physical traits, behavior, cultural expectations, and cultural assumptions (2008). However, it is not just skin color that matters. Facial features such as the shape and size of one's nose, eyes and lips contribute to perception of one's color, as well as the texture and style of a person's hair (Harris 2008:60). Therefore, using this framework to analyze placement decisions in transracial adoption cases can demonstrate the racialized frameworks that are being utilized today.

Blood quantum, lineage, and DNA testing

Another way these biological concepts of race are defined is by blood quantum rules. Blood quantum is often used to describe an individual by the "blood" contributions of their parents. Historically, blood quantum has been a mechanism frequently used to define racial

membership. For example, Blackness in the United States has been defined through hypodescent or the “one drop rule” that classifies anyone with any amount of African blood as black (Cornell and Hartmann 1998; Desmond and Emirbayer 2010). In 1977 Susi Guillory Phipps sued to have her racial classification changed from Black to White. The court upheld the states’ right to classify and quantify racial identity, and at that time the state law declared anyone with at least 1/32 “negro blood” to be Black (Desmond and Emirbayer 2010; Omi and Winant 1994).

Currently, many federally recognized Native American tribes use blood quantum rules to define membership eligibility through lineage. These rules were originally mandated by the United States Government through the Indian Reorganization Act of 1934. This act required blood quantum rules to determine which individuals could be recognized as tribal members and eligible for financial benefits, aid, and payments for sales of land. While tribes can choose their own membership rules, the Bureau of Indian Affairs oversees these rules and tribes must meet certain criteria in order to be federally recognized. This means that tribal blood was and is still calculated, evaluated, and recorded on a Certificate Degree of Indian or Alaska Native Blood (CDIB) card. For example, the Navajo official website states “a person MUST be at least 1/4 (one quarter) Navajo to be enrolled as a member of the Navajo Nation. To determine if you are eligible for tribal membership, contact the Navajo tribe” (Navajo Nation 2016).

Similarly, the Cherokee Nation requires a potential member to fill out a CDIB form. This form requires that an individual prove their “degree of Indian blood [which] is computed from lineal ancestors of Indian blood who were enrolled with a federally recognized Indian tribe or whose names appear on the designated base rolls of a federally

recognized Indian tribe” (Cherokee Nation n.d.). This can be done in various ways but most likely will involve birth certificates. In cases of adoption, the degree of Indian blood of the natural (birth) parent must be proven (Cherokee Nation n.d.)⁷. These membership rules demonstrate the historical use of blood quantum rules to determine racial boundaries all implemented by the United States government and based on biological conceptions of “pure” races.

Recently tribes have been utilizing DNA testing to enforce these membership rules. DNA testing can demonstrate a biological relationship between two individuals but there is no gene for individual tribes or American Indian/Alaska Native (AI/A) ancestry (Bardill 2014). There are three main categories of genetic testing, Parental Testing, DNA Fingerprinting and Genetic Ancestry Testing. Furthermore, there are three methods of genetic ancestry testing, mitochondrial DNA (MtDNA), Y-chromosome DNA, and single nucleotide polymorphisms (SNPs).

Parental testing uses blood to determine the parentage of a given child. They do this by comparing a child’s genes to those of a probable parent to confirm or deny their biological relationship (Bardill 2014). This the same thing as a paternity test or a maternity test.

⁷ You must give the maiden names of all women listed on the Request for CDIB, unless they were enrolled by their married names. A Certified Copy of a Birth Certificate is required to establish your relationship to a parent(s) enrolled with a federally recognized Indian tribe(s). If your parent is not enrolled with a federally recognized Indian tribe, a Certified Copy of your parent’s Birth or Death Certificate is required to establish your parent’s relationship to an enrolled member of a federally recognized Indian tribe(s). If your grandparent(s) were not enrolled members of a federally recognized Indian tribe(s), a Certified Copy of the Birth or Death Certificate for each grandparent who was the child of an enrolled member of a federally recognized Indian tribe is required. Certified copies of Birth Certificates, Delayed Birth Certificates, and Death Certificates may be obtained from the State Department of Health or Bureau of Vital Statistics in the State where the person was born or died.

DNA fingerprinting on the other hand focuses on wider relationships within a family or community, not just direct parental lineage (Bardill 2014). Much of this testing is done by comparing specific genetic markers between two reference samples as these samples are extremely similar for a parent and their biological child (Bardill 2014).

Genetic Ancestry testing looks at long-term historical connections. However, this information does not reflect an individual's entire ancestral line; instead, it traces ancestry through specific gene variation (Bardill 2014). MtDNA tests for mitochondria come from that individual's biological mother. Therefore, mitochondrial DNA is identical or extremely similar for each individual on the maternal line. A genetic test that analyzes MtDNA can provide information about an individual and his or her maternal female relatives in their direct lineage (Bardill 2014). Alternatively, Y-Chromosome DNA comes from the biological father. The DNA of this chromosome contains sections that are identical or very similar for that individual's paternal line (Bardill 2014). Finally, SNPs use statistical probability to estimate how likely it is that an individual comes from a certain region of the world (Bardill 2014). However, SNPs cannot conclusively determine who is from what tribe or who has American Indian/Alaska Native heritage. For example, Ancestry Informative Markers (AIMS) use SNPS to examine a person's genetic ancestry (Bardill 2014). Specifically, AIMS evaluate an individual's likely ancestry and differences between populations from different geographic areas (Bardill 2014). Geneticists then attempt to link genes with specific ancestry related to these geographic regions, finding that some SNPs occur in different frequencies in different populations (Bardill 2014). However, there are limits to what information this can give to American Indian and Alaskan Natives because there are very few samples from this population in the current databases used for these tests (Bardill

2014).

Tribes are currently using DNA testing in three ways; first they are using DNA testing to help inform new tribal enrollment decisions. Second, tribes are using DNA testing for disenrollment, and third, certain tribes are using DNA testing to obtain federal recognition. For example, in June 2010, the Eastern Band of Cherokee Indians passed a new enrollment ordinance that requires DNA testing for new applicants to be compared to the tribes' rolls (Kim TallBear and Bolnick 2004). This ordinance also includes a process for disenrolling individuals who do not qualify as Cherokee. They accept DNA testing only to determine the parentage of an applicant but not for determining tribal affiliation.

Using DNA tests for disenrollment has resulted in many indigenous people becoming "culturally homeless" (Taylor 2011). For example, Daria Powless was an enrolled member of the Ho-Chunk Nation in Wisconsin, but on September 17, 2011 the Ho-Chunk Nation General Council voted to disenroll her (Taylor 2011). The Ho-Chunk Nation began using DNA over 15 years ago, making the tribe one of the earliest to use the technique, but it has only been included in the tribal constitution since June 2009 (Taylor 2011). These DNA tests are used to prove parentage which is still based on blood-quantum enrollment requirements. Daria's grandmother raised her since she was two days old after her biological parents considered putting her up for adoption. Daria was "raised in a Ho-Chunk house and culture, which included pow wows, regalia, fancy dancing and later a more-modern expression of Indianness—playing basketball" (Taylor 2011). She received a college scholarship from the Ho-Chunk Nation and walked on to the division I basketball team as a freshman (Taylor 2011). However, when a teammate's relative reported that the man Daria thought was her biological father was not, she was required to take a DNA test (Taylor

2011). After the DNA test concluded that there was no chance her father was biologically related to her, she no longer met the necessary blood quantum requirements of the tribe and was disenrolled. Daria never received her promised scholarship, and when she was unable to pay her tuition, had to drop out of college (Taylor 2011).

Additionally, when the Federal Government fails to recognize a tribe or a tribe fails to recognize a group of potential members, these groups may turn to DNA testing as well (Kimberly TallBear and Bolnick 2004). For example, the Western Mohegan Tribe and Nation attempted to use DNA analysis to prove their Native American tribal status. However, they were ultimately unsuccessful (Kimberly TallBear and Bolnick 2004).

Similarly, when the Cherokee Nation disenrolled nearly 3,000 freedmen, the descendants of black slaves owned by Cherokee, turned to genetic testing. The freedmen were integrated members of the Cherokee community before being excluded from the Dawes rolls based solely on racial appearance (Taylor 2011). The Cherokee Nation bases their membership on the Dawes Rolls and requires that each member be able to demonstrate that they are a descendent from someone on the Dawes list. Many freedmen argue that the Dawes lists have historically been used to enforce colonial blood quantum policies and were used to divest property from indigenous people (Taylor 2011). Therefore, they should no longer be used to determine membership (Taylor 2011). Ralph Keen II, a tribal attorney argues, “[The Dawes lists are] race-based and are worse than biased” (Taylor 2011). Keen goes on to speculate that the real reason for the exclusion of the freedmen was based on the dwindling proportion of Cherokee “full-bloods” (Taylor 2011). In 2004, the freedmen attempted to use genomic testing to prove their “Indianness,” but the tests reported low percentages of Native ancestry (Taylor 2011). On August 22, 2011, the Cherokee Nation

high court ruled that freedmen were not Indians (Taylor 2011).

Many indigenous activists and social scientists are disturbed by this trend of DNA testing. For example, Sherman Alexie, a Spokane/Coeur d'Alene novelist and poet argues that “tribal enrollment now is completely political and economic. Casinos have turned reservations into banana republics. DNA is an utterly white thing to do. It’s capitalism, it’s racism, it’s apartheid, it’s colonial” (Taylor 2011).

However, DNA testing has also been understood as a way to develop different identities and to connect those who do not have information about their biological ancestry to a specific history. As, Rajagopalan, Nelson, and Fujimura note,

Through courts of law, historical institutions, and activist campaigns, communities and individual test takers are using new genetic technologies to develop community cohesion and collective memory, to achieve social justice, to reunite family members, and simultaneously to rebuild histories of community, nation-state, and diaspora. Their projects concern the adjudication and resolution of contentious issues in reconciliation efforts, and in this way, they act as cultural and political entrepreneurs toward particular political ends (Nelson 2016; Rajagopalan, Nelson, and Fujimura 2016:364).

While this can be interpreted as an empowering racial and political tool for tribal communities, the use of DNA testing to prove or disprove tribal membership is problematic, first, because of the unreliable nature of genetic testing and second, due to the absence of discussions of culture in determining tribal membership. No DNA testing can prove definitively whether an individual is American Indian and/or Alaska Native or has ancestry from a specific tribe (Bardill 2014). Genetics cannot determine specific tribal affiliations because neighboring tribes often have “longstanding complex relationships involving intermarriage, raiding, adoption, splitting and joining. These social and historical forces ensure that there cannot be any clear-cut genetic variables differentiating all the members of

one tribe from those of nearby tribes” (TallBear 2003:2). Furthermore, there are Native American “genetic markers” that are not found solely among Native Americans (TallBear 2003).

As Kim TallBear argues, biological connection is not the sole important factor in determining who belongs (2003). Cultural knowledge and connection to a land base are also valued. Like blood quantum, DNA is an imperfect answer to a cultural question (TallBear 2003). Neither higher blood quantum or DNA relatedness can guarantee greater cultural attachment (TallBear 2003). TallBear states,

A contemporary and perhaps more sophisticated form of eugenics equates genetic markers with cultural continuity and seeks to use DNA to support or deny an individual or group claim to cultural and political rights...Specifically, the racial ideology that is the foundation of certain applications of DNA analysis is integral to (if not totally representative of) blood quantum. The “measuring” of blood is a much debated and well-established tool for testing racial authenticity (TallBear 2003:82).

Eligibility for Native American rights is ultimately a political, cultural, and racial issue that cannot be satisfactorily addressed using genetics (Kimberly TallBear and Bolnick 2004). Therefore, given this trend, it is important to pay particular attention to how “scientific arguments and evidence about race and identity are used in transracial adoption cases as increasingly, regional and national governments, private enterprises, and genome scientists have turned to the authority of genomics to build narratives of national, tribal, and ethnic origins and genetic uniqueness” (Rajagopalan et al. 2016:364).

Implementation of biological race

The concept of biological race is often implemented through what Neil Gotanda (1991) calls “formal race”⁸. Formal race refers to socially constructed formal categories where

⁸ Neil Gotanda (1991) also includes “status race” as a separate use of race in his analysis. Status-race is the traditional notion of race as an indicator of social status. Under this definition,

“unconnectedness” is its defining characteristic (Gotanda 1991). Racial categories are seen as neutral, apolitical descriptions, reflecting merely skin color or country of ancestral origin (Desmond and Emirbayer 2010; Gotanda 1991). This understanding of race is unrelated to ability, disadvantage, or moral culpability and unconnected to culture, education, wealth, or language (Gotanda 1991).

Formal race utilizes “colorblind” legal arguments and decisions. Colorblind racism is a racial ideology, a loosely organized set of ideas, phrases, and stories that help whites justify contemporary white supremacy (Bonilla-Silva 2006b). They are the collective representations whites have developed to explain, and ultimately justify contemporary racial inequality (Bonilla-Silva 2006b). The colorblind racist ideology uses institutional and structural practices that steer away from overt racism but aids the maintenance of white privilege without bringing attention to itself or naming the subjects of who it discriminates against (Bonilla-Silva 2006a). For example, in the 1995 U.S. Supreme Court Case *Gratz v. Bollinger*, the University of Michigan’s undergraduate admittance policies were challenged. The University used race as a factor in making admissions decisions and had a policy that added twenty application points for underrepresented students on campus, specifically African Americans, Hispanics, and Native Americans. The court opinion stated the following:

Although the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other

individual freedoms and rights are associated with this legal social status. Status race assumes the inferior status of non-white racial groups based on a “common sense” and biological understanding of racial hierarchy (Gotanda 1991). However, I distinguish between definition and implementation. Both formal race and status race are types of application with the understanding that both applications have an underlying biological premise. While I initially considered including this concept, I ultimately did not find any evidence of the status race concept and thus it was not useful for analysis.

diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race (*Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003)).

In this case, the Court held that the University of Michigan's use of racial preferences in undergraduate admissions violated both the Equal Protection Clause and Title VI. The Court reasoned that the automatic distribution of twenty points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race was not narrowly tailored and did not provide individualized consideration *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003). Furthermore, this decision views race as an individual characteristic devoid of historical, social, and political context. The court therefore found that adding more points for certain racial categories over others in addition to other application criteria violated overly represented students' constitutional rights.

Despite the frequent "colorblind" or "formal" uses of race based on biology, overwhelming evidence demonstrates that race is not a biological construct and is in fact very connected to policy, law, and history. The notion that humankind can be divided along white, black, Asian, and Native American lines reveals the social rather than the scientific origin of race.

While there is debate about whether race identified by geographic regions exists on a genetic level, social scientists agree that scientists cannot see race by examining DNA strands. Humans share 95.5 to 99.9% of the same genes and there is 8.6 times more genetic variation within socially defined racial groups than between them (Desmond and Emirbayer

2010; Graves and Jr. 2003).

Despite this agreement, a common societal and individual approach is to acknowledge that races do not exist as objective biological entities, but then try to reconstruct an objective basis for recognizing 'racial' distinctions by grounding them by phenotype (Wade 1997). However, the phenotypical variety is itself socially constructed because the physical differences that have become cues for racial distinctions are specific. (Wade 1997). For example, skin color, certain facial features, and hair texture have often been looked to in order to racially categorize but not other features such as height, weight, or eye color. This history of biological definitions of race and their various forms of implementation within the law are important to consider in the context of transracial adoption law.

Historical Race

Historical race embodies past and continuing racial subordination, and the Court uses this concept of race when applying the "strict scrutiny test"⁹ to racially disadvantaging government conduct (Gotanda 1991). The state's use of racial categories is regarded as so closely linked to illegitimate racial subordination that it is automatically judicially suspect. The 1990 U.S. Supreme Court case *Metro Broadcasting, Inc. vs. Federal Communications Commission* challenged the constitutionality of two minority preference policies of the Federal Communications Commission. The first policy gave minority applicants first preference for broadcast licenses if all other relevant factors were roughly equal. The second policy, known as the "distress sale," allowed broadcasters in danger of losing their licenses to sell their stations

⁹All laws that have race-based distinctions must pass the highest and most difficult level of review, the "strict scrutiny test", to be constitutional. This test requires the law to be narrowly tailored to further a compelling state interest.

to minority buyers before the FCC formally ruled on the viability of the troubled stations (Gotanda 1991). The court opinion included the following passage,

We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective (*Metro Broadcasting, Inc.*, 497 U.S. at 566).

Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications" (*Metro Broadcasting, Inc.*, 497 U.S. at 566).

Additionally, the court reasoned,

Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree (*Metro Broadcasting, Inc.*, 497 U.S. at 566).

Therefore, the court held that the FCC's minority preference policies were constitutional because they provided appropriate remedies for discrimination victims and were aimed at the advancement of legitimate congressional objectives for program diversity. Thus the court's recognition of past historical discrimination and the current need for diversity indicates a historical race approach.

Culture Race

The concept of "culture race" focuses on community and consciousness. Culture, according to Gotanda, refers to broadly shared beliefs and social practices while community refers to both the physical and spiritual senses of the term (1991). Therefore, culture race focuses on traditions and actions based on self-awareness. Culture-race is the basis for the developing concept of cultural diversity. For example, *Grutter v. Bollinger* demonstrates this

concept when the United States Supreme Court found that Michigan Law School admission practices did not violate the 14th amendment.

Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary" (*Grutter*, 539 U.S. at 329).

The court goes on to say

...The Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races". These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds" (*Grutter*, 539 U.S. at 330).

Therefore, this court specifically focuses on the benefits of various types of cultural diversity, especially racial diversity.

Gotanda (1991) argues that the court has moved away from the notions of race that recognize the diverging historical experiences of racial groups. In place of these concepts, the Court relies increasingly on the formal-race concept, a vision of race as unconnected to the historical reality of oppression, where racial classification has lost its connection to social reality (Gotanda 1991). These concepts of race have not been studied within the adoption law context, which has great impact on the formation of interracial families. Research on racialization and socialization that incorporates critical race and constructivist perspectives offers important potential for generating new insights about the processes of family formation in an increasingly multicultural society (Burton et al. 2010).

As I will discuss in my methods section, these theoretical frameworks guide my analysis. Specifically, I use the legal concepts of biological race, culture race, and historical race broadly and in its various forms to understand the ICWA and the MEPA-IEAP. I

analyze congressional documents, case law, and various media sources to uncover the social, political and historical context surrounding these two pieces of legislation and its subsequent transracial adoption case law.

CHAPTER 2: METHODS

Law and society scholars have historically studied the gap between law-on-the books and law-in-action. Law and society scholars understand law as a social construction and as a reflection of society itself. As such, they examine the influence of law outside the legal system without accepting legal rules and procedures at face value; in contrast, traditional legal scholars mostly focus on jurisprudence and examine questions within the confines of legal logic and procedure (Clavita 2016; Macaulay, Friedman, Mertz 2007). As Kitty Calavita states

...At some level, the thrill is about catching law at violating itself—its promises eluded, its mandates subverted, its ostensible intent slipped...but it is more than that. In the process, we also discover law leaping from the confines of that room and boisterously affecting the lives of ordinary people... but we also want to understand the *gap*, because it can provide us with clues about not just the workings of law but also the workings of society itself” (2016:129).

Law and society scholars also argue that the methods and tools of social science can and should be used to analyze parts of our own society and the legal system in order to gain new insights into a society, community, or into group dynamics (Macaulay, Friedman, Mertz; 2007). This dissertation does just that by using a mixed methodological approach to study the legal processes of race-making in transracial adoption case law. Studying the processes of race-making in law requires understanding race as a fluid construct. Additionally, legal frameworks that often claim to be colorblind, “reinforce racial privilege as part of a broader conservative project to limit a wide-ranging redistribution of resources along racial lines” (Carbado and Roithmayr 2014:157). Specifically, critical race theorists support the study of racial inequality, ideology, racism or racial stratification as a dependent variable or the central focus of the study (Carbado and Roithmayr 2014). My research continues this approach by examining transracial adoption case law using mixed methods of content analysis. Content analysis is defined as a “research technique for making replicable and valid inferences from texts (or other meaningful

matter) to the contexts of their use” (Krippendorff 2004:18; White and Marsh 2006:27). Using qualitative methods allows me to examine themes and processes of racial analysis while a descriptive quantitative analysis allows me to evaluate case outcomes and sample characteristics more generally.

Judicial opinions are documents that show what kinds of disputes come before the court, how the parties frame their disputes, and how the judges reason their conclusions. Content analysis of judicial opinions “makes legal scholarship more consistent with the basic epistemological underpinning of other social science research” (Hall and Wright 2008:89)

Furthermore, content analysis allows legal analysts and sociologists to ask questions about the utilization of the facts and arguments made in each relevant case.

Content analysis holds value not only for conventional doctrinal analysis but also for more theoretically influenced work in major branches of jurisprudence...Judges and the law respond predictably to various social, political and market conditions, and empirical claims that researchers can systematically test” (Hall and Wright 2008:77)

This methodological technique also provides a more objective understanding of a number of decisions where each decision has equal value (Hall and Wright 2008). Court decisions are an important “communication device” intended not only as a communication to the parties in a particular case but also as a “communication to other judges, other lawyers, other litigants, and other potential participants in the legal system” (Hall and Wright 2008:92). This communication is exactly where my interest lies because these decisions often result in binding precedent and the reification of social norms.

Coding cases for descriptive quantitative analysis strengthens the objectivity and reliability of case law interpretation (Hall and Wright 2008). It also allows researchers to study processes that occur over long periods of time or that may reflect trends in a society (Hall and

Wright 2008). Content analysis is most suited for examining aspects of judicial method, specifically the various meanings and uses of social conceptions that their written opinions tend to reflect (Hall and Wright 2008:93). The strongest application of content analysis is when the subject of the study is judicial behavior. Here, content analysis allows for analytical legal approaches to be interpreted through rigorous social science methods.

Court cases are not objective or exhaustive summaries of truth or facts regarding a specific case. Judge-reported facts that are discussed in case law are used justify their decisions. Critical race theorists suggest, using the indeterminacy thesis, that judicial analysis is not solely based on doctrinal rules and objective applications; rather, judges interpret the relationship between the written law and its application to various real life events (Conti 2016; Fish 1989; Taylor 1993; Yablon 1984). Statutes and “legal rules are always at risk of being misunderstood; jurists fix the meaning of rules for specific instances, and in so doing make law” (Conti 2016:161). It is precisely this “fixing of meaning” and interpretation of facts that I wish to study (Conti 2016:159).

To be clear, however, this is not a jurimetrics study. I am not focusing on nor does the data allow for questions of legal outcome predictability. Race is a particularly difficult area to study in jurimetrics, as judges may not always mention race. As discussed in chapter 1, the courts may often use a colorblind approach when discussing race. Hall and White point out that judges are reluctant to mention race when they do not deem it relevant to the case and race is often less legally relevant for individuals who identify or are identified as white (2008). Therefore, if a socio-legal scholar wants to study the predictive role of race across a body of case law, there must be a racial indicator in every case not just the cases where individual judges found it to be relevant. Unfortunately, that is rarely the reality (Hall and Wright 2008).

While not the best method for studying predictive racial outcomes or an in-depth study on judicial conduct¹⁰, a systematic study of judicial reasoning and what facts judges find worthy of discussion is a compelling application of case content analysis because it answers the questions I am asking: how the court defines race and how judges use these notions of race to determine placement decisions.

My research questions address *how* judges discuss race when they *do* find it to be a relevant factor. Therefore, instead of predicting outcomes based on race, I am more interested in studying judicial processes of reasoning itself. This type of study may be less relevant to practicing lawyers trying to determine the likely outcome of their case, but would appeal to race scholars interested in the processes of race-making. This study would also be of interest to socio-legal scholars who seek to understand a legal process or a particular understanding of a substantive area of law (Hall and Wright 2008).

A mixed-method approach using content analysis has similar but diverging steps and concerns. Quantitative analysis is the most commonly used form of content analysis. It is deductive and was developed to test hypotheses or address questions generated from theories or previous empirical research. In contrast, qualitative content analysis is primarily inductive, meaning that it usually involves grounding the analysis in topics and themes that can be found in the data (Zhang and Wildemuth 2009). The analysis, therefore, pays attention to unique themes and patterns within the data. The discussion that follows involves each of the steps in

¹⁰ Content analysis has many strengths but it also has weaknesses. While content analysis can augment doctrinal analysis by identifying previously unnoticed patterns that warrant deeper study or by correcting misimpressions, it may also reach a thinner understanding of the law than that gained through ethnographic methods using participant observation or an audit study. “The coding of case content does not fully capture the strength of a particular judge’s rhetoric, the level of generality used to describe the issue, and other subtle clues about the precedential value of the opinion” (Hall and Wright 2008:87).

my data analysis as recommended by various social science scholars (White and Marsh 2006; Elo et al. 2014; Stemler 2001; Zhang and Wildemuth 2009).

Preparing the Data

The data used in this dissertation is a sample of transracial adoption case law. The sample of cases was identified through a search in LexisNexis Advanced (Lexis) and Westlaw legal databases. I met with a Lexis and Westlaw representative for information about search methodology and criteria. I used the following factors to create my sample of cases: year, adoption or permanent custody cases, cases that include a “best interest of the child analysis,” cases that had a clear custody determination, cases that fall under the ICWA or the MEPA-IEAP, and cases that have a clear potential (not necessarily outcome) for transracial adoption based on racial group categorization. Additionally, I chose to start my search parameters in the year 1997 because the MEPA-IEAP was enacted in 1996 and took effect in 1997. Therefore, all of the cases in my sample were decided between January 1, 1997 and December 31, 2016.

I also decided to include all cases regardless of precedential value. This means that even if a case is unpublished or overturned, therefore having no precedential value, it will still be included in my sample. I believe it is still important to analyze the discourse in these cases as they can still be used persuasively in court and the same judges executing these decisions have made and will continue to make decisions that will not be publically available for analysis.

While I attempted to include and exclude all of these factors using database search terms (see Appendix: Table A for the specific search terms), most of the sampling had to be done manually by reading each case. After trying various search terms in the Westlaw and Lexis

databases, I compiled a list of the case results by importing them directly into excel¹¹. Then, I cross-listed the cases in excel by eliminating the duplicates, which left me with 1,039 cases (see Appendix Table B for the complete list of cases in my sample). I read through those cases and further narrowed my sample to the 161 cases.

Furthermore, I excluded the following types of cases: cases with no discussion of race or racial groups¹², same-race placements with no potential for transracial adoption¹³, cases having to do with jurisdictional or procedural issues, cases that are remanded to a lower court without a clear custody determination, class-actions, adoption subsidy cases, and custody determinations between biological or previously legally sanctioned parents.

Finally, I only focused on the majority opinion of the cases as these are the parts of the cases that will be persuasive or demonstrate precedent. Therefore, I excluded the concurring

¹¹ While I used both Westlaw and LexisNexis law for cases searches, I used Westlaw to compile and download cases. Westlaw has superior research tools, which made it easier to compile a list of cases. For example, Westlaw allowed me to create a folder of cases that would not include duplicates. Once I added all of my cases to the folder, Westlaw also had an export to excel function which included some of case information I later used for analysis. LexisNexis did not have either of those capabilities. If I found a case in LexisNexis that did not come up in any of my Westlaw searches, I did a separate search for each individual case by using its reference number. I then added it to my Westlaw folder with the rest of my cases. I was able to find most of my cases this way, and in my final sample there were only two LexisNexis cases that I had to add to the excel file manually because I could not find them in Westlaw.

¹² Most of the cases that were excluded in my initial cases were because of an out of context use of the word race, for example the case might say “a race to the courthouse” or because the case related to adoption but nowhere in the case did it indicate that a transracial adoption case occurred. In these instances, the reason the case ended up within my search parameters was because the judge might have included the language of the entire statute related to what factors might be considered in a best interest of the child analysis but did not actually consider all of these factors.

¹³ This exclusion of same-race placements without the potential for transracial adoption, undeniably leads to an under-inclusive sample of same-race adoption placement. I did however keep track of how many same-race adoption cases I eliminated out of the original 1,039 case sample, and it was only 22 cases. This low number may not be surprising however, given my search terms. This is not intended to be a generalizable study that predicts racial outcomes. Instead, I am interested in the racialized discourse within the specific condition of a contested adoption or permanent custody case when at least one person seeking custody is a different race than the child. Thus, I am able to analyze the characteristics of families in contested adoption cases and the different racial ideologies that are used to support each custody determination.

opinion as well as any written dissent. The cases in my sample often included termination of parental rights cases where child custody and placement is frequently discussed. Very often the child is already in the care of a foster parent or an adoptive parent, and there is an adoption pending.

Case source limitations

There is always a gap in the litigation process, “most human interactions do not produce disputes, only some disputes result in legal claims, many claims are settled, and many trial decisions are not appealed. Appellate courts regularly decide to not publish some opinions and computer databases do not consistently include cases that are not officially published” (Hall & Wright 2008:104). Furthermore, these same computer databases may lack the access to many cases that fit the desired search criteria. Each of these gaps potentially distorts the pervasiveness of these trends and therefore threatens the ability to generalize. As such, I will not infer that these patterns reflect all transracial adoption cases in the United States, but I do have a robust sample of contested potential transracial adoption cases at the appellate level.

While Lexis and Westlaw are the most frequently used legal databases, they both have limitations with regard to case law overall and specifically in the area of family law. Both LexisNexis and Westlaw pull case law from the same pool of data, a program called Public Access to Court Electronic Records or PACER. PACER is an electronic public access service that allows users to obtain case and docket information from federal, appellate, district, and bankruptcy courts, and the PACER Case Locator via the Internet (Pacer Service Center 2012). PACER is provided by the federal Judiciary in keeping with its commitment to provide public access to court information via a centralized service (Pacer Service Center

2012). A small subset of information from each case is transferred to the PACER Case Locator server each night (PACER Website). The difference between Westlaw and LexisNexis is how they organize this information and how they operationalize each search term. However, the data going to PACER depends on many factors including whether the decision has been published, whether the state the case was heard in is electronically inclined, and the overall ethical considerations surrounding a case, such as the involvement of children and or abuse. In many cases, unpublished decisions are still included, but are done by both Westlaw and LexisNexis runners that find these cases in each courthouse and scan them. PACER cannot receive information that is closed to the public. Adoption law is a very sensitive area of law that is usually not available to the public. Adoption law involves many ethical issues, and most state level adoption cases are closed to the public as mandated by statute. However, state level adoption decisions that were appealed are often published and therefore included in PACER. Therefore, I primarily focused on Appellate and Supreme Court level cases, but I was also able to note the court decision on the state level if the case was appealed as the facts are often reviewed.

The lack of trial level transracial adoption data is not just a problem specific to LexisNexis and Westlaw, but problem with adoption records more generally. A staff attorney at the National Center for Adoption Law and Policy informed me that state level adoption cases are closed and are not available to the public. This is due to the nature of the confidential information shared during adoption cases and to protect the identities of the parties involved. She also informed me that the vast majority, if not all, of the cases pertaining to adoption would be appellate level opinions. The National Center for Adoption Law and Policy's database also only contains appellate level cases.

In conclusion, although there is some very rich data in this dataset, the sample is not representative of every contested transracial adoption case in the United States. However, this is an inclusive dataset involving publically accessible transracial adoption case law. This data tells us a lot about the racial discourse that forms precedent and therefore decision-making in future cases.

Defining the Unit of Analysis

Qualitative content analysis usually uses individual themes or expressions of an idea as the unit of analysis. Thus, one might assign a code to a text grouping of any size as long as that section represents a single theme or issue of relevance to the research questions (Zhang and Wildemuth 2009). A unit theme can be a combination of words or sentences used to convey an idea. In this project, I specifically looked at cases that involved transracial adoption. The descriptive quantitative portion of this study codes the entire case. However, the unit I analyzed in the qualitative section of my project are sections of text the discussed race.

I also conducted a qualitative analysis on legislative materials including congressional reports, bills, and hearing transcripts that were used when creating both the Indian Child Welfare Act and the Multiethnic Placement Act and the Interethnic adoption Provisions. Here, the unit of analysis is still a written document but it comes in the forms of reports, graphs, written transcripts of testimony, or written sets of guidelines. Much of this data has been compiled by non-profit advocacy organizations and is available online. For example, I found a list of congressional materials related to ICWA on the National Indian Law Library website. Additionally, I found legislative materials and reports used when considering the Multiethnic Placement Act and Interethnic Adoption Provisions on congress.gov. These materials are not meant to be an exhaustive analysis of the legislative history surrounding these two pieces of

legislation, but it does supplement my analysis of the case law by providing social and political context to the creation of these two Acts.

Developing Categories and a Coding Scheme

Categories and a coding scheme can be derived from three sources, the data, previous related studies and theories (Zhang and Wildemuth 2009). Coding schemes can be developed both inductively¹⁴ and deductively¹⁵. Inductive content analysis is particularly appropriate for studies that intend to develop theory. Glaser and Strauss (1967) encourage the use of the constant comparative method. This includes the following three steps (1) the systematic comparisons of each text assigned to a category with each of those already assigned to that category and (2) integrating categories and their properties through the development of interpretive memos (Zhang and Wildemuth 2009:4). As qualitative content analysis allows you to assign a union of text to more than one category simultaneously, each scheme should be defined in a way that is as internally homogenous as possible and as externally heterogeneous as possible. The development of a coding manual is therefore necessary, which consists of category names, definitions or rules of assigning codes and examples. The constant comparative approach allows for the constant changing of the codebook which will be documented using interpretive or “concept” memos (Zhang and Wildemuth 2009). Concept memos focus on emerging concepts, for example, the distinctive ways in which these concepts are phrased, and the researchers own interpretation of the concepts or themes (Zhang and Wildemuth 2009).

¹⁴ Themes and categories emerge from the data through the researcher’s careful examination and constant comparison (Zhang and Wildemuth 2009, 2)

¹⁵ The generation of concepts or variables from theory or previous studies. This can be used for qualitative or quantitative analysis ((Zhang and Wildemuth 2009, 2)

Qualitative analysis

First, I read a few cases and completed initial coding for relevancy by hand to better understand what questions I wanted to ask. After importing the cases into NVivo, I went through and repeated the coding. I used both inductive and deductive methods to form my “nodes” within NVivo. I deductively created my racial node “Legal Perspectives and Definitions of Race” with the subnodes “historical race,” “cultural race,” and “biological race” and “formal race” as subnodes. I also included the subnodes “blood quantum” and “skin-tone/colorism” under biological race. These nodes and subnodes use transracial adoption scholarship and critical race theory scholarship as a guide. These nodes specifically focus on my first area of inquiry: how do judges define race in transracial adoption cases?

Because I employed both a deductive and inductive approach, new themes and concepts emerged from my data and were added to the coding manual. The majority of the inductively created nodes answered my second area of inquiry, how do judges use race to make placement decisions in transracial adoption cases? After reading the cases in my preliminary sample, I divided the cultural competency node into a “cultural authenticity” subnode and a “cultural contacts” node. I then further divided the “cultural authenticity” subnode into two separate subnodes, the “Existing Indian family (EIF) exception” and “cultural practice/knowledge.” I then formed a “legal justification” node with the following subnodes “bonding/well-being” “discrimination protection,” “identity adjustment” “cultural genocide/ community-well-being,” “tools used to determine race,” and a “tribal customary adoption/Indian child exception” node.

Specifically, I divided the cultural competency node into subnodes because I found that while there is a common theme of evaluating each party’s level of cultural competency, I noticed that it was a slightly different analysis if the court is evaluating someone who shares the race of

the child compared to someone who is a different race. Similarly, I added the node “tools of determining race” once I started narrowing down my cases and observed arguments over ICWA notification requirements. In these instances, which I will elaborate on in Chapter 4, it is the courts that determine whether the notification requirement was satisfied, and thus whether the child is considered an “Indian child.” Therefore, as explained in Chapter 1, while tribes have the sovereign right to define their own membership, the tribe can only do this if they are notified properly. Whether there was adequate notification is determined by state and federal court judges. I also included a “bonding/well-being” and “identity adjustment” node because I continued to notice the tension between the analysis of race and cultural needs mostly related to the child’s future racial identity and other factors that might impact well-being, such as stability, health, or educational needs.

Finally, I added a Tribal Customary Adoption (TCA)/Indian Child Exception (ICE) node because I began noticing that tribes would request the use of these legal concepts as a substitute for more traditional forms of legally sanctioned adoption, based on their cultural values. As I will explain in more detail in chapter 4, these exceptions allow for permanent guardianship without the formal termination of parental rights, so that the “Indian child” may maintain contact with the tribe and biological family.

Quantitative analysis

I also created a dataset in excel and then SPSS using multiple variables and their value for my quantitative descriptive analysis. This allowed me to categorize each case by the following legal and extralegal factors: whether it was an ICWA case or an MEPA-IEAP case, who the parties in the case were, which party received custody, the state the case was heard in, the type or level of court that decided the case, the race of the child, the race of the party that was

granted custody, whether there was a difference in race between the race of the child and the person/s who received custody, whether historical race, blood quantum or the EIF exception was discussed, and whether the case was published. I also formed my racial category variables inductively. When the case made mention of a racial, ethnic, or national category, I created a new variable. This way, I was able to see what categories were the most salient in the courts. See Appendix: Table B to see the codebook.

Testing the Coding Scheme and Evaluating Coding Consistency

It is good practice to test the coding scheme on a sample of text to identify potential areas of confusion or error and evaluate coding consistency (Zhang and Wildemuth 2009). Not only are coders subject to fatigue and mistakes, but also during the process of coding, the understanding of the codes may change over time and lead to greater inconsistency. According to Zhang and Wildemuth, in most cases, coding consistency is assessed through inter-coder agreement (2009). However, I sampled and coded all of the data myself, so inter-coder agreement calculations are not the best way to measure reliability in this study.

I completed a preliminary analysis on 44 cases to test my coding scheme. I also received feedback based on this initial analysis during my dissertation proposal. After completing the inductive nodes mentioned in the previous section, I made only small changes to the codebook to make data analysis more manageable.

After sufficiently editing the codebook and any initial coding errors, I coded the rest of the text. I then ran several different analysis functions using NVivo including the matrix query and coding at several different nodes. This was done in order to provide a more accurate description of the cases in the sample.

Implications, Findings, and Trustworthiness

I then identified the themes and patterns found in the data, and made inferences and interpretations about these findings. I used Excel, SPSS, and NVivo to complete my analysis. Specifically, I used NVivo matrix queries and SPSS crosstabs, and SPSS frequency tables to describe the prevalence of each node and subnode within ICWA cases and MEPA-IEAP separately.

In content analysis, researchers must demonstrate the validity of the project, or in the case of qualitative research, the “trustworthiness” of the study (Lincoln and Guba 1985). Qualitative content analysis does not produce counts and statistical significance but instead uncovers patterns, themes, and categories important to social reality (Zhang and Wildemuth 2009). For quantitative, work this is measured by internal validity external validity reliability and objectivity (Zhang and Wildemuth 2009:6).

In qualitative research, trustworthiness is measured by credibility, transferability dependability and confirmability (Lincoln and Guba 1985; Zhang and Wildemuth 2009). *Credibility* refers to the adequate representation of the construction of the social world under study (Bradley 1993; Lincoln and Guba 1985; Zhang and Wildemuth 2009). This might include prolonged engagement of the field, persistent observation, triangulation, negative case analysis, checking interpretations against raw data, peer debriefing and member checking. Qualitative researchers not only need design data collection strategies that will adequately solicit the representation but also design a transparent process for coding and drawing conclusions from the raw data (Zhang and Wildemuth 2009). To ensure credibility, I also compared my results to census data and other empirical research on transracial adoption and the child welfare system. Additionally, I have presented this work at three conferences and

presented at two research institutions, receiving valuable feedback each time.

Transferability refers to the judgement about whether findings from one context can be applied to another context (Zhang and Wildemuth 2009). The researcher is therefore responsible for providing the data and ensuring that the descriptions are rich enough so that other researchers are able to make judgements about the findings' transferability to other settings or contexts. To demonstrate transferability, I provided the list of cases in my references section so researchers can see the individual cases I used. Additionally, I provided my search terms and coding scheme in my appendix.

The *dependability* criteria address the “coherence of the internal processes and the way the researcher accounts for changing conditions in the phenomena” (Zhang and Wildemuth 2009). I achieve dependability by including thorough methods and finding sections that explain the similarities as well as the differences in the data.

Finally, *confirmability* refers to the “extent to which the characteristics of the data, as posited by the researcher, can be confirmed by others who read or review the research results” (Bradley 1993:437; Zhang and Wildemuth 2009:6). In qualitative work, this is a “conceptual consistency between the data, the observations, and the conclusion[s]” (White and Marsh 2006:39). As such, I achieved confirmability by including my cases and as well as my observations. By including a search on the two main legal research databases, I am confident that my list includes all of all of the explicit contested appellate transracial adoption cases available to the public in the United States.

A Description of the Sample

While I will discuss my findings more thoroughly in chapters 4, 5, and 6, I will give a general descriptive overview of the sample in this section (see table 1, table 2, and table 3). As

mentioned in the previous section, the sample consists of 161 cases spanning from 1997-2016. 44% (n=71) are ICWA cases and 56% (n=90) of the cases fall under the MEPA-IEAP. 44% (n=70) of the cases in my sample are published 57% (n=91) are unpublished. Cases from all the years 1997-2016 are represented, with the highest number of cases heard in 2012 (n=16). However, only 34 states are represented in the sample¹⁶.

Furthermore, in approximately 76% (n=122) of the cases, the custody decision went in favor of the unrelated prospective adoptive parent. In approximately 88% (n=141) of the cases, the child and the parent who won custody were a different race,¹⁷ in 34% of the cases, the party that won custody was white and, in 32% of the cases the party that won custody was “non-Indian”. While these numbers are alarming, due to my search for potential transracial adoption cases, this number is most likely an overestimate, as I eliminated cases that did not indicate the potential for a transracial adoption.

As table 3 demonstrates, 90% of Black/African-American children were transracially adopted or fostered, while 88% of federally recognized Indian children were transracially placed. Furthermore, when the party who won custody was white, 98% of the cases resulted in transracial adoptions. Finally, 87% of ICWA cases resulted in transracial adoptions while 92% of MEPA-IEAP cases in this sample resulted in transracial adoptions.

¹⁶ Cases from Alabama, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Mississippi, New Hampshire, New Mexico, North Dakota, Rhode Island, Vermont, Virginia, West Virginia, and Wyoming were not included in the sample. There were also no cases in the U.S. territories and associated states included in the sample.

¹⁷ In many cases the court may not have identified the race of the parties involved but indicated instead that the parties had “different races.”

Table 1. Case Characteristics of Transracial Adoption Cases		
	Percent (%)	Cases (n)
Law		
ICWA	44	71
MEPA-IEAP	56	90
Parties involved in the case		
Unrelated adoptive parent v. unrelated adoptive parent	7	11
Unrelated adoptive parent v. government agency	2	3
Unrelated adoptive parent v. tribe	3	4
Unrelated adoptive parent v. biological parent	45	72
Unrelated adoptive parent v. foster parent	1	2
Unrelated adoptive parent v. related adoptive parent	24	38
Related adoptive parent v. foster parent	1	1
Biological parent v. government agency	3	4
Biological parent v. related adoptive parent	10	16
Tribe vs. governmental agency/foster parent	1	2
Related adoptive parent vs. related adoptive parent	4	6
Biological parent vs. biological parent	1	1
Case Outcome [Who gets custody]		
Tribe	1	1
Stepparent	2	3
Unrelated adoptive parent	76	122
State	1	1
Biological father	3	5
Pending state court decision	1	2
Biological mother	1	2
Related adoptive parent	12	20
Foster parent	3	5
Court Type (%)		
Family Court	14	22
Appellate Cases	68	109
State Supreme Court Cases	18	29
U.S. Supreme Court Cases	1	1
<p>Note: This sample is not weighted and may not add up to 100% due to rounding Source: LexisNexis and Westlaw. Retrieved January 1997-December 2016</p>		

Table 2. Racial Case Characteristics		
	Percent (%)	Cases (n)
Race of Party that Won Custody		
Black/African American/African	4	6
Hispanic/Latino	3	5
White/Caucasian/Anglo-Saxton/European	34	55
Native American/Indian- Federally Recognized Tribe	5	8
Native American/Indian –No Federally Recognized Tribe	4	7
Non-Indian/Non-Native	32	52
Biracial/Mixed-Race/Multiracial	2	3
Asian (Filipino/Chinese/Cambodian)	1	2
No race given/missing	12	20
Race of the Child		
Black/African American/African	26	41
Hispanic/Latino	3	5
White/Caucasian/Anglo-Saxton/European	1	1
Native-American/Indian-Federally Recognized Tribe	47	76
Native-American/Indian-No Federally Recognized Tribe	1	2
Non-Indian/Non-Native	1	1
Biracial/Mixed-Race	16	26
Asian (Filipino/Chinese/Cambodian)	3	4
Middle Eastern	1	2
No race given/missing	2	3
Difference in Race between Child and Custody-Winner		
Yes	88	141
No	10	16
Missing	1	2
<p>Note: This sample is not weighted and may not add up to 100% due to rounding Source: LexisNexis and Westlaw. Retrieved January 1997-December 2016</p>		

Table 3. Race Difference				
	Number of cases (total)	% Transracial	% Same Race	% missing
Race of Child				
Black/African American/African	41	90	7	2
Hispanic/Latino	5	100	0	0
White/Caucasian/Anglo-Saxton/European	1	0	100	0
Native American/Indian- Federally Recognized Tribe	73	88	12	0
Native American/Indian –No Federally Recognized Tribe	2	50	50	0
Non-Indian/Non-Native	1	100	0	0
Biracial/Mixed-Race/Multiracial	26	96	4	0
Asian (Filipino/Chinese/Cambodian)	4	75	25	0
Middle Eastern	2	100	0	0
Race Not Given	3	100	0	0
Race of the Party Who Won the Case				
Black/African American/African	6	50	50	0
Hispanic/Latino	5	100	0	0
White/Caucasian/Anglo-Saxton/European	55	98	2	0
Native-American/Indian-Federally Recognized Tribe	8	25	75	0
Native-American/Indian-No Federally Recognized Tribe	7	57	43	0
Non-Indian/Non-Native	52	100	0	0
Biracial/Mixed-Race	2	50	50	0
Asian (Filipino/Chinese/Cambodian)	2	50	50	0
Multiracial	1	100	0	0
Missing	20	90	5	5
Law				
ICWA	71	87	13	
MEPA-IEAP	90	92	8	
<p>Note: This sample is not weighted and may not add up to 100% due to rounding Source: LexisNexis and Westlaw. Retrieved January 1997-December 2016</p>				

CHAPTER 3: LEGISLATING RACE: THE INDIAN CHILD WELFARE ACT, THE MULTIETHNIC PLACEMENT ACT & THE INTERETHNIC ADOPTION PROVISIONS

“There is only one child, and her name is children”

~ John Woodenlegs

Legislation and landmark legal cases have historically addressed the creation of families especially when race is involved. The review of legal standards, laws, and foundational legal decisions based on these laws is important because they provide insight into the changing social values and beliefs about what a family should look like. Adoption policy has historically reflected the racialized ideologies surround the family and children.

The Indian Child Welfare Act (ICWA) and the Howard M. Metzenbaum Multiethnic Placement Act (MEPA-IEAP) are the two federal laws that address transracial adoption with very different viewpoints. Both of these pieces of controversial adoption legislation resulted from political action by advocacy groups that were embedded in larger ethnic movements. Reflected in these legislative debates were larger concepts of race that pitted concepts of family preservation against stability; cultural genocide against colorblindness; community autonomy against integration; and community consciousness against individualism.

These debates also reflect racial positionality. While many Native American and African American advocacy groups focused on issues of community autonomy, cultural genocide, and positive racial identity, many white advocates of transracial adoption utilized colorblind approaches that deemphasized racial hierarchies and emphasized the individual benefits of racial integration. This chapter will begin with a review of the best interest of the child analysis followed by a discussion of ICWA; its historical background; its advocates and critics; its legislative history; and its legal mandates. I will then turn to a similar analysis of the MEPA-IEPA.

The Best Interest of the Child Analysis

The legal structure for adoption consists of the adoption statutes (federal and state), the case law interpreting those statutes, and the placement practices of public and private adoption agencies whose role is to provide services to parents who wish to place children up for adoption and choose adoptive homes for the children. Each state has a set of statutes regulating the placement and adoption of children, but state laws are preempted by federal legislation. All federal and state legislation regarding adoption law, must serve the “best interests of the child” and thus, this standard is used in both ICWA and MEPA-IEAP cases (Simon and Alstein 1996). I argue that the that factors considered when determining the best interest of the child are intimately connected with the analysis of race.

Although there is no standard definition of "best interests of the child," the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. "Best interest" determinations are generally made by considering a number of factors related to the circumstances of the child and the circumstances and capacity of the child's potential caregiver(s), with the child's ultimate safety and well-being as the paramount concern¹⁸ (Child Welfare Information Gateway 2016).

This standard has frequently been criticized as vague and therefore variable based on subjective judicial interests (McCormick 1989). Judges may or may not consider many factors, including race. The next question then is, how is race used in the best interest of the child

¹⁸ Some of these factors include the emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers (13 states and the District of Columbia), the capacity of the parents to provide a safe home and adequate food, clothing, and medical care (eight states), the mental and physical health needs of the child (five states and the District of Columbia), the mental and physical health of the parents (six states and the District of Columbia), the presence of domestic violence in the home (eight States), and the stability and consistency of care for the child. U.S Department of Health & Human Services. (2010). Determining the Best Interest of the Child: Summary of State Laws. Retrieved from http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm

analysis? Since the 1940s, race has been treated by the U.S Supreme Court as a “suspect classification” under the Equal Protection Clause of the Federal Constitution. This means that when race is used in a statute it is subject to strict judicial scrutiny. These racial classifications can only be deemed constitutional if they are justified by a compelling governmental interest; a difficult standard to meet.

The Indian Child Welfare Act (ICWA)

Historical background & political mobilization

The advocacy that led to ICWA stemmed from a long history of forced assimilation and divestment. From the 1800s-1930s, thousands of indigenous children were placed in boarding schools throughout the country in order to solve the “Indian” problem of cultural difference (Dewan and Israel 2016). ICWA was created in the wake of “kill the Indian, save the child” practices which were designed to “educate the Indian out of a child” (Dewan and Israel 2016). The goal of the schools was to “deprive [Indian kids of their] language, cultural practices, and spirituality,” so they could be assimilated into mainstream American society (Dewan and Israel 2016). By the 1880s, more than 6,000 Native American students were enrolled in boarding schools (Dewan and Israel 2016).

According to Margaret Jacobs, post-World War II, policy makers were becoming concerned about the costs of boarding schools (2013). The Bureau of Indian Affairs (BIA) then decided to transfer this cost to state child welfare institutions. The most cost-effective solution, the BIA and child welfare service soon discovered, was to encourage the adoption of Indian children to white families (Jacobs 2013). From 1958 to the 1970s, the Indian Adoption Project, the Child Welfare League of America and the Adoption Resource Exchange of North America acquired children under the support of the federal government. (Woodward 2016). In the 1950s,

the Indian adoption project, which included federal government and nonprofit groups, placed 395 indigenous children from 16 western states with white families in Illinois, Indiana, New York, Massachusetts, Missouri, and other states in the East and Midwest (The Adoption History Project n.d.). Approximately fifty public and private adoption agencies cooperated with the project, but the largest number of children were placed by agencies that were leaders in African American adoptions and services to children of color, including Louise Wise Services, Spence-Chapin Adoption Services and the Children's Bureau of Delaware (The Adoption History Project n.d.).

While the Indian Adoption Project's projects director Arnold Lyso, believed these were racially tolerant practices in a time when adoption agencies implemented race matching policies, many now view the Indian Adoption Project as rooted in the same culturally destructive belief as the boarding schools (The Adoption History Project n.d.). The main goal here was to place indigenous children into white homes so that they could have a better life. "Not only were Native American kids losing their language, customs, and cultural heritage, but tribes were losing their future members" (Dewan and Israel 2016).

Sandra Davidson, an enrolled member of the White Earth Band of Ojibwe tribe explains that this unresolved tribal community-wide grief leads to high rates of alcoholism suicide and other social problems that impact indigenous communities today (Woodward 2011). She argues that this "historical trauma" is due in large part to the removal of children from their homes through boarding schools and adoption, thus and results in cultural genocide (Woodard 2011).

The Indigenous Civil Rights Movement, also called the Red Power Movement, was building momentum in the late 1960s and 1970s. Native communities and advocates demanded that the United States honor its trust responsibilities toward native communities by addressing government policies and laws infringing upon native rights (Woodward 2016). Under the

political pressures created by the civil rights movement; equipped with knowledge of the staggeringly disproportionate number of Indian children living away from home; Congress was finally pushed to act.

Congressional history & intent

Congress passed ICWA making specific findings related to both the best interest of the child and also to the interest of the tribe itself. Congress specifically addressed the importance of children to the continued existence, stability, security, and integrity of Indian tribes (*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989)). This is the only time when the interest of a racial-political group has been considered alongside the interest of the child. The goal of this legislation was to prevent welfare determinations from being made on “white middle-class standards” and that whenever possible the Native American child should remain in a Native American community (*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989)).

The first ICWA bill was introduced by James Abourezk, a U.S Senator from South Dakota. On April 8, 1974, in a hearing before the subcommittee on Indian Affairs of the committee on interior and insular affairs United States Senate he states,

For decades, Indian parents and their children have been at the mercy of arbitrary or abusive action of local, state, federal and private agency officials. Unwarranted removal of children from their homes is common in Indian communities. The federal government for its part has been conspicuous by its lack of action. It has chosen to allow these agencies to strike at the heart of Indian communities by literally stealing Indian children, a course which can only weaken rather than strengthen the Indian child, the family and the community. This at a time when the federal government purports to be working to help strengthen Indian communities. It has been called cultural genocide (United States Senate 1974:2).

William Byler, executive director of the Association on American Indian Affairs and Staff Attorney Bert Hirsch also testified in front of the U.S. Senate. Byler argued that this type of racial discrimination was not unique to Native Indian communities.

This problem does not affect Indians alone. Indians, blacks, Chicanos, and the poor are exposed to extraordinary risks; and if an Indian child, or one child at all is threatened with removal unjustly, then it threatens all children...Indians, Blacks, Chicanos, the poor, and parents that do not meet social norms – all are exposed to extraordinary risks of losing their children. If even one child is taken unjustly, all children are threatened. In the words of John Woodenlegs, a Northern Cheyenne, “there is only one child, and her name is children” (United States Senate 1974:8).

In response to Senator Bartlett’s question “what should be the structure for facing up to the emotional needs of Indian children and also in a meeting of educational needs?” Mr. Byler responded “I think it’s a copout when people say it’s poverty that’s causing family breakdown. I think perhaps the chief thing is the detribalization and the deculturalization, Federal and State and local efforts to make Indians white” (United States Senate 1974:13). Mr. Byler’s argument is important for two reasons, first it redirects attention from poverty to the systemic and institutionalized processes of detribalization that were occurring through child welfare services and boarding schools; and second, it links the experiences of marginalized communities of color together.

Twenty-three-year-old Cheryl Spider DeCoteau provided particularly compelling testimony regarding her experience with child welfare services. The child welfare agency took her son John to foster care while he was with a baby-sitter. They did this without a petition hearing and did not demonstrate that Ms. DeCoteau was an unfit parent in court. Her lawyer, Mr. Hirsch, who took the case after this occurred, testified that child welfare services took her child prior to having a hearing regarding “unfitness;” furthermore, when child welfare services finally did have a hearing, they shifted the burden of proof to Ms. DeCoteau to prove why she was a fit

parent rather than the correct burden of proof which is on the state to prove why she is unfit (United States Senate 1974:67). The hearing was scheduled for 7 months after the child was taken, and the state agency did not give Ms. DeCoteau direct notice. Instead, as was common practice, the agency published the notice in local newspaper (United States Senate 1974:67).

Ms. DeCoteau also testified that a child-welfare worker fraudulently tricked her into signing away her parental rights to her other son Bobby. While she was pregnant with Bobby, a social worker continuously called her and urged her to give her child up for adoption (United States Senate 1974). He came to her house every week both before she gave birth and after. Finally, after her son was born, the social worker demanded that Ms. DeCoteau come to his office. When she arrived, the social worker required her to sign papers without explaining what the documents said. Ms. DeCoteau signed them not knowing that they were papers giving consent to adoption of her son. Social services then immediately took Bobby, who was with her in the office. When she asked the social worker what he was doing, he said it was too late and that she had consented to adoption. It took over a year and a half for her to get both of her children back with Attorney Hirsch's help (United States Senate 1974:66–69).

Attorney Hirsch testified to Ms. DeCoteau's experience and discussed the prejudiced viewpoints of the Child Welfare office,

I went to serve intervention papers upon the State's attorney and he was with one of the supervisors, codirectors of the county welfare department. When I served those papers, we had the following exchange: I gave him the papers. He said why is the tribe so interested in this case. What is the big issue here?

I said that the tribe was concerned that if many more of their children were taken, because there's been quite a history of taking these kids from this reservation, that they were afraid that their very survival would be at stake. And, the co-director of this county welfare office responded to that by shrugging his shoulders and saying, "So, what?" (United States Senate 1974:70).

Attorney Hirsch then went on to explain that there is a “grey market” for adoption in Indigenous communities due to the racial preference hierarchies of white potential adoptive parents.

Mr. Hirsch: I think it is more accurately described as a gray market. I think there is tremendous pressure to adopt Indian children, or have Indian children adopted out. I think that local welfare workers in Indian communities feel this pressure intensely. They have long lists of non-Indian applicants for Indian children, and they feel obliged for a whole variety of social reasons to comply with the orders that they receive for children.

Senator Bartlett: You say long lists for adopting Indian children. Is that a relative term? Is there more interest in adopting Indian children than other children?

Mr. Hirsch: I think so. I think there's more interest in adopting Indian children primarily because non-Indian potential adoptive parents are white. They do not want to have a black child, as a generalization. White children are unavailable, there are just a few and they are generally now settling on either Indians or Orientals (United States Senate 1974:70).

Here, Mr. Hirsch describes the systemic processes involved in the racialized adoption market of Indian children. The racial hierarchy thus manifests itself in adoption procedures, making Indian children more desirable to white families than other minority groups, especially black children.

Social science also played a role in the creation of ICWA. Congress relied on governmental reports to demonstrate the vast number of Indian children that were taken out of the home by the State. The Association for American Indian Affairs conducted a national study in 1969 and again in 1974 to determine the rates of removal of Indian children from Indian homes and found that 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions (United States Senate 1974:15). They also completed a state by state evaluation, and found, for example, that in Wisconsin there are

17.8 times as many Indian children in adoptive homes as non-Indians and that Indian children are placed in foster care more than 14 times as often as non-Indian children (United States Senate 1974:92–93).

As recently as 2015, the BIA found that despite ICWA, American Indian and Alaskan Native children are three times more likely to be removed by state child welfare systems than non-native children and 56% of adopted American Indian and Alaskan Native children are placed outside their families and communities (National Indian Child Welfare Association 2015).

ICWA Legislation

ICWA was created in 1978 and sets federal requirements that apply to state child custody proceedings, including foster care, termination of parental rights, and pre-adoptive placement involving an “Indian child.” An “Indian child” under ICWA is a minor under the age of 18 who is a member or eligible for membership of a federally recognized tribe. Tribal membership and membership eligibility is defined by each individual tribe¹⁹. Furthermore, ICWA *requires* that tribal membership be considered and, I argue, race be considered when placing Native Indian children into homes.

As explained in the first chapter, many of these membership rules include blood quantum requirements, biological proof of direct lineage to a member on the tribe’s roll, and/or various types of cultural competency and tribal involvement demonstrations. However, the tribe does not get to define its own rules regarding federal recognition. As I will describe in more detail in chapter 6, the U.S. Government’s Office of Federal Acknowledgement has specific criteria that a tribe must meet in order to be federally recognized. This list of criteria includes requirements

¹⁹ See Phillip A.C. v. Central Council (In re Phillip A.C.), 122 Nev. 1284, 1291- 1292, 149 P.3d 51, 2006 Nev. LEXIS 150, 122 Nev. Adv. Rep. 109 (Nev. 2006).

surrounding Indian identity identification, community, political influence or authority, a governing document, descent, unique membership, and congressional termination (2015 Regulations, 25 CFR Part 83). According to a 2012 study completed by the U.S. Government Accountability Office (GAO), there are currently 566 federally recognized tribes and 400 tribes that have not been recognized by the federal government (United States Government Accountability Office 2012). Thus, I argue, whether an Indian child falls under the ICWA is a political, racial, and cultural process.

The ICWA also includes several procedural mandates. Since 1978, the Bureau of Indian affairs has offered guidelines for judges, lawyers, and child welfare professionals on how to comply with these legal mandates. Most of these guidelines are not mandatory but are encouraged. In 2014, the Department invited public comments to determine whether to update its guidelines to address inconsistencies in State-level ICWA implementation and interpretation (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). The Department held several listening sessions, including sessions with representatives of federally recognized Indian Tribes, State-court representatives, the National Indian Child Welfare Association, and the National Congress of American Indians (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). Many commenters on the 2015 Guidelines requested that the Department update its ICWA guidelines and also include binding regulations addressing the requirements and standards that ICWA provides for State-court child-custody proceedings (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). After considering these comments, the Department published updated Guidelines in March 2015. The Department then issued a final rule on June 14, 2016 that replaced both the 2015 and the 1979

versions of the Department's guidelines (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016).

One clear area of concern for the Bureau of Indian Affairs and Tribes was the identification of Indian children. The BIA guidelines require that the court treat the child as an Indian child, unless and until determined otherwise. This requirement is triggered if "there is reason to know the child is an Indian child" (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016:9). This requirement shifts the burden on the state or the adoption agency to disprove membership instead of on the individual parties or the tribe to prove it. This obligation ensures that ICWA's mandates are followed from the early stages of the case and avoids lengthy delays resulting from the failure to comply with ICWA (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016).

ICWA also gives Tribal courts jurisdiction of custody cases involving Indian children who reside or are domiciled within the reservation of the tribe. A showing of good cause is necessary to avoid the transfer of a case to tribal court (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). ICWA gives tribes and Indian custodians of a child the right to participate in state court proceedings if the custody proceedings are conducted there. According to the Bureau of Indian Affairs, the court cannot rely on the following factors to demonstrate "good cause:" the advanced stage of the proceedings if the Tribe did not receive notice, prior proceedings where there was no transfer, potential placement outcomes, the Indian child's cultural connections with the tribe or reservation, socioeconomic conditions of the tribe or reservation, or any negative perception of the BIA or

tribe's social services or judicial system (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016).

Additionally, "active efforts" must be demonstrated at two different points of child welfare proceedings. First, active efforts must be made to provide services after an investigation and before a decision is made to place the child outside the home (National Indian Child Welfare Association 2015). Second, active efforts must also be provided after the child has been removed from the home. These efforts should be designed to prevent the breakup of the family by working toward reunification (National Indian Child Welfare Association 2015). Therefore, active efforts require a state case manager to assist a family in making the changes necessary to either keep a child safely in the home or if they have already been removed, then for a child to be reunited with her or his family (National Indian Child Welfare Association 2015). The 2016 guidelines specifically state that active efforts must be "affirmative, active, thorough, and timely" (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016:38–39). Active efforts must also be "provided in a manner consistent with the prevailing social and cultural conditions and way of life the Indian Child's tribe and in partnership with the Indian child's parents' extended family members, Indian custodians, and tribe". (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016:38–39). The guidelines include specific examples of "active efforts," for example,

Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family in utilizing and accessing those resources (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016:41).

A case worker can also demonstrate active efforts by developing a case plan with assistance from the parents, an Indian custodian, and potentially the child, that uses tribal resources to seek out family services. They can also demonstrate “active efforts” by assisting parents in maintaining ongoing family relationships and involving the child’s tribe (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). Thus the active efforts requirement promotes the policy of family preservation.

In order to remove an Indian child from his or her home, the state must prove “by clear and convincing evidence,” that the conduct or condition of the parent will result in “serious physical or emotional damage to the child”(U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). Poverty is not a legally sanctioned reason to remove a child from the home. The “clear and convincing” standard of proof is higher than most states require for foster care placement proceedings, and it also must be supported by the testimony of a qualified expert witness (National Indian Child Welfare Association 2015). The qualified expert witness must have at least one of the following characteristics:

be a member of the child’s tribe who is recognized by the tribal community to be knowledgeable about tribal customs as they relate to family norms and cultural standards of child rearing, an expert with substantial experience in delivering family services to native families, or a professional having substantial education and experience in an area of specialty and substantial knowledge of prevailing social and cultural standards and child rearing practices within the Indian community (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016).

The 2016 guidelines state that the qualified expert witness must have more expertise than is required of normal social worker qualifications (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). Additionally, while a

qualified expert witness should have knowledge of the prevailing social and cultural standards of the Indian child's tribe, they do not have to be a citizen of the tribe (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). If active efforts have been made and the state, through a qualified expert, presents "clear and convincing evidence" that continued custody will result in serious emotional or physical damage to the child, only then can a child be placed out of the home.

ICWA also governs where a child is placed. The placement should be the least restrictive, most like family, within a reasonable proximity to the child's family and meets all of the special needs that specific child may have (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). The child should be placed with a member of the child's extended family, a licensed foster home approved by the child's tribe, an Indian foster home licensed or approved by the state, or an institution for children approved by the Indian tribe or an Indian organization that meets the child's special needs (National Indian Child Welfare Association 2015). Any state case worker should be in contact with the child's tribe, with other tribes and organizations, and with state foster homes to ask if they have a different placement preference and, if so, conduct a thorough search to comply with these placement preferences (National Indian Child Welfare Association 2015).

In order to terminate parental rights, the state agency must again demonstrate that active efforts were made to support the reunification of the family, but the conduct or condition of the parent is likely to result in an "imminent risk of serious physical or emotional damage to the child if the parent has continued custody" (National Indian Child Welfare Association 2015). Additionally, the state agency must show by using testimony of a qualified expert witness that continued custody of the child by the parent or Indian custodian is likely to result in serious

emotional or physical damage to the child *beyond a reasonable doubt* (National Indian Child Welfare Association 2015). This evidentiary standard has a higher burden of proof than most states require in termination of parental rights cases, as it is the same standard that is used in criminal cases (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016).

The 2016 BIA guidelines also give deference to the tribe's order of preference over that of ICWA if they differ. The consideration of a child or parent's preference is required only when appropriate (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016).

A court's determination of "good cause" should be based on at least one or more factors including, requests of the Indian child's parents, request of the child, sibling attachment, extraordinary physical, mental or emotional needs, safety of placement, and the unavailability of a suitable placement after a diligent search was conducted that conformed with the tribes prevailing social and cultural standards (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016).

The 2016 guidelines also make clear that some factors may not be used to determine "good cause," including socioeconomic status and the ordinary bonding with a non-preferred placement that followed from a violation of the ICWA (U.S. Department of the Interior Office of the Assistant Secretary - Indian Affairs Bureau of Indian Affairs 2016). As I discuss in chapter 4, the majority of the ICWA cases in my sample are termination of parental rights cases that discuss placement preferences. The BIA made specific determinations regarding factors that cannot be used to determine good cause due to the frequent occurrence of state courts failing to comply

with ICWA and then deciding that there was “good cause” to avoid the placement preferences. Most of the justifications for good cause included advanced proceedings and bonding with the caregiver.

Case Law

In 1989, the Supreme Court of the United States upheld ICWA in *Mississippi Band of Choctaw Indians v. Holyfield*²⁰. When 24-year-old Jennie Bell found out she was pregnant with twins she asked her family for help. Ms. Bell was a single mother of two and the biological father of the twins she was carrying was married to another woman (Maldonado 2008). Jennie was also a member of the Mississippi Band of Choctaw Indians. No one in her family was willing to take both children, so she started looking for an adoptive family for her children (Maldonado 2008).

Jennie choose Orrey Curtis Holyfield, a Methodist Minister and his wife Vivian Joan Holyfield to be the twins’ adoptive parents. The couple had been trying to adopt but were often rejected because of their age and Orrey’s health issues (Maldonado 2008). Orrey Holyfield was one fourth Mississippi Choctaw but not eligible for tribal membership. Once the Holyfields agreed to adopt the children, Jennie left the reservation and went to live with them in Long Beach, Mississippi, for the remainder of her pregnancy (Maldonado 2013). Jennie’s decision to move in with the Holyfields was multi-faceted. Jennie wanted to get to know the Holyfields, but it was also a legally strategic decision. The Holyfields’ attorney knew the chances of adoption were better if a state court had jurisdiction. If Jennie still lived on the reservation, then the tribe would be granted jurisdiction under ICWA and the Holyfields’ adoption petition would most likely be denied (Maldonado 2008). The Chief of the Mississippi

²⁰ This case is not in my sample as it was decided before 1997.

Band of Choctaw Indians testified in the 1978 Senate hearings and made a strong statement against non-Indian people raising Indian children due to the necessity of children for the tribe's survival (Maldonado 2008).

On December 29, 1985, Jennie gave birth to Megan Beth ("Beth") and Samuel Seth ("Seth") in a hospital 200 miles away from the reservation (Maldonado 2008:6). Twelve days later Jennie voluntarily terminated her parental rights and consented to the adoption of her twins (Maldonado 2008). The next day, the biological father of the twins, Windell Jefferson, did the same (Maldonado 2008). The Holyfields then filed a petition to adopt the twins and less than a month later the chancellor (trial level judge) issued the adoption. However, the decree did not mention the children's Choctaw background or ICWA (Maldonado 2008).

After Jennie returned to the reservation with her other children, the tribe discovered the adoption. On March 31, 1986, the tribe filed a motion to vacate the adoption on the grounds that it violated ICWA (Maldonado 2008). Both Jennie and Windell affirmed their consent to the adoption and expressed their desire that the twins remain with the Holyfields in an affidavit (Maldonado 2008).

The main issue in this case was whether ICWA applied to *voluntary* adoptions and whether the twins were *domiciled* on the reservation (Maldonado 2008). The Mississippi Chancery (the trial level) Court found that the state courts had jurisdiction. The tribe appealed to the Mississippi Supreme Court who affirmed the trial level court and found that the twins were not domiciled on the reservation and therefore the tribe did not have jurisdiction. The tribe then petitioned the United States Supreme Court for review and the Supreme Court granted it. The tribe had many concerns about this placement including the suitability of the adoptive home, but perhaps most importantly, the tribe was worried about the loss of two "full

blooded Choctaw children” (Maldonado 2008:13). The Mississippi Band of Choctaw Indians had strict membership requirements which mandated that all members must have at least “fifty percent Mississippi Choctaw blood” and thus at that time had less than 5,000 members (Maldonado 2008:13–14).

Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified:

One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child. (*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29).

On April 3, 1989, the U.S. Supreme Court reversed the decision of the lower court, vacated the adoption, and granted the tribe jurisdiction. The Supreme Court ruled that because Jennie was domiciled on the reservation, so were the twins, even if they had never physically been there. Additionally, the Supreme Court determined that ICWA applied to voluntary adoptions and thus the preferential placement requirements applied.

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

These preferences have been described by the Supreme Court as

[t]he most important substantive requirement imposed on state courts." (*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d)

Importantly, by the time this decision came down from the Supreme Court, the twins were three and a half years old (Maldonado 2008). Therefore, on February 9, 1990, four years after the Holyfields brought the twins home from the hospital, the Choctaw Tribal Court Judge Roy Jim granted the Holyfields' petition to adopt them based on the recommendation of the children's guardian ad litem and the children's interest in continuity and stability (Maldonado 2008). However, the Judge also required the twins to maintain contact with their extended Indian family and other tribal members (Maldonado 2008).

This case was foundational for tribal sovereignty generally and the ICWA specifically, as it upheld the rights of the tribe to maintain jurisdiction and thus decision-making power over its members in direct opposition to the rights and desires of the biological parents. Most relevant to my research, though, is what the ICWA and Holyfield case tell us about racial and cultural discourse in the context of adoption.

Interpretations of race in ICWA

The ICWA is unique in that it requires a race conscious approach based on historical context. The historical context of racial subordination and, more specifically, the unlawful removal of Native Indian children from their homes led to this legislation. The use of social science to demonstrate the discriminatory practices of child welfare employees further enforces the contemporary impact of racist policies.

Additionally, the legislature discusses issues of culture and uses a cultural race framework to justify ICWA. Here, ICWA focuses not only on the best interest of the child, but also the best interest of the tribe. This is one of the only times that the interest of a community group based on concepts of race and cultural genocide are considered along-side the child. Many legal scholars argue that this consideration is based on the unique political

status and semi-sovereign rights of federally recognized tribes and is not based on race. However, as discussed previously in this chapter, Congress created ICWA in opposition to racial and cultural understandings of race, specifically white middle-class notions of family well-being. The congressional transcripts, legislative material, and reports demonstrate the explicit consideration and discussion of the ICWA using racialized justifications. The dialogue in ICWA frequently places whiteness in direct opposition to Indianness and presents whiteness as a destructive force, causing harm to both the tribe and the child.

However, many who testified at the congressional hearing argued that the overrepresentation of Indian children in the child welfare system due to discriminatory child welfare practices was not unique (United States Senate 1974). Many other minority children who come from marginalized groups, have also been removed from their home and placed with white families. Therefore, the discriminatory practices based on concepts of racial hierarchy in the child welfare system is just one part of the larger systemic issue of cultural genocide and the rights of racial and ethnic groups.

In the case of the Holyfields, the role of culture is more complex because Orrey Holyfield was one fourth Mississippi Choctaw Indian (Maldonado 2008). He was not deemed Indian enough, however, because he did not speak the language and was not eligible for tribal membership. The ICWA's purpose therefore is to promote tribal well-being based on membership and community consciousness. However, in chapter 4, I go a step further and investigate how other ICWA cases are interpreted by judicial actors and how concepts of race and culture are utilized when making placement decisions.

The Howard M. Metzenbaum Multiethnic Placement Act (MEPA) and the Interethnic Adoption Provisions (IEAP)

Similarly, in the late 1960s and early 1970s, there was a strong focus on minority movements and the idea that community interest and belonging should be valued. A dominant ideology during this time was that children were resources to their communities. This concept was heavily emphasized during the “Black Power” movement (Platt 1994:59). In 1972, during the same time that Tribal advocates were collecting tribal data and lobbying for indigenous rights legislation, the National Association of Black Social Workers (NABSW) published a statement in favor of the preservation of black families. They discussed three main reasons for opposing transracial adoptions, the affirmation and preservation of ethnicity, the socialization process surrounding identity, and the protection from racism.

Overt ethnic identification, especially for Blacks, was long suppressed by the social and political pressures speaking to total assimilation of all peoples in that great melting pot...we now proclaim our truth, substance beauty and value as ourselves without apology or compromise. The affirmation of our ethnicity promotes our opposition to the trans-racial placement of Black children (National Association of Black Social Workers 1972:1).

Here, the NABSW is making a community argument based on the historic destruction and suppression of Black ethnic identity. Affirming Black ethnicity, they argue, requires the opposition to transracial adoption. The NABSW goes on to discuss the importance of family to a child’s identity development and relates this to the well-being or “best interest” of the child,

Family is the basic unit of society: one’s first, most pervasive and only consistent culturing life experience. Humans develop their sense of values, identity, self-concept, attitudes and basic perspective within the family group. Black children in white families are cut off from the healthy development of themselves as Black people...” (National Association of Black Social Workers 1972:1).

Finally, the NABSW argues that Black children must be socialized in order to cope with various

forms of racism. Again, this is tied to the overall well-being of black children and their unique developmental needs.

The socialization process for every child begins at birth and includes his cultural heritage as an important segment of the process. In our society, the developmental needs of Black children are significantly different from those of white children. Black children are taught, from an early age, highly sophisticated coping techniques to deal with racist practices perpetuated by individuals and institutions... only a Black family can transmit the emotional and sensitive subtleties of perception and reaction essential for a Black child's survival in a racist society (National Association of Black Social Workers 1972:2)

The NABSW notes that the traditional adoption process has historically eliminated potential Black adoptive families due to the emphasis on income, educational attainment, residential status, and "other accoutrements of a white middle class life style" (National Association of Black Social Workers 1972:3). These "race-neutral" factors keep many Black families from participating in legally sanctioned forms of adoption. Thus, the NABSW made subtle arguments relating the importance of cultural affirmation in the face of structural racism and symbolic violence by tying these concepts to the interpersonal identity formation and well-being of Black children. However, the claim that only Black families can transmit the knowledge necessary to promote strong black identities and essential coping mechanisms has been challenged by scholars. Law Professor Kevin Noble Maillard argues that there should not be a "presumption of racial proficiency or incompetence to decide how to parent a Black child. Cultural needs of children can be met by different-race parents who are committed to the best interest of their child" (Maillard 2014:1). Maillard instead argues for a theory of "interracial convergence" which takes into account events like transracial adoption where "racial convergers" like adoptive parents can "challenge the stability of racial boundaries" (Maillard et al. 2008:1). I, like Maillard, see transracial adoption as an important site to examine the

complex processes of racial formation and reconceptualization as I will discuss further in chapter 5. While Maillard is more interested in the mechanisms of racial identity in daily life, I focus on the legal processes that impact the formation of racial categories within case law.

Perhaps the most interesting part of this 1972 NABSW statement was the discussion surrounding the social construction of racial categories based on the adoption market. The NABSW wrote,

The supply of white children for adoption has all but vanished and adoption agencies, having always catered to middle-class whites developed an answer to their desire for parenthood by motivating them to consider Black children. This has brought about a re-definition of some Black children. Those born of Black-White alliances are no longer Black as decreed by immutable law and social custom for centuries. They are now Black-White, inter-racial, biracial, emphasizing Whiteness as an adoptable quality; a further subtle, but vicious design to further diminish black and accentuate white. We resent this highhanded arrogance and are insulted by this further assignment of chattel status to Black people (National Association of Black Social Workers 1972:2).

Just as Mr. Hirsch described the “grey market” of Indian adoptions to Congress in 1974, the NABSW describes the racial re-categorization of Black children to appeal to white middle-class families willing to adopt (United States Senate 1974). The NABSW argue that there was a racial re-definition of what in the past would be considered Black children, to biracial children in order to emphasize their whiteness. The NABSW then links this change in racial conceptualization to the lack of supply of white children for prospective white adoptive parents. Therefore, changing the racial categories themselves are used to achieve legal ends.

This discussion of racialized adoption markets is also examined in Kerry Woodward’s study of the racialized marketing strategies used by private adoption agencies. She found that prospective adoptive parents have strong preferences by race that suggest a “tripartite racial structure with white babies as the most desired by prospective parents, black babies as the least,

and other racial groups falling somewhere in between” (Woodward 2016:488). Additionally, “mixed” children, children who have at least one white biological parent, increased a child’s desirability; however, fewer families were willing to adopt black/white biracial babies than Asian, Latina/o, Native American, Middle Eastern, and Pacific Islander children (Woodward 2016:488). This study therefore supports the observations of both Mr. Hirsh and the NABSW.

The creation of MEPA-IEAP in 1994 was part of a broader shift in social policy away from social welfare services and family preservation towards punitive penalties and adoption (Roberts 2002:103). Therefore, As Roberts argued, “child welfare policy is cracking down on neglectful parents precisely at a time when welfare policy eliminated guaranteed support for poor children” (2002:103). This shift in federal policy is also reflective of the federal position on transracial adoption law (Roberts 2002:165).

Some scholars attribute the movement towards transracial adoption as a reflection of the adoption market and “white baby famine” (Roberts 2002:167) Dorothy Roberts identifies *Roe v. Wade*’s protection of a woman’s right to abortion and the diminished social stigma attached to single motherhood, as one of the reasons interest increased in transracial adoptions. She argues that this lead to the decrease of white babies available for adoption, lead to the current interest of white couples adopting transracially (2002:166).

MEPA-IEAP was framed as a congressional response to criticism and lobbying efforts that the widespread adoption agency practice of “race-matching” had increased the disproportionate amount of minority children in foster care. In 1989, the Child Welfare League of America found that minority children constituted 51% of those children waiting more than two years for adoption (Platt 1994). Advocacy groups like the National Coalition to End Racism in

America's Child Care System argue that transracial adoption solves the problem of a disproportionate amount of black children staying in foster care (Platt 1994).

Concurrently, with the MEPA-IEAP, the Adoption and Safe Families Act (ASFA) was passed by Congress in 1997. President Clinton signed the ASFA which created dramatic changes in the child welfare system. Advocates of the ASFA and the MEPA-IEAP gained support by focusing on cases where family preservation policies resulted in the severe harm or death of a child (Roberts 2002). Furthermore, ASFA offers financial federal incentives to states for having child welfare programs where adoption is the goal (Roberts 2002). The federal government pays states a bonus for foster child adoptions that exceed a yearly baseline²¹ of children adopted in the state (Roberts 2002). States receive 4,000 for each child adopted above the baseline and up to 6,000 for every special needs child (Roberts 2002).

Congressional Purpose and Intent

Congressional hearings are important forms of knowledge to investigate when studying the legal construction of race. It is through the process of legislation that social, political, and racial concepts are formally coded into law. Analyzing congressional hearings can provide a rich source of data that can be used to uncover congressional intent and the evidence that was used to form that intent. As Bill LaForge, a lobbyist who wrote a book called *Testifying Before*

Congress, states,

Although not a requirement, most important issues do receive a full vetting through the [congressional] hearings process. In fact, when a measure or amendment has not been the subject of a hearing, a typical ploy of its opponents, both in committee and on the floor, is to argue that the issue should not proceed or be approved because it was not considered in the hearings process. Thus, the congressional hearing is critical in most cases to the success of a committee as it shepherds a measure through the maze of the legislative process, and particularly as it lays the foundation

²¹ The baseline is the average annual amount of adoptions a year in the state (Roberts 2014).

for the committee's decision-making regarding the development of sound public policy (LaForge 2010).

The purpose of a hearing is to undertake a form of research and make a record of findings. The committee's primary goal is to gather accurate and timely information that can help guide policy (LaForge 2010).

For witnesses, testifying is an opportunity to educate congress and advocate for a chosen policy perspective. However, becoming a congressional witness is a very competitive process (LaForge 2010). Many influential people want to weigh in on policy issues including lobbyists, trade associations and corporations (LaForge 2010). Being invited to testify therefore has a lot to do with connections, credibility, and political stance. Therefore, it is more likely to have supporters of the policy or bill testify than critics. The witness-selection process varies from committee to committee, even sometimes from hearing to hearing (Roubein 2014). Each committee often governs itself (Roubein 2014).

Congress passed the MEPA and the IEAP because they concluded that too many children stayed in the child welfare system for long periods of time before they received permanent placements and that those lengthy waiting periods were not in the best interest of the child. Congress was also concerned about many adoption agencies' policies on race-matching that delayed children from being adopted by qualified parents. They noted that once Black children enter the foster care system, they remain there longer, are moved more often, and receive less beneficial placements than white children (House of Representatives 1995). Congress relied on testimony from Dale Robinson, an analyst in the social legislation and public welfare division, who testified to the following findings,

Minority children are disproportionately represented in the foster care population and in the numbers of children waiting for adoptive placement, representing over 50 percent of the children in both groups. Certain

children are also disproportionately represented in certain states and localities. Black children are 90 percent of the children in care in New York City [and] Hispanic children are 40 percent of the children in care in New Mexico (House of Representatives 1995:11).

Even though adoptions of minority children have increased in recent years, black children, in particular, tend to stay in foster care longer, and wait longer for adoptive placements than other children (House of Representatives 1995:11)²².

Ms. Robinson also testified to the general trends of foster care and child maltreatment. She found,

...children from families whose income was less than \$15,000 experienced more maltreatment and injury/impairment than did those from families with incomes greater than \$15,000. The overall rate of maltreatment was more than 5 times higher among lower income children who experienced maltreatment under the original definitions (House of Representatives 1995:24).

After laying out specific percentages of types of maltreatment by income category, less than \$15,000 a year and those that earn more than \$15,000 a year, Robinson concluded that “low income was a significant risk factor for child maltreatment...[and that her] findings indicate that family income is a potential predictor of child maltreatment and of maltreatment-related injuries/impairments by any set of definitional standards” (House of Representatives 1995:29).

²² According to one study in California, black children are less likely to be adopted or reunified and more likely to still be in care than children of other ethnicities. After 4 years in foster care, 41.2 percent of black children in California were still in care versus 17.2 percent of white children and 21.2 percent of Hispanic children. Moreover, 8 times as many black children remained in foster care after 4 years as were adopted (41.2 percent vs. 5.2 percent), four times as many Hispanic children remained in foster [care] as were adopted (21.2 percent vs. 5.9 percent) and only twice as many white children remained in foster care as were adopted (17.2 percent vs 8.9 percent). At the same time, adoptions of black children increased 92 percent in California in the last 5 years, and adoptions of Hispanic children by 80 percent (House of Representatives 1995:15).

Here, while this may seem like a solely class based argument, it comes at the tail end of a discussion of minority overrepresentation in the foster care system. As Dorothy Roberts points out it would be a mistake to obscure the system's racial origins and impact by focusing solely on economic inequality (Roberts 2002:97). Poverty and race are so interrelated in America that it makes little sense to try to separate them in bringing attention to the racial injustice of the child welfare system (Roberts 2014). Therefore, trying to isolate one source of inequality fails to capture the way institutional racism works (Roberts 2002:97).

This dangerous discussion of poverty and race without historical context or even a cursory analysis regarding the mechanisms influencing these numerical trends is exactly what Bonilla-Silva and Zuberi discuss in their book *White Logic, White Methods: Racism and Methodology* (Zuberi and Bonilla-Silva 2008). As Zuberi argues, current statistical methodologies continue to reflect the racist ideologies that gave rise to them during the Eugenics movement (Zuberi and Bonilla-Silva 2008). Many quantitative studies of racial differences fail to place race within a social context, which is always necessary because a population of races is a statistical concept based on a politically constructed measure²³ (Zuberi and Bonilla-Silva 2008). The misuse of statistical methods in the analysis of race is routinely demonstrated in social science journals and public research projects and has the potential to create devastating political and social impact (Zuberi and Bonilla-Silva 2008). The use of statistics in this way, which in this case has direct impact on the decisions Congress will make regarding the welfare of minority children, is dangerous. It is this use of data that helped propel the continuing pathologization of low-income Black families and the ideas surrounding the static ahistoric concept of race.

²³ Zuberi gives the example of race and test performance and argues that being an African American should not be understood as the cause of a student's performance on a test, despite the fact that being African American can be a very reliable basis for predicting test performance (Zuberi and Bonilla-Silva 2008).

There were also panels of experts including State of Michigan Department of Social Services employee Susan A. Kelly, Professor Richard Gelles, and Professor Peter J. Pecora who discussed the state of the field and research relating to foster care and specifically debated the effectiveness of permanency programs (House of Representatives 1995). During this panel, the influence of publicized cases clearly impacted some of the members of Congress. For example, Congressperson E. Clay Shaw Jr., Chair of the Subcommittee on Human Resources of the Committee on Ways and Means, asked the panel how long a foster placement should be allowed to proceed before a permanent decision is made (House of Representatives 1995). He cited a 1995 Florida case where Dr. Kathryn A. Reiter, a PhD in education absconded with her two-year old foster daughter, Baby J., after losing custody to her biological relatives (Navarro 1995). She returned three weeks later and faced up to five years in prison on a felony charge of concealing a child in violation of a court order (Navarro 1995). Shaw, however, framed this as a failure of the child welfare system and not individual behavior. He stated,

I think [this case] shows the tragedy of what happens when the State cannot move expeditiously in deciding the future of the child. This is not only played out in this particular case but we are seeing it in so many cases, where children are in foster care 5,6,7 years while the States are trying to either rehabilitate the parent or find a suitable relative, when that particular child could be a part of a family environment, could be adopted, and they are simply just not doing that (House of Representatives 1995:92).

Shaw uses this as an example to demonstrate why Congress must focus on the structure of foster care with the goal of permanency for foster children. However, he did not address the societal structural issues that caused Baby J. to be in foster care to begin with. For example, Baby J.'s biological mother was addicted to drugs, but there was no discussion of services or conditions surrounding addiction.

Family violence scholar, Professor Gelles, adamantly supported a faster adoption process. Specifically, he recommended a policy that was adopted in Rhode Island that treated uncured substance abuse for longer than 12 months as prima facie evidence for termination of parental rights (House of Representatives 1995). This is not surprising given that one of the “most effective rallying tools” in support of the ASFA was his book titled *The Book of David: How Preserving Families Can Cost Children’s Lives*, where he argues that preserving families and protecting children are two contradictory goals (Roberts 2002:107).

Another panelist²⁴ in support of faster pathways to adoption, Carol Statuto Bevan, Vice President of Research and Public Policy at the National Council for Adoption, asked,

What is the prevailing ideology here? The prevailing ideology is the mystique of the blood tie. The “romanticizing of biology” that assumes that the only ties that bind are blood ties....it is this ideal of blood ties, this ideology that keeps children in foster care for years while exhaustive efforts are made to fix the family (House of Representatives 1995:130).

Bevan goes on to argue that adoption services should be as aggressively and enthusiastically pursued as family reunification services (House of Representatives 1995). She also suggested that after 12 months of reunification services, the placement plan should automatically be changed to adoption (House of Representatives 1995:130)

Judge William D. Maddux, a Supervising Judge in Pretrial Mediation in Cook County, argued that judges should be given more deference and flexibility to terminate parental rights

²⁴ This was the second panel of the hearing and included Jean S. Price, Vice President of Social services Children’s Home society of Florida and Chairman of the national advisory committee on Adoption, child welfare league of America, Albert J. Solnit the senior research scientists at Yale University child study center, and commissioner of the Connecticut department of mental health, Nicholas Zill, PhD vice president and direct of child and family studies, Carol Statuto Bevan, Vice President of Research and Public Policy, National Council for Adoption, and Judge William D. Maddux, a Supervising Judge in Pretrial Mediation in Cook County (House of Representatives 1995).

(House of Representatives 1995). He gives the example of a drug addicted mother who fails drug rehabilitation services multiple times but under certain state rules can continue services. The Judge argues that this state rule is detrimental to the child who might have been adoptable earlier in the process but may not be adoptable by the end (House of Representatives 1995).

The only person on this panel that disagreed with the goal of permanency and faster termination of parental rights was panelist Susan Kelly, Director of the Division of Family Preservation Services in the Office of Youth Services in Lansing Michigan. She advocated for the preservation of the family and stated,

Removing risks, instead of removing children is our imperative. It makes good public policy to keep children and families together safely, whenever it is possible. The high human cost of separating families has long-term consequences that are difficult to repair. We all know, and I think all agree, that government does not make a good parent. Fostering situations will always be a necessity for some children, but the use of substitute families, even for the shortest time, must be a last resort, not a first resort (House of Representatives 1995:44).

Family reunification plans were often framed in opposition to adoption plans, and the majority of experts that testified were in favor of legislation that allowed for more adoptions in less time. This is also due to the nature of congressional hearings; Therefore, it is not surprising that MEPA-IEAP was supported given this expert testimony.

Furthermore, when discussions surrounding the “root of the problem” did come up, they were discussed primarily as failings of morality and spirituality(House of Representatives 1995).

For example, Congressman John Ensign claimed,

...if we actually are looking at root causes for what we are dealing with here, I think that we are dealing with the moral and spiritual underpinnings in the decay that we have seen in this country, because we don't value life, we don't value life when you are old, we don't value life when you are young, when you are unborn, and I think there are those underpinnings. And then with the violence that we see on television, people are what they are in a lot of ways because of what goes into their mind. And if we think

that what they see on television and in the movies doesn't affect them, I don't care what scientific research somebody says, causal effects, I don't see how it can't influence children and then enter their adulthood. And so when we are looking at root causes, it seems like to me that we are dealing with the whole picture.

Certainly, economics plays a part of that. But also the moral decay that we have had in the last 30 to 40 years in our country, I would think that has contributed greatly. And it would also seem to me that if we are serious about these problems in our country, that we need to address those as well, instead of just trying to throw some money at it at the end of the problem, and in social services and everything, that those need to be some moral underpinnings that we need to reestablish in this country (House of Representatives 1995:89–90).

Here, Congressman Ensign uses the amorphous concepts of morality and spirituality, to explain the increasing numbers of children in foster care. This conversation is in part referring to a social welfare bill that did not pass. His disregard of scientific research, economic resources, and social services as potential solutions to this problem is evidence of the covert racialized discourses embedded in creation of legislation and the resulting pathologization of young unwed minority mothers.

While ICWA considers the interest of federally recognized tribes, the MEPA-IEAP does not consider the interests of any other minority group with a history of discrimination. However, there has been a history of different community organizers trying to pass legislation that would recognize child welfare abuses and the rights of the racial or ethnic group. For example, when state assembly leader Connie Howard called for a state subcommittee on DCFS reform hearing in Chicago, more than 100 parents and community activists attended to discuss their experiences with racial discrimination (Roberts 2002:70). This hearing lasted 17 hours and many demands were made (Roberts 2002:70). For example, Reverend Sampson demanded a one year moratorium on sending black children out of state and to other distant predominately

white areas (Roberts 2002:70). Connie Howard introduced House Bill 1913, “The African American Child Welfare Act” which sought to give African American children the same protections as Indian children are given under ICWA (Roberts 2002:70).

While ICWA governs Native American children, every other child is governed by The Multiethnic Placement Act and its amendment within the Interethnic Adoption Provisions. This legislation started after several pieces of federal legislation was passed in the 1980s that allowed for earlier termination of parental rights. This meant more children were available for adoption. The Adoption Assistance and Child Welfare Act allowed federal funds to cover state-subsidized adoption payments (Nickman et al. 2005). The Adoption and Safe Families Act and the Promoting Safe and Stable Families Amendments increased the number of “non-traditional” adoptions, affecting families that were not considered a nuclear family and adoptions of older children (Nickman et al. 2005).

In 1994, the Howard M. Metzenbaum Multiethnic Placement Act (MEPA) was passed making it easier for transracial adoptions to occur. This legislation, along with other federal legislation, such as the Interethnic Adoption Provisions and the Adoption and Safe Families Act of 1996, aimed to reduce the length of time it took for children to be adopted. It also sought to prevent discrimination in the placement of children in foster care or adoption on the basis of race, color, or national origin (Frasch and Brooks 2003)²⁵. In 1996, the MEPA was

²⁵ A person or government that is involved in adoption or foster care placement may not

1. Deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child involved; or
2. Delay or deny the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved.

The purpose of MEPA/IEAP is to promote the best interest of children by:

1. Decreasing the length of time that children wait to be adopted.
2. Preventing discrimination in the placement of children on the basis of race, color, or

amended by the provisions for Removal of Barriers to Interethnic Adoption (IEAP) included in the Small Business Job Protection Act. The amendments removed potentially misleading language in MEPA's original provisions and clarified that "discrimination is not to be tolerated," whether directed at children in need of appropriate, safe homes, at prospective parents, or at previously "underutilized" communities who could provide resources for placing children (Papke 2014). The IEAP also strengthened compliance and enforcement procedures, including the withholding of federal funds²⁶ and the right of any aggrieved individual to seek relief in federal court against a state or other entity alleged to be in violation of the Act. The Small Business Job Protections Act (SBJPA) makes clear that adoption agencies can no longer use race to delay or deny adoptive placement. Furthermore, the Multiethnic Placement Act should be viewed in conjunction with Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits recipients of Federal financial assistance from discriminating based on race, color, or national origin in their programs and activities (Roberts 2002).

This means that adoption agencies can no longer assume that race, ethnicity, or culture are important factors in every case and cannot make racial consideration a general practice that applies to all children. Instead agencies that receive federal funds can only consider race if the agency made an individual determination that the facts and circumstances of a particular case require it (Griffith and Bergeron 2006).

-
- national origin; and
3. Facilitating the identification and recruitment of foster and adoptive families that can meet children's needs.

²⁶ The amendment even contained an enforcement provision that stated that any federally funded state program and private program receiving federal funds that violated the IEAA would have their funding reduced by two percent for the first violation, three percent for the second violation, and five percent for the third and each subsequent violation during any fiscal year (Papke, 2013, 77)

However, *judges* may use race as one of many factors when considering the best interest of the child standard (Bartholet 2006). Griffith and Bergeron argue that the MEPA-IEAP may still leave the door open to continued race-matching, which further demonstrates the preference for the construction of same race families in the United States (2006). This Act also leaves open whether agencies can deny placement because the prospective adoptive parents lack sufficient racial or cultural sensitivity.²⁷

So, what did this act actually accomplish? The answer to this question is debatable. Adoptive parents can still have a racial preference for whom they choose to adopt, and biological parents can still have a racial preference for whom they give their child to. However, the extent to which agencies can consider the culture, ethnicity, or racial background of the child, as one of many factors, is highly contested. On one side of the debate, scholars argue that the MEPA-IEAP is designed to combat cultural stereotypes and provides clear directions to eliminate any regular consideration of race in foster and adoptive placements (Bartholet 2006). Bartholet provides evidence that the U.S Department of Health and Human Services (DHHS) has been enforcing this interpretation on adoption agencies (2006).

On the other side of the debate, legal scholars argue that there is ambiguity regarding the role race should play in adoption proceedings (Griffith and Bergeron 2006). Constitutionally,

²⁷ § 1996b. Interethnic adoption

(1) Prohibited conduct- A person or government that is involved in adoption or foster care placements may not--

(A) Deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) Delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

(2) Enforcement- Noncompliance with paragraph (1) is deemed a violation of title VI of the Civil Rights Act of 1964 [[42 U.S.C.A. § 2000d et seq.](#)]. No effect on the Indian Child Welfare Act of 1978 -This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978 [[25 U.S.C.A. § 1901 et seq.](#)].

laws and practices that make distinctions based on race are “inherently suspect” and subject to a strict scrutiny analysis. To pass this level of scrutiny, the law must be narrowly tailored to meet a compelling state interest, which arguably can be met because racial consideration is protecting the best interest of the child (Griffith and Bergeron 2006).

Case Law

To date, the U.S. Supreme Court has not decided a case that addresses the MEPA-IEAP. However, there have been many trial level cases and federal class actions that accused state child welfare services of discrimination. For example, Baby T. was a highly-publicized case in Chicago that involved the custody of an African American infant named Travis²⁸. The Illinois Department of Child and Family Services (DCFS) took custody of Tina Olson’s son Travis from the hospital when he tested positive for cocaine exposure (Roberts 2002). They placed him in the care of a powerful and legally connected white family, Alderman Edward Burke and Appellate Court Judge Anne Burke.

Three years later, Olson was drug-free, employed, and had completed the classes required by the reunification plan (Roberts 2002). When Olson attempted to regain custody of Travis, DCFS decided to plan for permanent placement. DCFS then petitioned to terminate Olson’s parental rights in order to move forward with the adoption of Baby T. (Roberts 2002). The case was transferred to Judge Judith Brawka in Kane County, due to the potential influence Judge Burke may have in her own jurisdiction of Cook County (Roberts 2002). After a 19-day trial, Judge Brawka did not terminate Olson’s rights but decided that she also could not regain custody of him (Roberts 2002). Baby T continued to live with the Burke’s

²⁸ This case is not in my sample because the proceedings all took place at the trial level. While this case was regularly in the media and later written about in academic texts, none of the sources I found cited any court documents.

with court-monitored visitation with his mother (Roberts 2002). This case received constant media attention not just because of the political status of the Burkes but also because of race. Shoshana Felman argues that there is a relationship between law, trials, and trauma, specifically the repeated use of law as a tool to cope with “traumatic legacies” and “collective injuries” that are left over (Felman 2002:2). While the law tries to contain this trauma and translate it into legally conscious terminology, it instead ends up recreating it (Felman 2002). She further explains that despite its “conscious frames and rational foundations, the law is quite conspicuously and remarkably its own structural (professional) unconscious” that reflects trauma experienced in society and enacted through trials (Felman 2002:5). In the Baby T. trial, the trauma is two-fold: the trauma from the inability to achieve or practice the role of parenthood, a role that is upheld as one of the most important and intimate experiences in life, and the trauma from the impact of racial stereotyping and institutional discrimination on Black communities.

During the Baby T. trial, many members of the Black community supported Olison and voiced their own anger surrounding the racial bias in the system. For example, Reverend Al Sampson went on a forty-day fast outside the office of Alderman Burke who at the time had custody of Baby T (Roberts 2002). Reverend Anthony Williams claimed that DCFS was “the new slave master” and related these discriminatory practices to a “type of holocaust” at a gathering where there was media present (Roberts 2002:69).

Several grassroots organizations formed around these types of cases as well. One such group was called Operation MOSES or Mothers Organizing Systems for Equal Services and another was Grandparents helping Grandparents (Roberts 2002). These organizations were started by Black women who had their children or grandchildren removed from their custody

and placed with white families.

Additionally, In July 1999, Black families filed a federal suit against DCFS, then Illinois Governor George Ryan and other state officials on behalf of all African American parents and children involved in the Cook County juvenile court system. *Olison v. Ryan* argues that Black families have suffered systematic deprivation of their constitutional and civil rights as a direct result of the discriminatory practices of DCFS²⁹ (Roberts 2002:71).

Interpretations of Race in MEPA-IEAP

Here, the MEPA-IEAP arguably has a race-conscious focus in that it was created to decrease the time that minority children spend in state care. The finding that disproportionate numbers of minority children spend more time in foster care and are less likely to find permanent placements than their white counterparts was a catalyst for the MEPA and its amendment the IEAP. Additionally, this legislation does acknowledge that race can and in some cases *should* be a factor if the specific facts of a case call for it.

However, while the MEPA-IEAP does leave room to consider race, there has been a legislative narrowing of racial consideration away from a “race conscious” approach and towards an individualized “formal race” approach to adoption (Gotanda 1991). The congressional documents demonstrate that the subcommittee members did not consider or discuss historical context or the importance of cultural diversity and community when making their decision. The evidence considered predominately included scientific reports based on

²⁹ The majority of claims in this case were dismissed on summary judgement. The only remaining aspect of this case that continued was the official capacity Section 1983 claim (a civil suit for deprivation of rights) against the County Olison v. Governor Ryan, No. 99 C 4384, 2000 WL 1263597, at *8 (N.D. Ill. Sept. 5, 2000).

statistical methods and sensationalized cases. How judges determine when to use race and how to use race as a factor in the best interest of the child analysis can tell us which concepts of race are being used in practice.

Legal scholars like Professor Elizabeth Bartholet strongly support the MEPA-IEAP's colorblind approach. She argues that children "do not belong to their racial groups of origin and that children's interests are served by placement in the earliest available nurturing permanent homes, regardless of color" (Bartholet 2014:1). She even goes so far as to argue that the ICWA should not treat children as resources belonging to Indian Tribes and that "MEPA should be seen as the model for the adoption of American Indian children and children abroad" (Bartholet 2014:1).

Religious leaders have also participated in this debate. While many religious leaders like Reverend Al Sampson and Reverend Anthony Williams have been involved in the protests against discrimination in black communities, other religious leaders like Russell Moore, the president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, asserts in a *New York Times* Op Ed that "there is no place for racist bigotry and identity politics in solving this crisis" (Moore 2014:1). While Moore admits that we do not live in a post-racial or colorblind society, he also asks "can any of us honestly suggest that it would be better for a child to remain in this bureaucratic limbo than to be a son or daughter to loving parents whose skin is paler or darker than his or her own?" (Moore 2014:1). Here, like the MEPA-IEAP, Moore defines race by phenotypical attributes, specifically skin tone. He recognizes the existence of bigotry and racial hatred, but he posits that skin color should not determine whether a child finds a home. His reasoning ignores the cultural and historical context surrounding transracial adoption and uses a biological and colorblind approach to

support his argument.

In a 2014 *New York Times* Op Ed, J. Toni Oliver, the vice president of the NABSW, explained that many media sources misinterpreted and sensationalized their 1972 recommendations. The media outlets assumed that their position was that Black children should remain in foster care rather than be placed with White parents (Oliver 2014). Oliver clarifies that the NABSW recommends that children be placed with relatives when remaining with their biological parents is not the best option (Oliver 2014:1). The NABSW recognized and opposed the adoption agency practices that explicitly or implicitly screen out black families who want to be adoptive parents (Oliver 2014:1). In reference to transracial adoption she states,

We believe that families considering interracial adoption should be prepared by their agencies to understand the pervasive impact of race on achievement, self-esteem, self-concept and mental health. Adoptive parents of black children should recognize and combat the pervasiveness of institutional and individual racism. They should ensure that black children are connected to appropriate black role models, and are not racially isolated.

The National Association of Black Social Workers fights for the best interests of all black children and black families. We continue to affirm and recommend home-based services, reunification with birth families, kinship care, nondiscriminatory adoption services and – when deemed appropriate – transracial adoption (Oliver 2014:1).

Scholars like Law Professor Dorothy Roberts make arguments that are similar to those used in the ICWA and by the NABSW (2002). She finds that caseworkers often use white middle-class standards to determine whether a child has been neglected (Roberts 2002). She asserts that much of the public and legal debate has focused too much on transracial adoption and failed to examine why Black children are removed from their parents at such alarming rates and what the resulting consequences are for black families and communities (Roberts 2002). She further points out that this is because the child welfare system views childhood

poverty as the result of individual parental failure rather than as a result of structural inequality and deficit (Roberts 2002). Instead of focusing on the structural issues, political and legal actors have tried to solve racial disparities in foster care through faster termination of parental rights procedures and more adoptions (Roberts 2002).

According to a series of congressionally mandated assessments of child abuse, “the National Incident Studies,” there is no statistically significant difference in maltreatment rates between Black and White families, but African American children are removed from their families and placed in foster care at a rate more than two times greater than the proportion they represent in the U.S. child population (Evan B. Donaldson Adoption Institute 2008:11; Roberts 2002). In 2006, African American children represented 15% of the U.S. child population but 32% of the 210,000 children in foster care (Evan B. Donaldson Adoption Institute 2008:5; Roberts 2002). Law Professor Twila Perry states in the same *New York Times* Op Ed,

In the discourse favoring pro-transracial adoption in the context of foster care, black families and especially black mothers are often stereotyped and denigrated, while whites who seek to adopt black children are valorized. The image of a crying black child being torn from the arms of “good” white foster parents to be returned to a “bad” black mother has too often been the weapon of choice of transracial adoption advocates. Promoting this kind of image is easier than confronting the question of how best to help struggling, impoverished families (Perry 2014:1)

Roberts and Perry focus on the political role of transracial adoption and the child welfare system in America, a role they argue, that is often obscured by a focus on the rescue of individual children from neglectful parents (Perry 2014; Roberts 2002:ix). While Roberts claims that transracial adoption is distracting from the real issue of racial inequality and discrimination, I argue that transracial adoption instead illuminates it. By comparing and contrasting ICWA and MEPA-IEAP legislation and case law, I am able observe the reification

and reconceptualization of racial categories and the legal decisions that accompany them. Thus, I can evaluate the claims made by the NABSW (1972) and Woodward (2016) using a different data source. As Twila Perry notes, “race matters in adoption because race matters in America” (Perry 2014).

Conclusion

The political and legislative history behind ICWA and MEPA-IEAP cases demonstrates the hierarchical character of race. Colorblind advocates deny the hierarchical history, and use of race, while advocating for the continuance and strict interpretation of the MEPA-IEAP. On the other hand, those who advocate for ICWA emphasize the stratified nature of race. Pre-1970s white supremacy was implemented through unlawful adoptions and forced attendance in boarding schools. Post-1970s this demonstration of racial dominance comes in the form of welfare reform, mass incarceration, the abandonment of family reunification policies, and in some cases, adoption.

The ICWA and the MEPA-IEAP have many different procedural requirements that are demonstrated in legislation, guidelines, and congressional documents. While the tribal membership requirements are primarily based on biological definitions of race, the language used in ICWA also demonstrates the “historical” and “cultural” conceptions of race (Gotanda 1991). In the ICWA congressional hearings, experts focused on statistical data but also focused on the structural conditions of tribal communities. During the ICWA hearing, the U.S. Senate heard about the discriminatory and unlawful practices of social workers from the parents themselves, thereby giving often marginalized persons a chance to be heard directly. This utilization of historical and cultural understandings of race allowed for the creation of ICWA to act as a legal remedy for the discriminatory policies enforced by state child welfare services.

On the other hand, the congressional documents related to the creation of the MEPA-IEAP described race as a static ahistorical category. In this congressional hearing, the expert panels focused mostly on quantitative data and testimony from social work and psychology experts related to average times spent in foster care and the percentage of children adopted out. There was very little discussion surrounding the challenges facing minority communities that might lead to the removal of minority children from their home. Similarly, there were no studies completed or discussions of the discriminatory practices of social workers or the racial hierarchy trends in adoption markets. Finally, the subcommittee did not hear from any individual parents that were negatively impacted by these laws and policies.

Therefore, most of the MEPA-IEAP congressional subcommittee members understood the problems within foster care as disconnected to socio-economic inequality, as a “formal-race” approach suggests, and were instead caused by individual failures and poor life choices. Therefore, the individuals who made these poor choices should not be given too much time to seek services before their parental rights were terminated. When race was discussed explicitly, it was understood as an objective attribute that was unfortunately overrepresented in the foster care system. As Congressperson Charles B. Rangel, the one of two visible minorities on the committee, stated in the MEPA-IEAP congressional hearing, “when people are colorblind, sometimes they don’t recognize the problem; therefore they can’t come up with a solution” (House of Representatives 1995:86). Only by examining the role that race plays in transracial adoption case law can we understand how this discourse impacts the processes of racial construction and the creation of legally sanctioned families.

CHAPTER 4: CULTURE'S DNA: RACE, CULTURE, AND JUDICIAL DISCOURSE IN ICWA CASES

Quantitative Findings

In this sample of cases there were 71 ICWA cases and therefore at least 71 Native American children who were eligible for tribal membership through a federally recognized tribe³⁰. This sample of cases indicates that in 85% (n=59) of ICWA cases, Native American children were placed in homes where the guardian was a different race.

As Table 5 further demonstrates, in ICWA cases, 68% of non-native parents gained custody of Indian children. Native Americans who were not members of the same tribe or a federally recognized tribe gained custody of the "Indian child" 9% (n=6) of the time as did White parents 9% (n=6). Native American parents who were members of the same federally recognized tribe were granted custody in 11% (n=8) of the cases, however this is likely an underestimate, as I removed cases that had no potential for transracial adoptions. These patterns not only demonstrate a movement towards transracial adoption, but strong trend towards non-native individuals adopting native-children.

³⁰ One child was categorized as bi-racial even though the child was eligible for tribal membership

Table 4. ICWA Case Characteristics		
	Percent (%)	Cases (n)
Parties involved in the case		
Unrelated adoptive parent v. unrelated adoptive parent	9	6
Unrelated adoptive parent v. government agency	1	1
Unrelated adoptive parent v. tribe	6	4
Unrelated adoptive parent v. biological parent	32	23
Unrelated adoptive parent v. foster parent	1	1
Unrelated adoptive parent v. related adoptive parent	31	22
Related adoptive parent v. foster parent	0	0
Biological parent v. government agency	3	2
Biological parent v. related adoptive parent	9	6
Tribe vs. governmental agency/foster parent	3	2
Related adoptive parent vs. related adoptive parent	3	2
Biological parent vs. biological parent	1	1
Biological Parent vs. foster parent	0	0
Case Outcome [Who gets custody]		
Tribe	1	1
Stepparent	3	2
Unrelated adoptive parent	73	52
State	1	1
Biological father	3	2
Pending state court decision	3	2
Biological mother	1	1
Related adoptive parent	10	7
Foster parent	4	3
Note: This sample is not weighted and may not add up to 100% due to rounding Source: LexisNexis and Westlaw. Retrieved January 1997-December 2016		

Table 5: ICWA Race Characteristics		
	Percent (%)	Cases (n)
Race of Party that Won Custody		
Black/African American/African	0	0
Hispanic/Latino	0	0
White/Caucasian/Anglo-Saxton/European	9	6
Native American/Indian- Federally Recognized Tribe	12	8
Native American/Indian –No Federally Recognized Tribe	9	6
Non-Indian/Non-Native	71	48
Biracial/Mixed-Race/Multiracial	0	0
Asian (Filipino/Chinese/Cambodian)	0	0
Middle Eastern	0	0
No Race Given/Missing	0	0
Race of the Child		
Black/African American/African	0	0
Hispanic/Latino	0	0
White/Caucasian/Anglo-Saxton/European	0	0
Native-American/Indian-Federally Recognized Tribe	99	70
Native-American/Indian-No Federally Recognized Tribe	0	0
Non-Indian/Non-Native	0	0
Biracial/Mixed-Race	1	1
Asian (Filipino/Chinese/Cambodian)	0	0
Middle Eastern	0	0
No Race Given/Missing	0	0
Difference in Race between Child and Custody-Winner		
Yes	85	59
No	13	9
Missing	0	0
<p>Note: This sample is not weighted and may not add up to 100% due to rounding Source: LexisNexis and Westlaw. Retrieved January 1997-December 2016</p>		

Qualitative Findings

Based on this sample of cases, I discovered two main patterns of judicial racial analysis. The first involves the biological definitions of race through blood quantum and lineage and the second is through evaluations of cultural competency.

I find that even though tribes are entitled to develop their own definitions of membership, the courts often thwart that effort by failing to provide proper notification, or deciding that there is a constitutional reason that ICWA should not apply called the EIF exception. Courts may also find good cause to disregard ICWA mandates through well-being determinations and bonding evaluations. I also find, that the court evaluates the parties involved in the case in three main ways; through the cultural activities of the biological parent; through the contact with Native prospective adoptive parents; and through cultural literacy and tribal contact evaluations for non-native prospective adoptive parents.

Definitions of race

Despite ICWA's legislative purpose, race is often treated as an immutable, ahistorical description reflecting skin color and tone, blood quantum, and ancestral identity by the courts. The majority of ICWA cases in this sample identified the child's racial category without any explanation; but through further analysis it became evident that race was often defined and understood biologically.

Blood quantum is discussed frequently in ICWA cases where the Native American child is bi or multiracial. However, the racial or cultural identity of a biracial child is hardly discussed if they are eligible for membership. If the child does qualify for membership they are deemed solely an "Indian child" under ICWA. If the child does not qualify for tribal membership, then rarely is race, culture, or ethnicity discussed within the legal context again.

Children are treated only as "Indian" under the law if they qualify for federally recognized tribal membership and therefore their placement is under the discretion of the tribe. ICWA is only triggered when the child is labeled an "Indian child". Therefore, the political and I

argue in chapter 6 racial, classification of the child based on biological parental lineage is always determined or referenced at the beginning of ICWA cases in this sample. For example,

Baby Boy C. was born in California on March 22, 2004 to Rita C and her boyfriend Justin W. Rita is one half Native American Indian and is a registered member of the Tohono O’odham Nation tribe. Justin is Caucasian and Jewish (In re Adoption of Baby Boy C., 5 Misc.3d at 37).

However, using a blood quantum evaluation can be very arbitrary and can be based on very small fractions of “tribal blood.” In the case *in re Santos Y.* the court specifically discusses the tribal membership criteria of the Chippewa Indian Tribe, the court wrote,

The Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota (*Chippewa Constitution or Const.*) states that the Tribe consists of Chippewa Indians of the White Earth, Leech Lake, Fond du Lac, Bois Forte, and Grand Portage Reservations, and the Nonremoval Mille Lac Band of Chippewa Indians. Membership in the Chippewa Tribe is determined by Tribal “blood.” The Chippewa Constitution provides, in relevant part, that all children of at least one-quarter degree Minnesota Chippewa Indian blood born to a member after July 3, 1961, are eligible for membership, provided application takes place within a year of birth. (Chippewa Const., art. I, § 1(c).) The Constitution also provides for admission to the Tribe of a “person of Minnesota Chippewa Indian blood” who meets the membership requirements, but has not been enrolled due to some error. (Chippewa Const., art. I, § 3.) Thus, the time limits in which a member may be enrolled are not necessarily binding, but the membership requirement of “at least one quarter (¼) degree Minnesota Chippewa Indian blood” is inviolate. The Constitution does not allow adopted children of Tribe members to qualify for membership in the Tribe. A minimum of one-quarter Minnesota Chippewa Indian blood is, thus, the determining factor for membership in the Tribe. The Tribe deems the Minor eligible for enrollment. (*In re Santos Y.*, 92 Cal.App.4th at 698).

Here, the court analyzed the Chippewa constitution in order to argue that ICWA was unconstitutional because membership was based only on genetic or blood ties.

In this sample, there was only one case out of 71 ICWA cases where the child was a member of a federally recognized tribe and he was referred to as biracial (African American and

native Indian). In 99% (n=70) of ICWA cases, once the child was considered eligible for tribal membership, they were only referred to as an “Indian child.” This pattern demonstrates the pervasiveness and rigidity of race as well as its complex relationship to political status. While, only 17% (n=12) of cases in my sample had explicit discussions about blood quantum fractions, the other cases frequently referenced the previous determinations. Many courts conduct a separate hearing just to determine potential tribal membership eligibility. When this occurs, the court will usually reference the fact that the child has already been determined an “Indian child” under ICWA. However, these biological notions of race though blood quantum rules have been challenged recently by cultural understandings of race.

Evaluations of cultural competency

Cultural competency is a predominant theme and debate when discussing transracial adoption. Much of the research on transracial adoption focuses on the cultural authenticity of the transracially adopted children both in ICWA cases and in MEPA-IEAP cases. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified:

One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child. (*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29).

One procedural way cultural competency is evaluated, is through the EIF exception. This cultural competency evaluation is what I, in Chapter 6, define as either a “cultural authenticity” evaluation or an evaluation of “cultural contacts”. When the prospective adoptive family is of a

different race than the child, the court evaluates the prospective adoptive parent's knowledge, friend groups, neighborhood, and plans to provide the child with enough cultural contacts to overcome their lack of sharing the same racial identification. By analyzing these cases, I am able to uncover some of the judicial processes of race-making. In the next section, the court evaluates different levels of cultural knowledge, literacy and engagement.

Cultural engagement & expectations of biological parents: EIF exception

The concept of cultural competency is especially salient when discussing the *Existing Indian Family Exception*. This exception allows States to challenge the reach of ICWA based on the cultural authenticity of the Native American biological parent/s. For example, in the 1996 California Appellate case, *In re Bridget R*, the California court concluded that ICWA did not apply to the voluntary adoptive placement of a child of Indian lineage unless the child is part of an "Existing Indian Family" in which one or both of the parents have a "significant social, cultural, or political relationship" with the federally recognized tribe *In re Bridget R.*, 41 Cal.App.4th at 1491. The court reasoned that its interest in interfering with an adoptive placement of a child who was never part of an existing Indian family is clearly not compelling because a threat to a child's equal protection rights arises when a tribe stakes a claim to children solely on the basis of one component of their genetic makeup (*In re Bridget R.*, 41 Cal.App.4th). It is also an unwarranted burden on children's substantive due process rights (Meeter, 2004). This is a state-made exception to tribal membership rules that forces Native American biological parents to demonstrate not only their tribal enrollment or tribal membership eligibility but also their cultural authenticity level. Therefore, this exception has two requirements: the first is still a biologically based requirement mandated by the tribe and the second is a judicial requirement that requires a showing of cultural participation and networks.

In 2005, at least 14 states rejected the Existing Indian Family (EIF) exception by statute or case law.³¹ Only 7 jurisdictions have adopted it, but subsequent rulings in Alabama and Indiana have cast doubts on its continued viability³². Five of the six districts of the California Court of Appeal that have considered the EIF exception have been split on the subject. Although the California Legislature has eliminated the EIF exception by statute (Cal Welf & Inst Code § 360.6; Cal Rules Ct rule 1439), the constitutional rulings in the Second and Fourth Districts render the state statutory enactments constitutionally suspect in those courts (*Baby Boy C. v. Tohono O'odham Nation*, 27 A.D.3d 34, 47 (N.Y. App. Div. 1st Dep't 2005)). Thus, currently, the EIF exception is still utilized by the court.

³¹ Alaska, *Matter of Adoption of T.N.F.*, 781 P2d 973 [1989], cert denied sub nom. *Jasso v Finney*, 494 US 1030, 110 S Ct 1480, 108 L Ed 2d 616 [1990]; Arizona, *Michael J., Jr. v Michael J., Sr.*, 198 Ariz 154, 7 P3d 960 [2000]; Idaho, *Matter of Baby Boy Doe*, 123 Idaho 464, 849 P2d 925 [1993], cert denied sub nom. *Swenson v Oglala Sioux Tribe*, 510 US 860, 114 S Ct 173, 126 L Ed 2d 133 [1993]; Illinois, *In re Adoption of S.S.*, 252 Ill App 3d 33, 622 NE2d 832, 190 Ill Dec 802 [2d Dist 1993], revd on other grounds 167 Ill 2d 250, 657 NE2d 935, 212 Ill Dec 590 [1995]; Iowa, *In re R.E.K.F.*, 698 NW2d 147 [2005] and Iowa Code § 232B.5[2]; Michigan, *In re Elliott*, 218 Mich App 196, 554 NW2d 32 [1996]; Montana, *Matter of the Adoption of Riffle*, 277 Mont 388, 922 P.2d 510 [1996]; New Jersey, *Matter of Adoption of a Child of Indian Heritage*, 111 NJ 155, 543 A2d 925 [1988]; North Dakota, *In re A.B.*, 2003 ND 98, 663 NW2d 625 [2003], cert denied sub nom. *Hoots v K.B.*, 541 US 972, 124 S Ct 1875, 158 L Ed 2d 466 [2004]; Oklahoma, *Matter of Baby Boy L.*, 2004 OK 93, 103 P3d 1099 [2004] and Okla Stat Ann, tit 10 §§ 40.1, 40.3; Oregon, *Quinn v Walters*, 117 Or App 579, 845 P2d 206 [1993], revd on other grounds 320 Or 233, 881 P2d 795 [1994]; South Dakota, *Matter of Adoption of Baade*, 462 NW2d 485 [1990]; Utah, *State in Interest of D.A.C.*, 933 P2d 993 [1997]; Washington, Wash Rev Code § 13.34.040 [3]; § 26.10.034 [1]; § 26.33.040 [1] *Baby Boy C. v. Tohono O'odham Nation*, 27 A.D.3d 34, 47 (N.Y. App. Div. 1st Dep't 2005).

³² Alabama, *S.A. v E.J.P.*, 571 So 2d 1187 [Ct Civ App 1990]; Indiana, *Matter of Adoption of T.R.M.*, 525 NE2d 298 [1988], cert denied sub nom. *J.Q. v D.R.L.*, 490 US 1069, 109 S Ct 2072, 104 L Ed 2d 636 [1989]; Kansas, *Matter of Baby Boy L.*, 231 Kan 199, 643 P2d 168 [1982]; Kentucky, *Rye v Weasel*, 934 SW2d 257, 43 12 Ky L Summary 23 [1996]; Louisiana, *Hampton v J.A.L.*, 658 So 2d 331 [Ct App 2d Cir 1995], cert denied 662 So 2d 478 [1995], cert denied 517 US 1158, 116 S Ct 1549, 134 L Ed 2d 651 [1996]; Missouri, *In Interest of S.A.M.*, 703 SW2d 603 [Ct App 1986]; Tennessee, *In re Morgan*, 1997 WL 716880, 1997 Tenn App LEXIS 818 [Ct App 1997]; (see *S.H. v Calhoun County Dept. of Human Resources*, 798 So 2d 684 [Ala Ct Civ App 2001]; *Matter of D.S.*, 577 NE2d 572 [Ind 1991]). *Baby Boy C. v. Tohono O'odham Nation*, 27 A.D.3d 34, 47 (N.Y. App. Div. 1st Dep't 2005)

In the case *in re Santos Y.*, the court applied the EIF exception and found that the application of ICWA in this case was unconstitutional. Specifically, the Court of Appeal in this case made the following findings,

The Minor is multi-ethnic. His association with the Minnesota Chippewa Tribe is as a person of “one-quarter Chippewa Indian blood” and as the biological child of his Mother....The Mother was enrolled in the Tribe as a child. She has lived her adult life in Oregon and California. Her only relatives known to be associated with the Tribe are a first cousin, JoAnne B., and a third cousin, Jacki K., the Band’s prospective adoptive mother for the Minor. The record contains no indication that the Mother had ever met JoAnne B. or Jacki K. The Mother’s closest relatives—her husband, daughter, half-sister, and maternal grandparents—live in the Los Angeles area.

The Minor’s sole connection with the Tribe is a one-quarter “Minnesota Chippewa Tribe” genetic contribution from an enrolled bloodline, and enrollment based on that genetic contribution. While placing the Minor for adoption on the Grand Portage Reservation would, in the most attenuated sense, promote the stability and security of the Tribe by providing one more individual to carry on Minnesota Chippewa cultural traditions, we find the “repatriation” to the Reservation of a child of assimilated parents, solely because of the child’s one-quarter Minnesota Chippewa Tribe genetic heritage, to be a constitutionally impermissible application of the statute.... the “child has no association with the tribe other than genetics, i.e. his one-quarter Minnesota Chippewa blood” from an enrolled bloodline of the tribe. Whether we characterize this genetic association as racial, ethnic, or ancestry, a determination based on “blood,” on its face invokes strict scrutiny to determine whether the classification serves a compelling governmental interest and is narrowly tailored to achieve that interest. We find that it does not (*In re Santos Y.*, 92 Cal.App.4th at 723).

In this case, the court identifies Santos Y. as multi-ethnic (meaning one half Hispanic) as a tool to invalidate his tribal status. This rarely occurs in ICWA cases as the primary status of the child under ICWA is as a member of a federally recognized tribe. After an evaluation of the biological mother’s lack of contact with the tribe, the Second District Court of Appeal in California found that ICWA was unconstitutional in this case. Therefore, here, the court moved

away from a historical conception of race and was reluctant to acknowledge the discriminatory practices that gave rise to ICWA.

Another EIF exception evaluation was completed in the *In the Matter of Baby Boy C*. In this case, the New York Supreme Court decided that the EIF exception directly conflicted with the language and purpose of ICWA and the U.S Supreme Court decision in *Mississippi Band of Choctaw Indians v. Holyfield*. The court considered the following factors,

Rita [the biological mother] severed nearly all her ties to the Tribe as an adult. She has no interest in tribal policies and rarely visits the reservation. She has not participated in any Indian cultural events since was 12 years old and has no interest in them. She does not observe any Indian customs or practices and does not socialize with any members of the Tribe, except for her brothers. She has severed all contact with her maternal grandmother. Rita was married on two prior occasions to non-Indians in civil ceremonies. She had a child with each man and neither child is being raised in an Indian setting. Rita testified that she has no interest in the subject child being raised in the tribal culture. *In re Baby Boy C.*, 27 A.D.3d 34, 38, 805 N.Y.S.2d 313, 316-17 (2005).

Here the court analyzed the argument that cultural practices and engagement with a cultural community effects the racial identification of the child. The court heard evidence that the biological mother engaged in two interracial marriages, therefore asserting the argument that interracial marriage somehow dilutes one's own racial identity.

However, the EIF argument asserted by the prospective adoptive parents was not accepted by the court and after this analysis, the court made a determination about the necessity of cultural authenticity regarding Native American children. The court states,

Significantly, the statutory definition of an "Indian child" depends on tribal membership or eligibility for membership--not on the degree of connection with tribal culture. Most assuredly, the statute does not require that the Indian child be a part of an "existing Indian family," i.e., one that actively participates in tribal affairs or customs. *In re Baby Boy C.*, 27 A.D.3d 34, 47-48, 805 N.Y.S.2d 313, 323 (2005)

Therefore, the court ultimately found that the trend of court interpretations of ICWA was putting many Native American children at a disadvantage.

Generally, I find that if the Court determines that cultural authenticity is a primary factor, then the judge will defer to the standards set forth in ICWA and give jurisdiction to the appropriate tribal court or place the child with a Native American adoptive parent, if possible. Alternatively, if the Court finds an exception to ICWA there is rarely any continuing racial or cultural analysis, as the case no longer falls under the purview of ICWA.

In making such a determination, the court considered whether the child had become integrated into the foster family and whether there are strong emotional ties between the child and the relatives of the child. At the heart of this case and other cases that have focused on the Existing Indian Family Doctrine are fundamental questions about the child's identity and well-being. Therefore, judges are given the power to determine one's racial and in some cases political categorization by evaluating how often an individual participates in certain cultural activities that the judge feels are culturally authentic. Therefore, the EIF exception greatly limits the cultural and historical understanding of race put forth by ICWA (Gotanda 1991).

Evaluations of cultural literacy for Native unrelated adoptive parents

The next form of cultural authenticity involves the evaluation of cultural literacy and contacts of native unrelated prospective adoptive parents. Here I am interested in evaluating how the court discusses tribal difference. In the case *in re S.B.C.*, the expert witness testified that the

Foster Mother was not only unable to properly care for S.B.C., but was also unqualified to raise the other three Native American children she had already adopted because of cultural differences between the children's tribe and the Foster Mother's tribe (*In re S.B.C.*, 2014 MT at 538).

However, the court disagreed with this testimony and ruled that the child would be placed with the foster mother. The judge found that the Foster Mother was the only parent he has ever known and

that removal would create a substantial risk of harm to him, and be a detriment to his physical and psychological well-being. The judge also determined that the Foster Mother fully appreciates the laudable goals of ICWA, understands and is capable of helping S.B.C. learn his own heritage, culture and customs, and is willing to travel with him to participate in important tribal activities and rituals unique to his Blackfeet Tribe.

There was also testimony in this case that pointed out the distinct cultural differences between the child's tribe and the foster mother's tribe. This testimony stated that the foster mother would be unable to teach the "Crow" children specific Blackfeet customs. However, despite this testimony, the court seems to assume that the similarities in tribal culture and identity would uphold the best interest of the child.

Cultural interests and contacts: non-Native adoptive parents

For non-Native unrelated adoptive parents, there is usually an evaluation of cultural interests and contacts. In order to terminate parental rights, the court must find that the child is adoptable, meaning likely to be adopted. While the child does not need to be in a pre-adoptive placement to have their parents' parental rights terminated, being in one is evidence of adoptability. Therefore, just being in a foster home that would ultimately consider adopting, helps to sever the legal relationship between a parent and a child. Most state judicial concerns about cultural competency surrounding Non-native prospective adoptive parents are assuaged if they demonstrate that they have an interest in promoting the child's tribal culture. Furthermore, the courts rule favorably if the prospective adoptive parents agree to let the child continue contact with the biological family members. Thus, the biological family itself, is often understood as a cultural resource needed to overcome the cultural deficit of the non-native prospective adoptive parent.

For example, In *Cutright v. State*, the court found that “good cause” was not found to deviate from complying with ICWA preferences and the placement decision was reversed. The court noted that none of the parties seeking custody of the children fell within the parameters covered by the ICWA preferences, and that they all appeared to be “equally ill-equipped to seriously impart the Nation’s heritage and customs to the children” *Cutright v. State*, 97 Ark. App. 70, 244 S.W.3d 702, 707 (Ark. Ct. App. 2006).

Mr. Swartz admitted at the final placement hearing that,

Although he could not pronounce the name of the Nation and was unaware of the primary religion, he and his wife were educating the twins in Indian culture. He testified that they want them to learn the language, that his wife did research on the Internet and contacted a tribal member to obtain some CD’s, and has taught them some information about the Nation’s language and heritage based on that information. The only other evidence he presented was that his wife had always decorated their home with Southwestern items such as blankets, pottery, Indian pictures hanging on the walls, etc. He admitted that they had not attempted to enroll the twins in the Nation, although they had contacted Valerie Geronimo in Sells, Arizona, an official with the Nation, a couple of months after obtaining custody of the twins and spoke with her brother, Ronald Geronimo. *Cutright v. State*, 97 Ark. App. 70, 244 S.W.3d 702, 707 (Ark. Ct. App. 2006).

This type of cultural knowledge evaluation is common and rarely in my sample does the non-native parent fail to pass the evaluation as evidenced by the percentage of non-native unrelated adoptive parents who gain custody of Native American children. Another example of this concept is evident *in re Adoption of Keith MW*. Similarly, in this case the appellate court is evaluates whether there is good cause to deviate from the ICWA preference requirements, by placing Keith in a non-tribal home.

In its consideration of the importance of sensitivity by the adoptive parents in this case to cultural issues, the superior court characterized the open adoption as “a life raft.” Although recognizing that the Wilsons “do not understand much about native culture,” the court found that “[t]he open adoption offers relief,” and that “[r]easonable contact with the birth family can take care of that.” The court left open until a future hearing the specifics of the contact schedule, acknowledging that while weekly or

even monthly contact was not contemplated, there was a need for “contact that’s sufficient and appropriate for [Keith] to know the people who are his birth family as well as ... [have] enough of an exposure to them and enough time with them so that he can come to learn and experience those parts of his culture as well as the parts that the [Wilson] can provide to him.” (*In re Adoption of Keith M.W.*, 79 P.3d at 60).

The superior court found that there was a good cause to deviate from the placement requirements due to the bonding between Keith and the Wilsons. Furthermore, at times there are cultural evaluation comparisons that measure one individual’s level of cultural authenticity to another’s.

Law in Action: In re Autumn K. Case Study

In re Autumn K. is a strong example of how the concepts of race, culture, and permanency intertwine throughout a case. Specifically, it demonstrates the courts use of cultural competency concepts and applies them to different parties. Finally, this case allows for a comparison between the Existing Indian Family Exception and the Indian Child Exception.

In this case, Autumn’s biological parents appealed the order terminating their parental rights and the decision to place Autumn with a “non-native distant relatives” (Amanda and Adam Caleb C.) instead of with her Native maternal grandmother (Theresa) or her Native Aunt (Beatrice); two ICWA-compliant placements. The court first identified Autumn as “of Chickasaw descent and thus and Indian Child” (*In re Autumn K.*, 221 Cal.App.4th at 680). However, it must be noted that the grandmother was not an enrolled member of Chickasaw Nation but enrolled in the Yupik tribe.

The court heard ICWA expert England testify that the State Child Welfare Department’s adoption recommendation was not in Autumn’s best interest as required by ICWA. He stated

When an Indian child is removed from the home and adoption or guardianship is in question the child should be placed with extended Indian family within the family of the child’s tribal affiliation. The prospective family is not an Indian family according to the government’s federal recognition of tribal members. The home is not a Tribal Family

Home or family member within the child’s tribal affiliation. They are non-Native family members that should have only been looked upon had there been no other alternatives within the immediate Indian family.... [T]he fact of the matter is that the maternal Aunt, Beatrice R., who is a Chickasaw tribal member and considered a preferred placement within the immediate Indian family, was never considered as a placement by the [Department] or actively pursued as a possible placement. Yet a second cousin three times removed to Autumn, with strained relations with the family, and who was actively looking for an adoptable child was chosen. (*In re Autumn K.*, 221 Cal.App.4th at 689).

Further, England noted that there would be no tribal member living in the home to teach Autumn about her Chickasaw culture. Amanda, Autumn’s distant relative and potential adoptive parent stated that her step father was a Yurok tribe member, but he did not live in the home, and was not a blood relative of either Amanda or Autumn. Therefore, England argued, this was a “non-Indian family home.”

On the other hand, England described Teresa, Autumn’s Native Grandmother positively even though she was also not a member of the Chickasaw tribe³³. He stated,

[Teresa] is a very active, well known, and integral part of the Indian Community here in Del Norte County. Teresa is typical of many Indian Grandmothers with tradition and culture in that she is raising her grandchildren and teaching them their Chickasaw Culture while exposing them to local tribes. Teresa is an accepted Indian Person in our Community and her grandchildren participate in and are accepted by the Indian Community as Chickasaw Tribal Members. Teresa’s grandchildren participate in all things for Native Youth which includes boat making, cultural presentations, crafts, and all other things provided to tribal members. Teresa is well known with her involvement in the schools and

³³ The Yurok Tribe wrote an amicus curiae brief on behalf of Teresa, the grandmother. The court considered this brief and quotes it in the majority decision We close the discussion on this issue by quoting a paragraph of vigorous criticism made by *amicus curiae* Yurok Tribe: “Social Workers, Judges and Attorneys in Del Norte County still view the ICWA through the lens of white, middle-class values and value judgments. Children are routinely placed in non-tribal homes with little or no effort to locate viable Indian family members. After the children have resided with their non-tribal caretakers for a few months, Anglo values that support the concept of bonding and the judicially created doctrine of De Facto Parents are used against those Indian family members that do come forward. Tribes—which may be thousands of miles separated from local courts—and Indian families that are often poor and poorly educated, receive less than adequate representation in State courts. It is the position of the *Amicus* that *In re Autumn* is one such case.

looked upon as someone that participates in everything that her grandchildren are involved with. This includes chaperoning field trips, going to IEPs, visiting teachers and staff, and being an exceptional advocate for all her grandchildren's well-being. Teresa is also very well-liked by the school staff and a very strong advocate in her grandchildren's education and extracurricular activities. Teresa can often be seen driving her grandchildren to and from their practices and making sure that they have the same opportunities as everyone else. Throughout this process, and with the loss [of] her granddaughter, Teresa has shown determination and dedication by continuing to work toward bringing Autumn home to her Chickasaw family (*In re Autumn K.*, 221 Cal.App.4th at 690).

Therefore, he recommended that Autumn be placed in Teresa's home where she could be reunified with her Chickasaw siblings and her "immediate Indian family." However, at the permanency hearing another expert, Keith Taylor the state department's ICWA expert, said that this placement did satisfy the ICWA preference requirements because Autumn and Amanda are distant cousins. The court notes,

Taylor also believed Amanda was very committed to maintaining Autumn's cultural ties with the Chickasaw Nation. He noted she was adopted and raised by an Indian man herself, and she understood the importance of maintaining Autumn's connection to her culture. He acknowledged, however, he did not ask Amanda about her involvement with the Chickasaw culture, explaining he envisioned the Chickasaw contact coming through Teresa and Autumn's siblings. He also expected Amanda to make an effort to connect Autumn to local tribal activities, although he was not aware of anything she was doing to connect Autumn to her heritage. Taylor felt a non-Indian family could set appropriate standards for an Indian child (*In re Autumn K.*, 221 Cal.App.4th at 692)

This demonstrates the tension between culture and blood quantum requirements. When Taylor was cross-examined at the hearing he was asked about relative placement and the goal of preventing the breakup of an Indian family.

Taylor testified that adoption by the C.'s satisfied that goal because Amanda was a distant relative. When asked how distant a relative had to be before he or she ceased to have an active identity as part of the Indian family, Taylor responded, "There's some tribes that have direct descendants as tribal members. It really is—you know, we have people

that identify as Native that couldn't come up with a federal I.D. card ... and we accept that. That's not something that ... we challenge. People identify as being Indian or Native, we just accept it. It doesn't matter what their blood quantum is (*In re Autumn K.*, 221 Cal.App.4th at 693).

When asked about what the C.'s had done to introduce Autumn to Indian activities, Heather Friedrich, a social worker on the case, responded that she had given Autumn tribal enrollment forms, flashcards and a coloring book.

I have given them the enrollment packet for Autumn to be enrolled in the Chickasaw, and with that came some flash cards with some Chickasaw Indian words on them. And I know I've spoken with Ms. C. and she said she showed those to Autumn. There were also some coloring pages there, and she said Autumn drew on the color pages. So, given Autumn's age and what she can do, I think Ms. C. has respected that (*In re Autumn K.*, 221 Cal.App.4th at 694)

Furthermore, Chickasaw representative Regena Frye informed the court that the Chickasaw Nation did not have a custom allowing for placement with a second cousin once removed, especially if a maternal grandmother was available for placement. The tribe insisted on having Autumn either stay with her grandmother Teresa or her Aunt Beatrice.

Autumn was placed in her home on October 15, 2011, with the consent of all parties. Autumn referred to her and her husband as "Mom" and "Daddy," and was emotionally bonded to them. Amanda represented that they were "[a]bsolutely" willing to maintain postadoption contact with Autumn's siblings and other family members. She was also willing to have Autumn participate in Native American activities. Amanda, whose adoptive father was an enrolled member of the Yurok tribe, had three teenage children, two of whom had been involved in Yurok programs. There were also a number of other relatives on Amanda's side who were Native American (*In re Autumn K.*, 221 Cal.App.4th at 699).

By the end of the third day of the hearing, Autumn had been in the care of Amanda and Carl C. for over two years. The trial court ruled that due to bonding, Autumn should be placed with the C.s. Autumn's biological parents appealed and argued that the court incorrectly applied the

Existing Indian Family exception based on questions that the court asked Teresa during the hearing. Specifically,

[The lower court] asked her how many times she had “sat down with [her] six grandchildren and instructed them on specific aspects of culture and custom?” It asked her, “What is different about your lifestyle that makes you different from non-Indian families?” It also wanted to know “if there’s something different about how this family, a Chickasaw family, what lengths they’ve gone to, to preserve all those customs and traditions that [the expert] says are so important to preserving the Indian way of life.” And it was curious about “how much actual involvement has taken place through persons such as grandma who would know about those matters and pass that on to grandchildren and be passed on to Autumn as a member of this family (*In re Autumn K.*, 221 Cal.App.4th at 716).

In short, according to the parents, the court’s questions essentially asked Teresa “how Indian she was.” This was, they contend, “an attempt to use a ‘back-door approach to do exactly what the ICWA was intended to prevent: imposition of white middle class standards to child custody cases involving American Indian children (*In re Autumn K.*, 221 Cal.App.4th at 716).

The appellate court found that they did not apply the EIF exception and they reversed the order that terminated the biological parents’ parental rights with an order to complete a custody determination assessment. Post-remand the court found that the Grandparents could be considered as a placement option. However, after another State department assessment,

[The Department] determined that both homes have something to offer Autumn and neither home is perfect.” But, it explained, “there are many more concerns in the [Grandmother’s] household. Even if the criminal and child welfare history was a non-issue, the constant turmoil that [Teresa] allows [Patricia the biological mother] to create causes the Department great concern. [Teresa] has informed the Department on multiple occasions that she can set healthy boundaries and she is tired of [Patricia’s] drama. However, her actions and reactions demonstrate otherwise (*In re Autumn K.*, 221 Cal.App.4th at 2)

This vague reasoning of the criminal expungement, the possibility of a child welfare history, and the avoidance of drama, were deemed problematic indicators that the grandparents’

house was no longer in Autumn's "best interest." The Chickasaw tribe again intervened and stated their preference that Autumn go to the grandparents and if not, then the Aunt. The department's reasoning for this included bonding, permanency, the idea of a "psychological parent," and the reworking of the evaluation of cultural competency. Ultimately, the Department did not recommend moving Autumn to the Grandmother or to the Aunt, "as doing so would be detrimental to her well-being. Autumn deserves permanency as soon as possible and that was found for her" (*In re Autumn K.*, 2015 WL 4240987 at 4). The court agreed and allowed the Autumn to stay with Amanda C. and in 2015 the biological parents again appealed this decision.

The Court of Appeal emphasized the Department's viewpoint this time and used the Adoption Assessments reasoning that "As second cousins, once removed, who are familiar with tribal practices, this family affords Autumn the most stable placement while also following the placement preference of the Indian Child Welfare Act" (*In re Autumn K.*, 2015 WL 4240987 at 4). Furthermore, while Amanda was not a tribal member, the court emphasized Amanda's testimony that her adoptive father was a member of the Yurok tribe and that she was raised with knowledge of Indian cultures. She stated that if she adopted Autumn, that she would "ensure that she remained connected the Native American community" (*In re Autumn K.*, 2015 WL 4240987 at 4). The court noted that "Amanda already encouraged Autumn to look at Chickasaw language flashcards and language applications to make beaded necklaces, to hunt, fish and pick berries" (*In re Autumn K.*, 2015 WL 4240987 at 21).

There was also evidence that suggested that the Grandmother was perhaps not as culturally literate as previously thought,

Teresa acknowledged that she was not very connected to the Chickasaw tribe, because they did not have many local activities. She was, instead, usually involved with the Tolowa and Yurok cultures (*In re Autumn K.*, 221 Cal.App.4th at 11).

Autumn's biological mother also argued that the court abused its discretion by failing to apply the "Indian Child Exception" to this adoption. Specifically, she argued that the juvenile court erred in failing to apply the Indian child exception in this case, because termination of her parental rights would substantially interfere with Autumn's connection to her tribal community and with her sibling relationships. The court found that adoption would not limit Autumn's tribal membership rights and that the C.s would be providing her with cultural resources themselves, by taking her to cultural activities, and by allowing her Native immediate family members to have regular contact with her (*In re Autumn K.*, 2015 WL 4240987).

While the tribes maintained their position that Autumn should be placed with an Indian relative according to the tribal culture, the State court affirmed the original order that terminated parental rights and selected adoption as the permanent plan.

The ability of the court to reframe and reweight different facts in order to support a certain position, is evidence of the variability of law, as critical legal theory would suggest. The substantive shift from focusing on an Indian compliant placement to focusing on permanency and contact is evidence of a socially constructed child welfare system.

Conclusion: The Purpose of ICWA vs. Practice

Native American culture is not well understood by our administrative agencies and courts and there is an inherent bias in favor of non-Native American values. The consistent failure of state agencies to recognize the unique characteristics of Native American culture and the discriminatory child welfare practices that resulted in the unwarranted removals of Native American children from their tribal communities, led Congress to adopt the ICWA in 1978. The ICWA was an effort by Congress to reverse the tradition of taking Native American children

away from their parents and tribes for the “best interest” of the children based upon non-Native American values.

In ICWA cases, race is most often defined biologically through lineage and blood quantum rules. However, judges frequently conduct cultural competency evaluations when deciding whether there is “good cause” to depart from ICWA placement preferences. There are three different types of cultural competency evaluations, cultural authenticity/practice, cultural literacy/knowledge, and various forms cultural contacts. These evaluation criteria vary based on the individual’s relationship to the “indian child” and to the child’s tribe.

Additionally, I find that there is a current lack of compliance with ICWA procedural mandates as appellate courts have weakened the legal strength of ICWA requirements through the state made “Existing Indian Family” exception.

CHAPTER 5: THE COLOR OF FAMILY: RACE, COLOR AND CULTURE IN MEPA-IEAP CASE LAW

Quantitative Findings

A majority of the children discussed in this sample of 161 cases were identified as Black or African American (n=41). Many of the children were identified as Biracial (n=25) and the remaining children were identified as Asian (n=4), Hispanic/Latin@ (n=5), and federally recognized and non-federally recognized Native American (n=9), non-native (1) and Middle-Eastern/Arab (2), see Table 7.

Additionally, while my sample size is small, I do think it is important to look at preliminary trends within racial groups. Children who were identified as Black were most frequently placed 88% (n=36) with an unrelated adoptive family. Of the children labeled as biracial 69% (n=18) of them went to an unrelated adoptive parent. The five children who were identified as Hispanic/Latino all went to an unrelated adoptive family. Therefore, Black and Biracial children are especially likely to go to unrelated adoptive parents in this sample. Since many other racial groups only had one or two cases in the sample, I will not speculate about any potential trends related to racial groups with an n of less than five.

It is then necessary to analyze the race of the parties who gained custody of the children. As the transracial literature would suggest, these will most likely be white unrelated adoptive parents (Raleigh 2012). As this preliminary sample of data indicates, 92% of MEPA-IEAP cases resulted in children going to individuals or families of a different race. Furthermore, in 54% (49) of MEPA-IEAP cases, the party that gained custody was white. This is likely and underestimate as 21% (n=19) of the cases did not provide explicit information about the party's race but did indicate that the child and the prospective parent

were different races.

Table 6. MEPA-IEAP Case Characteristics		
	Percent (%)	Cases (n)
Parties involved in the case		
Unrelated adoptive parent v. unrelated adoptive parent	6	5
Unrelated adoptive parent v. government agency	2	2
Unrelated adoptive parent v. tribe	0	0
Unrelated adoptive parent v. biological parent	54	49
Unrelated adoptive parent v. foster parent	1	1
Unrelated adoptive parent v. related adoptive parent	18	16
Related adoptive parent v. foster parent	1	1
Biological parent v. government agency	2	2
Biological parent v. related adoptive parent	11	10
Tribe vs. governmental agency/foster parent	0	0
Related adoptive parent vs. related adoptive parent	4	4
Biological parent vs. biological parent	0	0
Biological parent vs. foster parent	0	0
Case Outcome [Who gets custody]		
Tribe	0	0
Stepparent	1	1
Unrelated adoptive parent	78	70
State/governmental agency	0	0
Biological father	3	3
Pending state court decision	0	0
Biological mother	1	1
Related adoptive parent	14	13
Foster parent	2	2
Note: This sample is not weighted and may not add up to 100% due to rounding		
Source: LexisNexis and Westlaw.		
Retrieved January 1997-December 2016		

Table 7: MEPA-IEAP Race Characteristics		
	Percent (%)	Cases (n)
Race of Party that Won Custody		
Black/African American/African	7	6
Hispanic/Latino	6	5
White/Caucasian/Anglo-Saxton/European	54	49
Native American/Indian- Federally Recognized Tribe	0	0
Native American/Indian –No Federally Recognized Tribe	1	1
Non-Indian/Non-Native	4	4
Biracial/Mixed-Race/Multiracial	3	3
Asian (Filipino/Chinese/Cambodian)	2	2
No Race Given/Missing	22	20
Race of the Child		
Black/African American/African	46	41
Hispanic/Latino	6	5
White/Caucasian/Anglo-Saxton/European	1	1
Native-American/Indian-Federally Recognized Tribe	7	6
Native-American/Indian-No Federally Recognized Tribe	2	2
Non-Indian/Non-Native	1	1
Biracial/Mixed-Race	28	25
Asian (Filipino/Chinese/Cambodian)	4	4
Middle Eastern	2	2
No Race Given/Missing	3	3
Difference in Race between Child and Custody-Winner		
Yes	91	82
No	8	7
Missing	1	1
Note: This sample is not weighted and may not add up to 100% due to rounding Source: LexisNexis and Westlaw. Retrieved January 1997-December 2016		

Qualitative Findings

Definitions of race

When it comes to family, “most Americans view blood ties as naturally superior to artificially constructed ones” (Wegar 2000:363). Proponents guided by this ideology argue that biological sameness helps make families work. Historically, adoption professionals have structured the

adoptive family to imitate biology and promoted the goal of matching adoptive parents with biological look alike. In this sample of judicial decisions, there was often a debate between the physical characteristics of the child and physical characteristics of the prospective adoptive family. Some of the starkest examples of the courts analysis of biological race can be seen in cases where the child is biracial/multiracial or Native American. In the *Interest of M.F. H.W.C and M.V.N*, there was lengthy testimony about the ability of the prospective adoptive parents to teach M.F, the child, about her cultural heritage. The court in this case explains that a presumably ideal match for a biracial child would be that each parent identified as ½ of the child’s race, meaning that the couple could have had a biological child with the same biracial identification as the adoptive child.

Neither H.W.C. and M.V.N., who are Caucasians, or Aunt, who is African American, “match” M.F.’s biracial ethnicity. The statute, however, does not require that the adoptive parents and the adoptive child be of the same racial or ethnic composition [the statute], requires only “the diligent recruitment of potential adoptive homes that *reflect* the ethnic and racial diversity” of adoptive children. *In re M.F.*, 1 S.W.3d 524, 534 (Mo. Ct. App. 1999).

However, in this case, despite the availability of a biological relative placement, the court found that the biracial child should be placed with the unrelated prospective adoptive parents.

[The] Aunt argues that there was affirmative evidence that H.W.C. and M.V.N. have and would continue to deny M.F. her racial and ethnic background. H.W.C. acknowledged at trial that he had made the following statement in part of his response to an interrogatory asking him to describe why they would be better parents than Aunt. *In re M.F.*, 1 S.W.3d 524, 534 (Mo. Ct. App. 1999)

[M.F.] looks like us and is recognized by outsiders, to be our biological child. She appears to be Caucasian and will be identified throughout life as a Caucasian. It is in her best interest to be with parents who look like her as opposed to [Aunt]’s situation, in which she would be identified as “the white child with the Black Mother” and would have constant attention

called to her throughout her life. H.W.C. also acknowledged that he had testified in his deposition that he and M.V.N. did not have any plans to find out definitively what M.F.'s race was, because they did not know of any way to find out that information. *In re M.F.*, 1 S.W.3d 524, 535 (Mo. Ct. App. 1999)

This example demonstrates colorism principles. In this case, the prospective adoptive parent argues that it would not be in the child's best interest to have a Black parent because she (M.F) looks white. Despite the fact that the child is biracial, the father argues that cultural sameness is not the important factor and instead the court should focus on physical sameness.

Furthermore, this case demonstrates the concept of biological race by assuming that race can be determined. In this case, the prospective adoptive father argued that because the child's race had not been "definitively" determined, certain cultural understandings did not have to take place.

Lastly, in *Kiley C*, the appellate court also noted the skin color of the child, Kiley, in comparison to her stepfather and biological mother's skin color and wrote,

The minor is an eight-year-old child of African American and Caucasian ethnicity. Father is African- American, but mother has not told the minor about his existence. The minor has begun to notice that her skin color is darker than the rest of the family. Mother indicates that she will answer the minor's questions openly when she begins to ask questions but hopes they will arise when the minor is older. (*In re Adoption of Kiley C.*, 2008 WL 217517 at 1).

In this case, the court terminated the African American biological father's parental rights and allowed the step-father's adoption petition to go forward. The court's focus on physical appearance seems to suggest that skin tone is being used as an indicator of race as well as a factor in the decision regarding what family would be the best placement for the child. The evidence considered, and the facts that the judge finds important in this case indicate that physical appearance is part of the child and family's racial classification. This further supports

the courts' assertion that it is in the best interest of the child to have a family that looks like them. However, this folk notion of race is too simplistic. Biological families often have physical differences, most frequently perhaps in skin tone. Furthermore, individuals who identify as different races often have similar skin tones.

Cultural competency evaluations: Cultural authenticity and cultural contacts

This second judicial framework focuses on the prospective adoptive parents' cultural and racial knowledge. This cultural competency evaluation occurs for both same race prospective adoptive families and prospective adoptive families that are identified as being a different race than the child. Evaluating competency in transracial adoption cases involves two slightly different understandings of competency. The first form is an evaluation of cultural authenticity, meaning the biological parent or the same race prospective adoptive parent's racial identity and cultural practices. If the prospective adoptive parent is not the same race as the child, then an evaluation of their cultural literacy and contacts are discussed.

Cultural authenticity & assumptions

After the first process of identifying the racial categories of both the prospective adoptive parents and the child, then the courts conduct a best interest analysis that may require a cultural competency evaluation. For biological parents or prospective adoptive parents who are the same race as the child, there is an underlying assumption that a racial-match also means a cultural match. This was a predominate theme in MEPA-IEAP cases. For example, *In re adoption of S.A.*, the court discussed the benefits of placing S.A, an African American child, with an African American prospective adoptive mother.

The court wrote, "C.R. and S.A. are both African Americans. C.R.'s evidence demonstrated that she has the life experiences of being an African American, and that she is able to bring those life experiences to

help S.A. understand what it means to be an African American...”. In re Adoption of S.A., 918 N.E.2d 736 (Ind. Ct. App. 2009)

In this case, the court found that the child should be adopted by the African American unrelated prospective adoptive mother. The court reasoned that her adoption petition should be granted because she had previously adopted the biological mother's teenage children who were doing well in her care, both she and the child were African Americans, and she was able to support the child financially (*In re Adoption of S.A.*, 918 N.E.2d 736 (Ind. Ct. App. 2009)).

This case highlights the assumption of cultural competency by race. However, “being an African American” can mean many things in the U.S. context. What it means to be African American to C.R in this case might mean something very different than what S.A’s biological parents might consider culturally relevant.

Law Professor Richard Banks challenges this assumption of cultural competency by members of the same racial group (2009:272). He notes that issues of cultural competency are mostly discussed when a white prospective adoptive parent attempts to adopt a minority child. State adoption officials assume that prospective adoptive parents of the same race will automatically be competent to raise a black child based on their own experiences. However, Banks argues that same race parents are not necessarily uniquely qualified to teach a minority child of their same race “how to survive and function in society” (Banks 2009:289). He further asserts that empirical evidence has shown that transracial adoptees do as well as any other children on standard measures of “self-esteem, educational achievement, behavioral difficulties, and relations to peers and other family members” (Banks 2009:289; Evan B. Donaldson Adoption Institute 2008; Simon and Alstein 1996).

While I do not agree with Banks’ policy implications, I do think he brings up

important analytical questions when he asks,

Suppose that black children placed in white families tend to believe that “people are people, and that race doesn’t really matter,” and that black children adopted into black families are more likely to think “race should be a crucial component of one’s identity.” Is there any reason to prefer one form of identity over another? Is it better to understand race as a fundamental part of one’s self or as a trivial part of one’s self? On what basis can we decide that one identity is better than another? (Banks 2009:288).

Here, Banks brings up important assumptions about race and identity that are often underlying the discourse surrounding transracial adoption. Banks argues that children will develop different identities based on where they were raised and who they were raised with, and these identities should be, in essence, value-neutral (Banks 2009). However, this view while aspirational, is limited, because he ignores the reality that racial categorization and identity is not value-neutral. We live in a racially stratified society that transcends and is embedded within identity.

Banks later acknowledges this hierarchy when he also suggests that black parents are no better able to teach black children how to succeed in America than non-black parents, just because they have experienced racism and discrimination (Banks 2009). He again asks,

But why would one conclude that they have been ennobled rather than damaged by such experiences? And why would white parents not have benefited from all their years spent on the white side of the racial divide? Who better than a white parent to explain to a black child how white people are likely to view and respond to him? It is as plausible that white parents might have useful knowledge about race that black people lack, as it is that black people may have developed unique and beneficial insights as a result of their experiences. In sum, any family will try to teach their child how to “make it” and there is no reason to assume that a black child will be better equipped by black parents than by white parents (Banks 2009:289).

Banks acknowledges that these questions might lend themselves to accusations of colorblind racism. However, he argues that this viewpoint does not deny the existence of racial discrimination, just that there is no place for discriminatory “race-matching” policies in

adoption law (Banks 2009). While I appreciate his introduction of these tough questions³⁴, I respectfully disagree. This type of yes “racial discrimination but...” argument ignores the impact of racial identity and racial hierarchy in society generally, and in transracial adoption law specifically. Additionally, tying this argument to “success” and the benefits of white privilege may lead to potentially dangerous implications³⁵.

As discussed in chapter 4, racial and political identity has a huge impact for Native American children. Children who are identified as members of a federally recognized tribe can receive financial, health, and educational benefits³⁶. Furthermore, racial identification on the census has large implications for resource allocation and benefits for different racial groups and communities, both at the local and federal level.

The assumption of same-race cultural competence and identity has further been challenged by race and socio-legal scholars. Harvard Law Professor and transracial adoption advocate, Elizabeth Bartholet, recounts her own experience as a white woman adopting her two sons from Peru,

I learned more about my own feelings about race as I puzzled through the process of creating my adoptive family. Adoption compels this kind of learning. You don't just get at the end of one general child line when you're doing adoption. There are a lot of lines, each identified by the race, disabilities, and age of the children available, together with

³⁴ As a transracially adopted person, I admit to having similar questions and critiques about the attention society puts on the value of identity. I used to wonder why everyone cared so much about how I identified [Black] and how being transracially adopted might impact my identity for the worst. I still find issue with the premise that one cannot have a strong and positive minority identity if they are transracially adopted. However, I eventually learned that these are individualistic questions and critiques that do not include important discussions of structural inequality.

³⁵ I have often considered doing a study focusing on the “white privilege” of transracial adoptees as another way to uncover the nuances of racial categorization and the benefits associated with certain racial categories. However, I worry about the dangerous implications of the work.

³⁶ While the argument that “indian children” is a political status would most likely be raised in response to this point, which I address more thoroughly in Chapter 6, the existence of the “existing Indian family exception” refutes that idea. The EIF exception does not start with the concept of political identity, it instead requires the specific actions of community participation and involvement, in order to qualify for political status.

the length of wait and the difficulty and cost of adoption. In choosing which line to join, I had to think about race, and to think on a level that was new to me. I had to try to confront without distortion the reality of parenting someone of another race -- since the child and I would have to live that reality. I had to decide whether I wanted a child who was a racial look-alike or not. I had to think about whether it would be racist to look for a same-race child or racist to look for a child of another race, as I was learning that the black social workers' organization opposed transracial adoption, calling it a form of racial genocide. When I decided to do an international adoption, I had to choose which country's line to stand in, and a piece of that choice was thinking whether I had particularly positive -- or negative -- feelings about the prospect of parenting a child of one of the different racial or ethnic groups involved, and musing about whether it was offensive or entirely all right to be engaged in this kind of thinking. And then when I finally did adopt I began life as part of a Peruvian-American family, part of a brown-skin/white-skin, indiancaucasian mix of a family³⁷ (Bartholet 1991:1169–70)

Bartholet views transracial adoption as a racially complex and transformative experience. It made her think and challenge her ideas about race. Maillard and McDonald address this nuanced racial interaction in their theory of “interracial convergence” (Maillard et al. 2008). They define interracial convergence as the “deliberate occupation of the evolving boundary between Black and White” and understand transracial adoption to be part of a “grey zone” where the interests of white adoptive parents are “passers” similar to white passing blacks, in that they both share very personal yet invisible ties with the Black community (Maillard et al. 2008:308). These “racial voyeurs” or “convergers” are thus able to cross boundaries and enter spaces that may have previously excluded them (Maillard and McDonald 2007:308, 319).

Convergers challenge the immutability of racial boundaries. Instead of absurdly positing the non-existence of race, or rejecting its social construction, performativity emerges as the critical indicator of racial affiliation. In this grey zone, interracial convergence offers an alternative conceptualization of the

³⁷ A particularly informative quote in Bartholet’s article also states, “this child is as inside my skin as any child could be. It feels entirely right that he should be there. Yet the powers that be in today's adoption world proclaim with near unanimity that race-mixing in the context of adoption should be avoided if at all possible, at least where black or brown-skinned American children are involved” (Bartholet 1991)

color line that extends beyond traditional roles of blood and biologism. This racial subversion relies on a color-conscious affirmation of difference rather than an empty adherence to colorblindness (352).

Similarly, I argue that the case of transracial adoption produces complex results and ideas regarding race, ethnicity and political status. Thus, studying transracial adoption law requires a more nuanced analysis than the frequently used dichotomy between racial tolerance and cultural genocide offers. Additionally, my research discusses the intersection between biological, historical, and cultural uses of race with a focus on its implications.

Cultural Literacy & Contacts for Transracial Adoptive Parents

In MEPA-IEPA cases when the prospective adoptive family is of a different race than the child, an evaluation of cultural literacy and contact occurs. 57 % (n= 51) of MEPA-IEAP cases addressed cultural contacts. Here, the courts used cultural contacts as a proxy for a biological family experience. Adoptions were often granted when the adoptive family could demonstrate their ability to provide the child with cultural contacts or resources and experiences similar to those the judges believed their biological parents would have provided. *In re Petition of F.W. and D.T.*, the court heard extensive testimony from multiple parties regarding race and associated cultural identity concerns,

The petitioners, who are described as Caucasian, had two older African American children in their family. The court heard testimony about these children and their relationships with the G. children, as well as testimony about the petitioners' sensitivity to issues of cultural and racial heritage and their efforts to promote the children's racial identities and awareness of their heritage. *In re F.W.*, 870 A.2d 82, 86-87 (D.C. 2005)

Evidence of cultural contacts was also heard *in re adoption of Kiley C*³⁸, *In the matter of the Petition of D.T to adopt B.T, in the matter of the petition of P.S to adopt N.S*³⁹, and *in re Petition of P.S & F.E.S*⁴⁰ *Adoption of Vito, and In re S.G.* The in-depth analysis and amount of evidence heard on this issue indicates the ongoing importance of cultural authenticity in the formation of a family. Ideally the prospective adoptive parent would be the same race as the child but if not the parent should have an abundance of friends, information, experiences, contacts, as well as live in a community filled with people who identify as a member of the child's same racial or cultural group.

This debate is clearly seen between the child's (M.F's) biological aunt and the prospective adoptive parents, when the Aunt's mother testified that,

The Aunt's extended family includes persons of different ethnic and racial backgrounds, including Faroese, Indian, African American and Irish, and several members of the family are multiracial. In Aunt's testimony as to why placement with her would be in M.F.'s best interests, Aunt offered the following testimony regarding her ability to meet M.F.'s needs in light of M.F.'s ethnic and racial background: "I am within her own minority racial classification. And I understand what she's going to be faced with growing up. I know that intrinsically, it's just instinctive. I don't have to go out and learn, and try to put that on as a layer on top of me. That comes from the inside". *In re M.F.*, 1 S.W.3d 524, 534 (Mo. Ct. App. 1999)

On the other hand, the Missouri Court of Appeals heard and considered an abundance of evidence that,

³⁸ Mother stated that she has African American friends, so the minor is exposed to cultural and racial differences. Father last visited when the minor was a year old.

³⁹ P.S. is Caucasian, but she lives in a culturally diverse neighborhood, has a culturally diverse group of friends, and has received training about raising a child in a culturally diverse home. D.T. argues that the district court's findings on B.T.'s connection with community, school, and church imply that D.T. is socially isolated because she lives in a predominantly white neighborhood.

⁴⁰ And that A.S.C. would gain a great deal by residing with siblings of her own heritage.

H.W.C. and M.V.N. are raising M.F. in a multicultural environment and have made efforts to expose her to diverse ethnic and cultural influences and educate her about her African American heritage. H.W.C. and M.V.N. have a multiracial family. H.W.C. and M.V.N.'s adopted son is African American and Native American. Their son, as a biracial child, will likely encounter many of the same experiences, and perhaps questions, as will M.F., and each child can provide support for the other.⁴¹ *In re M.F.*, 1 S.W.3d 524, 535 (Mo. Ct. App. 1999)

In this case, the court decided that the child, M.F, was to be placed with H.W.C. and M.V.N, the unrelated adoptive parents. While the first passage indicates the Aunt's racial and cultural authenticity and is a clear example of the second process, the discussion of H.W.C and M.V. N's cultural contacts is also clear. Here, the family argues that they too have the ability to socialize the child (M.F) into certain racialized cultural norms.

In the *interest of Peter Hart*, the Delaware Family Court focused on Mr. Hart and

⁴¹ The evidence indicates that H.W.C. and M.V.N. have provided an environment that attends to the ethnic and racial backgrounds of both their son and M.F. Although H.W.C. and M.V.N. work in Fulton, they choose to live in Columbia, a community whose racial diversity and multiculturalism is influenced by the presence of the University of Missouri. The daycare M.F. and their son attend, Columbia Montessori School, has minority staff members and a 25–30% minority student population, which includes children who are African American, Native American, Hispanic, Asian, Indian, and Korean. H.W.C. and M.V.N. have African American friends who spend time with their son and M.F., and some of the children's babysitters have been African American college students. H.W.C., M.V.N., their son, and M.F. have attended story hours and programs on multicultural issues at the public library.

H.W.C. and M.V.N. have taken M.F. and their son to Kwanzaa and Martin Luther King Day celebrations. The director of M.F.'s daycare and...a licensed clinical social worker who interviewed H.W.C. and M.V.N. in their home, both testified that H.W.C. and M.V.N. have artwork, pictures, books, toys and music in their home that reflect different races and cultures, including African American and Native American. H.W.C. and M.V.N. have attended meetings of the Committee to End Racism. Additionally, H.W.C. is a member of the Association of Multicultural Counseling, and as part of her work, M.V.N. evaluates cultural diversity training packages. Comparing Aunt's personal experiences as a minority and her multiracial extended family to H.W.C. and M.V.N.'s family, which includes a biracial child who will likely share the same experiences as M.F., and the efforts that H.W.C. and M.V.N. have already made which demonstrate their ability to attend to the ethnic and racial backgrounds of their son and M.F., this factor weighs equally in favor of Aunt and H.W.C. and M.V.N.

Mr. Shiri's (the prospective adoptive parents) engagement and involvement in support groups and cultural activities,

Both Mr. Hart and Mr. Shiri are involved in a number of adoptive parent support groups, same-sex parent support groups, interracial adoption support groups, and parenting groups. These groups provide not only helpful information to both of them, they also expose Peter and George to families similar to their own. These support groups also provide fun activities for the boys.... with friends and family the Hart/Shiri household engages in a variety of activities intended to provide the boys with information on and connection with their heritage. They celebrate Kwanza, go to art galleries, and attend cultural fairs. All of these activities, peer groups, and experiences caused Mary Lou Edgar, M.S.W., to comment that she believes that these children will grow up to be wonderfully tolerant adults (In re Hart, 806 A.2d at ___).

Finding that the adoption was in the children's best interest, the court granted the adoption petition. Here, the court understands membership of certain organizations and certain material items an indication that the unrelated adoptive parents are racially tolerant and knowledgeable enough to raise a child of a different race.

Furthermore, there is very little to no discussion of cultural diversity within racial groups. Racial groups are often discussed as having monolithic cultural practices that are frequently tied to the child's well-being. Additionally, whiteness is often understood as the lack of culture and race. For example, when a white parent sought to adopt a minority child, this was often discussed as a loss of culture for the child that would ultimately lead to adjustment and identity issues. A strong example of this concept is *In re Petition of F.W and D.T.*, the court heard testimony regarding the cultural competency of the parties regarding the adoption of B.T a biracial child.

D.T. [the unrelated prospective adoptive parent #1] challenges the district court's finding that B.T. is biracial and that P.S. [unrelated prospective adoptive parent #2] can meet B.T.'s [child] cultural needs. The record contains evidence that B.T. may be part Caucasian. Essentially, D.T. argues that P.S. is incapable of meeting B.T.'s cultural needs because P.S. is Caucasian. But under Minnesota law, "[p]lacement of a child cannot be

delayed or denied based on race, color, or national origin of the foster parent or the child." Minn. Stat. § 260C.212, subd. 2(c) (2008). *In re D.T.*, A10-35, 2010 WL 2733603 (Minn. Ct. App. July 13, 2010)

Here we can see that although the child is biracial it is the minority status of the child that is focused on. Whiteness is normalized and not considered a "cultural need". However, the court in this case ultimately decided that race was not the *most* important best interest factor; instead; it was just a factor that may be considered by the trial court in the process of determining the best interest of the child. This court declined to use the factor, and using a formal race approach, ruled in favor of the White adoptive parent.

This unspoken assumption that minority children and even biracial children's cultural needs can only be met by the minority parent, is indicative of larger debates and scholarship surrounding whiteness. Whiteness scholars assert that the white racial category has been the largely unexamined but used as an ubiquitous norm, implicitly standing for all that is presumed to be right and normal (Levine and Roediger 1993; McIntosh 1990). Thus, whiteness is the location from which others are defined and judged since it is white individuals who hold the power to do so (Andersen 2003). This "ubiquitous nature of whiteness" is important to study and analyze as it is typically unspoken and unacknowledged. In this case, while the court acknowledges the testimony regarding cultural needs, it fails to analyze the reasons for these needs. Rather, it is silently assumed that minorities have additional needs that cannot be met by white parents.

While the previous example, is used to describe the white racial frameworks, the discussion of biracial children must be expanded on. The biracial category as it is understood today is a complex racial category.

Case study: What About Biracial Children?

In the cases below, I compare and contrast the placement decisions surrounding biracial children in two different cases *In re Malik S.* and *In re H.G.* to discuss the similarities and differences of analysis for biracial children.

Malik S. was identified as a biracial child, as his biological father is black and his mother is white. Malik's was placed in Joyce O's home after his father was arrested and had been in the same foster home since he was fifteen months old. At the time of the hearing he was four and half years old. Malik's foster parents were identified by the court as white. The Department of Children and Families (DCF) filed a petition to terminate the biological parents' rights. During the trial the father questioned the placement decisions of the state because they placed Malik with a white foster family. The court recognized,

the likelihood that Malik will experience some difficulties, perhaps in school or on the playground, in growing up as a child of mixed race living with white parents. But some of these difficulties might be experienced by any child of mixed race, regardless of the nature of his household. Further, the fact that Malik does not have the same racial makeup as his foster parents would also be true if DCF placed him in a completely black family. Thus some of these difficulties are inevitable, especially given the need to place Malik in foster care. To overcome these potential difficulties, Malik will need a strong foster family to provide him comfort and guidance. From all appearances, the foster family chosen by DCF satisfies these concerns (*In re Malik S.*, 1999 WL 311177 at 5).

In this case, the court defined Malik as a black-white, biracial child. To the court this identification is a separate category on its own, differing from historical concepts of hypodescent or the "one drop rule". This also differs from ICWAs interpretation of biracial children. In contrast, the case *in re H.G.* describes the successful placement search for Serenity a biracial child described as Dutch and Vietnamese,

the Department located a prospective adoptive couple, an "excellent match" with Serenity because one (of Dutch ancestry) is an officer at the Consulate General of the Netherlands in Los Angeles, and the other (of Vietnamese ancestry) is an FBI agent in Los Angeles. In July, the Department recommended adoption and reported

that the couple was married in the Netherlands, that both prospective parents are well-educated and have a loving relationship, supportive families, and all the financial resources needed to care for Serenity.

Therefore, in this case the couple was considered a perfect match for the biracial child because the couple could have biologically had a child with a similar racial make-up. This contemporary understanding of multiracialism is thus an important finding for the legal construction of race.

CHAPTER 6: RACE, MEMBERSHIP, AND SOVEREIGNTY: THE BENEFITS OF USING A COMPARATIVE APPROACH WHEN ANALYZING RACE IN TRANSRACIAL ADOPTION CASES

Race scholars and critical race theorists have made a call for researchers to measure race in ways that reflect our theoretical understandings of race as complex and rooted in historical and social processes (Carbado and Roithmayr 2014; Gómez 2012; Zuberi and Bonilla-Silva 2008). Specifically, Laura Gómez suggests in her 2011 Presidential Address at the Law & Society Annual Meeting Conference, that we can do this in three ways: study race as a process rather than as an outcome, embrace the comparative study of race and racism, and avoid merely using race as a control variable in favor of a more nuanced approach (Gómez 2012). I will discuss the ways my research addresses each of these areas of methodological inquiry.

Gómez suggests that we focus on the processes of racialization, defined as the social processes by which a racial group comes to exist (2012). We must understand racial group positions in the racial hierarchy and how society comes to understand racial hierarchy as natural. Adoption law is a productive site to examine these racialization processes as one of the few areas of law that allows for the explicit discussion and consideration of race and ethnicity. This study examined how judges define race in transracial adoption cases and how these racial understandings are used to place children.

Gómez continues to argue for a comparative approach across racial groups, comparisons exploring heterogeneity within a racial group, and cross-national comparisons (2012). Gómez emphasizes the importance of comparing race, racism, and racialization dynamics across racial groups (2012). She notes that racial dynamics and cultural expectations should not be presumed to be the same for a single racial group (Gómez 2012). This study utilizes two of the three forms of comparison: comparisons across racial groups and comparisons that explore heterogeneity

within a racial group. The data in this project included the following racial/ethnic groups: Black/African American, biracial, multiracial, White/Caucasian, Latino/a, Native-American/Indian, Non-Indian, Vietnamese, Korean, and Chinese. This study examines how different concepts of race are promoted when children might be placed with a family of a different race.

While I do not make comparisons between different legal systems, I do examine the racialization processes that are governed by different federal laws -- the ICWA and the MEPA-IEAP--where the language in the ICWA requires deference to tribal law and cultural norms of the tribe. Through these comparisons, I gain a more nuanced understanding of the processes of racialization and its impact on family formation.

I suggest that in order to examine the social construction of race analytically, social scientists must examine the legal construction of race as it relates to political status and identify the ways in which these processes are intertwined. I argue as have many scholars before me, that political status and racial categories are not mutually exclusive because throughout U.S. history, there has always been an inequitable relationship among race, law, and citizenship. This project does not intend to speak to the debate surrounding how courts should interpret the political status and sovereign rights of federally recognized tribes. Instead, I focus on the ways judges understand racial concepts and categories when making decisions about child placement in transracial adoption case law.

I argue that great theoretical and empirical value is gained by comparing the Indian Child Welfare Act, the Multiethnic Placement Act, and the Interethnic Adoption Provisions case law because it is a productive site to investigate the processes of racialization and political group membership. When examined side by side, the case law under these two federal acts reveal

similar processes of race-making through judicial discourse: racial identification, examination of cultural authenticity, and an evaluation of cultural contacts despite the presence of tribal sovereignty, different legislative mandates, and the distinct histories of these minority groups.

These processes suggest that even when “race conscious” legislation is enacted, judicial understandings of race and culture are primarily biological in nature. Rather than focus on the structural issues that cause these racial inequalities the way that the social constructivist understanding of race demands, judges instead rely on folk notions of race to address the legislature’s concerns.

Before discussing the unique contributions of a comparative approach in this project, I will address the primary objections to a comparative approach. These objections predominately come from doctrinal legal scholarship that focuses on federalism and indigenous rights. The concerns regarding a comparative approach stem from the assumption that Tribes are not racial groups because they are political sovereigns. It follows that due to indigeneity, the granting of sovereignty, and the presence of treaty agreements, a legal comparison between tribes and other racial minorities is misguided.

The Racial and the Political Debate

The first and perhaps most important argument to address is the claim that tribes are not racial groups; instead, they are political groups that have sovereignty. This argument thus concludes that legal analysis comparing tribes to other racial groups is problematic because they have a different political status and thus different legal rights. The tribal sovereignty doctrine that emerges from federal Indian law is rooted in the concept of political sovereignty (Coffey and Tsosie 2001). Specifically, Matthew L.M. Fletcher argues, “virtually all elements of Indian

Affairs can be traced to a decision of the United States to recognize Indian Tribes as political entities and to make Indian Policy based on this status” (Fletcher 2008:155).

Alternatively, I argue that evidence in the form of legislation, case law, and tribal identity scholarship demonstrates that courts have historically understood and defined tribes in racial terms and continue to do so today under the premise of political sovereignty.

This issue is frequently debated by legal scholars who have thoroughly analyzed the law and historical context surrounding the facts of each case related to this question. Therefore, instead of repeating these arguments in detail, I will provide a review of the literature that focuses on three main areas of evidence used to support these positions: legislation, case law, and tribal identity scholarship.

Political argument

Legal scholars such as Matthew Fletcher argue that Indian Law is best seen through a political lens because of the historical evidence that the “United States always treated Indian affairs as a relationship between the federal government and Indian tribes, not as a race-based relationship involving Indians” (2008:156). He further argues that treating Indian law as race law is “misleading and inaccurate given the existence of overwhelming political, legal, and historical evidence that the foundations of American Indian law are political” (Fletcher 2008:157). Without denying the racial animus that permeated early Indian Law and policy, Fletcher points to three main sources of evidence: case law, original intent of the founders, and tribal definitions of membership.

I argue that legal scholars who contend that tribes should be solely understood as political categories are too narrowly focused on utilizing a doctrinal perspective and limited legal arguments. Instead, a socio-legal lens should be employed when discussing the role of race in

Indian law, as political status has always been shaped by racialized hierarchical understandings of group definitions. While written legal text is an important methodological source of inquiry, I also evaluate the social-historical context surrounding the political processes of federal recognition, tribal membership, and indigenous rights in order to understand the process of racialization in political and legal discourse. I will go on to address each of these arguments in more depth within the legislation, case law, and tribal identity scholarship sections.

Legislation

Legal scholars often look to the Constitution of the United States to address the question of “Indianness”. Fletcher (2008) argues that the acts of the Framers of the Constitution and Congress in the early decades of the American Republic demonstrates the Federal Government’s distinctly political relationship with the Indian Tribes. By looking at the federalist papers and foundational legal doctrine, he concludes that “treating Indian Law as race law is misleading and inaccurate given the existence of overwhelming political, legal, and historical evidence that the foundations of American Indian law are political” (Fletcher 2008:157; Harris 2008).

Fletcher (2008) also argues that the Trade and Intercourse Acts and Treaties provide the strongest support that the constitution granted Congress exclusive authority to interact with Tribes. This proves that the Framers intended Congress to interact with Indian tribes on a government-to-government level (Fletcher 2008). While he admits it is clear that Euro-Americans viewed Indian people with a racial, cultural, and religious bias, he finds this irrelevant because their “policy and legal choices offered a response to the political status of Indian tribes, not the characteristics of the Indian People” (Curtis 1996; Fletcher 2008:165) While Fletcher and Curtis are discussing a more specific legal question of whether the government and law

understands tribes as racial groups or political groups, the premise that indigenous tribes cannot be understood as racial entities must be addressed.

Federal Indian law and policy have historically been based on the assumption that “Indians” are a discrete category, separate and distinct from the white community, with fixed boundaries permitting easy definition and control (Berger 2004). While tribes also have distinct political rights and define their own membership rules, socio-legal scholars must analyze how this came to be. As Bethany Berger rightly asserts “Federal Indian Law has often been made in the absence of the people it most intimately affects” (2003:1999). Consequently, I must analyze the legislation and treaties surrounding sovereignty and membership.

The use of blood quantum rules was officially integrated into the legal status of Indigenous identity in the Indian General Allotment Act or what is commonly called the Dawes Act of 1887. This legislation allotted lands among tribal members. Although the Dawes Act did not explicitly discuss blood quantum rules, the implementation of this law began the process of dividing “full-bloods from “mixed-bloods” through a policy of measuring blood quantum that became crucial for land sale and use (Lawrence 2003). This was an attempt by the federal government to disband tribal entities and encourage assimilation through family farming (Schmidt 2011). This practice led to massive losses of tribal lands because Indigenous people whose lineages derived from more than one tribe might not be eligible for allotments, even though they were “full-blooded” (Lawrence 2003:5). By 1934, 118 out of 213 reservations were allotted which resulted in the loss of 90 million acres of tribal lands (Schmidt 2011:5; Wilkins and Stark 2010). These European understandings of racial purity were foreign to many Indigenous tribes.

The use of blood quantum rules was reinforced in 1934 when the Indian Reorganization (Wheeler-Howard) Act, used race as an essential requirement for tribal membership. Section 16 of the Act permitted "any Indian tribe, or tribes, residing on the same reservation ... to organize for its common welfare," subject to Bureau of Indian Affairs (BIA) approval of its constitution (Lawrence 2003). A key feature of this legislation was the establishment of US sanctioned tribal governments. The BIA encouraged tribes to codify constitutions based on the U.S. model (Schmidt 2011:6). In practice, most tribes adopted constitutions prepared by the BIA, including membership criteria based on blood quantum or proof of descent from a tribal member ((Schmidt 2011). The BIA also persuaded tribes to compile membership "rolls" which is currently what the majority of tribes use to trace their blood lineage (Schmidt 2011). The result was that race, which once had little or no bearing on tribal self-identification, came to be an essential element of group belonging and resource allocation.

In the context of the civil rights movement, Congress passed the Indian Self-Determination Act and Educational Assistance Act in 1975. This act specifically stated that the United States had an obligation to support the "expression of the American Indian people for self-determination"(Villazor 2008:809). To meet this obligation the Federal Government was required to take steps to ensure the "development of strong and stable tribal governments" (Villazor, 2008:809). However, the federal government adopted blood quantum rules to delineate the individuals and groups who would benefit from programs that fell under this federal policy. Thus, blood quantum rules in this context were being used to promote political self-determination, which formed part of the divide between the racial and political meaning of indigeneity under modern law (Villazor, 2008).

Given this legislative history, it is not surprising that blood quantum standards now figure prominently in the membership requirements of most tribes. The line between the political and racial has always been blurred, especially when previous methods of racial measurement like blood quantum rules are the same ones used to measure political membership. This can be seen in the current process for applying for federally recognized tribal status. Non-recognized tribes must submit applications for federal acknowledgement that satisfy the Bureau of Indian Affairs' Part 83 Criteria. These criteria are extensive and are meant to ensure that recognized tribes are distinct autonomous communities that existed before 1900. The mandatory criteria for Federal Acknowledgement are as follows:

- a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1990
- b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
- c) The petitioner has maintained political influence or authority of its members as an autonomous entity from historical times until the present
- d) A copy of the group's present governing document including its membership criteria. In the absence of this written document, the petition must provide a statement describing in full its membership criteria and current governing procedures.
- e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.
- f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian Tribe. However there are exceptions to this rule.
- g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship.

The process of federal recognition is in part determined by community attachment for a defined period of time. Proving this historical attachment is burdensome and nearly impossible without a treaty or other written documentation. Given the history of genocide, displacement, and exploitation of indigenous people throughout the colonial period, combined with the oral historical tradition of many tribes, it is not surprising that many tribal groups do not possess the

documentation that the federal government requires. As Coffey and Tsosie state

In a world where tribal political sovereignty is dependent upon federal acknowledgement, Indian nations will always be vulnerable to restrictions on their sovereignty, and perhaps even to the total annihilation of their sovereignty (2001:194).

Smith (1999) and TallBear (2003) argue that indigenous identities have therefore become regulated through legislation by the government. Smith argues,

legislated identities which regulated who was Indian and who was not... who had the correct fraction of blood quantum, who lived in the regulated spaces of reserves and communities were all worked out arbitrarily (but systematically), to serve the interests of the colonizing society (1999:22).

These legislated identities were therefore a form of symbolic violence. The regulation of Indian identity had serious implications for resource allocation and community. It is precisely this type of power relationship Foucault describes in his discussions of the relationship between power and subject.

This form of power applies itself to immediate everyday life which categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognize and which others have to recognize in him. It is a form of power which makes individuals subjects (Foucault 2017:781).

Individuals who are enrolled in a federally recognized tribe receive a Certificate of Degree of Indian Blood (CDIB) by the BIA which records the degree of Indian blood of each individual member. Proponents of a political understanding of tribes purport that Indian law is not one of race because

the means for determining ‘who is an Indian’—tribal membership criteria and federal or state definitions of Indianness’ – are both over inclusive and under inclusive. Race is under inclusive because many thousands of Indian people are not members of Indian tribes because they do not meet tribal membership criteria. Moreover, federal and state definitions of “Indianness” are written or construed narrowly, excluding additional Indians in order to keep government expenditures as low as possible. Race

is over inclusive because many non-Indian people are members of Indian tribes while many others qualify for tribal, federal, and state government Indian programs despite their lack of Indian racial characteristics such as blood quantum (Fletcher 2008:181).

While this is a persuasive argument for understanding tribes solely as political groups, the predominate way tribes were understood and treated by the U.S. government is through a racialized lens. Just as categories of nation and race overlap for other groups in the United States (i.e. African American), so too do understandings of indigenous racial identity and political status.

Additionally, as discussed in chapter 1, the biological understandings of race that predominately surround tribal membership rules have intensified with the use of genetic testing. Recently, tribes have been utilizing DNA testing to enforce these membership rules. DNA testing can demonstrate a biological relationship between two individuals, but there is no gene for individual tribes or American Indian/Alaska Native (AI/A) ancestry (Bardill 2014). Currently, tribes are using DNA testing in three ways: to help inform new tribal enrollment decisions; for disenrollment; and to obtain federal recognition. There is currently a resurgence of genetic essentialism which echoes the concepts of biological determinism. This use of genetic tactics to gain political recognition is evidence that there are biological concepts underlying the notions of tribal belonging and identity.

Case law

The courts have also played a main role in constructing “indianness.” *United States v. Rogers*, and *Morton v. Mancari* are two of the most frequently referenced cases by scholars debating the salience of race within the legal construction of tribal membership in the United States.

In 1844, William S. Rogers allegedly stabbed his brother-in-law to death. Both men were

racially white and married to Cherokee women. They became citizens of the Cherokee Nation and were therefore governed by Cherokee law. When the U.S. authorities sought to prosecute Rogers for the murder, he argued that the Arkansas court had no jurisdiction because crimes between Indians were exempted. He reasoned that because both he and his brother-in-law were citizens of the Cherokee nation, he could not be prosecuted by the state (Berger 2004). However, in 1846, U.S. Supreme Court dismissed Rogers' challenge and stated,

We think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their law and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, -- of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs. And it would perhaps be found difficult to preserve peace among them, if white men of every description might at pleasure settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that Congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country (45 U.S. 567 1846; Berger 2004:1968).

U.S. v. Rogers is often used as evidence that Federal Indian law is based on race.

However, this has been consistently debated by legal scholars⁴². Berger (2004) claims that the story is more complex than it appears. She argues that while the court claimed its view of equality between whites and Cherokee tribal members, the U.S. Supreme Court placed limits on tribal power by defining tribes racially (Berger 2004). Berger makes a convincing case that the U.S. Supreme Court took this case in order to limit tribal sovereignty (2004). By defining tribes

⁴² See debate (Goldberg-Ambrose 1991; Williams 1990, 1991).

as inherently bounded racial groups, the court could argue implicitly that they were inherently inferior to the United States and, thus, needed the federal government's help to govern the lawless citizens (like Rogers) among them (Berger 2004). She further argues that this tactic continues today as the court "emphasizes the racially closed nature of Indian tribes in order to deny tribal jurisdiction over non-members and affirm state jurisdiction over non-Indians on tribal land. These efforts replicate 19th century attempts to deny tribes political rights by defining them as groups tied together by 'blood and habit' rather than as government entities" (Berger 2004:2052).

As scholars, we must examine how legal claims of equality can mask the ethnocentrism and racism that often defines political rights. I will add that it is precisely this complexity that demands further comparative exploration of questions surrounding Indigenous tribes, its members, and Indigenous identity. We must examine the ever-changing boundaries of race, ethnicity, and nationality, as well as the rights afforded according to these boundaries. The social construction of race would anticipate this kind of complexity where the understandings of race are often re-defined and emphasized based on context. Specifically, one should expect to see the salience of race operating in different ways at different points in history based on the different actors utilizing these definitions. Therefore, it is my argument that tribal groups should be understood in political, racial, ethnic, and national terms. These categories are not mutually exclusive and are inextricably linked, especially within the history of colonization in the United States.

The 1974 Supreme Court case, *Morton v. Mancari* also demonstrates the political and racial construction of indigeneity. This case involved the constitutional challenge of a federal preferential employment policy. The BIA established a policy, called Section 472, that gave

hiring preferences to American Indians with ¼ or more degree Indian blood and two non-American Indian BIA employees challenged this policy (Villazor 2008). To address this argument, the court reframed the issue to emphasize the right of American Indian tribes to political sovereignty. In the majority opinion, Justice Blackmun cited the history of "special treatment" granted to Indians. The preference for Indians in Section 472 was not "a 'racial' preference", but rather "an employment criterion reasonably designed to further the cause of Indian self-government" (Morton v. Mancari, 414 U.S. 1142, 94 S. Ct. 893 (1974)). Section 472 was in support of the "fulfillment of Congress' unique obligation towards the Indians," and was therefore not in violation of the Fifth Amendment (Morton v. Mancari).

Redefining the use of blood quantum rules away from race allowed for a very important legal consequence, the level of review. While a race policy would traditionally trigger strict scrutiny, this blood quantum employment policy only triggered a rational basis review. Under this lower standard, the court found that the special treatment based on blood quantum was rationally tied to the fulfillment of Congress' unique obligation to ensure American Indian Tribal self-determination (Villazor 2008). This opinion also limited the validity of blood quantum employment policies to federally recognized American Indian tribes.

Many scholars, like Fletcher, point to Justice Blackmun's Footnote 24 in *Morton v. Mancari* to demonstrate that the preference for tribal members was not racial in character but political (2008). In this case, the court focused on the fact that the criteria benefited certain Indians because they were "members of quasi sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion not because of their racial characteristics" (Morton v. Mancari). Fletcher argues that because the definition of Indian only includes federally recognized tribes that the preference is political rather than racial in nature (2008).

However, Williams (1990) points out that all tribal membership qualifications require two elements 1) a political affiliation and 2) a tribal blood quantum rule. Williams argues,

On its face, the tribal blood quantum–based as it is on genetic material – should be suspect. If so, tribal membership is itself based on one suspect [race] and one non-suspect [political status] classification. *Mancari*, by contrast apparently assumed that tribal blood could not be a racial element–that the only possible “race” is the general group of “Indians.” Such an assumption reflects a persistent ethnocentric myopia: the general category “Indian” is a non-Indian innovation and rests on racist assumptions (Williams 1990:803).

I agree with Williams and argue that political status and racial categories are not mutually exclusive. Although, *Waldron v. United States* upheld tribal authority to determine their own enrollment policies in 1905, most federally recognized tribes still require potential members to demonstrate a minimum blood quantum amount (TallBear 2003). TallBear also points out that although tribes have the ability to create their own membership rules, this freedom is greatly limited by the BIA who “provides patronizing step-by-step process guidance on tribal enrollment, emphasizes federal review of tribal law, and even provides charts on how tribes should determine blood quantum” (2003:89).

Therefore, we must examine the legal construction of political indigeneity and investigate how these constructions are racialized (Villazor 2008). For example, Villazor’s work examines the legal production of political indigeneity and demonstrates how its narrowed construction reifies its racial component (2008). She finds that the process unfairly excludes many Indigenous groups and, in so doing, reifies the racialized construction of Indigenous groups who are unable to obtain federal recognition (Villazor 2008:807). When Native Hawaiians also fought for their right to self-determination as an Indigenous group, the federal government did not recognize them, so they were treated as a racial group (Villazor 2008). Similarly, in adoption cases, when

children fail to meet the necessary blood quantum standards to be enrolled in a tribe, they are treated like any other minority child under the MEPA-IEAP.

I question why governmental recognition makes a tribe somehow devoid of racial components and instead is determined to be solely a political interest group. We must examine legal institutions not as self-contained, objective entities, but as institutions that often make strategic decisions based on specific social, historical, and political contexts. If using this view, it follows that the judicial labeling of tribes as political groups instead of racial groups does not mean that there are not racialized processes occurring underneath the political label. It is therefore important to also include a discussion of tribal identity.

Tribal identity

While identity is an individual attribute, it is also relational and based on others' identities. Identity is based on historical context and is neither fixed nor neutral. Identities are embedded in systems of power based on race, class, and gender and are, therefore, highly politicized and socialized (Lawrence 2003). "Identity in a sense is about ways of looking at people, about how history is interpreted and negotiated, and about who has the authority to determine a group's identity or authenticity"(Lawrence 2003:4). As Lawrence argues, "for native people, individual identity is always being negotiated in relation to collective identity and in the face of an external, colonizing society" (2003:4).

Indigenous People in the United States are not a monolithic racial society. As Michael

Yellow Bird notes,

The idea of dividing people according to a single racial identity was the invention of Europeans, who socially constructed race to exclude and subordinate peoples who were not white and to privilege those who were... Under colonial rule, Indigenous People in the United States and Canada were systematically subjugated and oppressed because Europeans and European Americans considered them to be an inferior race and

therefore felt justified in ignoring individual tribal identities and labeling Indigenous Peoples as one racial group: Indians (1999:3).

Currently, Indigenous peoples in the United States represent more than 550 tribes which includes 223 Alaska Native villages (Bird 1999:3). The claim that Indigenous Peoples are solely political groups ignores individual tribal identities which continue to be institutionally suppressed and distorted (Bird 1999). Government entities simultaneously define Indigenous tribes as racial groups in the census, yet legally only define them as political groups. According to the 2010 census, “the U.S. Census Bureau must adhere to the 1997 Office of Management and Budget (OMB) standards on race and ethnicity which guide the Census Bureau in classifying written responses to the race question” (US Census Bureau 2013). The following is the racial category for Indigenous Peoples, “American Indian or Alaska Native – A person having origins in any of the original peoples of North and South America (including Central America) and who maintains tribal affiliation or community attachment”(US Census Bureau 2013). There is no separate category for political affiliation overall, just an area to handwrite your “enrolled or principal tribe” (US Census Bureau 2013). From a governmental standpoint, this political affiliation is embedded within a racial category. Lawrence points out that for Indigenous People, to be defined as a race is synonymous with having their nations dismembered. For over a century Native people in the U.S and Canada have been “classified by race and subjected to colonization processes that reduced diverse nations to common experiences of subjugation” (2003:4).

However, cultural identity is very important to Indigenous groups. Bird (1999) found that there is a strong preference for tribal affiliation labels because this demonstrates a powerful sense of ethnic and tribal pride. These identities are fundamental to understanding and respecting diversity among Indigenous Peoples (Bird 1999). Tribal identity represents a form of cultural identity empowerment that opposes anticolonial discourse as it forces colonizers to acknowledge

the rich diversity among Indigenous Peoples (Bird 1999). Alternatively, the label “American Indian” is a legal definition used by the federal government to fulfill its responsibility to a select group of federally recognized tribes in the U.S (Bird 1999). Lawrence argues that this contemporary Native identity exists in an uneasy balance between concepts of “Indianness” as a racial identity and specific tribal identities denoting nationhood (2003). Bird suggests that Indigenous Peoples use two labels, one racial label that would honor racial diversity and another indicating tribal political identity and sovereignty (1999). McKinley and Brayboy argue that a theoretical framework that accounts for the “political/legal nature of our relationship with the U.S. government as American Indians and with our embodiment as racialized beings” is needed (2005:427).

Coffey and Tsosie assert that there needs to be a reconceptualization of the tribal sovereignty doctrine that is based on *cultural sovereignty*, meaning the “effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures. Inherent sovereignty is not dependent upon any grant, gift or acknowledgement by the federal government. It preexists the arrival of the European people and the formation of the United States” (2001: 196). Therefore, cultural sovereignty seeks to provide a different context for political sovereignty, one rooted in autonomy of Native people as distinct cultural groups (Coffey and Tsosie 2001:201).

Finally, I must note that the blurring and shifting of racial boundaries due to the continuous negotiation of membership and the rights afforded by the U.S. government based on membership can have dangerous repercussions for Indigenous Peoples and tribal rights. Since 1887, native identity has legally been defined by legislation based on colonialist assumptions about race, nativeness, and civility that are deeply rooted in white supremacy and assimilationist notions of

“Indianness.” (Lawrence 2003). The purpose of this project is not to argue that the legal rights of tribes should be deemed unconstitutional due to the underlying racial understanding of tribal membership; rather, it is to investigate the evolution of race as a concept and analyze the ways these definitions affect family formation in the United States. Broadly, it is a call to researchers to pay special attention to the ways in which membership and culture are defined and applied as well as to the motives of those determining the boundaries. However, as social scientists, we must also understand the potential repercussions of our work and the impact our work has on the lived experiences of those who are affected.

Racial categories are often utilized strategically for political purposes. Examining transracial adoption case law allows me to investigate how ICWA, designed to protect the sovereign rights of tribes, is often scrutinized and weakened. Comparing this law to the MEPA-IEAP allows us to understand the current processes of racial categorization. I find that there are many more similarities than differences when evaluating the definitions of race and the processes of child placement. I find that while ICWA and the MEPA-IEAP legislation describes two completely different purposes and procedural mandates regarding race, in practice, state and federal judges are actually conducting a similar racial analysis throughout transracial adoption cases. My findings expose tensions between the different race conscious ideals that drove these two pieces of legislation and the unwritten procedures used to enact them. Through further qualitative analysis, I identified three processes of judicial decision-making: racial identification and labeling, examination of cultural authenticity, and the evaluation of cultural contacts.

Racial Identification and Labeling

Even though courts look at each case individually, a closer look at this sample of case law indicates that judges treat racial groups as biological entities to which interests are attributed,

especially in ICWA cases. While blood quantum rules are particularly salient in ICWA cases, colorism is often perpetuated in MEPA-IEAP cases, as described in chapters 4 and 5.

In ICWA cases many children are identified as “Indian” through blood quantum rules as described in chapter 4. Blood quantum is frequently discussed in ICWA cases when the “Indian child” is bi or multiracial. However, to be clear, biracial children are treated predominately as “Indian children” if they qualify for tribal membership. Therefore, ICWA is only triggered when the child is categorized as an “Indian child” by the tribe. I find that the political and racial classification of the child based on biological parental lineage is typically discussed at the beginning of ICWA cases in this sample. In the *Adoptive Couple v. Baby Girl* cases discussed in the introduction of this dissertation, the court begins by saying “this case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee” (*Adoptive Couple v. Baby Girl*).

While it is not common to see blood-quantum definitions used to denote “Blackness” today, it should not be ignored that “Blackness” in the United States was, in the not too distant past, defined through hypodescent or the “one drop rule” which classifies anyone with any amount of African blood as Black (Cornell and Hartmann 1998; Desmond and Emirbayer 2010). For example, the “one drop rule” and its various derivatives were some of the most common tools employed to restrict or limit citizenship, civil rights, and property rights (Desmond and Emirbayer 2010). A comparative approach uncovers the similarities between the concept of hypodescent used to deny certain rights for Black people and blood quantum rules used to limit resources to indigenous people.

In MEPA-IEAP cases, skin color and tone are discussed instead of blood quantum rules. Even though many Black families that are biologically related do not share the same

skin-tone, the court still ascribes to the belief that the closer the child looks to the adoptive parent, the better off the child will be. Historically, adoption professionals have structured the adoptive family to imitate biology and promoted the goal of matching adoptive parents with biological look alikes. In the MEPA-IEAP cases, there was often a comparison between the physical characteristics of the child and physical characteristics of the prospective adoptive family based on skin color and tone. For example,

Vito's foster family, with whom he had resided since his discharge from the hospital in February 1992, is 'Hispanic' (from the Dominican Republic); his foster parents speak only Spanish. Vito was raised as a Latino child and speaks both Spanish and English. His biological family is African American. The judge found, apart from the fact that Vito is light-skinned and his foster family is dark-skinned, that there were no striking physical differences between them". In re Adoption of Vito, 47 Mass. App. Ct. 349, 356, 712 N.E.2d 1188, 1195 (1999)

Throughout this case, racial categories were understood as mutually exclusive monolithic categories. Here Vito's foster parents were identified as dark skinned and Dominicans, which was deemed problematically different from being light skinned and African American. This passage also demonstrates the racialization of Latinos, where Latino/Hispanic is typically thought of as an ethnic category.

Cultural Authenticity Evaluations

In both ICWA and MEPA-IEAP cases, the court undergoes a cultural authenticity evaluation. Racial groups are often discussed as having monolithic cultural practices, which are frequently tied to the child's well-being. There is very little to no discussion of cultural diversity within racial groups. However, whiteness is often understood as the lack of culture and race.

The concept of cultural authenticity is especially salient when discussing the *Existing Indian Family Exception*, as discussed in chapter 4. This exception allows States to challenge the reach of ICWA based on the cultural authenticity of the biological parent/s. Therefore, in states

that have adopted this exception, ICWA does not apply to the voluntary adoptive placement of a child of Indian lineage unless the child is part of an “Existing Indian Family.” This means that the tribe or the parents must demonstrate that one or both of the parents have a “significant social, cultural, or political relationship” with the federally recognized tribe. When the court upholds the EIF exception, it is adopting both a biological and a cultural understanding of race. Not only must the child have met the requisite membership requirements determined by blood quantum but his or her biological parents must also have had a social or cultural relationship with the tribe. Therefore, the child is not an authentic tribal member unless the biological parent behaved like a tribal member (Maldonado 2008).

As social scientists, we must question who gets to define group membership and cultural belonging. While biological conceptions of race are problematic, so are cultural checklists created by non-tribal members to determine whether the tribe gets to make decisions regarding placement. By rejecting a definition of tribal membership purely based on genetic heritage, it also served to weaken the right that tribes have regarding family adjudications of Indigenous children. This is similar to Bethany Berger’s work mentioned at the beginning of this chapter, which argued that the U.S. government defined tribes racially in *United States v. Rogers* to limit tribal sovereign rights (2004). In this case, I argue that states enforced a cultural understanding of race to limit the reach of ICWA. Therefore, while blood quantum laws rooted in biological understandings of race are problematic, so too are cultural understandings of race when applied by “outsiders” with the purpose of limiting sovereign rights. Additionally, it must be reiterated that the need for tribal membership rules in the first place is due to an essentialist understanding of Indigenous populations and cultures, embedded within a history of colonization.

This exception was argued at the trial level in the *Adoptive Couple v. Baby Girl* case but it was quickly disregarded as the South Carolina court determined that the Existing Indian Family exception was against the purpose of ICWA. However, this court did include a lengthy analysis about Dustin Brown's relationship and involvement with the Wolf Clan tribe, which focused on everything from food to art to political participation.

[Father's father] is Cherokee Indian. He grew up knowing he was Cherokee and being proud of who he was. [Father's parents] ... prepare the following traditional foods in their home: grape dumplings, buckskin bread, Indian cornbread, Indian tacos, wild onions, fry bread, polk salad and deer meat. [Father's mother] state[d] she cooks these foods in her home on a regular basis and all of her children have eaten these items.

[Father's parents] attend the Cherokee Holiday in Tahlequah, Oklahoma [,] when they can and participate in eating traditional foods, viewing the arts and crafts and watching the traditional games. [Father's father] participates in voting in the Cherokee elections[,],.... took part in learning about the Cherokee culture when his children were in high school by learning to make Indian crafts and learning to play the drum, [and].... is sometimes seen at the Nowata Indian Health Clinic but receives the majority of his health care from the Veterans hospital. He claims his family is from the Wolf Clan, and he has been to as well as participated in stomp dances.

[H]is family had Indian land which was located in Pryor, Oklahoma and Cayuga, Oklahoma. He claims to have very traditional ties with his extended family and considers genealogy [sic] a hobby by researching his Cherokee culture. [Father's parents] have many Native American items in their home. Decorative Native American pieces are scattered throughout their home in nearly every room. Thus, the Record demonstrates that Father and his family are well-positioned to introduce Baby Girl to her Indian heritage. (*Adoptive Couple v. Baby Girl* 731 S.E.2d 550 (S.C. 2012)).

Similarly, there is very little to no discussion of cultural diversity within racial groups when discussing MEPA-IEAP cases. Racial groups are often discussed as having monolithic cultural practices which are frequently tied to the child's well-being. This is especially evident in the *Adoption of Vito* case,

...an expert on racial and ethnic issues in psychology, testified that Vito self-identified as a Latino, although racially he is African-American. [The expert] further testified, and the judge found, that Vito could become “curious” about his divergent cultural/racial makeup as he grows up and might want to gain information on his racial heritage. The judge also credited her testimony that, even though Vito's biological race had not been hidden from him, he still could have adjustment problems which would, typically, arise during his adolescence... The judge properly considered the difficulties Vito may face in the future. *Adoption of Vito* 712 N.E.2d 1188

However, the final court ruling in the Supreme Court of Massachusetts found no support for a determination that Vito needed to have contact with his biological mother. The following passage includes the Supreme Court judge’s review of the facts of the case and the appellate judge’s analysis.

[There is no support for the determination that] Vito's relationship with his biological mother is "crucial" for his "racial and cultural development and adjustment." Moreover, here the judge found that Vito "is a typical Latino child growing up in a Latino family . . . [and who] describes himself as Latino," who was "fully integrated into his foster family both emotionally and ethnically," and whose physical appearance was not strikingly different from his foster parents. His primary language is that of his foster family, not his biological mother. ...[Therefore] it was inappropriate to stall Vito's adoption at the hurdle of termination proceedings, based on speculation about Vito's need for contact with his biological mother to facilitate his adjustment later in adolescence to his racial identity. *In re Adoption of Vito*, 431 Mass. 550, 567, 728 N.E.2d 292, 305 (2000).

In all but two cases, whiteness was at worst, considered a destructive force or at best an invisible one. Very rarely was cultural diversity discussed in conjunction with whiteness. Additionally, as described in Chapter 5, whiteness is not considered a “cultural need.” This is especially clear when the child at issue is biracial or an “Indian child”. The minority status of the child becomes the main focus of the discussions surrounding identity adjustment.

Best-Interest Assessments and Cultural Contacts

In both MEPA-IEPA cases and ICWA cases, when racial match-ups as explained by the

previous two processes were not possible, the third process, finding cultural contacts occurred. Here, the courts used cultural contacts as a proxy for a biological family experience. Adoptions were often granted when the adoptive family could demonstrate their ability to provide the child with cultural contacts or resources and experiences similar to those the judges believed their biological parents would have provided. In MEPA-IEPA cases, the court looks for diverse family and friend groups, diverse neighborhoods, and memberships of certain organizations as indicators that the unrelated adoptive parents are racially tolerant and culturally competent enough to raise a child of a different race. There is also an underlying assumption that the prospective adoptive parents need not only be racially tolerant but also have enough resources to socialize the child into a certain racial identity to the extent that she or he will not suffer psychological harm.

This evaluation is especially common in in MEPA-IEAP cases. In the *Adoption of Vito* case, the probate judge and the appellate judge found, with support from the record, that the

.... biological mother could provide Vito with access to people who share his racial heritage and could provide Vito with information about the African–American community, thereby facilitating his adjustment to his dual heritage.

... It appears from the record that the judge did not order postadoption visitation to alter Vito's racial identity, but to ensure that he would have contact with African–Americans who could answer questions and serve as Vito's link to his ancestry and heritage.

...Although Vito's foster family were supportive of his racial heritage, they had no “significant contacts with the African–American community and could give him limited or no connection to his African–American family or culture (*In re Adoption of Vito*, 47 Mass.App.Ct. at 1195).

However, the Massachusetts Supreme Court found,

While Vito’s foster family currently has no significant contacts with the African American community, that fact says little, if anything about contacts that his adoptive family might develop in the future, if this

becomes important for their son (*In re Adoption of Vito*, 431 Mass. at 567).

There is a general unspoken assumption throughout transracial adoption law cases that minority children have similar needs that can best be met by having parents who look like them. Many courts were concerned about the child's adjustment and possible racial identity issues. However, there was virtually no discussion regarding why these adjustment issues arise. This is not to say that community belonging is irrelevant; however, the court is hesitant to discuss reasons for these adjustment issues that stem from racism and discriminatory actions for which the child may not have support. In fact, the Court has explicitly stated its reluctance to consider bias when making custody decisions in *Palmore v. Sidoti*.

In ICWA cases, I find when the child is ultimately placed with an unrelated non-Indian adoptive parent by a tribe rather than the state court system, the tribe often requires visitation between the biological parents and/or other tribal members in order to maintain cultural contacts. This use of cultural contacts was demonstrated in the Holyfield case discussed in chapter 3. The difference in ICWA cases is that cultural contacts are maintained not only to promote the best interest of the child, but also to advance the integrity and strength of the tribe. In the *Adoptive Couple v. Baby Girl* case, the South Carolina court states the following as reasoning for placing Veronica with the Capobiancos,

The adoptive Couple has through this litigation confirmed their intent to rear Baby Girl in a manner that maintains a meaningful connectedness to her Native American heritage *Adoptive Couple v. Baby Girl* 404 S.C. 490.

Therefore, there appears to be an unwritten burden of proof on the prospective adoptive parents requiring them to overcome the presumption that a child will be maladjusted if they do not share the same racial identification. This assumption is observed in both ICWA

and MEPA-IEAP cases. However, this burden can be overcome by a showing of cultural contacts, which are often met by maintaining contact with a biological parent or relative.

While this may initially seem like a positive compromise, it is problematic because courts are terminating biological parents' rights with the reasoning that they and the extended biological family can be used as a cultural resource for the adoptive family and child. Therefore, it is precisely the reasoning of cultural contacts and the desire of the biological parents to maintain custody of their children that justifies the termination of their parental rights.

Well-Being Considerations: Bonding and Permanency

Even more common than discussions of cultural competency were discussions of well-being. This can include anything from health care to cultural competency, but the most frequently discussed forms of well-being are bonding evaluations. Very often the concept of bonding and well-being was the ultimate best interest factor and would be used by judges to disregard evidence related to racial tolerance and cultural competency considerations. For example, *in re Navajo Nation v Arizona Department of Economic Security*, the appellate court affirmed the juvenile courts finding that that that bonding and the need for permanency was "good cause" to deviate from ICWA preferences. The Juvenile court stated,

The Child ... has been [with the current placement] for 15 of the 16 months of his life. Essentially, these are the only parents the Child has ever known. The Child and the [current placement] are bonded with each other.... It was the [current placement], not the Navajo Nation who rescued the Child from deplorable living conditions.... The Child will suffer detriments—including certain emotional and psychological damage, which has the potential to be profound—if removed from the [current placement]. The proposed Navajo [relative] placement ... has no relationship or bond with the Child. The Child will be exposed to his multi-ethnic culture, including the Navajo culture, if raised by the [current placement]. And, finally, there is no need to move the Child from the [current placement], as they have been certified to adopt (Navajo Nation, 230 Ariz. at 33).

This discussion is telling but perhaps not as surprising as the premise for this legal rationalization stemmed from the “psychological parent” theory, put forth by Joseph Goldstein and Anna Freud, and Albert Solnit. This theory contends that when a child is removed from their home they start to form new bonds with a “psychological parent,” and removing a child from their psychological parents could result in serious emotional harm (Roberts 2002). As you may remember from Chapter 3, Professor Albert Solnit was also a congressional witness invited to speak at the MEPA-IEAP congressional hearing, where he testified to the importance of permanency (House of Representatives 1995). While this theory has been critiqued for failing to consider the role of removal from a biological parent’s home or the potential for someone to have attachments to multiple parental figures, it’s emphasis on permanency has persisted in child welfare policy (Roberts 2002).

Furthermore, the practice of “concurrent placement” is part of this permanency trend (Roberts 2002:111). This policy simultaneously considers reunification and adoption when making placement decisions. The bonding clock essentially starts as soon as placement begins, and the longer it runs, the more likely a finding of permanency will overrule other best interest factors. Thus, the prevailing view that children in foster care should be quickly placed in permanent homes because stability and bonding are important for a child’s social and psychological development, is reflected in the transracial adoption cases I analyze (Roberts 2002).

Specifically, I find that when racial and cultural well-being factors are discussed, they are frequently pushed aside for an analysis regarding bonding. For example, in ICWA cases, the court often finds “good cause” to deviate from placement requirements because although there are other ICWA compliant placements, the child has a need for permanency and has

bonded with the prospective adoptive family. Thus, the goals of permanency often conflict with the goals of cultural family reunification, and community consciousness.

While most arguments surrounding child placement focus on the psychological well-being of the child particularly having to do with bonding and permanency, I posit that many of these discussions are happening in the wrong context. While some adopted children may have adjustment issues, the court does not address the structural components surrounding the root of these potential problems, or provide resources to help with that adjustment. Issues of racism, state sponsored violence, discrimination, poverty and prejudice are rarely discussed. This individualistic approach denies the importance and interest of historically marginalized communities in keeping their communities together. Just as ICWA allows for consideration of the rights of the parent, the best interests of the child, and the strength of the tribe, perhaps there should be a possibility for the consideration of community interests for other minority groups as well. Just as William Byler stated, there is a relationship between the treatment of all children, “there is only one child and her name is children” (United States Senate 1974:8).

Conclusion

Race is socially constructed by legal institutions that create and bolster racial ideologies without explicitly engaging in categorical debates or discussing the impact these definitions have on those they are applied to. This research provides additional insight relating to the current transracial adoption discourse and judicial perceptions of race and its role in family formation. It also contributes to the sociological literature by demonstrating how legal institutions make and reinforce racial categories. By identifying the processes of judicial decision making and studying the discourses in transracial adoption legislation, I can evaluate

processes of race-making more generally.

This analysis blends both legal and sociological contributions to the question of race, racial formation, and the formation of the family. Analyzing transracial adoption case law brings both visibility and awareness to these processes of racialization and family formation by the state. This study uncovers the racial concepts utilized by the state to racially categorize children and their caretakers. This research also demonstrates how judges understand and use race in similar ways when making placement decisions.

Finally, these findings suggest that even when “race conscious” legislation is enacted - judicial understandings of race do not align with social scientists’ agreed upon notion that race is a social construction rather than a biological certainty. However, when this legislation is applied in the case law, judges in both ICWA cases and MEPA-IEAP cases understand race as a biological certainty and attach this understanding to “best-interest” assessments. These findings support other research that demonstrates the resurgence of biological understandings of race.

APPENDIX A

Table A: Sampling Search Terms

TABLE A: SAMPLING SEARCH TERMS		
Database	Search Terms	# Cases Listed
Westlaw	adv: adoption & "best interest" and (race or racial or ethnic! or culture or cultural) /p (black or Afro! African or white or Caucasian or Asian or Korea! or China or Chinese or Hispanic or latin! or native or indigenous or indian or tribe or tribal or non-native or non-indian or non-indigenous or "different race") & (placement or custody)	881
Westlaw	adv: adoption & "best interest" & ("ICWA" or "Indian Child Welfare Act") & (race or racial ethnic! or culture or cultural) and (black or Afro! African or white or Caucasian or Asian or Korea! or China! or Hispanic or latin! or native or indigenous or indian or tribe or tribal or non-native non-indian or non-indigenous) & (placement or custody)	670
Westlaw	adv: adoption & "best interest" & ("Multiethnic Placement Act" or "Interethnic Adoption Provisions" "or MEPA" or "1996b") & (race or racial ethnic! or culture or cultural or black or	14

	Afro! African or white or Caucasian or Asian or Korea! or China or Chinese or Hispanic or latin! or native or indigenous or indian or tribe or tribal or non-native non-indian or non-indigenous or "different race") & (placement or custody)	
Westlaw	adv: transracial adoption and custody /p best interest and race or racial or ethnic! or culture or cultural and black or African or white or Caucasian or Asian or Hispanic or latino or native or indigenous or indian or tribe or tribal or non-native or non-indian or non-indigenous (Dates 1/1/1997-12/31/2016) limited by Family Law	928
Westlaw	transracial adoption /p best interest /p race or racial or ethnic! or culture or cultural and black or African or white or Caucasian or Asian or Hispanic or latino or native or indigenous or indian or tribe or tribal or non-native or non-indian or non-indigenous (Dates 1/1/1997-12/31/2016) limited by Family Law]	196
Westlaw	adv: adoption /p custody /p race or racial or ethnic! or culture or cultural or black or African or white or Caucasian or Asian or Hispanic or latino or native or indigenous or indian or tribe or tribal or non-native or non-indian or non-indigenous and best interest (Dates 1/1/1997-12/31/2016) limited by Family Law	672

Westlaw	ICWA and Indian Child Welfare Act and adoption and custody and best interest and race or racial or ethnic! or culture or cultural and native or indigenous or indian or tribe or tribal and non-native or non-indian or non-indigenous or Black or African! or White or Caucasian or Asian or Hispanic or Latino (Dates 1/1/1997-12/31/2016 restricted by family law]	330
Westlaw	Multiethnic Placement Act or MEPA and adoption /p custody and best interest and race or racial or ethnic! or culture or cultural and native or indigenous or indian or tribe or tribal or non-native or non-indian or non-indigenous or Black or African! or White or Caucasian or Asian or Hispanic or Latino (Dates 1/1/1997-12/31/2016) restricted by Family Law	693
LexisNexis	adopt! and ("Indian Child Welfare Act" or ICWA) and (culture, or race, or racial, or ethnic!, or Afro! or African!, or White, or Caucasian, or Black, or Latin!, or Hispanic, or Asian, or Korea! or China! or Indigenous, or Indian, or tribe, or tribal, or Native!, or "non-Indian") and "best interest" and (custody or placement) limited by 1/1/1997-12/31/2016 and Family Law – Adoption	752
LexisNexis	adopt! and ("Multiethnic Placement Act" or "MEPA" or "1996b") and (culture, or race, or racial, or ethnic!, or Afro! or African!, or White, or Caucasian, or Black, or Latin!, or Hispanic, or Asian, or	11

	Korea! or China! or Indigenous, or Indian, or tribe, or tribal, or Native!, or "non-Indian") and "best interest" and (custody or placement) limited by 1/1/1997-12/31/2016 and Family Law – Adoption	
LexisNexis	adopt! and ("Multiethnic Placement Act" or "MEPA" or "1996b") and (culture, or race, or racial, or ethnic!, or Afro! or African!, or White, or Caucasian, or Black, or Latin!, or Hispanic, or Asian, or Korea! or China! or Indigenous, or Indian, or tribe, or tribal, or Native!, or "non-Indian") and "best interest" and (custody or placement) limited by 1/1/1997-12/31/2016 and Family Law – Adoption	7
LexisNexis	adoption and (culture, or race, or ethnic!) and (Afro! or African!, or White, or Caucasian, or Black, or Latin!, or Hispanic, or Asian, or Indigenous, or Indian, or tribe, or tribal, or Native!, or "non-Indian") and "best interest" and (custody or placement) limited by 1/1/1997-12/31/2016 and Family Law – Adoption	360
LexisNexis	adopt! and ("Indian Child Welfare Act" or ICWA) and (culture, or race, or racial, or ethnic!) and (Afro! or African!, or White, or Caucasian, or Black, or Latin!, or Hispanic, or Asian, or Korea! or China! or Indigenous, or Indian, or tribe, or tribal, or Native!, or "non-Indian") and "best interest" and (custody or placement)	204

	limited by 1/1/1997-12/31/2016 and Family Law – Adoption	
LexisNexis	adopt! and ("Multiethnic Placement Act" or "MEPA" or "Interethnic adoption" or "1996b") and (culture, or race, or racial, or ethnic!, or Afro! or African!, or White, or Caucasian, or Black, or Latin!, or Hispanic, or Asian, or Korea! or China! or Indigenous, or Indian, or tribe, or tribal, or Native!, or "non-Indian") and "best interest" and (custody or placement) limited by 1/1/1997-12/31/2016 and Family Law – Adoption	7
Total # of Cases		N=1039
Total # of Cases in Sample		N= 161

APPENDIX B
Sample Cases

1. Adina B. v. State of Alaska Dept. of Health & Social Services, Office of Children's Services, No. S-14314, 2012 WL 516007, (Alaska Feb. 15, 2012)
2. Adoption of J.T. v. Justin W., A139671, 2014 WL 5489077 (Cal. Ct. App. Oct. 30, 2014)
3. Adoptive Couple v. Baby Girl, 398 S.C. 625, 731 S.E.2d 550 (S.C. 2012)
4. Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013)
5. Adoptive Couple v. Baby Girl, 404 S.C. 483, 746 S.E.2d 51 (S.C. 2013)
6. Adoptive Couple v. Baby Girl, 404 S.C. 490, 746 S.E.2d 346 (S.C. 2013)
7. B.A. v. Superior Court, B265793, 2016 WL 5462853 (Cal. Ct. App. Sep. 29, 2016)
8. C.L. v. P.C.S., 17 P.3d 769 (Alaska 2001)
9. Carlson v. Texas Dept. of Family and Protective Services, No. 14-09-00133-CV, 2010 WL 987050 (Tex. App. Mar. 18, 2010)
10. Christina H. v. Arizona Dept. of Economic Security, No. 1 CA-JV 11-0145, 2012 WL 70650 (Ariz. Ct. App. Jan. 10, 2012)
11. Crystal R. v. Superior Court, 59 Cal.App.4th 703, 69 Cal. Rptr.2d 414 (Cal. Ct. App. 1997)
12. Cutright v. State, 97 Ark. App. 70, 244 S.W.3d 702 (Ark. Ct. App. 2006)
13. Department of Human Services v. K.K.M., 244 Or.App. 413, 260 P.3d 693 (Or. Ct. App. 2011)
14. Department of Human Services v. Three Affiliated Tribes of Fort Berthold Reservation, 236 Or.App. 535, 238 P.3d 40 (Or. Ct. App. 2010)
15. Division of Family Services v. T.W., No. 01-03-02TN, 2002 WL 1929548 (Del. Fam. Ct. Jan. 25, 2002)
16. Division of Youth and Family Services v. J.C., 2006 WL 1071521 (N.J. Super. Ct. App. Div. Apr. 25, 2006)
17. Division of Youth and Family Services v. S.S., 2011 WL 1405005 (N.J. Super. Ct. App. Div. Apr. 14, 2011)
18. Fresno County Dept. of Children and Family Services v. Superior Court, 122 Cal.App.4th 626, 19 Cal.Rptr.3d 155 (Cal. Ct. App. 2004)
19. H.G. v. Superior Court, No. B194965, 2007 WL 178514 (Cal. Ct. App. Jan. 25, 2007)

20. In Interest of H.A.M., 25 Kan.App.2d 289, 961 P.2d 716 (Kan. Ct. App. 1998)
21. In re A.H., 2d Juv. Nos. B217056, B217721, 2010 WL 685396 (Cal. Ct. App. Mar. 1, 2010)
22. In re A.J., No. F057005, 2009 WL 2047587 (Cal. Ct. App. Jul. 15, 2009)
23. In re A.J., C071107, 2013 WL 1411912 (Cal. Ct. App. Apr. 9, 2013)
24. In re A.J.S., 288 Kan. 429, 204 P.3d 543 (Kan. 2009)
25. In re A.L., B261317, 2015 WL 4661315 (Cal. Ct. App. Aug. 6, 2015)
26. In re A.M., 215 Cal.App.4th 339, 155 Cal.Rptr.3d 537 (Cal. Ct. App. 2013)
27. In re A.P., No. 3-13-0360, 2013 WL 4715665 (Ill. App. Ct. Aug. 29, 2013)
28. In re Adoption of B.G.J., 33 Kan.App.2d 894, 111 P.3d 651 (Kan. Ct. App. 2005)
29. In re Adoption of B.G.J. 281 Kan. 522, 133 P.3d 1 (Kan. 2006)
30. In re Adoption of Baby Boy C., 5 Misc.3d 377, 784 N.Y.S..2d 334 (Fam. Ct., N.Y. County 2004)
31. In re Adoption of Baby Boy J., 37 Misc.3d 198, 944 N.Y.S.2d 871 (Fam. Ct., N.Y. County 2012)
32. In re Adoption of Baby Girl S., 181 Misc.2d 117, 690 N.Y.S.2d 907 (N.Y. Sur. Ct., Westchester County 1999)
33. In re Adoption of C.C.G., 762 A.2d 724 (Pa. 2000)
34. In re Adoption of C.J., No.2-15-0762, 2016 IL App (2d) 150762-U (Ill. App. Ct. 2016)
35. In re Adoption of D.C., 928 N.E.2d 602 (Ind. Ct. App. 2010)
36. In re Adoption of D.Z.S., No. A04-606, 2004 WL 2050095 (Minn. Ct. App. 2004)
37. In re Adoption of E.H., 103 P.3d 177 (Utah Ct. App. 2004)
38. In re Adoption of Hannah S., 142 Cal.App.4th 988, 48 Cal.Rptr.3d 605 (Cal. Ct. App. 2006)
39. In re Adoption of Karen, No. 03-P-172, 58 Mass.App.Ct. 1110 (Mass. App. Ct. 2003)
40. In re Adoption of Keith M.W., 79 P.3d 623 (Alaska 2003)
41. In re Adoption of Kiley C., 2d Juv. No. B191692, 2008 WL 217517 (Cal. Ct. App. 2008)

42. In re Adoption of L.S., 2014 IL App (4th) 140276-U (Ill. App. Ct. 2014)
43. In re Adoption of Micah H., 295 Neb. 213, 887 N.W.2d 859 (Neb. 2016)
44. In re Adoption of Nellie, No. 05-P-785, 65 Mass.App.Ct. 1109 (Mass. App. Ct. 2005)
45. In re Adoption of Odetta, 87 Mass.App.Ct. 575, 32 N.E.3d 1277 (Mass. App. Ct. 2015)
46. In re Adoption of S.A., 918 N.E.2d 736 (Ind. Ct. App. 2009)
47. In re Adoption of S.W.F., 60 N.E.3d 1145 (Table) (Ind. Ct. App. Aug 5, 2016)
48. In re Adoption of Sara J., 123 P.3d 1017 (Alaska 2005)
49. In re Adoption of Vito, 47 Mass.App.Ct. 349, 712 N.E.2d 1188 (Mass. App. Ct. 1999)
50. In re Adoption of Vito, 431 Mass. 550, 728 N.E.2d 292 (Mass. 2000)
51. In re Adoption of Xaviera, 71 Mass.App.Ct. 1108, 881 N.E.2d 169 (Mass. App. Ct. 2008)
52. In re Alex T., 2011 IL App (1st) 110910-U (Ill. App. Ct. Sept. 19, 2011)
53. In re Allison S., No. H12-CP 95001146A, 1999 WL 244622 (Conn. Super. Ct. Apr. 16, 1999)
54. In re Anaya J.G., 403 Ill.App.3d 875, 932 N.E.2d 1192 (Ill. App. Ct. 2010)
55. In re Angelia M., No. E039296, 2006 WL 1086257 (Cal. Ct. App. Apr. 26, 2006)
56. In re Ashley B., No. H12CP02008297A, 2004 WL 3106084 (Conn. Super. Ct. Dec. 10, 2004)
57. In re Autumn K., 221 Cal.App.4th 674, 164 Cal.Rptr.3d 720 (Cal. Ct. App. 2013)
58. In re Autumn K., A141991, 2015 WL 4240987 (Cal. Ct. App. Jul. 14, 2015)
59. In re Averyheart, 2009 Ind. Super. Ct. LEXIS 13 (Ind. Super. Ct. May 29, 2009)
60. In re B.M., A146594, 2016 WL 4434672 (Cal. Ct. App. Aug. 22, 2016)
61. In re Baby Boy C., 27 A.D.3d 34, 805 N.Y.S.2d 313 (N.Y. App. Div. 2005)
62. In re Barbara R., 137 Cal.App.4th 941, 40 Cal.Rptr.3d 687 (Cal. Ct. App. 2006)
63. In re Blake C., No. A129017, 2011 WL 244820 (Cal. Ct. App. Jan. 26, 2011)

64. In re C.H., 2000 MT 64, 299 Mont. 62, 997 P.2d 776 (Mont. 2000)
65. In re C.M., D066824, 2015 WL 3632909 (Cal. Ct. App. June 11, 2015)
66. In re Carpenter, No. 217634, 1999 WL 33409752 (Mich. Ct. App. Dec. 3, 1999)
67. In re Christian C., A134713, 2012 WL 3194343 (Cal. Ct. App. Aug. 8, 2012)
68. In re Christopher B., No. B155809, 2002 WL 31256675 (Cal. Ct. App. Oct. 8, 2002)
69. In re D.D., Jr., 385 Ill.App.3d 1053, 897 N.E.2d 917 (Ill. App. Ct. 2008)
70. In re D.T., No. A10-35, 2010 WL 2733603 (Minn. Ct. App. July 13, 2010)
71. In re Darnae K., 2012 IL App (2d) 111143-U (Ill. App. Ct. 2012)
72. In re Derek W., 73 Cal.App.4th 823, 86 Cal.Rptr.2d 739 (Cal. Ct. App. 1999)
73. In re Destani, No. B149472, 2002 WL 266828 (Cal. Ct. App. Feb. 26, 2002)
74. In re E.J., 776 N.W.2d 302 (Table) (Iowa Ct. App. Oct. 7, 2009)
75. In re Emanuel M., No. D042280, 2003 WL 22407312 (Cal. Ct. App. Oct. 22, 2003)
76. In re Erika J., Nos. A-10-1038, A-10-1039, 2011 WL 2724297 (Neb. Ct. App. July 12, 2011)
77. In re F.W., 870 A.2d 82 (D.C. 2005)
78. In re Fantasia W., 2012 IL App (2d) 110315-U (Ill. App. Ct. 2012)
79. In re G.C., Jr., 216 Cal.App.4th 1391, 157 Cal.Rptr.3d 826 (Cal. Ct. App. 2013)
80. In re G.D., 2014 IL App (3d) 130611-U (Ill. App. Ct. Mar. 14, 2014)
81. In re Gabriel Y., No. B187779, 2007 WL 93383 (Cal. Ct. App. Jan. 16, 2007)
82. In re Georgia B., 2008 WI App. 148, 314 Wis.2d 261, 757 N.W.2d 851 (Wis. Ct. App. Aug. 5, 2008)
83. In re Guardianship of K.H.O., 161 N.J. 337, 736 A.2d 1246 (N.J. 1999)
84. In re Guardianship of L.S., 2014 IL App (4th) 130766-U (Ill. App. Ct. 2014)
85. In re H.M., 2016 IL App (2d) 151215-U (Ill. App. Ct. 2016)
86. In re H.N.B., 619 N.W.2d 340 (Iowa 2000)

87. In re Hart, 806 A.2d 1179 (Del. Fam. Ct. 2001)
88. In re Nery V., 22 Neb.App. 959, 864 N.W.2d 728 (Neb. Ct. App. 2015)
89. In re Isaiah A., 2014 IL App (1st) 123187-U (Ill. App. Ct. 2013)
90. In re J.L., 2012 IL App (2d) 120228-U (Ill. App. Ct. 2012)
91. In re J.M., C068201, 2012 WL 541523 (Cal. Ct. App. Feb. 16, 2012)
92. In re J.T., A142880, 2016 WL 517335 (Cal. Ct. App. Feb. 9, 2016)
93. In re James B., 229 Wis.2d 737, 600 N.W.2d 56 (Wis. Ct. App. 1999)
94. In re Jose R., No. B170886, 2014 WL 1212042 (Cal. Ct. App. June 3, 2004)
95. In re Julllian B., 82 Cal.App.4th 1337, 99 Cal.Rptr.2d 241 (Cal. Ct. App. 2000)
96. In re K.I., 2016 IL App (3d) 160010, 55 N.E.3d 1193 (Ill. App. Ct. 2016)
97. In re Kaitlin S., No. D054874, 2009 WL 3530315 (Cal. Ct. App. Oct. 30, 2009)
98. In re KJP-D, No. 323596, 2015 WL 4746307 (Mich. Ct. App. 2015)
99. In re Kristina M., 2014 IL App (2d) 140235-U (Ill. App. Ct. 2014)
100. In re Lizmarie J., No. H14CP02007107A, 2005 WL 1219258 (Conn. Super. Ct. Apr. 28, 2005)
101. In re Lucy L., F071667, 2016 WL 538339, (Cal. Ct. App. Feb. 10, 2016)
102. In re M.B., 2009 MT 97, 350 Mont. 76, 204 P.3d 1242 (Mont. 2009)
103. In re M.D., No. E047267, 2009 WL 1893364, (Cal. Ct. App. June 30, 2009)
104. In re M.F., 1 S.W.3d 524 (Mo. App. 1999)
105. In re M.F., E054076, 2012 WL 734128 (Cal. Ct. App. Mar. 7, 2012)
106. In re M.H., 2011 IL App (1st) 110196, 956 N.E.2d 510 (Ill. App. Ct. 2011)
107. In re M.K.T., 2016 OK 4, 368 P.3d 771 (Okla. 2016)
108. In re M.L., No. B223940, 2011 WL 693575 (Cal. Ct. App. Mar. 1, 2011)

109. In re Mahaney, 105 Wash.App. 391, 20 P.3d 437 (Wash. Ct. App. 2001)
110. In re Mahaney, 146 Wash.2d 878, 51 P.3d 776 (Wash. 2002)
111. In re Malik S., 1999 WL 311177 (Conn. Super. Ct. May 5, 1999)
112. In re Mariah H., No. A094298, 2002 WL 475194 (Cal. Ct. App. Mar. 29, 2002)
113. In re Mariah S., 1999 WL 1077940 (Conn. Super. Ct. Nov. 10, 1999)
114. In re Matthew D., No. K09CP09011935A, 2011 WL 5531331 (Conn. Super. Ct. Oct. 19, 2011)
115. In re Maximus H., 25 Misc.3d 1241(A), 906 N.Y.S.2d 781 (N.Y. Fam. Ct., Monroe County, Dec. 10, 2009)
116. In re Micah B., 2016 IL App (2d) 160425-U (Ill. App. Ct. Sept. 28, 2016)
117. In re Michael M., No. G030542, 2002 WL 31832560 (Cal. Ct. App. Dec. 18, 2002)
118. In re MyKarla M., 2009 WI App 110, 320 Wis.2d 705, 771 N.W.2d 930 (Wis. Ct. App. 110)
119. In re N.J., 125 Nev. 835, 221 P.3d 1255 (Nev. 2009)
120. In re N.M., 174 Cal.App.4th 328, 94 Cal.Rptr.3d 220 (Cal. Ct. App. 2009)
121. In re P.S., 797 A.2d 1219 (D.C. 2001)
122. In re Q.B., 2012 IL App (2d) 110763-U (Ill. App. Ct. Mar. 13, 2012)
123. In re Quincy D., No. H12CP110137756A, 2012 WL 1434972 (Conn. Super. Ct. Mar. 19, 2012)
124. In re Rueben W., No. D039807, 2002 WL 31235434 (Cal. Ct. App. Oct. 4, 2002)
125. In re S.B., 130 Cal.App.4th 1148, 30 Cal.Rptr.3d 726 (Cal. Ct. App. June 30, 2005).
126. In re S.B.C., 2014 MT 345, 377 Mont. 400, 340 P.3d 534 (Mont. 2014)
127. In re S.G., No. A12-0066, 2012 WL 3262976 (Minn. Ct. App. Oct. 16, 2012)
128. In re S.G., 828 N.W.2d 118 (Minn. 2013)
129. In re S.H., 2016 IL App (2d) 160535-U (Ill App. Ct. Nov. 17, 2016)
130. In re S.J.G., 183 N.C.App. 490, 645 S.E.2d 229 (N.C. Ct. App. 2007)

131. In re S.M., No. C055211, 2007 WL 3318261 (Cal. Ct. App. Nov. 9, 2007)
132. In re Santos Y., 92 Cal.App.4th 1274, 112 Cal.Rptr.2d 692 (Cal. Ct. App. 2001)
133. In re T.D., 2016 IL App (4th) 160032-U (Ill. App. Ct. May 27, 2016)
134. In re T.L., H040218, 2014 WL 1006085 (Cal. Ct. App. 2014 Mar. 14, 2014)
135. In re T.W., No. A.127657, 2010 WL 4362807 (Cal. Ct. App. Nov. 4, 2010)
136. In re Tristan F., A133509, 2012 WL 3992936 (Cal. Ct. App. Sept. 11, 2012)
137. In re Wingo, 143 Ohio App.3d 652, 758 N.E.2d 780 (Ohio Ct. App. 2001)
138. In the Matter of Baby Boy L., 2004 OK 93, 103 P.3d 1099 (Okla. 2004)
139. Jeff O. v. Arizona Dept. of Economic Security, No. 1 CA-JV 11-0019, 2011 WL 3820513 (Ariz. Ct. App. Aug. 30, 2011)
140. Kelly C. v. State of Alaska, Dept. of Health and Social Services, No. S-15923, 2016 WL 281055 (Alaska 2016)
141. L.G. v. State of Alaska, Dept. of Health and Social Services, 14 P.3d 946 (Alaska 2000)
142. Liza A. v. Superior Court, No. F045551, 2004 WL 2095631 (Cal. Ct. App. Sept. 21, 2004)
143. M.C. v. Adoption Choices of Colorado, Inc., 369 P.3d 659 (Colo. Ct. App. 2014)
144. Monty H. v. State of Alaska, Dept. of Health and Social Services, No. S-11814, 2005 WL 3508722 (Alaska 2005)
145. Moses M. v. Andrew H., No. 1 CA-JV 08-0158, 2009 WL 1177045 (Ariz. Ct. App. Apr. 30, 2009)
146. Native Village of Tununak v. State of Alaska, Dept. of Health and Social Services, 303 P.3d 431 (Alaska 2013)
147. Native Village of Tununak v. State of Alaska, Dept. of Health and Social Services, 334 P.3d 165 (Alaska 2014)
148. Navajo Nation v. Arizona Dept. of Economic Security, 230 Ariz. 339, 284 P.3d 29 (Ariz. Ct. App. 2012)
149. New Jersey Div. of Youth and Family Services v. D.V.H., 2009 WL 1287517 (N.J. Super. Ct. App. Div. May 11, 2009).

150. New Jersey Div. of Youth and Family Services v. X.Z.Z., 2011 WL 535934 (N.J. Super. Ct. App. Div. Feb. 17, 2011)
151. Pascua Yaqui Tribe v. Arizona Dept. of Economic Security, No. 1 CA-JV 070079, 2007 WL 5515315 (Ariz. Ct. App. Nov. 27, 2007)
152. Paula E. v. State of Alaska, Dept. of Health and Social Services, 276 P.3d 422 (Alaska 2012)
153. People ex. rel. South Dakota Dept. of Social Services, 2011 S.D. 8, 795 N.W.2d 39 (S.D. 2011)
154. Pit River Tribe v. Superior Court, No. C067900, 2011 WL 4062512 (Cal. Ct. App. Sept. 14, 2011)
155. Priscilla G. v. Arizona Dept. of Economic Security, No. 2CA-JV 2009-0083, 2010 WL 702464 (Ariz. Ct. App. Feb. 26, 2010)
156. R.G.W. v. S.M., No. M2009-01153-COA-R3-PT, 2009 WL 4801686 (Tenn. Ct. App. Dec. 14, 2009)
157. Seminole Tribe of Florida v. Dept. of Children and Families, 959 So.2d 761 (Fla. Dist. Ct. App. 2007)
158. Soohoo v. Johnson, No. A05-537, 2006 WL 851808 (Minn. Ct. App. Apr. 4, 2006)
159. Steve C. v. Arizona Dept. of Economic Security, No. 2 CA-JV 2005-0091, 2006 Ariz. App. Unpub. LEXIS 535 (Ariz. Ct. App. Nov. 30, 2006)
160. Watkins v. Nelson, 321 N.J. Super. 482 (N.J. Super. Ct. App. Div. 1999)
161. White v. Adoption of Baby Boy D., 2000 OK 44, 10 P.3d 212 (Okla. 2000)

APPENDIX C
Table B:Dissertation codebook

TABLE B: DISSERTATION CODEBOOK			
Variable Name	Variable Type	Variable Values	Description
“casename”	String variable	N/A	Name of the case
“child race”	Numerical	1. Black/African American 2. Latin@/Hispanic 3. White/Caucasian 4. Native American/federally recognized tribal member 5. Native American/not eligible for federally recognized tribal membership 6. Non-Indian 7. Biracial 8. Multiracial 9. Asian (Cambodian, Chinese, Filipino, Vietnamese) 10. Middle Eastern “. ” Missing/Unassigned	The race of the child
“parties”	Numerical variable	1. unrelated prospective adoptive parent v. unrelated adoptive parent	What parties are involved in the case?

		<ul style="list-style-type: none"> 2. unrelated prospective adoptive parent v. government agency 3. unrelated prospective adoptive parent v. tribe 4. unrelated prospective adoptive parent v. biological parent 5. unrelated prospective adoptive parent v. foster parent 6. unrelated prospective adoptive parent v. related adoptive parent 7. related prospective adoptive parent v. foster parent 8. related prospective adoptive parent v. government agency 9. biological parent v. governmental agency 	
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		<ul style="list-style-type: none"> 10. biological parent vs. prospective related adoptive parent 11. biological parent v. foster parent 12. biological parent v. stepparent 13. tribe v. governmental agency/foster parent 14. related prospective adoptive parent v. related prospective adoptive parent 	
“party race”	Numerical value	<ul style="list-style-type: none"> 1. Black/African American/African 2. Hispanic/Latino/a 3. Native Indian/Native Alaskan/Native American - federally recognized tribal member 4. Native Indian/Native Alaskan/Native American - not eligible for federally recognized tribal membership 5. Non-Indian/Non-Native 6. Bi-racial 	What is the race of the party who received custody?

		<ul style="list-style-type: none"> 7. Multiracial 8. Asian 9. White 10. Multiple children 11. N/A “.” Missing/Unassigned 	
“racial difference”	Dummy Variable	<ul style="list-style-type: none"> 0=no 1=yes 9 = missing/unknown 	Was there a difference in race between the party that got custody and the child?
“year”	String variable		Year of the case
“court”	Numerical value	<ul style="list-style-type: none"> 1. Family court 2. Appellate court 3. State Supreme Court 4. U.S. Supreme Court 5. Tribal court 	What level of court heard the case?
“custody”	Numerical value	<ul style="list-style-type: none"> 1. Tribe 2. Step-Parent 3. Unrelated Adoptive Parent. 4. State 5. Biological Father 6. Pending State Court Decision 7. Biological Mother 8. Related Adoptive Parent" 9. Foster Parent 	Which party won custody?
“state”	String variable		What state was this case heard

			in? (Jurisdiction)
“published”	Dummy variable	0=no 1=yes	Was this case published?
“ICWA”	Dummy variable	0=no 1=yes	Is this an ICWA case?
“blood quantum”	Categorical variable	0=no 1=yes	Were definitions of biological race used?
“colorism”	Categorical variable	0=no 1=yes	Were colorism concepts used?
“EIF”	Categorical variable	0=no 1=yes	Was the Existing Indian Family exception mentioned?
“cultural race”	Categorical Variable	0=no 1=yes	Was cultural race discussed? (i.e. EIF exception)
“historical race”	Dummy Variable	0=no 1=yes	Was historical race discussed? This includes concepts of cultural genocide and past discrimination.
“cultural contacts”	Dummy Variable	0=no 1=yes	Was there a discussion of cultural contacts?

“formal race”	Dummy Variable	0=no 1=yes	Were colorblind understandings of race used?
QUALITATIVE CODING			
NODES	SUBNODES	ANALYSIS	DEFINITION
Definitions of Race	Biological race <ul style="list-style-type: none"> • Blood quantum • Skin/Colorism Culture Race Historical Race Self-Identity	Deductive analysis	Any general discussion of race. Where a judge specifically talks about the child’s racial category
<i>Biological Race</i>	Qualitative subnode	Deductive analysis	Biological race is the belief that there are natural, physical divisions among humans that are hereditary, reflected in morphology and roughly but correctly captured by terms like Black, White and Asian (Haney López 1994:6).
Blood Quantum	Qualitative subnode	Inductive analysis	Blood quantum. Another way these biological concepts of race are defined is by blood quantum rules. Blood quantum is often used to describe

			an individual by the “blood” contributions of their parents. Race is often defined as a fraction
Skin Tone/Colorism	Qualitative subnode	Inductive analysis	Colorism is the prejudice or discrimination against person based on their physical characteristics regardless of their perceived racial identity. Both race and colorism are ways to assign status and stigma but colorism focuses on hierarchies of privilege and disadvantage within racialized groups rather than just between them. Skin color is mentioned and evaluated
<i>Cultural Race</i>	Qualitative subnode	Deductive analysis	Culture race focuses on community, consciousness, traditions, and actions based on self-awareness.
<i>Historical Race</i>	Qualitative Subnode	Deductive Analysis	Historical race embodies past and

			continuing racial subordination, and is the meaning of race that the Court contemplates when it applies "strict scrutiny" to racially disadvantaging government conduct. The state's use of racial categories is regarded as so closely linked to illegitimate racial subordination that it is automatically judicially suspect (Gotanda, 1991).
<i>Self-Identity</i>	Qualitative subnode under definitions of race	Deductive Analysis	Recording how the child self-identifies racially
Tools of Determining Race		Inductive Analysis	Could be birth certificate, CDIB, DNA test etc.
Cultural Competency	Cultural Authenticity Cultural Contacts	Deductive Analysis	Discussions related to cultural authenticity, cultural literacy and cultural contacts.
<i>Cultural Authenticity</i>	EIF Exception Cultural Practice & Knowledge	Inductive Analysis	Judicial and expert evaluations of cultural knowledge and importance.
EIF exception		Deductive Analysis	ICWA does not apply to the voluntary

			adoptive placement of a child of Indian lineage unless the child is part of an “Existing Indian Family.” This means that the tribe or the parents must demonstrate that one or both of the parents have a “significant social, cultural, or political relationship” with the federally recognized tribe.
Cultural Practice & Knowledge		Inductive Analysis	Other general discussions of the cultural authenticity
<i>Cultural Contacts</i>	Neighborhood/Schools Cultural Activities Language Friend Groups/Family Members Tribal Customary Adoption & the Indian Child Exception	Inductive Analysis	Discussions about different cultural activities that a prospective adoptive parent should or would participate in.
Neighborhood/Schools	Qualitative Subnode	Inductive Analysis	The child lives in a diverse neighborhood
Cultural activities	Qualitative Subnode	Inductive Analysis	Holidays, museums, cultural fairs
Language	Qualitative Subnode	Inductive Analysis	The child has people around who can speak another language

Friend groups/family members	Qualitative Subnode	Inductive Analysis	Friend group or family members who belong or have knowledge of the child's racial category
Tribal Customary Adoption and the Indian Child Exception	Qualitative Subnode	Inductive Analysis	
Legal Justifications	Formal Race Discrimination Identity Adjustment	Deductive Analysis	How does the court determine the importance of considering race? Is it a best interest factor? If so, why?
<i>Formal Race</i>	Qualitative Subnode	Deductive analysis	Formal race refers to socially constructed formal categories where "unconnectedness" is its defining characteristic. Racial categories are seen as neutral, apolitical descriptions, reflecting merely "skin color" or country of ancestral origin. This understanding of race is unrelated to ability, disadvantage, or moral culpability and unconnected to

			culture, education, wealth, or language. (Desmond and Emirbayer 2010; Gotanda 1991). Formal race often gives way to the utilization of “colorblind” legal arguments and decisions. (Gotanda, 1991)
<i>Discrimination Protection</i>	Qualitative Subnode	Deductive analysis	Any mention of discrimination as a reason why the court should consider racial categories.
<i>Identity Adjustment</i>	Qualitative Subnode	Deductive analysis	Any mention of identity adjustment as a reason why the court should consider racial categories.
<i>Child Well-being/Bonding</i>	Qualitative Subnode	Deductive analysis	Any mention of a best interest factors related to well-being that doesn’t fit into a

<i>Cultural Genocide/Community Well-being</i>	Qualitative Subnode	Inductive Analysis	Discussions of community consciousness and well-being, the interest of the tribe, and the deliberate destruction of a culture.
Tribal Customary Adoption (TCA) & Indian Child Exception (ICE)	Qualitative Subnode	Inductive analysis	A TCA is an “adoption by and through the tribal custom, traditions, or law of an Indian child's tribe.” TCA “is an alternative to a standard adoption and protects both the Tribe's and the child's interests in maintaining tribal membership by formalizing an adoption by an individual selected by the Tribe without terminating parental rights.” (<i>In re A.M.</i> (2013) 215 Cal.App.4th 339, 348.)

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