Indian Embryos as "Indian Children?"

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I. INTRODUCTION

A couple—Mike and Megan—get married and buy a house in Phoenix, Arizona. After an annual checkup, Mike is diagnosed with testicular cancer. His doctors believe that with surgery and chemotherapy Mike will more than likely survive his diagnosis. However, chemotherapy can result in both temporary and permanent infertility.[1]

While Mike always wanted children, Megan has never been sure. Mike's diagnosis forces him and Megan to decide. Together, they choose to freeze fertilized embryos in case they want to have children later. The couple works with a clinic to remove eggs from Megan and fertilize them with Mike's sperm inside of a laboratory.[2] In many cases, the clinic may even insist that Mike and Megan sign reams of paperwork, including preferences regarding ownership in the case Mike and Megan divorce or choose not to use the embryos.[3] Mike and Megan then freeze the newly fertilized embryos—allowing Mike to undergo his cancer treatment without worrying about losing his opportunity to have children.[4]

A few years later, Mike's cancer is gone. Megan, however, has decided that she does not want to become a mother. The couple cannot resolve their differences regarding parenthood and so begin the marriage dissolution

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1. *See Testicular Cancer: Diagnosis & Treatment*, MAYO CLINIC (Oct. 22, 2022), https://www.mayoclinic.org/diseases-conditions/testicular-cancer-care/diagnosis-treatment/drc-20352991 [https://perma.cc/22SJ-2VYL].

2. *See Assisted Reproductive Technology (ART)*, CDC (Oct. 8, 2019), https://www.cdc.gov/art/whatis.html [https://perma.cc/YT94-P6GG].

3. *See* Jenny Gross & Maria Cramer, *The Latest Issue in Divorces: Who Gets the Embryos?*, N.Y. TIMES (Apr. 3, 2021), https://www.nytimes.com/2021/04/03/health/IVF-frozen-embryo-disputes.html [https://perma.cc/U77U-SHTA] (reporting that when a couple began working with a fertility clinic, they "faced mounds of paperwork" that required them to specify "[w]ho would determine the disposition of remaining embryos in the case of divorce or separation[]").

4. *See Embryo Freezing (Cryopreservation)*, CLEV. CLINIC (Feb. 17, 2022), https://my.clevelandclinic.org/health/treatments/15464-embryo-cryopreservation [https://perma.cc/8AET-792D].

process. The sticking point is the disposition of Mike and Megan's frozen embryos. States, which have broad authority over issues of family and property law, have different approaches when assigning ownership of frozen embryos during dissolution proceedings.[5] But remember, Mike and Megan live in Arizona.

In 2018, the Arizona legislature passed a scheme for the disposition of frozen human embryos during a marriage dissolution.[6] The statute requires courts to "[a]ward the in vitro human embryos to the spouse who intends to allow the in vitro human embryos to develop to birth."[7] In Arizona, Mike would be awarded the frozen embryos because he is the partner who wishes to develop the embryos to birth. He would even be awarded the embryos if he only intended to donate the embryos to another couple.[8] Importantly, Arizona's law trumps any agreement to the contrary, so any agreement they made—including any paperwork they may have filled out with the clinic—may not be enforced.[9] Arizona's new law is not finished with Megan. Not only would she lose control of the embryos, but she must also choose at the embryo-disposition stage whether she would assert parental rights over any children that develop from the frozen embryos.[10] Arizona's new law states that Megan will have no parental rights over a child born from her gametes unless she consents to such rights in writing during the embryo-disposition proceedings.[11]

States differ on how to determine embryo disposition during a marriage dissolution, commonly taking either a "property" or "personhood"

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5. *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 182 (N.Y. 1998) (holding that New York should follow a contractual approach to embryo disposition); *In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003) ("A better principle to apply, we think, is the requirement of contemporaneous mutual consent. Under that model, no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors."); Szafranski v. Dunston, 993 N.E.2d 502, 514 (Ill. App. Ct. 2013) (holding that Illinois should follow a hybrid approach to embryo disposition that prioritizes clear and existing contracts before considering the individual interests of the parties).

6. Act of Apr. 3, 2018, ch. 128, § 1, 2018 Ariz. Sess. 128 (codified as amended at ARIZ. REV. STAT. ANN. § 25-318.03 (2018)).

7. ARIZ. REV. STAT. ANN. § 25-318.03(A)(1).

8. *Id.*

9. *Id.* § 318.03(B).

10. *Id.* § 318.03(C).

11. *Id.* ("The spouse that is not awarded the in vitro human embryos has no parental responsibilities and no right, obligation or interest with respect to any child resulting from the disputed in vitro human embryos, unless the spouse provided gametes for the in vitro human embryos and consents in writing to be a parent to any resulting child as part of the proceedings concerning the disposition of the in vitro human embryos.").

approach.[12] The property approach treats human embryos as personal property and gamete providers as "owners,"[13] whereas the personhood approach affords embryos similar rights to those of a person.[14] By forcing courts to award embryos to the spouse most likely to cause the embryos to develop into a human child, Arizona's new law implements a personhood regime that treats embryos as potential human lives rather than personal property.[15]

Aside from prioritizing the development of human embryos above the right to not have children, Arizona's new law also forces difficult parental decisions amidst an already emotionally trying experience. By changing one fact, Mike and Megan's scenario morphs into an even more elaborate legal knot: what if Megan were an enrolled tribal member?

In 1978, the United States Congress passed landmark legislation entitled the Indian Child Welfare Act ("ICWA").[16] In fulfilling its trust responsibility to tribes,[17] the federal government passed ICWA to combat the "alarmingly high percentage of Indian families" broken up by state family law, adoption agencies, and foster care programs.[18] While the federal government generally does not intervene in the realm of family law, ICWA is triggered during custody proceedings over an "Indian child."[19] This includes foster care placement, adoptive and preadoptive placement, and termination of parental rights.[20] The goal of ICWA is stated simply: "to protect the best interests of Indian children and to promote the stability and security of Indian tribes."[21]

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12. *See* Davis v. Davis, 842 S.W.2d. 588, 594–97 (Tenn. 1992); Stephanie J. Owen, *Davis v. Davis: Establishing Guidelines for Resolving Disputes Over Frozen Embryos*, 10 J. CONTEMP. HEALTH L. & POL'Y, 493, 497–500 (1994).

13. Owen, *supra* note 12, at 499–500.

14. *Id.* at 497–99.

15. *See* Hannah C. Catchings, *A "Modern Family" Issue: Recategorizing Embryos in the 21st Century*, 80 LA. L. REV. 1521, 1535 (2020); Melissa B. Herrera, *Arizona Gamete Donor Law: A Call for Recognizing Women's Asymmetrical Property Interest in Pre-Embryo Disposition Disputes*, 30 HASTINGS WOMEN'S L.J. 119, 135 (2019). *See generally* ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

16. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C §§ 1901–63).

17. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1831) ("[Indian Tribes] relations to the United States resemble that of a ward to his guardian."); Morton v. Mancari, 417 U.S. 535, 553 (1974) ("Congress . . . determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies.").

18. 25 U.S.C. § 1901(4)–(5).

19. *Id.* § 1903(1).

20. *Id.* § 1903(1)(i)–(iv).

21. *Id.* § 1902.

For Arizona to terminate Megan's parental rights over a living child, it would have to ensure that Megan had counsel,[22] disregard any premature voluntary waiver of parental rights,[23] and prioritize placing the Indian child with extended family or a tribal member.[24] However, there are different laws governing embryos. Arizona applies a personhood regime to embryo disposition and pre-determines parental rights at the dissolution stage.[25] If Arizona applied ICWA protections at this stage where Mike intended to give the embryos to another couple, Megan would have access to counsel,[26] her tribe would be able to intervene,[27] and, most importantly, Megan would be given the freedom to effectively reserve her right to pursue parental rights of any future born child that may result from her donated gametes.[28] If applied, these protections would guarantee that Megan and her tribe would have the opportunity to help raise a potential future tribal citizen.[29] Without these protections in a personhood regime, Megan and her tribe may be denied rights under ICWA merely because of the unique designation that personhood states assign to embryos.

No court has yet applied ICWA protections to embryo disposition in a property regime. An "Indian child" must be a living "person,"[30] and embryos are not treated as people under a property regime. This seems fair: property regimes do not attempt to determine parental rights for a future born child. However, Arizona's new law attempts to determine parental rights at an embryonic stage.[31] Arizona is not alone. Other states, like Louisiana,[32] also have personhood regimes.[33] However, ICWA provides federal minimum

22. *Id.* § 1912(b).
23. *Id.* § 1913(a).
24. *Id.* § 1915.
25. ARIZ. REV. STAT. ANN. § 25-318.03 (2018).
26. 25 U.S.C. § 1912(b).
27. *Id.* §§ 1911(b), 1912(a).
28. *Id.* § 1913(a).
29. Note that the same opportunities exist in property regimes that do not pre-determine parental rights because the Indian parent did not, by law, waive any future parental rights.
30. 25 U.S.C. § 1903(4).
31. ARIZ. REV. STAT. ANN. § 25-318.03 (2018).
32. LA. STAT. ANN. §§ 9:126, 130 (1986).
33. New Mexico implements a system that implicitly leans towards personhood. On one hand, New Mexico law greatly prefers, and enables, the use of pre-fertilization agreements. On the other hand, New Mexico also pre-determines parental rights by requiring former spouses not awarded embryos to assert future parental rights at the contracting stage. *Compare* N.M. STAT. ANN. § 40-11A-704 (2010) *with* N.M. STAT. ANN. § 40-11A-706 (2010). Minnesota has a similar statute that requires "clear and convincing evidence" that a former spouse intended to maintain parental rights even if the embryos were implanted after a divorce. MINN. STAT. ANN. § 524.2-120 (2010).

standards for states to meet. It begs the question, should a state like Arizona, which treats embryos as persons, apply ICWA protections?

This Comment argues that ICWA protections should apply to human embryos in all states that reject pure property regimes for embryo disposition. Otherwise, personhood regimes would serve as an end-run around ICWA.[34] Once personhood regimes treat embryos as persons or create rules implementing family law before the birth of a child, inevitable tensions arise with ICWA. Not applying ICWA protections to these regimes would undermine the spirit of ICWA and create an unacceptable legal loophole to circumvent the rights of tribes, Indian parents, and Indian children. However, ICWA would not have to apply at the embryo-disposition stage in states that adopt pure property regimes because future parental rights are not determined at the dissolution stage. Part II surveys ICWA, its purpose, and its protections. Part III explores the current state of embryo-disposition laws and focuses on the newly passed Arizona personhood disposition regime. Part IV analyzes how ICWA should interact with personhood regime states and examines the risks that personhood states pose to tribes, Indian families, and the spirit of ICWA. Part V concludes that the best way forward is to reject personhood regimes in favor of pure property regimes or stringently impose ICWA protections at the embryo-disposition stage in personhood states whenever substantive family law is adjudicated.

II. THE SPIRIT OF ICWA: PROTECTING THE WELL-BEING OF INDIAN FAMILIES AND THE FUTURE OF TRIBAL NATIONS

The United States has a unique trust relationship with Indian tribes.[35] Before Congress passed ICWA, Indian families were ravaged by state and federal government child welfare practices.[36] Congress passed ICWA in 1978 to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[37] This Part first considers the basis of Congress's plenary power and trust responsibility that allows and compels

34. This Comment does not endorse a personhood regime. Property regimes avoid many of the thorny questions considered in this Comment. Once a state treats embryos as persons, however, there is no reason not to apply federal protections under ICWA.

35. Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) ("[The federal government] has charged itself with the moral obligations of the highest responsibility and trust.").

36. Thalia González, *Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption of Legal Protections for Indian Status Offenders*, 42 N.M. L. REV. 131, 138 (2012).

37. 25 U.S.C. § 1902.

it to act in the interest of Indian families and tribes. Next, this Part offers a brief description of the damage that was inflicted on Indian country pre-ICWA. Finally, this Part will explain how ICWA and its safeguards work.

A. The Federal Government's Trust Responsibility to, and Plenary Authority Over, Indian Tribes

Tribes preexisted the arrival of colonists and functioned as complex, stable, and vibrant governments long before Europeans invaded.[38] European powers often sought to align themselves with these powerful tribal nations to promote the security of their colonists and gain an edge against other European powers.[39] Over time, the British crown developed a centralized Indian affairs policy that rested Indian relations in the hands of the Crown rather than local leaders.[40] Following the Revolutionary War, the newly founded United States followed the British model and vested powers over Indians in the hands of Congress.[41]

Congress's centralized power over Indian affairs is established in the Constitution. The Indian Commerce Clause grants Congress power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."[42] This clause, along with various acts of Congress and Supreme Court precedent, has developed into the foundation of Congress's plenary power over Indian tribes.[43] In *Lone Wolf v. Hitchcock*, the Supreme Court acknowledged that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning."[44] This power leaves little to no room for states to assume authority over Indians without Congressional consent. Indeed, the Supreme Court has recognized that states and their citizens "are often [Indians'] deadliest enemies."[45]

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38. *See, e.g.*, Carrie Garrow, *New York's Quest for Jurisdiction Over Indian Lands*, 14 JUD. NOTICE 4, 4–7 (2019).

39. Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 721–22 (2004).

40. *Id.* at 722.

41. *Id.* at 724–26.

42. U.S. CONST. art. I, § 8, cl. 3.

43. *See, e.g.*, 25 U.S.C. § 177 (invalidating any treaty, land purchase, or convention entered into after the Constitution and requiring the United States to be present in any future negotiations between States and Tribes).

44. 187 U.S. 553, 565 (1903).

45. *Id.* at 567.

Congress's plenary authority over Indian tribes extends to authority over individual Indians.[46] This authority over tribes and individual Indians is not limited by the bounds of state borders.[47] Congress's plenary authority over Indian tribes and individual tribal members exists even though that tribe or member is "within the limits of a State."[48]

Congress has broad authority over Indian tribes and individuals, but it also has an affirmative legal and moral obligation to use that authority to act in the best interest of Indians.[49] Congress's plenary authority comes with trust responsibility.[50] The Court understands the relationship between tribes and the federal government as that between a guardian and its ward.[51] Congress has "charged itself with moral obligations of the highest responsibility and trust" over Indians.[52] In carrying out these obligations, Congress will be held to "the most exacting fiduciary standards."[53]

In sum, Congress possesses broad and plenary authority over tribes. Where Congress affirmatively uses this power, state borders have no effect in limiting or blocking Congress's authority. However, Congress's broad authority comes with exacting moral and legal obligations to Indian welfare. Accordingly, when Congress finds systematic and destructive government practices involving Indian families, it has both the legal authority and moral obligation to act. Such longstanding practices, described in the next section, were widespread before ICWA was passed.

B. The Damage to Indian Families Before ICWA

Before the passage of ICWA, Indian families were "devastated by state and locally sanctioned child welfare and adoption agencies who were removing Indian children from their families at an alarming and

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46. United States v. Holliday, 70 U.S. 407, 417 (1865) ("Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes.").

47. *Id.* at 417–18.

48. *Id.* at 418.

49. This "plenary" power is broader than the binds of the Indian Commerce Clause and has been used to regulate tribes and Indian country in areas non-economic or commercial in nature. U.S. v. Kagama, 118 U.S. 375, 378–79, 384–85 (1886) (finding that Congress can enforce the Major Crimes Act in Indian country under authority other than that granted in the Indian Commerce Clause).

50. Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

51. *Kagama*, 118 U.S. at 383–84.

52. *Seminole Nation*, 316 U.S. at 296–97.

53. *Id.* at 297.

disproportionate rate."[54] The House report on the bill that would become ICWA found that "approximately 25–35 percent of all Indian children [were] separated from their families and placed in foster homes, adoptive homes, or institutions."[55] Notably, "90% of those placements were in non-Indian homes."[56] It is no surprise then that in 1977 Congress found that "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."[57]

Pre-ICWA, Indian families were separated at shockingly high rates in comparison to non-Indian families. The problem was more prevalent in states with higher proportional Indian populations.[58] In Minnesota, Indian children were taken from their families five times more often than non-Indians.[59] In Montana, Indian families were at least thirteen times as likely to be separated than non-Indian families.[60] In South Dakota, Indians made up seven percent of the population, but Indian children constituted forty percent of the adoptions.[61] The problem was likely most pronounced in Wisconsin, where Indian children were 1,600 times more likely to be separated from their parents than non-Indian children.[62]

While the numbers alone are chilling, the justifications for separating Indian families make the pre-ICWA family separations even more disturbing. In 1977, the U.S. Senate found that "such family breakups frequently occur as a result of conditions which are *temporary or remedial* and where the Indian people involved *do not understand the nature of the legal actions involved*."[63] For example, the U.S. House found that one of the most frequent justifications for separating Indian children from their parents was alcohol abuse.[64] However, this justification was almost exclusively used against Indian families and was rarely used to separate non-Indian families, even in areas where rates of problem drinking were "the same" between Indian and non-Indian parents.[65] At base, Congress found that the epidemic of Indian

54. *Indian Child Welfare Act*, ASS'N ON AM. INDIAN AFFS., https://www.indian-affairs.org/icwa.html [https://perma.cc/VT8N-JSEU].

55. H.R. REP. NO. 95-1386, at 9 (1977).

56. ASS'N ON AM. INDIAN AFFS., *supra* note 54.

57. H.R. REP. NO. 95-1386, at 9 (1977).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. S. REP. NO. 95-597, at 11 (1977) (emphasis added).

64. H.R. REP. NO. 95-1386, at 10 (1977).

65. *Id.*

family separation was the result of a fundamental misunderstanding and inaccurate judgment of Indian parenting.[66]

Not only did child welfare workers rely on an inaccurate understanding of tribal cultures as a justification to target Indian families for separation, but Congress found that they also denied Indian parents their due process rights.[67] Indian parents and children were rarely represented by counsel.[68] Additionally, Congress found that child welfare workers used coercive practices to gain "voluntary" waivers of parental rights from Indian parents.[69] In one particularly disturbing case, South Dakota social services persuaded an Indian parent to sign over temporary custody during a time of need.[70] That very agreement was later used as evidence of neglect to permanently remove the Indian child from the Indian parent.[71]

Congress was also concerned that state and private agencies had economic incentives to place children in non-Indian homes.[72] Tribal leaders provided testimony about the actions of child welfare workers: "federally-subsidized foster care programs encourage some non-Indian families to start 'baby farms' in order to supplement their meager income with foster care payments and to obtain extra hands for farmwork [sic]."[73] Under such a practice, federal foster-care dollars were siphoned to non-Indian families.[74] This policy effectively stole two important resources from tribal nations: money and children. Tribal children, like the children of any nation, represent the future of their society.[75] The future success of tribal nations is dependent on the successes of their children; the loss of a generation of children can become the loss of an entire generation of future political, business, and social

66. *Id.*

67. *Id.* at 11.

68. *Id.* It is important to note that ICWA and its legislative findings were made before the Supreme Court held that the Constitution does not "require[] the appointment of counsel in every parental termination proceeding." Lassiter v. Dep't Soc. Servs. Durham Cnty., 452 U.S. 18, 31 (1981).

69. H.R. REP. NO. 95-1386, at 11 (1977).

70. *Id.* ("In a recent South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights.").

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 11–12.

75. NAT'L CONG. AM. INDIANS ET AL., NATIVE CHILDREN'S POLICY AGENDA: PUTTING FIRST KIDS 1ST 3 (2015), https://www.nicwa.org/wp-content/uploads/2016/11/2015_Native_Childrens_Policy_Agenda-1.pdf [https://perma.cc/7E9R-KHY8].

leaders.[76] Accordingly, a major goal behind ICWA was to prevent the "family breakdown [that] contributes to the cycle of poverty."[77] Preventing the export of Indian children to non-Indian families was an important step toward breaking the poverty cycle. By keeping Indian families together, tribes could raise their children and, by extension, realize their promising futures.

These concerns led Congress to an inevitable realization: there was "a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, with non-Indian . . . homes."[78] This epidemic of Indian family breakups "seriously impact[ed] long-term tribal survival."[79] Ultimately, Congress recognized that it had failed in its trust responsibility to tribes.[80] Congress's findings prompted the passage of ICWA, which would go on to provide important and constitutional safeguards for Indian families and tribes.

C. Safeguarding the Future of Tribes: ICWA's Provisions and Protections

Congress passed ICWA in 1978, explicitly attempting to live up to its trust responsibility to tribes.[81] While family law is typically reserved to the states,[82] Indian law, including Indian family law, is specifically reserved to Congress in Article I of the Constitution.[83] Congress used its plenary power to step into the field of family law and enact ICWA.[84] The policy behind ICWA is stated simply:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or

76. *See id.*

77. H.R. REP. NO. 95-1386, at 12 (1977).

78. *Id.* at 19.

79. S. REP. NO. 95-597, at 52 (1977).

80. *Id.* ("The U.S. Government, pursuant to its trust responsibility to Indian tribes, has failed to protect the most valuable resource of any tribe—its children.").

81. 25 U.S.C. § 1901.

82. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

83. U.S. CONST. art. I, § 8, cl. 3.; *see* H.R. REP. NO. 95-1386, at 12–18 (1977).

84. 25 U.S.C. § 1901(1)–(2).

> adoptive homes which will reflect the unique values of Indian culture.[85]

ICWA generally applies during "child custody proceedings" over an "Indian child."[86] Child custody proceedings under ICWA include foster care placement, preadoptive placement, adoptive placement, and termination of parental rights.[87] Notably, ICWA does not apply to an award of custody of an Indian child to one of the parents during a divorce proceeding.[88]

ICWA also only applies to child custody proceedings over an "Indian child."[89] An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[90] It is significant, especially for the purposes of this Comment, that the definition of an "Indian child" under ICWA includes children who are *eligible* for enrollment. Since enrollment criteria change, a child may move in and out of ICWA jurisdiction as tribal ordinances and constitutions change. Tribes can, and should, use their inherent powers over enrollment criteria as a tool to get ahead of legal ambiguities. Tribes should choose to have meaningful discussions regarding how to handle enrolling children born of In Vitro Fertilization ("IVF"), especially children born from donated embryos.[91] Such considerations are all the more important in personhood regime states.[92]

ICWA has many provisions designed to serve as safeguards for Indian families. Broadly speaking, these protections fall within three categories: procedural and due process rights, tribal jurisdiction, and placement preferences and active efforts. This section will discuss each category in turn.

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85. *Id.* § 1902.

86. *Id.* § 1903(1), (4).

87. *Id.* § 1903(1); 25 C.F.R. § 23.103(a).

88. 25 U.S.C. § 1903(1); 25 C.F.R. § 23.103(b)(3). Congress found that "the protections provided by this act are not needed in proceedings between parents." H.R. REP. NO. 95-1386, at 31 (1977).

89. 25 C.F.R. § 23.103(a).

90. 25 U.S.C. § 1903(4).

91. Tribes could, for example, explicitly state that children born of IVF are eligible for enrollment provided that the child is otherwise eligible. Of course, they could also make the opposite stipulation. Only tribal governments are capable of tailoring enrollment criteria to suit the needs of their community.

92. In personhood regime states, it would probably make state application of ICWA protections more likely if tribes that hope to enforce ICWA protections at embryo-disposition stages were explicit with how IVF affected enrollment status.

1. Procedural and Due Process Protections in ICWA

ICWA contains various procedural and due process protections for Indian families. One such protection is to provide counsel to indigent Indian parents.[93] Additionally, the court may use its discretion to appoint an Indian child legal counsel.[94] These provisions help address Congress's finding that pre-ICWA child custody proceedings were completed without Indian parents understanding "the nature of the legal actions involved."[95] By providing counsel to Indian parents that cannot afford it, ICWA seeks to limit the number of unjust removals resulting from an Indian parent's justified lack of understanding of the law.[96] Additionally, guaranteed representation by legal counsel serves to decrease the chances that an Indian family is unjustly broken up.[97] Representation serves to prevent coercion and limit child removals to cases where it is necessary and justified.[98]

Another important due process protection is ICWA's limit on voluntary waivers. ICWA requires that all voluntary waivers of parental rights by Indian parents be submitted in writing to the judge.[99] Furthermore, the judge must certify that "the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian."[100] Notably, especially for the scope of this Comment, ICWA invalidates any voluntary consent to termination of parental rights made before ten days after the birth of the Indian child.[101] When certifying voluntary waivers of parental rights, judges must explicitly inform Indian parents that they may withdraw any valid consent at any time before the final decree.[102] ICWA's safeguards serve to avoid coercive "voluntary" waivers of parental rights.[103]

A final procedural protection is that states are required to notify tribes of involuntary proceedings. ICWA states that "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking . . . termination of parental rights to[] an

93. 25 U.S.C. § 1912(b).
94. *Id.*
95. S. REP. NO. 95-597, at 11 (1977).
96. H.R. REP. NO. 95-1386, at 22 (1977).
97. *Id.*
98. *Id.*
99. 25 U.S.C. § 1913(a).
100. *Id.*
101. *Id.*; 25 C.F.R. § 23.125(e).
102. 25 C.F.R. § 23.125(b)(2).
103. *See* H.R. REP. NO. 95-1386, at 11 (1977).

Indian child shall notify . . . the Indian child's tribe."[104] This notice must be provided to "[e]ach Tribe where the child *may* be a member."[105] This is an important requirement for two reasons. First, as mentioned earlier, tribes develop their own requirements for enrollment.[106] It is both required and efficient to notify the tribes the Indian child is affiliated with because individual tribes are in the best position to determine enrollment eligibility.[107] Second, Indian children are often eligible for membership in multiple tribes.[108] To ensure compliance with ICWA, it is best practice to inform every potentially relevant tribe about ongoing child custody proceedings. The notification requirement is even more important after considering the next major category of ICWA protections: tribal jurisdiction.

2. Tribal Jurisdiction Under ICWA

ICWA recognizes exclusive tribal jurisdiction over child custody proceedings involving Indian children that are domiciled on, or residents of, that tribe's reservation.[109] Generally, Congress can grant states additional jurisdiction within reservations.[110] In the absence of such a congressional grant, tribes retain exclusive jurisdiction over child custody proceedings involving Indian children that live on reservation lands.[111] This is the ideal solution to the pre-ICWA child separation epidemic. Congress found that many unjust family separations were the result of government employees misunderstanding tribal cultures and family systems.[112] By guaranteeing

104. 25 U.S.C. § 1912(a).

105. 25 C.F.R. § 23.111(b)(1) (emphasis added).

106. *See supra* note 91 and accompanying text.

107. *See Answers to Frequently Asked Questions About Native Peoples*, NATIVE AM. RTS. FUND, https://www.narf.org/frequently-asked-questions/ [https://perma.cc/832S-5HYG] (last visited Feb. 9, 2023).

108. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 514–15 (2020) ("[M]any Indian children are eligible for membership with more than one tribe, and almost all tribes prohibit dual enrollment.").

109. 25 U.S.C. § 1911(a).

110. *See, e.g.*, Indians, State Jurisdiction Over Criminal and Civil Offenses, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 28 U.S.C. § 1360). Note that Public Law 280's extension of state civil jurisdiction over Indian country is limited to "jurisdiction over private civil litigation involving reservation Indians in state court." Bryan v. Itasca Cnty., 426 U.S. 373, 384–85 (1976).

111. 25 U.S.C. § 1911(a).

112. H.R. REP. NO. 95-1386, at 10–11 (1977) (finding that "the dynamics of Indian extended families are largely misunderstood," "Indian child-rearing practices are . . . misinterpreted," and "the abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of the standards of child abuse and neglect").

exclusive tribal jurisdiction, ICWA encourages the use of tribal court systems to adjudicate child custody proceedings involving Indian children.[113] This policy ensures that Indian child custody proceedings are adjudicated by judges who are "themselves knowledgeable about Indian life."[114] It also encourages investment in and development of tribal court systems and tribal self-determination.[115]

ICWA also grants tribes concurrent jurisdiction (with states) over child custody disputes involving Indian children that are not residents of, or domiciled on, a tribe's reservation.[116] ICWA allows Indian parents, guardians, or tribes to petition state courts to transfer child custody proceedings involving Indian children to tribal courts.[117] Transferring child custody proceedings to tribal courts is neither automatic nor required.[118] There are three situations in which a state to tribal court transfer will be denied. First, when either parent objects.[119] Second, when the tribe itself denies transfer of a child custody proceeding to its tribal courts.[120]

The final situation in which the transfer of proceeding will be denied is when there is "good cause to the contrary."[121] While state courts determine the presence of good cause,[122] they are prohibited from considering certain factors.[123] These include whether the state proceeding is at an "advanced stage," whether the transfer will affect where the child is placed, the Indian child's existing connections with her tribe, and the socio-economic conditions of the tribal court system.[124]

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113. *See id.* at 30 ("[ICWA] would vest in tribal courts their already acknowledged right to exclusive jurisdiction over Indian child placements within their reservations."); 25 U.S.C. § 1911(d) ("[E]very state . . . shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings.").

114. H.R. REP. NO. 95-1386, at 11 (1977).

115. *See supra* note 113 and accompanying text.

116. 25 U.S.C. § 1911(b).

117. *Id.* ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe.").

118. *Id.*

119. *Id.*

120. *Id.* ("*Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.").

121. *Id.*

122. 25 C.F.R. § 23.118(a).

123. *Id.* § 23.118(c).

124. *Id.* § 23.118(c)(1), (c)(3)–(5).

While ICWA includes certain carveouts to prevent transfers that are against the express wishes of tribes and Indian parents, the law is designed to promote the use of tribal courts so that they are intimately involved in the placement of Indian children. This goal is further achieved by ICWA's requirement that tribal court determinations regarding custody of Indian children be afforded full faith and credit by the "United States, every State, [and] every territory or possession of the United States."[125] That the spirit behind ICWA's jurisdictional provisions is to maximize the use of tribal courts in child custody proceedings involving Indian children should come as no surprise; unlike many state child welfare workers, tribal courts are "knowledgeable about Indian life" and thus in the best position to accurately assess the competency of Indian parenting.[126]

3. ICWA's Placement Preferences and "Active Efforts" Requirement

The last major category of ICWA provisions is perhaps its most well-known: active efforts and placement preferences. First, ICWA requires that states engage in "active efforts" to keep an Indian family together.[127] Before any orders of foster care or termination of parental rights can be entered by a state court, parties petitioning state courts for such orders must show "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[128] This provision furthers the explicit policy rationale behind ICWA that Indian families should not be separated because of temporary or fixable conditions.[129] Ideally, this provision limits separations of Indian families to situations where remedial or rehabilitative measures would have no impact on the ability of the Indian parent to raise their child.

ICWA's famous placement preferences[130] state that if a party successfully demonstrates active efforts were taken and unsuccessful, an Indian child's placement must follow a particular order.[131] ICWA lists three different

125. 25 U.S.C. § 1911(d).

126. H.R. REP. NO. 95-1386, at 11 (1977).

127. 25 U.S.C. § 1912(d).

128. *Id.*; 25 C.F.R. § 23.120(a).

129. S. REP. NO. 95-597, at 11 (1977).

130. *See* Jan Hoffman, *Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html [https://perma.cc/ZD8W-YDS4].

131. 25 U.S.C. § 1915.

groups with sequential priority for adopting an Indian child: first, members of the child's extended family; next, members of the child's tribe; and finally, other Indian families that are not members of the child's tribe.[132] Similar preferences are established for foster care or preadoptive placement.[133] Non-Indian, non-extended family members can adopt Indian children only after a search of these three classes has been attempted and unsuccessful.[134]

These placement preferences must be applied by state courts unless there is good cause not to apply them.[135] In determining the presence of good cause to the contrary, state courts may consider only a few factors: an explicit request by the parents in absence of a suitable placement under the placement preferences; a request from the child if the child is "of sufficient age and capacity to understand the decision that is being made"; whether there is another sibling involved and attachment can only be maintained "through a particular placement"; or "extraordinary physical, mental, or emotional needs" that require specialized treatment not accessible in communities "where families who meet the placement preferences live".[136] While it is permissible to consider these factors, courts are specifically prohibited from considering the "socioeconomic status of any placement relative to another placement" when determining good cause.[137]

The active efforts and placement preference provisions of ICWA are designed to prevent the breakup of Indian families and, short of that, to keep Indian children within their extended families and tribal communities. All the above-mentioned provisions—tribal jurisdiction, notice requirements, access to counsel—serve a similar purpose: "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[138] Congress's intent in passing ICWA was to stop the epidemic of Indian family separations.[139] The spirit of ICWA is to promote tribal self-determination, safeguard the future of tribal nations, respect tribal childrearing and family systems, and prevent the use of state law to break up Indian families. Since ICWA is commonly under attack from non-Indian

132. *Id.* § 1915(a).
133. *Id.* § 1915(b).
134. 25 C.F.R. § 23.132(c)(5).
135. 25 U.S.C. § 1915(a).
136. 25 C.F.R. § 23.132(c)(1)–(4).
137. *Id.* § 23.132(d).
138. 25 U.S.C. § 1902.
139. *See* 25 C.F.R. § 23.101.

parties,[140] it is particularly important that ICWA is applied whenever substantiative parental rights are involved.

III. THE PERSONHOOD MOVEMENT AND ARIZONA'S TREATMENT OF HUMAN EMBRYOS

ICWA was passed in 1978, the same year that the first IVF baby was born.[141] Current unsettled legal questions regarding disposition of embryos could hardly have been in the minds of lawmakers when ICWA was passed. Simply put, advances in reproductive science have created new avenues to parenthood.[142] The intersection of IVF and the law is not governed by uniform federal law, and states differ on their treatment of fertilized human embryos.[143]

IVF generally involves "surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman."[144] While Assisted Reproductive Technology provides many people access to parenthood, it also raises new and important legal considerations.[145] This Part first reviews the general approaches that states use when dealing with human embryos. Next, this Part will consider in greater depth the personhood movement through the lens of recently enacted Arizona legislation. It will show that the personhood movement is ill fit with the spirit of ICWA because it tends to allow courts to determine parental rights at the embryo stage, thus circumventing the important protections afforded to Indian families.

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140. This Land, *Solomon's Sword*, CROOKED MEDIA, at 40:28 (Aug. 23, 2021), https://crooked.com/podcast/1-solomons-sword/ [https://perma.cc/E7G8-CTX9] ("In the last decade, ICWA has been challenged more times than the Affordable Care Act.").

141. *See* Indian Child Welfare Act of 1978, *supra* note 16; Adam Eley, *How Has IVF Developed Since the First 'Test-Tube Baby'?*, BBC NEWS (July 23, 2015), https://www.bbc.com/news/health-33599353 [https://perma.cc/577A-75AL].

142. *See What Is Assisted Reproductive Technology?*, CDC (Oct. 8, 2019), https://www.cdc.gov/art/whatis.html [https://perma.cc/8SJB-SVL9]; Jenna Casolo et al., *Assisted Reproductive Technology*, 20 GEO. J. GENDER & L. 313, 313–14 (2019) ("In practice, ARTs have made parenthood possible for individuals and couples who, for a variety of reasons, are unable to reproduce through sexual intercourse.").

143. Casolo et al., *supra* note 142, at 314.

144. *What Is Assisted Reproductive Technology?*, *supra* note 142.

145. Casolo et al., *supra* note 142, at 314 (noting that ART has "led to novel legal disputes").

A. In Vitro Fertilization and the Legal Treatment of Human Embryos

To help understand whether ICWA's spirit can be realized alongside modern legal approaches to embryo disposition, it is important to consider how states currently approach control of embryos. When two gamete donors dispute the control of human embryos, states take varied approaches regarding the disposition of those human embryos. State embryo-disposition law falls into one of two camps: court approaches and statutory approaches.

1. Court Approaches to Embryo Disposition

The touchstone case is *Davis v. Davis*.[146] There, a Tennessee couple was not able to conceive children through sexual intercourse and was also unable to adopt.[147] IVF was their only remaining option.[148] The couple each provided gametes and had the resulting fertilized embryos cryopreserved.[149] Before a pregnancy could result from the process, the husband filed for divorce, giving rise to a novel legal question: which spouse should be given control of the frozen embryos?[150]

The *Davis* court wrestled with "whether the preembryos . . . should be considered 'persons' or 'property' in the contemplation of the law."[151] Citing Justice O'Connor's concurrence in *Webster v. Reproductive Health Services*, the *Davis* court rejected treating embryos as persons, partially because the state lacked a compelling interest in an embryo until that embryo became "viable."[152] The *Davis* court also rejected the treatment of human embryos under a pure property regime, electing instead to treat embryos as something in the middle—a "property plus" approach.[153]

Ultimately, the *Davis* court adopted a complicated, multi-step approach.[154] The first step is to consider the preferences of the gamete providers.[155] If the gamete providers cannot agree, an existing contract, if there is one, should be

146. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

147. *Id.* at 591.

148. *Id.*

149. *Id.* at 592.

150. *Id.*

151. *Id.* at 594.

152. *Id.* at 595 (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 529 (1989) (O'Connor, J., concurring)). The majority in that case recognized a limited compelling interest in what it called "future life," but the *Davis* court stated that stage is far from "the four- to eight-cell preembryos in this case."

153. *Id.* at 597.

154. *Id.* at 604.

155. *Id.*

followed.[156] The final step deviates from a pure property regime: if there is no contract, then the individual interests of the two parties must be weighed against one another to determine the disposition of human embryos.[157] Factors to consider include the ability of each party to achieve parenthood by other means, whether one party wishes to not become a parent, and whether the parties seeking control of the embryos wish to use the embryos personally or donate them to another couple.[158] The *Davis* court held that the right of parties to not become parents against their will is ordinarily sufficient to prevail and awarded the embryos to the spouse who wanted the embryos destroyed.[159]

Davis serves as an example of the difficulty that courts face when attempting to determine control of human embryos. The court's struggle comes from its unwillingness to treat embryos as either persons or property.[160] Absent applicable statutes, this discomfort moved state courts to develop three varied approaches to the disposition of human embryos: the contractual approach, the contemporaneous mutual consent approach, and the balancing approach.[161] The contractual approach attempts to avoid any judicial balancing by always adhering to the agreement between the parties.[162] The advantages of this approach are that it provides certainty through final determinations and is relatively efficient where a contract exists. The downside is that not all couples will enter IVF contracts on their own accord, leaving parties to battle it out where a contract does not exist.

Iowa is the only state to explicitly take a contemporaneous mutual consent approach:[163] the premise is that "no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo."[164] The advantage to the contemporaneous mutual consent approach is that, in theory, no party will ever have the embryos *used* in a manner they disagree

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156. *Id.* Up to this point, the Davis approach resembles a pure property approach in which the parties can freely contract to determine property disposition.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 595.

161. *See* Casolo et al., *supra* note 142, at 321; Szafranski v. Dunston, 993 N.E.2d 502, 506 (Ill. App. Ct. 2013).

162. *See, e.g.*, Kass v. Kass, 663 N.Y.S.2d 581, 590 (App. Div. 1997).

163. Paige Mackey Murray, *Disposition of Pre-Embryos upon Dissolution of Marriage in Colorado*, 50 COLO. LAW. 40, 44 (2021).

164. *In re* Marriage of Witten, 672 N.W.2d 768, 778 (Iowa 2003) (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 110 (1999)).

with.[165] Furthermore, this approach expressly acknowledges that decisions made in the past do not necessarily reflect the current will of a party.[166] One downside to this approach is that it lacks efficiency: until the parties can agree, which is by no means guaranteed, the embryos must remain in storage. This racks up bills for the now-divorced couple and prevents finality, a feeling that divorcing spouses are entitled to have. Finally, this approach, in practice, fails to live up to its own goals. By preventing the use of the embryo until the spouses agree, this approach functions to favor the spouse who wishes to destroy the embryo and not become a parent.[167] While favoring the right of a person to not become a parent may be the more just outcome, the reality is that this outcome undermines the policy purpose of the contemporaneous mutual consent approach in that the outcome can be determined by a single party over the objection of the other.

Finally, some courts take the balancing approach. This is the approach taken by the New Jersey court in *J.B. v. M.B.*[168] The approach starts by considering whether the parties can agree, then considers the terms of a contract—reserving the right to disregard contract terms in favor of its own values.[169] If neither of these considerations can solve the issue, the court balances the interests of the spouses.[170] This approach's advantage is that it seeks to prioritize agreement—first by seeking mutual consent, then by honoring an existing contract. Additionally, this approach guarantees finality. However, the multiple steps of this approach make it relatively inefficient and require the court to take substantial action.

Before moving on to statutory approaches, it is worth noting some commonalities of the judicial approaches to embryo disposition. First, none of these approaches involve courts waiving or predetermining parental rights or future custody. Instead, the courts are concerned with reproductive

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165. *Id.*

166. *Id.* ("One's erroneous prediction of how she or he will feel about the matter at some point in the future can have grave repercussions.").

167. *See In re* Marriage of Rooks, 429 P.3d 579, 589 (Colo. 2018); Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 99 (2014).

168. 783 A.2d 707, 719 (N.J. 2001) ("[T]he better rule . . . is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos."); *see also* Michael T. Flannery, *"Rethinking" Embryo Disposition Upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233, 233–234 (2013).

169. *J.B.*, 783 A.2d at 719.

170. *Id.*

rights—the right to become or not become a parent.[171] As such, so long as judicial approaches focus on ownership of the embryo rather than custody of a potential future born child, ICWA protections can be applied later—if needed.

Second, all three of these approaches share a goal of preferring a meeting of the minds between the parties. The contractual approach always prefers to effectuate written agreements between parties. The contemporaneous mutual consent approach limits courts from acting *unless* the two parties can agree. Finally, while the balancing approach allows parties to effectively change their minds and void prior agreements, the court may uphold and effectuate written agreements between parties. As we will see in the next section, some statutory approaches require courts to ignore all written contracts and impose the preferences of the legislature rather than those of the parties.

2. Statutory Approaches to Embryo Disposition

Judicial approaches to embryo disposition only apply in states that have not created statutory regimes, which, as of this writing, is most states.[172] While only a relative handful of states have statutory regimes governing embryo disposition, those that do tend to fall within one of two categories: property regimes and personhood regimes.

Property regimes try to treat embryos as close to traditional property as possible.[173] Florida may be the state closest to a property regime. Florida's embryo-disposition statute requires that couples who wish to undergo IVF enter an explicit contract that will govern the disposition of any human embryos in the case of a divorce.[174] Absent such an agreement, the disposition of the embryos remains in the joint control of the couple.[175] This law seems to treat embryos as property and not as potential persons.[176] However, under this law, there is uncertainty surrounding what courts will choose to do absent an existing contract.

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171. *See, e.g.*, J.B. v. M.B., 751 A.2d 613, 618 (N.J. Super. Ct. App. Div. 2000) ("In the present case, the wife's right not to become a parent seemingly conflicts with the husband's right to procreate.").

172. Caloso et al., *supra* note 142, at 320.

173. *See, e.g.*, FLA. STAT. ANN. § 742.17 (West 1993).

174. *Id.* ("A commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance.").

175. *Id.* § 742.17(2).

176. *See* Caloso et al., *supra* note 142, at 320 ("Florida law indicates that contract theories, not public policy, will prevail in determining the disposition of frozen embryos.").

At the opposite end of the spectrum from property regimes are personhood regimes. Personhood regimes treat embryos as persons more than property, either explicitly[177] or implicitly.[178] This type of statutory regime is exemplified in Louisiana's embryo-disposition statute.[179] Louisiana expressly defines embryos as "humans" and rejects treating embryos as property.[180] Furthermore, if gamete donors no longer wish to use fertilized human embryos, the Louisiana law requires that the unused embryos "be available for adoptive implementation."[181] The Louisiana law expressly treats embryos as persons and, just as expressly, rejects any application of property law.[182] The consequences of this designation are substantial: for example, under Louisiana law, embryos are judicial persons and can "sue or be sued just as if they are citizens of the United States."[183]

New Mexico enacted statutes that implicitly impose personhood on embryos. Under New Mexico law, "parents"[184] must submit written consent to preserve parental rights over any future born children resulting from embryos.[185] This consent must be submitted to the court during the marriage dissolution.[186] The New Mexico law does not explicitly classify embryos as "humans," but it does allow the court to predetermine parental rights at what may otherwise be a property-disposition stage. Another personhood regime state is Arizona,[187] which will serve as an example in the following sections.

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177. *See, e.g.*, LA. STAT. ANN. § 9:126, 130 (1986).

178. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

179. LA. STAT. ANN. § 9:126, 130 (1986).

180. *Id.* § 9:126 ("An in vitro fertilized human ovum is a biological human being which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum."); § 9:130 ("An in vitro fertilized human ovum is a juridical person which cannot be owned by the in vitro fertilization patients.").

181. *Id.* § 9:130.

182. *Id.* § 9:126, 130.

183. Tara Carlin, *Why the Legal Classification of Cryogenically Preserved Pre-Embryos Matter*, 17 RUTGERS J. L. & PUB. POL'Y. 312, 335–36 (2020).

184. Notably, the law chooses to use "parent" rather than "gamete provider," despite the law's singular applicability to embryo disposition. N.M. STAT. ANN. § 40-11A-704(A), (B) (2010). This phrasing is reminiscent of a personhood regime as it implicitly states that mere fertilized embryos can have a parent-child relationship with gamete providers.

185. *Id.* § 40-11A-704(A).

186. *Id.* Consent can be submitted later under narrow circumstances: "the parent, during the first two years of the child's life, resided in the same household with the child and openly held out the child as the parent's own." *Id.* § 40-11A-704(B).

187. *See* ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

B. Moving Away from Property: Personhood and Ariz. Rev. Stat. § 25-318.03

In rejecting a property approach to human embryos, the personhood approach provides more uncertainty during embryo dispositions by tying together this emerging legal area with substantive rights. For example, if embryos are humans, can an embryo inherit property?[188] If an embryo is accidentally damaged or destroyed, is it a criminal offense against a person? Most importantly for this Comment, if state law treats an embryo as a person, should ICWA apply?

The question of whether ICWA should apply in personhood regime states is particularly relevant in Arizona. Arizona has a higher-than-average Indian population with at least 5.3% of Arizonans identifying as Indian,[189] compared to 1.3% nationwide.[190] Additionally, there is a higher likelihood that an Indian child is domiciled on or a resident of a reservation because about 27.1% of Arizona is Indian country.[191] Arizona's large Indian population and land base make it a perfect example to consider the intersection of ICWA and personhood regimes.

Like most states, Arizona did not have a statute explicitly governing embryo disposition during marriage dissolutions until recently. That changed in 2018 after the Arizona Legislature wrote and passed § 23-318.03.[192] In short, the statute requires courts to award human embryos to the divorcing spouse with "the best chance for the in vitro human embryos to develop to birth" and ignores any agreed-upon contracts.[193]

Despite being less extreme than Louisiana, the law has various provisions that amount to a decidedly personhood regime. First, Arizona now requires that courts in marriage dissolutions "[a]ward the in vitro human embryos to the spouse who intends to allow the in vitro human embryos to *develop to birth*."[194] If both spouses want to develop the human embryos, the court must "resolve any dispute on disposition of the in vitro human embryos in a manner

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188. *See* LA. STAT. ANN. § 9:133.

189. *Quick Facts: United States (Chart)*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/geo/chart/US/RHI325221 [https://perma.cc/8A25-RBW6].

190. *Quick Facts: United States (Table)*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/RHI325221 [https://perma.cc/Q46X-K66K].

191. Julia Shumway, *Fact Check: Gosar Correct on Private Land in Ariz.*, AZCENTRAL (Apr. 13, 2015, 4:34 PM) https://www.azcentral.com/story/news/politics/fact-check/2015/04/13/fact-check-gosar-correct-private-land-arizona/25740527/ [https://perma.cc/B7NU-VDVL].

192. Carissa Pryor, *What To Expect When Contracting for Embryos*, 62 ARIZ. L. REV. 1095, 1113 (2020).

193. ARIZ. REV. STAT. ANN. § 25-318.03(A)(1)–(2), (B) (2018).

194. *Id.* § 25-318.03(A)(1) (emphasis added).

that provides the best chance for the in vitro human embryos to *develop to birth*."[195] The "develop to birth" threshold means that it is not necessary that the spouse awarded the embryos intends to personally use the embryos to achieve parenthood; in fact, spouses may be awarded the embryos if they intend to donate them.[196] In theory, if both spouses intend to allow the embryos to develop to birth, a spouse intending to donate the embryos could be awarded the embryos above a partner wishing to use them personally to achieve parenthood.[197] Ultimately, the Arizona law intends to turn all embryos into viable human fetuses and, eventually, born humans. It effectively treats embryos as potential future humans and categorically rejects the premise that a party has a substantive right not to achieve parenthood.[198]

The law also categorically rejects treating embryos as property according to traditional contract law.[199] The law specifically states that "[i]f an agreement between the spouses concerning the disposition of the in vitro human embryos is brought before the court . . . the court shall award the in vitro human embryos as prescribed" by the above-stated rules.[200] This means that Arizona courts are legally bound to ignore contracts, even when couples purposefully enter into agreements that set out specific terms for the disposition of human embryos in marriage dissolutions.[201] In effect, this law prevents courts from treating human embryos as property. Instead, Arizona takes a personhood approach to the disposition of human embryos.

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195. *Id.* § 25-318.03(A)(2) (emphasis added).

196. *See id.* § 25-318.03(A)–(A)(1) ("If an action . . . involves the disposition of in vitro human embryos, the court shall[] [a]ward the in vitro human embryos to the spouse who intends to allow the in vitro human embryos to develop to birth."); § 25-318.03(B) ("If both spouses intend to allow the in vitro human embryos to develop to birth but only one spouse provided gametes for the in vitro human embryos, award the in vitro human embryos to the spouse that provided gametes for the in vitro human embryos."). Additionally, two provisions, put together, produce an opposite outcome from the contemporaneous mutual consent approach. Effectively, a spouse who wants to develop the embryos to birth (through personal use or donation) has a veto right over the other spouse.

197. *See id.* § 25-318.03(A)(2) ("If both spouses intend to allow the in vitro human embryos to develop to birth and both spouses provided their gametes for the in vitro human embryos, resolve any dispute on disposition of the in vitro human embryos in a manner that provides *the best chance for the in vitro human embryos to develop to birth*.") (emphasis added).

198. *Cf.* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (stating that a party who wishes not to become a parent should generally prevail in such disputes).

199. ARIZ. REV. STAT. ANN. § 25-318.03(B) (2018).

200. *Id.*

201. *Id.*; Morgan Parker, Comment, *The Disposition of Human Embryos at Divorce*, 33 J. AM. ACAD. MATRIM. LAWS. 546, 666 (2021).

The final major component of the Arizona law is its predetermination of parental rights. The law's default is that "the spouse that is not awarded the in vitro human embryos has no parental responsibilities and no right, obligation or interest with respect to any child resulting from the disputed in vitro human embryos."[202] While this is the default, the law does allow the non-awarded spouse to preserve parental rights if she "consents in writing to be a parent to any resulting child *as part of the proceedings* concerning the disposition of the in vitro human embryos."[203] Thus, spouses that do not consent in writing effectively relinquish any claim to parental rights if the human embryos should develop into a human child.[204] Finally, if a spouse is not granted parental rights at this stage, that spouse must provide the other spouse "with detailed written non-identifying information that includes the health and genetic history of the spouse and the spouse's family."[205]

These provisions of the Arizona law are significant for a few reasons. First, the law's attempt to predetermine parental rights at the embryo-disposition stage[206] raises the stakes of embryo dispositions by prematurely determining parental rights. Compare this to a pure property regime that would not treat human embryos as persons. Where embryos are treated purely as property, a judge's disposition order would have no effect on whether the non-awarded spouse could claim parental rights over a potential future born child. However, Arizona's personhood law requires the non-awarded spouse to assert or waive any future parental rights at the embryo-disposition stage—far removed from the birth of any child.

Also, recall that contracts are not followed under the Arizona law. This could give rise to unfortunate situations where spouses do not appear before the court to submit written consent to parental rights on the assumption that parental rights reserved in a contract would be respected. Imagine an acrimonious divorce in which one spouse refuses to participate and defaults, or flatly accepts otherwise unfavorable terms to close the book on a traumatic period in their life. The intense stress associated with a divorce[207] may cloud a party's judgment regarding distant amorphous concepts—like future parental rights over a child that may not ever be born. While this result could

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202. ARIZ. REV. STAT. ANN. § 25-318.03(C) (2018).

203. *Id.* (emphasis added).

204. *Id.* § 25-318.03(D).

205. *Id.* § 25-318.03(E).

206. *Id.* § 25-318.03(C)–(E).

207. Mark E. Sullivan, *Understanding Your Divorce: The People, the Process, the Possibilities*, 27 FAM. ADVOC. 4, 4 (2004) ("Stud[i]es have shown that for many people, separation and divorce rank second only to the death of a loved one in terms of emotional turmoil, pain, and stress.").

be mitigated by effective counsel, many parties in Arizona family court are unrepresented.[208] Without adequate counsel, parties may not be able to make decisions that are in their best interest. These types of situations are made even more likely by the law's requirement that non-awarded spouses *affirmatively* present *written* consent to the court to retain potential parental rights.[209]

In sum, the Arizona law rejects a property regime for the dissolution of human embryos in favor of a personhood regime.[210] This regime prevents parties from implementing their own wishes through contract, ignores the right to not become a parent, encourages embryo donation by awarding the embryos to a spouse even if that spouse wants to provide them to another couple, and predetermines parental rights using a method that risks uninformed or premature waiver. ICWA should apply to regimes that treat embryos as persons because they make significant determinations about future parental rights at a—literally—premature stage. Furthermore, it would be against the spirit and purpose of ICWA if it isn't applied in personhood regimes. How personhood regimes undermine ICWA is considered in the next section.

IV. THE SPIRIT OF ICWA UNDER PERSONHOOD REGIMES

Congress designed ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[211] ICWA achieves its goal by setting minimum standards for states to follow in child custody proceedings.[212] Personhood regimes that treat human embryos as persons and, accordingly, adjudicate substantive family law risk undermining the spirit of ICWA by circumventing the act's protections. This Section begins by analyzing the inevitable tensions between ICWA and personhood regimes, like that of Arizona. Next, it argues that to achieve the purpose of ICWA, ICWA should apply in states that treat embryos as

208. JUDGE NORMAN J. DAVIS, MARICOPA CNTY. SUPERIOR CT., FAM. CT. DEP'T, PLAN OF IMPROVEMENT PROGRESS REPORT 2 (2006), http://www.superiorcourt.maricopa.gov/SuperiorCourt/FamilyCourt/docs/FinalProgressReport.pdf [https://perma.cc/K4QM-EUMH] ("88% of family law cases in Maricopa County involve one or more self-represented litigants who 'typically do not understand Court procedures at a level sufficient to expect (or require) them to move their case forward.'").

209. ARIZ. REV. STAT. ANN. § 25-318.03(D)–(E) (2018).

210. *Id.* § 25-318.03.

211. 25 U.S.C. § 1902.

212. *Id.*

anything other than pure property. Finally, it points out that pure property regimes have less tension with ICWA.

A. The Inevitable Tensions Between ICWA and Personhood Regimes

Personhood regimes, like Arizona's, create inevitable tensions with ICWA, including concern over voluntariness, notice requirements, and default parental rights. Perhaps the most glaring tension between ICWA and § 25-318.03 is the predetermination of parental rights. On one hand, Arizona's law explicitly attempts to make final parental rights determinations at the embryo-disposition stage.[213] This is in direct contrast with ICWA, which voids all voluntary waivers of an Indian parent's parental rights made before ten days after the birth of an Indian child.[214] Recall that this provision—voiding all voluntary waivers before a certain stage—was implemented to prevent two of Congress's concerns: the coercion of Indian parents and avoiding Indian family breakups in situations where the Indian families did not understand the nature of the legal proceeding.[215] Embryo dispositions are complex and novel legal disputes. Arizona citizens may be easily confused and not understand that the court is determining all future parental rights at a premature stage. Forcing parties to make substantive decisions regarding future parental rights over a potential future baby is asking a lot of Arizona citizens. Consider the steps of future planning required. Parties are several conceptual layers removed from the possibility of parenthood. First, they could either win or lose the award of human embryos. In either case, the embryos would need to be implanted. Next, the implementations would have to be successful and develop into a fetus. Still next, the fetus would have to be carried to term and birthed. For many, these layers could lead a party to perceive parental rights over human embryos to be a distant and amorphous consideration. Such a situation could lead to a pre-ICWA era condition where a potential Indian parent would lose or waive parental rights due to a lack of understanding of the law rather than a fully voluntary decision.

Additionally, a marriage dissolution can be a traumatic and stressful experience. Parties in marriage dissolutions may accept otherwise unfavorable terms merely to put an end to an ongoing and strenuous period in their life. This temptation, combined with the potentially distant conception of parental rights determination, starts to look like pre-ICWA era

213. ARIZ. REV. STAT. ANN. § 25-318.03(C)–(D) (2018).
214. 25 U.S.C. § 1913(a).
215. S. REP. NO. 95-597, at 11 (1977).

involuntariness. While it is unfortunate that any Arizonian might face coercion or have a less-than-complete understanding when accepting or waiving parental rights, ICWA specifically protects Indian parents from these very conditions. Arizona's law creates some of the very conditions that Congress aimed to prevent by passing ICWA. Accordingly, the law is in tension with the spirit of ICWA.

Perhaps the best example of the tension regarding "voluntary" waiver of parental rights lies in the burdens that each law places on the party whose parental rights are being adjudicated. ICWA requires that voluntary waivers of parental rights be submitted in writing to the presiding judge and that the presiding judge certify that Indian parents fully understand the terms and consequences of their waiver.[216] Arizona places the burden on the opposite party. For a non-awarded spouse to maintain future parental rights, they must submit written consent to the judge during the disposition proceedings;[217] otherwise, that parent effectively waives all parental rights.[218] These provisions are directly opposed to one another, and so is their effect. ICWA's provision places the burden on parties seeking a waiver of parental rights.[219] This provision limits situations where Indian parents' parental rights are cursorily or unjustly waived. In contrast, the Arizona law places a burden on the potential parents whose rights will be waived unless they affirmatively act.[220] The effect of the Arizona law is to settle any potential parental rights disputes that may discourage people from developing embryos into humans. The two laws simply advance contrary goals. If an Indian woman was pregnant through non-IVF means, ICWA would require that any waiver of parental rights made before ten days after the child's birth be voided. But unless ICWA is applied to embryos in Arizona, the new Arizona personhood regime would allow the state to circumvent ICWA protection solely because the fertilization was completed in a lab. ICWA's concerns regarding an Indian parent's pre-birth waiver are not less relevant because an individual uses IVF.

Arizona's law is also in tension with ICWA's due process and procedural protections—in particular, ICWA's notice and legal counsel requirements. ICWA guarantees state-provided legal counsel to indigent Indian parents to ensure their rights are competently protected.[221] No such access to legal counsel exists in the Arizona law. Indeed, Arizona does not provide legal

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216. 25 U.S.C. § 1913(a).
217. ARIZ. REV. STAT. ANN. § 25-318.03(C) (2018).
218. *Id.* § 25-318.03(D).
219. 25 U.S.C. § 1913(a).
220. ARIZ. REV. STAT. ANN. § 25-318.03(C)–(D) (2018).
221. 25 U.S.C. § 1912(b).

counsel to indigent parties in marriage dissolutions, and 88% of marriage dissolutions in Maricopa County, Arizona's most populous county, involve at least one unrepresented party.[222] Arizona's regime far from guarantees that an indigent member-Indian's rights would be fully represented.

ICWA requires state courts to notify all tribes that an Indian child is a member of or may be eligible for membership in.[223] Arizona law, on the other hand, does not require any additional parties are informed. In fact, the only requirement even approaching "notice" mandates is that a non-awarded, non-consenting spouse provide the awarded spouse relevant biological and genetic information.[224] Without notice, tribes are unlikely to be aware of any marriage dissolution proceedings involving human embryos.

Since notice to tribes is not required under Arizona's new statute, it is in tension with ICWA's jurisdiction transfer provision. ICWA grants tribes concurrent jurisdiction over child custody proceedings involving Indian children that do not live on a reservation.[225] Upon request by a party or tribe, state courts must transfer ongoing proceedings to tribal courts in the absence of an objection by a parent, declination by the tribe, or finding of good cause.[226] Arizona's law provides no indication that courts must consider whether a tribe has an interest in the disposition of human embryos. In fact, Arizona's law is founded on the premise that the disposition of human embryos implicates core state interests to such a level that the legislature no longer trusted the judiciary to competently adjudicate without statutory guidance.[227] It is unlikely that a statute designed to command state courts and would allow for a transfer of jurisdiction to another sovereign. The entire purpose of the statute was to control judicial decision-making regarding embryo dispositions; allowing a transfer of jurisdiction would serve to circumvent that control. ICWA's jurisdiction transfer provision is even more in tension with Louisiana's law, which requires unwanted and unused human embryos to remain in the custody of fertility clinics until they can be provided to another couple.[228]

Finally, Arizona's law is in tension with ICWA's placement preferences. Under the Arizona law, a non-Indian spouse who wanted to donate frozen human embryos to a third party could be awarded the embryos and then give them to any person interested in implanting them, regardless of Indian status.

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222. Davis, *supra* note 208, at 2.
223. 25 U.S.C. § 1912(a).
224. ARIZ. REV. STAT. ANN. § 25-318.03(E) (2018).
225. 25 U.S.C § 1911(b).
226. *Id.*
227. *See supra* Section III.B.
228. LA. STAT. ANN. § 9:126, 130 (1986).

ICWA provides three-tiered preferences for child placement before non-Indian, non-family can obtain custody: first, extended family members; then, members of the Indian child's tribe; finally, members of other tribes.[229] The Arizona law, on the other hand, includes only one preference: that the human embryo is awarded to the spouse "that provides the best chance for the in vitro human embryos to develop to birth."[230]

As it stands, many of ICWA's protections will not be applied to embryo disposition in Arizona. This is in spite of the fact that Arizona chooses to treat embryos as persons. Left unchallenged, this law can serve as an end-run around ICWA protections. It is pivotal, therefore, to consider how ICWA should be applied to personhood regimes to effectuate its purpose.

B. Applying ICWA Under a Personhood Regime

We have seen how Arizona's personhood regime potentially circumvents ICWA in multiple respects. Recall that ICWA is triggered when there is a child custody dispute over an Indian child.[231] Congress was likely unaware of IVF, as it was developed in England in 1978—the same year ICWA was passed.[232] Accordingly, Congress almost certainly did not intend for ICWA to apply to IVF. Importantly, unforeseeable technological developments should not justify abrogating the express purpose of a congressional act. Congress intended ICWA to apply uniformly, and living up to its spirit requires state courts to do just that. When substantive family law is being adjudicated—including future parental rights—ICWA should be applied consistently. Consistent application means no pre-birth waivers of parental rights for potential Indian parents despite personhood statutes like that of Arizona.

There are some limits to ICWA's application. ICWA does not apply in custody disputes between parents.[233] Even if ICWA did apply to embryo dispositions, it would likely not apply when the spouse awarded the embryos personally used them to achieve parenthood. However, ICWA would apply when the spouse awarded embryos intended to give them to other couples

229. 25 U.S.C. § 1915.

230. ARIZ. REV. STAT. ANN. § 25-318.03(A)(2) (2018).

231. 25 C.F.R. § 23.103(a).

232. Ashley M. Eskew & Emily S. Jungheim, *A History of Developments To Improve* In Vitro *Fertilization*, 114 J. MO. ST. MED. ASS'N 156, 156 (2017).

233. 25 U.S.C. § 1903; 25 C.F.R. § 23.103(b)(3); *supra* note 88 and accompanying text. Compare this to the fact that Arizona's law *only* applies to divorcing married couples. ARIZ. REV. STAT. ANN. § 25-318.03. A major question floating around this law is what happens to embryos coming from non-married gamete donors. Are contracts effectuated then?

and when the non-awarded parent's rights are terminated. Since ICWA's limit regarding divorce proceedings only applies when "custody" is granted to "one of the parents," ICWA placement preferences would still apply to awarded embryos destined for embryo. The placement preferences would help guarantee that personhood regime states do not serve as end-runs around ICWA.

Application of ICWA within personhood regimes would not be a substantial burden on state courts. These courts should be familiar with ICWA and apply it in family court. Courts would merely have to apply it to personhood embryo disposition. In other words, family law and ICWA should be inherently linked: whenever family law is substantively adjudicated, ICWA is proportionately applied.

Applying ICWA in personhood regimes would be particularly easy for Arizona courts because section 25-318.03 already requires spouses who waive parental rights to provide genetic and health histories.[234] Medical and genetic histories may resemble something akin to family histories. This information may allow a court to easily determine if, and which, tribes have an ICWA interest in the dispute. Thus, not only would courts be able to interview the spouses to determine potential tribal affiliation, but the court may also have access to additional information allowing it to identify potentially interested tribes.

Finally, Arizona and other personhood regime states should apply ICWA at the disposition stage because not applying it contradicts the values that personhood states impose. These states choose to treat human embryos as persons rather than purely property. States justify these regimes using rhetoric of public policy and state interest.[235] If human embryo disposition creates substantial public policy and state interests, don't those policies and interests extend to Indian families and tribal governments? How then can a state regime justify treating embryos as quasi-persons but not apply ICWA? Such a regime would undermine itself. It is by no means inevitable that embryos should be classified as quasi-persons. However, the individual philosophies of states shouldn't affect the interpretation or application of ICWA. ICWA should apply whenever substantive family law is being adjudicated—for example, when courts try to predetermine future parental rights. Thus, ICWA should be applied to personhood regimes regardless of a legislature's understanding of embryos.

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234. ARIZ. REV. STAT. ANN. § 25-318.03(E) (2018).

235. *See* John B. Krentel, *"Ownership" of the Fertilized Ovum In Vitro: A Hypothetical Case in Louisiana*, 32 LA. BAR J. 284, 286–87 (1985).

There are a few ways that ICWA could be applied to personhood regimes. Specifically, Congress could amend ICWA, the Interior Department could update regulations, tribes or private parties could sue to enforce their rights, or states themselves could pass legislation applying ICWA to embryo dispositions. These options range from difficult to comically unlikely. There is a simple alternative that removes the tensions between ICWA and embryo dispositions: enact pure property regimes.

C. Reducing the Tension: ICWA in Pure Property Regimes

Enacting pure property regimes would effectively reduce the tensions between ICWA and embryo disposition. When embryos in marriage dissolutions are treated purely as property, family law is not implicated. Parentage determinations would only be made if the embryos resulted in a subsequent birth. Since substantive family law rights will not be affected, pure property regimes would not need to apply ICWA. Conversely, personhood regimes require courts to make discretionary decisions beyond the control of the parties. This is the exact kind of discretion that ICWA was designed to combat, and that is why it is so important that courts in personhood regimes apply ICWA.

An ideal pure property regime would encourage, if not require, contracting between couples before beginning IVF. Each party should be independently represented by an attorney. Courts would then be required to honor the contract. The regime would look like Florida's current regime[236] and should go a step further by requiring courts to apply principles of property law during embryo disposition. Additionally, the court should be prohibited from adjudicating substantive family law during the embryo-disposition stage.

The above-described pure property regime would require couples to engage in meaningful thought before entering IVF and prevent judges from adjudicating parental rights at premature stages. As such, ICWA would not need to apply. This method would limit disputes, promote judicial efficiency, and protect the rights of Indian families by not implicating them at all.

CONCLUSION

Congress designed ICWA to protect the interests of Indian families and provide security and wellbeing to Indian tribes.[237] It imposes minimum

236. *See* FLA. STAT. ANN. § 742.17 (West 1993).

237. 25 U.S.C. § 1902.

federal standards on state courts when adjudicating family law.[238] To fulfill the spirit of ICWA, states should apply ICWA to embryo-disposition regimes that adjudicate substantive family law—i.e., personhood regimes. Doing otherwise would undermine the purpose of ICWA, serve as an end-run around ICWA's protections, and cause internal inconsistency within states' law. States that choose to use personhood regimes should be able to easily apply ICWA to embryo dispositions in the same way these states apply ICWA to child custody disputes. However, the easiest way to adjudicate embryo dispositions without affecting ICWA is to reject personhood regimes outright and enact pure property regimes. Such regimes promote judicial efficiency and prevent the proliferation of legal disputes. Most importantly, these regimes don't implicate ICWA—and that is for the best.

238. *Id.*