HAALAND V. BRACKEEN: SUPREME COURT SAVES ICWA, BUT INDIGENOUS CHILD WELFARE STILL AT RISK

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In 2023, the Supreme Court issued a decision in Haaland v. Brackeen*.* Brackeen *presented a rare facial challenge to the Indian Child Welfare Act ("ICWA"), which Congress passed in response to years of forced removal of Indigenous children from tribal nation communities through adoption and foster care. The Act provides a framework that gives heightened protection — for example, requiring states to undertake "active efforts" to reunify Indigenous families — to Indigenous children in child custody proceedings. This Note begins by providing a brief overview of the Court's decision in* Haaland v. Brackeen *and the vulnerabilities for future challenges left by the Court's decision. It then argues that the decision in* Brackeen *was normatively good for Indigenous child welfare. This Note concludes by providing a practical guide for judges and practitioners to enforce a culturally competent adjudication of child welfare proceedings under both ICWA and the state best interests test, should ICWA be overturned.*

INTRODUCTION

For nearly 150 years, the United States government undertook efforts to remove Indigenous[1] children from their families and assimilate them into white American culture.[2] With the U.S. government's blessing, Indigenous culture was weeded out of Indigenous children through efforts such as educational programming on reservations and at residential boarding schools.[3] Starting in the 1950s and continuing into the 1970s, tribal nations suffered from a new method of cultural genocide: adoption.[4] Government agencies forcibly removed thousands of Indigenous children from their homes and put them up for adoption, typically without evidence of abuse or neglect.[5] These children were taken *en masse* from Indigenous

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[1] For the purposes of this Note, the word "Indian" will be used when referring to the statutory text of the Indian Child Welfare Act and the provisions of the U.S. Code. Elsewhere in this Note, I refer to the Indigenous people of Turtle Island as "Indigenous."

[2] *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1641-46 (2023) (Gorsuch, J., concurring).

[3] *Id.*; *see also infra* Part II.

[4] *See Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affs. of the Comm. on Interior and Insular Affs.*, 93d Cong., 2d Sess. (1974).

[5] *Indian Child Welfare Act,* U.S. DEP'T OF HEALTH AND HUMAN SERVICES CHILDREN'S BUREAU, https://www.childwelfare.gov/topics/systemwide/diverse-populations/americanindian/icwa/ (last visited Dec. 17, 2022); *see also Brackeen*, 143 S. Ct. at 1645 (Gorsuch, J., concurring).

communities and given to white families; more than eighty-five percent of removed Indigenous children lived in homes with no ties to a tribal community.[6] In response, Congress drafted the Indian Child Welfare Act ("ICWA") to provide minimum standards for foster care and adoption cases involving Indigenous children.[7] Congress believed that these safeguards would protect against the unjustified removal of Indigenous children from their communities and would work to keep children with their families and tribes.

ICWA overrides several aspects of state family law to preserve the stability of tribal nation families and communities.[8] First, ICWA allocates exclusive jurisdiction to tribal governments when an "Indian child" — a child who is an enrolled member of a federally recognized tribe or is the biological child of an enrolled member of a federally recognized tribe and eligible for enrollment[9] — resides or is domiciled on the reservation.[10] Second, for children not residing or domiciled on a reservation, the state and the tribe have concurrent jurisdiction.[11] When a foster care or adoption

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[6] Jeanette Centeno, *Opinion: Where Would Indigenous Children Be Without the Child Welfare Act*, POWWOWS.COM (Mar. 9, 2022), https://www.powwows.com/where-would-indigenous-children-be-without-the-indian-child-welfare-act/.

[7] DEP'T OF THE INTERIOR, *Indian Child Welfare Act (ICWA)*, https://www.bia.gov/bia/ois/dhs/icwa (last visited Dec. 17, 2022); 25 U.S.C. § 1902 ("The Congress hereby declares that it 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 adoptive homes.").

[8] ICWA standards apply solely to state courts. Since Congress assumes that tribal courts will devise standards which further their sovereignty, Congress defers to tribal courts on Indian child welfare matters. Tribal courts have shown that they will exercise their discretion for non-Indian placements when it is in the best interest of the child. For example, after the Supreme Court remanded the *Holyfield* case to the tribal court, the tribal judges permitted the adoption by non-Indian parents. *See* Solangel Maldonado, *Race, Culture, and Adoption: Lessons From* Mississippi Band of Indians v. Holyfield, 17 COLUM. J. GENDER & L. 1, 15-18 (2008).

[9] 25 U.S.C. § 1903(4).

[10] *Id.* § 1911(a); There is an exception. Under Pub. L. 280, states designated as "mandatory" or "optional" may have jurisdiction instead of the tribal court. Act of Aug. 15, 1953, Pub. L. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326). Pub. L. 280 grants mandatory or optional states jurisdiction over adjudicatory proceedings, including child welfare proceedings. *See, e.g.,* Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005).

[11] 25 U.S.C. § 1911(b) ("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

proceeding occurs in state court, both the child's custodian and the tribe have a right to intervene in the proceeding.[12] Third, ICWA establishes requirements for the State in court proceedings: the Act requires states to give notice to Indigenous parents and custodians after the initiation of child welfare proceedings,[13] make "active efforts" to reunify Indigenous families,[14] locate and retain expert witnesses,[15] and keep records for the parties to examine.[16] Finally, in adoption cases, ICWA contains a placement preference for relatives, members of the child's tribe, and members of other Indigenous families.[17]

ICWA has sparked controversy since its implementation,[18] and in 2023, it faced its most serious challenge: the Supreme Court. In its 2022-23 term, the Court granted certiorari to hear a facial challenge to ICWA.[19] To the surprise of many experts in the field, the Court upheld ICWA in its entirety.[20] While the immediate outcome of *Brackeen* is favorable and this Note agrees that the Court should have upheld ICWA as a legally sound and vital policy for Indigenous children, those concerned with child welfare should be aware that the majority opinion leaves ICWA in a tenuous position. As argued in this Note, the opinion makes clear that ICWA is vulnerable to future challenges on congressional power and equal protection grounds. Furthermore, even in the interim, Indigenous children are in danger of being improperly placed outside of their families because of the demand for Indigenous children and the biases against tribal nation communities. Judges and others concerned with Indigenous child welfare must act to ensure that these children are protected both in the present and in the distressing possibility that ICWA is ultimately challenged and overturned.

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parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.").

[12] *Id.* § 1911(c).

[13] *Id.* § 1912(a).

[14] *Id.* § 1912(d).

[15] *Id.* § 1912(e). Expert witnesses must be qualified as defined by 25 C.F.R. § 23.2 (2021).

[16] *Id.* § 1912(c).

[17] *Id.* § 1915(a) ("In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.").

[18] *See, e.g.*, Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD LEGAL RTS. J. 1 (2017).

[19] Kian Hudson, *SCOTUS Cert Recap: The Indian Child Welfare Act*, NAT'L L. REV. (Mar. 2, 2022), https://www.natlawreview.com/article/scotus-cert-recap-indian-child-welfare-act.

[20] Nick Estes, Opinion, *The Supreme Court Made a Surprising Ruling for Native American Rights*, GUARDIAN (June 18, 2023, 6:00 AM), https://www.theguardian.com/commentisfree/2023/jun/18/supreme-court-icwa-ruling.

This Note proceeds as follows. Part I describes the Court's recent decision in *Haaland v. Brackeen* and agrees with the majority's conclusion that past precedent required the Court to uphold ICWA. Notwithstanding ICWA's strong legal foundation, the majority's opinion left the Act vulnerable to inevitable future attacks. Part II argues that the Act is normatively good for Indigenous children. Part II also situates ICWA within the historical context of the Indian Adoption Project and the mass removal of children from their tribal nation and contends that heightened protections for Indigenous children are still necessary given the continued existence of factors that led to the 1970s removals. Part III argues that, although ICWA is still in place, judges must mitigate bias in family proceedings involving Indigenous children and should continue to follow bias-mitigating factors if the Supreme Court overturns ICWA.

I. CURRENT LEGAL DOCTRINES SUPPORT UPHOLDING ICWA

Haaland v. Brackeen arose from three separate child custody proceedings governed by ICWA.[21] The petitioners were three families who wished to adopt or foster Indigenous children and an Indigenous woman who wanted non-Indigenous parents to adopt her biological child.[22] They were joined by the States of Texas, Indiana, and Louisiana, although only Texas remained as a party by the time the case reached the Supreme Court.[23] These petitioners sued the United States, the Department of the Interior and its Secretary, the Bureau of Indian Affairs and its Director, and the Department of Health and Human Services and its Secretary.[24] The petitioners challenged ICWA on multiple grounds. They argued that Congress lacks the authority to enact ICWA, that ICWA violates the Tenth Amendment's anti-commandeering principle, that ICWA violates the Equal Protection Clause, and that one of ICWA's provisions violates the non-delegation doctrine.[25]

The Northern District of Texas granted the petitioners' motion for summary judgment and held that ICWA was unconstitutional on equal protection grounds.[26] The defendants appealed to the Fifth Circuit, which affirmed in part and reversed in part after a rehearing en banc.[27] Finally, in an opinion authored by Justice Barrett, the Supreme Court held that all of ICWA was constitutional and upheld the Act in its entirety.[28]

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[21] Haaland v. Brackeen, 143 S. Ct. 1609, 1625 (2023).

[22] *Id.* at 1625-26.

[23] *Id.* at 1626.

[24] *Id.*

[25] *Id.*

[26] Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018).

[27] Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021).

[28] *Brackeen*, 143 S. Ct at 1623 ("[T]he bottom line is that we reject all of petitioners' challenges to the statute, some on the merits and others for lack of standing.").

In *Brackeen*, the plaintiffs first argued that ICWA is an overreach of Congress's power because it impedes the rights of states to set standards for the placement of children. The argument is two-fold: first, the plaintiffs argued that the Constitution does not give Congress the power to enact ICWA, and second, even if Congress had the Constitutional authority to enact ICWA, the statute impermissibly commandeers the authority reserved to state officials and judges. They also alleged that ICWA violates both the non-delegation doctrine and Equal Protection Clause. The majority ultimately rejected these arguments and upheld ICWA in its entirety. Below, I describe the decision and argue that it leaves ICWA vulnerable to attack.

A. Congress Has the Power to Enact ICWA

Despite over two hundred years of precedent to the contrary, plaintiffs argued that, instead of having a wide-reaching "plenary power" over the tribal nations, Congress can only regulate tribes if it relates to specific enumerated powers. According to the petitioners in oral argument, this understanding would limit Congress's ability to act only when Congress is regulating tribal lands and people within tribal lands, pursuant to a specific treaty's obligations, and when acting on tribal nation governments as governments.[29] In reality, if the Court had accepted this argument, it would have had serious consequences for United States-tribal relationships because it would have vastly restricted the type of laws Congress could pass and exposed most of the tribal law to litigation.[30]

Fortunately, the Court rejected this narrow reading of Congress's plenary power, holding that their "cases leave little doubt that Congress's power in this field is muscular, superseding both tribal and state authority."[31] While Justice Barrett agreed with the plaintiffs that the plenary power must be tied to the Constitution, she held that the structure, enumerated powers, and trust relationship between the United States and the tribal nation inform the breadth of Congress's powers in this area;[32] altogether, she reasoned that the combination of these authorities create a broad plenary power to legislate with respect to the different tribal nations.[33]

Justice Barrett reaffirmed that this broad plenary power is deeply rooted in the Court's precedent. Under a line of cases dating back to

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[29] Transcript of Oral Argument at 72, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (No. 21-376).

[30] If Congress were limited to legislating solely on those bases, it would not be able to enact most of the laws pursuant to its trust obligation, like tribal nation gaming, gambling, fishing, and hunting laws, among others.

[31] *Brackeen*, 143 S. Ct. at 1627 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

[32] *Id.* at 1627-28.

[33] *Id.* at 1628-29.

1886,[34] the Court established that Congress has uniquely expansive authority to legislate on behalf of Indigenous people and the tribal nations.[35] Justice Barrett verified that although the plenary power is not absolute, Congress still has a significant breadth of authority to govern on behalf of tribal nations, including in areas traditionally governed by the states.[36] Thus, while the precedent is indeed "unwieldy" and confusingly tied to many separate constitutional grounds, the petitioners gave the majority no convincing reason to severely limit the scope of Congress's power in this area.[37]

B. There Is No Anti-Commandeering Problem Under the Tenth Amendment

The Court also held that ICWA does not violate the anti-commandeering doctrine. The anti-commandeering doctrine is an implied limit on Congress's power to preempt state law.[38] This highly complex doctrine prohibits Congress from directly compelling state political branches to enact and enforce federal regulatory programs.[39] Plaintiffs asserted anti-commandeering challenges to three of ICWA's provisions: (1) required actions for local and state agencies in involuntary proceedings, namely the "active efforts provision"; (2) ICWA's placement preferences and the requirement to find preferred placements; and (3) the requirement to maintain and transmit records of custody proceedings to the Federal Government.[40]

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[34] *See* United States v. Kagama, 118 U.S. 375, 383-84 (1886).

[35] The Court has consistently held that this virtually unlimited plenary power is necessary to support the federal government's trust relationship towards Indians, which is the "unique obligation [of the United States government] towards the Indians." Morton v. Mancari, 417 U.S. 535, 555 (1974). The modern understanding that Congress has a "duty of protection" to tribal nations was most famously captured in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), where Chief Justice Marshall recognized the "settled doctrine" that when a stronger sovereign (the United States) takes over a weaker sovereign (tribal nations), the stronger sovereign assumes a "duty of protection" over the weaker sovereign. *See* Matthew Fletcher & Wenona Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 893-95 (2017).

[36] *Brackeen*, 143 S. Ct. at 1628-31.

[37] *Id.* at 1629.

[38] JAY B. SYKES, CONG. RSCH. SERV., LSB10133, THE SUPREME COURT BETS AGAINST COMMANDEERING: *MURPHY V. NCAA*, SPORTS, GAMBLING, AND FEDERALISM (2018).

[39] *See* New York v. United States*,* 505 U.S. 144 (1992) (explaining anticommandeering of state legislatures); *see also* Printz v. United States, 521 U.S. 989, 933 (1997) (explaining that directing state law enforcement officers to conduct background checks before certain gun purchases, pursuant to the Brandy Handgun Prevention Act, was unconstitutional commandeering).

[40] *Brackeen*, 143 S. Ct. at 1631-32.

Justice Barrett held that all three requirements were not improper commandeering.

First, the Court held that ICWA's heightened protections, and the "active efforts" provision specifically, do not "harness[] a State's legislative or executive authority."[41] The anti-commandeering doctrine does not apply when Congress "evenhandedly regulates an activity in which both States and private actors engage."[42] As Justice Barrett correctly pointed out, the active efforts and qualified expert witness provisions apply to "any party,"[43] including private individuals and agencies, not just state agents.[44] Courts across the country have held that ICWA applies in private adoptions, including in *Adoptive Couple v. Baby Girl*, the Court's most recent ICWA case before *Brackeen*.[45] The plaintiffs conceded this point at oral argument, agreeing that the provisions apply to the states in the "overwhelming majority of cases."[46] Yet, as the majority held, under current case law, the fact that primarily state actors implement ICWA provisions is of no import, and besides, "the record contained no evidence supporting the assertion that States institute[d] the vast majority of involuntary proceedings."[47] In addition, the Court rejected the petitioners argument that ICWA could be distinguished from past cases where a generally applicable law was found not to commandeer the states. The petitioners had argued that, unlike laws directed at commercial activity, ICWA regulated the States' "core sovereign function of protecting the health and safety of children within its borders."[48] The Court disagreed and held that, because ICWA applies outside of child neglect situations, the Act does not "isolate a domain in which only the State can act"[49] and therefore does not commandeer a "core sovereign function" of the State.

The Court also dismissed the plaintiffs' arguments against ICWA's placement preferences for three reasons. First, the "diligent search" requirement, which asks both public and private parties to look for a foster family that meets ICWA's placement preferences, applies evenhandedly and, therefore, does not commandeer a core function of the state.[50]

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[41] *Id.* at 1632.

[42] Murphy v. Nat'l Collegiate Athletic Ass'n*,* 138 S. Ct. 1461, 1478 (2018).

[43] *See* Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 YALE L. & POL'Y REV. 292, 330 (2020).

[44] *Brackeen*, 143 S. Ct. at 1632.

[45] Gale & McClure, *supra* note 43, at 330 (noting that both of the Supreme Court's ICWA cases were private adoption cases).

[46] Transcript of Oral Argument at 47, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (No. 21-376).

[47] *Brackeen*, 143 S. Ct. at 1632.

[48] *Id.* at 1633 (quoting Brief for Petitioner the State of Texas at 66, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (No. 21-376)).

[49] *Id.* at 1634.

[50] *Id.* at 1634-35.

Second, the Court found that this provision often asks the state agencies to do nothing since, under *Adoptive Couple v. Baby Girl*, there is no action on behalf of the State if no preferred party has come forward.[51] Instead, the burden is on the tribe or other objecting party to find a higher-ranked placement.[52] Thus, this is also not commandeering because there is no action required of state agencies. Third, the Court held that the requirement that state courts apply federal standards when making custody determinations is not commandeering but preemption.[53] The federal Constitution's Supremacy Clause binds state judges to follow the "supreme law of the land," which includes federal laws like ICWA.[54] Courts have found that, under the Supremacy Clause, Congress can impose federal procedural rules on state courts to vindicate federal interests, even when those rules govern state-created causes of actions.[55] Moreover, contrary to the plaintiffs' arguments, ICWA is not an unprecedented intrusion into state courts. In foster care alone, federal law imposes numerous regulations on courts that are widely accepted as permissible preemption.[56] Accordingly, the Court rejected the plaintiffs' argument that a federal law modifying a state law cause of action differs from a federal law requiring state courts to entertain federal courses of action and held that ICWA's placement preferences are constitutionally permissible preemption.[57]

Finally, the Court rejected the anti-commandeering challenge to the recordkeeping provision. ICWA requires courts to provide the Secretary of the Interior a final order in the adoptive placement of any child that falls under its statutory scope and maintain a record "evidencing the efforts to comply with the order of preference specified by ICWA."[58] The plaintiffs argued that this was "conscript[ing] the States into federal service by assigning them recordkeeping tasks."[59] Justice Barrett rejected this argument. She detailed historical examples of recordkeeping to elicit the rule that "Congress may impose ancillary recordkeeping requirements related to state-court proceedings without violating the Tenth Amendment."[60] Accordingly, she held that ICWA's recordkeeping requirements do not commandeer the States.

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[51] *Id.* at 1635.

[52] *Id.*

[53] *Id.*

[54] U.S. CONST. art. VI, § 2.

[55] *See* Gale & McClure, *supra* note 43, at 304-11 (describing the ability of Congress to impose federal procedures on state courts to vindicate federal and to modify state causes of action in certain circumstances.).

[56] *Id.* at 327-29 (detailing record-keeping and reporting requirements in the federal Adoption and Foster Care Analysis and Reporting System).

[57] *Brackeen*, 143 S. Ct. at 1635.

[58] *Id.* at 1636 (citing 25 U.S.C. § 1951(a); 25 U.S.C. § 1951(e)).

[59] *Id.*

[60] *Id.* at 1638.

C. Equal Protection and Nondelegation Claims Dismissed on Standing

In Part IV of the opinion, Justice Barrett dismissed petitioners' equal protection and nondelegation claims on standing. Despite acknowledging that non-Indigenous families are placed on "unequal footing" with Indigenous parents during ICWA-governed child welfare proceedings, she held that the non-State petitioners did not show that their injury was "likely to be redressed by judicial relief."[61] She also concluded that the federal parties were the wrong parties to sue because state courts and state agencies are the parties who carry out ICWA.[62] Similarly, she held that the declaratory judgment requested by the petitioners, stating that the challenged provisions of ICWA are unconstitutional, would not remedy the alleged injury because state officials would not be bound by the judgment.[63] The majority reasoned that because there was no preclusive effect for state officials, a decision on the merits would be "little more than an advisory opinion."[64] Finally, Justice Barrett rejected the petitioners' argument that their injury is redressable because "state courts are likely to defer to a federal court's interpretation of federal law, thus giving rise to a substantial likelihood that a favorable judgment will redress their injury."[65]

The majority also held that Texas lacked standing to challenge the placement preferences. Under the Court's precedent, States do not have equal protection rights of their own and cannot assert equal protection claims on behalf of their citizens.[66] The majority rejected Texas's "creative" arguments for standing.[67] First, the majority rejected Texas's argument that it had an "unclean hands" injury. Texas argued that ICWA injures Texas because the State must break its constitutional obligation and "promise to its citizens" of color-blind implementation of the laws by enforcing ICWA in child custody proceedings.[68] The Court held that this is not an Article III injury-in-fact, and "[w]ere it otherwise, a State would always have standing to bring constitutional challenges when it is complicit in enforcing federal law."[69] Second, the majority rejected Texas's argument it has a "direct pocketbook injury associated with the costs of keeping records."[70] As Justice Barrett correctly noted, Texas would have

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[61] *Id.* (citing TransUnion, LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021)) (internal quotation marks omitted).

[62] *Id.* at 1639.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1640 (citing South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966)); Alfred K. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 610, n.16 (1982)).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

to pay these costs even if it did not have to apply ICWA's placement preferences.[71] Finding no injury, Justice Barrett vacated the judgment of the Fifth Circuit and remanded the case with instructions to dismiss for lack of standing.[72]

D. This Opinion Leaves ICWA Vulnerable

Despite upholding all parts of the Act, the majority opinion left ICWA vulnerable to future attack, particularly on congressional power and equal protection grounds.

1. Barrett Leaves Questions About Article I Powers

While Justice Barrett aptly described Congress's power as "muscular," she left ICWA at risk for future challenges to Congress's Article I powers in the tribal law arena. In Part II.C of her opinion, although Justice Barrett discounted the petitioners' congressional power arguments, she did not explicitly state that Congress's Article I powers allow it to enact ICWA. Instead, Justice Barrett opposed petitioners' arguments for their "fail[ure] to grapple with precedent" and carry their "burden of establishing ICWA's unconstitutionality."[73] She wrote that petitioners were "silent about the potential consequences of their position" and did not explain whether their position would "undermine established cases and statutes."[74]

To be clear, Justice Barrett's description of Congress's plenary power accurately depicts an expansive Congressional power over tribal nation affairs. Yet she left open the possibility that a subsequent case would allow the Court to limit Congress's power in the area. She stated that "[i]f there are arguments that ICWA exceeds Congress's authority as [the Court's] precedent stands today, petitioners do not make them," indicating that there may be arguments that would change her decision about the scope of Congress's Article I powers to enact statutes for the protection of Indigenous peoples.[75]

With this language, Justice Barrett has practically invited future challenges to ICWA with arguments that better wrestle with the Court's previous tribal nation law cases. And, she has done this before. In *Fulton v. City of Philadelphia*, Justice Barrett posed questions about what a post-*Smith* judicial framework would look like.[76] Scholars from institutions across the country responded by writing numerous law review articles, attempting to answer her questions and provide a post-*Smith* framework that

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[71] *Id.* at 1640-41.
[72] *Id.* at 1641.
[73] *Id.* at 1630.
[74] *Id.* at 1631.
[75] *Id.*
[76] Fulton v. Pennsylvania, 141 S.Ct. 1868, 1883 (2021) (Barrett, J., concurring).

Justice Barrett would sign onto in a future First Amendment case.[77] If scholars begin to answer the questions posed by Justice Barrett in *Brackeen* in the same way they have begun to do with *Fulton*, and this scholarship prompts a new Supreme Court case, it is possible that Justice Barrett would rule with dissenting Justices Thomas and Alito to overturn ICWA.

2. Justice Kavanaugh Invites an Equal Protection Challenge

Likewise, Justice Barrett's majority opinion leaves ICWA vulnerable to future equal protection challenges because the Court decided the equal protection claim was decided on standing rather than on the merits. Justice Kavanaugh wrote separately "to emphasize that the Court today does not address or decide the equal protection issue."[78] He stressed in his concurrence that the equal protection issue is "serious."[79] Kavanaugh's concurrence signals to lawyers who want to challenge ICWA or other statutes with preferences for Indigenous people that he would side with dissenting Justices Thomas and Alito if a subsequent equal protection case reached the Court. Lawyers who oppose ICWA can easily find a plaintiff with standing to challenge ICWA on equal protection grounds. Any person who is in the midst of a child welfare proceeding concerning an Indigenous child in a state court can sue state court officials and allege that the state court would be acting unconstitutionally if it followed ICWA's placement preferences.[80] It is only a matter of time before anti-ICWA opponents find a plaintiff in this position and attempt to overturn the Act.

Under past precedent, ICWA should survive an equal protection challenge. Since the 1974 case of *Morton v. Mancari*,[81] the Court has

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[77] *See* Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 268 n.7 (2021) (noting that overruling *Smith* remains a possibility because prominent scholars had already begun answering the questions posed by Justice Barrett in *Fulton*).

[78] *Brackeen*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring).

[79] *Id.*

[80] While some scholars have suggested there is a mootness problem, it is likely that the Court will find that this is an issue "capable of repetition, yet evading review." Courts will decline to find a case moot when the alleged wrong has terminated by the time the court is hearing the case, but similar issues with mootness are likely to arise in the future. RICHARD H. FALLON, JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 203-04 (Robert C. Clark et al. eds., 7th ed. 2015). For example, the Court in *Roe v. Wade* held that the plaintiff's abortion case was not moot, even though she was no longer pregnant, because this case was "capable of repetition yet evading review." 410 U.S. 113, 125 (1973).

[81] *Morton v. Mancari* concerned a Fifth Amendment challenge to an Act that gave Indian Bureau of Indian Affair employees a preference in promotion decisions. 417 U.S. 535 (1974). To qualify for the promotion preference, an employee needed to be "one-fourth or more degree of Indian blood and be a member of a

considered distinctions between Indigenous and non-Indigenous people political — not racial — distinctions. *Mancari* established the rational relation test, which states that "special treatment" of Indigenous people and tribes is constitutionally permissible if it can be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[82] *Mancari* was an employment case in which aggrieved non-Indigenous employees of the Bureau of Indian Affairs (BIA) contested the Indian Reorganization Act of 1934, which gave promotion preference to Indigenous BIA employees.[83] ICWA arguably presents a more straightforward case than *Mancari*, as the removal of children directly threatens the existence of federally recognized tribes, and ICWA's preferences address this problem by keeping children connected to their tribes.[84]

Future challengers to ICWA will still argue, as the petitioners did in *Brackeen*, that the Act is not "rationally related" to Congress's unique obligation to the tribal nations. The *Brackeen* petitioners argued that ICWA's third placement preference, which specifies a preference for "other Indian families" and "Indian foster home[s]" over non-Indian placements — when a member of the child's family or tribe is not a placement option — is unconstitutional under the Fifth Amendment's guarantee of equal protection.[85] Future challengers will likely adopt this reasoning and argue that there is no rational reason for placing a child with a member of a different tribe because it does not further the existence of either tribe. Moreover, future challengers will likely argue that tribes are not fungible and that this legislation impermissibly groups sovereigns based on a shared race instead of a rational political distinction.[86]

However, the third placement preference is rationally related to Congress's obligation in several ways. First, while tribes are not fungible, tribes have significant similarities that allow members of different tribes to support each other in unique ways. Unlike white, Christian families, all tribes have a shared history of genocide and understand what it means to

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federally-recognized tribe." *Id.* at 553, n.24. The Court unanimously upheld the preference, deciding that it did not violate equal protection. *Id.* at 553-55.

[82] 417 U.S. at 555. *See supra* text accompanying notes 34-61. *See also* MARIEL J. MURRAY, CONG. RSCH. SERV., R46647, TRIBAL LAND AND OWNERSHIP STATUSES (2021).

[83] *See Mancari,* 417 U.S. at 537-39.

[84] *See* 25 U.S.C. § 1902 ("The Congress hereby declares that it 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 adoptive homes.").

[85] Brief for Individual Petitioners at 37-42, Haaland v. Brackeen, 143 S. Ct. 1690 (2023) (No. 21-376).

[85] Haaland v. Brackeen, 143 S. Ct. 1609, 1626-27 (2023).

[86] *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004).

have their culture erased.[87] Further, the United States has historically treated all tribal nations alike, subjecting them to the same or similar experiences.[88] Tribes also have shared linguistic, cultural, and religious traditions. For example, in Michigan, three of the largest tribes are the Ojibwa, Potawatomi, and Odawa tribes. While they are separate political entities, the tribes are part of "The Three Fires Confederacy," a historical alliance that promotes their mutual interests.[89] The tribes of the Three Fires interact like members of a family, referring to Ojibwa as older brothers, Odawa as middle brothers, and Potawatomi as younger brothers.[90] Placing an Ojibwa child with an Odawa family would still keep the child connected to her family. In addition to furthering child welfare goals, the third placement preference rationally furthers tribal sovereignty. It is rational to think that placing a child in an Indigenous household which respects traditional Indigenous values will make a child more likely to join their tribal nation, thus furthering tribal stability. Lastly, placement preferences are not mandates. While there is a statutory preference is for "other Indian families," if there is good cause for placing children with a non-Indigenous family instead, that is where a court will — and *should* — place the child. Nevertheless, the Justices expressed skepticism to these defenses in oral argument and may still find that ICWA is not rationally related under the *Mancari*'s test.[91]

Future challengers may also argue that the Court should analyze ICWA under strict scrutiny instead of *Mancari*'s rational relation test. The petitioners here focused their equal protection argument on the definition of an "Indian child," arguing that even if one concedes that tribal membership classifications are political,[92] subjecting children who are only

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[87] University of Pennsylvania Carey School of Law, *The History and Future of the Indian Child Welfare Act (Session 2),* YOUTUBE (Dec. 1, 2022), https://www.youtube.com/watch?v=NLT-_HoHUqc.

[88] Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. 1755, 1786 (2022) ("While it is not true all Indian tribes are alike, it is also true that states and the federal government discriminated against all Indians alike; for example, the federal government forced Indian children from across the country to attending boarding schools.").

[89] *The Three Fires: Ojibwa, Odawa, Potawatomi*, ABSOLUTE MICHIGAN, http://absolutemichigan.com/michigan/the-three-fires-ojibwa-odawa-potawatomi/ (last visited Dec. 18, 2022).

[90] *Id.*

[91] *See generally* Transcript of Oral Argument, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (No. 21-376).

[92] Both the individual and federal petitioners argue that the tribal distinctions are also race-based, since many tribes require a certain percentage of tribal blood or tribal ancestry as a condition for tribal citizenship. *See* Brief for Individual Petitioners, *supra* note 80, at 32-33. I am focusing, however, on the eligibility component because the parties devote far more time to this issue, and it is more likely to be overturned. In addition, my arguments that tribal citizenship is not simply based on biology and is political in nature because of the historical

"eligible" for tribal citizenship unconstitutionally uses "ancestry as a proxy for race."[93] This too is a weak basis for overruling past precedent. Eligibility for tribal citizenship is not simply based on biology. Many people are Indigenous "by blood" but are *not* eligible to become members of tribes;[94] likewise, many people who are not biologically Indigenous are eligible for citizenship. For example, descendants of people that were formerly enslaved by the Cherokee tribe are eligible for Cherokee citizenship.[95]

It is important to acknowledge that classifications based on statutes have an inherent racial component. Most tribal nations require some measure of Indigenous descent as a condition for citizenship.[96] However, as the *Mancari* court recognized, distinctions that single out Indigenous people are special under the law. The United States has a *sui generis* trust relationship with the tribes, and the relaxed *Mancari* standard is needed for Congress to uphold that trust relationship.[97] In addition, the Constitution assumes that Congress has the power to make these classifications.[98] The drafters of the Constitution included two explicit references to "Indians" as a category: (1) Article I, § 2 has the Indian Commerce Clause; and (2)

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treatment of tribes support why tribal membership should legally be a political classification.

[93] The Court decided in *Rice v. Cayetano* that it was unconstitutional to use "ancestry as a proxy for race." 528 U.S. 495 (2002). In *Rice,* the Court struck down a state voting classification that only allowed "Hawaiians" to vote. "Hawaiians" was defined as descendants of the peoples inhabiting the Hawaiian Islands in 1778.

[94] Leah Myers, *Blood Quantum Laws are Splintering My Tribe*, ATLANTIC (June 21, 2023), https://www.theatlantic.com/family/archive/2023/06/blood-quantum-laws-native-american-tribal-communities/674461/ (explaining how federal laws prevent people with a high Indigenous blood-quantum from joining her tribe. The author discusses how the Indian Reorganization Act of 1934 split her tribe into three. As a result, there are now three legally separate tribes in the region despite shared ancestry and history. Because of some of the tribes' blood-quantum requirements, there are people who have a high blood-quantum percentage of the original tribe, but a low blood-quantum of each specific tribe, may not be eligible for citizenship in any of the three tribes).

[95] Harmeet Kaur, *The Cherokee Nation Acknowledges That Descendants of People Once Enslaved by the Tribe Should Also Qualify as Cherokee*, CNN, https://www.cnn.com/2021/02/25/us/cherokee-nation-ruling-freedmen-citizenship-trnd/index.html.

[96] Michael Doran, *The Equal-Protection Challenge to Federal Indian Law*, 6 U. PA. L. & PUB. AFFS. 1 (2020).

[97] *See infra* Part II (explaining the importance of kinship care for Indigenous children); *see also supra* note 35 (explaining the tribal-trust relationship).

[98] This argument was not raised in the briefs by the parties but was raised in the amici briefs. *See* Brief of Indian Law Professors as Amici Curiae in Support of Federal and Tribal Defendants, *Haaland v. Brackeen*, No. 21-376 (2023).

the now-repealed "Indians not taxed" provision of Article I, § 2.[99] The drafters of the Fourteenth Amendment also included a direct reference to "Indians" as a category, stating that "representatives shall be apportioned among the several states . . . excluding Indians not taxed."[100] Given the inclusion of these provisions, it is necessary to assume that the founders intended for Congress to be able to draw distinctions between Indigenous and non-Indigenous Americans. The founders' explicit communicative intent indicates that some form of lower scrutiny should be applied to Indigenous classifications.

Though ICWA's placement preferences are legally sound, a future equal protection challenge could likely lead to the Court overturning ICWA. If the Court applies strict scrutiny on a future challenge, like the lower court did in *Brackeen v. Zinke*, it is highly unlikely that ICWA would be upheld. Strict scrutiny is a high bar, described as "strict in theory and fatal in fact."[101] *Mancari* is especially vulnerable to being struck down under strict scrutiny because the Court decided *Mancari* before any of its affirmative action cases, and those cases rejected remedying past discrimination as a compelling interest.[102] Moreover, even limited affirmative action admissions programs are now unconstitutional under *Students for Fair Admissions v. Harvard College*.[103] Thus, the almost inevitable equal protection challenge could be lethal to ICWA.

3. Future Challenges to ICWA Are Likely

Thus, while the Act survived its first challenge, the constitutionality of ICWA is almost certainly going to come before the Court again. ICWA is highly unpopular with many groups, including those who feel it is harmful for children and those who want to undermine ICWA's placement preferences as part a larger effort to dismantle governmental preferences for the tribal nations.[104] Additionally, ICWA is the prime statute to challenge on equal protection grounds for those who have larger political goals. In *Mancari*, the case that established the lower scrutiny for Indigenous classifications, the preference applied "only to members of 'federally recognized' tribes,' and the Court specified that that 'exlude[d] many

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[99] U.S. CONST. art I, § 8, cl. 3; *id*. art. I, § 2, cl. 3 (repealed).

[100] *Id.* amend XIV, § 2.

[101] *See* Adarand Constructors v. Pena*,* 515 U.S. 200, 237 (1995) (stating that the Court "wish[ed] to dispel the notion that strict scrutiny is 'strict in fact, but fatal in theory.'").

[102] *See* Grutter v. Bollinger, 593 U.S. 306 (2003) (holding that increasing diversity itself was not a compelling interest, but that educational benefits from a diverse body, which would improve classroom discussions and promote cross-racial understanding could be a diverse interest); Gratz v. Bollinger, 539 U.S. 344 (2003); Fisher v. University of Texas, 579 U.S. 365 (2016).

[103] *See generally* Students for Fair Admissions v. President of Harv. Coll., 600 U.S. 181 (2023).

[104] *See* Gale & McClure, *supra* note 43 at 304-11.

individuals who are racially classified to as 'Indians.'"[105] ICWA however, applies even to children who are eligible for tribal membership, but are not yet enrolled. While that is a logical policy and rational because it applies to children who may be infants and are not yet enrolled, it leaves ICWA vulnerable to future equal protection challenges.

II. ICWA IS IN THE BEST INTERESTS OF INDIGENOUS CHILDREN

If the equal protection issue reaches the Court again, Justices Thomas, Alito, and Kavanaugh have already indicated that they believe that ICWA violates the Equal Protection Clause. On the other side, in *Brackeen*, Justice Gorsuch implied that he is unlikely to vote to overturn *Mancari* and apply strict scrutiny, citing *Mancari* for the proposition that "Indian status is a 'political rather than racial classification.'"[106] Likely, the liberal Justices — Sotomayor, Kagan, and Jackson — would side with Justice Gorsuch if an equal protection challenge to ICWA faces the Court. Chief Justice Roberts and Justice Barrett will therefore be the deciding votes on whether the Court upholds ICWA in a future challenge. Seeing as both are adoptive parents, it is likely that policy will sway the Justices in a future challenge to ICWA.[107] Therefore, it is important to understand why ICWA is good policy. Below this Note argues why ICWA was a normatively good decision and should survive a future constitutional challenge.

A. ICWA Furthers the Best Interests of Indigenous Children

Experts have labeled ICWA the "gold standard" of child welfare practice.[108] ICWA codifies procedures[109] that experts believe are best practices

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[105] Morton v. Mancari, 417 U.S. 535, 553 n.24 (1973).

[106] *Brackeen* 143 S. Ct. at 1648 (Gorsuch, J., concurring) (citing Morton v. Mancari, 417 U.S. 535, 553 n.24 (1973)).

[107] Nina Totenberg & Meghanlata Gupta, *The Supreme Court Leaves Indian Child Welfare Act Intact*, NPR (June 15, 2023, 6:34 PM), https://www.npr.org/2023/06/15/1182121455/indian-child-welfare-act-supreme-court-decision.

[108] *See*, *e.g.*, *How Can Child Welfare Systems Apply the Principles of the Indian Child Welfare Act as the "Gold Standard" for All Children?*, CASEY FAMILY PROGRAMS (Nov. 25, 2022, 1:29 AM), https://www.casey.org/icwa-gold-standard/; Janice Beller, *Defending the Gold Standard: American Indian Tribes Fight to Save the Indian Child Welfare Act*, IDAHO STATE BAR (June 24, 2022), https://isb.idaho.gov/blog/defending-the-gold-standard-american-indian-tribes-fight-to-save-the-indian-child-welfare-act/; Tara Hubbard & Fred Urbina, *ICWA — the Gold Standard: Golden Nuggets of Evidence from Arizona*, 58 ARIZ. ATT'Y 32 (2022).

[109] First, ICWA provides due process protections for Indian parents and tribes, including notice of child welfare cases and higher standards for removal. Second, ICWA requires active efforts to keep families together, which requires affirmative action to prevent the breakup of an Indian family and requires that child-welfare agencies involve the parent or Indian custodian in the case plan.

for all children, not just Indigenous children: notice provisions, higher standards for removal, active efforts provisions, and placement preferences.[110] These practices work to keep children together with their families. For all children, "kinship placements," or care by a child's relatives or community, increases positive welfare outcomes.[111] For example, when controlling for baseline risk, children in kinship care have been shown to have fewer mental or behavioral problems than other children placed in foster care.[112] Kinship care also leads to fewer placement disruptions and allows children to develop a sense of stability and cultural identity.[113] Encouragingly, Indigenous children have increased options for kinship placements since tribes often serve as extended families.[114] As a result of ICWA, ninety percent of Indigenous children are now placed with family members compared to eighty-six percent of non-Indigenous children.[115]

Opponents of ICWA, including the Brackeen family, the named plaintiff in *Haaland v. Brackeen*, disagree that ICWA is good policy because it overrides the "best interests of the child" standard that applies in most child welfare cases. The best interests standard, they argue, is individualized to take into account the specific circumstances of a child, which

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Active efforts also require that parents are connected to any services they need that would allow them to be reunited with their child, such as housing, mental health, or substantive abuse services. Third, ICWA has placement preferences to keep Indian children with their relatives or with their extended family (their tribes).

[110] In fact, Congress's expressed intent in enacting ICWA was to "protect the best interests of Indian children and to promote stability and security of Indian tribes and families." 25 U.S.C. § 1902.

[111] David M. Rubin et al., *Impact of Kinship Care on Behavioral Well-Being for Children in Out-of-Home Care,* 162 ARCHIVES PEDIATRICS & ADOLESCENT MED. 550, 550-56 (2008), https://jamanetwork.com/journals/jamapediatrics/fullarticle/379638.

[112] *Id.*

[113] *Id*.; Tanya Albert Henry, *How Tribal Placements Benefit Native Foster Children's Health,* AM. MED. ASS'N (Sept. 21, 2022), https://www.ama-assn.org/delivering-care/population-care/how-tribal-placements-benefit-native-foster-children-s-health.

[114] Brief of American Academy of Pediatrics & American Medical Association as Amici Curiae Supporting Respondents, *Haaland v. Brackeen*, No. 21-376 ("That second preference simply incorporates a broader conception of kinship, because in many Tribal communities, familial relationships extend beyond the first- and second-degree connections conventionally regarded as "family.").

[115] Brief of the States of California, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, and Wisconsin, and the District of Columbia as Amici Curiae Supporting Respondents, *Brackeen*, No. 21-376 (citing Annie E. Casey Found, *Keeping Kids in Families: Trends in U.S. Foster Care Placement* (Apr. 2019), at 2).

includes any unique trauma that an Indigenous child will face by being placed in a non-Indigenous household.[116] The opponents contend that replacing this individualized standard with a blanket standard dictated by Congress deprives the child of being placed in an ideal home for their circumstances.[117] To demonstrate the argument in practice, take the Brackeen family. The Brackeens, a white family, filed their suit after challenges in adopting Y.R.J., a child who falls under the "Indian Child" definition because her mother is Navajo.[118] The Brackeens had previously adopted A.L.M., Y.R.J.'s older half-brother.[119] They contend that ICWA's high bar for placement with non-Indigenous families hinders their ability to adopt Y.R.J., which might problematically take Y.R.J. away from the family she has bonded with since infancy and, instead, place her with an unknown Indigenous family.

While the Brackeens' story could be compelling, their argument fails to address the fact that non-Indigenous families adopt Indigenous children frequently despite the higher threshold imposed by ICWA. In fact, of the three non-Indigenous families who joined the Supreme Court case, two of them have successfully adopted Indigenous children even though there were biological family members available to take the child.[120] Unlike what opponents argue, ICWA does not completely replace the best interests standard with a per se, automatic veto in favor of placement with Indigenous families.

While experts agree that care by relatives and other Indigenous families tends to be in the best interests of the child, there are many reasons why the best interests standard alone, as applied by most states, is insufficient. First, state child welfare systems are often ineffective at acting in a child's best interest.[121] ICWA assists state courts by ensuring that procedures are in place to collect sufficient information about a child (specifically, Indigenous children) and their circumstances. Rather than taking

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[116] Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 TEX. REV. L. & POL. 55, 89-93 (2021).

[117] *Id.*

[118] *See* Jan Hoffman, *Race Question in Supreme Court Unnerves Tribes*, N.Y. TIMES (2022), https://www.nytimes.com/2022/11/07/health/native-american-adoption-icwa.html.

[119] *Id.*

[120] *See* Rebecca Nagle, *The Story of Baby O — and the Case That Could Gut Native Sovereignty*, NATION (2002), https://www.thenation.com/article/society/icwa-supreme-court-libretti-custody-case/.

[121] *M.D. v. Abbott* held that the welfare system in Texas consistently violated the constitutional rights of foster children. 152 F. Supp. 3d 684, 828 (S.D. Tex. 2015), *aff'd in part*, *rev'd in part*, *and remanded sub nom.* M.D. by Stukenberg v. Abbott, 907 F.3d 237 (5th Cir. 2018) (holding that Texas's system was "broken for Texas's . . . children" and that children often left foster care "more damaged than when they entered" due to overloaded caseworkers, insufficient oversight, and failure to collect information or record it properly).

away from an inquiry into the best placement of the child, ICWA's extra protections and processes provide a *better* understanding of a child's situation to help the state courts determine which family placement best serves the child. ICWA gives judges the needed information to determine which family is in the best interests of the child.

B. Historical Record Requires Differential, Federalized Treatment of Indigenous Children

The historical record illustrates that there are reasons for particular concern about state adjudication of child welfare proceedings as it pertains to Indigenous children. Before ICWA, the U.S. government used adoption to remove children from their tribal nations and assimilate them into white communities. In 1958, after boarding schools declined in popularity,[122] the Bureau of Indian Affairs founded the Indian Adoption Project to promote adoption as a cheaper alternative to assimilate Indigenous children.[123]

The Indian Adoption Project was massively successful in removing Indigenous children from their communities. The director of the Indian Adoption Project, Arnold Lyslo, implemented mainstream advertisement campaigns urging white parents to adopt Indigenous children. These advertisements employed dual narratives: (1) that reservations and families were broken; and (2) that adopting children was a benevolent act to rescue them from these areas.[124] The post-World War II zeitgeist made the American public, the target of Lyslo's campaign, an easily persuaded audience. The introduction of contraception, the legalization of abortion in the 1970s, and decreased stigma against single moms caused a shortage of available white children up for adoption.[125] Families interested in adoption were excited to fill their desire for parenthood while simultaneously providing a child with "a better life." Lyslo's rhetoric particularly appealed to religious groups, who became some of the most frequent adopters of Indigenous children. His rhetoric was so effective because it capitalized on the increased religiosity in response to the uncertainties of the Cold War.[126] The Indian Adoption Project explicitly cultivated relationships with churches, developing and drawing on the sentiments that adopting these "forgotten children" put their religious views into

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[122] *See* Katie L. Gojevic, *Benefit or Burden?:* Brackeen v. Zinke *and the Constitutionality of the Indian Child Welfare Act*, 68 BUFF L. REV. 247, 256 (2020).

[123] *See* MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 41-43 (2014) ("Lyslo, too, championed adoption as a means of saving the taxpayer money.").

[124] *Id.*

[125] Neoshia R. Roemer, *The Indian Child Welfare Act as Reproductive Justice*, 103 B.U. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4199675.

[126] JACOBS, *supra* note 123, at 54-71.

practice.[127] As a result, some religious groups even created their own private adoption programs for Indigenous children.[128] Religion was such a significant cause of demand for Indigenous children that the official Indian Adoption Project study found that only one of the ninety-seven families in the study identified as having no religion.[129] It is estimated that over 12,000 Indigenous children were adopted during the Project's tenure.[130]

Leaders of the Indian Adoption Project also took measures to increase the "supply" of children available for adoption. Children were being removed from their homes at exceptionally high rates, and these removals were supported only by obscure reasoning, with little or no signs of abuse or neglect. For example, as Justice Gorsuch detailed in his concurrence in *Brackeen*,[131] a 1970s survey in North Dakota found that only one percent of Indigenous children were removed for physical abuse and neglect, while the other ninety-nine percent were removed for vague issues related to poverty.[132] Moreover, some states statutorily defined the child-raising practices of the tribal nations as neglect, and some others even made living on a reservation sufficient evidence to prove neglect.[133] As a result, around one-in-three Indigenous children were removed from their families, and almost ninety percent of these children were placed with non-Indigenous families.[134]

Some opponents argue that removal was a historical phenomenon and should not be used to justify current child-welfare practices.[135] However, it has been shown that the passage of ICWA slowed the widespread removal of Indigenous children. Consider Professor Wenona Singel's devasting, and sadly uncommon, story of how she and her family were affected by governmental targeting of Indigenous children. Professor Singel is a law professor at the Michigan State University College of Law and an enrolled member of the Little Traverse Bay Bands of Odawa Indians. In 1977, Professor Singel's sister was taken from her family and put up for

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[127] *Id.* at 71.

[128] *Id.* at 59-61.

[129] *Id.* at 71.

[130] Claire Palmiste, *From the Indian Adoption Project to the Indian Child Welfare Act: The Resistance of Native American Communities*, HAL (2011).

[131] Haaland v. Brackeen, 1403 S. Ct. 1609, 1644 (2023) (Gorsuch, J., concurring).

[132] Matthew L.M. Fletcher & Kathryn E. Fort, *Indian Child Welfare Act as the "Gold Standard*," APSAC ADVISOR (2019) (citing H.R. Rep. No. 95-1386).

[133] *Id.*

[134] *Id.* (citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)).

[135] *See, e.g.,* Kathryn Jean Lopez, *We Continue to Harm Vulnerable American-Indian Children*, NATIONAL REVIEW (June 19, 2023, 6:30 AM), https://www.nationalreview.com/2023/06/we-continue-to-harm-vulnerable-american-indian-children/.

adoption by members of the family's church, without evidence of abuse or neglect.[136] The church members believed that Singel's sister would be better off in an upper-class white family than in her community.[137] Sadly, Professor Singel's sister was not the first child in her family to be removed without good cause — Singel says that her children will be the first in her family line not to be impacted by coerced or forced governmental removal.[138] Professor Singel's family is one of many who can attest to the recency of the removal policy and the importance of maintaining ICWA's heightened protections.

C. Contemporary Cultural & Religious Biases Warrant Federal Indigenous Child Welfare Standards

There is still a large demand to adopt Indigenous children. In the United States, there are currently more intended adoptive parents than children available to be adopted.[139] The adoption industry first sought to increase the "supply of infants"[140] by adopting children from other countries, but the number of children available for international adoption has plummeted.[141] As a result, since the mid-2000s, there has been a push to adopt from foster care instead. From 2011 to 2019, the number of children adopted from foster care increased by thirty percent, despite the stated goals of reunification.[142] While "foster-to-adopt" is not a legal status,[143] families often foster children intending to adopt, and then argue for the termination of a parent's rights, regardless of what is best for the child. These foster-to-adopt parents use their tenure as a child's foster parent to argue that they are "the only parents a child has ever known."[144] All three of the couples who challenged ICWA in *Brackeen* attempted to adopt from foster care, and they are only three of the many families using foster care to build their families.

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[136] Matthew Fletcher & Wenona Singel*, Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 887 (2017).

[137] *Id.*

[138] *Id.* at 886.

[139] Nagle, *supra* note 120.

[140] Dobbs v. Jackson Women's Health Org.,142 S. Ct. 2228, 2259 n.46 (2022).

[141] Nagle, *supra* note 120.

[142] *Id.*

[143] *Id.*

[144] Professor Matthew Fletcher argues that the "only family" argument is often used as an emotional appeal in child welfare cases. He claims that foster and adoptive parents further this narrative to center their emotional hurt in ICWA cases and paint a child's Indian family as strangers. *See* Matthew L.M. Fletcher, *How the 'Only Family' Argument Is Used Against Indigenous Families,* HIGH COUNTRY NEWS (2020), https://www.hcn.org/articles/indigenous-affairs-justice-how-the-only-family-argument-is-used-against-indigenous-families.

The religious impulse to adopt remains strong as well. In a 2019 interview, the Brackeens cited their Christian faith as their incentive to adopt.[145] According to Vox, the religious demand to adopt stems from the same motivations that religious adopters held in the late 1900s: they want to "save" Indian children.[146] This high demand for Indigenous children means there is an elevated risk of widespread removal of Indigenous children from their families and communities, even under ICWA.

In addition to the continued "demand" for Indigenous children, the stereotypes that led to the mass removal of Indigenous children during the adoption era are still widely held. A Peabody Award-winning NPR study recently found that social workers still remove children due to the poverty of their communities — under the guise of "neglect"— and lack of understanding about the cultural tradition of living with an extended family — under the guise of "lack of supervision."[147] Negative stereotypes can be especially damaging when applying the standard best interests test. The test is malleable, and biases can easily sway a judge's decision. It is not uncommon for a judge to side with an upper-class white family over a poor Indigenous family living on a reservation. ICWA ensures that there are baseline minimum standards urging family unification to limit the impact of such biases on foster and adoption proceedings.

III. JUDGES SHOULD ADOPT A CULTURALLY COMPETENT APPROACH TO INDIGENOUS CHILD WELFARE CASES

ICWA's preferences are important to protecting Indigenous children. However, these children are still vulnerable while ICWA is in place and will be particularly vulnerable if ICWA is later challenged and overturned. Thus, judges presiding over child welfare cases with Indigenous children must take steps to be more culturally competent. Below, I describe how judges can reduce bias in child welfare cases, both under ICWA's heightened protections and also under the typical state best interests tests should ICWA be overturned in the future.

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[145] Emily McFarlan Miller, *Religion Plays a Role in Native American Adoption Case Before the Supreme Court*, https://religionnews.com/2022/11/09/religion-plays-a-role-in-native-american-adoption-case-before-supreme-court/ (last accessed Dec. 18, 2022).

[146] Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections For Native Children*, VOX (Feb. 20, 2020, 7:30 AM), https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care.

[147] *See* Laura Sullivan & Amy Waters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Mar. 12, 2023, 3:18 PM) https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system.

A. Judges Should Prefer Kinship Placements

Courts making decisions under the best interests analysis should still presume that placement with Indigenous families is in the best interest of the child. However, admittedly deciding that reunification with an Indigenous family is best for the child can be complicated in practice. Take the stereotypical ICWA case: On one side, a judge will have an affluent, white, educated family who wants to adopt a child and provide them with a life that includes summer camp, school tutors, fully-funded college, and endless other opportunities. On the other side, the judge will have an Indigenous relative or extended tribe member living on a reservation filled with abject poverty and high rates of alcoholism and crime. In practice, it may be hard for judges to decide that placing the child with the white family is *not* in the best interests of the child, especially when a judge has grown up in a white middle- or upper-class family.

When analyzing a case like this, there are a few best practices and considerations that judges should adopt. First, judges should not treat adoption cases as a choice between two potential options, but rather treat each case with a presumption of placing a child with family. It is in a child's best interest to be raised by their family, which is indicated by studies revealing better adult outcomes for children placed in kinship care.[148] Moreover, judges should consider tribal definitions of families. When applying a presumption for kinship care, judges should understand that non-blood-relative tribal members are often considered extended family. Judges should ask representatives from the tribal nation's counsel to explain the relevant family dynamics.

B. Judges Should Incorporate Cultural Understandings of Existing Best Interests Factors

Second, judges should take a culturally competent approach to analyzing existing best interests factors. In analyzing the need for permanence, a typical factor in the best interests analysis, judges should consider the stability and continuity of relationships with parental figures, mentors, and other relatives. Judges can also ask which placement provides for permanence of culture, religion, language, and friends. In addition, judges should consider the effect of separation from a child's family and "extended family," since separation often results in trauma and other mental-health declines.[149] Further, judges should consider a child's identity as a

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[148] Heidi Redlich Epstein*, Kinship Care is Better for Children and Families*, AM. BAR ASS'N (July 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/.

[149] Kathryn Hampton et al., *The Psychological Effects of Forced Family Separation on Asylum-Seeking Children and Parents at the US-Mexico Border: A Qualitative Analysis of Medico-Legal Documents*, 16 PLOS ONE, no. 11, 2021, at 1-11.

component of their well-being. Judges should ask themselves which placement environment will be more respectful of the child's culture and heritage.

Judges should also inquire about what steps a potential non-Indigenous foster or adopted parent will take to keep the child connected to their tribe. Some tribal courts require "culture contracts" when a child is placed in a non-Indigenous family. These contracts require that non-Indigenous families bring a child to the community for important cultural and family events and that those families connect the child with their history and traditions.[150] Judges do not need to require these contacts as a legal matter, but it would be helpful for their internal examination and decision-making processes to understand if a non-Indigenous family values a child's culture.

C. Judges Should Consider the Best Interests of Indigenous Tribes

Third, when judges are choosing between two placements that they deem adequate for a child's welfare, judges should consider the best interest of the tribe for custody cases. Children are an essential part of tribal sovereignty. The removal of children from tribes is the removal of the next generation of language speakers, tradition holders, and, quite simply, citizens. Placing a child with a tribe instead of with a non-Indigenous family helps stop the widespread removal of Indigenous children that has decimated tribes since the first days of colonization. However, this is not to say that tribal sovereignty should be more important than the individualized best interests of a child. Instead, focusing on tribal unity is essential to prevent future child welfare problems in tribes. Boarding schools and widespread removal have resulted in intergenerational trauma for tribal nation communities, leading to distant parenting, substance abuse problems, and continued family dysfunction.[151] As Judge William A. Thorne detailed, many of the children he sees in foster proceedings are the latest in multiple generations of removed children.[152] Furthering tribal unity allows judges to stop the cycle of intergenerational trauma and support the next generation of Indigenous children.

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[150] Judge Lisa L. Atkinson, *Best Interests of the Child: A Tribal Judge's Perspective*, AM. BAR ASS'N (Jan. 1, 2019), https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/winter/best-interest-the-child-tribal-judges-perspective/.

[151] William Aguiar & Regine Halseth, *Aboriginal Peoples and Historical Trauma: The Processes of Intergenerational Transmission, National Collaborating Centre for Aboriginal Health* (2015).

[152] University of Pennsylvania Carey School of Law, *The History and Future of the Indian Child Welfare Act (Session 2),* YOUTUBE (Dec. 1, 2022), https://www.youtube.com/watch?v=NLT-_HoHUqc.

D. Judges Should Take Affirmative Steps to Be Culturally Competent

Finally, judges who consistently decide foster care and adoption cases concerning Indigenous children should take affirmative steps to question their biases. Judges should watch tribal courts and understand how they take a community-focused approach to child-rearing.[153] Judges could also take Harvard's "Native American Implicit Association Test" to question their assumptions about tribes.[154] Further, judges should read the research on kinship care, not just for Indigenous children, but for all children on their docket. Engaging with this research and hearing first-hand accounts from minority (and, specifically, Indigenous) adoptees into white families can facilitate understanding of the impacts of family separation.

CONCLUSION

The Indian Child Welfare Act is critical to upholding the interests of Indigenous children. The Act focuses on kinship care and preventing the widespread removal of children. Even under ICWA, Indigenous children are at an increased danger of being removed from their families and this danger would only increase if ICWA were to be overturned. Judges presiding over Indigenous child welfare cases should take care to not let their biases get in the way of providing a child with a stable home with someone in their community. To do this, judges should have a presumption for kinship placements and should ensure they are looking at the best interests factors through a culturally competent lens. Lastly, judges should educate themselves on the history of Indigenous child removal, keep updated on child welfare research, and take affirmative steps to unlearn their biases.

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[153] *See* Atkinson, *supra* note 150.

[154] *See* Project Implicit, http://www.projectimplicit.net/generalinfo.php (last accessed Dec. 18, 2022).