Article

Equity for American Indian Families

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For the better part of two centuries, the cornerstone of federal Indian policy was destabilizing and eradicating tribal governments. In the process, federal Indian policy also dismantled American Indian families via child removal. Attempting to equalize American Indians through the practice of assimilation, decades of Indian child removal policies destroyed Indian families. In 1978, Congress responded to these horrors by passing the Indian Child Welfare Act (ICWA), a revolutionary law that was responsive to its trust responsibility to American Indian Tribes. By providing for the best interests of Indian children, heightened protections for parents of Indian children in certain child custody proceedings, and vesting Tribes with a legally recognizable interest in their children's futures, Congress issued a referendum on equality for American Indians and the very nature of colonialism.

For nearly fifty years, ICWA has governed certain child custody proceedings involving Indian children in state courts. In 2018, a group of state and private actors decided to challenge ICWA's constitutionality in Haaland v. Brackeen. *Among their claims, these parties alleged that ICWA violated the equal*

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protection rights of potential adoptive parents who are non-Indian and that ICWA placed Indian children at a disadvantage. However, just beneath the surface of these claims lies the real allegation: American Indian children should be available for the "good families" or for the "right kind of families" to adopt them. By claiming American Indians had special rights via ICWA, these plaintiffs hoped to re-introduce a version of equality that allowed generations of federal, state, and individual actors to enact assimilationist policies. Ultimately, the goal of equality in this area remains to ensure that "good families" maintain access to Indian children. Contrary to congressional goals, Indian children remain a commodity in demand for "good families" looking to save Indian children.

Blending family law, federal Indian law, and constitutional law, this Article evaluates the fallacy in applying the Equal Protection Clause to claims about ICWA. In doing so, this Article demonstrates that ICWA contains an anti-colonial equity principle that is contrary to the equal protection doctrine—a doctrine that Congress knew could never apply when the matter came to accessing the rights of American Indian families against those of the settlers, primarily because the rights of American Indian individuals are intricately linked to the federal trust responsibility. This Article argues that given ICWA's character as an anti-colonial statute, applying the Equal Protection Clause to it will only stand to yield absurd results in furtherance of a colonial project that Congress has abandoned. Instead of the equality the Supreme Court promises through its equal protection doctrine, ICWA's mandate requires equity.

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INTRODUCTION

In the pursuit of fulfilling its mandate to Indian Tribes, Congress enacted the Indian Child Welfare Act (ICWA) in 1978 to remedy decades of Indian child removal.[1] For nearly fifty years, state courts around the United States have implemented ICWA in certain types of child custody proceedings involving Indian children. In the past decade, ICWA has garnered both positive and negative attention as modern family regulation scholars look toward ICWA for solutions to an increasingly criminalized, punitive child welfare system, and ICWA's opponents search for arguments to render the Act void.

In June 2023, the Supreme Court opined on ICWA's constitutionality in *Haaland v. Brackeen*.[2] In *Brackeen*, a group of state and individual plaintiffs argued that ICWA was unconstitutional as it violated (1) Congress's Article I authority to regulate Indian Affairs, (2) the anticommandeering principle of the Tenth Amendment which had previously left child welfare to the state police power, and (3) the equal protection doctrine of the Fifth Amendment.[3] While these plaintiffs argued that ICWA violated their constitutional rights in a five-year long litigation battle, the lives of three Indian children—their ability to maintain ties to their families, culture, and to grow up in a safe and healthy environment—lay at the heart of the case. Indeed, Justice Barrett's opinion in *Brackeen* opens with, "This case is about children who are the most vulnerable: those in the child welfare system."[4]

Historically, Indian children have been the cornerstone of federal law and policy meant to eliminate Indian Tribes.[5] Perhaps in a somewhat shocking move, the Court upheld ICWA's constitutionality in a 7-2 decision. To be clear, ICWA's

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1. 25 U.S.C. §§ 1901–1963. Congress made several findings in enacting ICWA, including that Congress "has assumed the responsibility for the protection and preservation of Indian tribes" and that "an alarmingly highly percentage of Indian families are broken up by the removal . . . of their children." *Id.* § 1901(2), (4).

2. 143 S. Ct. 1609 (2023).

3. *Id.* at 1623 (summarizing the plaintiffs' arguments).

4. *Id.* at 1622.

5. *See infra* Part I.A (exploring the development of assimilationist policies, with an emphasis on child welfare, that drastically reduced American Indian populations).

constitutionality itself was not a shock.[6] The survival of the Act, given its opponents' penchant for creating well-curated and financially-resourced cases before the Roberts Court, which has shown its hand at being the "post-racial" court and friend of the conservative legal movement,[7] was shocking.

While *Brackeen* was a win for ICWA in 2023, the Court declined to answer whether ICWA violates the equal protection doctrine. When it came to this issue, the Court rightfully held the plaintiffs did not have standing to bring the claim—right before explaining to the plaintiffs exactly how they might confer appropriate standing to bring the equal protection claims in the future.[8] Indeed, a similar question as to equal protection came before the court in an Indian gaming case.[9] Although equal protection is always a topic that gains the attention of the legal academy because of its purported social justice potential, equal protection is a much more complex conversation when it comes to Indian law. An adverse ruling on equal protection could essentially dismantle federal Indian law—the body of law that governs the self-determination of American Indian Tribes—piece by piece. In *Brackeen*, the Court did not choose a middle ground on this issue. Rather, it declined to answer the question on procedural grounds.

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6. *See, e.g.*, Michael C. Snyder, *An Overview of the Indian Child Welfare Act*, 7 ST. THOMAS L. REV. 815, 817 (1995) (finding that in the seventeen years following ICWA's enactment, "the few reported state courts decisions have all deemed the ICWA constitutional").

7. *See infra* Part III.B.1 (discussing recent Supreme Court cases involving race under the Equal Protection Clause).

8. *Brackeen*, 143 S. Ct. at 1638–41 (suggesting that the prospective adopters instead sue the state courts and agencies that implement ICWA and that Texas, the state plaintiff, clarify the relationship between compliance with ICWA and the alleged fiscal injury).

9. Petition for Writ of Certiorari, West Flagler Assocs. Ltd. v. Haaland, 144 S. Ct. 2671 (2024) (No. 23-862). Petitioners, casino operators, challenged Florida's compact with the Seminole Tribe that allowed the tribe to operate online sports betting off tribal lands. *Id.* at 1. They argued that granting a statewide gambling monopoly to one tribe was a violation of the Equal Protection Clause. *Id.* at 32. The Court denied the petition for writ of certiorari. *West Flagler*, 144 S. Ct. at 2671. But the equal protection argument was not without an audience: Justice Kavanaugh, in an earlier denial of Petitioners' application for a stay of the lower court order, wrote, "[t]o the extent that a separate Florida statute . . . authorizes the Seminole Tribe—and only the Seminole Tribe—to conduct certain off-reservation gaming operations in Florida, the state law raises serious equal protection issues." West Flagler Assocs. v. Haaland, 144 S. Ct. 10, 10 (2023) (Kavanaugh, J., concurring).

Equal protection, at least how the doctrine is understood today, reinforces colonial era rot. Colonialism first excluded American Indians from the guarantee of equal protection and even U.S. citizenship.[10] Colonialism demanded Tribes divest all their resources to American settlers in the name of nation building and progress.[11] Settlers—and the states they would form—were as important to the process of colonialism as the federal government.[12] At the expense of erasing the true nature of colonialism and its lingering impacts on American Indian communities, nation building and progress are the myths that the American dream and exceptionalism rest upon today. A large foundation for those myths is the mirage of equality supported within the modern understanding and application of the equal protection doctrine.

Today, ICWA's opponents bring race-based equal protection claims challenging the Act largely manufactured with one goal in mind: to demand access to the most important resource that Tribes have—their children. Although ICWA's opponents argue that Indian children cannot qualify as "commerce" to bring the statute under Congress's purview,[13] ICWA's opponents also see

10. Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1196 (2016) [hereinafter Berger, *Birthright Citizenship*] (explaining that the Senate chose the wording of the Fourteenth Amendment based on the belief that although American Indians were born in the United States, they were not "subject to the jurisdiction thereof," and therefore would not be protected by the Amendment).

11. *See* NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 50–53 (2020) (stating that European colonists in North America intended to permanently occupy colonized territories, and American Indian peoples became "obstacles" to that goal).

12. *See id.* at 51 ("Land is what allows the settlers to create and control a society of their own imagining and then, using that land and its resources, to generate the profits that enable them to consolidate and expand their sovereign prerogative."). Colonialism within this article references the settler colonial paradigm in which the colonial power did not merely seek resources, but also sought to settle. *See id.* at 45 (comparing external or "classic" colonialism with settler colonialism). In what became the United States, colonialism included a racialization component. *See id.* at 52–53 (suggesting that settler colonialism can explain the lived experiences of people of color in the United States, from colonial times to today).

13. Reply Brief for Individual Petitioners at 29–30, *Brackeen*, 143 S. Ct. (No. 21-376) (defining commerce as the power to regulate intercourse and distinguishing it from child custody placements).

those same Indian children as commodities for "good families."[14] Since the post-World War II era, children and their ability to create nuclear families have been commodities—commodities that have often come at a cost to their biological families.[15] Given the history of Indian child removal, Congress, in passing ICWA, acknowledged that was the folly, cruelty, and inhumanity of a system that purposely extracted Indian children as resources from their communities for the benefit of equality under the auspices of American nationhood.[16]

In many ways, *Brackeen* epitomized American equality. Through the legal system, America's first rights holders—its settlers—were able to protest what they viewed as an injustice: not being able to adopt the children of their choosing. By using equal protection claims to demand a uniformity that has never existed for anyone except America's rights holders, ICWA's opponents attempted to further the colonial extraction of Tribes' future generations. Like the American mythos that proudly boasts we are all created equal, opponents of ICWA further colonial assimilation by projecting a specific brand of American identity that prioritizes the "good family" or "right kind of families" vis-à-vis the rights of white parents with means over others. Equality—the kind best (mis)understood to mean that everyone is operating on the same level playing field—is neither conducive nor responsive to ICWA's goals. In this vein, "good parents" are red herrings

14. *See, e.g.*, Neoshia Roemer, *Un-Erasing American Indians and the Indian Child Welfare Act from Family Law*, 56 FAM. L.Q. 31, 44 (2022) (describing media coverage of a white foster family who fought to adopt an Indian child in 2016 as "erasing the purpose of ICWA . . . to uplift the narrative of the 'good family'"). The belief that "good" white families are better for Indian children predates ICWA. *See, e.g.*, Margaret D. Jacobs, *The Great White Mother: Maternalism and Indian Child Removal in the American West, 1880–1940* (quoting a member of the Women's National Indian Association, a white women's organization, as suggesting in 1892 that the group should "find[] homes in good families for Indian children exposed to the vices seen in homes of intemperance"), *in* ONE STEP OVER THE LINE: TOWARD A HISTORY OF WOMEN IN THE NORTH AMERICAN WESTS 191, 191 (Elizabeth Jameson & Sheila McManus eds., 2008).

15. *See* Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 141–42 (2013) (tracing the increase in adoptions of Indian children by non-Indian families to the simultaneous "postwar nuclear family ideal" and "liberalizing racial ideologies" of the 1960s).

16. *See* 25 U.S.C. § 1901(4) (declaring in its statement of congressional findings that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children").

used to hide neo-colonial goals for the American Indian family. Indian children are human objects who need to be saved, or rescued, from their tribal communities and families.

After all, as this Article explores, colonialism in the United States was never a project that the government conducted on its own.[17] Moving beyond arguments over whether strict scrutiny or rational basis should define ICWA in an equal protection challenge, this Article encourages a new framework altogether: equity. Here, equity does not mean an equitable remedy or utilizing a court of equity.[18] Rather, equity means "justice according to natural law or right."[19] There is a great deal of justice to be had in preserving tribal sovereignty and Indian families and in continuing to protect them from colonial intrusions into their families.

Throughout the 1970s, Congress heard testimony from Indian Tribes, Indian parents, and advocates alike on the issue of Indian child removal.[20] A common thread within that testimony was "equal justice."[21] ICWA represents the pursuit of equal justice. It was not a racial remedy or panacea. Amidst a history of Indian removal policies,[22] ICWA has been a vehicle for Tribes securing their futures as they have experienced population growth during the last five decades. ICWA's opponents attack those tribal futures using a legal tradition that has increasingly perverted the concept of equality as defined by the equal protection doctrine. As such, this Article challenges the notion that the

17. *See infra* Part I.A (discussing the colonial history of American Indian child removal).

18. *See generally* Owen W. Gallogy, *Equity's Constitutional Source*, 132 YALE L.J. 1213 (2023) (discussing the constitutional authority for equity).

19. *See, e.g.*, *Equity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/equity [https://perma.cc/UA5P-FP9T] (defining equity as "justice in accordance with natural law").

20. *See generally Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearing Before the Subcomm. on Indian Affs. of the S. Comm. on Interior and Insular Affs.*, 93d Cong. (1974) [hereinafter *1974 Hearing*].

21. *See, e.g.*, *id.* at 162 (statement of Victoria Gokee, Director, American Indian Child Placement and Development Program) ("[W]e are realizing that the Constitution was made not only for you, but it was made for us, too. . . . We are demanding equal justice. This is something that the Indians have never known in this country.").

22. *See infra* Part I.A. (explaining the federal government's aggressive efforts to eliminate American Indians and their culture).

equal protection doctrine's form of equality is the appropriate framework for an ICWA challenge and proposes a reconsideration of ICWA as an anti-colonial equity statute as it was created and executed through American legal history and tradition.

Once aspirational and a tool of progress during the Civil Rights Movement, equality as defined by the equal protection doctrine has reached its *Empire Strikes Back* era. This era champions an individual rights approach that centers the right to compete as opposed to equality for groups.[23] Claiming minority status and perceived wrongs,[24] those who have always held dominant positions within American society are fighting to dismantle group protections. As such, it is imperative scholars continue to look outside of the box as federal Indian law has always required given the unique status of American Indian Tribes. Therefore, this Article argues a new way forward for ICWA: anti-colonial equity.

Here, I use caution with my language. Equality is a much broader concept than the judicial delineation of the Fourteenth Amendment's Equal Protection Clause. Indeed, self-determination itself is a form of equality.[25] ICWA's mandate is—as it has

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23. Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 518–25 (2019) (arguing that the Supreme Court's equal protection jurisprudence "coheres around a stated commitment to protect every person's right to compete for public goods . . . irrespective of their race," a conclusion reached by looking to the Court's holdings on racial classifications in government contracting and admission to educational institutions).

24. *E.g.*, Brief for Individual Petitioners at 9, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (No. 21-376) ("Although placement with the Brackeens would have kept A.L.M. with the only parents he knew—and close to his biological parents and cousins, who also lived in Texas . . . —the state court concluded that ICWA required denial of the Brackeens' adoption petition."); *see also id.* at 10–11 ("Child P. had 'twenty minutes to say goodbye' to the Cliffords, and Child P. 'cr[ied] uncontrollably' the entire time. . . . Minnesota officials instructed R.B. 'not to allow Child P. to contact' the Cliffords."); *id.* at 11 ("The Tribe nevertheless intervened in Baby O.'s custody proceedings to block the Librettis' adoption, asserting that it had unilaterally enrolled Baby O. as a member of the Tribe. The Tribe then identified 'more than forty' potential Indian-family placements, attempting to take Baby O. from the Librettis and move her to a State she had never visited.").

25. *See* U.N. Charter art. 1, ¶ 2 ("The Purposes of the United Nations are . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."); *see also* Jane Wright, *Minority Groups, Autonomy, and Self-Determination*, 19 OXFORD J. LEGAL

always been—a vision of equality for American Indian Tribes and families. Realistically, my use of "equity" instead of "equality" is to distinguish what ICWA is meant to do with what the equal protection doctrine does because ICWA falls within a true equality paradigm.[26] Thus, this Article does not rebuke the concept of equality. Rather, this Article rebukes the application of the equal protection doctrine as it has been applied since Justice Powell's infamous opinion in *Regents of the University of California v. Bakke*[27] decried the likelihood of white Americans, the dominant group, becoming the minority group in America if the Court did not course correct American jurisprudence's understanding of equality.[28] This course correction has created a marketplace of rights in family regulation that inherently leads to less equality.

Various examples throughout history, including segregation and vagrancy laws, demonstrate the American legal system's problem with conceptualizing the vision of equality that Abraham Lincoln's Radical Republicans envisioned with the ratification of the Fourteenth Amendment in 1865 that included *protecting* citizens from the state[29]—even as Congress sought to exclude American Indians from the broader protections of citizenship guaranteed within the Fourteenth Amendment.[30] As this Article

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STUD. 605, 618 (1999) (arguing for positive measures in favor of the "minority group" to "ensure a level playing field" and respect the "equality of peoples").

26. *See, e.g.*, Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 328 (1999) (arguing that democratic equality offers freedoms and affords people the ability to exercise "responsible agency").

27. 438 U.S. 265 (1978).

28. For a full discussion of *Bakke* and Justice Powell's fears therein, see *infra* Part III.B.1. *See also* Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 334, 363 (2013) ("Strict scrutiny lumps policies of exclusion with polices of inclusion, suggesting that they are difficult to distinguish. This permits detractors to conflate laws [stating a preference for Black applicants in educational admissions or hiring] with laws [segregating public facilities and transportation, such as by requiring Black passengers to sit at the back of trains and buses]. We run the risk of inviting this kind of tactic—permitting others to align racism with affirmative action—when we rationalize racism.").

29. Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y.L.F. 385, 427 (1966) (explaining that the Fourteenth Amendment was originally intended to grant Congress the power to ensure equal protection of life, liberty, and property but, after Republican opposition, was redrafted to be a "limitation on state action").

30. *See* Berger, *Birthright Citizenship*, *supra* note 10.

will discuss, equality has sometimes meant assimilation and attempts at cultural eradication.[31] As America has struggled with the project of equality, I use equity here to uncouple ICWA from this problem with the Court's application and understanding of equality via the equal protection doctrine.

As such, ICWA must be understood, utilized, and applied as an anti-colonial equity statute. Here, anti-colonial applies to more than just what the federal government has done and currently does. For colonialism to work, it required a great deal of settler complicity. Although colonialism is usually synonymous with the federal government, state actors and individual actors also carried out and benefitted from the colonial project.[32] After all, tribal sovereignty, the Indian family, and Indian children need protection from state and individual actors who would seek to remove Indian children and continue placing them outside of their communities at disproportionate rates.[33] Anti-colonial equity is a check against the power of the state and of individuals that American history books may have forgotten—but left an

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31. Bethany Berger, Williams v. Lee *and the Debate Over Indian Equality*, 109 MICH. L. REV. 1463, 1480 (2011) [hereinafter Berger, Williams v. Lee] ("Over the course of the 1950s, the American press continued to report termination decisions as historic measures freeing the Indians, and their opponents as advocating 'preservation of basket-weaving in the face of pauperism.' Indian people, however, were ever more unified in their resistance to such measures, seeing the measures not as paths to equality but as dictatorial attempts to acquire their property and forcibly assimilate them." (citations omitted)).

32. *See, e.g.*, Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 886–87 (2017). Professor Singel details the personal account of her own family's history, including the story of how members of her mother's church community colluded to remove her infant sister from her mother despite any evidence of abuse, neglect, or inability to care for the child. When her mother tried to seek her child's return, these individuals worked to convince her that her child would be better off in an adoptive placement. ICWA's legislative history, and cases outlined in Parts I.A and I.B of this Article, demonstrate that this type of collusion between individuals, and sometimes even state agencies, was par for the course.

33. *Disproportionality in Child Welfare*, NAT'L INDIAN CHILD WELFARE ASS'N (Oct. 2021), https://www.nicwa.org/wp-content/uploads/2021/12/NICWA_11_2021-Disproportionality-Fact-Sheet.pdf [https://perma.cc/BYJ2-86DV] (finding that American Indian children are overrepresented nationwide in foster care at a rate 2.66 times that of their proportion in the general population, a rate that has increased from 2.01 in 2010). Some states have far greater disparities than others: in South Dakota, for example, less than 14% of children are American Indian, but 62% of children in foster care are American Indian. *Id.*

impact so devastating that Tribal Nations are still recovering their missing generations of children.

An anti-colonial equity statute's viability does not turn upon a fickle concept of equal protection that may be co-opted by those who simply speak the language of the state and look the part of the "right kind of family." The language of respectability, and frankly whiteness, has long been used to divest Tribes of their children and tear American Indian families apart. As sovereigns, Indian Tribes have a natural right to maintain their membership.[34] Justice, not equality, requires that years of predatory assimilative practices coupled with modern family regulation schemes precipitate protections for their member children. This comports more with the theme of equity than one of equality.

Traditional scholarship in this area has focused on the racial-versus-political distinction found in *Morton v. Mancari*.[35] However, as this Article will explore, modern legal perceptions and successive attacks on ICWA are eroding that distinction—in a very purposeful way—to demonstrate why Indians should not have so-called special rights. As the Supreme Court correctly determined in *Brackeen*, federal Indian law is different than other types of jurisprudence and laws, and perhaps by fluke, the framers built an anti-colonial principle into the U.S. Constitution when clarifying that Congress alone would hold authority to regulate Indian Tribes.[36] Once supremely one-sided in many ways, Congress's authority has morphed into more of a tenuous partnership between the federal government and individual Tribes since the mid-1970s.[37] This Article taps into this history and

34. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978) (citing Roff v. Burney, 168 U.S. 218 (1897)).

35. 417 U.S. 535, 553 n.24 (1974) ("[T]he preference [for employing American Indians in the Bureau of Indian Affairs] is political rather than racial in nature.").

36. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.").

37. *See* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5302(b) ("The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is

body of scholarship with the claim that although race and political status are still important to broader Indian law conversations, the distinction is quickly eroding in the twenty-first century. This is likely truer before a Supreme Court that is poised to strike down anything and everything it believes is a racial classification challenging its bid for a so-called post-racial society.

The challenges to ICWA should be seen as a fight between equality and equity in which the political is equity. ICWA is about justice for Indian Tribes and their members—both those who are parents and those who are children. Listening to advocates, activists, tribal members, and legal professionals, Congress exercised its duty of protection and devised a plan to ensure that Indian children would not be treated the same as other children.[38] This is not because Congress thought Indian children were better than other groups of children or deserved more protection, but because Congress understood that Indian children are a distinct group with no true peer group in the United States. As such, challenges brought against ICWA should be removed from the equal protection paradigm all together.

This Article revisits a prior work in which I explain this distinction and a way to bridge this gap[39] and joins a growing body of literature that suggests perhaps the racial-versus-political status distinction is not as useful as it once was. While previous literature has focused on assessing the value and place of equal protection claims more broadly, this Article engages that literature in two ways. First, this Article does not call for relitigating *Mancari* or the political status that American Indian Tribes hold. Rather, this Article describes the fallacy of the equal protection doctrine and provides an equity framework for contemplating what political status should mean in its fully realized form. Second, this Article contemplates the logical, moral, and legal fallacy in allowing equal protection claims to move forward and circumvent congressional prerogatives to remedy the destruction of American Indian families and Tribes, tribal self-

committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.").

38. *See generally 1974 Hearing*, *supra* note 20 (detailing an important hearing and related statements).

39. Neoshia R. Roemer, *Equal Protection for the Beneficiaries (Parents) of Colonialism*, 71 KAN. L. REV. 595 (2023) [hereinafter Roemer, *Equal Protection*].

determination, and the right to family integrity that American Indians hold. As a general matter, the concept of equal protection contradicts and serves as a modern affront to reproductive justice for American Indians.[40]

In Part I, this Article more fully articulates how ICWA is an anti-colonial equity statute. Part I.A begins with a discussion of why ICWA is necessary, including a brief history of the Act and its modern necessity. Although this Article does not provide a thorough history, the focus on the historical component here is in the colonial policies and politics that made ICWA necessary. In Part I.B, this Article defines what ICWA does both through the anti-colonial and the equitable lens. In Part I.C, this Article describes ICWA during the *Brackeen* years before eventually describing some of the more relevant claims made in *Brackeen* and its outcome.

Part II focuses on the equal protection challenges to ICWA. Part II.A begins with a discussion on the equal protection doctrine and Indian law. In Part II.B, this Article discusses specific arguments about race and political status and how to move beyond these arguments in the context of equal protection. In Part III, this Article focuses on bridging the gap between equality and equity. Here, this Article imagines how scholars can think beyond the confines and limitations of the equal protection doctrine to bridge the gap between race and political status. Finally, this Article concludes with a brief discussion on looking ahead to the next equal protection challenge to ICWA.

I. DEFINING ICWA AS ANTI-COLONIAL EQUITY

Colonialism necessitated the need for federal Indian law and policy such as ICWA.[41] Federal Indian law and policy exists against a backdrop in which the dominant group negotiated for its own power at the diminishment of the rights of Indian Tribes

40. *See generally* Neoshia R. Roemer, *The Indian Child Welfare Act as Reproductive Justice*, 103 B.U. L. REV. 55 (2023) [hereinafter Roemer, *Reproductive Justice*] (framing reproductive justice broadly as applied to American Indian families).

41. *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1706, 1715 (1993) ("The racialization of identity and the racial subordination of Blacks and Native Americans provided the ideological basis for slavery and conquest.").

and tribal members.[42] In this case, the diminishment of rights began with telling Indians they could not own their lands, proceeded with insulting language on Tribes' new subordinate role, and culminated in Indian removal policies.[43]

The unique needs of American Indian individuals to choose if, when, and how to raise a family cannot be understood outside the context of colonial history.[44] As the U.N. Declaration on the Rights of Indigenous Peoples makes clear, American Indians have both collective and individual rights.[45] In the United States, this means the intersectional needs of an individual exists alongside their membership in a Tribe.

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42. Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1825 (2022) ("To maintain this racially-casted domination, signatories to the social contract of whiteness continue to negotiate the terms of whiteness to fight the existential threats to that domination—including the struggle of Black and Indigenous peoples for their own contracting and property-holding authority.").

43. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (discussing a Tribe's right to own and alienate land); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (discussing the application of state law on Indian Tribes); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (discussing the rights Indian Tribes' have to the maintenance of their own governments as domestic dependent nations); *see also* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 683–84 (2006) ("Whatever the intent of the authors and whatever the impact of the Trilogy, another purpose the Trilogy serves is to help justify the ongoing expansion of the United States through the dispossession of Indian lands—the Trilogy as American Myth.").

44. Sarah Deer, *(En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 YALE J.L. & FEMINISM 1, 9 (2019) (describing how colonial patriarchal norms established federal Indian law using Indigenous Feminist Legal Theory); *see also* Roemer, *Reproductive Justice*, *supra* note 40, at 115 (describing the intersection of reproductive justice and federal Indian law as it exists within the realm of ICWA).

45. G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, art. 1 (Sept. 13, 2007) ("Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms."). The Declaration is not legally binding on States and does not impose any legal obligations. When the Declaration was introduced to the United Nations in 2007, the United States voted against it; four years later, in 2011, the United States announced its "support" for the Declaration. *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T OF STATE (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm [https://perma.cc/WLY3-JXHF]; *see also* Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. 1755, 1758 (2022) ("Indian tribes are collectives, after all, and tribal governments often possess interests that overlap with the interests of individual tribal members.").

Moreover, "[a]s international law has embraced reproductive rights, it has uplifted Indigenous rights."[46] From a feminist perspective, American Indian families have always had a variety of needs that coexist with their tribal membership. At times, racist ideas and policy surrounding fertility and motherhood precipitated the disruption and exploitation of American Indian families.[47] Family regulation interventions have long harmed American Indian families as they imposed colonial standards onto families.[48] In these interventions, American Indian parents were characterized as "incapable of adequate parenting."[49] Undoubtedly, these interventions harmed American Indian women and children the most.[50] Specifically, an Indian mother's Indianness, defined as an unwillingness to leave her tribal ways behind, was a strike against her.[51]

The erasure of American Indians from public conversation can make arguments like the ones the *Brackeen* plaintiffs presented seem wholly reasonable to many when completely devoid of context. This is especially true given the optics of the "good parent" paradigm that contemplates a neutrality that does not

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46. Lauren van Schilfgaarde et al., *Tribal Nations and Abortion Access*, 46 HARV. J.L. & GENDER 1, 72 (2023).

47. *See id.* at 5 ("Native reproductive care has long been the target of assimilationist and even genocidal policies, and has also been greatly underfunded and neglected, resulting in a population with devastating rates of violence and maternal mortality, and with extremely limited access to abortion care.").

48. *See* Joanna Woolman & Sarah Deer, *Protecting Native Mothers and Their Children: A Feminist Lawyering Approach*, 40 WM. MITCHELL L. REV. 943, 947 (2014) (arguing that historical trauma, itself a result of "the forced application of patriarchal colonial systems," has culminated in the harmful application of American child protective services to Native women and their families).

49. Van Schilfgaarde et al., *supra* note 46, at 11 (citing the 1928 Meriam Report, which condemned both the federal government's role in perpetuating failures in reproductive care and the Native mothers who suffered from those failures).

50. *See* Woolman & Deer, *supra* note 48, at 957 ("[E]ven after thirty-five years of ICWA, Native children are still removed from their homes at rates far exceeding that of other groups.").

51. *See id.* at 955 (demonstrating that child welfare workers classified traditional kinship practices, like sibling care, as neglect); Bethany R. Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 44–45 (1997) ("If the mother had not renounced tribal ways, her status would often stigmatize the child and was viewed as an impediment to the child's interest in assimilation.").

exist outside of class-based, racialized standards.[52] These arguments also allow the denial that "[m]ost families are harmed to varying degrees by a child welfare system that relies on market-supplied services for the socially privileged and terror for the socially disadvantaged."[53]

The "good parent" paradigm creates a market for both family regulation and Indian adoption, making the nearly unquestioned alignment of the best interests of Indian children with white families seem logical. It also denies that American Indian families matter and that they also have strong relationships with their children, even if they look different than the mainstream nuclear model.[54] Yet, it was this very idea that Congress intended to dismantle when enacting ICWA. Indeed, this valuation of culture and certain types of families may even exist in the representation of American Indian children's interests in child custody proceedings.[55]

Poverty remains an issue for American Indian families. Those living on reservation have a poverty rate of 36%, which is nearly four times higher than the national family poverty rate.[56] Neglect is often attached to issues stemming from poverty such as houselessness, hunger, and lack of resources to remedy communal conditions. Indeed, somewhere around 78% of all modern family regulation cases are dispositions of neglect.[57] For

52. *See* KELLEY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES 66 (2023) ("Like everyone, reporting professionals [such as employees of child protection agencies] develop snap judgments about people based on race, ethnicity, class, and other characteristics; any notion of 'neutral eyes' is impossible.").

53. DOROTHY ROBERTS, TORN APART 84 (2022).

54. *See* Woolman & Deer, *supra* note 48 at 951 (arguing that since the arrival of missionaries in the modern-day United States, American Indian families were encouraged to adopt the nuclear family model, which introduced "a form of institutionalized sexism that had no predecessor in many traditional cultures").

55. *See* Matthew L.M. Fletcher & Kathryn E. Fort, *Indian Children and Their Guardians Ad Litem*, 93 B.U. L. REV. ANNEX 61, 62–63 (2013) (discussing anti-American Indian bias amongst guardians ad litem in ICWA cases).

56. *American Indians and Alaska Natives – By the Numbers*, ADMIN. FOR CHILD. & FAMS. (Mar. 19, 2014), https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-numbers [https://perma.cc/54QJ-2PFB].

57. *See* Brief of Casey Family Programs & Twenty-Six Other Child Welfare & Adoption Organizations as Amici Curiae in Support of Federal and Tribal Defendants at 14, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (No. 21-376)

American Indian children, those statistics are even more skewed as 89.3% of family regulation system cases involving American Indian children were dispositions of neglect while only 15.6% of dispositions involved physical abuse.[58] That is, for American Indian children, instances of charged neglect are higher than average while instances of physical abuse are lower than average. While neglect can be dangerous to child well-being, neglect cases usually offer the best set of circumstances for in-home interventions as opposed to removal.[59] Removing children from their homes is "inherently traumatic."[60]

Perhaps trauma is the best way to understand the relationship between colonial policy and American Indian families. As such, this Article first turns toward looking at the federal legal history that necessitates ICWA and the challenges brought in *Brackeen* to develop the anti-colonial equity principle. Part I.A describes the context through which ICWA became a necessary law, focusing heavily on the history of child removal policies from the mid-nineteenth through twentieth centuries. In Part I.B, this Article defines what ICWA does both through the anti-colonial and the equitable lens. In Part I.C, this Article describes ICWA during the *Brackeen* years before eventually describing

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[hereinafter Brief of Casey Family Programs] ("Careful attention to ICWA's requirements matters because American Indian and Alaska Native children are more likely than other children to be involved in the child welfare system due to neglect, rather than abuse—a situation that is particularly susceptible to prevention and mitigation with the proper provision of services."); *see also* Att'y Gen.'s Advisory Comm. on Am. Indian & Alaska Native Child. Exposed to Violence, *Ending Violence so Children Can Thrive*, DEP'T OF JUST. 87 (Nov. 2014) [hereinafter *Ending Violence so Children Can Thrive*], https://www.justice.gov/d9/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf [https://perma.cc/4JLB-KVZV] (citing statistics on types of family regulation cases).

58. *See Ending Violence so Children Can Thrive*, *supra* note 57, at 87.

59. *Id.* at 88.

60. Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 531 (2019) (explaining the results of a study that found that family separation creates feelings of "grief and ambiguity" and that the moment of removal is a "significant turning point . . . that many children will relive over and over again in their minds"); *see also* 25 U.S.C. § 1912(e) ("No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.").

some of the more relevant claims made in *Brackeen* and its outcome.

A. THE NECESSITY OF THE INDIAN CHILD WELFARE ACT

A long history of colonial practices targeting Indian families led Congress to enact ICWA in 1978.[61] To understand why ICWA exists and what its mechanisms do, it is first important to understand this colonial history situated amongst the government-to-government relationship the United States has with federally recognized Indian Tribes.[62]

Early in the history of the American republic, politicians were concerned with what to do with what they dubbed the "Indian problem." The "Indian problem" is best defined as the notion that the existence of tribal governments and insular tribal communities challenged the very progress that the federal government intended to achieve through various policies including Manifest Destiny.[63] Opining on how to solve the "Indian problem" through assimilation, one nineteenth century commentator noted that "[t]he greatest danger hanging over the Indian race arises from the fact that, with their large and valuable territorial possessions which are lying waste, they stand in the way of what is commonly called 'the development of the country.'"[64] The federal government, often with the help of state governments and private individuals, first sought to deal with the "Indian

61. Brief for Tribal Defendants at 6, *Brackeen*, 143 S. Ct. (No. 21-376) ("From the start, Indian children have been central to the United States' relationship with Tribes—sometimes to their benefit, and sometimes not.").

62. *Brackeen*, 143 S. Ct. at 1641 (Gorsuch, J., concurring) ("ICWA did not emerge in a vacuum.").

63. *See, e.g.*, Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 161 (tracing the history of the "Indian problem" to the idea of American Indians as "an obstacle to Manifest Destiny"). *See generally* Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 167 (2008) [hereinafter Fletcher, *Original Understanding*] (contemplating the historical "Indian Problem" as one in which the federal government was tasked with dealing with Indian Tribes as political entities).

64. Carl Schurz, *Present Aspects of the Indian Problem*, 133 N. AM. REV. 1, 23 (1881).

problem" through land grabs and overt war.[65] When that failed, the strategy turned to diplomacy and Indian children.[66]

As early as the framing of the Constitution, America's political figures contemplated how they would engage American Indian populations.[67] At the framing of the Constitution, how the new republic would engage Indian Affairs was front and center within the debates over federalism.[68] The need for uniform, successful Indian Affairs policy led to the creation of the strong federal government found in the U.S. Constitution.[69] The Constitution was ground zero for the colonial project.[70]

Since the 1830s, the Supreme Court has interpreted the Indian Commerce Clause[71] to create an Article I right for Congress alone to regulate Indian Tribes.[72] Tribal sovereignty is limited

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65. *See, e.g.*, Lyman Abbott, *Our Indian Problem*, 167 N. AM. REV. 719, 727 (1898) (calling for an end to the federal trust relationship).

66. *See* Karen M. Tani, *States' Rights, Welfare Rights, and the "Indian Problem": Negotiating Citizenship and Sovereignty, 1935-1954*, 33 LAW & HIST. REV. 1, 13 (2015) (describing the role of Indian children in the administration of federal Indian affairs and the crafting of the "Indian Problem"); *see also* Addie C. Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention*, 11 COLUM. J. RACE & L. 811, 831 (2021) ("This theme of solving the problem posed by the existence of an entire group of people by controlling and remaking their children also spurred the high rates of adoption and foster care placement experienced by Native children from the 1950s through the 1970s and beyond.").

67. *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1011 (2014) (discussing early colonial efforts to govern Indian affairs, particularly related to land ownership).

68. *See id.* (describing conflicting attempts to reconcile the treaties individual colonies made with tribes and the centralization of the federal government).

69. *See id.* (describing how the failure of weak Indian policy in the Articles of Confederation led to debates about the role of the federal government and eventually set the foundation for expansionist policy).

70. Maggie Blackhawk, *The Supreme Court, 2022 Term—Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 23 (2023) [hereinafter Blackhawk, *Constitution of American Colonialism*].

71. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes"). Congress's authority to enact ICWA under this power was challenged in *Brackeen*. *See* Haaland v. Brackeen, 143 S. Ct. 1609 (2023).

72. *See* United States v. Kagama, 118 U.S. 375 (1886) (establishing the basis for the modern plenary authority doctrine); *see also* Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) ("In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in

only by acts of Congress—which is a fact itself loaded with underlying colonial context.[73]

Early in the American republic, the federal government understood tribal sovereignty to mean that it needed to make treaties with Tribes setting the stage for a body of American jurisprudence that would sometimes protect the rights of Tribes and sometimes further a colonial project.[74] Generally, treaties between Indian Tribes and the federal government included provisions about land boundaries in exchange for a sum of money, as well as provisions for the maintenance of Indian lands and Tribes.[75] Today, many of these treaties still set the limits of

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substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.").

73. *See, e.g.*, FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 112 (2009) ("Federal authority in Indian affairs derives from treaty making and the Indian Commerce Clause. Yet it is important to remember that this federal authority was understood as *limited* to regulate interaction *with* tribes through treaties and commerce but not to regulate the trade and self-governance *of* tribes."); *see also* Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 969 (2022) ("Indian tribes take initiative, make their own choices, and impact the world in positive ways; they are laboratories of democracy.").

74. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) ("It follows that, as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment, which, as we have said, had for its sole object to control the powers conferred by the constitution on the national government."); *see also* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 182 (2002) ("[N]ot only the plenary power doctrine, but also the idea that federal law is superior to and can displace tribal law, are grounded on the late-nineteenth century doctrines of racial superiority that fueled the colonialism of that day.").

75. *See, e.g.*, Treaty Between the United States of America and the Navajo Tribe of Indians, Navajo-U.S., art. VI, June 1, 1868, 15 Stat. 667, 669 (providing for compulsory education of Indian children between the ages of six and sixteen); Treaty Between the United States of America and Different Tribes of Sioux Indians, Sioux-U.S., art. X, Apr. 29, 1868, 15 Stat. 635, 638–39 (providing that the federal government would supply clothing and food rations for a period of thirty years in lieu of monetary payments for lands). Although these are two examples, the Department of Interior has acknowledged that the U.S. Government entered into 171 treaties with Indian Tribes between 1819 and 1868 that included provisions on Indian education specifically. 2 Bryan Newland, *Federal Indian Boarding School Initiative Investigative Report*, U.S. DEP'T OF THE INTERIOR 45 (July 2024) [hereinafter *Boarding School Report Volume II*], https://www.bia.gov/sites/default/files/media_document/doi_federal_indian_boarding_

federal litigation involving Indian Tribes, including *Brackeen*.[76] However, not all federally recognized Indian Tribes have a treaty with the federal government because treaty making as a matter of Indian Affairs ended with the nineteenth century as Indian policy goals changed.[77]

As treaty making with Indian Tribes ended, the colonial project intensified through forced assimilation policies. Modern Indian law scholars have articulated assimilation on multiple fronts, targeting both lands and people.[78] Indeed, land and people were intricately linked. From the mid-nineteenth century to the mid-twentieth century, policy makers focused on how to assimilate Indians and discharge their treaty obligations where possible—finding assimilative boarding schools could make that a reality.[79] In doing so, they conducted the federal government's trust obligation by carrying out "its relationship with Tribes through children."[80] Architects of this project believed that they could solve the Indian problem within one generation.[81]

In the assimilation project, the goal was not to kill Indians and physically remove them from society. Instead, the goal was to destabilize tribal communities, eventually demolishing tribal governments and citizenship.[82] In making arguments to support

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school_initiative_investigative_report_vii_final_508_compliant.pdf [https://perma.cc/Z8Z2-3569].

76. *See* 143 S. Ct. at 1628 (declining to limit Congress's power to legislate on Indian affairs to pre-existing treaties).

77. *Id.*

78. *See* Rolnick, *supra* note 66, at 827–28 (describing how Natives were assimilated and granted citizenship in exchange for working on the land).

79. *See generally* 1 Bryan Newland, *Federal Indian Boarding School Initiative Investigative Report*, U.S. DEP'T OF THE INTERIOR 32 (May 2022) [hereinafter *Boarding School Report Volume I*], https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [https://perma.cc/TM8N-S58J] ("Indian treaties and successive statutes, including during the Federal Indian boarding school era, originate with the Constitution and involve U.S.-Indian relations; U.S.-Native Hawaiian relations; and political relationships unique to Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community." (internal citations omitted)).

80. Brief for Tribal Defendants, *supra* note 61, at 8.

81. *Brackeen*, 143 S. Ct. at 1644 (describing government officials' commentary on solving the Indian problem in one generation).

82. *See Boarding School Report Volume I*, *supra* note 79, at 32–33 ("Treaties, although almost always signed under duress, were the window dressing whereby we expropriated the Indian's land and pushed him back across the continent.").

assimilationist policies, policymakers relied upon a variety of stereotypes from "lazy Indians" to "uncivilized" Indians to support their policies.[83] Thus, this project was as focused on tribal governments as it was tribal members. On the international level, this would become recognized as cultural genocide.[84]

Ironically enough, one of the first targeted assimilation projects would happen through the administration of a treaty duty: the provision of Indian education. From the late nineteenth century until the mid-twentieth century, government officials working for the newly established Department of the Interior oversaw the boarding school project.[85] Early on, Indian Affairs officials described these boarding schools as centers of learning, where Indian children would learn important skills that they could bring home like reading and writing.[86] However, it became clear that "[the] federal government had darker designs" to forcibly disconnect Indian children from their culture.[87] Instead of educating Indian children, boarding schools became centers of terror

83. Robyn Taylor-Neu et al., *(De)Constructing the "Lazy Indian": An Historical Analysis of Welfare Reform in Canada*, 7 ABORIGINAL POL'Y STUD. 65, 70 (2019) (describing how early republicans in the British colonies constructed Indians as lazy and how these ideas would later tie into views on social policy involving Indians in Canada); Jacobs, *supra* note 14, at 139–40 (discussing the role of anti-Indian prejudice and stereotypes in developing assimilationist policies in the United States).

84. *See* Brief of Amicus Curiae Senator James Abourezk in Support of Federal & Tribal Parties at 15, *Brackeen*, 143 S. Ct. (No. 21-376) [hereinafter Senator Abourezk Brief] ("A century of abusive removal policies, and the arbitrary placement of Indian children in foster or adoptive care and boarding schools amounted to a systematic attempt at cultural genocide."); *see also* G.A. Res. 61/295, *supra* note 45, at 4 (declaring that forced removal of children is an act of violence).

85. *See Boarding School Report Volume I*, *supra* note 79, at 28. Initially, the department supervising Indian affairs, including schools, was housed within the War Department. *Id.* at 26.

86. *Id.* at 28 ("School facilities should be enlarged, the children divorced from [nomadic] camp life, and with a plain English education instructed well in farm or mechanical labor.").

87. *Brackeen*, 143 S. Ct. at 1642 (Gorsuch, J., concurring); *see also Boarding School Report Volume I*, *supra* note 79, at 60 ("[T]he Commissioner of Indian Affairs described that to 'educate the Indian is to prepare him for the abolishment of tribal relations, to take his land in severalty, and in the sweat of his brow and by the toil of his hands to carve out, as his white brother has done, a home for himself and family.'").

and forced labor.[88] Assimilation robbed Indian parents of some of the most important childrearing decisions they could make, as well as the lives of their children.[89]

In the early twentieth century, as state child welfare agencies first emerged,[90] American Indian families quickly became the target for those agencies.[91] The federal government wanted state agencies to take over the care of Indian children.[92] From the federal government's position, the cost of administering boarding schools had become incredibly expensive and they needed a better way to assimilate Indian children.[93]

Amidst post-World War II America, lawmakers began to see that the boarding schools were not sufficiently assimilating Indian children. Primarily, this was because Indian children who attended the schools eventually became adults who went home to their Indian communities.[94] By this time, America was in the

88. *See Boarding School Report Volume I*, *supra* note 79, at 8 ("The Federal Indian boarding school system predominately included manual labor of American Indian, Alaska Native, and Native Hawaiian children as part of school curricula, including but not limited to the following: livestock and poultry raising; dairying; western agriculture production; fertilizing; lumbering; brick-making; cooking; garment-making; irrigation system development; and working on the railroad system."); *see also id.* at 59 ("The labor of [Indian] children as carried on in Indian boarding schools would, it is believed, constitute a violation of child labor laws in most states.").

89. *See id.* at 9 ("Based on the Federal Indian Boarding School Initiative investigation's initial analysis, approximately 19 Federal Indian boarding schools accounted for over 500 American Indian, Alaska Native, and Native Hawaiian child deaths. As the investigation continues, the Department expects the number of recorded deaths to increase.").

90. *See* CATHERINE E. RYMPH, RAISING GOVERNMENT CHILDREN: A HISTORY OF FOSTER CARE AND THE AMERICAN WELFARE STATE 53–54 (2017) (describing the emergence of state child protection agencies as a result of New Deal era legislation for public welfare); *see also* Neoshia R. Roemer, *Finding Harmony or Swimming in the Void: The Unavoidable Conflict Between the Interstate Compact on the Placement of Children and the Indian Child Welfare Act*, 94 N.D. L. REV. 149, 164 (2019) ("Perhaps one of the most important aspects of a placement decision remains the funding and determining who will provide the funding for a child placement.").

91. *See* Brief for Tribal Defendants, *supra* note 61, at 8–9 (describing how states reluctantly took responsibility for Indian child welfare and placed Native children with non-Native families).

92. MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 6 (2014).

93. *Id.*

94. *Id.*

middle of a baby boom where adoption was emerging as an industry.[95]

The America quickly emerging in the post-war era rapidly regulated families both socially and legally as having children became a status symbol.[96] Above all, the new America prioritized the nuclear family. To the detriment of Indian families who often relied on extended family networks, no other family was proper—especially not one where an unwed mother birthed and chose to raise children born out of wedlock.[97]

In the 1950s, Congress enacted, and the Bureau of Indian Affairs (BIA) implemented, the Indian Adoption Project (IAP).[98] This project "looked to the ultimate private sector to take over the expense of raising Indian children and assimilating them once and for all" through "a caring program that would rescue supposedly forgotten Indian children and find them permanent homes."[99] One goal of the IAP was to streamline the adoption of Indian children, making it faster and easier for non-Indian families to adopt Indian children through the application of state jurisdiction.[100] State law facilitated Indian adoptions "[b]ecause placing Indian children with wealthy (usually non-Indian) families was cheaper, and [satisfied] escalating non-Indian demand for Indian adoptees."[101] To allow quick and easy adoptions,

95. *See* GABRIELLE GLASER, AMERICAN BABY: A MOTHER, A CHILD, AND THE SHADOW HISTORY OF ADOPTION 56 (2021) ("After the war ended, ads beamed into American living rooms sent the message that domestic happiness and security were built on the rock of the modern, nuclear family, anchored by a pretty, conventional mother.").

96. *See* Gabrielle Glaser, *The Brutal Past and Uncertain Future of Native Adoptions*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/2023/05/16/nyregion/indian-child-welfare-act-supreme-court.html [https://perma.cc/U4HP-9D9U] (describing a program in New York designed to facilitate white families adopting Native children and how the program led to the passage of the Indian Child Welfare Act); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259 n.46 (2022) (citing a CDC report describing the need for a "domestic supply of infants").

97. *See* JACOBS, *supra* note 92, at 24 ("Indian communities, however, saw little problem with unwed motherhood and readily accepted children born out of wedlock into extended kin networks.").

98. *See id.* at 6.

99. *Id.* at 6–7.

100. *Id.* at 6–7, 23.

101. Brief for Tribal Defendants, *supra* note 61, at 9.

Tribes were divested of jurisdiction over their member children.[102]

Because many Indian communities relied on extended family networks, unwed Indian mothers did not traditionally face the same pressures as white unwed mothers to place their children for adoption.[103] However, federal officials wanted to find a way to convince Indian mothers to voluntarily part with their children "as a broadening of opportunity and choice."[104] Because government officials considered the proper, assimilated family as the nuclear family, they disregarded the child rearing practices of tribal communities.[105] The IAP purposely targeted unwed Indian mothers,[106] essentially targeting a problem that government officials created out of thin air when they deemed Indian families unfit and "promoted intervention in the Indian family and child removal as the means to resolve the chronic 'Indian problem.'"[107]

In solving the "Indian problem" of the mid-twentieth century, some state social workers placed a great deal of pressure on unwed Indian mothers to place their infants for adoption based on stereotypes that they were all unwed, and thus, unfit to parent.[108] Because the IAP relied upon a network of federal, state, and religious institution support, this pressure also came from other fronts.[109] Private individuals, agencies, and religious institutions also participated in the extraction of Indian children

102. *See id.* ("States changed their laws to facilitate the removal of Indian children to non-Indian homes.").

103. JACOBS, *supra* note 92, at 24.

104. *Id.* at 25; *see also* Kimala Price, *What is Reproductive Justice?: How Women of Color Activists Are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS 42, 56 (2010) (describing the reproductive justice movement as a response to choice feminism which emphasized individual choice over recognizing and engaging larger intersectional and community needs).

105. JACOBS, *supra* note 92, at 26.

106. *Id.* at 28.

107. *Id.* at 48.

108. *Id.* at 76.

109. *See, e.g.*, Haaland v. Brackeen, 143 S. Ct. 1609, 1644 (2023) (Gorsuch, J., concurring) ("This restarted a now-familiar nightmare for Indian families. The same assimilationist rhetoric previously invoked by the federal government persisted, voiced this time by state and county officials." (internal quotation marks omitted)).

for adoption much like they had in the boarding school project.[110] Today, countless accounts exist of Indian adoptees describing their experiences with boarding schools, adoption, and the painful repatriation process.[111]

By the 1970s, several societal factors had converged to demonstrate the need for legislative change. One attorney who appears in ICWA's legislative history quite frequently, Bertram Hirsch, described these factors in the lead up to ICWA in a recent *New York Times* article:

> White social workers were using their standards to judge how a child should live . . . . 'Were there conditions of poverty on Indian reservations? Yes—we're talking about poor parts of the United States. But was there abuse? Almost never. But because the social workers weren't used to seeing extended families in the same household, or seeing a little kid run around barefoot, they'd categorically declare 'neglect.'[112]

Mr. Hirsch highlighted an issue still prevalent today in which poverty and neglect are often conflated with each other because of snap judgments on child rearing practices. Through these judgments on child rearing practices, colonialism has always posed an external threat to Native motherhood.[113]

Former Senator John Abourezk was the Chair of the Senate Select Committee on Indian Affairs in the 1970s.[114] In his amicus brief before the Supreme Court in *Brackeen*, Mr. Abourezk reaffirmed his understandings of the congressional findings leading up to ICWA and noted that:

> ICWA was enacted in response to the chronic failures of child welfare agencies across the country to protect the wellbeing of Indian children. A century of abusive removal policies, and the arbitrary placement of Indian children in foster or adoptive care and boarding schools, amounted to a systematic attempt at cultural genocide.[115]

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110. *See, e.g.*, Fletcher & Singel, *supra* note 32, at 886–88 (detailing a personal narrative of Indian child removal); *Boarding School Report Volume II*, *supra* note 75, at 47 (noting that 210 of 417 federally funded boarding schools were operated by religious organizations).

111. *See, e.g.*, SANDY WHITE HAWK, A CHILD OF THE INDIAN RACE (2022) (recounting her journey as an Indian child adoptee reconnecting with her Lakota family and culture as an adult).

112. Glaser, *supra* note 96 (quoting Bertram Hirsch).

113. *See* Woolman & Deer, *supra* note 48, at 950 (explaining how dissonance between Euro-American parenting standards and Native parenting standards led to shame and isolation).

114. Senator Abourezk Brief, *supra* note 84, at 1.

115. *Id.* at 15.

The former Senator's brief highlights the role of state agencies in removing Indian children.[116] Indian child removal was thus a broad project that extended beyond federal methods and also implicated states, localities, and private agencies.

Questions about tribal child rearing practices, raising children amongst the backdrop of poverty, and the demand to adopt American Indian children are not just historical matters.[117] These issues were at the heart of *Brackeen* itself. Contemplating how the American racial—or here, the colonial—contract utilizes the private order and private law to further the goals of white supremacy,[118] the next Section highlights ICWA as a disruptive tool of mitigation to Indian child removals meant to resist the notion that Indian parents make the wrong kind of family.

B. THE INDIAN CHILD WELFARE ACT

In the immediate lead up to ICWA's enactment, the U.S. Supreme Court heard cases involving the removal of Indian children. In 1975's *DeCoteau v. District County Court*,[119] the Court heard the case of a mother who brought a writ of habeas corpus against the State of South Dakota to stop dependency proceedings against her and seek the return of her children for lack of jurisdiction.[120] Ms. DeCouteau's story with family regulation was recorded during the 1974 hearings before Congress where she testified about deceptive practices state officials used to remove all three of her children from her over the course of several years, one at a time.[121] As with most jurisdictional cases in

116. *Id.* at 14 ("[T]he issue of Indian child removal was exacerbated by the failure of state welfare systems to 'take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian Tribe in preserving and protecting the Indian family as the wellspring of its own future.'" (internal citation omitted)).

117. *See* Malinda Seymore, *Adoption as Substitute for Abortion?*, 95 U. COLO. L. REV. 1089, 1109 (2024) ("With both transracial adoption and adoption of Native children, it seems that White prospective parents simply believe they should be able to adopt any child they wish.").

118. Sow, *supra* note 42, at 1829.

119. 420 U.S. 425 (1975).

120. *Id.* at 429.

121. *See Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Comm. on Indian and Insular Affairs*, 93d Cong. 69 (1974) (statement of Cheryl DeCoteau). I have heavily detailed Ms. DeCouteau's story in another piece as it describes the lack of due process state agents often used

Indian Country, the case largely turned upon the exterior boundaries of the reservation as determined by Congress.[122] Ultimately, the Court was unable to provide Ms. DeCouteau's relief because the Court reasoned the reservation was terminated by a treaty, and thus, the state could appropriately exercise its jurisdiction over her family.[123]

Likewise, in 1976's *Fisher v. District Court*,[124] the Court heard the case of an adoption of an Indian child. In *Fisher*, the district court certified a question to the Tribe's appellate court to determine whether the state court had jurisdiction over the adoption.[125] After the tribal appellate court determined the district court did not have jurisdiction, the state court dismissed the adoption case for lack of jurisdiction.[126] Under a theory that state courts had exclusive jurisdiction prior to the reservation's establishment in 1935 and equal protection under the state constitution, the Montana Supreme Court on appeal held that the state had jurisdiction over the adoption.[127] Therefore, the *Fisher* Court was tasked with determining whether the exercise of state court jurisdiction would interfere with tribal self-determination.[128] The Court held that because the adoption proceeding was one that arose on the Indian reservation, tribal court jurisdiction was appropriate.[129]

Undeniably, singular court cases focused on jurisdiction were not sustainable in the fight for ending Indian child removal.[130] Namely, the children at the heart of these cases had already been removed. As modern cases demonstrate, once a

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to interact with American Indian parents. *See* Roemer, *Reproductive Justice*, *supra* note 40, at 101.

122. *DeCoteau*, 420 U.S. at 427–28.

123. *Id.*

124. 424 U.S. 382 (1976).

125. *Id.* at 384.

126. *Id.*

127. *Id.* at 385. The equal protection claim here is best summarized as the notion that denying Indian plaintiffs, such as the adoptive parents in this case, access to state courts constituted impermissible race-based discrimination. Citing *Morton v. Mancari*, 417 U.S. 535 (1974), the Court rejected this argument. *Fisher*, 424 U.S. at 390–91.

128. *Fisher*, 424 U.S. at 386.

129. *Id.* at 387–88.

130. STAFF OF AM. INDIAN POL'Y REV. COMM'N., REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 87 (Comm. Print 1976) [hereinafter REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION].

child has been removed and placed for adoption, it is challenging to seek a result that allows placing the child back with their family or with another appropriate tribal placement.[131] Moreover, the cases focused on the exterior boundaries of Indian Country when the phenomenon of Indian child removal existed both within and without Indian Country.[132] Although advocates and litigators used the legal tools available, Congress saw a need to implement a national solution identifying Indian child removal as a "national crisis" that "impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children."[133]

Calls to enact ICWA came as a way for Congress to exercise its authority to regulate commerce with Indian Tribes as well as its trust responsibility.[134] In enacting ICWA, Congress acknowledged that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[135]

1. ICWA as an Anti-Colonial Statute

Congress considered the "alarmingly high percentage of Indian families" that are "broken up by the removal, often unwarranted, of their children from them *by nontribal public and private agencies* and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[136] Congress also recognized that states often

131. *See, e.g.*, *In re* Adoption of B.B., 417 P.3d 1 (Utah 2017). In this case, the biological mother had a person who was not the father attest that they were the father to consent to adoption. *Id.* at 1. After the father found out, he sought custody. *Id.* However, he was unable to immediately seek an invalidation of the adoption. *Id.*

132. *See, e.g.*, Tonya L. Brito et al., *Chronicle of a Debt Foretold:* Zablocki v. Red Hail *(1978)* (describing the story of an American Indian plaintiff who had been involved in the system as a child in a landmark Supreme Court case seeking declaration on his right to marry despite owing child support), *in* THE POVERTY LAW CANNON: EXPLORING THE MAJOR CASES 232 (Marie A. Failinger & Ezra Rosser eds., 2016).

133. REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION, *supra* note 130, at 87.

134. *Id.*

135. 25 U.S.C. § 1901(3).

136. *Id.* § 1901(4) (emphasis added).

"failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[137]

Congress's goals in enacting ICWA were substantially in line with its other obligations in federal Indian law and policy in the era of Indian self-determination. The self-determination era, which commenced with the Indian Self-Determination and Education Assistance Act of 1975,[138] focuses on reaffirming and protecting tribal sovereignty through a partnership between Tribes and the federal government to administer a variety of services related to the health, education, and welfare of Tribes.[139] On that note, ICWA ensures Tribes have the ability to protect their membership.

Because ICWA is about the government-to-government relationship, its provisions are membership based. Specifically, ICWA defines "Indian child" as someone who is (1) under the age of eighteen, (2) unmarried, and (3) either an enrolled member in a federally recognized Tribe or the biological child of an enrolled member of a federally recognized Tribe who is eligible for enrollment.[140] To apply ICWA in a given case, the child must have some attachment to a federally recognized Tribe—not a mere self-identification as Indian.[141] Further, Indian Tribes alone are the sole decisionmakers of who is eligible for enrollment in their Tribe.[142] However, that decision is generally based on an authentication from the BIA that an individual has Indian blood.[143]

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137. *Id.* § 1901(5).

138. Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5302(b).

139. *See* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 518 (2020) [hereinafter Fletcher, *Politics, Indian Law, and the Constitution*] (describing how Congress permits Tribes to compact with federal agencies to provide various services to Tribal members).

140. 25 U.S.C. § 1903(4).

141. *Id.*

142. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." (citation omitted)).

143. *See, e.g.*, *In re* Z.K., 973 N.W.2d 27, 30 (Iowa 2022) (citing to BIA's inability to sign off on a child's eligibility for membership as a reason the Tribe needed more time to determine whether the child is Indian for the purposes of ICWA); *see also* 25 C.F.R. § 61.14(a) (requiring certain BIA records of tribal membership to "contain for each person . . . [the] degree of Indian blood").

Claims that ancestry and race are inherently interchangeable give rise to the idea that this is a race-based classification.[144]

ICWA applies in certain types of child custody proceedings in state courts involving Indian children.[145] Child custody proceedings for the purposes of ICWA include the type of proceedings that may lead to out-of-home care placements, termination of parental rights, pre-adoptive placements, and adoptive placements.[146] Although most press surrounding ICWA involves adoption, ICWA is most commonly applied in abuse and neglect cases.[147] In these proceedings, state courts must always inquire whether there is reason to know a child is an Indian child for the purposes of ICWA.[148] If there is a question whether ICWA applies to a given case, the best practice is to apply ICWA when there is reason to know a child is an Indian child and until confirmation is received from the suspected Indian Tribe.[149]

One of ICWA's most unique features is that it bolsters tribal sovereignty in cases by requiring that a *moving party* provide notice to a Tribe in family regulation cases involving Indian children.[150] To modern family regulation scholars, the promotion of

144. *See* Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2652 (2022) ("The Court's holding [in *Rice v. Cayetano*]—that ancestry can be, and was in that specific factual context, a proxy for race—rested on a thin conception of race as a static biological fact and a narrow construction of indigeneity. In the hands of aggressive litigants, it has been transformed into a shorthand rule that ancestry and race are equivalent; that ancestry-based classifications are therefore illegal under the Fourteenth and Fifteenth Amendments; and that legal protection for Indigenous rights is limited to a narrow class of American Indian tribal citizens." (citing 528 U.S. 495 (2000))).

145. 25 U.S.C. § 1911(a)–(c).

146. *See id.* § 1903(1) (defining child custody proceedings as foster care placements, terminations of parental rights, preadoptive placements, or adoptive placement).

147. *See* Kathryn E. Fort, *Observing Change: The Indian Child Welfare Act and State Courts*, N.Y. ST. BAR ASS'N FAM. L. REV., Spring 2014, at 8, 8, https://nysba.org/NYSBA/Publications/Section%20Publications/Family/PastIssues2000present/Spring%202014/FamilyLawReviewSpring14.pdf [https://perma.cc/2CE4-VZJX] (explaining that, while many high-profile ICWA cases center around adoption, ICWA is more regularly applied to abuse and neglect cases).

148. 25 C.F.R. § 23.107(a) (2024).

149. *Id.* § 23.107(b).

150. *See* 25 U.S.C. § 1912(a) ("In 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 the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe.").

government involvement may seem contrary to preserving family integrity. However, tribal participation in ICWA cases functions to protect Indian family integrity as a mechanism to ensure the best interests of the Indian child are served. Tribes have the right to intervene at any point in family regulation proceedings.[151] Here, "at any point" even includes intervening for the first time on appeal, especially in cases where Tribes have not received proper notice that the proceedings are under way.[152] Further, Tribes may request to transfer those proceedings to tribal court absent good cause to the contrary.[153]

Contemplating ICWA's requirements, the statute is anti-colonial because of how it approaches state family regulation proceedings involving Indian children. ICWA was the first legislation of its kind, predating other congressional mandates for child welfare by two years.[154] Though standard child welfare law has gone through trends in what could be considered in the best interests of the child, ICWA has always remained static in promoting the best interests of Indian children, protecting the rights of parents, and providing for the exercise of tribal sovereignty in these cases.[155] As discussions loom on the abolition of child

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151. 25 U.S.C. § 1911(c).

152. *See id.* § 1914 (providing that Indian parents, custodians, and Tribes "may petition any court of competent jurisdiction" to invalidate foster care placements or terminations of parental rights for Indian children); *see also* Brief for Respondent Birth Father at 9, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399) (describing fatal errors in notice sent to the Cherokee Nation to verify child's status as an Indian child).

153. 25 U.S.C. § 1911(b).

154. *See generally* Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.) (providing an example of a major child welfare statute passed two years after ICWA in 1980). Using its spending power, Congress enacted the Adoption Assistance and Child Welfare Act of 1980 to impose requirements on state courts and child welfare agencies and list findings courts had to make in order to access funds under Title IV-E of the Social Security Act. *See id.* This includes the modern, non-ICWA requirement that a state make reasonable efforts to prevent the removal of a child from his or her home. *See id.* at 503 (requiring that reasonable efforts be made to prevent the need for the removal of a child from his or her home).

155. Marcia Zug, *ICWA's Irony*, 45 AM. INDIAN L. REV. 1, 3 (2021) ("Over time, ideas about children's best interests changed, and the ICWA began to conflict with new child welfare laws and policies. This conflict created the perception that the Act harms Indian children. Today, ideas regarding child welfare best practices are changing again, and modern child welfare policy substantially

welfare law as an arm of family regulation, ICWA continues to provide disruptions to harmful modern child welfare practices by protecting family integrity.[156] Primarily, ICWA rebukes a value-laden judgment that the "right kind of family" should have preference over an Indian child's family and community members.

Not only does ICWA apply to state actors, but it also applies to individual actors.[157] Although states have a limited obligation to the welfare of children,[158] individuals may petition for guardianship or seek to adopt a child absent state interference.[159] In applying ICWA to cases of this nature,[160] ICWA's anti-colonial mandate as to individual parties becomes clearer. ICWA does not permit individual actors to take Indian children without process or in unscrupulous ways any more than it would allow a state to do the same.[161] Indeed, Congress set ICWA's process in 1978 to respond to these actors.[162]

2. ICWA as an Equity Principle

As the National Indigenous Women's Resource Center and American Indian women told the U.S. Supreme Court, "ICWA mandates a process, not a result."[163] ICWA provides protections

aligns with the ICWA."); *see also infra* note 164 (discussing the best interests standard).

156. *See* ROBERTS, *supra* note 53, at 8–9 (advocating for the abolition of the child welfare system); *see also* Roemer, *Reproductive Justice*, *supra* note 40, at 55 (describing how ICWA is a disruption to the family regulation project).

157. Haaland v. Brackeen, 143 S. Ct. 1609, 1632 (2023) ("[Section 1912(d)] applies to 'any party' who initiates an involuntary proceeding, thus sweeping in private individuals and agencies as well as government entities.").

158. *See* DeShaney v. Winnebago, 489 U.S. 189, 189, 196 (1989) (holding that the Fourteenth Amendment's Due Process Clause imposes no affirmative duty on states to protect children from private actors).

159. *See, e.g.*, *In re* Adoption of T.A.W., 383 P.3d 492, 502–04 (2016) (discussing ICWA's applicability to privately-initiated terminations).

160. *See, e.g.*, *In re* Guardianship of Eliza W., 938 N.W.2d 307, 313 (Neb. 2020) (holding that a guardianship proceeding, initiated by an Indian child's grandparent, constituted "foster care placement" under ICWA); *see also In re* Adoption of T.A.W., 383 P.3d at 503–04 (holding that ICWA provisions requiring active efforts to remedy and rehabilitate the parents of Indian children before a termination of parental rights applies both to state-initiated and privately initiated terminations).

161. *See* cases cited *supra* note 160.

162. *See* 25 U.S.C. § 1901(4) (referencing harms caused by private agencies).

163. Brief of Amici Curiae National Indigenous Women's Resource Center, Stephanie Benally, & Sandy White Hawk, et al. in Support of the Federal

for Indian children, families, and Tribes in state court proceedings. For Indian children, ICWA is in their best interests, meaning that fulfilling the goals of ICWA meets the best interests of the Indian child.[164] For Indian parents, ICWA provides heightened protections in both voluntary and involuntary child custody proceedings.[165] For Indian Tribes, ICWA provides mechanisms for intervention in state court proceedings,[166] protection of tribal court jurisdiction,[167] and the ability to negotiate with states to create placement preferences.[168]

Parties and Tribal Defendants at 5, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (No. 21-376).

164. *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 which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."). In non-ICWA cases, "best interests of the child" typically refers to a list of factors that a court must consider in arriving at its decisions in cases involving children. *See, e.g.*, FLA. STAT. ANN. § 39.810 (West 2024) (listing factors that a court must consider in determining the best interest of a child). In lieu of this list of factors, ICWA engages the child's Tribe and ensures that it is a part of the decision-making process. 25 U.S.C. § 1902. As a representative model of what the best interests of the child test looks like in a proceeding to terminate parental rights, the Florida statute requires that a court consider and make findings as to eleven nonexhaustive factors to determine the manifest best interests of the child. FLA. STAT. ANN. § 39.810 (West 2024). A variety of factors are listed, but notably, Florida's first factor requires a court to consider a suitable permanent custody arrangement with a suitable relative—similar to ICWA's placement preference. *Id.*

165. *See* 25 U.S.C. § 1912 (providing the parents of Indian children with a broad ability to withdraw consent during voluntary termination of parental rights proceedings); *id.* § 1913 (allowing parents, custodians, and Tribes to petition for the invalidation of involuntary child custody proceedings regarding Indian children).

166. *See id.* § 1911(c) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.").

167. *See id.* § 1911(a) (providing Tribe with exclusive jurisdiction over child custody proceedings involving an Indian child who resides within a reservation or is a ward of a tribal court).

168. *See id.* § 1919 ("States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings.").

In involuntary or child welfare proceedings, ICWA requires a finding of active efforts to prevent the breakup of the Indian family.[169] These active efforts provide for a stronger standard than is required in most family regulation cases.[170] ICWA also requires a qualified expert witness who must testify to childrearing practices used in the child's Indian community and the likelihood that the child will face substantial harm if not removed from their home.[171] In voluntary or adoption proceedings, ICWA mandates voluntary and informed consent before a parent can relinquish their rights.[172] These provisions are "a direct response to the lawless removals of Indian children by state authorities in the past."[173]

As part of this direct response to the governmental atrocities against the Indian family, ICWA blends the best interests of the Indian child and their Tribe.[174] For Indian children, their

169. *See id.* § 1912(d) ("Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court 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.").

170. *See* Andrea Jane Martin, *Beyond* Brackeen*: Active Efforts Toward Antiracist Child Welfare Policy*, 42 YALE L. & POL'Y. REV. 42, 80–92 (2023) (discussing the weaknesses of the "reasonable efforts" standard of non-ICWA child removal proceedings and explaining that ICWA's "active efforts" standard is a comparatively "higher, more meaningful" standard).

171. 25 U.S.C. § 1912(e)–(f).

172. *See id.* § 1913(a) ("Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood.").

173. Barbara Ann Atwood, *Standing Matters:* Brackeen*, Article III, and the Lure of the Merits*, 23 J. APP. PRAC. & PROCESS 105, 113 (2023).

174. *See* Emily J. Stolzenberg, *Tribes, States, and Sovereigns' Interest in Children*, 102 N.C. L. REV. 1093, 1106 (2024) ("In light of the multifaceted harms ICWA seeks to prevent, Congress was well justified in concluding that the statute both 'protect[s] the best interests of Indian children and promote[s] the stability and security of Indian tribes and families.' The contention that ICWA departs from State family law to the detriment of Indian children is factually unsupportable.").

interests are "broad, communal, and include their future needs."[175] Many struggle with the idea that ICWA is in the best interests of the Indian child because in an ICWA case, the court does not need to hold a separate best interests hearing for the child as ordinarily required by state law.[176] However, this perspective also misses emerging bodies of literature on how the best interests of the child standard is skewed and does not account for cultural practices or adjust for cultural humility.[177] One of the primary goals of modern family regulation law was to create an equalized standard void of any consideration that differences in child rearing practices or poverty do not always constitute abuse.[178] As Congress noted when enacting ICWA, blending the best interests of the Indian child and their Tribe is in the best interests of the Indian child.[179] International law also recognizes that a child "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise [sic] his or her own religion, or to use his or her own language."[180]

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175. Kathryn Fort, *The Road to* Brackeen*: Defending ICWA from 2013–2023*, 72 AM. U. L. REV. 1673, 1702 (2023).

176. *See* Lucy Dempsey, *Equity over Equality: Equal Protection and the Indian Child Welfare Act*, 77 WASH. & LEE L. REV. ONLINE 411, 420 (2021) ("Congress drafted the ICWA to promote the unique best interests of Indian children *and* tribes by addressing tribal considerations in child welfare proceedings and eliminating 'subjective values' imposed by judges and state welfare officials which previously controlled the evaluation of Indian children's best interests.").

177. *See* Tanya Assim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 245 (2013) (arguing that the "best interests" legal standard is vague, indeterminate, and allows foster care professionals and judges to insert their subjective judgments and biases into child welfare decision-making).

178. *See* MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM HAS LOST ITS WAY 1, 31–54 (2020) (discussing policymakers drafted child welfare policies without consideration of how race and class relate to abuse definitions and interventions).

179. *See* Dempsey, *supra* note 176, at 420 (explaining that Congress's purpose in drafting ICWA was to promote the best interest both of Indian children and tribes).

180. G.A. Res. 44/25, Convention on the Rights of the Child, art. 30 (Nov. 20, 1989)*; see also* Aliza G. Organick, *Holding Back the Tide: The Existing Indian Family Doctrine and Its Continued Denial of the Right to Culture for Indigenous Children* (discussing the "recognition of the right of identity for indigenous children" in international law), *in* FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30, at 221, 222 (Matthew L.M. Fletcher et al. eds., 2008).

Perhaps one of ICWA's most well-known features is its placement preferences. In any case involving the removal of an Indian child from the custody of their parents, for either foster care or adoptive placements, ICWA provides a list of placement preferences that prioritize placement with the child's extended family members first before moving on to other tribal placements and tribally approved placements.[181] ICWA also allows Tribes and states to compact and come up with their own list of placement preferences.[182] While not always perfect, the working relationship between Tribes and some states is so efficient that states have crafted state ICWA laws[183] and some jurisdictions have implemented ICWA courts[184] in addition to tribal-state agreements and court improvement projects in which state

181. *See* 25 U.S.C § 1915(a) (listing the placement preferences for foster care placements); *id.* § 1915(b) (listing the placement preferences for adoptive placements).

182. *See id.* § 1919(a) (authorizing states and Indian tribes to enter into agreements "respecting care and custody of Indian children"); *see also* Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529, 531–33, 540–45 (2012) (describing a state-tribal forum meeting that issued initial recommendations leading to the enactment of the Michigan Indian Family Preservation Act, which became Michigan's state ICWA law in 2013); MICH. COMP. LAWS §§ 712B.1–.41 (West 2024) (establishing Michigan's state Indian child welfare laws).

183. As of January 2024, twelve states have state ICWA laws. *See* CAL. WELF. & INST. CODE § 224 (West 2024); Indian Child Welfare Act, IOWA CODE ANN. §§ 232B.1–.14 (West 2024); Maine Indian Child Welfare Act, ME. REV. STAT. ANN. tit 22, §§ 3941–3955 (2023); Michigan Indian Family Preservation Act, MICH. COMP. LAWS §§ 712B.1–.41 (2024); Minnesota Indian Family Preservation Act, MINN. STAT. §§ 260.751–.836 (2024); Nebraska Indian Child Welfare Act, NEB. REV. STAT. §§ 43-1501 to -1517 (2024); NEV. REV. STAT. §§ 125E.010–.190 (2023); Indian Family Protection Act, N.M. STAT. ANN. §§ 32A-28-1 to -42 (West 2024); N.D. CENT. CODE ANN. §§ 27-19.1-01 to -06 (West 2023); Oklahoma Indian Child Welfare Act, OKLA. STAT. tit. 10, §§ 40–40.9 (2024); OR. REV. STAT. §§ 419A.116(k), 419B.600–.665 (2024) (embedding ICWA standards in relevant areas across Oregon's dependency code); Washington State Indian Child Welfare Act, WASH. REV. CODE. §§ 13.38.010–.190 (2024).

184. *See generally* ADREA KORTHASE ET AL., NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, INDIAN CHILD WELFARE ACT (ICWA) COURTS: A TOOL FOR IMPROVING OUTCOMES FOR AMERICAN INDIAN CHILDREN AND FAMILIES 1, 2–3 (2021) (chronicling the development and practices of the St. Louis County ICWA Court in Duluth, Minnesota which implements federal and state ICWA statutes).

courts and tribal officials collaborate to implement ICWA.[185] This cooperation, in addition to the prioritization of the Indian family, is why child welfare professionals consider ICWA the "gold standard" of child welfare.[186] That is, if the goal of family regulation was in keeping families together, standards like those used in ICWA would be used in all cases to promote family (re)unification.

Since 1978, state courts around the country have applied ICWA. Given where Tribes are located and the displacement of Indian peoples, some jurisdictions have handled more ICWA cases than others. For example, even in the twenty-first century, there are state courts that are not only unfamiliar with ICWA, but believe that ICWA is something they do not apply in their jurisdiction.[187] Due to a lack of statistics and recordkeeping required in child welfare cases,[188] it is hard to determine how many ICWA cases have happened in the past forty-five years or get a sense of the parties involved and all outcomes.

As family regulation policies evolve, including the increasing calls for abolition of this system all together, ICWA provides an "evidence-based best practice" in child welfare law.[189] As Casey Family Programs notes:

> ICWA more than exemplifies these best practices; it helped shape them. Its provisions on removal, termination of parental rights, and temporary and adoptive placements work in harmony to prioritize safely maintaining a child within the child's birth family first; placement with extended family next (even if they have no tribal connection); then placement with members of the child's broader community, including the child's tribe; and finally placement with another Indian family, a provision that reflects the inter-tribal relationships that are common for many families with Indian children.[190]

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185. *See* Kathryn E. Fort, *Waves of Education*, *supra* note 182, at 533, 538 (discussing collaborations between, and projects implemented by, Tribes and state courts to improve foster care and adoption laws and judicial processes).

186. Brief of Casey Family Programs, *supra* note 57, at 8.

187. This is an anecdote based on experience in a jurisdiction where confidentiality rules governing a family regulation proceeding were so strict, an Indian parent could not even contact their Tribe for help prior to the termination of their parental rights.

188. *See* Kathryn E. Fort & Adrian T. Smith, *The Indian Child Welfare Act During the* Brackeen *Years*, JUV. & FAM. COURT J., Mar. 2023, at 9, 26 ("[T]rue data on ICWA compliance and the treatment of ICWA-eligible children in state child welfare systems are woefully lacking.").

189. Brief of Casey Family Programs, *supra* note 57, at 10.

190. *Id.*

Further, while ICWA has typically garnered much attention in the arena of adoption, ICWA often applies in cases where children have lived in their homes and communities for years.[191] As the Casey brief notes, the median age of children placed in out-of-home care is 6.3 years old.[192]

Prior to *Brackeen*, the U.S. Supreme Court had previously heard two ICWA cases, both involving voluntary adoptions. In *Mississippi Band of Choctaw Indians v. Holyfield*,[193] the Court heard a case involving the adoption of two Indian infants (twins) whose mother had chosen a placement for them outside of ICWA and outside of the jurisdiction of the tribal court.[194] In its opinion, the Court considered the legislative history and intent behind ICWA to arrive at a decision that had little impact on who could adopt those Indian children.[195] Holding that the children's domicile was the same as the mother's—on the reservation—*Holyfield* affirmed the exercise of tribal sovereignty in the adoption of the twins. As it was outside of ICWA's purview, the Court declined to pivot on its holding that tribal jurisdiction was appropriate solely because of the mother's wishes.[196]

The Supreme Court next heard the case of *Adoptive Couple v. Baby Girl*.[197] *Adoptive Couple* was an incredibly challenging case that invoked issues of paternity law and modern understandings of family, coupled with ICWA. In *Adoptive Couple*, a birth father challenged the adoption of his daughter by a non-Indian couple.[198] Without a true understanding that the child's birth mother had decided to place the child for adoption, the birth father sent a text message—days before his military deployment—that would later be construed as his consent for

191. *Id.* at 14.

192. *Id.*

193. 490 U.S. 30 (1989).

194. *Id.* at 37–38.

195. *See id.* at 43–53 (examining the legislative history of ICWA and holding that tribal courts have jurisdiction over adoptions of Indian children regardless of the location where the child was born).

196. *See id.* at 48 (maintaining that the domicile of a child is determined by that of their parents); *id.* at 49 ("Nor can the result be any different simply because the twins were 'voluntarily surrendered' by their mother. Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe . . . .").

197. Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).

198. *Id.* at 637.

adoption.[199] Only, in the eyes of the State of South Carolina and the U.S. Supreme Court, his consent was not required because he was never legally the child's father.[200] Because the father had not properly registered on South Carolina's putative father's registry, he was thus not legally entitled to notice that the child would be adopted.[201] After years of litigation, and even the transfer of the child from the adoptive parents to the biological father for a period of time, the birth father was ordered to return the child to the adoptive couple and the adoption proceeded.[202]

As upsetting as the 2013 outcome in *Adoptive Couple* was, the case provides language for understanding how ICWA is a remedial statute with forward-looking goals for tribal sovereignty while also entrenching some regressive ideas on parentage law. ICWA narrowly, if not consistent with state law, defines parent as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child" that "does not include the unwed father where paternity has not been acknowledged or established."[203] Undoubtedly, Congress's goal in enacting ICWA was not to further family separation. However, when Congress enacted ICWA in 1978, American law was still grappling with an evolving family law landscape with questions as to whether unwed fathers had legal rights to their children—leading states to enact a variety of measures limiting *which* unwed fathers could establish legal parentage.[204]

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199. *Id.* at 643–47; Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 555 (S.C. 2012), *rev'd*, 570 U.S. 637 (2013).

200. 570 U.S. at 650.

201. *See* S.C. CODE ANN. § 63-9-820(D) (2024) ("[A]n unmarried biological father's failure to file a claim of paternity with the registry constitutes an implied irrevocable waiver of the father's right to notice of any proceedings pertaining to the termination of his parental rights and to the child's adoption. Such waiver includes a waiver of any right of the parent to be named as a party in or served with a summons or any other document prepared in conjunction with a termination of parental rights proceeding or an adoption proceeding.").

202. *See* Michael Overall, *Baby Veronica Case: Dusten Brown to Stop Custody Fight for Veronica*, TULSA WORLD (Oct. 10, 2013) https://tulsaworld.com/news/baby-veronica-case-dusten-brown-to-stop-custody-fight-for/article_2d903520-319a-11e3-abf1-0019bb30f31a.html [https://perma.cc/2Q95-HB7E] (describing the end of the litigation).

203. 25 U.S.C. § 1903(9).

204. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 654–58 (1972) (holding that an unwed father may not be presumed unsuitable for custody on the basis of being unmarried); Caban v. Mohammed, 441 U.S. 380 (1979) (holding

Adoptive Couple also provided an opportunity to put the "right kind of family" center stage. In 2013, television personality "Dr. Phil" McGraw invited the parties to *Adoptive Couple* to come onto his show.[205] Breaking up an argument between an adoptive parent and tribal advocate—and to thunderous audience applause—Dr. Phil infamously said: "I'll tell you what I hear you saying: it's what's best for the Tribe and not what's best for the child."[206] Although Dr. Phil's comments focused on the best interests of the child, he only ever responded to the feelings and fears of the adoptive couple not being able to adopt her. Neither a discussion of the child's interests nor her own opinion, living with her birthfather at this point, seemed to make it into the show.

Although the crux of *Adoptive Couple* was parentage law, it opened a door for future litigation. In his *Adoptive Couple* concurrence, Justice Thomas considered the history of the Indian Commerce Clause and its original meaning to determine whether Congress had the authority to pass ICWA.[207] Justice Thomas found two problems with ICWA. First, Congress has the authority to regulate commerce, and child custody does not fall under the original meaning of commerce.[208] Second, the ICWA provisions challenged do not "regulate Indian tribes as tribes."[209] Since 2013, there has been momentum to achieve what appears to be Justice Thomas's desired outcome, leading to *Brackeen*.[210]

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unconstitutional a New York statute which discriminated between unmarried mothers and unmarried fathers); Lehr v. Robinson, 463 U.S. 248 (1983) (holding that where a biological father has not had a "substantial relationship" with his child—providing financial, custodial, or personal support—the Due Process Clause does not entitle him to an adoption notice).

205. Dr. Phil, *Adoption Controversy, Dr. Phil Breaks Up His Guests Arguing over ICWA*, YOUTUBE (June 6, 2013), https://www.youtube.com/watch?v=YZOxZmM3S84&ab_channel=Dr.Phil.

206. *Id.*

207. Adoptive Couple v. Baby Girl, 570 U.S. 637, 665 (2013) (Thomas, J. concurring).

208. *Id.*

209. *Id.*

210. *See, e.g.*, A.D. v. Washburn, No. CV-15-01259, 2016 WL 5464582, at *1 (D. Ariz. Sept. 29, 2016) (responding to allegations by plaintiffs that ICWA exceeds Congress's power under the Indian Commerce Clause and Tenth Amendment).

C. ICWA DURING THE *BRACKEEN* YEARS

Although three state plaintiffs initially challenged the constitutionality of ICWA in *Brackeen*, not all states agree that ICWA should be deemed unconstitutional or that it violates state sovereignty.[211] Indeed, not even all states who participated in this litigation at the district court level seem to agree that ICWA is a bad law. While already signed on as a plaintiff in *Brackeen*, Louisiana codified the federal statute into state law in 2018.[212]

As of January 2024, twelve states have passed some form of state ICWA laws.[213] During the ongoing litigation in *Brackeen*, several states have either amended their state ICWA laws, passed a state ICWA law for the first time, or codified the federal statute into state law.[214] Specifically, the 2023 legislative session was very robust for state ICWA laws. Passing these state ICWA laws is one way in which states and Tribes attempted to preserve the protections of ICWA. Had the Court declared ICWA unconstitutional on any grounds except equal protection, these twelve states would still have a state ICWA law.[215]

While *Brackeen* was in litigation for five years, with a variety of answers on which ICWA provisions are or are not constitutional, state courts around the country continued to apply ICWA.[216] In each year of that five-year period, state courts heard at least 200 ICWA appellate cases with courts declining to

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211. *See, e.g.*, *supra* note 183 (listing states that have enacted state ICWA laws).

212. *See* LA. CHILD. CODE. ANN. art. 103.1 (2024) (originally enacted as Indian Child Welfare Act, 2018 La. Acts 984, 984) ("The provisions of the federal Indian Child Welfare Act and the regulations promulgated thereunder supersede the Children's Code whenever the outcome of an involuntary or voluntary proceeding may result in the removal of an Indian child from a parent under circumstances in which the parent cannot have the child returned upon demand.").

213. *See* sources cited *supra* note 183.

214. *See supra* note 183.

215. Alex Brown, *States Try to Protect Tribes' Rights in Child Custody Cases as Supreme Court Weighs Law*, USA TODAY (Apr. 16, 2023), https://www.usatoday.com/story/news/nation/2023/04/16/states-seek-protect-tribes-rights-native-child-custody-cases/11667856002 [https://perma.cc/ZBS8-WMAT] (explaining that nearly half a dozen states have passed legislation to keep ICWA protections on the books in case the statute is struck down as unconstitutional by the Supreme Court).

216. *See* Fort & Smith, *supra* note 188, at 10–11 (describing the widespread incorporation of the ICWA into state law and by extension, into state courthouses).

publish most of those cases.[217] Interestingly, very few of these state court cases cited to the Fifth Circuit's decision in *Brackeen* that the Supreme Court later reviewed.[218] Even when a state court in Texas took *Brackeen* into consideration in 2018, it declined to follow the Northern District of Texas's ruling.[219] This might suggest that among those who regularly deal with ICWA cases, such as state courts and social workers, ICWA is more popular than it is with the political leaders looking to further a political agenda.

In amicus filings before the Supreme Court, twenty-four states filed an amicus brief in support of ICWA.[220] The states' amicus brief represents a mix of both conservative and liberal states, indicating that ICWA holds bipartisan support.[221] One reason for this bipartisan support is that ICWA helps already

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217. *Id.* at 12 ("In 2017, there were two hundred and fourteen appealed ICWA cases and thirty-four were published. In 2018, two hundred and six ICWA cases were appealed, and forty-nine were published. In 2019, there were two hundred and twenty-six cases appealed and forty-two published.").

218. *See id.* at 24 ("In the spring of 2021, the Fifth Circuit issued a very long split decision on ICWA's constitutionality. Only two state ICWA cases cited to this opinion on appeal.").

219. *Id.* at 18 ("In late 2018, the Northern District of Texas declared ICWA unconstitutional. While the case was stayed by the Fifth Circuit, 2019 would have been the first year for state appellate courts to take the case into consideration. Only three did, and all of them declined to follow or extend it, including a court in Texas.").

220. Brief for the States of California, Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Vermont, Washington, & Wisconsin, & the District of Columbia, as Amici Curiae in Support of Petitioners, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Nos. 21-376 & 21-377) [hereinafter Brief for the States of California et al.]; Brief of Casey Family Programs, *supra* note 57. The Casey Family Programs brief was signed by a total of twenty-seven social service agencies represented by noted family rights scholar Martin Guggenheim. Brief of Casey Family Programs, *supra* note 57.

221. Although Texas Attorney General Gregory Abbott led the charge on behalf of states in the *Brackeen* litigation, likely for coordinated political reasons, *see* This Land, *Behind the Curtain*, CROOKED MEDIA (Aug. 23, 2021), https://crooked.com/podcast/2-behind-the-curtain [https://perma.cc/3JDU-JG65], Texas's social services agency continued to follow and apply ICWA throughout the litigation. Indeed, state and tribal partners came together to host the Texas ICWA Summit, an online training program for social workers. *Texas ICWA Summit*, TEX. DEP'T OF FAM. & PROTECTIVE SERVS. (Jan. 22, 2021), https://www.dfps.texas.gov/Child_Protection/Disproportionality/texas_icwa_summit.asp [https://perma.cc/Z4UU-G5SF].

underfunded and overburdened state social service agencies administer services to Indian children and families.[222] In Texas, the child welfare system already struggles to serve all of the families within the system.[223] When the professional standards for caseworkers nationwide indicate that caseworkers should handle no more than twelve to fifteen cases at a time, a report commissioned by the Texas Supreme Court demonstrated that caseworkers in Texas routinely carry thirty or more cases—with some former caseworkers testifying they have carried anywhere from forty to sixty cases at a given time.[224] Given the lack of pay and the case load, turnover is extremely high, leaving caseworkers spread so thin that the agency has created an intermediary position—also with a great deal of turnover—to conduct many of the face-to-face visits with children in care.[225] Because of these staffing issues, other problems persist with children in foster care in Texas such as child abuse within placements that goes largely uncorrected and unmitigated.[226] All of this has created a culture within the foster care system in which children do not trust the social workers that the state alleges are meant to be protecting them.[227]

Additionally, media attention on *Brackeen* was different than the media attention on previous ICWA cases as a move toward diversity, equity, and inclusion has led to centering the voices of American Indians. Rebecca Nagle—journalist, author, and host of the acclaimed *This Land* podcast, which covered

222. Brief of Casey Family Programs, *supra* note 57, at 9.

223. *See* M.D. *ex rel.* Stukenberg v. Abbott, 907 F.3d 237 (5th Cir. 2018) ("Minor children in permanent managing conservatorship of Texas Department of Family Protective Services (DFPS) filed class action under § 1983 alleging that state's maintenance of its foster care system exposed them to serious risk of abuse, neglect, and harm.").

224. *Id.* at 257 ("Former DFPS caseworker Beth Miller testified that she routinely carried 40 to 60 cases, sometimes higher.").

225. *Id.* at 259 ("Caseworkers are routinely unable to make regular, face-to-face contact with their children; even when they are able to make visits, the contact is often 'cursory.' As a result of high caseloads and administrative burdens, both of which are exacerbated by the abysmal state of DFPS's recordkeeping systems.").

226. *Id.* at 266 (explaining that official records of abuse are incomplete due to a lack of reporting).

227. *Id.* ("Several former foster children testified that they did not know how to report abuse or whom they should tell. Even if children knew whom to call, many are so distrustful of the system that they are unlikely to feel comfortable reporting abuse.").

Brackeen in its second season—is a member of the Cherokee Nation of Oklahoma.[228] Several American Indian law professors have written on ICWA.[229] Many of them are cited throughout this Article and in Justice Gorsuch's concurrence in the *Brackeen* opinion.[230] Additionally, there seemed to be a better sense among journalists to also cite legal and social work experts, as well as advocates, when seeking out Indian and non-Indian sources on the case.

Moreover, the landscape on family regulation at large has rapidly evolved during these years. In conjunction with other social movements, family regulation experts have started to question how any system that disproportionately targets poor families of color while allowing white, well-to-do families to flourish under any circumstances could ever induce justice.[231] Scholars have also raised alarms as to the lasting impacts of the system on parents and children who are involved.[232] As in the criminal context, a growing number of advocates, activists, and scholars have called for a complete abolition of child welfare in favor of monetary payments to communities to allow for self-regulation and care.[233] Although ICWA certainly does not abolish the

228. REBECCA NAGLE, https://rebeccanagle.com/about [https://perma.cc/38JG-V2K7].

229. *See, e.g.*, Fletcher & Singel, *supra* note 32; Angelique EagleWoman & G. William Rice, *American Indian Children and U.S. Indian Policy*, 16 TRIBAL L.J. 1, 1 (2016).

230. *E.g.*, Haaland v. Brackeen, 143 S. Ct. 1609, 1641 (2023) (Gorsuch, J. concurring) (citing Fletcher & Singel, *supra* note 32, at 917–18).

231. *See* ROBERTS, *supra* note 53, at 86–90 (discussing racial disparities in family regulation that targets only some families; *see also* Martin, *supra* note 170, at 78–79 (discussing the lack of appropriate standards in family regulation cases leading to disparate impact); ROXANNA ASGARIAN, WE WERE ONCE A FAMILY: A STORY OF LOVE, DEATH, AND CHILD REMOVAL 219 (2023) (highlighting how easy it is for some families to evade family regulation systems based on appearance); KELLEY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES 67 (2023) ("But reporting professionals' classist and racist judgments are consequential because they prime professionals to funnel marginalized families to CPS as a means of 'rehabilitation' while giving their more privileged counterparts a pass.").

232. FONG, *supra* note 231, at 78 (describing how family surveillance is extensive and delves into intimate family life, putting families on edge).

233. *See* Ndjuoh MehChu, *Neither Cops nor Caseworkers: Transforming Family Policing Through Participatory Budgeting*, 104 B.U. L. REV. 73, 112 (2024) (advocating for participatory budgeting to allow greater awareness of the need for public aid and less shame in seeking public aid when such aid is allocated at the community level).

system and has a limited scope, it has increasingly provided a framework that more scholars, activists, and legislators have started to look toward in establishing reforms and advocating for other groups impacted by mass child removal.[234] In 2024, Minnesota used ICWA as a model to pass the Minnesota African American Family Preservation and Child Welfare Disproportionality Act.[235] The first of its kind, this legislation aimed to promote the stability and unity of African American and disproportionately represented families.[236] Simply stated, the family regulation landscape changed dramatically in the five years that *Brackeen* was litigated.

D. *HAALAND V. BRACKEEN*

Brackeen originated in 2018 in the Northern District of Texas.[237] The district court held that ICWA is unconstitutional.[238] That decision was appealed to the Fifth Circuit where a panel overruled the district court.[239] However, in an en banc opinion, the Fifth Circuit largely upheld the district court's ruling.[240] The Supreme Court granted certiorari in *Brackeen* in 2022, heard oral arguments in November 2022, and rendered its opinion in June 2023.[241]

The three major constitutional challenges brought in *Brackeen* challenged Congress's Article I authority to enact ICWA under the Indian Commerce Clause, anti-commandeering principles, and equal protection. The Court held ICWA constitutional

234. *See* Zug, *supra* 155, at 3 (arguing that family regulation goals have increasingly realigned with ICWA over time); *see also* Martin, *supra* note 170, at 64–67 (arguing that moving toward the use of "active efforts" in all family regulation cases would provide a better framework for those cases).

235. Minn. Stat. §§ 260.61–.693 (2024).

236. Minn. Stat. § 260.62(a)(2) (2024).

237. Brackeen v. Zinke, No. 17-CV-00868-O, 2018 WL 10561971 (N.D. Tex. July 24, 2018).

238. Brackeen v. Zinke, 338 F. Supp. 3d 514, 546 (N.D. Tex. 2018), *rev'd sub nom.* Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019), *on reh'g en banc sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *aff'd in part*, *vacated in part*, *rev'd in part*, 143 S. Ct. 1609 (2023).

239. Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019), *on reh'g en banc sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *rev'd in part*, *aff'd in part*, *vacated in part*, 143 S. Ct. 1609 (2023).

240. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *rev'd in part*, *aff'd in part*, *vacated in part*, 143 S. Ct. 1609 (2023).

241. Haaland v. Brackeen, 143 S. Ct. 1609 (2023).

as to the Indian Commerce Clause and anti-commandeering principle while dismissing the equal protection claim on standing grounds.[242] Here, this Article focuses on the generalized equal protection claims of the parties.

The individual plaintiffs in *Brackeen* were comprised of several adoptive couples and one biological mother who wished to place her children for adoption.[243] Their claims originated under both involuntary and voluntary ICWA placement scenarios. The individual parties challenged ICWA on the grounds of equal protection, arguing that (1) the definition of "Indian child" was broad and "sweeps in children who are not even tribal members based solely on their ancestry", and (2) the placement preferences created a hierarchy that relegates non-Indian adoptive families to fourth-tier status.[244] Additionally, the plaintiffs argued that "[t]he adoption regime that ICWA establishes bears no resemblance to the classifications of Indians previously classified as 'political' by this Court."[245] Here, the plaintiffs also suggest that ICWA "places non-Indian families on unequal footing because they are not the right race; and it usurps the historically state-run affair of child placement."[246]

Effectively, the individual parties argued that ICWA is both too broad and too narrow. Because ICWA applies in state court proceedings, it is too broad. Because ICWA might not prioritize placement with non-Indian families, it is too narrow.

Additionally, the individual parties contended that ICWA could not survive rational basis review, let alone strict scrutiny.[247] They cited *Shelby County v. Holder*, stating:

> [N]either Congress nor Respondents have made an effort to justify ICWA's intrusive regime with evidence of circumstances that exist today, or offered a basis to believe States today would return to the severe abuses of 50 years ago. Congress cannot wield such a drastic remedy based solely on historical problems; those needs must persist in the present.[248]

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242. *Id.*

243. Brief for Individual Petitioners, *supra* note 24, at 8–11.

244. *Id.* at 20 (arguing that ICWA makes two unconstitutional classifications that should be subject to strict scrutiny).

245. *Id.*

246. *Id.*

247. *Id.* at 16.

248. Brief for Individual Petitioners, *supra* note 24, at 42 (citing Shelby County v. Holder, 570 U.S. 529, 553 (2013)) (holding as unconstitutional certain discrimination remedies of the Voting Rights Act of 1965).

In line with *Shelby County*, the placement preferences, they contended, are "massively overinclusive and underinclusive" in fulfilling Congress's mandate to protect tribal interests and that the placement preferences do nothing to stop Indian child removals.[249]

Interestingly, *Shelby County* involved the Fifteenth Amendment, which unlike the Fourteenth Amendment, expressly prohibits *all* racial classification.[250] The use of *Shelby County* here is purposeful. As Professor Sarah Krakoff opines: "As the Court moves, in general, toward an increasingly ahistorical and genealogical approach to racial classifications, it sows confusion about tribes, their status, and their interests, and obscures the law's historical role in racializing and subordinating American Indians as well as other groups."[251] Given recent trends in Indian law cases, these arguments "reinforce the trend whereby the Court uses dubious constructions of state sovereignty to undermine racial remediation policies."[252]

As a state party, Texas challenged ICWA on equal protection grounds as well. Primarily, Texas focused on its duty to protect its citizens and apply the laws within its state.[253] Texas cited its state constitution to claim that "ICWA is not only an intrusion into, but a direct attack on, Texas's domestic affairs."[254] Texas claimed that ICWA creates a race-based "exception for Indian

249. *Id.* at 44.

250. U.S. CONST. amend. XV; *see also* Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943, 967–68 (2002) (discussing classifications under the Fifteenth Amendment).

251. Sarah Krakoff, *Constitutional Concern, Membership, and Race*, 9 FIU L. REV. 295, 298 (2014) [hereinafter Krakoff, *Constitutional Concern*] (citing Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1473 (2004)). Specifically, Professor Krakoff is exploring *Rice v. Cayetano*, 528 U.S. 495 (2000), which the *Brackeen* plaintiffs also utilized to build their argument that ICWA violates equal protection. *See e.g.*, Brief for Individual Petitioners, *supra* note 24, at 18–20 (referencing *Rice*).

252. W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1546 (2023).

253. Brief for Petitioner the State of Texas at 61, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, 21-380) ("By forcing States to implement Congress's racially discriminatory child-custody scheme, ICWA offends the principles of state sovereignty protected by the anticommandeering doctrine.").

254. *Id.* at 41.

children."[255] To bolster its claim that ICWA is a race-based statute, Texas drew a parallel between ICWA and affirmative action, referring to it as "so-called 'benign' discrimination."[256] Texas also stated: "ICWA creates a government-imposed and government-funded discriminatory regime sorting children, their biological parents, and potential non-Indian adoptive parents based on race and ancestry."[257]

Because ICWA could be applied to a non-tribal member, the state argued that ICWA improperly racially classifies Indian children.[258] Further, Texas alleged that ICWA discriminates between Indian and non-Indian parents by giving Tribes equal footing to Indian parents in ICWA cases[259] while also making non-Indian foster and adoptive parents compete in a "race-based system."[260] Like the individual plaintiffs, Texas contended that ICWA could not survive rational basis review, let alone strict scrutiny, under an equal protection analysis.[261]

Notably, the ancestry arguments furthered by the plaintiffs were grounded in *Rice v. Cayetano*.[262] Like *Shelby County*, *Rice* involved discrimination claims under the Fifteenth Amendment.[263] In *Rice*, the Supreme Court considered whether a Hawaii voting law that limited voting for certain state positions to

255. *Id.*

256. *Id.*

257. *Id.* (internal citation omitted).

258. *Id.* at 43 ("ICWA's inclusion of non-tribal members demonstrates why this Court's decision in *Mancari* does not transform ICWA into a political classification." (citing Morton v. Mancari, 417 U.S. 535, 538–39 (1974))). *But see In re* Dependency of Z.J.G., 471 P.3d 853, 866 (Wash. 2020) ("The final determination of whether a child is an Indian child is not based on heritage or race. It is determined by the political affiliation of the child with a tribe. However, as stated above, *the tribe has the exclusive jurisdiction to determine that political affiliation*.").

259. Brief for Petitioner the State of Texas, *supra* note 253, at 48 ("Through ICWA, Congress effectively created two classes of parents: parents of children with Indian blood and all other parents. A parent's rights vary depending upon the class to which they belong.").

260. *Id.* at 49.

261. *Id.* at 51 ("Because ICWA's purpose of preventing the integration of Indian children into non-Indian families is not a legitimate government purpose, ICWA fails even this more deferential standard of review.").

262. *Id.* at 46 ("At most, therefore, ICWA's tribal connection constitutes an ancestry requirement, which is often 'a proxy for race.'" (citing Rice v. Cayetano, 528 U.S. 495, 514 (2000))).

263. *Rice*, 528 U.S. at 513.

persons with Native Hawaiian ancestry was impermissibly race-based.[264] The *Rice* court held that the state statute's invocation of "ancestry" was based on race.[265] Although ICWA textually requires a child be a member of a Tribe or have imminent access to tribal membership, the plaintiffs argued that ICWA should be struck down on similar grounds because both the class of children ICWA applies to and some of ICWA's placement preferences are based on ancestry as a proxy for race.[266]

The Supreme Court issued its opinion in *Brackeen* in June 2023. Perhaps as a welcome surprise, the Court affirmed ICWA's constitutionality in a 7-2 decision. Only Justices Alito and Thomas—the author of *Adoptive Couple* and an author of the concurrence in *Adoptive Couple*—dissented.

Writing for the majority, Justice Barrett provided a rather straightforward, clear-cut opinion. She characterized ICWA's goal as "to keep Indian children connected to Indian families."[267] On the issue of Congress's Article I authority to enact ICWA, Justice Barrett wrote that Congress had the authority to enact ICWA under the Indian Commerce Clause.[268] The opinion reviewed both the meaning of the Indian Commerce Clause in the Constitution and its historical underpinnings, noting that the Court has often missed opportunities to clearly express its authority for this power.[269]

In its examination of the Indian Commerce Clause, the Court also rejected the notion that there should be a "family law carve out" for Indian affairs as the plaintiffs had alleged.[270] In rejecting the argument, the Court noted that the "Constitution does not erect a firewall around family law."[271] As the Court

264. *Id.* at 498–99.

265. *Id.* at 516 ("The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.").

266. *See supra* notes 258, 262. Part II.B.1 of this Article further engages this particular argument.

267. Haaland v. Brackeen, 143 S. Ct. 1609, 1623 (2023).

268. *See id.* at 1628 ("In sum, Congress's power to legislate with respect to Indians is well established and broad.").

269. *Id.* at 1629 ("Admittedly, our precedent is unwieldy, because it rarely ties a challenged statute to a specific source of constitutional authority. That makes it difficult to categorize cases and even harder to discern the limits on Congress's power." (citing Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977))).

270. *Id.* at 1630.

271. *Id.*

correctly noted, children may not be commerce, but ICWA falls under Indian affairs.[272] Justice Gorsuch described a great deal of this history within his concurring opinion[273]—but the fact of the matter is that the federal government once implemented its assimilationist programs by targeting Indian children and families.[274] As the Court noted, the *Brackeen* plaintiffs "frame their arguments as if the slate were clean. More than two centuries in, it is anything but."[275] More than the idea that two centuries is a long time, those two centuries of family separation as means of governance is why ICWA is a tool of federal Indian law,[276] addressing Indian families alongside tribal sovereignty.

Turning to the Tenth Amendment anti-commandeering arguments, the Court held that since ICWA applies to both private and state actors alike, it cannot have commandeered state law.[277] The Court also considered some issues of preemption. Particularly, Texas claimed that because of their own state law provisions on child placement, ICWA commandeered state law.[278] However, the Court disagreed with that assessment, noting that the argument "runs headlong into the Constitution."[279]

The Court did not reach the merits of the state and individual parties' equal protection claims because no party had standing to raise them.[280] Primarily, the standing issue that the Court found in these claims was that the state officials who implement ICWA were not parties to this suit, leaving the Court with

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272. *Id.* ("[O]f course children are not commercial products. . . . As we already explained, our precedent states that Congress's power under the Indian Commerce Clause encompasses not only trade but also 'Indian affairs.'" (citing Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989))).

273. For an overview of this history, see *id.* at 1641–46 (2023) (Gorsuch, J., concurring).

274. *See supra* Part I.A.

275. *Brackeen*, 143 S. Ct. at 1631.

276. *See* Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Ac*t, ATLANTIC (Jan. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167 [https://perma.cc/9LFR-JMZS]; *see also* Roemer, *Reproductive Justice*, *supra* note 40, at 55 (arguing that tribal sovereignty and individual identity cannot be separated when discussing the regulation of American Indian families given this history).

277. *Brackeen*, 143 S. Ct. at 1633 ("Legislation that applies 'evenhandedly' to state and private actors does not typically implicate the Tenth Amendment.").

278. Brief for Petitioner the State of Texas, *supra* note 253, at 64.

279. *Brackeen*, 143 S. Ct. at 1635.

280. *Id.* at 1638.

nothing to redress.[281] Essentially, the parties might have standing to bring this suit if they sued those who implement ICWA, such as state social workers and state courts. Otherwise, the Court noted "state officials are nonparties who would not be bound by the judgment."[282]

Further, the Court resoundingly rejected Texas's *parens patriae* argument regarding ICWA's placement preferences. The Court reaffirmed its prior holdings that states do not have equal protection rights of their own.[283] Nor can states bring suit against the government under the theory of *parens patriae*.[284] The Court also characterized Texas's argument as "a thinly veiled attempt to circumvent the limits on *parens patriae* standing."[285]

At the end of the day, *Brackeen* was a victory for tribal sovereignty, Indian children and families, and ICWA advocates. It also provided a victory for critics of the modern family regulation system as its measures survive to disrupt the harms of a system that still disproportionately targets Indian families.[286] Even in light of this victory, Justice Kavanaugh wrote a very brief concurring opinion specifically highlighting that the Court did not decide the equal protection claims on the merits.[287]

Writing alone, Justice Kavanaugh signaled that he believed ICWA could provide an equal protection concern along the lines of *Palmore v. Sidoti*.[288] His precise concern was that "a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child's race—even if the

281. *Id.* at 293–94; *see also* Atwood, *supra* note 173, at 123.

282. *Brackeen*, 143 S. Ct. at 1639–40.

283. *Id.* at 1640 ("Texas also lacks standing to challenge the placement preferences. It has no equal protection rights of its own." (citing South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966))).

284. *Id.* ("A State does not have standing as *parens patriae* to bring an action against the Federal Government." (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 610 (1982))).

285. *Id.* at 1640 n.11.

286. Martin, *supra* note 170, at 45 (explaining that families of color are disproportionately represented in the child welfare system and are more likely to experience negative outcomes compared to white families).

287. *Brackeen*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring) ("I write separately to emphasize that the Court today does not address or decide the equal protection issue that can arise when the Indian Child Welfare Act is applied in individual foster care or adoption proceedings.").

288. *See id.* (citing Palmore v. Sidoti, 466 U.S. 429, 430 (1984)).

placement is otherwise determined to be in the child's best interests."[289] Justice Kavanaugh also noted that "a prospective foster or adoptive parent may in some cases be denied the opportunity to foster or adopt a child because of the prospective parent's race."[290] This is a common misconception about what typically occurs in an ICWA case in which the Indian child's familial and cultural ties are considered alongside their best interests.

However, the tie to *Palmore* is as interesting as it is problematic. In *Palmore*, the Court heard the case of a white woman who divorced her white husband.[291] Initially, the woman had custody of her child.[292] However, when she started dating a Black man, her ex-husband returned to court challenging her fitness as a parent.[293] The trial court agreed with the husband, citing how disruptive the mother's interracial relationship had been to the child. Once this case reached the Supreme Court, the Court agreed that the state court's decision was not based on permissible criteria.[294] In its holding, reached on the principle of equal protection, the Court noted: "The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."[295] The *Palmore* Court noted the goal of the Equal Protection Clause was to get rid of all government-imposed discrimination based on race.[296]

Palmore is distinct from this equal protection challenge because ICWA is neither about nor does it invite racial discrimination. First, ICWA follows Indian children who can establish a political relationship with a Tribe. Second, ICWA placements are not limited by race. Because Indians are one of the most racially diverse groups, it is not uncommon for an Indian child to be placed with non-Indian relatives.[297] Third, *Palmore* is about the

289. *Id.*

290. *Id.*

291. *Palmore*, 466 U.S. at 430.

292. *Id.*

293. *Id.*

294. *See id.* at 432 ("The court correctly stated that the child's welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race.").

295. *Id.* at 434.

296. *Id.* at 432 ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.").

297. *See* Rolnick, *supra* note 144, at 2718–19.

removal of a child from their parent and disrupting the parent-child relationship because of racial discrimination. At its core, ICWA promotes family unity and helps children retain ties to their culture.[298]

Palmore parallels ICWA in one eerie circumstance prevalent in some high-impact ICWA cases. Although the mother in *Palmore* won at the Supreme Court, she did not receive the relief she sought in state court. The state court applied an improper standard to remove the child from her custody, but then, the state court later demanded a showing that the return of the child to her mother's custody was in her best interests.[299] That was before transferring jurisdiction to a court in the state where the father had relocated with the child. Indeed, the appellate court's decision seemed to still be punitive as the court noted: "A child custody suit is not a game to be played for the benefit of either parent."[300]

In *Palmore*, injustice was answered with injustice. That is the history behind ICWA, and it continues to be the story of many systems-involved American Indian families. This is a contemporary concern that many in the family regulation space grapple with today.[301] As such, this Article now turns to understanding these equal protection claims more and how they apply to Indians.

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298. Haaland v. Brackeen, 143 S. Ct. 1609, 1623 (2023).

299. Palmore v. Sidoti, 472 So. 2d 843, 845–47 (Fla. Dist. Ct. App. 1985).

300. *Id.* at 847.

301. *See, e.g.*, Brief for Robyn Bradshaw, Grandmother & Adoptive Parent of P.S. ("Child P.") As Amicus Curiae in Support of Tribal & Federal Defendants at 3–4, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, 21-380) [hereinafter Brief for Robyn Bradshaw] (describing an Indian grandmother's claim to her grandchild). Ms. Bradshaw is a grandparent who was able to adopt her grandchild, but this adoption was implicated in *Brackeen* as the would-be adoptive couple who wanted to adopt the child was one of the families sued. *Id.* This specific case is explored in more detail in Part I.C of this Article. Ms. Bradshaw's briefing largely focused on an explanation, that even if the plaintiffs prevail in *Brackeen*, the adoption of her grandchild should be final. *Id.* at 14 ("First, the Minnesota decision is final. No matter how this Court resolves the questions presented, that will not change."). This type of briefing is indicative of fears that some families have regarding receiving a legal determination that may or may not be followed given a further assessment of a child's best interests by a lower court.

II. TODAY'S EQUAL PROTECTION DOCTRINE

An understanding of race and the colonial project also begs the question of the utilization of equal protection claims against laws aimed at protecting tribal interests. Applying equal protection to Indian law statutes is backwards.[302] Moreover, "[t]he modern era began with uncertainty as to whether Indian policy could survive under a robust understanding of equal protection, but shifted to an implicit recognition that tribal rights and civil rights are complementary rather than antagonistic."[303]

Thus, this Part evaluates equal protection claims as they apply to Indian Tribes and the problem of equality. First, this Part provides a brief overview of equal protection doctrine as applied to Indians with an overview of the Fifth and Fourteenth Amendment jurisprudence in this area. Then, in Part II.B this Article describes how the equal protection doctrine in this area should move beyond solely conversations on race versus political status.

A. THE HISTORY OF THE EQUAL PROTECTION DOCTRINE AND INDIANS

In the context of Indian law, the normative world view that fixates on anti-discrimination law as a societal changemaker is problematic. Anti-discrimination principles are already built into federal Indian law.[304] Yet, calls for equality have long led to non-Indians simultaneously calling to terminate tribal rights.[305]

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302. Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1169 (2010) [hereinafter Berger, *Reconciling Equal Protection*] ("Because race-based discrimination manifested itself in denials of the special status of Indian people and tribes, applying a model of equal protection focusing on classifications of individuals to federal Indian policy is precisely backwards."); *see also* Bryan McKinley Jones Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37 URB. REV. 425, 433 (2006) ("Even though our status as a legal/political group has been repeatedly articulated in government policy, legal code, and the everyday lives of American Indian individuals and communities, it remains a point of debate and contention in most popular settings. For example, conservative groups who have attacked federally funded programs for American Indians invoke arguments—by utilizing the fourteenth amendment and the Civil Rights Act of 1964—that position American Indians solely as a racialized group.").

303. Berger, *Reconciling Equal Protection*, *supra* note 302, at 1187.

304. *Id.*

305. Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 346–47 (2004) ("[U]nhappy

When it comes to American Indians, people see legislation that purports to improve the lives of Indians, such as ICWA, as promoting a special interest.[306] This framing of so-called special rights is "a conservative movement that perceives racial discrimination in such schemes, but that itself often reflects racism against the Indians."[307] As we understand equality, demands to protect tribal rights co-opt the purest understanding of what equal protection of the laws should entail.

In considering the equal protection doctrine and laws impacting American Indian Tribes, the Court looks to the Fifth Amendment, as these are federal laws, and the Fourteenth Amendment applies only to the states.[308] The Fifth Amendment protects American Indian Tribes from abuses of federal power.[309] The Fifth Amendment states: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[310]

Beyond equal protection, the Fifth Amendment often appears in Indian law cases given how Indian law is enshrined in federal law and policy, not state law. As Professor Fletcher opines, the Fifth Amendment is a series of political rights listed somewhat at random.[311] The guarantees of the Fifth Amendment were meant to protect people from the intrusions of the federal government, and thus, "the political protections afforded Indian people and Indian tribes in the Fifth Amendment are actually far more important than the equal protection component of the Fifth Amendment."[312] Although the Fourteenth Amendment applies to the states, the Supreme Court reads its guarantee of equal protection to apply to the federal government as well

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non-Indians demand that tribal rights be terminated to theoretically equalize everyone.").

306. *Id.* ("The tribal governance power and immunity from some state laws . . . results in the American Indians being charged with unjustifiably demanding 'special rights.'").

307. David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 760 n.3 (1991).

308. U.S. CONST. amend. XIV, § 1.

309. Matthew L.M. Fletcher, *On Indian Children and the Fifth Amendment*, 80 MONT. L. REV. 99, 113 (2019) [hereinafter Fletcher, *On Indian Children*].

310. U.S. CONST. amend. V.

311. Fletcher, *On Indian Children*, *supra* note 309, at 111.

312. *Id.* at 114.

through the Fifth Amendment.[313] The reading of the Fourteenth Amendment's plain language is important here because the Privileges and Immunities Clause excluded American Indians from birthright citizenship.[314] If Congress aimed to exclude American Indians from the guarantee of citizenship, it stands to reason that Congress also did not envision that equal protection of the laws would apply the way in which the *Brackeen* plaintiffs hoped.

Further, "[t]he Fifth Amendment is not always the friend of Indian people and Indian tribes."[315] Consider, for example, *United States v. Sioux Nation of Indians*.[316] *Sioux Nation* is a particularly troubling case because it involved the federal government taking sacred lands in abrogation of a treaty. While the Tribe argued for those lands to be returned, the Supreme Court focused on whether there was a taking under the Fifth Amendment and whether it required just compensation.[317] Further, the right to devise one's property as they see fit at the time of their

313. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217 (1995) ("[T]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975))).

314. *See* U.S. CONST. amend. XIV, § 2 (excluding "Indians not taxed" from representative apportionment); *see also* Berger, *Birthright Citizenship*, *supra* note 10, at 1197–98 (describing the constitutional debates surrounding granting American Indians citizenship through the Privileges and Immunity Clause of the Fourteenth Amendment); Roemer, *Equal Protection*, *supra* note 39, at 615 (discussing how, although citizens of Tribal Nations were excluded from the Fourteenth Amendment, the federal government continued to exercise its powers as to Tribes, including assimilationist policies); Fletcher, *On Indian Children*, *supra* note 309, at 114 (arguing that this language "expressly leaves Indian people out of" the incorporation of the equal protection doctrine through the Fifth Amendment).

315. Fletcher, *On Indian Children*, *supra* note 309, at 106.

316. 448 U.S. 371 (1980).

317. *See id.* at 424 ("[T]he Act effected a taking of tribal property . . . . [which] implied an obligation on the part of the Government to make just compensation . . . .").

death is synthesized from a Fifth Amendment Indian law case.[318]

Though perhaps the most important Fifth Amendment Indian law case is a employment law case: *Morton v. Mancari*.[319] In *Mancari*, the Court considered whether a 1934 law instituting Bureau of Indian Affairs employment preferences prioritizing hiring Indian employees violated anti-discrimination law and the Due Process Clause of the Fifth Amendment.[320] The Supreme Court held that the employment preference did not violate anti-discrimination law or the Fifth Amendment because the preference was "political rather than racial in nature" and "reasonably and directly related to a legitimate, nonracially based goal."[321] Indeed, the 1934 law, more precisely known as the revolutionary Indian Reorganization Act of 1934, sought to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[322] The basis of modern Indian law, particularly the government-to-government relationship between Tribes and Congress and self-determination, rests on this holding in *Mancari*.

In *Brackeen*, the plaintiffs argued the Court should distinguish ICWA from *Mancari*, arguing that it was more like *Rice* than *Mancari*.[323] Although the Court did not reach this argument, *Mancari*, like ICWA, applies to a specific class of persons: members of federally recognized Tribes.[324] However, *Mancari*'s

318. *See* Hodel v. Irving, 481 U.S. 704, 704–05 (1987) (holding that § 207 of the Indian Land Consolidation Act "effected a 'taking' of appellees' decedents' property without just compensation").

319. 417 U.S. 535 (1974).

320. *Id.* at 537.

321. *Id.* at 553 n.24, 554; *see also id.* at 554 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.").

322. *Id.* at 542–43. Here, the Court also noted that "Congress was seeking to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes. Initial congressional proposals would have diminished substantially the role of the BIA by turning over to federally chartered self-governing Indian communities many of the functions normally performed by the Bureau." *Id.* (citations omitted).

323. Reply Brief for Individual Petitioners, *supra* note 13, at 11–17 (discussing *Mancari* and *Rice*).

324. *See supra* notes 319–22 and accompanying text (detailing *Mancari*).

holding does not necessarily pit racial classification against political classification. Rather, the Court was "demonstrating the ways the classification fulfilled the goals emerging from the unique federal relationship."[325]

Just three years later, the Supreme Court considered its *Mancari* holding to determine whether the Fifth Amendment should apply in *Delaware Tribal Business Committee v. Weeks*.[326] In *Weeks*, Congress authorized distribution payments for land takings for some Delaware Tribes, but it excluded one Delaware Tribe from those payments.[327] While affirming its holding in *Mancari* and declaring that the Court would still consider congressional action involving Indian Tribes under an equal protection analysis, the Court held that Congress's record demonstrated the action was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[328] In arriving at its decision, the *Weeks* Court considered Congress's review of the history of the Tribe and its status.[329]

Contemplating *Weeks*, Professor Nell Jessup Newton articulated an alternative framework that would allow Indian Tribes to assert equal protection claims in the offense.[330] In doing so, she considered Tribes, as political associations, a suspect class under the equal protection doctrine to provide a way for Tribes to seek redress for wrongs.[331] For example, in *Weeks*, that Tribe asserted the claim that its equal protection rights had been violated in the congressional distribution scheme.[332] Here, the suspect class status would attach to Indian Tribes, providing a higher scrutiny, precisely because of the federal trust responsibility.[333]

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325. Berger*, Reconciling Equal Protection*, *supra* 302, at 1186.

326. 430 U.S. 73 (1977).

327. *Id.* at 75–76.

328. *Id.* at 85 (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974)).

329. *Id.* at 85–89.

330. *See generally* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984) (discussing Fifth Amendment application to tribal claims).

331. *See id.* at 269–70 (describing Tribes as political associations in the context of strict scrutiny application).

332. *Weeks*, 430 U.S. at 75.

333. *See* Jessup Newton, *supra* note 330, at 270 ("The inherent value of heightened judicial scrutiny . . . is honored no less when Indian tribes, rather than individual Indians, raise the spectre of prejudice.").

In a strange turn of events, the type of argument that Professor Newton articulated on behalf of Tribes seeking rights and protections from federal powers is the same type of argument that is used to de-legitimize ICWA. Although *Brackeen* left the question largely unanswered on its merits, both the states and the individual parties argued that strict scrutiny should apply and that ICWA could not even meet a rational basis review.[334] While Professor Newton's argument is not intended to further a colonial project in any aspect, this highlights how non-Indians have weaponized principles intended to empower Tribes to protect their sovereignty to articulate how federal Indian legislation like ICWA discriminates against them. It is not surprising to see equality talk utilized to further colonial goals including white supremacy.[335]

Specifically, there has been a rhetoric shift to understanding the unequal treatment of whites—in which laws supporting Indian preference, such as ICWA, are seen as a threat to overthrowing racial preferences.[336] This rhetoric shift involves the trope of the "vanishing Indian."[337]

Similarly, Professor Carole Goldberg has noted that "some of the challengers view Indian law as threatening their ultimate agenda of overthrowing government-sponsored racial and ethnic preferences."[338]

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334. Brief for Petitioner the State of Texas, *supra* note 253, at 50; Brief for Individual Petitioners, *supra* note 24, at 28–29.

335. *See* Krakoff, *Constitutional Concern*, *supra* 251, at 328 ("The stereotypical Indian is dressed in traditional garb, lives in harmony with nature (or, in the negative version, is a savage of the wilderness), and has an ethereal (or wicked) and, in either case, largely silent demeanor. Anything other than this 'full blood' vision is not truly Indian. The narrative of the disappearing full-blooded Indian justified severing Indians from their land and resources, and facilitated non-Indian settlement. The flip side of this is that today's tribes, especially if they engage in mainstream economic activity, are not really 'tribes,' but amalgams of racially-related opportunists getting a leg up on non-Indian competition.").

336. *See* Goldberg, *supra* note 250, at 944 ("Over time, the rhetoric has shifted from concern for equal treatment of Indians to fear of unequal treatment of whites.").

337. *See* Krakoff, *Constitutional Concern*, *supra* note 251, at 297 n.20 ("[This has been described as] the shift from an antisubordination to an anticlassification approach to equal protection.").

338. Goldberg, *supra* note 250, at 948–49.

Moreover, when Tribes attempted to use similar litigation theories, such as in *Oglala Sioux Tribe v. Van Hunnik*,[339] the courts have rejected them. In *Van Hunnik*, the Oglala Sioux Tribe and Rosebud Sioux Tribe sued the State of South Dakota for violations of the Fourteenth Amendment Due Process Clause and ICWA in emergency proceedings involving Indian children using 42 U.S.C. § 1983.[340] Essentially, the Tribes were suing state actors using the theory of *parens patriae*. Under the theory of *parens patriae*, a sovereign may confer standing to bring a suit on behalf of its citizens to remedy a wrong.[341] As such, the Tribes alleged that:

> The Tribes bring this action as *parens patriae* to vindicate rights afforded to their members by the Due Process Clause of the Fourteenth Amendment and by ICWA. The Tribes and their members have a close affiliation, indeed kinship, with respect to the rights and interests at stake in this litigation. The future and well-being of the Tribes is inextricably linked to the health, welfare, and family integrity of their members.[342]

In bringing this suit, the tribal and individual plaintiffs sought remedies for the lack of due process within the state in the form of prospective relief.[343] Simply stated, the plaintiffs wanted to stop South Dakota child welfare officials from violating ICWA and the constitutional rights of parents in future child welfare cases. However, the state asserted its sovereign immunity from suit using abstention doctrines.[344]

At the district court, the court considered congressional goals and motivations behind ICWA to resolve whether the

339. 904 F.3d 603 (8th Cir. 2018).

340. Oglala Sioux Tribe v. Van Hunnik, 993 F. Supp. 2d 1017, 1021 (D.S.D. 2015).

341. Brief of Amici Curiae Cherokee Nation, Navajo Nation, ICWA Law Center, National Indian Child Welfare Ass'n, National Congress of American Indians at 25, Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018) (Nos. 17-1135, 17-1136, 17-1137) [hereinafter Brief of Amici Curiae Cherokee Nation et al.] ("Plaintiffs' complaint seeks prospective relief against state officials in their official capacities.").

342. *Van Hunnik*, 993 F. Supp. 2d at 1027 (quoting Class Action Complaint for Declaratory & Injunctive Relief at 4, *Van Hunnik*, 993 F. Supp. 2d 1017 (No. CIV-13-5020)).

343. *See* Appellees' Brief at 38, Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018) (No. 17-1135).

344. *Id.*

Tribes had standing to bring this suit.[345] Tribes were successful in keeping the case afloat because "[t]he focus of this litigation is not to redress past injuries to plaintiffs; rather, it is to prevent future violations of the Due Process Clause of the Fourteenth Amendment and ICWA."[346]

However, the Eighth Circuit declared that it "need not address whether any of the plaintiffs satisfy the requirements for Article III standing, because the district court should have abstained."[347] The Eighth Circuit's decision turned upon the notion that the federal district court should have abstained from hearing the matter as it would potentially bind South Dakota to following procedures that the state already outlined and that the state courts could also hear these claims.[348] Additionally, the Eighth Circuit noted that the plaintiffs brought no constitutional challenge to the state's law.[349]

In the end, federalism—the vertical relationship between the federal and state governments—prevented Tribes from effectively enforcing the rights of their members and the application of ICWA to cases involving their member children. The system provided a check on this remedy. Although the Eighth Circuit never reached the standing issue, federal courts have rarely ruled in favor of Tribes utilizing *parens patriae* to bring suit because Tribes are "not representing the interest of all its members."[350] Given theories on who sovereigns represent, especially in public actions such as criminal or child welfare proceedings, this is an interesting colonial argument. While rejecting the State of Texas's *parens patriae* argument to bring an equal protection claim in *Brackeen*,[351] it is possible that perhaps a Tribe may be able to sustain such a claim. As the Court has previously

345. *See Van Hunnik*, 993 F. Supp. 2d at 1028 ("Given the Congressionally established purposes of the [ICWA], the court finds the Tribes have *parens partriae* standing to bring this action . . . .").

346. *Id.*

347. *Fleming*, 904 F.3d at 610.

348. *Id.* at 611–13.

349. *Id.* at 614.

350. Brief of Amici Curiae Cherokee Nation et al., *supra* note 341, at 27–28. *But see* Doe v. Mann, 415 F.3d 1038, 1047 (9th Cir. 2005) ("The purpose of ICWA was to rectify state agency and court actions that resulted in the removal of Indian children from their Indian communities and heritage. Resolving any ambiguity in favor of the Indians yields a conclusion that Indians have a forum in federal court to challenge state child custody decisions.").

351. Haaland v. Brackeen, 143 S. Ct. 1609, 1640–41 (2023).

held, Tribes and states are different with different interests that must be balanced.[352]

B. GETTING TO THE SPACE BEYOND RACE AND POLITICAL STATUS

For Indian children, families, and Tribes, equal protection of the law is far beyond conceptualizing whether a law applies to a suspect class of persons and determining how much review and deference to give to the law after that point. In the seventy years since *Brown v. Board of Education*,[353] the Court has primarily construed the equal protection doctrine as one of anti-classification, meaning that classifications are inherently suspicious, even if that language never appeared in *Brown*.[354] In the context of Indian law, this anti-classification principle is utilized to further colonialism.[355] This is primarily because federal Indian law is rooted in the "fundamental contradiction between the historical fact and continuing realities of colonization on the one hand, and the constitutional themes of limited government, democracy, inclusion, and fairness on the other hand."[356] Balancing the two has long been problematic given the ways in which American national identity and memory erase these practices to impose its myth of sameness and version of equality. However, as Professor Maggie Blackhawk notes:

> Unless we recognize colonialism as a distinctive struggle of fundamental practices, norms, and institutions within our society and recognize discourses around power, self-determination, sovereignty, jurisdiction, and community as a distinctive form of constitutional discourse, we leave the strategies that mitigate the American colonial project at risk of constitutional challenge.[357]

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352. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980) ("This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.").

353. 347 U.S. 483 (1954).

354. Siegel, *supra* note 251, at 1475, 1481.

355. Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 496 (2017) [hereinafter Krakoff, *They Were Here First*].

356. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 384 (1993).

357. Blackhawk, *Constitution of American Colonialism*, *supra* note 70, at 13.

Because of the general trust responsibility the federal government owes Tribes, Indian Tribes are not similarly situated to any other group within the United States.[358] Calling for the equal treatment of American Indians is denying that American Indians are members of Tribes, polities that are equal to the United States government, is to "deny another form of equality."[359] From the perspective of the crafters of federal Indian law and policy, ICWA is meant to provide anti-discrimination measures for Indian families based on how previous law and policy impacted those families *precisely because* they are tribal members.[360] After all, in the 1970s, Congress had no other laws or policies that called for disproportionate disruption of families from any other group.[361] The modern mass-scale family-disruption project that would affect Black American families was only looming on the horizon in the thrust of anti-social welfare policies of the 1980s and 1990s.[362]

However, understanding the trust responsibility alone is not enough to help us resolve the application of the equal protection doctrine. To preserve the integrity of American Indian families and fulfill ICWA's promise, we must arrive at a common understanding. As a colonial tool, the Constitution often worked to exclude Indians, assimilating them instead of including them, and its crafters certainly never intended that equality would apply to American Indian tribes.[363] The Constitution has always dealt with American Indians as separate peoples through both the

358. *See* Alex T. Skibine, *Using the New Equal Protection to Challenge Federal Control over Tribal Lands*, 36 PUB. LAND & RES. L. REV. 3, 4–5 (2015) ("[T]he political relationship existing between the Indian tribes and the United States is said to be a trust relationship.").

359. Bethany Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 597 (2019).

360. *See* Roemer, *Reproductive Justice*, *supra* note 40, at 92–93 (describing previous law and policy effects on Tribes).

361. *See* Zug, *supra* note 155, at 7–8 (explaining that ICWA predates the first set of federal requirements for state child welfare systems).

362. *See generally* ALAN J. DETLAFF, CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION 57–58 (2023) (describing the early relationship between Black Americans and the welfare system); DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 219–22 (20th Anniversary ed. 2017).

363. *See* Blackhawk, *Constitution of American Colonialism, supra* note 70, at 26–27 (describing the Constitution's role in early colonization of American Indian tribes).

overt colonial project and the modern self-determination and partnership model.[364]

Forcibly imposing the constitutional standard of equal protection to questions of citizenship and the existence of Indigenous peoples within the United States under the auspices of equality is not an appropriate solution for fixing the wrongs that the Constitution permitted and does not appropriately recognize a government-to-government relationship between the federal government and Tribes. Because of colonial dealings and racial othering, American Indians have faced genocidal levels of oppression in the United States.[365] Given their unique positionality, it stands the solution to this problem must also be unique. As Professor Sarah Krakoff notes, "if race is a construct that divides and subordinates (or privileges) different groups for different purposes, then remedies may also have to be distinct for each group."[366] A more comprehensive discussion of the divide between race and political status is necessary to understand why it is not the divide that matters so much as the individual and collective needs of American Indians calling for equity. A strict adherence to equal protection jurisprudence neither promotes tribal sovereignty nor fulfills the mandate of the trust responsibility.

1. Race

In furtherance of colonialism, an anti-classification principle applied to Indian law aims to position American Indians as a racial group and ultimately eliminate federal Indian law.[367] Yet, for many—legal scholars included—the equal protection arguments the individual parties in *Brackeen* put forth seem logical and easily resolvable given they are in line with equal protection jurisprudence. To some degree, the arguments make sense when

364. Morton v. Mancari, 417 U.S. 535, 551–52 (1974) (explaining that the Constitutions requires "separate" legislation and treatment for tribal matters).

365. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. II(e), Dec. 9, 1948, 78 U.N.T.S. 277 (defining forcibly removing the children of one group to another as a form of genocide).

366. Krakoff, *They Were Here First, supra* note 355, at 500–01.

367. Goldberg, *supra* note 250, at 948–49 (describing how opponents of affirmative action have latched on to federal Indian law as a threat to the "ultimate agenda of overthrowing government-sponsored racial and ethnic preferences").

it comes to the topic of race and biology.[368] The Supreme Court continues to struggle with definitions of race.[369] Recent jurisprudence demonstrates the Court's antipathy toward any racial classifications.[370] We are living through a test on these limits as groups claiming to fight for equality pose legal challenges to anything from diversity, equity, and inclusion (DEI) initiatives to people simply having jobs.[371] One might opine that beyond fears of racial discrimination, the modern American population also has a deep fear of systems becoming more accessible to those traditionally denied access or process, reviling such practices as a foregone opportunity.

While ICWA's definition of Indian child is firm in requiring a child's enrollment or eligibility for enrollment in a Tribe,[372] Indian law scholars have long pointed out that there is no real distinction between race and ancestry.[373] To be eligible to enroll in

368. *See, e.g.*, LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 2139, 2152 (2023) ("Today the ancestry-based conception of race proliferates.").

369. Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 18 (2008) ("*Holyfield* illustrates how Congress and the Supreme Court continue to struggle with definitions of race.").

370. *See* Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2151 (2023) (holding that using racial classifications in college admissions are contrary to the Equal Protection Clause and unconstitutional).

371. *See* Alexandra Olson, *Grant Program for Black Women Entrepreneurs Blocked by Federal Appeals Court*, ASSOCIATED PRESS (Oct. 1, 2023), https://https://apnews.com/article/black-women-businesses-federal-court-ae4ed6a9b298d7e00ff9e4c16324a32b [https://perma.cc/4J7J-ZLGQ] (describing a legal challenge to a venture group's program providing grants to Black women business owners); *see also* Anemona Hartocollis, *Northwestern Law School Accused of Bias Against White Men in Hiring*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/us/affirmative-action-lawsuit.html [https://perma.cc/E8ZL-7DHC] (describing a lawsuit brought against Northwestern University Law School claiming bias against hiring white male law professors, naming several professors of color who were hired instead of them).

372. *The Indian Child Welfare Act: A Family's Guide*, NAT'L INDIAN CHILD WELFARE ASS'N, https://www.nicwa.org/wp-content/uploads/2017/04/The-Indian-Child-Welfare-Act-A-Familys-Guide.pdf [https://perma.cc/V8ZA-ZDK8] (describing how ICWA's applicability depends on the child's membership in a federally recognized tribe).

373. *See also, e.g.*, Fletcher, *Original Understanding*, *supra* note 63, at 164 ("American Indian law and policy relating to Indian people often has been driven by racial animus and race-based paternalism—sometimes in the same breath."); Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal*

a federally recognized Tribe, one must have ancestry within a federally recognized Tribe.[374] Simple "box checking," or claiming Indian status, is not enough.[375] Though given the ways in which federal policy has historically worked to dilute Indians from the population, these arguments are somewhat ironic.

The *Brackeen* plaintiffs' contention that ICWA is race-based relied heavily on the concept that a child need not be enrolled in a Tribe for ICWA to apply,[376] which is only a partial truth. In the BIA's 2016 regulations, the BIA provided guidance for determining whether a child is an Indian child using the "reason to know" standard.[377] Where a moving party has a reason to know a child is an Indian child, the court is to apply ICWA to the proceedings unless and until the court can make a finding that the child is not an Indian child.[378] As the Washington Supreme Court reminded the world in *Z.J.G.*, there are a myriad of reasons why American Indians, who are eligible for political membership within their Tribes, are not enrolled—in no small part due to

Sovereignty, 87 WASH. L. REV. 1041, 1043 (2012) ("The racialization of American Indians, which served the purposes of justifying expropriation of their lands and imposing policies of forced assimilation, is today embedded in their separate political status. The political and the racial are therefore hopelessly intermingled in current legal definitions of tribes in ways that nonetheless point to the same deferential conclusion that courts currently reach."); Krakoff, *Constitutional Concern, supra* note 251, at 297 ("The Court's tendency to conflate the categories of race, lineage, and tribal membership, and to see all of those classifications as troubling regardless of the context or purposes, has been developing over time."); Berger, *Reconciling Equal Protection*, *supra* note 302, at 1196 ("While an anti-racial discrimination norm is at the core of equal protection, racial discrimination for Indian peoples had less to do with defining individuals according to race than with defining tribes as racial groups and denying them sovereignty and property as a result.").

374. *Tribal Enrollment Process*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/tribes/enrollment [https://perma.cc/HGN5-7SHS].

375. *Id.* (describing the genealogical research and documentation of ancestry needed to apply for enrollment in a Tribe).

376. Reply Brief for Individual Petitioners, *supra* note 13, at 4–5.

377. 25 C.F.R. § 23.107(a) (2024); *see also In re* Dependency of Z.J.G., 471 P.3d 853, 856 (Wash. 2020) ("The 'reason to know' finding performs a critical gatekeeping function. It ensures that the court applies the heightened ICWA and WICWA standards early on in any proceeding and ensures that tribes receive adequate notice of the proceeding in order to protect their children and the tribes' sovereign interests.").

378. *Z.J.G.*, 471 P.3d at 856.

forcible displacement and child removals.[379] In *Z.J.G.*, the court contemplated whether there was reason to know if a child was an Indian child where their parent was eligible for enrollment but not enrolled.[380] In that case, in which there had been multigenerational state involvement with an Alaska Native family residing in Washington, the court held that there was sufficient reason to know that the child was an Indian child on these facts.[381]

Although this holding was monumental, applying the logic of the *Brackeen* plaintiffs, this child was not an Indian child because of the one generation disconnect. Given how long family regulation proceedings can take, it is not wholly uncommon that a child (and their parent) could become enrolled in their Tribe as the proceedings unfold.[382] In this scenario, both the parent and the child still have a political tie to a Tribe, even if the physical tie may have been violently severed. If the Supreme Court turned away from previous Indian law precedent classifying Indian as a political status, in turn defining this preference as a race-based classification, an adverse ruling to ICWA would have been inevitable[383]—which is very likely the point of the argument in the first place.

Additionally, ICWA requires an inquiry into whether a child qualifies as an Indian child.[384] In any child welfare proceeding, all state agencies must inquire as to whether there is reason to know a child is an Indian child as a threshold matter.[385] Where a state has the reason to know a child is an Indian child, the

379. *See id.* at 856–57, 860 (describing the "horrific wrongs" done against Tribes, including forced removal of children and lack of due process).

380. *See id.* at 858 (detailing the facts of the case and highlighting that the children's mother had Tribal heritage but had not enrolled in a federally recognized Tribe).

381. *Id.* at 857 ("Given these guiding principles, we hold that an indication of tribal heritage is sufficient to satisfy the 'reason to know standard.'").

382. *See, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637, 645 n.2 (2013) (describing how Biological Father's Tribal enrollment status changed during litigation). Although *Adoptive Couple* involved a private adoption, the same holds true for family regulation cases that can last for years.

383. *See* Fletcher, *Politics, Indian Law, and the Constitution*, *supra* note 139, at 552–53 (describing how the classification of Indian as a political status satisfies previous precedent and that there is "no room" allowed for creating a racial classification).

384. 25 C.F.R. § 23.107(a) (2024).

385. *Id.*

state must do its due diligence by sending proper notice to any of the Tribes that the child is or could possibly be enrolled in.[386] Once the state receives confirmation from those Tribes that the child either is or is not a member or eligible for enrollment, they can proceed appropriately.[387] As a best practice, a court should follow ICWA as though it might apply as it awaits this determination.[388] However, the underlying child welfare matter continues as the Tribe makes this determination.[389] Realistically, there is no lost cost here as no child welfare case is harmed by providing heightened protections in the short term. Given issues with compiling ICWA-related compliance data,[390] one common ICWA practitioner claim is that prolonged ICWA litigation usually happens when states overlook this first step and decline to apply ICWA early on in the case.[391]

In utilizing race-based classifications, the *Brackeen* plaintiffs centered themselves not only as the right types of families for the Indian children in question but also as victims to race-based policies.[392] The argument itself is a form of the

386. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11(a) (2024).

387. *See, e.g.*, *In re* Dezi C., 553 P.3d 829, 841–42 (Cal. 2024) (hinging the conditional reversal on the accuracy of the inquiry into the child's Indian heritage); *see also In re* Kenneth D., 553 P.3d 815, 824 (Cal. 2024) (noting that this inquiry must be conducted in the first instance and must be made prior to a final disposition in the case).

388. *See* 25 U.S.C. § 1912(e) ("No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.").

389. *See id.*; *see also id.* § 1912(d) (describing how the foster placement hinges on both the determination of the child's Indian heritage as well as investigation of the custody arrangement's potential to inflict emotional and physical damage on the child).

390. *See* Fort & Smith, *supra* note 188, at 11–12 (describing the methodology and difficulties behind compiling ICWA data).

391. *E.g.*, Sarah Krakoff, *Indian Child Welfare Act: Keeping Families Together and Minimizing Litigation*, COLO. LAW., Feb. 2001, at 81, 81 ("Custody proceedings involving Indian children can become protracted if a child is not identified early in the process as one who warrants the ICWA's special protections.").

392. *See* Reply Brief for Individual Petitioners, *supra* note 13, at 4–11 (arguing that the ICWA's supposed race-based preferences disadvantaged the plaintiffs); *see also, e.g.*, Brief for Individual Petitioners, *supra* note 24, at 10–11 (recounting how an Indian child "flourished" with the white Clifford family while

racialization of parents' rights in which only some parents have rights that deserve to be protected and championed.[393] ICWA ensures not only continued tribal existence but that Indian families are treated fairly in dealings with state courts and private actors.

The children the Brackeen family sought to adopt became eligible for adoption because their parents came under the purview of the family regulation system.[394] In that case, the child's family wanted to adopt the first child until the Brackeen family initiated this lawsuit.[395] Asking grandparents to withstand a custody battle to maintain ties to grandchildren that the family regulation system legally orphaned in the first place, especially those who may not have resources to weather a legal challenge of this nature, is another reason Congress enacted ICWA.[396] ICWA's goal of Indian family preservation is as strong as its goals for tribal sovereignty.

The case of the Clifford family, one of the individual parties in *Brackeen*, is also like that of the Brackeens. The child the Cliffords wanted to adopt in Minnesota was an Indian child whose Indian grandmother also sought placement.[397] Notably, the child's grandmother, Ms. Bradshaw, was a survivor of an Indian boarding school.[398] In their Supreme Court briefing, the Cliffords noted that the child, who was previously ineligible for membership, was placed with them because Ms. Bradshaw "had been previously unfit to serve as a foster parent."[399] This is true. The state agency had previously declared Ms. Bradshaw unfit to

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also pointedly noting that the child's Indian grandmother had a prior criminal conviction).

393. *See* Baldwin Clark, *supra* note 368, at 2198–202 (describing how the rights of white parents and their children are often prioritized over the rights of parents of color).

394. This Land, *supra* note 221 (describing how the involvement of CPS triggered the foster placement).

395. *Id.*

396. *See* Krakoff, *Constitutional Concern*, *supra* note 251, at 300 ("The ICWA was designed to address the fundamental problem (by many accounts a continuing one) of discriminatory interference in the families of American Indian tribal members." (footnote omitted)).

397. Julia Lurie, *Forever Home*, MOTHER JONES (Mar.–Apr. 2023), https://www.motherjones.com/politics/2023/02/brackeen-haaland-scotus-indian-child-welfare-act-icwa [https://perma.cc/6RAP-9UUD].

398. *Id.*

399. Reply Brief for Individual Petitioners, *supra* note 13, at 10.

serve as a foster parent—and they repeatedly denied other family members who sought placement.[400] ICWA did not suddenly make Ms. Bradshaw fit, but rather, federal standards had improperly deemed her unfit given a fifteen-year-old property crime and a previous child welfare case from when her own child was young.[401] Seemingly, there were no findings that made Ms. Bradshaw unfit or otherwise found her culpable of wrongdoing in that case.

To the consternation of the Cliffords, once the child's Tribe became involved, they immediately recommended that the child be placed with her grandmother.[402] A key factor that the Cliffords omit from that briefing is that Ms. Bradshaw *fought* for her grandchild. Her battle never stopped as Ms. Bradshaw "did everything in her power to get her granddaughter back."[403] She continued making phone calls and seeking legal help to have her grandchild placed with her or one of their other extended family members.[404] Ms. Bradshaw would eventually learn that she could apply to have her criminal conviction set aside, making her eligible as a placement for the child.[405] As with many issues impacting American Indian families, lack of access to legal assistance complicated her fight.[406]

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400. This Land, *Grandma Versus the Foster Parents*, CROOKED MEDIA (Aug. 30, 2021), https://crooked.com/podcast/3-grandma-versus-the-foster-parents [https://perma.cc/MC7B-FTR6].

401. Lurie, *supra* note 397.

402. Reply Brief for Individual Petitioners, *supra* note 13, at 10–11.

403. Brief for Robyn Bradshaw, *supra* note 301, at 9. Ms. Bradshaw's amicus brief in this case asserts that the child's adoption is final. *Id.* at 1.

404. Lurie, *supra* note 397.

405. *Id.* (describing how county social workers failed to inform her of this possibility).

406. *See* 25 U.S.C. § 1912(b) (describing the protocol for appointing counsel due to indigency). Although ICWA provides for the appointment of counsel for parents facing child removal and/or termination of parental rights, there is a dearth of those with knowledge and expertise on ICWA cases in some places. *See, e.g.*, Shanna Knight et al., *Improving Outcomes in Indian Child Welfare Cases: Strategies for State-Tribe Collaboration*, AM. BAR ASS'N (Jan. 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/january-2017/improving-outcomes-in-indian-child-welfare-cases--strategies-for [https://perma.cc/BFH4-9HE7] (explaining how lawyers need to be well-versed in the ICWA, but how much of that "uncommon expertise" mostly comes from the Tribe itself); *see also* E-mail from Kathryn E. Fort, Director, Michigan State University Indian Law Clinic, to author (Feb. 25, 2025, 09:21 EST) (on file with author) ("Without

In Ms. Bradshaw's case, she found a non-profit that specialized in American Indian issues.[407] On the flip side, the Cliffords had the help of attorneys, service providers, and others in helping them obtain custody of the child and helping her adjust to living in their home.[408] While the Tribe had previously declined to become involved given the mother was not enrolled, the non-profit group alerted the Tribe about the enrolled grandmother's attempt to fight for her granddaughter.[409] The Tribe became involved almost immediately after that.[410] The Cliffords' briefing characterizes this as a sudden change that happened almost overnight, leaving them blindsided.[411] Undoubtedly, they understood that this child is an Indian child.[412]

Yet, court filings portray Ms. Bradshaw as someone who flew in by night to disrupt this child's adoption.[413] This type of argument that criticizes ICWA and Tribes as disruptors to a child's permanency plan is not uncommon. In a recent ICWA notice case, *Dezi C.*, the California Supreme Court chastised state agents who claimed that a conditional reversal of an order for the termination of parental rights pending the proper application of ICWA was little more than parents gaming the system and prolonging the process.[414] In response to these claims, the court noted that in the time that it took for this case to reach the court on appeal, the state agency could have undertaken the appropriate measures to conduct the inquiry as to whether there

question the biggest obstacle to meeting an ICWA placement is lack of representation for the placement. Even if the Tribe is involved in the case, they cannot also provide legal representation to the preferred placement.").

407. Lurie, *supra* note 397 (describing how she accessed the Upper Midwest American Indian Center).

408. *Id.* (detailing the Cliffords' access to lawyers, therapists, and community groups).

409. *Id.* ("When Upper Midwest alerted White Earth that a member of the tribe was seeking custody of her granddaughter, White Earth sprang into action, too.").

410. *Id.*

411. Reply Brief for Individual Petitioners, *supra* note 13, at 10–11.

412. Lurie, *supra* note 397 (describing how the Cliffords knew the importance of P.S. maintaining a connection to her heritage).

413. *See* Reply Brief for Individual Petitioners, *supra* note 13, at 10–11 (characterizing the involvement of Ms. Bradshaw as blindsiding to the Cliffords).

414. *See In re* Dezi C., 553 P.3d 829, 850 (Cal. 2024) ("[T]here is little indication that the unlikely concern of gamesmanship outweighs, or is on equal footing with, the critical importance of ensuring an adequate and proper inquiry.").

was reason to know the child was an Indian child.[415] ICWA provides a procedural process that sometimes parties overlook, but it is overlooking the process that creates delays in permanency.

As to Ms. Bradshaw, once the court ordered supervised, and later overnight, visits between the child and her grandmother, the Cliffords did not take the change well. They took issue with Ms. Bradshaw telling her granddaughter she was seeking custody and sending her gifts, noting they were not things the child asked for, that they were "dollar store" items, and they did not always have the original tags, which they requested be included.[416] They took issue with how visits with Ms. Bradshaw disrupted the consistent diet they had created for the child.[417] They also referenced meltdowns after the visits with her grandmother and the fact that while she had once shown no interest in looking at a family album, the child became very interested in looking at those photo albums and wanting to reunite with her family.[418] At the very least, the Cliffords' complaints were rooted in classism. At worst, the Cliffords' complaints highlight the ongoing condemnation of Indian childrearing practices rooted in culture as well as the conditions of poverty—the very condemnation that Congress intended ICWA would mitigate when it came to removing Indian children from their families and homes.

Ms. Bradshaw's case also demonstrates just how subjective family regulation decisions can be. In two separate home visits, two social workers gave the court completely different interpretations of Ms. Bradshaw's home.[419] One criticized her for having too much junk food around while the other noted positively how there was always food available for the child.[420] Where one social worker criticized Ms. Bradshaw for not having appropriate structure for the child—for example, not sending her to summer school—another felt that Ms. Bradshaw provided a loving home.[421] Confusing poverty for neglect, or in this case a guardian's inability to care for a child because another family was better at meeting capitalist metrics of the "good family," is par for

415. *Id.* at 851.

416. Lurie, *supra* note 397.

417. *Id.*

418. *Id.*

419. *Id.* (describing the two social workers' "strikingly different" interpretations).

420. *Id.*

421. *Id.*

the course in the family regulation system.[422] In the end, the judge on the case criticized one social worker because she "will never believe Ms. Bradshaw is a successful parent no matter what she does."[423] In this case, the judge had competing testimony from two social workers to weigh and arrive at their determination.[424] That does not happen in every case in which a social worker's biases may be taken at face value. Again, the condemnation of childrearing practices that may look different, especially because of poverty, is why Congress had to enact ICWA in the first place.

Both cases that the Brackeen and Clifford families were involved in were the precise type of case to which Congress intended ICWA apply heightened scrutiny to protect the integrity of Indian families. Although it would be absurd to classify these would-be adoptive families as malevolent actors simply for attempting to adopt children, the family regulation system has almost always presumed their innocence and competence in childrearing at the expense of a child's biological family because of their race and class stature.[425] ICWA sought family reunification and, albeit political, community support for families in need.[426] ICWA protected Indian parents' rights in a time before modern child welfare existed.[427] Even after the advent of modern child welfare law, ICWA continues to work for Indian children, parents, and Tribes. While ICWA works for Indian families, children, and Tribes, it seemingly imposes a roadblock for non-Indian adoptive couples who seek to adopt Indian children because

422. *See* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 100–10 (2017) (describing how poor families receive more extensive scrutiny from the child protection and foster care systems); *see also* Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. 1541, 1541–44 (2024) (arguing that there needs to be a better way to distinguish poverty from neglect, highlighting that poor families are overrepresented in neglect cases).

423. Lurie, *supra* note 397.

424. *Id.*

425. *See* Glaser, *supra* note 96 (describing how biases have long tilted preference in favor of placing Indian children with white parents over having them remain with tribal members or Indian parents).

426. *See* 25 U.S.C. § 1912(d) (requiring active efforts to prevent "the breakup of the Indian family").

427. *See* Zug, *supra* note 155, at 6–9 (showing that the ICWA's preference for family preservation predated welfare forms that also put family preservation at the forefront).

they deserve to be families.[428] Anecdotally, this was also my experience working with custody and visitation cases involving children who may have had both a non-Indian and an Indian parent. Sometimes, the narrative in such cases centered the idea that while non-Indians are good enough to obtain cultural competency, Indians can never overcome the hurdles needed to be good parents and families.

Some ICWA cases, including this one, garner a lot of media attention. A lot of that media attention focuses on the good parents and the evil, antiquated law that stands to keep those good parents from adopting.[429] In fact, multiple news outlets featured the adoptive family in the *Alexandria P.* case on their cover in a state of sincere emotional distress, discussing all types of messaging and personal information on the child's amount of Indian blood.[430]

Sometimes, media attention turns to the poor Indian child who needs to be saved. As discussed in Part I.A, the concept of the best interests of the child is often leveraged to allege that ICWA denies Indian children their best interests.[431] Supposedly,

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428. *See In re* Alexandria P., 204 Cal. Rptr. 3d 617, 621–22 (Cal. Ct. App. 2016) (finding that there was not good cause to depart from the standards in the ICWA, leading to a placement with extended family and not the non-Indian foster parents).

429. *See, e.g.*, *Christina Rose, Baby Veronica and the Future of ICWA: What's Next*, INDIAN COUNTRY TODAY (Mar. 12, 2014), https://ictnews.org/archive/baby-veronica-and-the-future-of-icwa-whats-next [https://perma.cc/96T8-SZDT] (discussing how the media portrays the ICWA as an "antiquated law" and how pro-ICWA activists often "don't win in public opinion").

430. *See, e.g.*, SAVE OUR LEXI, http://saveourlexi.com [https://perma.cc/x56ZN-FDVU] (adoptive family's website referencing the child's "1.5%" of Indian blood); Naja Rayne, *'Save Lexi' Protestors Gather as 6-Year-Old Part-Native American Girl Is Removed from Foster Home*, PEOPLE (Mar. 21, 2016), https://people.com/crime/save-lexi-protestors-gather-after-6-year-old-is-removed-from-foster-home [https://perma.cc/3NBU-HSZQ] (again referencing Lexi's percentage of Choctaw heritage, as well as extensively detailing the distress of the foster family).

431. *See, e.g.*, Brief Amici Curiae Goldwater Institute, Cato Institute, Texas Public Policy Foundation, & Families Affected by ICWA in Support of Brackeen, et al. & State of Texas at 27–29, Haaland v. Brackeen, 143 S. Ct. 1609 (2022) (Nos. 21-376, 21-377, 21-378, 21-380) (arguing ICWA denies Indian children their best interests); *see also* Bonnie Cleaveland, *ICWA Is Politicizing the 'Best Interests' Determination*, CHRON. SOC. CHANGE (May 29, 2015), https://www.socialjusticesolutions.org/2015/05/29/icwa-politicizing-best-interests-determination [https://perma.cc/LFL5-LZQY] (questioning how best interests is applied in ICWA cases).

the best interests standard is a neutral standard used to assess what is best for any child in these circumstances.[432] But as ICWA litigation exemplifies, this standard is imbued with bias and used as determinant of who makes the right kind of family.[433]

Beyond child welfare cases, adoption is riddled with unconscious bias. Not much has changed since the pre-ICWA days where the adoption market reflects the same racial hierarchies as other segments of American society.[434] White adoptive couples of means may dominate the market, but evidence suggests they prefer white children and children of lighter skin tones over Black and/or unambiguously non-white children.[435] Indian children display diverse phenotypes because American Indian children are likely to be of mixed racial heritage.[436] For example, an American Indian child may appear as a white-presenting person because of genetics. However, that does not negate their political and cultural relationship with a Tribe making them American Indian.

Perhaps this is one of the reasons that the race argument in *Brackeen* takes advantage of how society views race. Consider the first sentence of *Adoptive Couple v. Baby Girl*. In determining whether ICWA should apply in that case, Justice Alito wrote:

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432. *See, e.g.*, Anne L. Alstott et al., *Psychological Parenthood*, 106 MINN. L. REV. 2363, 2364–65 (2022) (describing the pervasiveness of the "best interests" standard in family law and how it aims to give judges discretion to protect the child).

433. *See* Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681, 692 (2021) (characterizing child removal as "not just in the child's 'best interest': it is a punitive response to parents that no longer deserve the right to parent"); *see also* Alstott et al., *supra* note 432, at 2421 ("At the same time, however, the best interests standard permits ad hoc decisions based on the judge's personal values and biases rather than objective factors."); Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 280–82 (2022) (discussing proposals to limit the use of the best interests of the child standard in order to prevent judge bias in child protection cases).

434. *See* Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 UC DAVIS L. REV. 1415, 1423–26 (2006) (describing how the racial preferences of white adoptive parents often lean towards white children).

435. *Id.*

436. Alyssa Liehr, *Use of Multiracial Category Underestimates Disproportionate Representation of Black and Indigenous Children in Foster Care*, CHILD TRENDS (Aug. 20, 2024), https://www.childtrends.org/publications/multiracial-category-representation-black-indigenous-children-foster-care [https://perma.cc/LB8W-G2FE].

"This case is about a little girl (Baby Girl) who is classified as Indian because she is 1.2% (3/256) Cherokee."[437] Although the Supreme Court tried to reduce the child to her ancestry, the Cherokee Nation considered her a member.[438] The Court's commentary was meant to remind us that she was barely Indian at all. After all, it helped make sense of the Supreme Court's ultimate holding that ICWA did not apply. By reducing Baby Girl to a blood quantum, the Court *constructed* race to determine an antiquated paternity law was good enough to show there was no Indian family to breakup.[439]

Perhaps a success of the larger settler colonial project, non-Indians are largely aloof about the political—as opposed to racial—status that American Indians enjoy. In the United States, education has portrayed colonialism as a net good. The myth of the American national identity is built on emphasizing equality vis-à-vis the equal protection doctrine's narrow construction of the anti-classification principle.[440] In the case that Americans are willing to recognize that Tribes enjoy a political status as sovereigns, such as the *Brackeen* plaintiffs did before the Supreme Court, they wish to place limitations on what sovereignty means.[441] They resort to the idea that an exercise of sovereignty is only permissible so long as it does not offend the non-Indian

437. Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013); *see also* Fletcher, *Politics, Indian Law, and the Constitution, supra* note 139, at 500 n.29 (noting that this statement, while disparaging the child's Cherokee heritage, indicates that some conservative justices on the Supreme Court might be willing to reconsider the political classification doctrine).

438. *See, e.g.*, *"Baby Veronica" Handed Over to Adoptive Parents, Cherokee Nation Confirms*, CBS (Sept. 24, 2013), https://www.cbsnews.com/news/baby-veronica-handed-over-to-adoptive-parents-cherokee-nation-confirms [https://perma.cc/E249-H3TP] (quoting a tribal representative who said that Baby Veronica will "always be a Cherokee citizen").

439. *See Adoptive Couple*, 570 U.S. at 641–42 (arguing that there were not enough ties between the child and the Indian family for ICWA to merit her being placed with them).

440. *See supra* Part II.B (establishing the background of how the American national identity is rooted in the Court's construction of the anti-classification principle within the context of Indian law).

441. *See* Brief for Individual Petitioners, *supra* note 24, at 14 (arguing that the notion of Indian self-government or sovereignty is subject to the limitation of applying only to members of Indian tribes on or near Indian lands).

judiciary and society's sensibilities.[442] After all, we are one nation. Those who make this argument see tribal sovereignty itself as a special right afforded to a group based on race. In reality, tribal sovereignty is about a series of political identities and existences that pre-date the arrival of the first European settlers.

2. Citizenship

Considering *Mancari* and *Rice*, the individual parties in *Brackeen* contended that ICWA's placement preferences are more like *Rice* than *Mancari* because of how Indian Tribes confer citizenship.[443] They argued that ICWA requires a "biological classification" because the definition of Indian child requires a "blood connection."[444] The individual parties noted "[a] child's 'eligibility' is thus based on ancestry, not on any political affinity or voluntary decision" because "ICWA even imposes its constraints on children despite a biological parent's wish *not* to enroll her child in a tribe, and despite the parent's express wish for the child to be adopted by a non-preferred family."[445]

But citizenship is almost always conferred through some form of birthright citizenship. If tribal membership was race-based, citizenship questions and defining an "Indian child" for the purposes of ICWA might be more straightforward. As it stands, to apply ICWA to an Indian child, the child must be a tribal member or eligible for enrollment as a child of an enrolled member of a Tribe. This requires more than just the accident of

442. *See id*. at 14–15 (arguing that an exercise of sovereignty is permissible if it does not apply outside of that limited context and extends to laws that regulate an "affair of the State" (quoting Rice v. Cayetano, 528 U.S. 495, 522 (2000))).

443. *See id*. at 29 ("This explicit lineal-descent requirement sharply distinguishes ICWA from the BIA hiring preference in *Mancari*, which was upheld because it 'applie[d] only to members of "federally recognized" tribes.' Instead, like the classification in *Rice*, the definition looks to biological descent." (citing Morton v. Mancari, 417 U.S. 535, 553 n.24, 554 (1974))).

444. *See id.* (presenting the argument that if a couple enrolled in a Tribe had two non-member children, one biological and one adopted, only the biological child would be an "Indian child" under the ICWA); *see also* H.R. REP. No. 95-1386, at 39 (1977) (using the term "blood connection" within the context of the ICWA's enactment).

445. *Id*. at 30.

birth; it requires an act of bureaucracy that years of Indian removal has complicated.[446]

While the individual petitioners in *Brackeen* argue that ICWA's placement preferences are more like *Rice* and based on ancestry as a proxy for race, ancestry in this context is about more than race. Ancestry is a requirement to attain political status as a tribal member and an American Indian person—precisely because the colonial power required it.[447] The idea of Indian as blood comes from federal law and policy.[448] Notably, references to "Indian blood" exist in places such as land allotments—or how the U.S. government divvied up Indian lands—and in determining Indian status for the purposes of criminal jurisdiction.[449] Looking toward the quagmire that is criminal jurisdiction in Indian Country provides some very telling analogies and examples.

In the 1846 murder case *United States v. Rogers*, the Supreme Court held that, although a Tribe adopted a white man, he was not considered Indian under the law.[450] In *Rogers*, the Court conflated tribal membership with race, stating that the laws of Indian Tribes applied only to those of the Indian "race," not members.[451] Although *Rogers* was a murder case pre-dating

446. *See, e.g.*, *In re* A.W., 741 N.W.2d 793, 812–13 (Iowa 2007) (striking a provision of the Iowa state ICWA law that would have applied ICWA to all Indian children); *In re* Z.K., 973 N.W.2d 27, 35 (Iowa 2022) (declining to apply ICWA in a case where tribal officials asked for more time to determine the child's eligibility); Nielson v. Ketchum, 640 F.3d 1117, 1124 (10th Cir. 2011) ("Not only does the temporary membership provision of the Citizenship Act fail to bring temporary members under the protection of ICWA, but the Citizenship Act's broad definition of citizenship—even if it was full citizenship as opposed to temporary—violates Congress' intent.").

447. *See* Fletcher, *supra* note 139, at 513 (noting that many federal statutes and policies elect to define who is an Indian by blood quantum).

448. *Id.*

449. *See id.* (detailing that whether a person was eligible for an allotment of land depended on whether the person was "in whole or in part of Indian blood or descent" (citing 25 U.S.C. § 345 (2018))); *see, e.g.*, United States v. Diaz, 679 F.3d 1183, 1187 (10th Cir. 2012) (providing an example of an evidentiary test for criminal jurisdiction under the General Crimes Act requiring a showing of "some Indian blood").

450. 45 U.S. (4 How.) 567, 572–73 (1846).

451. *See id.* ("And we think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself

the Major Crimes Act,[452] it demonstrates federally imposed limits on tribal decisions involving membership. In exercising its criminal jurisdiction today, the federal government relies upon tribal enrollment information and citizenship to charge a person under the Major Crimes Act, not a mere affirmation of race.[453]

Today, charging decisions in Indian Country come down to (1) where the crime occurred, and (2) whether the defendant and victim are members of a federally recognized Indian Tribe.[454] While there is no statutory definition of Indian in this context,[455] the Ninth and Tenth Circuits have adopted this test to

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amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, — [sic] of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.").

452. Act of March 3, 1885 (Major Crimes Act of 1885), ch. 341, § 9, 23 Stat. 362, 385 (current version at 18 U.S.C. § 1153) (conferring jurisdiction over certain crimes, including murder, committed in Indian Country to the federal government).

453. *See* United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005) (noting that under the *Rogers* test, courts should also consider factors such as tribal enrollment, enjoyment of benefits from tribal enrollment, social recognition as an Indian through residence on a reservation, and participation in Indian social life).

454. *See, e.g.*, United States v. McBratney, 104 U.S. 621, 624 (1881) ("The single question that we do or can decide in this case is that stated in the certificate of division of opinion, namely, whether the Circuit Court of the United States for the District of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute Reservation, and within the limits of the State of Colorado; and, for the reasons above given, that question must be Answered in the negative."); *Ex parte* Kan-gi-shun-ca, 109 U.S. 556, 559 (1883) ("In the present case the Sioux reservation is within the geographical limits of the Territory of Dakota, and being excepted out of it only in respect to the Territorial government, the district court of that Territory, within the geographical boundaries of whose district it lies, may exercise jurisdiction under the laws of the United States over offenses made punishable by them committed within its limits."); United States v. Kagama, 118 U.S. 375, 383 (1886) ("The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there.").

455. *See* Fletcher, *Politics, Indian Law, and the Constitution*, *supra* note 139, at 512 ("Federal Indian affairs statutes originally did not define 'Indian' at all, as exemplified by the Constitution itself.").

determine whether a defendant qualifies as Indian for the purposes of criminal jurisdiction.[456]

Against this backdrop and with *Rogers* in mind, consider the more recent case of *Oklahoma v. Hill*.[457] In *Hill*, an Oklahoma trial court considered whether it would dismiss a case brought against a member of the Cherokee Nation because, based on where the crime occurred and the status of the defendant, the state did not have jurisdiction to prosecute this crime.[458] Primarily, Mr. Hill filed this motion after the Supreme Court held in *McGirt v. Oklahoma*[459] that Congress had never diminished reservation lands in Oklahoma, meaning somewhere around forty-seven percent of Oklahoma remained Indian Country.[460] This led

456. *See* United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005) ("The generally accepted test for Indian status considers (1) the degree of Indian blood; and (2) tribal or government recognition as an Indian. . . . The first prong requires ancestry living in America before the Europeans arrived, but this fact is obviously rarely provable as such. Because the general requirement is only of 'some' blood, evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong." (citation omitted)); *see also* United States v. Diaz, 679 F.3d 1183, 1187 (10th Cir. 2012) ("To find that a person is an Indian the court must first make factual findings that the person has 'some Indian blood' and, second, that the person is 'recognized as an Indian by a tribe or by the federal government'. . . . A person satisfies the definition only if both parts are met; conversely the government can prove that a person is not Indian by showing that he fails either prong. This test, moreover, applies to determine the status of both a perpetrator or a victim of a crime in Indian Country." (citation omitted)).

457. *See* Motion to Dismiss at 1, Oklahoma v. Hill, No. NF-2020-491 (Okla. Dist. Ct. Sept. 28, 2020) (requesting the court dismiss the case against Mr. Hill on the basis that the state has no jurisdiction to prosecute the crime).

458. *Id.* at 2; *see* Chris Cameron & Mark Walker, *Two Black Members of Native Tribes Were Arrested. The Law Sees Only One as Indian*, N.Y. TIMES (June 3, 2023), https://www.nytimes.com/2023/06/03/us/politics/freedmen-mcgirt-ruling-oklahoma.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/UU5A-8WCL] (noting that the fate of Mr. Hill hinged upon his race and ancestry).

459. 140 S. Ct. 2452 (2020).

460. *See id.* at 2482 ("If Congress wishes to withdraw its promises, it must say so."); Investing in Native Cmtys., *U.S. Supreme Court Rules That About Half of Oklahoma is Native American Land*, NATIVE AMS. IN PHILANTHROPY (2020), https://nativephilanthropy.candid.org/events/u-s-supreme-court-rules-that-about-half-of-oklahoma-is-native-american-land [https://perma.cc/D9WZ-SE76] ("In McGirt v. Oklahoma, the decision, 5–4 in favor of McGirt, acknowledges that Congress has never extinguished the reservation lands set aside for the Muscogee Creek Nation in 1866. Or, put more plainly, 19 million acres composing 47 percent of the state of Oklahoma—an area that's home to 1.8 million people—is still Native land.").

to many convicted persons and criminal defendants in Oklahoma, like Mr. Hill, seeking relief—and further led to the Supreme Court's later ruling in *Oklahoma v. Castro-Huerta* that further complicates criminal jurisdiction in Indian Country.[461] In Mr. Hill's case, the Oklahoma district court denied his motion to dismiss even before the Supreme Court heard *Castro-Huerta*.[462]

The district court denied the motion on the grounds that Mr. Hill had the burden of proving "he has some Indian blood" and that "he is recognized as an Indian by a tribe or federal government."[463] Herein lies the problem: Mr. Hill is the descendent of Cherokee Freedmen.[464] That is, members of the Cherokee Nation enslaved Mr. Hill's ancestors. After obtaining their freedom, his ancestors later became members of the Cherokee Nation.[465] Asking Mr. Hill to prove his "Indian blood" is akin to asking someone to show "American blood" after the ratification of the Fourteenth Amendment. It is also rather similar to what happened to the Indian child at the center of *Adoptive Couple* whose blood quantum was put on display for the world to see just how Indian she was.[466]

Over the years, there has been quite a bit of debate in terms of whether the Cherokee Nation should extend membership to the Freedmen, even though it agreed to extend membership to

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461. *See* Oklahoma v. Castro-Huerta, 597 U.S. 629, 632 (2022) (detailing that Federal and state governments have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country).

462. *See* Oklahoma v. Hill, No. CF-2020-263, at 1 (Okla. Dist. Ct. Sept. 30, 2021) (order denying defendant's motion to dismiss based on lack of jurisdiction).

463. *Id.* The district court cited *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989) (Lumpkin, J., concurring), in arriving at this decision. In the concurring opinion, Judge Lumpkin highlights that this is a test that Oklahoma has developed. *See id*. at 405.

464. *See* Cameron & Walker, *supra* note 458 ("Mr. Hill is a citizen of the Cherokee Nation through ancestors called Freedmen—Black people who were enslaved by Native tribes.").

465. *See* Sarah Deer & Mary Kathryn Nagle, *Return to Worcester: Dollar General and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J.L. & GENDER 179, 203 (2018) (discussing the Cherokee Nation's adoption of slavery as an attempt at pre-removal assimilation).

466. *See supra* notes 197, 437 and accompanying text (discussing *Adoptive Couple*).

formerly enslaved peoples in an 1866 treaty.[467] Undoubtedly, both within and without the Cherokee Nation, its hesitance to grant citizenship to the Black descendants of Freedmen on lands bordering the site of one of the most violent, infamous racial massacres in American history raised questions as to the role of racism in the Nation's position.[468] In 2021, the Cherokee Nation Supreme Court struck the words "by blood" from its constitution, conferring citizenship to all who met the requirements of membership within the Tribe.[469] Regardless, the State of Oklahoma still wanted Mr. Hill to demonstrate his ancestry by blood. Mr. Hill is a member of the Cherokee Nation—but his race is used to dictate how other sovereigns should interact with him as a tribal member.

Beyond ancestry, Tribes are the supreme authority when it comes to determining their own membership. The Supreme Court considered this issue in *Santa Clara Pueblo v. Martinez*[470] when a female member of the Tribe brought a challenge to the Tribe's enrollment laws under the Indian Civil Rights Act (ICRA).[471] In *Santa Clara Pueblo*, a woman whose child did not qualify for tribal membership because her father was a non-member sued the Tribe under the equal protection provision of ICRA, Section 1302(a)(8).[472] Without reaching whether that was

467. *See, e.g.*, Cherokee Nation v. Nash, 267 F. Supp. 3d 86, 140 (D.D.C. 2017) (interpreting the 1866 Treaty's provision on citizenship for Freedmen).

468. *See* Lolita Buckner Inniss, *Cherokee Freedmen and the Color of Belonging*, 5 COLUM. J. RACE & L. 100, 115 (2015) (noting that the practice of race and color-based discrimination against Blacks in the United States is not limited to those of European ancestry, but expands to North American aboriginal communities as well). The southern border of the Cherokee Nation borders the City of Tulsa, where the Tulsa Massacre took place in 1921. *See* Scott Ellsworth, *Tulsa Race Massacre*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry?entry=TU013 [https://perma.cc/2TS7-HFVB].

469. *See* Allison Herrera, *Cherokee Nation Supreme Court Rules Citizenship Not Determined 'By Blood'*, THE WORLD (Mar. 4, 2021), https://theworld.org/stories/2021/03/04/cherokee-nation-supreme-court-rules-citizenship-not-determined-blood [https://perma.cc/TFE2-C5LN] (noting that by striking "by blood," the decision effectively ended a "decades long debate over citizenship status in the largest tribe in the country").

470. 436 U.S. 49 (1978).

471. Indian Civil Rights Act of 1968, 25 U.S.C. § 1302.

472. *Santa Clara Pueblo*, 436 U.S. at 52–53; 25 U.S.C. § 1302(a)(8) ("No Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.").

an equal protection violation under ICRA, the Court held that the Tribe alone could determine its membership.[473] If membership, or citizenship, was linked to biology, there would be no need for any Tribe to declare its membership. The case involving Ms. Bradshaw's granddaughter—the child's lack of enrollment coupled with the Tribe's lack of information that a member sought to adopt her granddaughter—exemplifies the importance of citizenship and how Tribes engage their members.[474]

As one might imagine, *Santa Clara Pueblo* created a great deal of backlash. Feminist scholars were particularly concerned that a Tribe could discriminate against its members based on sex.[475] However, the principle stood: Tribes are sovereigns with the ability to make their own membership decisions, even if outsiders disagree with those decisions, because these are cultural and political decisions. ICWA does much the same. In some cases, non-members may not agree with a Tribe's decision on who is an Indian child based on where their parents live, their connections to the Tribe, or even their degree of Indian blood.[476] All the same, Tribes can determine their membership and protect the children that qualify as Indian children under the statute. *Santa Clara Pueblo* demonstrates that acts of sovereignty do not always have to make sense to outsiders. Feminist scholars writing in liberal principles and Indian law scholars have never

473. *See Santa Clara Pueblo*, 436 U.S. at 72 (holding that § 1302(a)(8) does not "impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers").

474. This Land, *supra* note 400. Additionally, the child at the center of this case is of mixed race heritage. *Id*. She is both African American and American Indian. *Id*.

475. *Compare* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 66 (1987) (referring to *Martinez* as a "difficult case"), *with* Valencia-Weber, *supra* note 305, at 366 (critiquing MacKinnon's view as an essentialist approach that "ignores cultural and racial experiences that are inseparable in the lives of ethnic minority women" and critiquing the platforming of Indian feminist voices discussing *Martinez*).

476. *See, e.g.*, *In re* S.C., 833 P.2d 1249, 1257 (Okla. 1992) (holding that the existing Indian family exception applied to a case where there was not an existing Indian family to breakup), *overruled by In re* Baby Boy L., 103 P.3d 1099, 1108 (Okla. 2004) (holding that the existing Indian family exception was no longer viable in Oklahoma because of its state ICWA law and the general understanding of the ICWA's purpose).

reconciled on this issue.[477] This is because liberalism "asserts that 'equality' mandates only the equal treatment of individuals, and does not require that 'groups' are made whole, even if past discrimination was specifically targeted against those groups."[478] Simply stated, the principles of equality are often not in conversation with repairing the harms of colonialism.

In the case of the Cherokee Nation, for example, Freedmen gained citizenship through the Cherokee government's political process.[479] While this involved litigation and years of tense conversation within the Nation, including a period where Freedmen were disenrolled, some thought around the inclusion of Freedmen within the government could be summarized as: "[W]hen Tribal Nations adopt the United States' view that other nations and/or people are inferior, everyone—except the United States—suffers."[480] Like any other sovereign, Tribes have internal political processes that interact with their constituent groups.

Yet, the way that the Ninth and Tenth Circuits have defined Indian for the purposes of criminal jurisdiction stands contrary to *Santa Clara Pueblo*.[481] If Tribes have the sole ability to determine their membership, why does the federal government require a showing of Indian blood? An even better question: If race and political status are synonymous off-reservation, as the parties in *Brackeen* contended,[482] why would the federal government have to consider both Indian blood and membership to make an outside determination that someone is Indian?

Brackeen highlights how nonsensical and harmful it can be to continue imposing colonial constructs onto Tribes, especially when it comes to understandings of race and political status. The individual parties in *Brackeen* argued for limiting ICWA's

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477. *See* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 813 (2007) (noting how there is a "schism between liberal theorists advocating for the primacy of individual rights and Indian scholars arguing for adherence to tribal sovereignty's measured separatism").

478. Rebecca Tsosie, *The New Challenge to Native Identity: An Essay on "Indigeneity" and "Whiteness"*, 18 WASH U. J.L. & POL'Y 55, 57 (2005).

479. *See* Cherokee Nation v. Nash, 267 F. Supp. 3d 86, 101–02 (D.D.C. 2017) (detailing the political process that enabled Freedman to acquire the same rights and footing as native citizens).

480. Deer & Nagle, *supra* note 465, at 203–04.

481. *See supra* note 456 (discussing how both circuits require a blood quantum analysis to help determine Indian status).

482. *See* Brief for Individual Petitioners, *supra* note 24, at 14–15.

application and the political status of American Indians to the interior boundaries of Indian Country, with arguments on race that parallel affirmative action.[483] Yet today, somewhere around eighty-seven percent of all American Indians live off reservation.[484] Why so many Indians live off-reservation can be attributed to a variety of historical and contemporary points. These reasons include the Indian Relocation Program, which was a federal jobs program in the 1950s and 1960s, as well as Indian adoptions and the fact that Indians, like other peoples, can and do relocate for a variety of reasons.[485] These arguments are meant to evoke the notion that the only "good" exercises of tribal sovereign authority are ones that the colonial power can control and/or over the ones who remain on the reservation. It is not only impractical to view tribal sovereignty with such limitations, but it is an application of colonial authority moving in the opposite direction of Congress when they enacted ICWA.

As the parties in *Brackeen* argue that either their own rights have been violated,[486] or in the case of the states, argue that they are protecting the rights of their citizens,[487] courts do not tend to agree with Indians who raise claims of equal protection based on their status as Indians. Cases like *Rogers* and *Hill* demonstrate how courts can, and do, make up ways to determine how they will treat American Indians. In *United States v. Antelope*,[488] the United States Supreme Court contemplated how it applied criminal jurisdiction in Indian Country. Essentially, the defendants alleged an equal protection challenge on the grounds that had they been non-Indian, the state, instead of the federal government, would have had jurisdiction—taking a severe charge off

483. *See id*.

484. *American Indians and Alaska Natives in the United States*, U.S. CENSUS BUREAU (2020), https://www2.census.gov/geo/maps/DC2020/AIANWall2020/2020_AIAN_US.pdf [https://perma.cc/D63X-3X49]. Although this is the data as of the 2020 Census, this information is based on self-identification, which could include those who identify as Native American but do not have a political affiliation with a Tribe.

485. Indian Relocation Program of 1956, Pub. L. No. 84-959, 70 Stat. 986. This statute was also called the "Adult Vocational Training Program." *Id.*

486. *See* Brief for Individual Petitioners, *supra* note 24, at 38–39.

487. *See* Brief for the States of California et al., *supra* note 220, at 1.

488. 430 U.S. 641 (1977).

the table.[489] Using *Mancari* to deny the statute created an impermissible race-based classification, the Court held that the statutory scheme did not violate equal protection on the grounds that all defendants would be treated similarly under federal jurisdiction.[490]

However, in the case of ICWA, Congress ensured that tribal membership decisions would be protected without an eye toward equal protection because the law intended to protect children previously open to disproportionate removal.[491] Unlike other areas of the law, ICWA does not require outside commentary on someone's Indian blood and the imposition of colonial ideas on who can be considered Indian. Indeed, reading ICWA this way provides a very specific narrative: the only Indians that exist are reservation Indians and the colonial power can determine Indianness.[492] In the 1970s, Congress responded to this attitude by enacting ICWA to deter state actions that displaced children from their communities, effectively ripping them from their culture, and destabilizing Tribes.

III. EQUITY: A NEW FRAMEWORK

As discussed in Part II, applying the equal protection doctrine to ICWA turns heavily upon the distinction between race and political status. However, this distinction is not entirely clear cut, especially given modern conceptions of race or even in the writings of the Court. As such, Part III discusses what lies

489. *See id.* at 644 ("They argued that a non-Indian charged with precisely the same offense, namely the murder of another non-Indian within Indian Country, would have been subject to prosecution only under Idaho law, which in contrast to the federal murder statute, 18 U. S. C. § 1111, does not contain a felony-murder provision.").

490. *See id.* at 649 ("Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter.").

491. 25 U.S.C. § 1901(4).

492. *See, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013) ("This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute at issue here do not demand this result.").

at the heart of this Article: proposing equity as the proper framework for ICWA claims. Part III.A discusses how scholars can bridge the gap between race and political status because this is about the trauma that family regulation has wrought onto individual American Indian families as well as Tribes. Part III.B continues the discussion from the Introduction on the vision of equity that should be developed in this area.

A. BRIDGING THE RACE AND POLITICAL STATUS GAP

Traditionally, legal scholarship and advocacy has called upon us to focus on the political elements of Indian law and governance, emphasizing the political and not the racial.[493] Perhaps in fear of the outcome of equal protection claims leaving federal Indian law vulnerable, Indian law scholarship has largely strayed away from conversations of race. However, the colonial project was incredibly nuanced and took on many forms.[494] It does not make sense to address the political and not the racial aspect, or vice versa. Whether the trauma wrought onto American Indian families and communities was of a racial or political nature matters much more in theory than it does in practice.

Racism in federal Indian law and policy dictated policies requiring a two-fold assimilation project that included "civilizing" individuals and terminating Tribes.[495] That was both a racial and political project. If Indians were assimilated into the general population, there would be no need to continue honoring treaties, boundaries of reservations, or maintaining a government-to-government relationship with Indian Tribes. For Indian affairs, "the enforcement of racial and other hierarchies, and the expansion of white 'civilization' across the American continent, were among the fundamental purposes of both the national and local state in

493. *See* Blackhawk, *Constitution of American Colonialism*, *supra* note 70, at 83 (discussing how Native American advocacy leverages "law talk" to "shape the United States" and to impose "principled limits on the American colonial project from the Founding").

494. *See supra* Part I (exploring the various intricacies of the colonial project and its implications within the context of understanding the ICWA).

495. *See* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 601 (2009) ("While racial discrimination against individual Indians remained, by the dawn of the new nation the emphasis on Indian assimilation would mean that such discrimination had to be justified in the name of Indians' continuing ties to their tribes.").

early America."[496] But settler colonialism "mak[es] racial what is international."[497] Despite how American politicians and the imagination perceive American Indians, there is no one Indian race.

In addition to active racism, settler colonialism transformed tribal sovereignty into a sovereignty rooted in the western ideology of the nation state by separating cultural groups into distinct political entities.[498] Modern Tribes do not always comport with a cultural group at large.[499] For example, it is possible for two local Tribes to be part of the same cultural group but be politically distinct, having a wholly separate relationship with the federal government.[500] On top of that, because of how "Indian" is defined, it is wholly possible for the category to miss entire groups of people all together.[501] There are more racially Indian children living in the United States than who qualify for the protections of ICWA.[502]

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496. Ablavsky, *supra* note 67, at 1087.

497. JODI BYRD, THE TRANSIT OF EMPIRE 125 (2011).

498. *See id.* at 144 ("A troubling trend within indigenous nationalism has been the reification of colonization and imperialism that situates outsiders, and anyone who might be identified as such depending on political agendas, as always already oppressive 'others,' and here I am thinking specifically of the ways in which indigenous arrivants enter other indigenous lands as a consequence of colonization and diaspora.").

499. *See* Ann Laquer Estin, *Equal Protection and the Indian Child Welfare Act: States, Tribal Nations, and Family Law*, 35 J. AM. ACAD. MATRIM. LAWS. 201, 228 (2022) (explaining how Indian communities are highly diverse with tribal members not identifying with a single culture or race). Furthermore, it should be noted that Native communities are often not insular and that there are significant rates of intermarriage among groups, with many families having a kind of mixed tribal citizenship. *See id*.

500. *See id.* (discussing why such tribal political diversity continues to exist).

501. *See, e.g.*, Rolnick, *supra* note 144, at 2720–21 ("[T]he courts have blurred or eradicated any distinction between ancestry and race. . . . Race jurisprudence has undermined Indigenous rights in Hawaii and the Pacific Islands and has also become a significant threat to Indian tribal rights.").

502. There are children who may have Indian blood, but they do not qualify for tribal membership because of the enrollment restrictions/qualifications of the Tribes in which they would be eligible for enrollment. *See* Miriam Jorgensen et al., *What Can Tribal Child Welfare Policy Teach Us About Tribal Citizenship?*, *in* BLOOD QUANTUM AND THE FUTURE OF NATIVE NATIONS 228, 235 (Kathleen Ratteree & Norbert Hill eds., 2017). Moreover, race is often something that people can self-select on forms without any verification of political membership. *See About the Topic of Race*, U.S. CENSUS BUREAU (Dec. 20, 2024), https://www.census.gov/topics/population/race/about.html [https://perma.cc/

On top of cultural separation into distinct political entities, the U.S. government and state governments alike encouraged the separation of families. Family regulation based on the prevailing white cultural norms runs deep in America.[503] In fact, it runs so deep that it is the oft erased story behind American colonialism. Professor Laura Briggs notes: "Taking children may be as American as a Constitution founded in slavery and the denial of basic citizenship rights to Native people, African Americans, and all women, but activists in every generation have also stood up and said it did not have to be."[504] The removal of Indian children has "lasting trauma for both individuals and tribes, as well as a disconnection between individuals and their tribal communities."[505] Yet, this trauma is minimized because removing the Indian child is to save the child.[506]

And this is an important point: the rights of Indians as individuals, even in state courts, are tied to their status as tribal members. It is impossible to disconnect the Indian person from the tribal member, regardless of where they live, because colonial practices meant to terminate Tribal governments impacted tribal members. Colonialism conducted through family regulation targeted both the individual and the collective.[507] In implementing ICWA, Congress recognized its duty to ensure Tribes

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E28Y-L977] (noting how the U.S. Census, a large collector of racial data, obtains such information through self-identification).

503. *See* Anita Sinha, *A Lineage of Family Separation*, 87 BROOK. L. REV. 445, 457–59 (2022) (highlighting various historical family regulatory efforts, primarily education-related, that sought to impose white Christian values, thereby eroding Indigenous cultures); *see also* van Schilfgaarde & Shelton, *supra* note 433, at 688 ("Indigenous child-rearing is not the only cultural practice to be devalued, perceived as in conflict with the dominant society, and subsequently conflated with child neglect. But for Indigenous families, the stage has been set for hundreds of years; outside institutions, with both nefarious and altruistic intentions, have scorned, scrutinized, interfered with, and dismantled Indigenous families."). Family regulations that separated Indigenous families began as early as the 1880s, shortly after the formal abolition of slavery in the United States, and are often seen as a response to the Civil War. *Sinha*, *supra*, at 457.

504. LAURA BRIGGS, TAKING CHILDREN 15 (2020).

505. *In re* Dependency of Z.J.G., 471 P.3d 853, 861 (Wash. 2020).

506. *See* van Schilfgaarde & Shelton, *supra* note 433, at 688 ("This systemic invasion is rationalized in part by the system's perceived obligation to 'save' Indigenous children through ensuring their exposure to 'American values.'").

507. Roemer, *Reproductive Justice*, s*upra* note 40, at 105, 116 (discussing the role of family regulation in settler colonialism).

could maintain their membership while also protecting the rights of individuals.[508] Although the individual parties in *Brackeen* frame this as racism against themselves or others like them, it is a recognition of how continued colonial practices actively harmed tribal members and the government's voluntary promise to rebuke these practices. This is also a point recognized in international law, as the U.N. Declaration on the Rights of Indigenous Peoples recognizes that Indigenous peoples possess both collective and individual rights.[509]

The call here is twofold. First, to bridge the gap between the racial and the political, scholars must recognize that the two are inextricably linked. Indian child removal was as much about eradicating the "Indian race" as it was abrogating political relationships and tribal sovereignty. *Brackeen* illustrates why the distinction between the two categories has often seemed dire within federal Indian law. If the plaintiffs had been successful in their equal protection claims that ICWA was about race, all of federal Indian law could have come under collateral attack under the idea that it is race-based discrimination. However, there is nothing truly separating these categories in either social or legal settings, as society and the law alike racialize American Indians and make decisions on those grounds. While this is not to capitulate that American Indian status is race-based, it is very much a matter of settler colonial construction—much like the equal protection doctrine.

Second, scholars must recognize that American jurisprudence weaponizes equal protection to threaten tribal sovereignty and the continued existence of Indian Tribes. It should not be a matter of which level of scrutiny the Supreme Court should be applying to an ICWA case. Rather, it is a question of the legitimacy of state and individual actors to assert a right to compete in this matter. To argue the levels of scrutiny that should apply

508. 25 U.S.C. § 1901(3).

509. G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, art. 24(1) (Oct. 2, 2007). The United States has not ratified this Declaration, so it is not legally binding, but as the U.S. Agency for International Development notes, "it carries moral force." *See Indigenous Peoples*, U.S. AGENCY FOR INT'L DEV., https://www.usaid.gov/environmental-policy-roadmap/indigenous-peoples [https://perma.cc/6K3Y-UR3K]; *see also* Fletcher & Singel, *supra* note 32, at 1758 ("Indian tribes are collectives, after all, and tribal governments often possess interests that overlap with the interests of individual tribal members.").

to equal protection claims against ICWA is to concede to the left hand and the right hand of the colonial authority—states and individual actors—that they have legitimate concerns deserving to be heard in the administration of Indian affairs. While this may seem harsh, and possibly even counter to the modern construction of individual rights, limitations on the perpetrators of colonial authority should not be taken lightly. When framing their interests as a matter of protecting the "best interests of Indian children" and child-saving, these actors shift the goal posts of what it is they are after: the assimilation of American Indians and culling of Indian Tribes in the same "benign" manner their ancestors argued.[510] Only today, the resources desired include land, natural resources, and children who are otherwise in short supply for the American adoption market.[511]

Assuredly, the settler colonial model dictated how the federal government would engage American Indians as both individuals and part of a collective. The call here is not to simply treat American Indians like other groups. American Indians have no true peer group in the United States and federal Indian law is exceptional.[512] The call is to ensure that American Indians enjoy true equality through the understanding that statutes like ICWA are much less about providing "special rights" to discriminate against the dominant group. Instead, ICWA ensures the equality of Tribes as distinct political, sovereign Nations who are now capable of flourishing and creating community because they finally have the ability to keep and raise their member children. This is what I call equity.

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510. *See supra* notes 64–65 and accompanying text (exemplifying nineteenth century discussions of the "Indian Problem").

511. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259 n.46 (2022) (citing the shortage of the "domestic supply of infants" for adoption). *But see generally* ROBERTS, *supra* note 53 (challenging the idea that family separations are primarily for the purposes of funneling children into the adoption market, and instead proposing that these removals are about creating multigenerational carceral webs and a money making scheme for participants in the system who are able to recoup funds that parents living in poverty cannot).

512. *See* Rolnick, *supra* note 66, at 827, 838 (discussing the use of assimilation practices to separate children from "the traditional practices of their people," thus isolating them from one another); *see also* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1789, 1794–95 (2019) ("[T]he colonized status of Native peoples does render certain aspects of federal Indian law exceptional . . . .").

B. FROM EQUAL PROTECTION TO EQUITY

What Indian law scholars see as a protection of sovereignty and important governance functions, and family law scholars see as the protection of family integrity and the reduction of harm to children, others see as special rights. As Matthew Fletcher astutely notes: "Ensuring that history is not repeated cannot be considered the creation of special rights."[513] As such, this Section contemplates how to focus on fulfilling ICWA's promise and distinguishing it from the equal protection line of affirmative action cases. There is real value in distinguishing ICWA as an anti-colonial equity statute that is firmly situated within Indian affairs and recognizing that ICWA exists outside of the equal protection doctrine's equality paradigm.

1. Current Perceptions of Equality

Applying the equal protection doctrine's concept of equality, especially one that is predicated on a firm distinction between race and political status, is precarious for American Indian Tribes and their citizens. Professor Michael Doran argues that *Mancari*'s assertion of political status for Tribes is especially vulnerable as *Mancari* pre-dates adverse affirmative action cases.[514] The Court has a long history of supporting the political classification for American Indians in criminal cases to further the colonial project, while rejecting it when it does not.[515]

Without a doubt, there is an agenda that aims to decentralize federal authority, strengthen states' rights, and end race-based programs that would help historically disadvantaged groups—including underprivileged white people—find a modicum of success.[516] The arguments raised in *Brackeen* hit every note of that conservative legal agenda—with a conservative

513. Matthew L.M. Fletcher, *States and Their American Indian Citizens*, 41 AM. INDIAN L. REV. 319, 342 (2017).

514. Michael Doran, *The Equal-Protection Challenge to Federal Indian Law*, 6 U. PA. J.L. & PUB. AFFS. 1, 29 (2020) (highlighting the vulnerability of the *Mancari* approach).

515. *Id.* at 27 (noting the Court's inconsistent political classification for American Indians).

516. *See, e.g.*, AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES (2015) (detailing the history, influence, and agenda of the Federalist Society); *see also* This Land, *supra* note 400 (describing an email that the Texas Attorney General sent to other Republican Attorneys General seeking states to sign onto the *Brackeen* litigation, citing an opportunity to challenge federalism).

majority court batting down two of the constitutional questions and saving the third, equal protection, for a different case.[517] Justice Gorsuch, who has even garnered media attention for his pro-Tribe views, wrote an extensive concurring opinion detailing the history behind ICWA and why he believed an originalist approach to constitutional interpretation supports ICWA.[518] For all intents and purposes, it seems the Court—the same Court that decided *Castro-Huerta*—believes at the very least that ICWA is an Indian affairs statute and applies to both state and private actors, making it pass constitutional muster.

Though, as a scholar, I grapple with the Court linking state and private obligations here. If Congress had not received the relevant testimony and adequate foresight into the full extent of Indian child removal throughout the nineteenth and twentieth centuries, would ICWA be unconstitutional today because it commandeers state law? More than a statement on tribal sovereignty, this is also a referendum on the ability of state overreach and oversight when it comes to family regulation. A lot of power is vested in states to absolutely wreck families and traumatize children under the guise of child-saving.

As the case was before the Supreme Court, I shared Professor Doran's concern about the affirmative action cases,[519] and more specifically, the link between ICWA and affirmative action that the plaintiffs were too obviously making. As a scholar of both federal Indian law and family law, I heard two distinct opinions on what would happen in this case. From Indian law scholars, it was unlikely that this would come down to equal protection. From family law scholars, it would most likely be all about equal protection. It was hard to know who would be right, but the game plan was fairly transparent. The plaintiffs' equal protection arguments got a lot of attention because if America is anything, it is obsessed with race and racial classifications.

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517. Haaland v. Brackeen, 143 S. Ct. 1609, 1638 (2023) (striking down the equal protection claim for lack of standing and thus not analyzing the merits of the claim).

518. *See* Adam Liptak, *Justice Neil Gorsuch Is a Committed Defender of Tribal Rights*, N.Y. TIMES (Jun. 15, 2023), https://www.nytimes.com/2023/06/15/us/politics/neil-gorsuch-supreme-court-opinions.html [https://perma.cc/ZZ63-2RZZ] (discussing Justice Gorsuch's concurring opinion in *Brackeen*).

519. *See supra* note 514 and accompanying text (discussing the link between ICWA and affirmative action).

And to be fair, the equal protection question is only resolved for now. After all, Justice Kavanaugh wrote his own concurring opinion likening ICWA to the *Palmore* case, providing some rather specific instructions to future litigants on how to raise an equal protection claim that would likely have standing.[520] Although he was the lone Justice on that concurring opinion, it is hard to gauge where most of the other Justices may stand on that issue—especially with claims like those that the *Brackeen* plaintiffs brought about discrimination against would-be adoptive families and Indian children not having access to the "right kind of families." Some day in the hopefully distant future, would similarly situated plaintiffs be able to demonstrate that ICWA interferes with their right to compete in the adoption market as fair competitors? Should arguments about family sound like casual economic arguments?

Looking ahead, shifts to conservative legal modalities and governance could be particularly damning for forthcoming equal protection claims. Although ICWA shares bipartisan support across the states and on the Court, we should not overlook or overestimate what successfully linking ICWA, or Indian law, to affirmative action would raise for this Court. Consider *Regents of University of California v. Bakke*, and its anti-classification principle where the Court believed a policy allegedly placed white Americans at a disadvantage.[521] *Bakke* addressed affirmative action in college admissions.[522] In his majority opinion, Justice Powell stated what would become a rallying cry for banning race-based policies that is still heard loudly in 2025:

> The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants.[523]

520. *See supra* Part I.D (discussing Justice Kavanaugh's suggestion that ICWA posed concerns similar to those in *Palmore*); *Brackeen*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring) (citing Palmore v. Sidoti, 466 U.S. 429 (1984)).

521. 438 U.S. 265 (1978) (holding that a university's affirmative action admissions policy violated the Equal Protection Clause).

522. *Id.*

523. *Id.* at 295–96.

Justice Powell's fears of the minority of white Anglo-Saxon Protestants are not confined to this opinion. The Roberts court, infamous for its belief in the post-racial society, seemingly acts based on the same fear.[524]

Within the context of First Amendment jurisprudence, Professor Leah Litman has argued that modern jurisprudence reflects the Court's concern that evangelicals are a minority in America.[525] Although she distinguishes between racial and religious discrimination on the basis that racial discrimination requires intent, the Court's language in both *Brackeen* and *Students for Fair Admissions* points to a further erosion of its anti-classification racial discrimination doctrine similar to Justice Powell's contention in *Bakke* on whether racial classifications could ever be benign and questioned how a court could ever make this determination.[526] The State of Texas even utilized the "benign discrimination" language in its opening *Brackeen* brief.[527]

Justice Powell rejected the idea that "that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces."[528] Citing the infamous *Korematsu v. United States*,[529] Justice Powell noted: "If it is the individual who is entitled to judicial protection against

524. *See, e.g.*, Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2175–76 (2023) (prohibiting colleges from considering race in admissions decisions as part of efforts to diversify student bodies, instead insisting colleges should evaluate students "based on his or her experiences as an individual—not on the basis of race").

525. Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 20–21 (2022) ("In the religion context, the Court has adopted a theory of discrimination that discounts the relevance of intent and focuses more on the relative burdens of a law, comparing the burdens faced by religious organizations to the burdens faced by (at least some) nonreligious organizations.").

526. *Bakke*, 438 U.S. at 297–98 (stating that "it may not always be clear that a so-called preference is in fact benign").

527. *See* Brief for Petitioner the State of Texas, *supra* note 253, at 41 ("In theory, Congress passed ICWA to remedy wrongs inflicted by bad actors—including federal bad actors—more than half a century ago. In practice, it replicates those wrongs. A classic example of so called 'benign' discrimination, ICWA creates a government-imposed and government-funded discriminatory regime sorting children, their biological parents, and potential non-Indian adoptive parents based on race and ancestry." (internal citations omitted)).

528. *Bakke*, 438 U.S. at 298.

529. 323 U.S. 214 (1944) (permitting the internment of Japanese-American citizens during World War II), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently."[530] Thus removing the theory of equal protection based on group identity and relegating it to one that protects individual rights—for consistency's sake.

Bakke was a win for liberal principles as it provided an opportunity for equality under the Fourteenth Amendment, but it was not one that comports with the original intent of the provision.[531] As a result of *Bakke*, the last forty-five years have seen programs intended to provide remedies for Black Americans still experiencing the impacts of slavery, much like American Indians still experience the impacts of colonialism, slowly shuttered leading to 2023's *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*.[532]

The Court issued its decision in *Students for Fair Admissions* just two weeks after its decision in *Brackeen*.[533] Unlike the favorable ruling in ICWA, the Court held that race-based college admissions programs are unconstitutional under the Fourteenth Amendment.[534] Repurposing the language of *Brown* to denounce affirmative action programs, the Court noted that "separate cannot be equal."[535] The Court also referenced *Palmore* in its majority opinion in this case to describe the Equal Protection Clause's "core purpose" of dispensing with all racial classification.[536] Citing *Rice*, the Court noted the reason its acceptance of race-based statutes has been rare is because of its doctrine of equality.[537] If

530. *Bakke*, 438 U.S. at 299.

531. *See id.* ("Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant." (internal citation omitted)).

532. 143 S. Ct. 2141 (2023) (finding that the race-based admissions systems used by Harvard and University of North Carolina were in violation of the Equal Protection Clause).

533. *Id.* at 2141 (deciding this case on June 29, 2023, whereas *Brackeen* was decided on June 15, 2023).

534. *Id.* at 2166.

535. *Id.* at 2149 (citing Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954)).

536. *Id.* (citing Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

537. *Id.* at 2162 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000))).

anything, the cases that the conservative majority keeps citing, including *Palmore* and *Rice*, should be a strong indicator of how they will apply equal protection to ICWA should they believe it is race-based.

In concurrence with the majority in *Students for Fair Admission*, Justice Thomas stated that Reconstruction Era Acts enacted consistent to the Fourteenth Amendment did not support affirmative action because "freedmen" was a "formally race-neutral term" as not all Black people were former slaves.[538] Admittedly, that argument is hogwash in both a historical and modern context. This Article solely references this argument because Justice Thomas has frequently written similar ahistorical statements in Indian law cases while advocating that the Court should completely reconsider the historical basis for the Indian Commerce Clause and plenary authority.[539]

Without a doubt, the current Supreme Court is structured to vote against race-based statutes and claims. As such, this Article does not argue that the line between racial and political status should be erased all together. Quite the opposite. It is currently among the most effective litigation strategies. The fact that American Indians possess a political status is supported in both federal and international law. That fact should be articulated freely and race-based arguments distinguished. However, calls for equality that compare American Indians to other groups are calling for the continued erasure of American Indians. In response, it is important to consider what equality for American Indians—a group without a true peer group within the United States—looks like because it is unlikely this argument has taken its final breath.

2. Why Equity

Equality-based arguments involving ICWA highlight how the concept of equality under the equal protection doctrine has been a façade based on the political whims of the Court. If modern jurisprudence demonstrates anything, equality is a

538. *Id.* at 2185 (Thomas, J., concurring).

539. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 664–65 (2013) (Thomas, J., concurring) ("There is little evidence that the ratifiers of the Constitution understood the Indian Commerce Clause to confer anything resembling plenary power over Indian affairs."); *see also* Haaland v. Brackeen, 143 S. Ct. 1609, 1662 (2023) (Thomas, J., dissenting) (arguing that there is no constitutional provision that supports ICWA).

manipulatable mirage. It is a place where members of dominant society can assert rights that are routinely denied to others either through the courts or within society at large. ICWA exists in a place beyond equal protection; it is quite possibly Congress's first act to provide equitable results. Here, equity is ensuring Tribes can maintain their membership, the Indian family can maintain its integrity and dignity, and Indian children can retain ties to their culture. Unless and until Congress repudiates the responsibilities it owes to Indian Tribes under federal law, international law, and a good sense of moral obligation, ICWA is a congressional prerogative.[540]

For Indian communities, the concept of equality has been the basis for assimilation itself.[541] Assimilation breeds the myth of equality, which can be seen in the *Brackeen* plaintiffs' brief as the parties articulated how they are owed the equal protection of the laws to adopt Indian children.[542] Their main contention is that ICWA discriminates against them based on race while they are essentially the same as Indian parents for these children—and as we see from cases like *Palmore*, *Bakke*, *Rice*, *Students for Fair Admission*, or any other case in the affirmative action line of cases for that matter—all they need is to craft Indian preference as a racial preference that discriminates against them. In a doctrine that is increasingly about entrenching individual rights and protections, ICWA's utility and benefit to Indian collective and individual rights can be thrown out with the bathwater of perceived racial discrimination against the "right kind of families." Reducing equality to its most simplistic form—which is what the equal protection doctrine does—is contrary to principles of self-determination.[543]

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540. Doran, *supra* note 514, at 26 ("To suggest, as *Mancari* does, that the equal-protection status of federal Indian law turns on the government's 'unique obligation' to the Indian tribes is really to say that the equal-protection status of federal Indian law turns on the continuing will of Congress not to repudiate that obligation.").

541. *See* Berger, Williams v. Lee, *supra* note 31, at 1474 ("Beginning in the 1940s, Congress and the executive came to agree that equality for American Indians depended on freeing them from federal supervision.").

542. *See* Brief for Petitioner the State of Texas, *supra* note 253, at 37 (arguing that ICWA violates parties' equal protection rights).

543. *Id.* at 1468 ("[C]alling these claims a rejection of equality relies on an assumption that equality can be reduced to identical treatment of all, and overlooks the deep claims to equality at the heart of demands for self-determination.").

At least one Justice seemingly wants to hear this equal protection challenge to Indian law.[544] In *West Flagler*, Justice Kavanaugh wrote that a separate Florida statute permitting Indian Tribes "to conduct certain off-reservation gaming operations in Florida . . . raises serious equal protection issues."[545] That was the second time in 2023 that Justice Kavanaugh mentioned equal protection and American Indians. Although *West Flagler* was a sports betting case in Florida, it bears mentioning that the Seminole Indian Nation has owned The Hard Rock Café brand since 2006.[546] Indian gaming has become a serious source of economic development for many Indian Tribes around the country.[547] Given increasing income sources, some Tribes now rely upon a mix of their own internal funds and federal grant funding to fund their family regulation programs and to pay for other health, education, and welfare programs.[548] For Indian Tribes, family regulation programs are typically run to support Indian families through unification programs and services.[549] Although

544. W. Flagler Assocs. v. Haaland, 144 S. Ct. 10 (2023) (granting a stay in an application before the Supreme Court).

545. *Id.*

546. Michael J. de la Merced, *Florida's Seminole Tribe Buys Hard Rock Cafes and Casinos*, N.Y. TIMES (Dec. 8, 2006), https://www.nytimes.com/2006/12/08/business/08rock.html [https://perma.cc/SZ3S-FHTW].

547. *See NIGC FY 2023 Gross Gaming Revenue Report*, NAT'L INDIAN GAMING COMM'N 4–5 (2023) [hereinafter *Gaming Revenue Report*], https://www.nigc.gov/images/uploads/GGR23_Final.pdf [https://perma.cc/J3G2-AQKP] (finding that in fiscal year 2023, 527 gaming operations operated by 245 Tribes in twenty-nine states earned a gross gaming revenue of $41.9 billion dollars). This is around half of the entire national gaming industry's revenue. *See id.* However, because of the Indian Gaming Regulatory Act and tribal-state compacts, Tribes will pay the states they are located in a significant portion of that revenue. Rebecca Nagle has posited that this gaming revenue, in addition to oil interests on tribal lands, could be pushing the opposition to ICWA and federal Indian law at large—especially given that the same law firm with significant oil industry connections represented the *Brackeen* plaintiffs on a pro bono basis in this lawsuit. This Land, *Pro Bono*, CROOKED MEDIA (Sept. 13, 2021), https://crooked.com/podcast/5-pro-bono [https://perma.cc/DM5G-YTK5].

548. Kathryn E. Fort, *After* Brackeen*: Funding Tribal Systems*, 56 FAM. L.Q. 191, 206–08 (2023) (examining how tribal systems are funded).

549. However, not all Tribes have access to lucrative gaming or other economic opportunities. Fewer than half of all Tribes in the United States have gaming operations—and none are as lucrative as the Hard Rock Café. *Compare Gaming Revenue Report*, *supra* note 547, at 4–5 (noting gaming operations are made up of 245 Tribes), *with* MAINON A. SCHWARTZ, CONG. RSCH. SERV., R47414, THE 574 FEDERALLY RECOGNIZED INDIAN TRIBES IN THE UNITED STATES 1 (2024) (recognizing 574 Tribes in the United States).

West Flagler was an equal protection challenge about a gaming law, it threatened tribal sovereignty and American Indian families in a similar manner as *Brackeen*. Once again, equal protection was pit against the very survival of Indian Tribes in both a legal and actual setting.

However, a particularly strong rebuke to the application of this affirmative action principle to Indian law remains that the Court does not need to determine anything about the status of American Indian peoples. The framers of the Constitution, and later the Supreme Court, determined the status of sovereign Indian Tribes. This predates any notion of so-called equal protection.[550] *Brackeen* reaffirms this. There was no uniform understanding of who was an Indian at either the framing of the Constitution or in early Indian Affairs statutes; even the political status construct is a modern construction.[551]

To combat equal protection concerns, scholars have posited alternate theories of understanding Indian law and ICWA. The status of American Indians could possibly be a political question.[552] Construing ICWA as a political question would mean that it is nonjusticiable for the courts.[553] A particular danger with this argument is that, as we have seen in the 2020s, the political whims of the legislative and executive branches can change wildly.[554] However, as Professor Michalyn Steele notes,

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550. *See generally* Ablavsky, *supra* note 67 (examining the efforts of the framers of the Constitution to govern Indian affairs). *See also* Doran, *supra* note 514, at 33 ("The plenary power is so extensive that it displaces and substitutes for the general police power of the states; it permits Congress to regulate even the most quotidian matters for Indians and Indian tribes, such as the number of witnesses needed for an attested will or the requirements for obtaining a hunting license. This is not the stuff of compelling governmental interests."); Fletcher, *Politics, Indian Law, and the Constitution*, *supra* note 139, at 555 ("Indian and tribal legal rights were established in federal laws that Indian tribes and people acquired in a bargained-for exchange going back to the Founding.").

551. Fletcher, *Politics, Indian Law, and the Constitution*, *supra* note 139, at 512–15 (discussing how early Federal Indian affairs statutes did not contain a definition of Indians).

552. *Id.* at 535–36 ("The scope of that trust is left to Congress to decide as a political matter.").

553. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803) (referencing political acts in which the executive's sole discretion is conclusive).

554. Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 706 (2016) ("Leaving the interests of an insular minority to the whim of the political process generally runs counter to

"given the Court's broad view of the plenary power doctrine, it is not at all clear that tribes lose anything meaningful, either in substance or process, in losing justiciability of questions of inherent tribal authority."[555] It is also important to note that maniacal entitlement to adopt Indian children notwithstanding, ICWA continued to enjoy bipartisan support even in *Brackeen*.[556]

To protect self-determination, Professor Fletcher argues for divestiture from the courts and to rely upon Congress's decision to protect Indian children through ICWA, and instead, he argues that the only question should be whether Congress's actions involving Indian Tribes are reasonable.[557] For the last fifty or so years, Congress has maintained its colonial position while also implementing anti-colonial measures such as ICWA. It is one thing to know that a Tribe is a sovereign body and another to take steps to ensure that one has undertaken its trust responsibility, or duty of protection, appropriately. Taking steps to divest from judiciary review would protect further ICWA's equitable goals for Indian families. If American Indians have no other true peer group, imposing a review on a law like ICWA on the grounds of equal protection only stands to yield an absurd result. While the Roberts Court seems empathetic to some Indian law arguments, they have demonstrated that they are a Court of strict adherence to canon.

The individual *Brackeen* plaintiffs rely upon sympathetic and common arguments about the ability for anyone to adopt

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our sense of justice and propriety under a system of checks and balances that has built-in protections for minority interests against the tyranny of the majority. Should Congress act to strip tribes of authority tribes deem essential to tribal self-governance, they would have no recourse to the judiciary under this proposal. Yet, similarly, should Congress act to recognize and affirm tribal authority, those who oppose that authority would not have a judicial recourse either—short of an individual rights constitutional claim—and would need instead to work through the political branches.").

555. *Id.* at 707.

556. Brief for the States of California et al., *supra* note 220 (demonstrating bipartisan support of ICWA across multiple states).

557. Fletcher, *Politics, Indian Law, and the Constitution*, *supra* note 139, at 552 ("None of the choices made by Congress in ICWA are irrational choices to apply federal law to Indians on the basis of their race or ancestry. All of the choices made by Congress in ICWA are inherently political and deserving of deference by the courts under *Mancari*.").

children so long as they provide a loving home.[558] The myth of the abused child in search of a good home has long been out of touch with the realities of family regulation—but it is one that works because most people react strongly against the notion of child abuse or neglect even when it is only imagined or socially engineered. And as social media apps like YouTube and TikTok give the public greater insight into the private lives of families, the goal posts on what the public imagines as abuse or neglect are evolving. In *Brackeen*, Justice Barrett even framed ICWA as a law that applies "even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay there."[559] Curiously, this language near the beginning of such a pro-ICWA opinion signifies that Justice Barrett, an adoptive parent, may also hold these concerns.

Briefly setting aside concerns regarding the usefulness of the general best interest of the child standard mentioned above,[560] ICWA meets the best interests of Indian children and adoptive families who are ready to do the work of acknowledging that they are adopting an Indian child.[561] A brief submitted on behalf of non-Indian adoptive families in *Brackeen* highlighted a non-Indian family who adopted an Indian child. This family felt strongly that it would be in the best interests of the child to maintain cultural and familial ties to their Tribe.[562] Interestingly, this adoptive couple expressed more skepticism of the private adoption industry meeting the best interests of the child as the adoption agency tried to pressure the couple to sign documentation agreeing to never contact the child's potential Tribes.[563] Moreover, as this brief astutely notes, ICWA does not explicitly bar non-Indian families from adopting Indian

558. Brief of Aubrey Nelson & Sam Evans-Brown, as Amicus Curiae, in Support of Tribal & Federal Defendants at 2, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, 21-380) [hereinafter Brief of Aubrey Nelson & Sam Evans-Brown] (stating the benefit of adoption is that it "gives children the gift of a loving, supportive home").

559. Haaland v. Brackeen, 143 S. Ct. 1609, 1622 (2023).

560. *Supra* Part I.B.2.

561. Brief of Aubrey Nelson & Sam Evans-Brown, *supra* note 558, at 13 ("ICWA encourages connection between Indian children and their Tribes and determines that these relationships are in their best interests.").

562. *Id.* at 12 (stating that it is in the child's best interest to know where she comes from and have a connection to her Tribe).

563. *Id.* (noting the pressure they felt to sign the document).

children—it explicitly requires tribal involvement.[564] Tribes have been known to approve placements with non-Indian families in specific circumstances.[565] The availability of extended family members, tribal placements, and even parental preferences can carry a lot of weight in a Tribe's preferred placements. The key here is the involvement of the child's Tribe and not an assertion that an assimilative family setting is best because it is a "good family."

Modern practices of assimilation, such as the push to funnel Indian children to the "right kind of families," should raise concerns about the benefits of equality of the law under the equal protection doctrine versus equity under the law. This is especially true as so many of ICWA's opponents continue to use the language of "helping kids . . . [and] saving souls."[566] Even in the 1970s, it was clear that non-Indian homes and communities were not always sympathetic environments for Indian children.[567] Now adult adoptees had a variety of experiences within their adoptive placements with at least one survivor discussing how she faced abuse on the basis that as an Indian child, she should be grateful to her adoptive family for saving her.[568]

And it happened to more than just one Indian child. Although child removals at large are harmful, emerging research demonstrates lingering post-traumatic stress disorder as far back as the boarding school era could have community-wide impact today.[569] According to former Assistant Secretary of Indian

564. *Id.* at 20.

565. *See, e.g.*, *id.* at 24 (discussing ICWA's good cause to deviate exception to the placement preferences).

566. This Land, *Solomon's Sword*, CROOKED MEDIA (Aug. 23, 2021), https://crooked.com/podcast/1-solomons-sword [https://perma.cc/7Y9Q-JVEY].

567. REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION, *supra* note 130, at 87 ("The removal of Indian children from their natural homes and tribal setting has been and continues to be a national crisis."). *See generally* WHITE HAWK, *supra* note 111 (documenting the author's experience in an abusive adoptive home).

568. *See* This Land, *Behind the Curtain*, *supra* note 221 (discussing a woman's story where her adopted mother said "I should have just left you on the reservation, you're so ungrateful").

569. *See* Newland, *supra* note 75, at 65 ("Although the understanding of brain function differences in PTSD-associated traumatic memories is emerging, early findings call for increased medical investment in understanding the individual and intergenerational impacts of American Indian and Alaska Native traumatic experiences involving the Federal Indian boarding school system and placement in non-Indian foster or adoptive homes or institutions.").

Affairs Bryan Newland, ICWA strengthens the health status of American Indian communities.[570] Since the Indian Self-Determination Act, Tribes have been able to contract for their own services, providing a range of services to their families both off and on reservation. Forward-thinking legislation from the 1970s has promoted tribal sovereignty and health.

Utilizing the equal protection doctrine's equality framework, how does one reconcile ICWA's goals and its outcomes with treatment of other groups who have not faced the same harm? If it is to be about the equality of the "right kind of families" with those presumedly inferior because of statutory placement, has governmental policy created community-wide lingering health impacts on this group by denying adoptions of certain children? How does it reconcile the fact that ICWA's opponents—particularly state and private actors—are using the same old pre-1978 playbook to destabilize Indian Tribes and families? In the same vein that ending affirmative action practices has been an equality project, dismantling Indian Tribes through Indian child removals has been an equality project. The goal of promoting tribal sovereignty and protecting Indian children and families does not squarely align with the goals of colonialism.

After the federal government exited the business of Indian child removal by enacting ICWA, it used the Act to limit the authority of the state and private actors who largely aided in Indian child removals. Although the federal government is generally synonymous with colonialism, and for good reason, we must remember that state and private actors were also a large part of the colonial project from land usurpation, war, and child removal. Today, private actors remain part of this project whether they are knowingly complicit or not. To the *Brackeen* plaintiffs, the assimilationist narrative renders ICWA unconstitutional regardless of historical context, special relationships between Tribes and the federal government, the statute's goals, and the work that it has done for American Indian family preservation. It is about their perceived *right* to these children; their right to compete in a market full of the "right kind of families." ICWA is an anti-colonial statute precisely because the federal government instructs state governments and private actors to respect tribal sovereignty, the integrity of the Indian family, and the

570. *Id.* ("The ICWA strengthens the health status of American Indians and Alaska Natives.").

best interests of Indian children. The fact that ICWA is a federal statute is not one that should be downplayed or overlooked. In some ways, ICWA is effectively using the master's tools to dismantle a system of oppression.[571] Using colonial law to deconstruct colonialism will only take one so far. While ICWA's findings language is coy about the federal government's role, its language is clear about the alarming rate of Indian child removals and the necessity for procedures to limit state action against Indian parents and children.[572]

Through ICWA, Congress effectively placed a check on its colonial partners: the states and the settlers. Relying on Congress can be a double-edged sword for American Indians.[573] The limits on state authority are some of ICWA's most important aspects, especially considering family regulation is largely a matter left to the states. Even today, ICWA is only as effective as state court compliance—and some states are better at it than others.[574] As a case like *Van Hunnik* demonstrates, it can be an uphill battle seeking legal remedies and trying to get state courts to comply with ICWA within the federal legal system as it exists.[575] ICWA's opponents are seeking to weaponize rights language against government policies meant to protect and carry

571. *See generally* AUDRE LORDE, THE MASTER'S TOOLS WILL NEVER DISMANTLE THE MASTER'S HOUSE 19 (2018) (calling upon Lorde's generally accepted argument that "the master's tools will never dismantle the master's house").

572. *See generally* 25 U.S.C. § 1902 (declaring the policy to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families").

573. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903) (declining to hear claims that the federal government fraudulently induced tribal leaders into signing a treaty on the basis that Congress's plenary authority over Indian Tribes is a political question).

574. *See, e.g.*, Brief of Casey Family Programs, *supra* note 57, at 16 ("Some state courts do a much better job applying ICWA than others. For example, in some states, American Indian or Alaska Native children are between 4 and 17 times more likely than other children to be placed in foster care; in other states, the rate of foster care placement is about the same for all children.").

575. *See* discussion *supra* Part II.A; Oglala Sioux Tribe v. Van Hunnik, 993 F. Supp. 2d 1017 (D.S.D. 2015), *rev'd sub nom.* Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 610 (8th Cir. 2018) (holding that the district court should have abstained from hearing a matter concerning a state's ICWA violation).

out the duties to some of its most vulnerable citizens.[576] In the Supreme Court, they hoped to find a sympathetic ear.

But most importantly, because ICWA exists in affirmation of Congress's duties to Tribes in the realm of Indian child welfare, this is now a duty that Congress and the federal government writ large owes to Indian Tribes. It is a duty that is based in text, not just sentiment, to remedy the wrongs of the past and protect Indian Tribes and families moving forward.[577]

Congress's explicit action vis-à-vis ICWA is so important because *Arizona v. Navajo Nation*[578] demonstrates what happens when Congress has not articulated its duty to a Tribe. In that case, the Navajo Nation alleged the federal government has a duty to take affirmative steps to protect its water supply.[579] The Court—the same Court that heard *Brackeen*—rejected that argument because the treaty in question only prevented interference with the Navajo Nation's water supply.[580] Because the United States is a sovereign, the normal common law trust principles to manage assets to the benefit of the beneficiaries do not apply to its trust responsibility where it has not established a duty.[581]

This case demonstrates some of the larger complications within Indian law, as even the Court noted that a treaty from the nineteenth century surely could not foresee all the Navajo

576. *See* Seth Davis, *Equal Sovereignty as a Right Against a Remedy*, 76 LA. L. REV. 83, 90 (2015) ("Rights may be invoked to limit the government's power to provide redress to those who are injured and to design remedies to deter legal wrongs.").

577. *See generally* van Schilfgaarde & Shelton, *supra* note 433 (arguing that in order to remedy the harmful and antiquated child welfare system is to allow Tribes to take the lead).

578. 143 S. Ct. 1804, 1810 (2023) (holding the United States did not have to take affirmative steps to secure water for the Tribe).

579. *Id.*

580. *Id.* at 1813 (finding that the treaty "contained no 'rights-creating or duty-imposing' language that imposed a duty on the United States to take affirmative steps to secure the water for the tribe" (citing United States v. Navajo Nation, 537 U.S. 488, 506–07 (2003))).

581. *Arizona*, 143 S. Ct. at 1814 ("Here, nothing in the 1868 treaty establishes a conventional trust relationship with respect to water."); *see also* United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011) (describing the duties the federal government owes to Tribes under its trust responsibility).

Nation's water needs well into the twenty-first century.[582] Yet, there would be no relief for the Navajo Nation as the Court mentioned: "there is no judicially defined meaning for what constitutes Congress's unique obligation toward Indians."[583] While *Navajo Nation* parses what the federal trust responsibility is, Congress affirmatively stated its obligation to Tribes in ICWA.[584] Whether there are ways to perfect ICWA and its application, that is for another day. As mentioned with the *West Flagler* case, *Navajo Nation* and the affirmation of a Tribe's water rights is as important to tribal sovereignty and the maintenance of the Indian family as ICWA. Settler overpopulation of the southwest has put the Navajo Nation into a dangerous position in which it does not have access to water, but the federal government has yet to affirm its duty to protect that water. So, the Court will not permit the Navajo Nation to seek a legal remedy and force the issue. It is a matter for the political process.

So, where does that leave ICWA? In the majority opinion of *Brackeen*, Justice Barrett spent a great deal of time detailing ICWA's viability as an Indian Affairs statute.[585] In *Brackeen*, Justice Barrett noted that "[a] power unmoored from the Constitution would lack both justification and limits" before categorizing Supreme Court precedent as "unwieldy, because it rarely ties a challenged statute to a specific source of constitutional authority."[586] While the focus of this is Congress's ability to enact ICWA under the Indian Commerce Clause, it is perhaps the best way to look at ICWA. It defines exactly how ICWA is an anti-colonial equity statute. ICWA promotes a partnership between federal, state, and tribal governments aimed at protecting the wellbeing of Indian children, protecting the rights of their families and keeping their families intact, and supporting tribal sovereignty.

As Justice Barrett noted, the precedent is sometimes unwieldy.[587] Much of Indian law is judicial doctrine and based on the idea that Congress has ultimate authority over making laws

582. *Arizona*, 143 S. Ct. at 1808 ("And it is unsurprising that a treaty enacted in 1868 did not provide for all of the Navajo's current water needs 155 years later.").

583. Skibine, *supra* note 358, at 36.

584. 25 U.S.C. § 1901(2).

585. Haaland v. Brackeen, 143 S. Ct. 1609, 1627–29 (2023) (detailing Congress's power with respect to Tribes).

586. *Id.* at 1629, 1627.

587. *Id.* at 1627.

regarding Indian affairs. Historically, this has been problematic for Indian Tribes and caused a great deal of heartbreak to Indian families.[588] Today, there are bipartisan partnerships in place to foster more positive relationships between Tribes, states, and the federal government.[589] However, Professor Maggie Blackhawk has critiqued the reliance on the plenary power doctrine as one which permits an application of federal common law over constitutional law.[590]

Connecting constitutionalism and colonialism is inherently hard because the two ideas exist in a degree of conflict. Although the Framers contemplated the role of Indian Affairs, Indians were a problem meant to be solved, not peoples meant to persevere through numerous attempts at assimilation. It is complicated to reconcile constitutionalism and colonialism—which makes it harder to contemplate how the equal protection doctrine's equality paradigm could ever answer questions about ICWA's existence and survival without continuing some of colonialism's cruelest, harshest, and most devastating effects. In the realm of family law, ICWA is a revolutionary statute that protects American Indian families. In a perfect world, laws like ICWA would be unnecessary because supporting healthy families with tangible resources would transcend racialized child welfare and family politics. In a perfect world, tribal governance and sustenance would be supported without an act of Congress.

A simple anti-classification equality frame can never capture what ICWA does as a matter of Indian and family law. However, viewing ICWA as a statute recognizing that Indians have no similarly situated group in the United States and its original

588. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903) (declining to review a claim that Congress abrogated a treaty with the Sioux Nation and improperly allotted surplus tribal lands on the basis that this was a political matter).

589. *See, e.g.*, *The North Dakota ICWA Family Preservation Partnership*, UNIV. OF N.D., https://und.edu/cfstc/indian-child-welfare-act/ndicwafpp.html [https://perma.cc/6RBQ-A672] (describing the North Dakota ICWA partnership). In addition to ICWA specific partnerships, many states with Indian Country within their boundaries have some type of tribal-state forum. *See, e.g.*, *About the Forum*, N.Y. FED.-STATE-TRIBAL CTS. AND INDIAN NATIONS JUST. F., https://nyfedstatetribalcourtsforum.org/about.shtml [https://perma.cc/ZT6P-6CTN].

590. Blackhawk, *Constitution of American Colonialism*, *supra* note 70, at 57 ("Today, the Supreme Court envisions the 'plenary power' of colonization as political, culminating in federal common law and not constitution law, and it struggles to articulate principled limits and logics to the power.").

purpose, is the appropriate lens for administering the statute's anti-colonial equitable mandate. Understanding and arguing that ICWA is first and foremost an Indian Affairs statute remains critical to its application. It is the job of Congress alone to administer Indian Affairs—and they have done that through ICWA outside of the judicially constructed equal protection doctrine frame. Indeed, Congress intended ICWA to limit state and private actors from interfering in American Indian families without cause. Its goal was not equality as ICWA's opponents seem to understand that term in the twenty-first century—but it was to heed the calls for equal justice coming from tribal members suffering from some of the deepest, most personal pains colonialism could ever offer: the theft of Indian children and the attempted destruction of entire Nations.

CONCLUSION

Although Congress remains in the driver seat of the colonial project, Congress did not conduct the colonial project alone. Individual citizens have long been partners in this project. Without question, *Brackeen* affirmed the constitutionality of ICWA. Although the Court did not answer the equal protection question on its merits, its decision means that ICWA remains good law. Given the Court's support of plenary authority and rejection of commandeering arguments furthered by the plaintiffs, a future equal protection challenge might survive too. But what does this mean for scholars and those advocating on behalf of ICWA?

First and foremost, we must always recognize that ICWA exists because of Congress's express duty to protect tribal sovereignty vis-à-vis its trust responsibility. Second, ICWA is generally a best evidence practice in family regulation, meaning that in ICWA cases, the outcome may not always be one in which a family remains unified. However, maintaining the integrity of the Indian family is always the first goal. The second, and an overarching goal, is to ensure that an Indian child may maintain ties to their tribal culture. Third, understanding ICWA is an anti-colonial equity statute that does not comport with the values of equal protection is paramount. Congress enacted ICWA precisely because state and individual actors abused their power, wreaking havoc on Indian Tribes and families alike. Allowing these actors to assert rights to Indian children is precisely

what Congress exercised its plenary authority over Indian affairs to discontinue.

Although limited to ICWA and federal Indian law, this Article has provided a strong rebuke to the equal protection doctrine as it stands. As Americans, we may believe the equal protection doctrine's formulation of equality is the bedrock of our society. But this equality is moreso a belief built upon a myth that we are all created equal under the law. Perhaps that is true in the eyes of a higher power, or even in a human rights framework in which we all have equal footing. However, we cannot all be equal under the law so long as a dominant group can levy substantial attacks on the existence of groups that they have long attempted to not only subjugate but culturally eradicate. American jurisprudence—as well as law and policy—in Indian law demonstrates the truth of this matter. We did not all start at the same starting line.

Cases like *Brackeen* demonstrate how colonial legal doctrines allow equality to breed inequity. I highly suspect that ICWA's proponents, and indeed members of the Roberts court, will not give this a rest. If the equal protection question were ever raised in an ICWA case again, scholars and advocates must be prepared to argue the faults of equality while promoting the principles of tribal sovereignty and equity upon which Congress rested ICWA. Falling into arguments on racial classification on this issue is to engage logical folly. Scholars and litigators must be clear about what equality means here and for whom. If we lean in and focus on the race-based arguments, we miss the heart of the challenge all together.

Here, equality is the settlers' equal opportunity for continued colonialism under the auspice that we are all equal now. As current events demonstrate, this version of equality is little more than a dream yet to be achieved. Congress saw this for what it was in the 1970s, and as such, few legal examples exist that provide such a clear guiding principle and rebuke to the dismantling of families as ICWA. ICWA itself is proof that Congress understood that equal protection of the laws has never existed for American Indians as members of Tribal Nations whose individual rights are so often tied into the federal trust relationship. Congress has a long history of ensuring that American Indians would not receive equal protection of the laws until tribal governments were gone and the process of full assimilation was

complete. And thankfully, assimilation is a project the federal government has never been able to achieve.

If it were not a fool's errand, perhaps this Article might suggest that scholars and attorneys simply ignore the racial vs. political divide in discussing equal protection. ICWA litigation and evolving understandings on family regulation demonstrate it makes little sense to try avoiding the elephant in the room: ICWA stands apart from the conservative legal movement's attacks on race-based programs primarily because it is imbued with an anti-colonial equitable mandate. ICWA has never been about equality for settlers and preserving the settler colonial project, but it has always been an equitable measure to ensure Tribes can continue to enjoy self-determination and that the American Indian family can persist.

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