Chapter Three

Tribal Family Law

Lexie, a ten-year-old girl, is a member of the Fort Peck Assiniboine Tribe. When she was two years old, the Fort Peck Tribal Court decreed that Lexie’s unmarried parents would have joint custody of Lexie, with Lexie’s mother having primary physical custody. Eight years later, Lexie’s mother dies, and Lexie is taken to stay with her maternal grandmother, pursuant to tribal custom. When Lexie’s maternal aunt seeks an award of custody in tribal court, also supported by tribal custom, the Tribal Court orders that Lexie should remain in the grandmother’s custody. Lexie’s non-Indian father, who has not been determined to be unfit, pursues his own award of custody in state court. The state court dismisses the father’s petition in deference to the pending tribal court proceeding. The father then goes to federal court to challenge the tribal court’s order as a violation of his constitutional right to parent his child.1

Building on the concepts of Indian identity, tribal sovereignty, and tribal jurisdiction discussed in Chapters One and Two, this Chapter turns to the vital role played by tribal courts in regulating family relations. Tribal jurisprudence in family law visibly implicates cultural values, and family law is the area most frequently associated in the case law with the perpetuation of tribal custom and tradition.2 Indeed, tribes tend to view the regulation of family relations

1. This fact pattern, reminiscent of the Rishcherris case described in the Introduction, is drawn from Atwood v. Fort Peck Tribal Court, 513 F.3d 943 (9th Cir. 2008) (dismissing father’s challenge based on his failure to exhaust tribal court remedies).

as a core aspect of tribal sovereignty.\textsuperscript{3} The meaning of the parent-child relationship itself, the guidelines for resolving custody disputes, and the role of adoption are but a few of the questions as to which tribal law and state law may yield vastly different answers. Through their adjudicatory jurisdiction, tribes can fashion judicial decrees that reflect the tribe’s unique view of parent-child duties, extended-family responsibilities, gender roles, and other core elements of family life.

Because family law disputes in tribal court today so often involve Indians as well as non-Indians, non-Indians can surely benefit from learning about the tribal forum. Fortunately, tribes are increasingly permitting their written decisions to be reported in accessible fashion.\textsuperscript{4} While some tribes have resisted publishing their court decisions out of a culturally-rooted discomfort with the idea

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\item As noted by the Navajo Supreme Court, regulation of internal family matters is at the “core of the tribe’s ‘internal and social relations.’” Billie v. Abbott, 16 Indiar. L. Rptr. 6021, 6022 (Navajo 1988). The court in Billie emphasized the essential role played by tribal courts in the perpetuation of tribal culture:

Navajo statutes and case law reflect Navajo culture and the unique circumstances and needs of the Navajo people living on the reservation. State determinations of tribal domestic relations, no matter how narrow the intrusion, is [sic] always hostile to and in conflict with the needs of the Indian people…. A further danger is that state decisions on Navajo domestic relations may cause a decline in Navajo court authority over Navajos and over Navajo domestic relations.

\textit{Id.} at 6023 (\textit{citations omitted}). One year later, the court again remarked that “[r]egulation of marriages, an integral part of the Navajo Nation’s right to govern its territory and protect its citizens, should be free from the reach of state and foreign law. The Navajo Nation must regulate all domestic relations within its jurisdiction if sovereignty has any meaning.”

\textit{In re Validation of Marriage of Francisco}, 16 Indian L. Rptr. 6113, 6115 (Navajo 1989).

\item The Navajo Nation has published Navajo court opinions in the Navajo Reporter since 1969. Stephen Conn, \textit{Mid-Passage—The Navajo Tribe and Its First Legal Revolution}, 6 Am Indian L. Rev. 329, 368–70 (1978). Navajo court decisions are now available electronically at the Nation’s website. See http://www.navajocourts.org. The Indian Law Reporter, a loose-leaf series published since 1974, is a unique repository of tribal opinions along with federal and state court opinions related to Indian law that is currently operated by the American Indian Lawyer Training Program. See www.indianlawreporter.org. In addition, Versuslaw and the Tribal Law and Policy Institute now publish tribal opinions electronically, permitting word searches to facilitate research. See http://www.tribal-institute.org/lists\_decision.htm. A narrow data base, “Okla. Trib.,” exists on Westlaw covering tribal courts in Oklahoma. Significantly, several law schools have begun offering courses on tribal law, and at least a few textbooks on tribal law have been published. See Justin B. Richland & Sarah Deer, \textit{Introduction to Tribal Legal Studies} (2004); Carrie E. Garrow & Sarah Deer, \textit{Tribal Criminal Law and Procedure} (2004).
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of publicly disseminating the names and details of private disputes, others seem to recognize that a tribe may garner more respect as a sovereign by permitting open access to judicial rulings. Thus, in one sense, the recorded jurisprudence of tribes is the “‘extended hand’ of respect and willingness to engage in judicial dialogue.” To the extent that tribal judges are facilitating the public dissemination of their words, we should take advantage of the opportunity to learn from their work.

Part One analyzes family law opinions from the judiciaries of diverse tribes with an emphasis on issues as to which tribal law is distinct from Anglo-American common law. At the outset, I explore the source of law that is unique to tribal adjudication: tribal custom and tradition. Since tribal traditions are often pivotal in family dispute resolution, Part One looks at the methods by which traditions are proved and the difficulties inherent in a court’s reliance on unwritten customary law. The discussion then turns to tribal jurisprudence regarding family relations and tribal courts’ distinct approaches to child custody dispute resolution. The prominent child-rearing role of extended family members in the traditions of many tribes poses a vivid counterpoint to the dominant society’s emphasis on parental autonomy—reaffirmed by the United States Supreme Court in Troxel v. Granville. The Supreme Court’s constitutional approach in Troxel and contrasting decisions from several tribal courts are explored in detail.

Part Two examines tribal court opinions on the meaning of adoption within tribal culture. Informal adoption has existed in many tribes over time as a fluid arrangement for child-rearing when biological parents were unavailable. These informal adoptions—often referred to as “customary” or “traditional” adoption—vary from tribe to tribe but typically are more open and modifiable than contemporary Anglo-American adoption. Indeed, the severance of parental rights followed by formal adoption was foreign to many tribes until relatively recently. Chapter Six explores more directly the potential uses of customary adoption and kinship guardianship in achieving permanency for Indian children in the state child welfare systems.

5. Interview with Hon. Violet Lui Frank, San Carlos Apache Tribal Court, March 15, 2000, Tucson, Arizona (suggesting that tribe owes duty to parties to protect their privacy). Professor Frank Pommersheim has suggested that there may be “extrajudicial concerns about the impact of converting (at least in part) the oral custom into the written decision, the plural into the singular, and the dynamic into the potentially static.” Frank Pommersheim, Tribal Court Jurisprudence: A Snapshot From the Field, 21 VT. L. REV. 7, 27 (1996) [hereinafter Snapshot].


Tribal courts bring unique perspectives to their adjudication based on each tribe's understanding of its place in the world. Even when tribes adhere to Anglo-American models of adjudication, they seem to do so in a uniquely Indian form. By identifying differences between tribal courts and state courts on common questions of family law, this Chapter underscores the deep cultural and practical meaning of jurisdictional choices.

Part One. The Distinctive Voice of Tribal Courts in Family Disputes

A. Sources of Law

Tribal judges choose from a multitude of sources of law in deciding a particular case and, in doing so, discern and define the tribe's cultural character. Often, in relying on a particular strand of non-tribal doctrine, a tribal judge may imbue the doctrine with a distinct value or purpose that carries unique cultural meaning. The amalgam of sources can yield an analysis of the question before the court that not only is rich in cultural nuance but is self-consciously so.


9. According to Gloria Valencia-Weber:

[t]he law produced in tribal codes and courts does not necessarily retain the discrete elements from Anglo-American legal culture with the same meaning and value as in the contributor culture or jurisprudence. In ... tribal law ... there is an innovative result that is consistent with a pervasive characteristic of the indigenous nations: the capacity to change as an evolving culture.


10. As former Chief Justice Tso of the Navajo Supreme Court put it:

A close look at the Navajo Tribal Government would reveal many characteristics that appear to be Anglo in nature. Actually, many concepts have their roots in our ancient heritage. Others are foreign to our culture but have been accommodated in such a way that they have become acceptable and useful to us.

For most Native tribes, the “common law” of the tribe is not a heritage of written judicial precedents but, rather, the customs and traditions that form a shared world view and social system. These historically were unwritten, passed on by oral tradition and collective memory. In the present day, decision-makers draw not only from tribal custom but also from contemporary Native and non-Native legal sources and are explicitly aware of their constitutive role in perpetuating culture. To be sure, tribal customary law and cultural beliefs are often submerged in the rhythms of daily life, narratives passed down by elders, and unrecorded traditions that are inaccessible to the outsider. Nevertheless, by studying the work of tribal courts, outsiders can at least begin to see the different narratives constructing tribal adjudication.

The use of custom and tradition by tribal judges has undoubtedly occurred since the first modern courts were organized, but formal and explicit reliance on tribal custom has increased in recent years in the reported decisions of many

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11. Frank Pommersheim, Braid of Feathers 103–12 (1995) (describing power of language, narrative, and myth in tribal culture). Observing that most tribes did not have written documents as governmental guidelines, Deloria and Lytle point out that the Iroquois Constitution was a notable exception. "The Iroquois Constitution was written on the sacred wampum belts made of sea shells and displaying a particular pattern, which, when held in a ceremony and used in the recitation of the Great Law, was acknowledged by all as the instrument of Iroquois nationality," Vine Deloria, Jr., & Clifford Lytle, American Indians, American Justice 82 (1983).


13. See Mary Jo B. Hunter, Tribal Court Opinions: Justice and Legitimacy, 8 Kan. J. L. & Pub. Pol’y 142 (1999). The author, a judge for both the Ho-chunk Nation and the Winnebago Tribe, views tribal custom and tradition as an important aspect of tribal decision-making which tribal judges "should nurture and strengthen." Id. at 146. She further explains, "[T]he use of tribal custom and tradition is a method of memorializing our traditions and customs while dispensing justice. And the use of traditions and customs legitimates them for the world outside of our tribal jurisdictions." Id.

tribes. In some tribes, the courts’ obligation to follow tribal custom is spelled out by code. For example, the Navajo Tribal Code directs tribal courts to apply Navajo customary law to guide statutory interpretation or when other law is silent, and the Navajo Supreme Court has held that certain customs amount to the equivalent of an unwritten constitution and are part of Navajo “higher law.” Where codified by tribal code, the available sources of law frequently are prioritized such that tribal law and federal law are paramount to state law. In other tribes, judges themselves have announced the sources of law that will

15. The words of the Saginaw Chippewa Tribal Court are illustrative: “The Saginaw Chippewa Tribal Court, while based on an Anglo system of justice, attempts to incorporate traditional tribal values, symbols, and customs into its decision making.” Fisher v. Pigeon, 24 Indian L. Rptr. 6258 (Saginaw Chippewa Tribal Ct. 1990). Interestingly, the Navajo Court of Appeals, later to become the Navajo Supreme Court, initiated a Navajo Common Law Project in the early 1980s. Through the Project, the court hoped to produce a definitive treatise on Navajo common law, collect oral histories of the Navajo, and renew efforts to use Navajo common law in court decisions. See Lowery, supra note 2, at 382 n.5.

16. Navajo Tribal Code tit. 7, §204(a) (2005) (Navajo court must utilize “Dine bi beenahaz’aanii (Navajo Traditional, Customary, Natural or common Law)” to guide interpretation of statutory law and whenever statutes or regulations are silent). Likewise, the Pascua Yaqui Tribe recognizes custom as a source of law in its constitution. See Constitution of the Pascua Yaqui Tribe of 1987 art. VIII, §2 (jurisdiction of tribal courts includes cases arising under “traditions, customs or enactments” of tribe). Yet another approach can be found in the Havasupai Tribal Code, which directs the tribal court to apply “in the following order: the Constitution and By-Laws of the Tribe, this Code, the ordinances and/or resolutions of the Tribe and Tribal customs/traditions.” Havasupai Tribal Code §2.3 (1995). If no such law is available, the code authorizes the application of common law, state law, the law of other tribes, and federal law. Id.

17. Bennett v. Navajo Bd. Of Election Supervisors, 18 Indian L. Rptr. 6009, 601: (Navajo 1990). See also Begay v. Navajo Nation, 15 Indian L. Rptr. 6032, 6034 (Navajo 1988) (due process is both a Navajo tradition and a right guaranteed by the Navajo code). The use of unwritten customary law by Navajo courts has proved to be controversial within the Navajo Nation itself. As this book was going to press, the Navajo Nation Council overrode the veto of the Nation’s president to enact the Foundation of Diné, Diné Law and Diné Government Act of 2009, barring the judiciary’s use of Diné Fundamental Law to supersede or replace Navajo statutory law or legislative policies. See Navajo Nation Council, Office of Speaker, Navajo Nation Council Overrides Veto of Navajo President (Feb. 23, 2010), available at http://www.navajo.org/News%20Releases/Joshua%20Lawyer%20Butler/Feb10/2010223vptr_NAVC_Special_Session_veto_override.pdf (hereinafter Navajo Nation Council Overrides Veto).

18. The Navajo Tribal Code, for example, makes application of state law optional as a matter of comity, subordinate to tribal and federal law. See Navajo Tribal Code tit. 7, §204(D). Likewise, the Winnebago tribal rules gives supremacy to the constitution, statutes, and common law of the tribe not prohibited by federal law, and they authorize application of state law only if “compatible with the public policy and needs of the tribe.” See Winnebago Code of Civil Procedure §2-111 (1994).
obligation to follow tribal custom is spelled out in the Tribal Code which directs tribal courts to apply customary interpretation or when other law is silent. The Navajo court has stated that certain customs amount to tribal constitutions and are part of Navajo "higher law," the available sources of law frequently include federal and state law are paramount to state law. The Navajo Supreme Court in a seminal case, S. Navajo Indians v. M. Navajo Indians (1996), announced the sources of law that will guide the decision-making. These express directives to take tribal custom into account reflect a growing sense across Indian country that tribal survival requires conscious development of a tribe's distinct cultural heritage. Nevertheless, tribal judges understandably resist creating legal doctrine out of whole cloth and often look to state law concepts for guidance, while recognizing that the laws do not govern their own force.

The identification of relevant tribal tradition or custom is often challenging. The process of choosing the applicable law may often include arguments about the legitimacy, meaning, and appropriateness of the use of custom in any particular case. The approaches one finds within tribal court opinions include the taking of judicial notice of a particularly well-established tradition, consultation with an elder or a committee of elders, expert witness testimony, and even explorations into anthropological writings about the tribe.

19. The Hopi Tribal Court, for example, has held that the customs, traditions, and culture of the Hopi Tribe are mandatory authorities, while federal law, state law, and the common law are only persuasive. See Hopi Tribe v. Mackiewa, 25 Indian L. Rptr. 6144 (Hopi Ct. App. 1995); Hopi Indian Credit Assoc. v. Thomas, 27 Indian L. Rptr. 6039 (Hopi Ct. App. 1998) (identifying as mandatory authority the Hopi Constitution, Hopi ordinances and resolutions, and Hopi customs, traditions and culture).

20. At least one scholar believes some tribal judges may be reluctant to explicitly rely on traditional or customary law, and he is quite critical of their reticence. See, for example, Putting the Tribe in Tribal Courts, supra note 2, at 81–82 (describing tribal court opinions in which judges relied on federal and state precedents after making "formal declarations that tribal laws and traditions are paramount").

21. In In re the Matter of S.N.J., 24 Indian L. Rptr. 6036, 6037 (So. Ute Tribal Ct. 1996), for example, the court followed the child support guidelines in use in the state of Colorado which, although not controlling in the tribal court, provided "a reasonable and rational basis for assessing child support.

22. See Pommersheim, Snapshot, supra note 5, at 27. In DuMarc v. Hemminger, 20 Indian L. Rptr. 6077 (N. Plains Intertribal Ct. App. 1992), for example, the two justices in the majority and the concurring justice disagreed about the prerequisites for a traditional adoption, or egocayaw, in the Sisseton Wahpeton Tribe.

23. See, e.g., In re C.D.S., 1 Okla. Trib. 200, 204–06 (Ct. of Indian Offenses for Delaware Tribe of W. Oklahoma 1988) (taking judicial notice of unique relationship existing between Indian grandparents and grandchildren, despite absence of written tribal law); Hopi Indian Credit Assoc. v. Thomas, 25 Indian L. Rptr. 6168, 6169–70 (Hopi Ct. App. 1996) (introduction of custom at trial requires prior notice, offer of sufficient evidence, and demonstration of custom's relevance to issues before court). One study of Navajo common law found that the most prevalent method of identifying custom was through judicial notice. See Lowery, supra note 2, at 395–96.

24. The Navajo Supreme Court has enumerated various sources that tribal judges may consult for determining the Nation's customary or "common" law, including reported court decisions, "learned treatises," judicial notice, expert witness testimony, or common knowl-
occasion, tribal courts look beyond their own tribes to the known traditions of other tribes or even of Indian peoples generally in order to identify a theme of indigenous law to guide their decision-making.25

Thus, the inherent unpredictability of the rule of decision may be seen as a drawback of tribal court adjudication, particularly for outsiders.26 Indeed, tribal officials themselves may be in disagreement about a particular custom,27 and the lack of recorded opinions makes reliance on precedent difficult.28 On the other hand, as tribal jurisprudence evolves and yields an accessible record in the form of written opinions and recognized principles, the problem of inconsistency or unpredictability should diminish.29

25. See, e.g., Goldtooth v. Goldtooth, 3 Navajo Rptr. 223, 225–26 (Navajo Dist. Ct. 1982) (considering traditions of Inuit culture); In re C.D.S., 1 Okla. Trib. 200, 204–06 (Ct. of Indian Offenses for Delaware Tribe of W. Okla. 1988) (considering “unique relationship that exists between Indian grandparents and Indian grandchildren” and “common knowledge in Indian country that both the maternal and paternal grandmothers traditionally play a very significant role in the Indian family”).


27. In In re Validation of Marriage of Francisco, 16 Indian L. Rptr. 6113 (Navajo 1989), for example, the Navajo Supreme Court and the tribal council seemed in tension regarding the status of common law marriage. Despite ambiguous codified law, the court held pursuant to Navajo custom that common law marriage was not entitled to recognition within the Navajo Nation. In dicta, the court made clear that unlicensed Navajo traditional marriages would nevertheless be entitled to recognition. Id. at 6115. In 2010, the Navajo Nation Council dramatically restricted the ability of the Nation’s judiciary to use Diné Fundamental Law. See Navajo Nation Council Overrides Veto, supra note 17.


29. According to Valencia-Weber, “[i]ncreasingly, the need to codify, document, and publish is recognized because the development of a law system provides the benefits of
B. The Parent-Child Relationship

In deciding family law cases, tribal judges have produced distinct solutions to familiar human problems through creative reliance on cultural themes. In many tribal decisions, one sees a representation of the parent-child relationship that diverges markedly from the traditional Anglo-American vision. As Gloria Valencia-Weber observed, “The legal reasoning based on custom can ... result in outcomes facially indistinguishable from those based on federal or state law. One must distinguish external form from internal substance to appreciate how the outwardly similar is not so.” Tribal courts, like state courts, endorse the hallmark of “best interests of the child” in resolving custody disputes, but the meaning of that standard in tribal court sometimes incorporates elements that one would be unlikely to encounter in the state systems. Moreover, while both tribal courts and state courts profess to place paramount importance on the interests of children in custody determinations, both systems attend to additional but somewhat divergent concerns.

Tribal judges at times announce their decisions in terms that are meant to unambiguously distinguish the tribal approach from the perceived approach of state courts. The Navajo Nation Supreme Court, for example, in Alonzo v. Martinez pointedly declared: “Navajos do not view children as property or

precedent, predictability, and notice to those subject to the law.... Achieving regularity through publication and codification of custom helps legitimize the tribal courts and allay the fears of nonmembers about tribal courts.” Valencia-Weber, supra note 9, at 239.


32. See, e.g., Clark v. Friedlander, 25 Indian L. Rptr. 6154 (Conf. Tribes of Coivlle Res. App. 1998) (reversing award of custody by default judgment because trial court did not consider best interests of child or tribal custom); Bird v. Ortiz, 24 Indian L. Rptr. 6204, 6206 (Winnebago Tribal Ct. 1996) (noting that tribal courts have consistently applied “best interests” standard in custody cases); T.C. v. L.C., 4 Okla. Trib. 90 (Sac and Fox Nation Dist. Ct. 1994) (applying “best interests” standard in modification of custody proceeding); Nez v. Nez, 19 Indian L. Rptr. 6123 (Navajo 1992) (remanding divorce decree for findings of fact to show that best interests of children were considered); Spotted Tail v. Spotted Tail, 19 Indian L. Rptr. 6032 (Rosebud Sioux Tribal App. Ct. 1989) (recognizing that applicable tribal court standard for determination of custody is best interests of child).

33. 18 Indian L. Rptr. 6178 (Navajo 1991).
possessions, but value them as individuals in a community.\textsuperscript{34} In upholding the tribal court’s power to award back child support, the Alonzo court emphasized that “[t]here is a fundamental Navajo belief that children are wanted and must not be mistreated in any way.”\textsuperscript{35} Consistent with the commonly held tribal view that children are the key to cultural survival, the Alonzo court explained, “Navajo children are the Navajo people’s future.”\textsuperscript{36} In a different case, the Navajo Supreme Court put the point more forcefully:

[Children] have special status as members of Indian tribes, and they are eligible for the protection of those tribes and their traditional social structures.... There is no resource more vital to the continued existence and integrity of the Navajo Nation than our children. Consequently we have a special duty to ensure their protection and well-being.\textsuperscript{37}

More recently, the Navajo Supreme Court again emphasized the child’s revered status in holding that juveniles may not be incarcerated unless an adult could be incarcerated for committing the same offense.\textsuperscript{38} Other tribes similarly embrace the notion that tribal children are vital to the survival of the tribe.\textsuperscript{39}

The centrality of children in many tribal cultures does not have an exact counterpart in Anglo-American jurisprudence. In state courts, the resolution of family disputes involving children has often focused on a construction of parental rights and obligations against a backdrop of state policy, leaving some

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} In re Custody of S.R.T., 18 Indian L. Rptr. 6158, 6160 (Navajo 1991).
\textsuperscript{39} The Children’s Code of the Cherokee Nation, for example, provides that it is to be construed “[t]o protect the interest of the Cherokee Nation in preserving and promoting the heritage, culture, tradition and values of the Cherokee Nation for its children....” CHEROKEE NATION CHILDREN’S CODE tit. 10, § 1(E) (1993). As expressed by the Mille Lacs Band of Chippewa Indians, “[T]here is no resource that is more vital to the continued existence and integrity of the Band than our children and our elders and all the people who comprise the Non-Removable Mille Lacs Band of Chippewa Indians.” TRIBAL CODE OF MILLE LACS BAND OF CHIEF WANG TIT. 8, § 1 (2004). The same principle was embraced by Congress in the Indian Child Welfare Act when it announced as a finding "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." See 25 U.S.C. § 1901(3) (2006).
individuals in a community.\textsuperscript{34} In upholding the need for child support, the Alonzo court emphasized the Navajo belief that children are wanted in Navajo society.\textsuperscript{35} Consistent with the commonly held belief that cultural survival is vital to the continued existence of the Navajo people's future,\textsuperscript{36} In a different case, the court more forcefully stated that: \textsuperscript{37}

members of Indian tribes, and they whose tribes and their traditional social structures are more vital to the continued existence of their Nation than our children. Consequently, the court again emphasized the child's revered status, noting that to incarcerate an adult without an adequate offense is a crime more severe than any other offense.\textsuperscript{38} Other tribes similarly emphasize the importance of their cultures to the survival of the tribe.\textsuperscript{39} Especially in the context of tribal cultures, the decision does not have an exact precedent. In state courts, the resolution of cases has often focused on a construction of state law at a backdrop of state policy, leaving some critics with the impression that children's interests are subordinate to other concerns.\textsuperscript{40} Moreover, several principles of federal constitutional law in the realm of family law have seemed to rest on a formalistic perception of children's circumstances.\textsuperscript{41} One need not endorse the view that Anglo-American law is overly hostile to children to recognize that the child in Anglo-American law occupies a role that is often qualitatively distinct from that role in tribal jurisprudence. At the very least, one can surmise that the cultural importance of children among Indian tribes may inform tribal court adjudication in ways that distinguish it from adjudication in the state court systems.

An early child custody decision handed down by then Judge Tom Tso of the Navajo district court illustrates the child-centered nature of Navajo culture. In Goldtooth v. Goldtooth,\textsuperscript{42} the court had before it a custody battle between a Navajo father and a Hopi mother. In resolving the contest, the court consulted Native and non-Native sources to support its decision to award joint custody of the children to the parents. The sources included a standard treatise on family law, a psychological study documenting new trends in child custody, known elements of Navajo culture and tradition, and court opinions discussing the traditions of other tribes. In its explanation of the role of Navajo culture, the court stated:

\begin{quote}
42. 3 Navajo Rptr. 223 (Navajo 1982). I am indebted to Judge Loren Ferguson for her insightful discussion of the Goldtooth decision in her keynote address at the 1999 International Society of Family Law North American Regional Conference. See Judge Loren Ferguson, Keynote Address, International Society of Family Law, North American Regional Conference (June 12, 1999, Albuquerque, New Mexico).
\end{quote}
[1] In Navajo culture and tradition children are not just the children of the parents but they are children of the clan. In particular, children are considered [sic] members of the mother’s clan. While that fact could be used as an element of preference in a child custody case, the courts [sic] want to point out that the primary consideration is the child’s strong relationship to members of an extended family.... Therefore the court looks to that tradition and holds that it must consider the children’s place in the entire extended family in order to make a judgment based upon Navajo traditional law.43

The court went on to approve a joint custody award as a way of ensuring the children’s contact with both parents and the extended families. In emphasizing the value of such an award from the child’s perspective, the court pointedly noted that it would enforce the children’s rights as a primary matter and would provide for the rights of the parents only “where they are in harmony with those of the children.”44 Indeed, in dicta, the court suggested that under certain circumstances, a child’s interests might require that custody be awarded to someone other than a legal parent.45 In its final order, the supreme court decreed that physical custody of the children should follow past actual physical custody patterns and that the parents should develop the joint custody plan together.46 The court plainly desired to protect the children’s sense of conti-

43. Goldtooth, 3 Navajo Rptr. at 226.
44. Id. at 227.
45. In this regard, the court discussed at length and with evident approval a custody dispute from a court in Quebec, Canada, involving a child who had been cared for by his Inuit grandparents pursuant to a traditional Native adoption. The court granted legal custody to the mother, physical custody to the grandparents, and visitation to the father. See Deer v. Okpik, 4 Can. Native L. Rptr. 93 (Cour Superieure de Quebec 1980), discussed in Goldtooth, 3 Navajo Rptr. at 225–26. Deer was cited with similar approval in Lentz v. Notah, 3 Navajo Rptr. 72, 76 (Navajo Ct. App. 1982), where the appeals court explained that tribal judges “will look to the welfare of the child before the rights of a natural parent.”
46. Goldtooth, 3 Navajo Rptr. at 228. After the court entered its order in Goldtooth, the parties were unable to agree upon a plan for implementation of joint custody. See Favenyooma v. Goldtooth, 5 Navajo Rptr. 17 (Navajo Ct. App. 1984). Without further hearings, the trial court made a split custody award of the minor children. That order was reversed by the Navajo Court of Appeals because of the lower court’s failure to follow appropriate procedures for modifying custody. Id. Moreover, rather than remanding the case to the trial court, the appeals court took the unusual step of announcing specific guidelines for implementing the original joint custody award and of setting child support amounts. Its action derived from an evident concern for the children: “Considering the length of time the matter has been pending, the Court finds that it is in the best interests of the parties and the minor children that litigation in this matter come to an end.” Id. at 20.
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from the perspective of their own interests only "where they are in harmony with the natural preferences of the child." With this, the court suggested that under these circumstances, the court might require that custody be awarded to the
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44. See, e.g., In re Marriage of Weidner, 338 N.W.2d 351 (Iowa 1983) (discussing evolution of joint custody).
45. Judge Tso wryly remarked that "Anglo-European society is increasingly discovering ways which we have known for centuries." Goldtooth, 3 Nav. Rptr. at 226. He made a similar observation a year earlier:
46. See, e.g., In re Marriage of Weidner, 338 N.W.2d 351 (Iowa 1983) (discussing evolution of joint custody).
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child. State statutory law sometimes provides that the practice of spiritual healing alone cannot be the basis of a finding of child neglect, but such statutes are driven by religious freedom concerns rather than a shared belief in the effectiveness of spiritual healing. Ironically, the free-exercise concerns of such statutes may collide with another facet of the first amendment, the Establishment Clause.

In tribal court, in contrast, a litigant may encounter greater receptivity to the use of spiritual healing for children so long as the chosen methods comport with the tribe’s traditions. Significantly, tribal governments often incorporate a religious dimension, and the Indian Civil Rights Act does not


54. Tribal codes may explicitly acknowledge a spiritual healing practice. The Pascua Yaqui Tribe, for example, has authorized medical treatment by tribal order where a child’s life is at risk, but it requires the tribunal court to give consideration to spiritual treatment:

In making this order the Court shall give due consideration to any treatment being given the child by prayer through spiritual means alone or through other methods approved by Tribal customs, traditions or religions, if the child or his parent ... are adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical treatment, or practices in fact the Tribal customs, traditions or religion upon which they rely for such treatment of the child.

5 PASCUA YAQUI TRIBAL CODE §§-380(C) (2006).

provides that the practice of spiritual healing of child neglect, but such statutes are many rather than a shared belief in the effectiveness of the free-exercise concerns of such statutes at the First Amendment, the Establishment Clause. A parent may encounter greater receptivity to treatment so long as the chosen methods comport significantly, tribal governments often interpret the Indian Civil Rights Act does not include a counterpart to the First Amendment’s mandate for separation of church and state. In In re T.M.M., the Inter-Tribal Court of Appeals of Nevada reviewed a case that had run an arduous course in the Walker River Paiute juvenile tribal court. There, a Paiute mother had sought to treat her child, who suffered from lymphoma, with a variety of spiritual methods in lieu of conventional allopathic medicine. In considering whether the child should be declared a ward of the court, the juvenile court expressed a deep respect for traditional healing methods. “Traditional Northern Paiute Indian doctors,” the court stated, “have had a centuries-long and successful history within our Northern Paiute Nation when their medical advice and treatment is sought soon enough, and they have played an integral role in our communities and are essential to this tribe’s continued existence as a sovereign.” In the view of the juvenile court, however, the mother’s chosen treatments were not traditional Northern Paiute treatments; rather, they included acupuncture, the use of healers from the Wintu tribe of northern California, and various forms of naturopathy. Reasoning that non-Paiute forms of treatment were not “medical care” within the meaning of tribal law, the court explained in a second opinion that the mother had failed to establish that her preferred treatments were aligned with tribal custom.

[The mother] seems to confuse being “Native American” with being “Northern Paiute.” ... The mere fact that a Native American or one or two members of the Walker River Paiute Tribe may use the services of Wintu healers is not controlling on this court or capable of being the basis for a finding of tribal common law (custom, tradition and usage). Finding a sufficient basis for a wardship, the court ordered that...
the child be placed in the custody of the tribe's social services department to receive “equally traditional Northern Paiute and conventional white medical treatment.”  

Interestingly, the tribal appeals court viewed the case somewhat differently. The appellate court accepted the mother's reliance on “Indian medicine,” without requiring her to establish its legitimacy under Northern Paiute tradition. The appellate court wrote:

We ... find that the evidence in this case does not support a conclusion of medical care deprivation because the mother has always proceeded in a manner designed to provide such care according to Indian custom and traditions. ... [M]edical care, as defined for this case, means that traditional Indian medicine is an alternative to allopathic medicine, and that the mother and child have a strong belief in and preference for, traditional Indian medicine. That preference must be respected, barring conclusive evidence of its lack of efficacy.

The various opinions generated by the dispute in T.M.M. reveal a tension between the court's desire to protect a child's welfare and the goal of recognizing the legitimacy of both conventional "white medicine" and traditional healing methods. The final appellate decision deferring to the mother's choice of "traditional Indian medicine" placed the burden on those opposing her choice to establish the inefficacy of the selected treatment. That endorsement of traditional healing methods, amounting to a presumption of efficacy, contrasts sharply with the often grudging attitudes towards non-allopathic healing methods one encounters in the state courts. Moreover, the disagreement between the tribal juvenile court and the court of appeals points up an uncertainty regarding the degree to which traditional healing must bear the imprimatur of a particular tribe to acquire legitimacy. The very existence of the tension indicates that the Northern Paiute cultural understanding of parenthood is dynamic. Thus, the T.M.M. dispute also demonstrates that tribal courts can play a key constitutive role in defining the cultural norms.

61. Id. at 6045.

62. In re T.M.M., 24 Indian L. Rptr. 6176, 6176 (Inter-Tribal Ct. App. Nev. 1997). Although the court found that there was no evidence of neglect on the part of the mother, the wardship of the child remained in effect for the reason that, by the time the case came before the appeals court, the mother was the subject of a state criminal prosecution for child neglect and would be unable to perform the obligations of parenthood.
The tribe's social services department to the Paiute and conventional white medical care viewed the case somewhat differently. The tribe's reliance on "Indian medicine," withdrawal under Northern Paiute tradition, this case does not support a conclusion because the mother has always provide such care according to Indian Paiute medical care, as defined for this case, medicine is an alternative to allopathic child have a strong belief in and medicine. That preference must be evidence of its lack of efficacy.

The dispute in T.M.M. reveal a tension between the child's welfare and the goal of recognition "white medicine" and traditional medicine deferring to the mother's choice the burden on those opposing her choice selected treatment. That endorsement amounts to a presumption of efficacy, regarding attitudes towards non-allopathic the state courts. Moreover, the district court and the court of appeals points to which traditional healing must be to acquire legitimacy. The very existence Northern Paiute cultural under- Thus, the T.M.M. dispute also has a key constitutive role in defining

63. See generally Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States (1994) (recounting eighteenth-century views of children as father's property, nineteenth-century view that caring for children was within feminine sphere, and late-twentieth century approach that custody should be determined according to gender neutral "best interests" standard).

64. Tribes adhering to matrilineal traditions include the Navajo, the Dakota, the Iroquois, and many of the Pueblo tribes. See Jane B. Katz, I Am the Fire of Time 3 (1977). Paula Gunn Allen, The Sacred Hoop 209 (1986). In the Santa Clara Pueblo, on the other hand, a child of a male member married to a nonmember is eligible for tribal membership, while the child of a female member who similarly marries outside the tribe is denied membership. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that tribe's alleged denial of equal protection through application of patrilineal membership rules was not reviewable in federal court under Indian Civil Rights Act), discussed in Chapter One.


67. Id.


69. Cooter & Fikentscher, Part II, supra note 30, at 541.
take custody, to the maternal grandparents.\textsuperscript{70} Today, however, few tribal codes contain an explicit gender bias in their child custody provisions.\textsuperscript{71} More often one finds the gender-neutral “best interests” standard.\textsuperscript{72} Nevertheless, a cultural heritage strongly favoring mothers over fathers surely casts its influence on the actual disposition of custody disputes in tribal courts.\textsuperscript{73}

In some tribes, modern equality guarantees that have been added to tribal codes may be interpreted to preclude the continued reliance on customary gender preferences in the custody realm. Within the Navajo Nation, two court opinions decided in consecutive years yielded conflicting views about the vitality of the traditional Navajo view of maternal priority in custody contests. In 1982 the Navajo Court of Appeals recognized the Navajo tradition favoring maternal custody. In \textit{Lente v. Notah},\textsuperscript{74} the court addressed a custody dispute between a Navajo father and a Comanche mother. Because of notice problems, the appeals court reversed the trial court’s award of custody to the father, and in remanding for a hearing, the appellate court set out guidelines for resolving the custody contest. In response to the mother’s argument that Navajo custom required an award of custody to her, the court addressed the proper role of custom in resolving child custody disputes. “Traditionally the father and child lived with the mother’s family,” the court explained, “and the child was said to ‘belong’ to the mother’s clan.”\textsuperscript{75} Thus, Navajo children

\textsuperscript{70} \textit{Id.} at 544.

\textsuperscript{71} The “tender years” presumption, favoring maternal custody for young children, does show up in a few tribal codes. \textit{See, e.g., Law & Order Code of the  Utah Indian Tribe of the Uintah & Ouray Reservation Utah \$5-3-9} (1988) (requiring tribal court to consider “the natural presumption that the mother is best suited to care for young children” in making custody awards); \textit{Law and Order Code of Havasupai Indian Tribe \$3.24(E)} (1995) (providing that “natural mother” shall have custody of children where natural father has not acknowledged paternity in writing or married natural mother). Were such provisions to appear in a state statute, the gender categorization would surely be vulnerable to challenge under modern equal protection jurisprudence.

\textsuperscript{72} \textit{See, e.g., Confederated Tribes of the Colville Reservation Law & Order Code \$5-1-121} (2006) (requiring tribal court to determine custody in accordance with best interests of the child and, secondarily, traditions and customs of Colville Indian people).

\textsuperscript{73} \textit{See Coober & Fikentcher, Part II, supra note 30, at 543–44} (according to Hopi judge, Hopi custom is to give children to mother’s family, but custom will be bunt in best interests of child; Pueblo tribal judges generally favored mother’s family). Tribal judges affirm on an anecdotal basis that mothers are generally the presumptive parental custodian in tribal court, in light of tribal tradition. Telephone Interview with Hon. Lucilda Yáñez yezuela, Tohono O’odham Tribal Court, Feb. 29, 2000; Interview with Hon. Violet Lui Frank, \textit{supra} note 5.

\textsuperscript{74} 3 Navajo Rptr. 72 (Navajo Ct. App. 1982).

\textsuperscript{75} \textit{Id.} at 80.
customarily went with their mother in the event of a divorce. "There are exceptions to this general rule," the court stated, "but they are said to be rare and...must be approved by everyone concerned, especially the head mothers." Nevertheless, the appeals court emphasized that a given custom may not apply under the circumstances of a particular case. In the case before it, for example, the court noted that the Comanche mother and Navajo father might not have expected that customary law would apply to them—thus implying that parties' expectations about custom are relevant. In addition, the court stated that district judges should consider the impact on the child of a disruption in existing custody—a factor which, in the case at bar, favored the father.

Lente thus affirmed the existence of Navajo customary law favoring maternal custody, a tradition that may inform tribal court resolutions of custody disputes—whether in the district courts or before a Peacemaker. At the same time, Lente clearly indicated that particular customary laws will not govern every dispute and may be particularly unlikely to govern cases involving a non-Navajo mother. Moreover, other concerns, such as the need to protect the child's sense of continuity in placement, may outweigh the role of custom. Under Lente, the customary preference for mothers in custody disputes is "but one of the many factors" a trial judge must consider, and under certain circumstances the judge "may be justified in disregarding old ways."

One year after deciding Lente, the Navajo Court of Appeals again addressed the question of the proper standard to govern custody disputes between parents under Navajo law. In Help v. Silvers, the court rejected any presumption that would favor mothers over fathers, including the "tender years presumption," noting that the Navajo Equal Rights guarantee precludes such a rule. Without mentioning Lente, the court disavowed any gender preference:

76. Id. at 81 (citations omitted).
77. Id.
78. Id. Interestingly, a district court opinion on custody in the same year did not allude to the customary law of maternal custody. See Goldtooth v. Goldtooth, 3 Navajo Rptr. 223 (Window Rock Dist Ct. 1982), discussed supra at notes 42-50 and accompanying text.
79. 4 Navajo Rptr. 46 (Navajo Ct. App. 1983).
80. The Navajo Equal Rights Amendment, adopted in 1980, provides: "Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex..." 1 NAVajo TRIBAL CODE § 3 (2005). Interestingly, in the resolution adopting the amendment, the tribal council reaffirmed that "[t]he tradition and culture of the Navajo Nation has always emphasized the importance of the woman in Navajo society" and that "Navajo culture and society is both matrilineal and matrilocal." Navajo Tribal Council Res. CF-9-80, Feb. 7, 1980, quoted at id. (Notes 1 & 2).
[Under the equal rights guarantee] there can be no legal result on account of a person's sex... For this reason, there can be no presumption that a young child should be in the care of the mother... It is the relationship that is important, not a mere rule of thumb, and the child's age is important only in consideration of its relationship to the parents.\textsuperscript{81}

In so holding, the court of appeals tacitly rejected the mother's argument that the tender years presumption was supported by Navajo custom and tradition. Thus, \textit{Help} suggests that customary presumptions favoring mothers may give way to express guarantees of gender equality that have been adopted more recently by tribes.\textsuperscript{82}

In tribes where strong internal guarantees of gender equality do not exist, it is doubtful that a successful challenge to a customary gender preference could be brought under (external) federal law. A matrilineal or patrilineal tradition within a tribe is not vulnerable under the federal Constitution since tribes—as discussed in Chapter One—are pre-constitutional sovereigns.\textsuperscript{83} The Indian Civil Rights Act imposes an equal protection guarantee, but most gender disparities under tribal law will not be reviewable in federal court under ICRA in light of the decision in \textit{Santa Clara Pueblo v. Martinez},\textsuperscript{84} limiting relief to habeas corpus. Because it is unlikely that a dissatisfied custody litigant could fashion his or her claim into a federal habeas corpus petition.\textsuperscript{85}

\textsuperscript{81} 4 Navajo Rptr. at 48.

\textsuperscript{82} See also Keplin v. Keplin, No. 03-5014-1 (Turtle Mountain Ct. App. July 21, 2005), available at \url{http://www.tribal-institute.org/opinions/2005/NATM.0000005.htm} (rejecting mother's argument that joint custody award violated Turtle Mountain matrilineal tradition, noting that Turtle Mountain Tribal Code is gender neutral and that trial judge's failure to consider matrilineal traditions would not necessarily be abuse of discretion).

\textsuperscript{83} See, e.g., Talton v. Mayes, 163 U.S. 376 (1896) (Fifth Amendment not applicable to tribal courts).

\textsuperscript{84} 436 U.S. 49 (1978), discussed in Chapter One. The option of filing a federal court action challenging a tribal court order for lack of jurisdiction, once tribal remedies have been exhausted, remains open in theory. See infra notes 125–28 and accompanying text.

Martinez effectively closes the federal courts to ICRA-based claims in the child custody context.

Consequently, a party challenging tribal action on the basis of gender bias under ICRA or the tribe's own constitution or code must do so in tribal court. The hurdle facing such a litigant is that tribal judges may view ICRA as subordinate to the values of tribal self-government and cultural autonomy. If the tribe's customary law endorses gender classifications with respect to particular matters, the tribal court would be unlikely to view ICRA as a higher authority. Indeed, in Martinez, the Supreme Court itself emphasized that ICRA's equal protection provision “differs from the constitutional equal protection clause in that it guarantees ‘the equal protection of its [the Tribes] laws’ rather than of ‘the laws.’”87 The wording of ICRA, then, reflects a congressional desire to accommodate the unique needs of tribal governments. Moreover, a defense of sovereign immunity in tribal court may defeat any claim of sex discrimination under ICRA.88

In short, it is clear that tribal courts can creatively construe their constitutional mandates and need not adhere to accepted federal constructions. As recognized by the Winnebago tribal court, for example, “Winnebago constitutional guarantees are different in both substance and origin to either the ICRA or the Bill of Rights. The equal protection and due process provisions ... of the Winnebago Constitution shall be interpreted with flexibility and as culturally appropriate to the Winnebago Tribe.”90 Thus, because tribal courts often assume broad interpretive authority, categorical distinctions between

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82. v. (1896) (Fifth Amendment not applicable to

83. One. The option of filing a federal court

84. In re Petition of Alcan, 711 F.2d 1091 (9th Cir. 1983) (the constitution of the scope of federal habeas corpus is not available to challenge federal habeas corpus peti-

corpus available to non-Indian parent to challenge jurisdiction of tribal court in custody dispute, but exhaustion of tribal remedies was first required).

86. The Winnebago Tribal Court, for example, refused to entertain an ICRA claim against tribal officials for alleged sex discrimination. In Winnebago Tribe of Nebraska v. Big- fire, 24 Indian L. Rptr. 6232 (1997), the court reasoned that the tribe had not adopted the provisions of ICRA as tribal law, and that “any ICRA interpretations by this Court are also subject to Winnebago community common law standards.” Id. at 6235.


88. See Winnebago Tribe of Nebraska v. Bigfire, 24 Indian L. Rptr. 6232 (1957) (reasoning that Congress in enacting ICRA did not abrogate tribal sovereign immunity).

89. Professor Pommersheim has urged tribal courts to exploit the opportunity to engage in "pathbreaking" constitutional adjudication by tailoring their interpretations to reflect the cultural identity of the tribe. See Frank Pommersheim, A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts, 27 Gonz. L. Rev. 393, 410–12 (1991/92) [hereinafter Constitutional Adjudication].

90. Bigfire, 24 Indian L. Rptr. at 6236 (emphasis added).
tween mothers and fathers for purposes of custody decision-making in tribal court may not be vulnerable to challenge—at least where the distinctions are firmly rooted in tribal custom and there is no overriding internal equality mandate.

C. The Role of Extended Family Members

A singular feature of Anglo-American law that contrasts sharply with the approach of many American Indian tribes is the characterization of parenthood as a rights-based exclusive status. In Anglo-American jurisprudence, the view that a child can have only one mother and one father has a natural law heritage. Under this tradition, a child’s legal parents—so long as they can satisfy a minimal standard of fitness and so long as the family is intact—have near-absolute responsibility for the child’s welfare. Parental rights—judicially constructed in the United States as fundamental liberty interests entitled to protection under the Due Process Clause—have figured prominently in conflicts over children. In a long line of cases, the Supreme Court has viewed child-rearing and the right to maintain parent-child relations as falling within a sphere of fundamental liberty interests protected from undue state interference by the Due Process Clause.


92. As Justice Scalia put it in his plurality opinion in Michael H. v. Gerald D., 491 U.S. 110, 118 (1989), “California law, like nature itself, makes no provision for dual fatherhood.” In that case, the Court upheld the legal presumption under state law that a man married to a child’s biological mother is the child’s father as against the constitutional challenge of a putative father seeking the opportunity to establish paternity. Scalia noted that “our traditions have protected the marital family … against [infrusion from third parties].” 491 U.S. at 124.


94. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting that: liberty interest under Fourteenth Amendment includes freedom “to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children”); Pierce v. Society of the Sisters, 268 U.S. 510, 534 (1925) (striking down law that barred parents from sending children to private school on ground that it “unreasonably interferes with the liberty of parents … to direct the upbringing and education of [their] children”); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing that “the custody, care and nurture of the child reside first in the parents”); Stanley v. Illinois, 405 U.S. 645 (1972) (holding that due process and equal protection clauses were violated where state
FAMILY LAW

...of custody decision-making in tribal settings—at least where the distinctions there is no overriding internal equal-


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law that contrasts sharply with the approach of a natural law tradition in Anglo-American jurisprudence, the view that the father has a natural law heritage. So long as they can satisfy a minimum of family life—have near-absolute parental rights—judicially constructed in the interests entitled to protection under the constitution in conflicts over children. In a long

gard child-rearing and the right to maintain a sphere of fundamental liberty influence by the Due Process Clause. In this


On the Egg: A Child-Centered Perspective on Parental Rights, Janis L. Dolgin, Just a Gene: Judicial As-

537 (1993); Katherine T. Bartlett, Rethinking

Opinion in Michael H. v. Gerald D., 491 U.S. 110, makes no provision for dual fatherhood. A provision under state law that a man married earlier than his current wife against the constitutional challenge of the legislature to establish paternity. Scalia noted that "our tran-

sition from third parties." 491 U.S.

broad and exclusive autonomy to par-

t. E. Scott, Parents as Fiduciaries, 81 Va. L.

90, 399 (1923) (noting that liberty interest in "to engage in any of the common occu-

pations, establish a home and bring up chil-

dren, 510, 534 (1925) (striking down law that school on ground that it "unreasonably in-

terfered with the upbringing and education of [their] children" (1944) (recognizing that the custody, parents"); Stanley v. Illinois, 405 U.S. 645 (1972) (the protection clause was violated where state

jurisprudence, the Court has characterized the rights to conceive and to raise one's children as "essential," and "[t]he right more precious . . . than property rights." Within Anglo-American law, the traditional protection of parental rights is a poten-
tial constitutional roadblock whenever the State through its parens patriae power intrudes into the parent-child relationship by overriding parental choice.

Consistent with this vision of parenthood, the common law did not recog-

nize rights of custody or visitation for grandparents or other third parties, and state courts routinely denied requests for visitation or custody from outsiders. Although laws authorizing grandparent and other third-party visitation became widespread by the end of the twentieth century, the Supreme Court's decision in Troxel v. Granville reaffirmed the presumptive right of a fit legal parent to control access to the child. In Troxel, paternal grandparents had obtained visitation in a state trial court with their granddaugh-
ters after the death of their son, the children's father. In a bitter dispute with the children's mother, the grandparents relied on a state law that entitled "any person" to visitation on a showing that it would be in the children's best interests.

In a decision that produced multiple different opinions, none of which com-

manded a majority, the Supreme Court concluded that the Washington visitation statute was unconstitutional as applied to the facts before it. In her plurality opinion, Justice O'Connor recognized that the Due Process Clause statute presumed unwed father, but not unwed mother or married parents, to be unfit until he could prove otherwise; Lehr v. Robertson, 463 U.S. 248 (1983) (holding state's failure to give notice to unwed father of pending adoption of child did not violate due process where father had no relationship with child and could have ensured notice by participating in putative father registry). See generally Martha Minow, What Ever Happened to Children's Rights?, 80 MINN. L. REV. 267, 294–95 (1995) (noting that resistance to state intervention in families has deep cultural roots); Francis Barr McCarthy, The Confused Constitutional Status and Meaning of Parental Rights, 22 GA. L. REV. 975 (1988) (describing ambiguity and inconsistency in law governing rights of parents).

97. See 1 Blackstone, Commentaries *434–47 (describing parent-child relationship as existing by virtue of natural law and observing that state's right to intervene in family matters is limited to protecting parent-child relationship).
98. See Succession of Reis, 15 So. 151, 152 (La. 1894); see generally Annot., Visitation Rights of Person Other Than Natural or Adoptive Parents, 98 A.L.R.2d 325 (1964).
100. 530 U.S. 57 (2000).
101. See id. at 60 (quoting REV. CODE OF WASH. §26.10.160(3)) (plurality opinion).
“provides heightened protection against government interference with certain fundamental rights and liberty interests.”

The fundamental liberty interest at issue in *Troxel* was the well-established “interest of parents in the care, custody, and control of their children.”

According to O’Connor, the “breathtakingly broad” Washington statute infringed on that fundamental parental right by effectively allowing any third party seeking visitation to subject a parent’s decision to state court review on a best interests standard.

*“[T]he Due Process Clause,”* O’Connor wrote, “does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a ‘better’ decision could be made.”

The plurality concluded that the Washington law gave insufficient weight to the parent’s judgment concerning the wisdom of grandparent contact: “*T[i]he decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And ... the court must accord at least some special weight to the parent’s own determination.*”

Under *Troxel*, then, the federal Constitution subordinates the voice of the collective—the State—to a parent’s individual liberty interests. In the wake of the Court’s decision, most lower courts have read *Troxel* to require strong deference to parental decision-making on the question of visitation and to impose a heightened burden of proof on third parties, whether grandparents or otherwise.

In contrast to the constitutional framework of *Troxel*, analysis of the role of extended family members *vis a vis* Indian children generally begins from a different foundation in tribal court. There the voice of the collective—the Tribe—is a powerful force of cultural identity and survival that may trump the individual parent’s choice in child rearing. In the traditions of many In-

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102. *Id.* at 65 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

103. 530 U.S. at 65 (describing parental liberty interest as “perhaps the oddest of the fundamental liberty interests recognized by this Court”).

104. *Id.* at 67.

105. *Id.* at 72–73.

106. *Id.* at 70. Significantly, two other Justices would have gone even further. See *id.* at 76–78 (Souter, J., concurring) (Court should have held visitation statute unconstitutional on its face); *id.* at 80 (Thomas, J., concurring) (Court should have applied strict scrutiny standard to infringement of parent’s authority).

The fundamental liberty interest of interest of parents in the care, custody, and control of their children is ‘perhaps the oldest of the Court’.

The role of extended families in child rearing among Native tribes was one of the cultural norms that many state authorities ignored in the decades preceding the Indian Child Welfare Act when Indian children were removed from their Indian caregivers in massive numbers. See H.R. Rep. No. 1386, 95th Cong., 2d Sess. 10, reprinted in 1978 U.S.C.C.A.N. 7530, 7532.

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United States Dep't of Health and Human Services, Strengthening the Circle: Child Support for Native American Children 38 (1999) [hereinafter Strengthening the Circle].


Strengthening the Circle, supra note 110, at 38.


tice of “the unique relationship that exists between Indian grandparents and grandchildren, and the need for maintenance of these contacts, despite the fact there is no written tribal law on the subject.” In ordering visitation for the maternal Kiowa grandmother, the court further observed that grandparents are crucial vehicles for passing on knowledge of tribal tradition:

Since this is an Indian family, where grandparents often provide the necessary guidance in traditional tribal customs, history, and culture, and function as the central part of the family, the court would find it difficult to completely ignore the need to maintain and foster such important relationships. The fact that the children in this case have lived with the petitioner for a significant period of their childhood, is a weighty factor in reaching this conclusion.

Although the court referred to the increasing recognition of grandparent visitation rights in state courts, its decision was based primarily on its view of the deep cultural significance of Indian grandparents.

The C.D.S. court’s approach to the question of grandparent visitation contrasts with the posture of most state courts. The absence of a tribal code provision authorizing grandparent visitation did not preclude the court from granting such visitation, since it relied instead on unwritten tribal custom. In addition, the court’s explanation suggests that a grandparent who has had a significant caretaking role vis a vis the children in question acquires a presumptive right of contact that the court will honor unless there is a showing of detriment to the child. That receptivity to grandparent contact rests in part on recognition of the vital role that the grandparent will have in fostering the child’s sense of tribal identity and knowledge about the tribe’s customs and traditions. State laws,

115. 1 Okla. Trib. 200, 204 (Ct. Indian Offenses for Delaware Tribe of W. Okla. 1988) (noting that both maternal and paternal grandmothers traditionally play significant roles in Indian family).

116. Id. at 207.

117. Id. On the facts before it, the court found that grandparent visitation was particularly appropriate because the two children had lived with the grandmother for a substantial period of their life when their mother had experienced psychiatric difficulties. Id. at 203–04.

118. Court opinions from other tribes similarly show that relationships between children and members of their extended family are deeply embedded in tribal culture. In Wike v. Tarasiewicz, 14 Indian L. Rptr. 6020 (Rosebud Sioux Tribal Ct. 1987), for example, the court had to resolve a custody dispute between biological parents in which two state courts had rendered opposing custody orders. The tribal court concluded that the father, a member of the Rosebud Sioux tribe, should have custody, and that a contrary state court judgment could be disregarded because the state forum had acted without jurisdiction. In
in contrast, typically require the grandparent to prove that visitation would be in the child's best interests, and Torzel requires that grandparent visitation statutes place the burden of proof on the grandparent as a matter of constitutional law. State law, moreover, is generally silent as to any role the grandparent might have in helping the child maintain a sense of cultural heritage.

The Native respect for extended family sometimes has extended beyond visitation to an outright award of physical custody to the relative over the objections of parents. In one contentious dispute before the tribal court for the Sak and Fox Nation, the court cited the continuing acrimony between the parents as a reason for awarding temporary physical custody to the child's paternal grandmother. In a similar vein, the Rosebud Sioux Tribal Court of Appeals pointedly suggested such a solution to the trial court after expressing disapproval of the parents' excessively negative evidence.

addressing the best interests of the children, the court emphasized that paternal custody would ensure continued contact with grandparents and other relatives living on the reservation. According to the court, "the grandparents, aunts, uncles and other members of the family are part of the extended family network" who can provide nurturing and support for the children. Id. at 6022.

119. See, e.g., In re Interest of K.A.W., 2 Okla. Trib. 338 (Comanche Children's Ct. 1992) (consistent with Comanche custom, paternal aunt acquired legal custody of child when biological mother was absent, and aunt's domicile controlled in determining tribal court's jurisdiction over custody dispute).

120. See T.C. v. L.C., 4 Okla. Trib. 90 (Sac & Fox Nation Dist. Ct. 1994). The district court noted the detrimental impact on the child of the parents' continual fighting and found both parents "unsuitable" for custody. The frustration of the judge was apparent: "The bottom line after considering the various factors, I believe, in this case, is the present least detrimental alternative and the child's right to be free from the stress of warring parents." Id. at 98. Although the award to the grandmother was not grounded expressly in tribal custom, the court did state that the custody provisions of the tribal code were "sufficient for the court to award custody of a minor child to a third party when the parents are unsuitable." Id.

121. See Spotted Tail v. Spotted Tail, 19 Indian L. Rptr. 6032 (Rosebud Sioux Tribal Ct. App. 1989). In that case, the parents bitterly contested custody of their children by focusing on one another's allegedly "immoral" conduct. The appellate court reversed the trial court's award of custody to the mother and remanded for a new trial in an opinion that revealed its displeasure with the tenor of the proceedings:

The trial court should also authorize the receipt of testimony from neighbors and members of the extended family, particularly ... the maternal grandmother....

[It] is well within the framework of Lakota tradition and custom that placement be made, if appropriate, with a member of the extended family, particularly when that individual has provided substantial care and nurture to any of the children.

Id. at 6032. See also Deer v. Opikisk, 4 Can. Native L. Rptr. 93 (Cour Superieure de Quebec, Division de law Famille 1980) (ordering continued physical custody of Inuit child with grandmother over objection of mother, to ensure integration of child into Inuit culture)
Troxel’s potential impact on tribal court adjudication is tenuous. The Court in Troxel established beyond debate that an order from a state court granting visitation or custody to a nonparent over the objection of a fit parent may be vulnerable as an unconstitutional intrusion on parental authority—more specifically, as a deprivation of a parent’s liberty interest under the Due Process Clause of the Fourteenth Amendment. In contrast, the constitutional constraints on state action do not exist as such in the tribal forum. Although tribal court’s rulings in theory are limited by the due process and equal protection guarantees of the Indian Civil Rights Act, tribal courts may interpret those provisions to accommodate tribal tradition. In other words, where tribal custom or tradition supports a particular resolution of a family dispute before a tribal court, the court is unlikely to change its resolution in response to a due process challenge under the federal law. Moreover, resort to federal court by a dissatisfied parent is unlikely to succeed. As discussed above, tribal court judgments are effectively unreviewable in the federal courts for equal protection or due process violations except by way of a criminal habeas corpus petition.

In addition, as demonstrated by this Chapter’s introductory case, federal courts in theory can entertain jurisdictional challenges to tribal court action, but the exhaustion of remedies requirement poses a significant separate barrier. In Atwood v. Fort Peck Tribal Court, the non-Indian father filed a federal lawsuit challenging the tribal court’s award of child custody to the maternal grandmother, claiming it was a violation of his substantive due process right to parent. Treating the federal court action as a jurisdictional challenge, the Ninth Circuit held that the father’s lawsuit had been properly dismissed be-

(discussed with approval in Goldtooth v. Goldtooth, 3 Navajo Rptr. 223, 225–26 (Navajo Dist. Ct. 1982)).


123. See, e.g., In re The Sacred Arrows, 3 Okla. Trib. Ct. 332, 337–38 (Cheyenne-Arapaho Dist. Ct. 1990) (tribal courts should not “merely simulate the state and federal courts in interpreting and applying tribal laws” but should incorporate “centuries of customs and traditions”); Tom v. Sutton, 553 F.2d 1101 (9th Cir. 1976) (terms such as “due process” and “equal protection” as used in ICRA may have different meaning from same terms in federal Constitution); Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238 (9th Cir. 1976) (equal protection provision of ICRA may be interpreted so as not to impair tribal practice or custom). See generally Christine Freitag, Putting Martinez to the Test: Tribal Court Disposition of Due Process, 72 Ind. L.J. 831, 848–58 (1997) (collecting court opinions from diverse tribes that emphasize essential role of tribal custom in interpreting due process clause of ICRA).


125. 513 F.3d 943 (9th Cir. 2008).
Court adjudication is tenuous. The Court sought an order from a state court granting the objection of a fit parent may be more tenuous on parental authority — more difficultly interest under the Due Process Clause. In contrast, the constitutional consequence is such in the tribal forum. Although shielded by the due process and equal protection Act, tribal courts may deviate from the federal law. Moreover, resort to federal courts is unlikely to succeed. As discussed below, review in federal courts would be difficult except by way of a criminal appeal.

Chapter's introductory case, federal constitutional challenges to tribal court action, often pose a significant separate barrier. In the non-Indian father filed a federal habeas corpus action after he was denied custody of his son, the substantive due process right to parent as a jurisdictional challenge, the court had been properly dismissed because the state courts had no jurisdiction.

See R. S. 3, Navajo Rptr. 223, 225-26 (Navajo C. A. 1987). See also, 3, Navajo Rptr. 301, 337-38 (Cheyenne-Arapaho C. A. 1976); see also, 3, Navajo Rptr. 337-38 (Cheyenne-Arapaho C. A. 1976); see also, 3, Navajo Rptr. 337-38 Chayenne-Arapaho C. A. 1976). The court in this case, however, noted that due process requirements were not necessarily met simply because the court had custody of the child.

Thus, the court recognized the need to interpret ICRA's due process provision within the context of tribal culture, and it made clear that parents' rights vis a vis extended family members does not carry the same meaning in tribal culture as they do in the nontribal world. Nevertheless, the court in L.F. granted the father's petition because the child had been in the actual physical custody

cause of his failure to exhaust tribal remedies. In so holding, the court noted that the custody dispute was still pending in tribal court, and it indicated that the father was unlikely to prevail in his objection to the tribal court's jurisdiction in any event. Other federal courts have been equally unreceptive to claims that tribal courts stepped beyond their jurisdiction in issuing custody decrees.

On the other hand, the ICRA has been successfully invoked in tribal court in at least one case to require the return of a child to his father in an action against the maternal grandparents. In In re Application of L.F., a tribal appeals court entertained a father's habeas corpus petition after the tribal family court had given physical custody to the grandparents. Although the court ultimately upheld the father's claim, it did point out that the due process guarantee of the ICRA is different from the Due Process Clause of the Fourteenth Amendment of the federal Constitution:

The state decisions are reflective of different culture and traditions. In the culture of the Tribes, extended families pay a much greater role in raising children. The rights of such extended family members will not necessarily be subordinate to natural parents when those extended family members have been rearing a child in their home or when they can offer more continuity of care than a parent who has not played a major role in parenting.

Thus, the court recognized the need to interpret ICRA's due process provision within the context of tribal culture, and it made clear that parents' rights vis a vis extended family members does not carry the same meaning in tribal culture as they do in the nontribal world. Nevertheless, the court in L.F. granted the father's petition because the child had been in the actual physical custody

126. Id. at 948.
127. Id. (explaining that the father had voluntarily participated in the tribal proceedings and that the child herself was a member of the tribe).
130. Id. at 6016.
of the father on the reservation and had been doing well before the tribal court changed the child’s custody to the grandparents. Under the circumstances, no cultural tradition supported a disruptive award of custody to the grandparents. The basic reasoning of L.F., however, indicates that an award of custody or visitation to a grandparent in conformance with a tribe’s customary practices would not be subject to an ICRA challenge by a dissatisfied parent.

In sum, visitation and custody requests by nonparents in tribal court are construed through a distinct cultural lens. A tribal tradition of involving extended family members in child rearing may strongly influence any judicial response to an intra-familial dispute and may lead to the tribal court’s use of a presumption favoring the extended family member. In the state courts, on the other hand, Troxel has reaffirmed the dominant culture’s protection of the nuclear family and, more specifically, the autonomy of parents. While tribal law likewise respects parents’ rights, as shown in Application of L.F., tribal courts applying tribal custom and tradition can sometimes override parental authority in order to give effect to a culturally-grounded role for grandparents or other relatives.

Part Two. Adoption from a Tribal Perspective

A. The Anglo-American Approach, in Brief

Adoption is an area of singularly contrasting philosophies both between tribes and states and among tribes themselves. Adoption, never a part of the English common law, was legislatively recognized in the United States during the nineteenth century, and the early adoption statutes authorized the transfer of children by deed from one set of parents to another. In modern Anglo-American law, adoption is the formal creation of legal parenthood that requires that pre-existing parental rights have been extinguished—either by consent or involuntary termination. Despite the growing movement toward open


132. Traditional Anglo-American law has required the termination of parental rights as a corollary of adoption and the consequent extinction of all rights to continued contact between the child and the birth parents. See generally Homer H. Clark, Law of Domestic Relations in the United States 855–62 (2d ed. 1988); Annette R. Appell, Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice, 75 B.U.L. Rev. 997, 1008–13 (1995). Formal, closed adoption was not always the model in the United States. In the nineteenth century, informal open adoption was the norm, and
been doing well before the tribal court and parents. Under the circumstances, the appropriate award of custody to the grandparents indicates that an award of custody is consonant with a tribe's customary law in the face of a challenge by a dissatisfied parent. While nonparents in tribal court are considered to have a tribal tradition of involving extended family members to provide a balanced judicial response to the tribal court's use of a presumption in favor of the grandparents, the court's decision in the case under review, and the purpose of the tribal court, is to give extended family, including extended family, the opportunities to assume the role of a child's parent or relative.

A Tribal Perspective

The American law is not the only law in the world. Other cultures and traditions have developed different approaches to family law. This section explores the tribal perspective on adoption.

A New Perspective on Adoption

In the United States, adoption is the legal process by which a new parent gains legal custody of a child. Adoption is often used to formalize a relationship between a child and an adult who has taken care of the child in a consistent manner. Adoption can be a transformative experience for both the child and the new parent. The process of adoption involves a series of legal steps that must be followed to ensure that the child's best interests are protected. In many cases, adoption involves the participation of multiple parties, including the child, the birth parents, and the adoptive parents.

Adoption within the last twenty years, even in those states where open adoption is accepted, adoptive parents typically have the right to decide the degree to which the child will have contact with biological relatives. As one family law scholar put it, “As a result of the adoption decree the legal rights and obligations which formerly existed between the child and his natural parents come to an end, and are replaced by similar rights and obligations with respect to his new adoptive parents.” While significant variations continue to exist in American adoption law that belie the characterization of adoptive parents as a complete “replacement” of the birth parents, an adoption under state law typically severs the child's relations with the child's birth parents and extended family once the adoption is final. This doctrine manifests itself in a variety of ways, including the continued refusal of a majority of state courts to enforce visitation agreements entered into between adoptive parents and birth parents, despite compelling evidence in individual cases that such visitation might be in the best interests of the child.

Conversely, the bonds that a child has formed with an intended adoptive family may be legally meaningless under Anglo-American law if the

the informal arrangements frequently permitted ongoing contact between the child and the birth family. See Douglas E. Abrams & Sarah H. Ramsey, Children and the Law 709 (2000). After Massachusetts enacted the first modern adoption law in 1851, states gradually moved to a closed adoption model, mandating the sealing of adoption records and prescribing the effect of adoption as a severance of all legal and social relationships between the child and the biological family. Id.

133. Anita L. Allen, Open Adoption Is Not for Everyone, in Adoption Matters 47 (Sally Haslanger & Charlotte Witt, eds. 2005) (describing movement toward open adoption and suggesting that values of familial privacy and autonomy may justify resistance to open adoption and may be necessary to retain adoption as an alternative).

134. Clark, supra note 132, at 850.

135. See Cahn, supra note 131 (exploring symbolism of state laws that differentiate among the different legal relationships between biological children and adoptive children for purposes of inheritance and incest laws).

136. See, e.g., Adoption of Vito, 728 N.E.2d 292 (Mass. 2000) (trial court's order for post-adoption visitation with biological mother was clearly erroneous since it rested solely on child's speculative future need to develop racial identity); In re Custody and Visitation of Jeffrey A., 584 N.W.2d 195 (Wis. Ct. App. 1998) (adoption after termination of birth mother's rights defeats maternal grandparents' equitable claim for visitation); but see Michael D. Warlick, 551 A.2d 738 (Conn. 1988) (trial court may enforce post-adoption visitation agreement with birth mother, subject to finding that visitation is in child's best interests). Significantly, post-adoption visitation in the Uniform Adoption Act is authorized only in the context of stepparent adoption. See Uniform Adoption Act §1-105 & 4-113. See generally Joan Heifetz Hollinger, The Uniform Adoption Act: Reporter's Ruminations, 30 Fam. L.Q. 345 (1996) (describing "divisive" and "arduous" task of drafting because of need to protect rights of adoptive parents).
adoption is set aside. In the well-publicized cases of Jessica DeBoer, 137 Anna He, 138 and others like them, 139 children were removed from would-be adoptive homes to be returned to birth parents with whom they had no psychological relationship. To critics, such cases are a tragic demonstration of the Anglo-American judicial system's insistence on an exclusive, all-or-nothing construction of legal parenthood, a judicial posture that may ignore the reality of a child's emotional ties with caregivers. 140

B. Tribal Perspectives

In general and notwithstanding internal differences, tribal courts appear to embrace a more fluid concept of child-rearing in which biology and formal adoption are not the only routes to the obligations and responsibilities of parenthood. Although biology is of critical importance to the kinship ties within many tribes, child-rearing responsibilities often extend beyond biological parents. As Terry Cross and Kathleen Fox have explained:

[1]In Indian tribal systems, a child is born into a particular family and from the moment of birth, that child's place in the world is defined by his or her relationships with his or her mother's and father's families. In a fundamental sense, a child's very definition as a human being is in the context of the family in which he or she is born. 141


138. In re Adoption of A.M.H., 215 S.W.3d 793 (Tenn. 2007) (reversing termination of parental rights of Chinese couple and ordering return of daughter after more than seven years).


Shared responsibility for child-rearing is a common tradition among tribes, with tribal traditions assigning different roles to various relatives. As has been discussed, maternal grandparents and aunts, in particular, often have discrete parenting functions and traditionally assumed responsibility for children when parents were unavailable. In earlier times, informal arrangements took the place of formal child protection proceedings, with children in need being raised by extended family, clan members, or other persons sharing a communal bond with the children’s family. The parent-child relationship was not extinguished prior to such arrangements, and the child’s continued contact with extended family was a central tenet of the practice. Still today, severance of the child’s relationship with extended family, in the view of many tribes, is outside the purview of tribal authority. Indeed, a formal judicial decree to terminate parental rights may be altogether foreign within some tribes. Likewise, tribal law frequently provides that an adoption, whether formal or informal, will not affect a child’s tribal membership or benefits flowing from that status.

142. See supra notes 108–13, and accompanying text.


145. Terry Cross and Kathleen Fox have described the contrasts between many tribal approaches and state child welfare systems:

Permanency planning in Indian child welfare ... has as much to do with maintaining a child’s connection and sense of belonging to the extended family, clan, or tribe as it does with maintaining ties to the biological parents. Termination of parental rights is valued as the method of choice to insure permanence in the mainstream child welfare system. However, in Indian child welfare, it has the potential of severing the child’s connection to an extended family or tribe.

Cross & Fox, supra note 141, at 427. In their own research, these authors were unable to find any tribes with customs, ceremonies, or common practices that ended relationships between parents and children. To the contrary, they found that “many tribes actively abhor the idea and will not subject their children to this unthinkable act.” Id. at 428. The authors are evidently referring to customary practices, not contemporary tribal codes—where procedures for the absolute severance of parental rights can be found readily. See, e.g., Mashantucket Pequot Tribal Laws tit V, ch. 5, § 7(b) (2007) (providing that termination of parental rights severs “all rights, powers, privileges, immunities, duties and obligations” between parent and child).

146. The Siletz Code, for example, provides that a termination of parental rights shall have no effect on the child’s enrollment status or degree of blood quantum, among other protected rights. SILETZ JUVENILE CODE §8.027 (2005).
The codes of several tribes now express a clear preference for open adoption. In some codes, that goal is accomplished by providing that some portion of parental rights will survive the adoption, and in other codes, the result is achieved by “suspending” rather than terminating parental rights. The Confederated Salish and Kootenai Tribes of Montana, for example, include the following passage in their Children’s Code:

In accordance with Indian custom, the Court may determine that an open adoption in some degree is best for the child and family. In that case, the Court will decide that a full termination of parental rights is not in the best interests of the child, and that certain residual parental rights will be maintained by the natural parents of the child. Such residual rights may include rights to visitation, contact, to be informed of matters of major importance affecting the health, welfare, education or spiritual training of the child, or such other residual rights as the Court may determine in the best interests of the child.

Under the Code, a “suspension of parental rights” means the “temporary or indefinite severance of the legal relationship between parent or child,” while a “termination of parental rights” means the “permanent cancellation” of the relationship. Nevertheless, even in ordering a termination of parental rights,

147. In the Pascua Yaqui Code, for example, the tribe has made explicit its desire to continue a child’s ties with his or her biological parents:
Adoptions under this Code shall be in the nature of “open adoptions.” The purpose of such open adoptions is not to permanently deprive the child of connections to, or knowledge of, the child’s natural family. The purpose of adoptions shall be to give the adoptive child a permanent home.

5 PASCUA YAQUI TRIBAL CODE §7-440 (2006). The Code goes on to enumerate specific rights, such as the child’s “absolute right, absent a convincing and compelling reason to the contrary, to information and knowledge about his natural family and his tribal heritage,” id. at (B), and a right to reasonable visitation with the biological parents and extended family, subject to reasonable controls of the adoptive parents, unless otherwise restricted for compelling reasons, id. at (C).

148. Although a few states have incorporated “suspensions” of parental rights in their statutes, the term is used typically in conjunction with guardianships or other forms of custody that fall short of adoption. See, e.g., ARIZ. REV. STAT. ANN. §14-5204 (2005) (authorizing guardianship where parental rights have been “terminated or suspended by circumstances or prior court order”); MAINE REV. STAT. ANN tit. 18-A §5-204(a) (1998) (same); MICH. COMP. LAWS ANN §700.5204 (2002) (same, with delineation of circumstances justifying guardianship).

149. CONF. SALISH AND KOOTENAI TRIBAL LAWS CODIFIED §3-2-406(10)(h) (2003).
150. Id. at §3-2-401.
The Court may determine that an adoption is in the best interests of the child and family. In that case, a termination of parental rights is necessary, and that certain residual parental rights are in the best interests of the child. Such visitation, contact, to be informed, or such other residual rights as are in the best interests of the child.

The Code, “[s]uch an adoption must be voluntarily entered into by the natural parent or parents involved and the custodian, and shall be recognized as a legal adoption. The natural parent or parents consenting to the adoption must do so with knowledge of the permanent nature and effect upon their natural parent rights.” While the Code does not purport to prescribe the elements of the

151. Id. at §3-2-313(6)(b)(ii) (permitting tribal court to order residual parental rights in termination decree, such as rights to communicate and visit with child, right to be consulted about child’s religious affiliation, medical treatment, or marriage). Residual rights for extended family members may also be ordered. Id. at §3-2-313(7).


153. Id. Similarly, the White Earth Band of Ojibwe endorses open adoption in its code. See WHITE EARTH BAND OF OJIBWE CHILD/FAMILY PROTECTION CODE tit. 4, ch. XXVII, §1 (2003) (providing that “[m]ost adoptions under this code shall be in the nature of Open Adoptions. The purpose of such open adoptions is not to permanently deprive the child of connections to, or knowledge of, the child’s natural family”). The White Earth Code goes on to provide that, absent compelling reasons to the contrary, the child has a right to information about his or natural family and tribal heritage and rights of visitation with biological parents and other family members. Id.

154. See Red Horse, supra note 144, at 248.


156. SALISH AND KOOTENAI CHILDREN CODED §3-2-408 (2003).

157. Id. at 3-2-408(1).
voluntary placement or agreement, it does provide that an informal or traditional adoption, once validly created, has the same effect as formal adoption.\textsuperscript{158}

Thus, through explicit code passages and the evocative notion of a "suspension" of parental rights, the Salish and Kootenai Tribes have made clear that some residual portion of parental rights can survive an adoption, whether formal or informal. Moreover, the tribes have taken the bold step of acknowledging in their code the practice of informal adoption. By declaring the effect of an informal adoption without attempting to regulate the details of its creation, the tribes have achieved a balance between the need to respect the unwritten dynamic nature of tribal tradition and the practical need to have clear legal records of parent-child relations.\textsuperscript{159}

Although traditional adoption may be rooted in tribal history without formal embodiment in tribal law, some tribes have taken the route of explicitly prescribing traditional adoption in code provisions.\textsuperscript{160} The Sisseton-Wahpeton Sioux, for example, have included a description of "traditional adoption," or "ecagwaya," in their tribal code. According to the code, ecagwaya or traditional adoption means "the placement of a child by his natural parents ... with another family but without any Court involvement."\textsuperscript{161} According to the code, after the child has resided with another family for two years, the tribal court will recognize that the adoptive parents have acquired "certain rights" over the child, even though parental rights have not been terminated.\textsuperscript{162} Interestingly, the code directs tribal courts to adjudicate disputes between adoptive and biological parents based on the child’s best interests and on "recognition of where the child’s sense of family is."\textsuperscript{163} In the code’s description of ecagwaya, with its guidelines for achieving judicial recognition, the Sisseton-Wahpeton Sioux have chosen to partially for-

\textsuperscript{158} Id. at 3-2-408(5) ("Following the effective creation of an informal adoption, the relation of parent and child and all rights, duties, and other legal consequences of the natural relation of the child and the parent shall be in accordance with [law specified] for formal adoptions").

\textsuperscript{159} In a similar recognition that parental rights survive and can be restored, the White Mountain Apache Tribe provides for revocation of a termination order and restoration of parental rights within six months of a termination on a showing that the best interests of the child would be served. See WHITE MOUNTAIN APACHE JUVENILE CODE § 8.7 (2000).


\textsuperscript{161} SISSETON-WAHPETON SIOUX JUVENILE CODE § 38-03-24.

\textsuperscript{162} Id.

\textsuperscript{163} Id.
malize an informal process. This approach serves the practical needs of contemporary society by imparting a degree of certainty to a heretofore unwritten tribal tradition.

The concept of ecagwaya was explained in DuMarce v. Heminger,164 where an intertribal court of appeals faced a dispute about whether an ecagwaya adoption had taken place. According to the court, through ecagwaya adoption, the voluntary placement of a child with another family may evolve with the passage of time into an adoption, giving the adoptive parents certain rights without terminating the parental rights of the birth parents. In comparing traditional adoption with the adoption laws of most states, the tribal appeals court noted that under Anglo-American law parental rights must be terminated before an adoption can take place, parents can claim a fundamental right of constitutional dimension, and termination of parental rights is conditioned on a finding of unfitness.165 The ecagwaya adoption, on the other hand, allows for an adoption without terminating the birth parents’ rights and envisions some degree of continued involvement in the child’s life by the birth parents and extended family. The court emphasized that adversarial relations between the parties are inconsistent with the harmonious nature of ecagwaya.166

Traditional adoption is often linked to the Native concept of collective responsibility for the welfare of tribal children. Commentary from a Navajo court provides an example. In In re Interest of J.S.,167 the tribal district court granted an adoption of a neglected child by a member of the child’s extended family. Judge Tom Tso explained that “[t]he American Law of Adoption thinks in terms of duties. Natural parents have duties towards their children, and when those duties are breached, then the law will take the children away from the natural parents and give them to other parents.”168 According to Tso, “Navajo concepts are different” and stem from different sources.169

165. Interestingly, on the facts before it the court found no ecagwaya adoption because of the hostile relations between the parties and the involvement of the court. For a valid ecagwaya adoption, the parties would have had to maintain amicable relations without adversary court proceedings. 20 Indian L. Rptr. at 6079.
166. Other tribes likewise recognize forms of traditional Native adoption. See, e.g., In re S.I.S., 4 Okla. Trib. 466, 475 (Cheyenne-Arapaho 1995) (noting that tribal law recognizes statutory adoptions as well as “traditional adoptions under tribal custom and common law”).
167. 4 Navajo Rptr. 192 (Navajo Dist. Ct. 1983).
168. Id. at 193.
169. Id.
The Navajo Common Law is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because those concepts are irrelevant in a system which has obligation to children that extends beyond the parents. Therefore, upon the inability of the parents to assist a child or following the occurrence of a family tragedy, children are adopted by family members for care which may be temporary or permanent, depending upon the circumstances. The mechanism is informal and practical and based upon community expectation founded in religious and cultural belief.\textsuperscript{170}

Traditional Navajo adoption, as described by Judge Tso, is grounded on the cultural premise that children belong to more than just the parents. In Navajo custom, extended families and clans have an obligation to care for children whose parents are unable to do so.\textsuperscript{171} Under Judge Tso’s formulation, “[t]he mechanism [for traditional adoption] is informal and practical and based upon community expectation founded in religious and cultural belief.”\textsuperscript{172} Navajo adoption, according to Tso, is not concerned with the exchange of legal parents but is “based on need, mutual love and help.”\textsuperscript{173}

Traditional adoption, then, exists in certain tribes as a caregiving relationship established over time. Often rooted in need, it is a transfer of parenting responsibilities where a child’s birth parents are unable or unwilling to provide adequate care, but the adoption typically will not impede continued contact with extended family or benefits flowing from tribal membership.\textsuperscript{174}

## Conclusion

This Chapter has introduced some of the ways in which tribal decision-making involving children reveals a world view that diverges from that of the dominant society. A tribe’s cultural outlook may manifest itself in jurisprudential themes about the cultural primacy of children in the community, the obligations of parenthood, or the central importance of tribal identity in resolving family disputes about children. In particular, the traditional role of the extended family in child rearing among many tribes has figured prominently.

\textsuperscript{170} Id. at 195.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 194–95.
\textsuperscript{174} The growing significance of tribal adoption practices in child welfare permanency planning is explored in Chapter Six.
in child custody disputes, and tribal courts have had to resolve conflicting claims of parents and grandparents. In many such cases, the tribal court portrays the grandparent as a cultural insider—the special elder who can assume child-rearing responsibilities according to custom and can imbue the child with a sense of cultural heritage. In contrast, in Anglo-American jurisprudence—as demonstrated most tellingly by the Supreme Court’s decision in Troxel—the grandparent is an outsider whose intrusion into the nuclear family is subject to strict constitutional oversight. While the due process claims advanced in Troxel can also surface in tribal court disputes by way of the Indian Civil Rights Act, tribal courts will not necessarily subordinate tribal custom to the dictates of the ICRA. The result is a fluid interplay of customary and contemporary understandings of the family.

Tribal law also yields alternative constructions of adoption and kinship caregiving. The norm reflected in many tribal codes—that an adopted child remains permanently linked to biological relatives and the tribal community—is not found in Anglo-American law. Likewise, tribal codes that permit an adoption after the suspension of parental rights, with the potential of reestablishing parental ties in the future, reflect a more fluid approach to parenting. These traditions of parenting and shared responsibility for child-rearing may offer alternatives that could be adapted to the non-tribal context.

By suggesting points of contrast between tribal family law and that of the Anglo-American world, this Chapter makes clear that tribal-state conflicts are about more than power. Jurisdictional fights also determine which substantive law will apply, which sovereign's shared cultural values will be invoked, and whose construct of family will be followed. When tribal courts resolve adoption and custody disputes, their decisions often draw on the tribe's unique traditions in conceptualizing and healing breaches in family relations. The response of outsiders involved in such disputes, including state judges themselves, should start from a place of appreciation for the possibilities of tribal law.

175. Occasionally, critics of Anglo-American family law have pointed to longstanding practices in American Indian communities to support particular reforms. See, e.g., Meyer, supra note 140, at 831 (describing traditional Indian adoption practices as support for proposal for open adoption). Of course, traditional practices that are dependent on a particular tribe's world view cannot necessarily be transplanted to the non-Native context. See Carole E. Goldberg, Overextended Borrowing: Tribal Peacemaking Applied in Non-indian Disputes, 72 Wash. L. Rev. 1003 (1997). Insights gleaned from traditional practices, however, may benefit decision makers in non-Native courts.

176. As Milner Ball has observed, “[n]on-Indians have much to receive from Indians across the distance of their difference.” Milner Ball, Constitution, Court, Indian Tribes, 21 Am. Bar Found. Res. J. 1, 7 (1987).