PEPPERDINE UNIVERSITY

Journal of the National Association of Administrative Law Judiciary

Volume 43 | Issue 2 Article 4

7-15-2023

The Heart of the Matter: ICWA and the Future of Native American Child Welfare

Amelia Tidwell

The Heart of the Matter: ICWA and the Future of Native American Child Welfare

By Amelia Tidwell

ABSTRACT

The United States has a long and tragic history of removing Native American children from their homes and culture at shocking rates. Congress passed the Indian Child Welfare Act (ICWA) in 1978 in response to that crisis and many states have bolstered the Act with state legislation and tribal-state agreements, but racial disparities are still present in the child welfare system today. Some states with low Native American populations joined non-Native American prospective adoptive parents in a constitutional challenge of ICWA, and hundreds of supporters (tribes, organizations, and states) poured out support for the Act. The Supreme Court heard the case, Haaland v. Brackeen, in November 2022, and both sides await the Court's ruling on ICWA's future. This article delves into the history of U.S. child welfare practices and cultural distinctions that played a role in creating and perpetuating the racial disparities to understand the necessity of the Act. It then analyzes the way states have embraced or resisted ICWA to demonstrate states' preparedness (or lack thereof) to handle Native American child welfare cases should the Supreme Court overturn ICWA. This article argues that, regardless of the Supreme Court's ruling in Haaland v. Brackeen, states must take steps to address the persistent racial disproportionalities and ensure protections for tribal culture and Native American children in the absence of ICWA. Finally, this article presents three pillars that states must address concurrently to achieve those aims.

TABLE OF CONTENTS

I. INTRODUCTION

National attention frequently shifts toward Native American[1] affairs when threats to tribal lands arise, such as when the widespread concerns surrounding the Dakota Access Pipeline rallied support across the country.[2] For the past few years, however, increasingly more attention has gone toward child welfare practices when a Native American child is involved, and for the first time in about a decade, the issue reached the Supreme Court in November 2022 in *Haaland v. Brackeen*.[3]

The case challenges the constitutionality of the Indian Child Welfare Act (ICWA),[4] a 1978 federal statute that sought to halt the long and tragic history of child welfare services removing Native American children from their homes at shocking rates.[5] More than twenty states, nearly two hundred federally-recognized tribes, and a large number of child welfare and political organizations have weighed in on the matter with amicus curiae briefs, and advocates for both sides eagerly await the outcome now that the Supreme Court has heard the case.[6] The challenge

[1] I have chosen to use the term "Native American" in this article but recognize and respect that the term is not universally used. Rather than alternating with other terms with which many in the community identify—such as American Indian, Indigenous peoples, Indian, and others—with the exceptions of quotes and titles, this article will use "Native American" throughout for the sake of consistency and clarity.

[2] *Treaties Still Matter: The Dakota Access Pipeline*, NATIVE KNOWLEDGE 360°, https://americanindian.si.edu/nk360/plains-treaties/dapl (last visited Apr. 8, 2023).

[3] Argument, Haaland v. Brackeen, 142 S. Ct. 1205 (2022) (No. 21-376), https://www.supremecourt.gov/oral_arguments/audio/2022/21-376 [hereinafter Oral Arguments]. The last ICWA case before the Supreme Court was in 2013. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 650 (2013). This paper refers to *Haaland v. Brackeen* generally as "*Brackeen*."

[4] Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (1978).

[5] *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N, https://www.nicwa.org/about-icwa/ (last visited Apr. 5, 2023).

[6] *Amicus Briefs Filed to Uphold the Indian Child Welfare Act and Support Indian Children and Families in Brackeen v. Haaland (formerly Brackeen v. Bernhardt)*, NAT'L CONG. OF AM. INDIANS (Oct. 12, 2021), https://www.ncai.org/news/articles/2021/10/12/amicus-briefs-filed-to-uphold-the-indian-child-

against ICWA goes beyond the mere constitutionality of the Act, however, and brings up questions about whether the Act truly makes positive progress toward its aims and what has caused shortfalls and failures in accomplishing its goals. Regardless of the latest constitutional challenge's outcome, the case has alerted tribes and lawmakers to the systemic failings since ICWA's passage and highlights the need for states to step in and improve upon the Act, ensure that officials apply Native American child welfare laws consistently and accurately, and focus more attention on the unfortunate realities that lead to child welfare involvement to begin with.

This article begins in Section II by delving into the history of ICWA and child welfare practices in the United States and analyzing some of the cultural distinctions between traditional Native American and white American child-rearing practices to provide a foundational understanding of the need for ICWA and potential biases that still creep into caseworker decision-making processes today. Section III looks at the Act itself, its benefits and shortfalls, and legal challenges to ICWA. The article's attention shifts to states' relationships with ICWA in Section IV, using Washington, Minnesota, and the state Respondents in the recent Supreme Court challenge (Texas, Louisiana, and Indiana) as case studies of the way that states have applied, failed to apply, or resisted ICWA. Finally, Section V assesses ICWA's fate upon reaching the Supreme Court and identifies steps that Congress, states, and tribes must take to make further progress in ameliorating the persistent disparities in child welfare for Native Americans, regardless of how the Court rules in *Haaland v. Brackeen*.

---

welfare-act-and-support-indian-children-and-families-in-brackeen-v-haaland-formerly-brackeen-v-bernhardt.

II. HISTORICAL BACKGROUND

A. IMPETUS FOR ICWA

In the twentieth century, states became "increasingly interventionist" regarding child welfare.[7] State adoption and child welfare agencies separated more than a quarter of Native American and Alaska Native children from their families.[8] Of those children, 85% were placed in homes away from their communities even when extended family members were willing and able to home them,[9] and many of them never returned to their biological families.[10] A 1976 report revealed to Congress the tragedy of what "has been and continues to be a national crisis,"[11] and the legislature passed ICWA in response.[12]

Similar removal practices have plagued Native American communities for centuries, with mission and boarding schools tearing Native American children away from their communities and attempted to "civilize" them by forbidding the use of their language and culture and instead indoctrinating the children with Christianity.[13] While today's child welfare involvement in Native American communities may appear less barbaric on its face, these separation policies have

---

[7] Onalee R. Chappeau, *Trusting the Tribe: Understanding the Tensions of the Indian Child Welfare Act*, 64 ST. LOUIS L. J., 241, 242 (2020).

[8] *About ICWA*, *supra* note 5; Chappeau, *supra* note 7, at 243.

[9] *About ICWA*, supra note 5.

[10] Christie Renick, *The Nation's First Family Separation Policy*, THE IMPRINT (Oct. 9, 2018, 5:05 AM), https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431.

[11] AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION, H.R. REP. NO. 77-476, at 87 (1976).

[12] Chappeau, *supra* note 7, at 243–44.

[13] *Id*. at 242.

persisted into recent memory. Advocates in the twentieth century were eager to reform child welfare policy,[14] and Native American families found themselves particularly harmed by the rampant removal of children from their homes.[15] The traditional Native American approach to child-rearing differs from that in white American culture.[16] However, child welfare agencies failed to appreciate the cultural influence of such differences and deemed Native American child-rearing methods sufficiently neglectful to merit removing the child from their home and even terminating parental rights.[17] Rather than placing the children in suitable Native American homes, state agencies and courts overwhelmingly placed the children in foster and adoptive homes that lacked understanding of the child's cultural roots, or in boarding schools that did not keep the child's language or traditions alive.[18] In fact, the Indian Adoption Project (IAP)[19] that began in the 1950s

---

[14] ANDREW L. YARROW, HISTORY OF U.S. CHILDREN'S POLICY, 1900-PRESENT 1–2 (2009), https://firstfocus.org/wp-content/uploads/2014/06/Childrens-Policy-History.pdf.

[15] Chappeau, *supra* note 7, at 242. In part, the passage of Public Law 280 in 1953 exacerbated this issue, as it "required five states . . . to take over civil and criminal jurisdiction of Indian lands from the federal government." Kathryn A. Carver, *The 1985 Minnesota Indian Family Preservation Act: Claiming a Cultural Identity*, 4 MINN. J. L. AND INEQUALITY 327, 331 (1986). Though the law's purpose was to address criminal law concerns, civil law jurisdiction came with it, which led to issues regarding the application of state family law to Native American communities. *Id.* at 332–33. Minnesota was among the states implicated by Public Law 280, *id.* at 331, the results of which will be considered in greater detail in Section IV.C below.

[16] *See infra* Section II.C.

[17] Chappeau, *supra* note 7, at 243. "As a direct result of" Euro-centric criteria employed by child welfare officials when assessing family situations, "disproportionate numbers of indigenous children were removed from their homes by social workers." *The Outplacement and Adoption of Indigenous Children*, BRITANNICA, https://www.britannica.com/topic/Native-American/The-outplacement-and-adoption-of-indigenous-children (last visited Nov. 14, 2021).

[18] Lucy Dempsey, *Equity Over Equality: Equal Protection and the Indian Child Welfare Act*, 77 WASH. & LEE L. REV. 411, 416 (2021).

[19] The Bureau of Indian Affairs worked with the Child Welfare League of America to launch the IAP in response to child welfare officials removing Native American children from their homes at "disproportionate" rates. BRITANNICA, *supra* note 17. Reservations tended to have few foster homes, and far too many Native American children were in need of temporary placements, so officials often forced children to live at residential schools. *Id.* The IAP addressed that problem by allowing interstate

chose to handle the placement of a shocking number of removed Native American children by predominantly adopting out the children to non-Native American families.[20] The program's leaders felt it was an "enlightened"[21] way to reduce racial tensions through inter-racial adoptions, but Native American activists and allies argued instead that the program continued the long history of cultural genocide against Native Americans.[22] Given Congress's implied constitutional mandate to protect and ensure tribes' welfare,[23] upon realizing these tragedies, the legislature passed ICWA in hopes of fulfilling that promise by focusing on the future of the tribes: Native American children.[24]

B. RACIAL INEQUITIES IN CHILD WELFARE INVOLVEMENT

Healthy child welfare practices were severely lacking for most of United States history, with orphans receiving little care and protection until the mid-nineteenth century when reformers began programs similar to what is now called foster care to protect children from neglectful, abusive, and exploitative practices.[25] In the twentieth century, child welfare advocates identified

---

adoption and foster care placements of Native American children, but the solution still severed ties to the children's cultural roots by placing them in the homes of white families. *Id.*

[20] Dempsey, *supra* note 18, at 417.

[21] *Indian Adoption Project*, THE ADOPTION HIST. PROJECT, https://pages.uoregon.edu/adoption/topics/IAP.html (Feb. 24, 2012).

[22] *Id*.

[23] Chappeau, *supra* note 7, at 244. Congress claims "plenary power over Indian affairs" based on "Congress' interpretation of the Indian Commerce Clause and recognition of a federal responsibility to Indians individually and as tribes." *Id. See* U.S. CONST. art. 1, § 8, cl. 3 (Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes*" (emphasis added)).

[24] Chappeau, *supra* note 7, at 244.

[25] Linda Gordon, *Child Welfare: A Brief History*, SOC. WELFARE HIST. PROJECT (2011), https://socialwelfare.library.vcu.edu/programs/child-welfarechild-labor/child-welfare-overview/.

poverty as a barrier against efforts to improve the lives of children and states made financial assistance available to poor mothers in the 1910s and 20s.[26] However, the assistance programs discriminated against immigrants and nonwhites when distributing those funds—African Americans made up only 3% of the recipients, and Hispanics and Native Americans often found themselves entirely excluded from receiving aid.[27] Studies on child welfare practices in the mid-to-late-twentieth century reveal "a pattern of inequity, if not discrimination, based on race and ethnicity in the provision of child welfare services" overall,[28] and Native Americans had "the least chance" of receiving these services.[29] Discrimination was apparent in child abuse and neglect reporting, as well, after the 1974 Child Abuse Prevention and Treatment Act imposed mandatory reporting requirements on certain professionals.[30] Even when evidence of maltreatment was equally apparent among "more privileged families," evidence showed that single mothers, minorities, and people facing poverty were disproportionately reported.[31]

Similar issues of racial inequity in child welfare continue today. Native Americans frequently face poverty, and many have moved off reservations where their lives become more

---

[26] *Id.*

[27] *Id.*

[28] Mark E. Courtney, Richard P. Barth, Jill Duerr Berrick, Devon Brooks, Barbara Needell & Linda Park, *Race and Child Welfare Services: Past Research and Future Directions*, 75 CHILD WELFARE 99, 112 (1996). Studies done based on data from the 1970s discovered that removed African American and Latino children were the least likely to receive plans for family visits, that welfare officials commonly placed Latino children in group homes and deemed them "behaviorally disturbed," and that white children and families consistently received more services overall. *Id.* at 108–09.

[29] *Id.* at 108.

[30] Gordon, *supra* note 25.

[31] Id.

exposed to non-tribal officials who understand little about cultural differences[32] and are susceptible to bias.[33] As a result, Native American families can encounter more culturally misinformed state child welfare officials and family courts, resulting in welfare systems placing Native American children away from their cultural roots.[34]

Child welfare systems have had a disproportionate presence in minority communities throughout history.[35] In part, this is due to the correlation between child maltreatment and issues of poverty and substance abuse, which are historically more common in communities of color that "had fewer economic and educational opportunities."[36] From a statistical standpoint, child welfare officials can rationalize expecting to find abuse and neglect when a family falls into a low socioeconomic status—children in such families are reportedly five times more likely to face incidents of maltreatment, more than three times more likely to experience abuse, and more than seven times more likely to experience neglect than children in families of higher socioeconomic status.[37] However, the system is prone to confusing the effects of poverty with signs of neglect,

---

[32] Carver, *supra* note 15, at 334.

[33] Shanta Trivedi, *The Harm of Child Removal*, 43 N. Y. UNIV. REV. OF L. & SOC. CHANGE 523, 536 (2019).

[34] Carver, *supra* note 15, at 334.

[35] Courtney, Barth, Berrick, Brooks, Needell & Park, *supra* note 28, at 101. "Issues of race and poverty are factors that are disproportionately represented within child protection caseloads; however, little is known about how race and poverty influence decision making in practice." Jacqueline Stokes & Glen Smith, *Race, Poverty and Child Protection Decision Making*, 41 BRITISH J. SOC. WORK 1105, 1106 (Sep. 2011). Studies from 1982 on the issue showed "that Caucasian parents received more social service support than other parents" and that "over half of the families with children in placement" received no service recommendations, "with Native American families having the least chance for service recommendations, and Caucasian and Asian American families the greatest chance." Courtney, Barth, Berrick, Brooks, Needell & Park, *supra* note 28, at 108.

[36] Courtney, Barth, Berrick, Brooks, Needell & Park, *supra* note 28, at 107.

[37] Maren K. Dale, *Addressing the Underlying Issue of Poverty in Child-Neglect Cases*, ABA (Apr. 10, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/addressing-underlying-issue-poverty-child-neglect-cases/. These statistics come from

which can inflate the statistics that influence social workers to more strictly scrutinize lower-income homes.[38]

The most common form of child abuse in the United States is neglect.[39] In fact, between 2016 and 2018, 87.1% of cases in which California officials removed a child from the home and placed her in foster care were due to neglect, compared to 7% due to physical abuse.[40] The Native American community has "the highest rates of victimization" in the United States "at 14.8 per 1,000 children" as of 2019.[41] Data suggests that over half of child maltreatment cases were based solely on findings of neglect, which leads to concerns that child welfare officials remove too many children from their homes "due to poverty alone"—"but poverty does not equate to neglect."[42]

U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, THE NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4) (2004–2009). The Centers for Disease Control and Prevention (CDC) confirmed in 2022 that the rates of abuse and neglect increase five-fold for children in poor households. *Fast Facts: Preventing Child Abuse & Neglect*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/childabuseandneglect/fastfact.html (Apr. 6, 2022).

[38] Jerry Milner & David Kelly, *It's Time to Stop Confusing Poverty With Neglect*, THE IMPRINT (Jan. 17, 2020), https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222.

[39] DULCE GONZALEZ, ARIAN BETHENCOURT MIRABAL, JANELLE D. MCCALL & CHADDIE DOER, CHILD ABUSE AND NEGLECT (NURSING) 1 (2022), https://www.ncbi.nlm.nih.gov/books/NBK568689/#_NBK568689_pubdet_. "General neglect occurs when a parent, guardian, or caregiver fails to provide adequate food, shelter, medical care, or supervision for the child, but no physical injury occurs." John Kelly, *Focus on the Figures: Reasons for Removal from Home*, THE IMPRINT (Mar. 3, 2014), https://imprintnews.org/featured/focus-on-the-figures-reasons-for-removal-from-home/5352.

[40] *First Entries into Foster Care, by Reason for Removal*, KIDS DATA, https://www.kidsdata.org/topic/16/foster-entries-reason/pie#fmt=13&loc=2&tf=125&ch=35,36,37,38&pdist=89 (last visited Mar. 8, 2022).

[41] CHILDREN'S BUREAU, CHILD MALTREATMENT 2019: SUMMARY OF KEY FINDINGS 3 (2021), https://www.childwelfare.gov/pubpdfs/canstats.pdf.

[42] Milner & Kelly, *supra* note 38.

Given that minorities are overrepresented among poor families[43] and persons of color are historically underrepresented as child welfare officials,[44] minorities are particularly susceptible to negative outcomes in encounters with child welfare services.[45]

When comparing the proportion of children in each ethnic group in the United States to their respective proportion in the foster care system, racial disparities are evident.[46] White, Hispanic, and Asian children are underrepresented in foster care (with Asian children dramatically so), while African American, Native American, and multi-racial children are seriously overrepresented.[47] As of 2020, African American children made up 14% of the total population yet represented 23% of foster care children.[48] Similarly, as of 2018, multi-racial children doubled their proportional share of representation, while Native American children nearly tripled theirs—Native Americans make up less than 1% of the total population, yet 2.4% of the U.S. foster care population is Native American.[49]

---

[43] Courtney, Barth, Berrick, Brooks, Needell & Park, *supra* note 28, at 101–02.

[44] *Id.* at 110. Even if the social worker is not of the same race or cultural background as the family, it is important that the social worker at least understands the family's cultural context to make appropriate determinations about the situation. *Id.*

[45] *Disproportionality and Race Equity in Child Welfare*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/human-services/disproportionality-and-race-equity-in-child-welfare (Jan. 26, 2021).

[46] *Id.*

[47] *Id.*

[48] Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can be Done to Address Them?* 692 ANNALS, AM. ACAD. POL. & SOC. SCI. 253, 253–54 (2020). While shocking and unfortunate, the 23% statistic represents an improvement. In 2000, African American children made up 38% of the foster care population, but the proportion dwindled after state legislatures around the country became aware of the disproportionality and demanded their child welfare systems respond. *Id.* at 254.

[49] NAT'L CONF. OF STATE LEGISLATURES, *supra* note 45.

Not only are these minority groups vastly overrepresented in the foster care system, but children of color overall are more likely than white children to have negative outcomes during and after their encounters with the foster care system.[50] For example, non-white children are "more likely to experience multiple placements, less likely to be reunited with their birth families, more likely to experience group care, less likely to establish a permanent placement[,] and more likely to experience poor social, behavioral[,] and educational outcomes."[51] Additionally, if an African American and white household face the same maltreatment allegations, the child welfare system is more likely to allow the white child to stay with his family while removing the African American child from hers.[52] Similarly, white and Native American families experience different outcomes in situations of alcohol abuse.[53]

Measuring racial disproportionality by comparing a group's share of the population to its share of child welfare interactions can be "useful for describing relative rates of CPS involvement," but "it is unlikely to inform whether particular groups may be appropriately represented in CPS based on" the true rates of maltreatment.[54] Essentially, experts worry about bias or other factors

[50] *Id.*

[51] *Id.*

[52] Trivedi, *supra* note 33, at 536.

[53] Marcia A. Yablon-Zug, *ICWA International: The Benefits and Dangers of Enacting ICWA-Type Legislation in Non-U.S. Jurisdictions*, 97 DENVER L. REV. 205, 236 (2019).

[54] Sarah A. Font, Lawrence M. Berger & Kristen S. Slack, *Examining Racial Disproportionality in Child Protective Services Case Decisions*, 34 CHILD. AND YOUTH SERV. REV. 2188, 2189 (2012).

skewing statistics.[55] Thus, scholars have attempted to take numerous factors into account to assess the influence that bias has in inflating the racial disproportionalities in the child welfare system.[56]

Researchers attribute the over-representation of children of color in the child welfare system to "disproportionate need" in minority households, "racial bias in child welfare decision making,"[57] and higher risk of abuse and neglect in minority homes "due to a variety of risk factors," such as poverty.[58] Additionally, because of the higher likelihood that minorities fall into lower socioeconomic brackets, minority families are more likely to use government services and participate in public assistance programs.[59] "[M]ore frequent contact with these systems" may make minority families more "visible" to child welfare officials who are on high alert for child maltreatment in impoverished homes[60] and who may wield negative stereotypes and presumptions about minorities "to justify ongoing supervision of these parents and their children."[61]

---

[55] Id.

[56] *Id.* It is important to note that, at the same time, researchers run the risk of allowing bias to influence their own research by potentially expecting bias to play too strong of a role in explaining the racial disparities. *Id.*

[57] SUSAN CHIBNALL, NICOLE M. DUTCH, BRENDA JONES-HARDEN, ANNIE BROWN, RUBY GOURDINE, JACQUELINE SMITH, ANNIGLO BOONE & SHELITA SNYDER, CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY 4 (2003), https://www.childwelfare.gov/pubpdfs/children.pdf.

[58] *Id*. at 5. "Poverty is a well-established risk factor for child maltreatment." Caroline E. Chandler, Anna E. Austin & Meghan E. Shanahan, *Association of Housing Stress With Child Maltreatment: A Systematic Review*, 23 TRAUMA, VIOLENCE, & ABUSE 639 (2022), https://journals.sagepub.com/doi/epub/10.1177/1524838020939136.

[59] CHIBNALL, DUTCH, JONES-HARDEN, BROWN, GOURDINE, SMITH, BOONE & SNYDER, *supra* note 57, at 4.

[60] *Id.*

[61] Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 238 (2013). "Known as the racial geography of foster care, those neighborhoods with poor African American and Native American families and the greatest involvement and concentration of foster care system surveillance are a perfect match." *Id.*

On a macro level, institutional racism may also contribute to the disproportionalities.[62] The Children's Bureau, an office of the U.S. Administration for Children and Families, published a bulletin addressing racial disproportionality and disparity in the child welfare system in 2021.[63] The agency expanded upon the common contributing factors listed above by noting the failure of policies and statutes in "targeting the needs of children of diverse racial and ethnic backgrounds" and the influence of "[s]tructural racism (e.g., historical policies and cultural dynamics)."[64] For example, the historical prevalence of substance abuse and poverty in reservation communities has emboldened state officials to feel even more justified in removing Native American children from their homes and tribes.[65] However, the modern pervasiveness of substance abuse and poverty is rooted in historical trauma and racism that "created systems of inequality and cycles of abuse that have impacted the health of reservation residents from one generation to the next."[66] The "intergenerational and historical trauma" in Native American communities includes the forced removal of children from Native American homes,[67] and the continued removal of children from their communities and culture only perpetuates the cycle.

---

[62] Font, Berger & Slack, *supra* note 54, at 2189.

[63] CHILDREN'S BUREAU, CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY (2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf.

[64] *Id.* at 4–5.

[65] Chappeau, *supra* note 7, at 243.

[66] Monica C. Skewes & Arthur W. Blume, *Understanding the Link Between Racial Trauma and Substance Use Among American Indians*, 74 AM. PSYCH. 88, 94 (Jan. 2019). Much of U.S. history saw "federal policies . . . enacted to deliberately destroy Indigenous ways of life, cultural practices, traditional languages, spiritual beliefs, ceremonies, and family systems," and "[o]ther racist policies persisted well into the 20th Century." *Id.* at 90.

[67] *Id.* at 94.

In every stage of a child welfare investigation, officials must make "crucial decisions," often "in a context of incomplete information."[68] As a result, "there is the potential for bias" filling the informational gaps at each step.[69] Evidence suggests that child welfare officials are more likely to give credence to reports made for maltreatment of children in communities of color than they are when the report occurs in a white community.[70] Whether this tendency arises from systemic racial bias, individual workers' susceptibility to applying negative "racial stereotypes that bear little resemblance to reality[,] or as a result of statistical discrimination" that in turn biases the child welfare officials when making their determinations,[71] the results still merit concern.

C. CHILD WELFARE IDEOLOGIES AND CULTURAL DISTINCTIONS

While not the exclusive determining factor, cultural misconceptions historically contributed to the high rates at which officials removed children from Native American homes.[72] "The prevailing models of well-being" in child welfare in the twentieth century "reflected the culture of the Euro-American middle classes," and child welfare officials judged Native American homes according to those misinformed standards.[73] Today, child welfare investigations allow

[68] Font, Berger & Slack, *supra* note 54, at 2189.

[69] *Id.*

[70] Courtney, Barth, Berrick, Brooks, Needell & Park, *supra* note 28, at 103; Font, Berger & Slack, *supra* note 54, at 2190.

[71] Font, Berger & Slack, *supra* note 54, at 2190.

[72] Ronald S. Fischler, *Child Abuse and Neglect in American Indian Communities*, 9 CHILD ABUSE AND NEGLECT 95, 96 (1985).

[73] BRITANNICA, *supra* note 17.

extensive subjectivity throughout the decision-making process, which may result in findings that could greatly differ from a culturally competent analysis.[74]

Family structures and child rearing methods in Native American communities bear cultural distinctions from white households, which in part served as grounds for the rampant removal of Native American children from their homes.[75] Children tend to have greater autonomy in tribal communities and parents do not always impose the strict schedules, structures, and methods of discipline often seen in white homes,[76] which caseworkers have historically misinterpreted as "an indication that the children lacked parental supervision."[77] By contrast, white western child-rearing ideology traditionally believes that children require "direct" guidance by parents and authority figures on how they should think and behave.[78]

Additionally, "the idea of the nuclear family common to mainstream America is a foreign concept to families" in traditional Native American communities.[79] Native American tribes have traditionally taken a more "communitarian approach[]" to child-rearing and family life, which

---

[74] Sheila Regan, *American Indian Children in Minnesota Disproportionally Placed in Foster Care*, TWIN CITIES DAILY PLANET (Nov. 28, 2011), https://www.tcdailyplanet.net/foster-children/#:~:text=The%20Poverty%20Factor&text=According%20to%20Sutton%2C%20%E2%80%9Cneglect%E2%80%9D,2009%20were%20allegations%20of%20neglect.

[75] Chappeau, *supra* note 7, at 242.

[76] Tamara Camille Newcomb, *Parameters of Parenting in Native American Families*, 31 (July 2008) (Ph.D. dissertation, Oklahoma State University) (On file with SHAREOK); Yablon-Zug, *supra* note 53, at 235.

[77] Yablon-Zug, *supra* note 53, at 235.

[78] Diane M. Hoffman, *Childhood Ideology in the United States: A Comparative Cultural View*, 49 INT'L REV. OF EDUC. 191, 198 (2003).

[79] CTR. FOR AM. INDIAN HEALTH, ENGAGING THE STRENGTH OF FAMILY TO PROMOTE LIFELONG HEALTH: LESSONS FROM THE FIRST AMERICANS (2017), https://caih.jhu.edu/assets/documents/Conference_Proceedings_Final1.pdf; *see also* Carver, *supra* note 15, at 348.

"stood in [stark] contrast" to white American and European culture.[80] Extended family members in Native American families tend to have important roles in a child's upbringing, and nonrelated individuals who have close personal ties to the family may play significant caretaking roles.[81] These individuals provide a support system to the parents and assist in caretaking and disciplinary responsibilities, contribute to decision-making, and pass down the tribal culture and traditions.[82] They also would traditionally step in to "provid[e] temporary or permanent substitute parents" when the birth parents were, for whatever reason, unable to properly care for the child.[83] The extended family approach to child rearing is arguably especially important to reinforce traditions and support new parents given the trauma and family breakdowns that have plagued Native American communities for generations due to child removal practices, though reports suggest that these traditional extended support groups are not always as available to new parents today.[84] Comparatively, white Americans traditionally consider children to be a direct product of their parents' efforts and hold the parents fully responsible for their child's upbringing.[85] This

[80] BRITANNICA, *supra* note 17.

[81] Newcomb, *supra* note 76, at 25; Yablon Zug, *supra* note 53, at 235.

[82] Newcomb, *supra* note 76, at 25–26. The president of National Indian Child Welfare Association, Gil Vigil, testified to the Senate Committee on Indian Affairs about the importance of "natural helping systems in [tribal] communities" using Native American "culture, teachings, and extended families to keep children safe and strengthen our families." NAT'L INDIAN CHILD WELFARE ASS'N, CHILD AND FAMILY POLICY UPDATE 1–6 (2021), https://www.nicwa.org/wp-content/uploads/2021/07/Child-and-Family-Policy-Update-July-2021.pdf.

[83] Fischler, *supra* note 72, at 96.

[84] Newcomb, *supra* note 76, at 27, 32, 37.

[85] Hoffman, *supra* note 78, at 202.

distinction historically led caseworkers to mistakenly perceive the Native American communitarian practices as abandonment and neglect.[86]

Further, while white culture in the United States values an individual's ability to raise his or her family to a higher socio-economic status, Native American communitarian culture traditionally had an opposite focus, wanting to ensure that no household fell below a certain level economically.[87] Adding that distinction to the widespread lack of "material comforts" such as electricity on reservations for much of the twentieth century, child welfare officials saw such "material divergences" as evidence that Native American families were "backward and neglectful of their children."[88]

For most of United States history, white Americans have driven public policy and legislation.[89] It is little surprise, then, that child welfare practices failed to account for cultural distinctions and misconstrued them as evidence of abuse and neglect and, therefore, grounds to

---

[86] Fischler, *supra* note 72, at 96.

[87] BRITANNICA, *supra* note 17.

[88] *Id.*

[89] *See Black Americans in Congress*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Exhibitions-and-Publications/BAIC/Black-Americans-in-Congress/#:~:text=Since%201870%2C%20when%20Senator%20Hiram,Representatives%2C%20Delegates%2C%20or%20Senators (last visited Jan. 14, 2023) (detailing the history of African Americans in Congress, including the first African Americans elected to the U.S. Congress in 1870, nearly a century after the country's founding). A trend of disparity in representation continues, as the majority of representatives in the 118th Congress are white. Katherine Schaeffer, *U.S. Congress continues to grow in racial, ethnic diversity*, PEW RSCH. CTR. (Jan. 9, 2023), https://www.pewresearch.org/fact-tank/2023/01/09/u-s-congress-continues-to-grow-in-racial-ethnic-diversity/. The U.S. House currently has four Native American and Alaska Native members, four multiracial members, fourteen Asian American members, forty-six Latinx members, and fifty-three African American members, while 313 members (72%) are white. *Id.* An even greater proportion of the U.S. Senate is white, at 88%. *Id.*

remove Native American children from their homes.[90] Child welfare proceedings are susceptible to bias, beginning with a child welfare official's initial observations in the home, and that leads to significant disparities in the outcomes for minority children and families.[91] Studies show that numerous variables affect how caseworkers assess each child welfare case, however, complicating the issue beyond just racial bias.[92]

While foster care placements are meant to be temporary, the unfortunate "reality is that a substantial number of children will remain in foster care even after it is clear the child cannot return to his or her biological parent."[93] Additionally, minority children tend to have longer stays in the foster care system than white children do.[94] Having a single, stable home during a child's formative years is important for development,.[95] Spending years in foster care can cause psychological trauma due to the child lacking the opportunity to form strong attachments to a constant figure in his life and never settling into a long-term home.[96] For that reason, ensuring that Native American children receive tribal foster care and adoptive placements are vital for maintaining the child's cultural heritage and sense of belonging and identity.[97]

---

[90] Chappeau, *supra* note 7, at 242–43.

[91] Trivedi, *supra* note 33, at 536.

[92] Font, Berger & Slack, *supra* note 54, at 2189, 2198; *see supra* Section II.B.

[93] Carver, *supra* note 15, at 346.

[94] *Id.* at 346–47.

[95] Linda Jensen, *Permanency Mediation: New Tool for Child Welfare Systems*, 42 ADVOCATE 15, 15 (1999).

[96] *Id*.

[97] Carver, *supra* note 15, at 347.

III. THE INDIAN CHILD WELFARE ACT

A. OVERVIEW OF THE ACT

The United States considers itself a "trustee" of Native American tribes.[98] The Supreme Court has identified Congress's "plenary power to legislate in the field of Indian affairs."[99] Upon realizing the excessive removal of Native American children from their homes and its effects on tribal communities,[100] Congress implemented the Indian Child Welfare Act (ICWA)[101] to fulfill its duty of protecting the tribes by protecting the best interests of Native American children first.[102] The Act prioritizes maintaining children's connection to their tribal communities[103] and entrusts tribal courts with decisions on how to best achieve that aim in child welfare proceedings.[104] Notably, the statute does not order tribal courts to mimic the way state family courts operate; rather, it gives tribes broad discretion to set up a court "operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings."[105]

---

[98] 25 U.S.C. § 1901(3).

[99] Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

[100] AMERICAN INDIAN POLICY REVIEW COMMISSION, *supra* note 11, at 87.

[101] 25 U.S.C. § 1901 et seq.

[102] *Id.* § 1902; *id.* § 1901(3).

[103] *Id.* § 1902.

[104] *Id.* § 1911. This comes from Congress's recognition "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* § 1901(5).

[105] *Id.* § 1903(12). Child welfare proceedings are thereby capable of respecting each tribe's unique culture and needs. Yablon-Zug, *supra* note 53, at 237. For example, in some Native American tribes, "a

ICWA is implicated whenever a Native American child is involved in child custody proceedings.[106] As soon as a court "knows or has reason to know" that the child has tribal connections, the court must notify the tribe of its right to intervene in the proceedings,[107] and the tribe or other relevant parties may petition for removal of the case to tribal court.[108]

The Act requires that agencies make "active efforts . . . [t]o the maximum extent possible" to reunite the child with her family.[109] In fact, the Act precludes officials from placing a Native American child in foster care unless active efforts "proved unsuccessful"[110] and clear and convincing evidence shows that the child will be harmed by remaining with her parents.[111] Moreover, termination of parental rights in ICWA cases requires the support of "evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that" not terminating custody "is *likely* to result in *serious* emotional or physical damage to the child."[112] ICWA provides an order of preference for the child's placement in foster or adoptive homes if removal is necessary: at the top of each list is placement with a member of the child's extended family, followed by someone within the child's tribe, then a Native American home or family outside of

---

biological mother and her biological sisters share the same parental status . . . and may possess equally strong custody claims." *Id.*

[106] *Indian Child Welfare Act (ICWA)*, ADVOKIDS, https://advokids.org/legal-tools/indian-child-welfare-act-icwa/ (last visited Sep. 10, 2021).

[107] 25 C.F.R. § 23.11.

[108] 25 U.S.C. § 1911.

[109] 25 C.F.R. § 23.2.

[110] 25 U.S.C. § 1912(d)

[111] *Id.* § 1912(e).

[112] *Id.* § 1912(f) (emphasis added).

the child's tribe, and finally, if necessary, a non-Native American placement that has either received approval from the tribe or from the child or parent.[113] However, tribes have the power to create their own order of placement preferences instead.[114] If another entity believes that the court should not follow the placement preferences, they must receive a court finding of "good cause" to deviate from those preferences.[115] "Good cause" may consist of parental request, a request by the child, the need to maintatin a "sibling attachment," a finding of the child's exceptional needs that are likely not to be met with a placement in a Native American community, or the "unavailability of a suitable placement."[116]

ICWA's advocates call the Act "the 'gold standard' for child welfare practices."[117] "Few federal laws have affirmed tribal sovereignty" to the extent that ICWA has.[118] It requires states to respect tribal sovereignty in child welfare proceedings and gives tribes opportunities to exercise that sovereignty with "intentional policy-level decisions"[119] rooted in traditional teachings (such as the obligation from a creator to protect children, who are sacred) instead of "mainstream

---

[113] *Id.* § 1915(a) and (b).

[114] *Id.* § 1915(c).

[115] 25 C.F.R. § 23.132.

[116] *Id.* § 23.132(c).

[117] Elizabeth Amon, *Minneapolis Lawyers Rely on 'Gold Standard' Law to Keep Native American Families Together*, THE IMPRINT (May 17, 2021), https://imprintnews.org/law-policy/minneapolis-lawyers-rely-on-gold-standard-law-to-keep-native-american-families-together/54527 [hereinafter Amon, *Minneapolis Lawyers*].

[118] Terry L. Cross & Robert J. Miller, *The Indian Child Welfare Act of 1978 and Its Impact on Tribal Sovereignty and Governance*, *in* FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30 13, 14 (2009).

[119] *Id.*

standards."[120] The Act aims to ensure tribal control in child welfare matters, and supporters say "ICWA is integral to meaningful tribal sovereignty."[121] Additionally, tribal control over such proceedings "reduces the likelihood of state bias" and "unjustified assumptions" based on cultural misunderstandings.[122] Proponents claim that the Act's prioritization of maintaining cultural ties "naturally build[s] resilience" and serves as "a protective factor for American Indian and Alaska Native youth."[123] As part of efforts to maintain familial connections, ICWA's "active efforts" requirement aims to make services and community resources more accessible to parents and "facilitate[e] transportation to ensure parents and their children can attend appointments or visits."[124]

Despite the Act's good intentions and advocates' positive responses to ICWA, systemic biases remain against Native American children and families in the child welfare system, and flaws persist in how courts interpret, apply, and enforce the Act[125] Native American children are still significantly more likely than white children to be removed from their homes and communities.[126] Advocates point to "institutionalized racism and . . . haphazard compliance with ICWA" as issues

---

[120] *Id.* at 17.

[121] Yablon-Zug, *supra* note 53, at 230.

[122] *Id.* at 234.

[123] *How can Child Welfare Systems Apply the Principles of the Indian Child Welfare Act as the "Gold Standard" for all Children?* CASEY FAMILY PROGRAMS (Apr. 1, 2022), https://www.casey.org/icwa-gold-standard/.

[124] *Id.*

[125] *About ICWA*, *supra* note 5.

[126] NAT'L INDIAN CHILD WELFARE ADMIN., DISPROPORTIONALITY IN CHILD WELFARE (2021), https://www.nicwa.org/wp-content/uploads/2021/12/NICWA_11_2021-Disproportionality-Fact-Sheet.pdf.

responsible for continued disproportionalities of Native American children in the child welfare system,[127] and lack of funding may also be to blame.[128] The legislature attempted to bolster the aims of ICWA with child welfare programs specifically targeting Tribal communities,[129] but they have chronically lacked funding and the legislature has not reauthorized many.[130] Tribes often lack access to Title IV-E funds from the federal government as well, which tribes need to financially assist foster homes.[131]

The Bureau of Indian Affairs (BIA) "has traditionally maintained a hands-off, non-binding approach to promulgating ICWA," leading to inconsistent outcomes across the states.[132] Recognizing the need for "uniformity in the interpretation and application of this important Federal law," the BIA published its Final Rule in 2016.[133] Since the BIA feared the "devastating consequences" of continuing to allow states broad discretion in implementing the Act,[134] the Final

---

[127] Amon, *Minneapolis Lawyers*, supra note 117.

[128] *See* Press Release, U.S. Representative Ruben Gallego, Reps. Gallego and Young Re-Introduce Bipartisan Bill to Protect Native Children, (Mar. 9, 2021), (on file with author); NAT'L INDIAN CHILD WELFARE ASS'N, *supra* note 82.

[129] Press Release, U.S. Representative Ruben Gallego, *supra* note 128. For example, then-Senator John McCain's Indian Child Protection and Family Violence Prevention Act, passed in the early 1990s, set up several programs to provide tribes with tools and resources to prevent and manage child welfare issues in their own communities, but to this day—decades later—the programs are yet to have sufficient funding to achieve those aims. *Id.*

[130] *Id.*

[131] ANDREA WILKINS, STATE-TRIBAL COOPERATION AND THE INDIAN CHILD WELFARE ACT 4 (2008), https://www.ncsl.org/print/statetribe/ICWABrief08.pdf. Title IV-E funds help states and tribes "provide safe and stable out-of- home care for eligible children" as well as preventative services that lessen the need for foster care. *Title IV-E Foster Care*, CHILDREN'S BUREAU, https://www.acf.hhs.gov/cb/grant-funding/title-iv-e-foster-care (Mar. 30, 2023).

[132] Chappeau, *supra* note 7, at 256.

[133] Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,782 (June 14, 2016).

[134] *Id.* at 38,851.

Rule "provide[d] a binding, consistent, nationwide interpretation of" ICWA's minimum procedural and substantive standards[135] and was followed by the Guidelines for Implementing the Indian Child Welfare Act, which were designed to aid in the uniform application of ICWA and the BIA's regulations.[136]

Generally speaking, courts successfully implement the Act when there is little room to question the child's Native American heritage and when early identification enables tribal intervention, but courts struggle in cases with questionable or weaker heritage, late identification of tribal connections, and when a parent has either abandoned the child or had their parental rights terminated.[137] Constitutional questions surround the Act as well, and challenges have arisen regarding both the feasibility and legality of enforcing this law.[138]

B. LEGAL CHALLENGES TO ICWA

ICWA has faced some major legal challenges since its passage in 1978, but few cases have reached the Supreme Court.[139] In the 1989 case *Mississippi Band of Chocktaw Indians v. Holyfield*, the Supreme Court ruled that ICWA's grant of exclusive jurisdiction to tribes in certain circumstances cannot be circumvented by parents' desires to remove the child from tribal life through adoption because the Act's purpose is to protect not only the best interests of Native

[135] Chappeau, *supra* note 7, at 256.

[136] Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96,476 (Dec. 30, 2016).

[137] Chappeau, *supra* note 7, at 257.

[138] *See infra* Section III.B.

[139] Chappeau, *supra* note 7, at 257.

children and families, but of federally recognized tribes as a whole.[140] Conversely, the Supreme Court in the 2013 case *Adoptive Couple v. Baby Girl* was less rigid in interpreting the Act's purpose of preventing "the breakup of the Indian family."[141] Because the child in that case had only one Native American parent who terminated his own parental rights prior to the child's birth, the Court determined there was no "Indian family" from which to remove the child and thereby implicate ICWA.[142] Additionally, as a public policy matter, the Court reasoned that applying the Act strictly in this situation would actually lead to greater harm for Native American children in need of a permanent and healthy home by dissuading non-Native American families from even attempting to adopt Native American children.[143] Since *Adoptive Couple*, ICWA has faced more constitutional challenges,[144] one of which reached the Supreme Court in 2022 as *Haaland v. Brackeen*.[145]

The *Brackeen* challenge began in 2017 when Texas, Indiana, and Louisiana, along with seven non-Native American prospective adoptive parents of Native American children, filed suit

---

[140] *Id.* at 258; *see* Miss. Band of Choctaw Indians v. Holyfield, 480 U.S. 30, 49 (1989). "Ultimately, the Court deferred the responsibility of determining the best interests of the child to the experience, wisdom, and compassion of the tribal courts." Chappeau, *supra* note 7, at 260.

[141] Chappeau, *supra* note 7, at 262; 25 U.S.C. § 1912(d).

[142] Chappeau, *supra* note 7, at 263; Adoptive Couple v. Baby Girl, 570 U.S. 637, 650 (2013).

[143] Chappeau, *supra* note 7, at 263; *Adoptive Couple*, 570 U.S. at 653. This argument is echoed by Texas's Attorney General Ken Paxton, detailed further *infra* Section IV.C.1.

[144] Scott Trowbridge, *Legal Challenges to the ICWA: An Analysis of Current Case Law*, ABA (Jan. 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/january-2017/legal-challenges-to-icwa--an-analysis-of-current-case-law/.

[145] *Brackeen Headed to the U.S. Supreme Court*, NATIVE AM. RIGHTS FUND (June 28, 2022), https://narf.org/icwa-brackeen/. *Haaland v. Brackeen* oral arguments were heard by the Supreme Court on November 9, 2022. *See* Oral Arguments, *supra* note 3.

in the U.S. District Court for the Northern District of Texas.[146] The parties challenged ICWA's constitutionality on the grounds that they violated Fifth Amendment equal protection and due process as well as the Tenth Amendment anticommandeering doctrine.[147] The parties further claimed that the 2016 Final Rule violated the Administrative Procedure Act (APA) and the nondelegation doctrine.[148] Three Native American tribes intervened in the case[149] and ICWA received an outpouring of support,[150] but the district court granted summary judgment in favor of the Plaintiffs, finding violations of equal protection, the anticommandeering doctrine, the nondelegation doctrine, and the APA.[151] The district court framed ICWA as a "threat[]" to Native American children who had "fortunately found loving adoptive parents,"[152] and the court applied strict scrutiny due to a finding that the Act relied on "racial classifications."[153]

---

[146] Brackeen v. Zinke, 338 F.Supp.3d 514, 519 (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, ref'd in part sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021).

[147] Brackeen v. Bernhardt, 937 F.3d 406, 420 (N.D. Tex. 2019), *on reh'g sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021).

[148] *Id.*

[149] Brackeen v. Zinke, 338 F.Supp.3d at 519. By the appellate stage, five tribes had intervened. Brackeen v. Bernhardt, 937 F.3d at 416.

[150] Amon, *Minneapolis Lawyers*, *supra* note 117. Specifically, "486 federally recognized American Indian and Alaska Native tribes and 59 Native American organizations" opposed the challenge to the ICWA's constitutionality, and "26 states, 31 child welfare organizations and 77 members of Congress signed a statement of support for those defending ICWA." *Id.*

[151] Brackeen v. Bernhardt, 937 F.3d at 416.

[152] Brackeen v. Zinke, 338 F.Supp.3d at 519.

[153] *Id.* at 534.

Defendants appealed, and a three-judge panel of the Fifth Circuit reversed the decision in 2019.[154] The Fifth Circuit disagreed with the Plaintiffs' position that "Indian child" for the purposes of § 1903(4) of ICWA was a racial classification in violation of the Equal Protection Clause.[155] The court pointed to a longstanding precedent that Congress has plenary power to legislate on Native American affairs based on their *political*—not racial—classification, even if an individual is merely eligible for membership to a federally recognized tribe.[156] The Fifth Circuit also found that the Act preempts conflicting state law and thus does not violate the anticommandeering doctrine because ICWA and the Final Rule instruct state *courts* on their handling of child welfare cases involving a Native American child, not state executives or legislatures.[157] Similarly, the three-judge opinion found no violation of the delegation doctrine, given that the Supreme Court has "long recognized that Congress may incorporate the laws of another sovereign," in this case federally recognized Native American tribes, "into federal law without violating the nondelegation doctrine."[158] Finally, the court determined that the Final Rule meets the APA's requirements.[159]

---

[154] Brackeen v. Bernhardt, 937 F.3d at 416.

[155] *Id.* at 426.

[156] *Id.* The Fifth Circuit noted on this point that such eligibility is not "based solely on tribal ancestry or race." *Id.* at 428. Persons may have eligibility through adoption or relations to a person granted membership to a tribe despite racially having no connection. *Id.*

[157] *Id.* at 431.

[158] *Id.* at 436.

[159] *Id.* at 441.

However, in 2021, the Fifth Circuit vacated its 2019 decision, granted an *en banc* rehearing, and addressed the issues once again in far greater detail in *Brackeen v. Haaland*.[160] In the approximately 200-page opinion, the Fifth Circuit failed to reach a majority on multiple issues, leaving no precedent on such matters, and the majority rulings are narrow in their precedential scope.[161] The Fifth Circuit in *Brackeen v. Haaland* held that Congress has the constitutional authority to enact ICWA and that the "Indian child" classification of the Act is not an equal protection violation, reversing the district court ruling.[162] However, the 2021 decision failed to reach a majority on whether the Act's preference for adoptive and foster placements in Native American homes violates equal protection.[163] The court found valid preemption of state law on several of the challenged provisions, but not all.[164] A majority affirmed the district court's finding that three provisions of the Act—the active efforts, expert witness, and recordkeeping

[160] Glennas'Ba Augborne Arents &April E. Olson, *Indian Law Special Focus: Bent, But not Broken ICWA Stands: A Summary of Brackeen v. Haaland*, 57 ARIZ. AT'Y 62, 64 (2021); Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021). The U.S. Secretary of the Interior is now Deb Haaland, which means that "a Laguna Pueblo woman and the first Native person to hold a Cabinet secretary position in U.S. history" is now defending ICWA's constitutionality before the Supreme Court. Sarah Rose Harper and Jesse Phelps, *Texas, Big Oil Lawyers Target Native Children in a Bid to End Tribal Sovereignty*, LAKOTA PEOPLE'S LAW PROJECT (Sep. 17, 2021), https://lakotalaw.org/news/2021-09-17/icwa-sovereignty.

[161] Arents & Olson, *supra* note 160, at 63; Brackeen v. Haaland, 994 F.3d at 267–69.

[162] Brackeen v. Haaland, 994 F.3d at 267–68.

[163] *Id.* at 268. The provisions at issue here are 25 U.S.C. §§ 1915(a)(3) and 1915(b)(iii). *Id.*

[164] *Id.* at 268. 25 U.S.C. §§ 1911(c) (intervention in state court proceedings), 1912(b)-(c) (appointment of counsel and examination of reports or other documents), 1913(a)-(d) (parental rights and voluntary termination), 1914 (petition to court to invalidate action upon showing of violations), 1916(a) (petitions and best interests of child), and 1917 (tribal affiliation and other information, application of adoptee, and disclosure by court) all validly preempt state law. *Id.* 25 U.S.C. §§ 1915(a)-(b) (adoptive and foster care placements and preferences) and 1912(e)-(f) (foster care placement orders and parental right termination orders) "validly preempt state law *to the extent they apply to state courts* (as opposed to state agencies)." *Id.* (emphasis added).

requirements—unlawfully commandeered state law,[165] and the court failed to reach a majority that would overturn the district court's finding of commandeering on several other provisions regarding notice and placement records.[166] However, a majority found no nondelegation doctrine violation, thereby reversing the district court's contrary ruling.[167] A majority also determined that the 2016 Final Rule did not violate the APA except "to the extent that it implemented [the aforementioned three] unconstitutional" requirements that violated the anticommandeering doctrine.[168]

Since the 2021 decision, four petitions for certiorari were filed with the Supreme Court regarding *Brackeen v. Haaland* by four parties: the prospective adoptive parents, the state of Texas, the Solicitor General, and the intervening tribes.[169] Additionally, three amicus briefs in support of protecting ICWA were filed in early October 2021 by 180 tribal nations; thirty-five Native American organizations; twenty-five states, plus the District of Columbia; ten child welfare and adoption organizations; and Casey Family Programs.[170] In February 2022, the Supreme Court

---

[165] *Id.* The provisions at issue here are 25 U.S.C. §§ 1912(d), 1912(e) and (f), and 1915(e). *Id.*

[166] *Id.* The provisions at issue here are 25 U.S.C. §§ 1915(a)-(b) (as they apply to state agencies and officials), 1912(a), and 1951(a). *Id.* As a result, "the district court's judgment declaring those sections unconstitutional under the anticommandeering doctrine is affirmed without precedential opinion." *Id.*

[167] *Id.* at 269.

[168] *Id.*

[169] Evan Molinari, *Update: Parties File Petitions for Certiorari with the U.S. Supreme Court*, NAT'L ASS'N OF COUNS. FOR CHILD. (Sep. 21, 2021), https://www.naccchildlaw.org/news/471047/UPDATE-DECISION-5th-Circuit-Court-of-Appeals-reaffirms-constitutionality-of-ICWA.htm.

[170] *Amicus Briefs Filed to Uphold the Indian Child Welfare Act and Support Indian Children and Families in Brackeen v. Haaland (formerly Brackeen v. Bernhardt)*, supra note 6. Casey Family Programs is a foundation focused on improving and lessening the need for foster care in the United States and its territories. *About Us*, CASEY FAM. PROGRAMS, https://www.casey.org/who-we-are/about/ (last visited Apr. 10, 2023). The organization works with North American tribal nations in order to protect the best interests of children, families, and communities. *Id.*

granted certiorari to hear the consolidated case.[171] The Court heard oral arguments in November 2022,[172] and parties on both sides of the case eagerly await the outcome.[173]

IV. ICWA AND THE STATES

Despite the Act requiring states to record Native American child placements,[174] the federal government neither tracks the frequency and effectiveness of states' application of ICWA nor imposes sanctions for failure to comply.[175] Congress passed ICWA in 1978, but the Obama administration was the first to enact rules to collect information about children affected by the Act.[176] However, the Trump administration delayed implementing those rules until it could finalize its own version,[177] and analysts expect that "actual public reporting of the new data could be . . .

---

[171] *Haaland v. Brackeen*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/supct/cert/21-376#:~:text=The%20Supreme%20Court%20granted%20certiorari,Haaland%20(21%2D380). (last visited Apr. 8, 2023). The case was scheduled for argument in the November 2022. *Id.*

[172] Oral Arguments, *supra* note 3.

[173] Nora Mabie, *US Supreme Court to hear* Brackeen v. Haaland*, a Case Challenging Indian Child Welfare Act*, GREAT FALLS TRIB. (Feb. 28, 2022), https://www.greatfallstribune.com/story/news/tribal-news/2022/02/28/united-states-supreme-court-hear-challenge-indian-child-welfare-act/64926683007/.

[174] 25 U.S.C. § 1915(e).

[175] Amon, *Minneapolis Lawyers*, supra note 117.

[176] John Kelly, *The Data Dispute: Where New Rules on Foster Care Numbers Stands*, THE IMPRINT (May 26, 2021), https://imprintnews.org/youth-services-insider/data-dispute-where-new-rules-on-foster-care-numbers-stand/55266 [hereinafter Kelly, *The Data Dispute*]. The Department of Health and Human Services (HHS) broadly expanded the data points collected by the Adoption and Foster Care Analysis and Reporting System (AFCARS) to include relevant information. *Id.* AFCARS, established in 1993, "provides an annual view of youth who enter, live in[,] and exit foster care." *Id.* The new rules, which were the first update to AFCARS and the first to require data on children affected by ICWA, *id.*, were finalized in 2016 "after two years of proposals and feedback from local stakeholders and national advocacy groups." John Kelly, *New AFCARS Data Collection: What to Know*, THE IMPRINT (Jan. 13, 2017), https://imprintnews.org/subscriber-content/new-afcars-collection-know/23970.

[177] Kelly, *The Data Dispute*, *supra* note 176.

years away."[178] Citing state estimates that the Obama version would place burdensome costs on the states, the Trump administration's rules required far fewer data points and "cut back significantly on ICWA data."[179] The current Biden administration is yet to suggest plans to reinstate the Obama-era AFCARS data requirements or produce its own updates.[180] Even without national data reports for the foreseeable future, a closer look at individual states and their interactions with ICWA can provide clues on the Act's effectiveness.

Advocates supporting the Act argue that when states pass their own versions of ICWA, they protect Native American communities even in the face of legal challenges to the federal law.[181] Data collected by the Center for Courts[182] suggests that ICWA positively affected Native American child welfare cases, cutting the average time before a child returns home from 379 days without the tribe present at the first hearing to 158 days when the tribe attends.[183] More than forty years after the Act's passage, however, Native American children are still "removed from their families and communities at disproportionate rates unseen in any other racial groups."[184] In the absence of

[178] John Kelly, *Trump Administration Delays New Child Welfare Data Rules Until 2020, But Plans Changes to Obama Plan*, THE IMPRINT (Sep. 6, 2018), https://imprintnews.org/youth-services-insider/trump-administration-delays-new-child-welfare-data-until-2020-but-plans-changes-to-rules-set-by-obama/32154.

[179] Kelly, *The Data Dispute*, *supra* note 176.

[180] *Id.*; *see also* NAT'L INDIAN CHILD WELFARE ASS'N, s*upra* note 82.

[181] Amon, *Minneapolis Lawyers*, supra note 117.

[182] Center for Courts is "a partnership of private and governmental organizations representing attorneys and judges." *Id.*

[183] *Id.*

[184] *Id.*

national reports on state ICWA data, this section analyzes available information on several states to assess how states have implemented or, in some cases, resisted ICWA.

A. WASHINGTON

Though still in need of improvement, the state of Washington demonstrates positive, collaborative progress related to ICWA. In 1987, Washington collaborated with tribes, tribal legal counsel, the Association on American Indian Affairs, the BIA, two state departments related to child services and Native American affairs, the state's Attorney General's office, and the Governor's Office of Indian Affairs to draft two ICWA Tribal-State Agreements[185] that "were approved by Tribes Statewide."[186] In 2011, state tribes and child welfare agencies "continu[ed] the legacy of their shared commitment" and successfully encouraged the legislature to pass the Washington State Indian Child Welfare Act (WICWA).[187] Additionally, nearly half of the twenty-nine federally recognized tribes in Washington have entered into their own memorandum of understanding with the state,[188] and many of those agreements have been reviewed and updated in

[185] These are authorized by 25 U.S.C. § 1919, which is discussed in more detail *infra* Section IV.C.2.

[186] SHANNON KELLER O'LOUGHLIN, A SURVEY AND ANALYSIS OF TRIBAL-STATE INDIAN WELFARE ACT AGREEMENTS 15 (2017), https://www.indian-affairs.org/uploads/8/7/3/8/87380358/icwa_tribal-state_agreements_report.pdf.

[187] *Appendixes*, WASH. STATE DEP'T OF CHILD., YOUTH & FAMILIES, https://www.dcyf.wa.gov/indian-child-welfare-policies-and-procedures/14-appendices, (last visited Apr. 8, 2023). WICWA "protects the essential tribal relations and best interests of Indian children" by "promoting practices designed to prevent" out-of-home foster placement and supporting parents' rights, child health and welfare, and tribal interests. *Id.*

[188] O'LOUGHLIN, *supra* note 186, at 12, 15. These individual agreements between various tribes and the state of Washington "outline roles and responsibilities of [the Children's Administration (CA)] and tribes when coordinating on cases that may or do involve an Indian child, and when working with a tribe CA caseworkers must always refer to any applicable signed [Memorandum of Understanding]." *Appendixes*, *supra* note 187.

the past decade.[189] The state provides a template as a guide for drafting the agreements.[190] The agreements have many similarities, but the final version of each is unique.[191]

Some agreements are fairly simple and mostly just explain certain requirements and the responsibilities of the tribe and state in ICWA cases.[192] Others are more detailed.[193] The agreement with the Jamestown S'Klallam Tribe, for example, precisely defines important terms and adds sections detailing state versus tribal services, the mutual exchange of information between tribal and state entities, dispute resolution, and other matters.[194] The Jamestown S'Klallam agreement also has extensive appendixes expounding upon services and providers for a broad range of concerns, including mental health, visitation, and family preservation.[195] Many of the agreements manifest an interest in keeping up with current needs by agreeing to review the document

[189] *Tribal/State Memorandums of Agreement*, WASH. STATE DEP'T OF CHILD., YOUTH & FAMILIES, https://www.dcyf.wa.gov/tribal-relations/icw/mou (last visited Jan. 14, 2023).

[190] *Id.*

[191] O'LOUGHLIN, *supra* note 186, at 15.

[192] *See*, *e.g.*, Working Agreement Between the Kalispel Tribe of Indians and Children's Administration Division of Children Family Services (Feb. 2014) (on file with the Washington State Department of Children, Youth & Families); Memorandum of Understanding Between Shoalwater Bay Tribe and the Dep't of Soc. and Health Servs., Child.'s Admin. (July 22, 2013) (on file with the Washington State Department of Children, Youth & Families); Memorandum of Understanding Between the Suquamish Tribe and DSHS Child.'s Admin. for Sharing Resp. in Delivering Child Welfare Servs. to Child. of the Suquamish Tribe (Aug. 2011), (on file with the Washington State Department of Children, Youth & Families).

[193] *See*, *e.g.*, *infra* notes 194–196 and accompanying text.

[194] Memorandum of Agreement Between the Jamestown S'Klallam Tribe and tThe Wash.ington State Dep'artment of Soc.ial and Health Services. Child.ren's Admin. istration for Sharing Resp.onsibility in Delivering Child Welfare Services. to Child.ren of the Jamestown S'Klallam Tribe (July 2015) (on file with the Washington State Department of Children, Youth & Families).

[195] *Id.*

periodically, most commonly every one or two years, and allowing either party to initiate modifications at any time.[196]

Despite the positive, collaborative efforts, Washington still has an over-representative share of Native Americans in child welfare situations.[197] That said, modest improvements are visible. For example, Native American children in Washington were three times more likely to be referred to CPS than white children were in 2004.[198] In 2012, they were nearly twice as likely (or 98% more likely) to be reported to CPS than white children, and that statistic dropped again to 80% more likely in 2018.[199]

The Washington court system recently produced case law that strongly supports ICWA aims as well as tribal sovereignty in adjudicating Native American child welfare cases.[200] A unanimous decision by the state's Supreme Court in 2020 for *Matter of Dependency of Z.J.G.* ruled that it is "a tribe's exclusive role" to determine a child's tribal membership or eligibility,[201] "and

---

[196] *See*, *e.g.*, Memorandum of Agreement Between Nisqually Tribe and Wash. State Dep't of Child., Youth, and Families for Sharing Resp. in Delivering Child Welfare Servs. to Child. of the Nisqually Tribe (Mar. 2021) (on file with the Washington State Department of Children, Youth & Families); Memorandum of Understanding Between Quinault Indian Nation and DSHS Child.'s Admin. for Sharing Resp. in Delivering Child Welfare Servs. to Child. of the Quinault Indian Nation (July 2015) (on file with the Washington State Department of Children, Youth & Families); Coop. Agreement Between Snoqualmie Indian Tribe and Child.'s Admin. (July 2013) (on file with the Washington State Department of Children, Youth & Families).

[197] *Disproportionality*, WASH. STATE DEP'T OF CHILD., YOUTH & FAMILIES, https://www.dcyf.wa.gov/practice/practice-improvement/ffpsa/prevention/disproportionality (last visited Jan. 14, 2023).

[198] MARNA MILLER, RACIAL DISPROPORTIONALITY IN WASHINGTON STATE'S CHILD WELFARE SYSTEM 29 (2008).

[199] CHRISTOPHER J. GRAHAM, 2019 WASHINGTON STATE CHILD WELFARE RACIAL DISPARITY INDICES REPORT 17 (2020).

[200] *See* Matter of Dependency of Z.J.G., 471 P.3d 852 (2020).

[201] *Id.* at 186.

state courts cannot establish who is or is not eligible for tribal membership on their own."[202] The decision notes the tragic history of "states' widespread removal of Indian children without notice,"[203] and the court cited a published study that demonstrates the detrimental effects of removing Native American kids.[204] Affirming tribal sovereignty in determining whether ICWA applies may help lessen the removal rates from tribal communities.[205] While only Washington courts are bound by the decision, ICWA advocates expect it to have "persuasive value" for courts in other states.[206]

Justice Raquel Montoya-Lewis, who is the first Native American on the state's highest court "and reportedly only the second [Native American state supreme court justice] in the nation," drafted the decision.[207] Such statistics highlight that Native Americans are subject to a justice system in which their voices are starkly underrepresented. Tribal courts' influence in Native American child welfare cases is thus vital for ensuring that child welfare proceedings understand, respect, and account for the values and realities of these communities.

---

[202] *Id.* at 158.

[203] *Id.* at 168.

[204] *Id.* at 166. The 2017 study, published in the *American Indian and Alaska Native Mental Health Research Journal*, demonstrated the higher rates at which Native American adoptees experience mental health problems, addiction, and suicidal thoughts and actions than white adoptees. *Id.*

[205] Elizabeth Amon, *Legal Victory for Native Communities in Washington State Child Welfare Case*, THE IMPRINT (Sep. 3, 2020, 9:49 PM), https://imprintnews.org/child-welfare-2/legal-victory-for-native-communities-in-washington-state-child-welfare-case/47174.

[206] *Id.*

[207] Id.

B. MINNESOTA

By contrast, Minnesota's track record on Native American child welfare has been more problematic. Although Native Americans comprise only 2% of the state's population, Native American families in Minnesota experience substantially more child removal and parental termination proceedings than in any other state.[208] In fact, according to a 2019 report, Native American children in Minnesota are 18.2 times more likely than white children to be placed in out-of-home care.[209] This is the case despite the state passing its own Minnesota Indian Family Preservation Act (Minn. IFPA) in 1985,[210] which purportedly "strengthens and expands" ICWA.[211]

Minnesota passed the Minn. IFPA after discovering that, even after ICWA's passage, "one in eight Indian children under age eighteen was in an adoptive placement, and one in four Indian children under the age of one year was adopted."[212] The Minn. IFPA followed a state law passed in 1983, the Minnesota Heritage Child Protection Act (Minn. HCPA), that required adoption proceedings to consider a child's ethnic background to combat the frequent placement of minority children in nonminority homes.[213]

---

[208] Brandon Stahl & Maryjo Webster, *Indian Kids in Foster Crisis*, STAR TRIB. (Aug. 21, 2016), https://www.startribune.com/part-1-why-does-minnesota-have-so-many-american-indian-kids-in-foster-care/389309792/.

[209] MINN. DEP'T OF HUMAN SERV., MINNESOTA'S OUT-OF-HOME CARE AND PERMANENCY REPORT, 2018 6 (2019), https://edocs.dhs.state.mn.us/lfserver/Public/DHS-5408Ka-ENG.

[210] Carver, *supra* note 15, at 327.

[211] *Indian Child Welfare: Policies and Procedures*, MINN. DEP'T OF HUMAN SERV., https://mn.gov/dhs/partners-and-providers/policies-procedures/indian-child-welfare/ (last visited Oct. 15, 2021).

[212] Carver, *supra* note 15, at 329.

[213] *Id.* at 335.

Similarly to the plaintiffs' arguments in *Brackeen*, opponents to the passage of the Minn. IFPA in 1985 cited concerns about due process protections in the tribal courts[214] and harm to Native American children by denying them placements within more financially stable homes simply due to race.[215] These concerns did not reflect reality. In 1982, Minnesota ranked first in the U.S. Department of Health and Human Services report of states' rates of Native American children in out-of-home placements despite ranking eleventh in Native American child population size.[216] Even after passing the Minn. HCPA, the state still "favored" placements that removed Native American children from their communities.[217] The state legislature attempted to remedy failures in both the Minn. HCPA and the federal ICWA with the 1984 Minnesota ICWA,[218] but the bill failed to pass in part due to some legislators' lack of understanding of the issue, and in part because of resistance to providing tribal courts with "any more authority in child placements than they already had."[219] Supporters of the reforms addressed the concerns that defeated the 1984 act and

[214] *Id.* at 351. Namely, opponents worried about the ability to appeal in tribal courts. *Id.* However, tribal courts have their own court of appeal, where a federal district court hears an appeal and it follows the normal course of federal appeals. *Id.* at 351–52.

[215] *Id.* at 352. For this reason, opponents felt that prioritizing the race of the temporary or adoptive family was "racist and detrimental to the child's best interests." *Id.* However, state child welfare services and courts "already . . . placed material resources above the importance of Indian cultural, spiritual, and community support for the Indian child," *id.*, which led to "a profound sense of isolation coupled with a complete lack of Indian identity" in many adolescent Native Americans who experienced such placements. *Id.* at 350.

[216] *Id.* at 329. "By comparison, Arizona, which had the largest population of Indian children, had a placement rate" nearly thirty-five times smaller. *Id.* The foster care placement rate of black children in Minnesota that year was nearly half that of Native American children, and Hispanic and white placements were nearly ten times lower. *Id.*

[217] *Id.*

[218] *Id.* at 338.

[219] *Id.* at 340–41.

successfully passed the Minn. IFPA in 1985, albeit with "a lost opportunity to strengthen the federal" ICWA to the degree that advocates had initially hoped.[220]

The state has not abandoned the act despite its shortcomings, but rather sought improvements. In 2007, Minnesota entered into a single tribal-state agreement[221] with all eleven of the federally recognized tribes and bands in the state[222] "to strengthen implementation of the letter, spirit and intent of" ICWA and the Minn. IFPA.[223] Of note in this agreement is that it includes "very lengthy definitions sections that define terms not included in the Act including 'Best Interests of an Indian Child,' 'Good Cause Not to Follow the Placement Preferences,' 'Good Cause Not to Transfer Jurisdiction to Tribal Court,' and 'Termination of Parental Rights.'"[224] These definitions are unique compared to all other states' Tribal-State Agreements.[225] The agreement clarifies that the state may not withdraw, decrease, or deny social services simply because a tribal court exercises jurisdiction in a case.[226] Importantly, the agreement commits to "cooperative on-going training programs" for child welfare officials, judicial system members, and law enforcement personnel involved in Native American child custody proceedings in order to increase understanding of ICWA and the Minn. IFPA and awareness of "the special cultural and legal

---

[220] *Id.* at 345.

[221] Authorized by 25 U.S.C. § 1919. *See infra* Section IV.C.2.

[222] O'LOUGHLIN, *supra* note 186, at 9. By comparison, most agreements tend to be with half or fewer of the state's resident tribes. *See id.* at 5–8, 10, 12.

[223] Tribal/State Agreement at 3 (Feb. 22, 2007) (on file with Minnesota Judicial Branch).

[224] O'LOUGHLIN, *supra* note 186, at 9.

[225] *Id.*

[226] Tribal/State Agreement, *supra* note 223, at 22. The state "recognizes the responsibility of the State and local social service agencies to make available to Indian families all of the other services available to any other family." *Id.*

considerations pertinent to such proceedings."[227] The parties additionally "agree to meet annually . . . to address systemic issues related to compliance with" ICWA and the Minn. IFPA "and to address possible legislative resolutions."[228]

The state is far from having completed its aims, but it has progressed since the tribal-state agreement's formation. Since 2010, rates for Native American children in out-of-home care in Minnesota decreased while tribal involvement in placements increased.[229] Nearly half of the Native American children in Minnesota's child welfare system in 2018 "were placed under supervision of tribal social services (44.1%); an even higher proportion of these placements continued in [tribal] care in 2018 (59.6%)."[230] That said, the total number of Native American children in the system is still wildly out of proportion. In 2018, a total of 2,833 African American children were in the system, compared to 3,507 Native American children,[231] despite Native Americans making up a tiny percentage—just over 1%—of Minnesota's total population.[232] Additionally, Native American children are still more likely to stay in the system for two or more

[227] *Id.* at 26–28.

[228] *Id.* at 21.

[229] MINN. DEP'T OF HUMAN SERV., *supra* note 209, at 15.

[230] *Id.* at 21.

[231] *Id.*

[232] *American Indian*, CULTURAL CARE CONNECTION, https://culturecareconnection.org/cultural-responsiveness/american-indian/#:~:text=60%2C916%20Minnesotans%20are%20American%20Indians,population%20in%20the%20United%20States (last visited Mar. 15, 2022). African Americans, by contrast, "are the third-largest racial group in Minnesota" and make up 5.8% of the state's total population. *African American*, CULTURAL CARE CONNECTION, https://culturecareconnection.org/cultural-responsiveness/african-american/ (last visited Mar. 15, 2022).

years compared to children of other racial and ethnic groups.[233] More effort must be put toward assessing the causes of the continued tragic disparities.[234]

C. TEXAS, LOUISIANA, AND INDIANA

Texas, Louisiana, and Indiana are among those challenging ICWA in *Haaland v. Brackeen*.[235] Notably, these states' Native American populations make up less than 2% of their respective total populations.[236] Why, then, are these states challenging ICWA's constitutionality?

1. THE BRACKEEN CHALLENGE TO ICWA

In its petition for a writ of certiorari to the United States Supreme Court, Texas argues against the supposition that Congress has "plenary power" over Native American affairs under the Constitution and claims that ICWA seeks to control "issues traditionally left to the States."[237] This "confusion regarding the scope of Congress's authority" stems from prior Supreme Court decisions, and thus "only [the Supreme] Court can address it."[238] If allowed to stand, Texas argues, the Fifth Circuit's ruling in *Brackeen v. Haaland* would result in "virtually limitless" congressional power over any matter in which "an Indian is involved."[239]

---

[233] MINN. DEP'T OF HUMAN SERV., *supra* note 209, at 28.

[234] *See infra* Section V.B.3.

[235] *See supra* note 154.

[236] *Native American Population 2021*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/native-american-population (last visited Oct. 6, 2021).

[237] Petition for Writ of Certiorari at 1, Texas v. Haaland, Sec'y of the U.S. Dep't of the Interior, et al. (2021) [hereinafter Texas Petition].

[238] *Id.*

[239] *Id.* at 13.

"[E]ven if" the Court determines that Congress's "Article I authority to regulate the adoption of Indian children under state law" exists,[240] Texas also contends that the Act violates Fifth Amendment equal protection by creating a "race-based federal child-custody system"[241] that "is designed to prevent the adoption of Indian children by non-Indians."[242] While the Fifth Circuit affirmed the longstanding assertion that the classification is political rather than racial,[243] Texas contends that the 2016 Final Rule's "deliberate exclusion of . . . cultural, political, and familial factors confirms that ICWA and the Rule treat Indian children based on ancestry: a forbidden racial classification. Similarly, the placement preferences . . . also evidence Congress's intent to prioritize an Indian child's ancestry over his best interests."[244] As a result, the individual plaintiffs in the *Brackeen* case, who simply desire to give "loving homes to Indian children," have been denied in their attempt to provide that stability.[245]

Texas leaned into this emotional plea, ending its writ with a reminder that hearing this case and resolving its constitutional questions will allow "all Indian children [to] have the best

---

[240] *Id.* at 19.

[241] *Id.* at 1.

[242] *Id.* at 4. Texas cites Mississippi Band of Choctaw Indians v. Holyfield, 480 U.S. 30, 37 (1989), to argue that ICWA is designed "to ensure that state courts do not use 'white, middle-class standard[s]' when adjudicating child-custody cases involving Indian children. . . . A more transparently racial purpose or operation is hard to imagine." *Id.* at 20.

[243] Brackeen v. Haaland, 994 F.3d 249, 333–40 (5th Cir. 2021). While ICWA's "Indian child" classification may be overbroad to some degree, Supreme Court case law has demonstrated that a classification does not have to be perfect to suffice for the rational-basis standard. *Id.* at 343. ICWA properly accounts for the reality that minors are not able to make their own decision to seek tribal membership when their parents did not, so it is appropriate to expand the classification to include those who are merely eligible for membership to that "political entity, regardless of his or her ethnicity." *Id.* at 340.

[244] Texas Petition, *supra* note 237, at 23–24.

[245] *Id.* at 7.

opportunity to find permanent, stable, and loving homes."[246] Texas Attorney General Ken Paxton has repeated this tone for some time,[247] and it is not without merit. "Too often," children whose permanent placements are blocked under ICWA have to stay longer in temporary care while "lawsuits [are] waged,"[248] and the Supreme Court has acknowledged that applying ICWA too strictly could "dissuade [prospective adoptive parents] from seeking to adopt Indian children. And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home."[249]

However, some question the states' child-centric motives for challenging ICWA in this case.[250] Not only do each of the three plaintiff states have very low Native American populations, but also the plaintiffs' pro-bono representation before the Fifth Circuit was Gibson, Dunn & Crutcher—"a high-powered law firm which also counts oil companies Energy Transfer and Enbridge, responsible for the Dakota Access and Line 3 pipelines, among its clients."[251] Upon

---

[246] *Id.* at 33.

[247] When the case reached the Fifth Circuit, Attorney General Paxton employed terminology reminiscent of civil rights issues: "The tragic result [of ICWA's stipulations] is that Native children are deprived of loving families committed to their well-being. The federal government has no right to impose its illegal and discriminatory requirements on states. This separate and unequal system must go." *AG Paxton's Office Asks 5th Circuit to Uphold a District Court's Ruling That the Indian Child Welfare Act is Unconstitutional*, TEXAS ATT'Y GEN. (Mar. 13, 2019), https://www.texasattorneygeneral.gov/news/releases/ag-paxtons-office-asks-5th-circuit-uphold-district-courts-ruling-indian-child-welfare-act.

[248] Harper and Phelps, *supra* note 160.

[249] Adoptive Couple v. Baby Girl, 570 U.S. 637, 653–54 (2013).

[250] *See, e.g.*, Harper and Phelps, *supra* note 160; Law Students for Climate Accountability, *Law Students Launch Boycott of Law Firm Gibson, Dunn & Crutcher*, UPRISE RI (Dec. 3, 2021), https://upriseri.com/law-students-launch-boycott-of-law-firm-gibson-dunn-crutcher/.

[251] *Id*. U.S. tribes have a history of contentious relationships with oil and gas companies, which often detrimentally affect tribal land—both environmentally and archaeologically. Cody Nelson, *'Their Greed is Gonna Kill Us': Indian Country Fights Against More Fracking*, THE GUARDIAN (June 10, 2020), https://www.theguardian.com/us-news/2020/jun/10/new-mexico-fracking-navajo-indian-country. The Dakota Access Pipeline (DAPL) celebrates the benefits it has bestowed upon local economies and

taking the case, the firm "alerted the Texas Attorney General," who quickly intervened—an unusual occurrence given the early stage of the case and its nature as a family law issue—and the Attorneys General of three states with similarly low Native American populations joined the action.[252] Given that protecting Native American children's connection to their tribes is seen as "vital" to the continuance of Native American tribes and culture,[253] and considering tribes' struggle to protect tribal land against encroachments like the DAPL in the recent decades,[254] advocates for ICWA and Native American rights suggest that the constitutional challenge to the case has motives

communities. *Moving America's Energy: The Dakota Access Pipeline*, DAKOTA ACCESS PIPELINE, https://daplpipelinefacts.com/ (last visited Feb. 12, 2022). However, the Standing Rock Sioux Tribe, along with other tribes and allies, adamantly protested the DAPL because it "'poses a serious risk to the very survival of [their] tribe and . . . would destroy valuable cultural resources.'" *Treaties Still Matter: The Dakota Access Pipeline*, *supra* note 2. A Gibson Dunn spokesperson defended the firm's decision to now represent, pro bono, parties fighting the constitutionality of a law passed with the hopes of stopping the long history of practices that were detrimental to Native American tribes and families. Vivia Chen, *Gibson Dunn Pro Bono Case Draws Ire of Some Native Americans*, BLOOMBERG L. (Nov. 23, 2021), https://news.bloomberglaw.com/business-and-practice/gibson-dunn-pro-bono-case-draws-ire-of-some-native-americans. The spokesperson noted that the firm's pro bono program is "incredibly diverse, reflecting the diversity of our attorneys" and their "efforts to raise significant constitutional issues of national importance on behalf of our clients." *Id.* Additionally, a Gibson Dunn partner responded to charges that the true purpose of the suit is to pick away at tribal sovereignty by stating that *Brackeen v. Haaland* "is about the well-being of that three-year-old little girl, not abstract notions of tribal sovereignty." *Id.* While it would be unnecessarily cynical to suggest that the firm is purely motivated by corporate greed, *see* Law Students for Climate Accountability, *supra* note 250 (describing the law student boycott against Gibson Dunn on the grounds of repeated "weaponization of the American judicial system to," among other things, "assault Indigenous rights"), it would likewise be naïve to ignore the firm's longstanding representation of various oil and gas companies, as well as those companies' troublesome history with tribal land and peoples.

[252] Harper and Phelps, *supra* note 160. Indiana and Louisiana joined Texas and the individuals as plaintiffs, and Ohio filed an amicus brief in support. Brackeen v. Haaland, 994 F.3d 249, 270 (5th Cir. 2021). "It's notable that, between, them, these four states represent less than 1 percent of all tribal members in the U.S. Ohio has zero. Meanwhile, 26 states, home to 94 percent of all tribes in the U.S., expressed their opposition to the lawsuit." Harper and Phelps, *supra* note 160.

[253] 25 U.S.C. § 1901(3).

[254] See Nelson, supra note 251; see also Treaties Still Matter: The Dakota Access Pipeline, supra note 2.

far removed from the Native American children's wellbeing.[255] Allies worry that ICWA would be "the first domino to fall, potentially leading to the erosion — or total erasure — of Native rights in the only homelands Indigenous North Americans have ever known."[256]

2. TEXAS, LOUISIANA, AND INDIANA'S ICWA AGREEMENTS WITH THEIR RESPECTIVE RESIDENT TRIBES

ICWA does not define the precise way that states and tribes should coordinate all aspects of ICWA proceedings.[257] It instead authorizes states and Native American tribes to "enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings"[258] or simply for the purpose of addressing gaps left by the federal law.[259] The provision's broad and permissive language[260] gives the entities "flexibility to best address their mutual needs" at their own discretion.[261]

Many states have entered into formal agreements related to ICWA with their resident tribes,[262] though Texas's agreements are comparatively less detailed.[263] Three federally recognized

---

[255] *See* Harper and Phelps, *supra* note 160. *See also supra* note 251.

[256] Harper and Phelps, *supra* note 160.

[257] *Indian Child Welfare Act*, ASS'N ON AM. INDIAN AFFAIRS, https://www.indian-affairs.org/indian-child-welfare-act.html (last visited Feb. 15, 2022).

[258] 25 U.S.C. § 1919.

[259] *Topic 10. Tribal-state agreements*, NAT'L INDIAN L. LIBR., http://www.narf.org/nill/documents/icwa/faq/tribalstate.html (last visited Feb. 15, 2022).

[260] States and tribes are not required by ICWA to form agreements. *Id.*; *see* Native Village of Stevens v. Smith, 770 F.2d 1486, 1489 (9th Cir. 1985).

[261] O'LOUGHLIN, *supra* note 186, at 2.

[262] *Id.* at 16; *see supra* Sections IV.A and IV.B.

[263] *See* O'LOUGHLIN, *supra* note 186, at 5–15. Arizona's agreement with the Navajo Nation, for example, while relatively straightforward, "closely mirrors the language of ICWA" and "is generally a good example of a basic ICWA Agreement with a well-organized structure that is easy to follow and

tribes reside in Texas, and the state has entered into "Memoranda of Understanding" with two of them regarding ICWA's implementation.[264] The two agreements' provisions are overall quite similar and "fairly basic."[265] Both agreements impose state investigative procedures and reporting requirements, "whether or not the Tribe has exclusive jurisdiction,"[266] and neither addresses the issue of jurisdiction.[267]

The agreement with the Alabama-Coushatta Tribe of Texas is intended to "clarify[] the roles of the Department and the Tribe with respect to abuse, neglect, or abandonment investigations either on the Tribe's reservation or involving any Alabama-Coushatta Tribe of Texas child located in Regions 4 and 5."[268] For example, the tribe's Social Services/Indian Child

---

understand." *Id.* at 5. It also adds "some unique provisions" related to concurrent jurisdiction, though the agreement tends to favor the state "instead of using cooperative or collaborative language." *Id.* Colorado and the Southern Ute Indian Tribe have a longstanding agreement from 1981 that "fully incorporates ICWA by reference and includes provisions that mirror ICWA," as well as adding "a unique process for licensing foster care facilities" and "Interstate Placement" provisions. *Id.* at 6. Connecticut, by contrast, took a more unique approach that "does not handle the subject matter of ICWA comprehensively." *Id.* at 7. Rather, it addresses particular needs related to non-Native American children residing with Mohegan families in the state, and Connecticut also has a separate child welfare agreement with the Mohegan tribe related to that matter. *Id.* Maine likewise entered into a more detailed agreement with the Houlton Band of Maliseet Indians that "recognizes the Tribe's desire to have its own Tribal Court and child welfare system, and expresses the Tribe's dissatisfaction with its historical reliance on the State" in child custody issues. *Id.* at 7–8. The agreement thus contains provisions that address those unique needs and desires and overall created a "very strong agreement." *Id.*

[264] *Id.* at 10. The Ysleta Del Sur Pueblo/Tigua Tribe formed an agreement with the Texas Department of Family and Protective Services, Child Protective Services, on July 27, 2009, and the Alabama-Coushatta Tribe of Texas formed an agreement with the Texas Department of Family and Protective Services, Child Protective Services Division, Regions 4 and 5, on April 21, 2010. *Id.*

[265] *Id.*

[266] *Id.*

[267] Id.

[268] Memorandum of Understanding between Alabama-Coushatta Tribe of Tex, and the Tex. Dep't of Fam. and Protective Servs., Child Protective Servs. Div., Regions 4 and 5, at 1 (2010) (on file with Gen. Couns. to the Alabama-Coushatta Tribe of Tex.) [hereinafter Alabama-Coushatta-Texas Agreement].

Welfare Department (SS/ICW) "[c]ontinues to have authority over investigations of abuse, neglect, or abandonment of children on the Alabama-Coushatta Tribe of Texas reservation," but tribal SS/ICW is subject to the Texas Family Code § 261.301(f) provision that requires the tribe and law enforcement to conduct joint investigations when a report alleges victimization that could result in death or serious harm.[269] The Texas Department of Family and Protective Services is instructed by the agreement to "assist with or assume responsibility for an investigation on the reservation" at the tribe's request,[270] but the state department has primary authority ("subject to all requirements of the Indian Child Welfare Act") when an Alabama-Coushatta child is "found off the reservation."[271] The Alabama-Coushatta agreement includes a section on training, which is neither detailed nor appears to be completely mandatory given that the language of the brief section simply states that "the Department and the Tribe agree to extend appropriate training opportunities to each other's staff to the greatest extent possible" and to notify each other "when relevant training is available."[272] Likewise, review and revision of the agreement is flexible,[273] and it has not been updated since its signing in 2010.

While section 1919 of ICWA authorizes agreements between states and tribes, according to a 2017 nationwide survey, only thirty-nine such agreements exist.[274] Those agreements involve thirty-seven tribes and ten states—"[i]n other words," of the 567 federally recognized tribes in the

---

[269] *Id.* at 2.

[270] *Id.*

[271] *Id.*

[272] *Id.* at 4.

[273] The agreement says the parties "may" revise the agreement "on an annual basis or as otherwise necessary upon the signature of both parties." *Id.* at 5.

[274] O'LOUGHLIN, *supra* note 186, at 2.

U.S., "only 6.5% . . . have developed ICWA Agreements with states."[275] In its 2016 Guidelines, the BIA elaborated on the § 1919 provision[276] and noted that "[t]he Department strongly encourages both Tribes and States to enter into these cooperative agreements."[277]

However, many states chose more informal means of implementing ICWA, ranging from state policies and legislation "developed in coordination with Tribes" to agreements made merely on the county level to truly "informal" expressions of "state-tribal relationships regarding ICWA" that "are only expressed through funding contracts."[278]

Louisiana is among those states using a less formal approach.[279] Louisiana is home to four federally recognized tribes, two of which have formed interagency agreements with the state "relating to the protection of non-Indian children visiting the Tribes' casinos."[280] The agreements are fairly basic and offer little elaboration.[281] Comparatively, Indiana has no agreements with its two resident, federally recognized tribes, and only 0.3% of the state's population is Native

---

[275] Id.

[276] ICWA allows such agreements to address child care and custody and to establish procedures and jurisdiction in Native American child custody proceedings. U.S. DEP'T OF THE INTERIOR OFF. OF THE ASSISTANT SEC'Y – INDIAN AFFAIRS BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 7 (2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf. The Guidelines further clarify that "[s]uch agreements can also address how States notify Tribes in emergency removal and initial State hearings, financial arrangements between the Tribe and State regarding care of children, mechanisms for identifying and recruiting appropriate placements and other similar topics." *Id.* at 8. States and tribes can choose, for example, to "provide for the orderly transfer of jurisdiction on a case-by-case basis" or "provide for concurrent jurisdiction between States and Indian tribes." *Id.* Additionally, certain provisions of ICWA (e.g., the mandatory dismissal provisions of § 23.110) no longer control when a state and tribe form an agreement that provides otherwise. *Id.*

[277] *Id.* at 7.

[278] O'LOUGHLIN, *supra* note 186, at 16.

[279] See id. at 17.

[280] Id.

[281] Id.

American.[282] Given that Louisiana and Indiana have not created detailed agreements or legislation that could stand alone and solve the issues if ICWA is struck down,[283] it is concerning that they are so eager to challenge the Act's constitutionality and potentially create a void they have not prepared to fill.

V. THE FUTURE OF NATIVE AMERICAN CHILD WELFARE

Despite the opposition to the federal law and the above demonstration of the Act's shortcomings since its enactment, ICWA has a strong base of support.[284] In 2019, 468 federally recognized tribes and fifty-nine Native American organizations filed an amicus brief to the Fifth Circuit leading up to the en banc *Brackeen* proceedings,[285] and hundreds of tribal, state, and organizational supporters of ICWA filed three briefs with the Supreme Court in 2021.[286] Comparatively, briefs challenging the Act came from Ohio, Oklahoma, Project on Fair Representation, Christian Alliance for Indian Child Welfare, and three conservative/libertarian-

---

[282] *See the Size of Native American Population in Indiana*, STACKER (Nov. 22, 2021), https://stacker.com/indiana/see-size-native-american-population-indiana. Out of the fifty states in the U.S., Indiana ranks #41 in terms of the proportion of Native Americans making up the state's total population. *Id.*

[283] *See supra* notes 280–83; La. Child. Code § 661.1 (2018). Louisiana's Children Code merely instructs courts to "proceed pursuant to the federal Indian Child Welfare Act and the regulations promulgated thereunder." La. Child. Code § 661.1(B) (2018). Indiana's Family Code does not have a concise section discussing Native American child welfare policies, but rather scatters the occasional brief explanation of such policies, *see, e.g.,* Ind. Code Ann. § 31-28-6-1 (West 2012) at Art. II(7) and Art. VII(h), and concludes with a short, vague section encouraging "reasonable efforts to consult with Indian tribes in promulgating guidelines to reflect the diverse circumstances of the various Indian tribes." *Id.* at Art. XVIII.

[284] *See* Brief for 486 Federally Recognized Tribes, Association on American Indian Affairs, et al. as Amici Curiae Supporting Appellants, Brackeen v. Haaland, 994 F.3d 249 (2021) (No. 18-11479).

[285] *Id.*

[286] Amicus Briefs Filed to Uphold the Indian Child Welfare Act and Support Indian Children and Families in Brackeen v. Haaland (formerly Brackeen v. Bernhardt), supra note 6.

leaning organizations including the Goldwater Institute.[287] While the briefs in support of ICWA—the petitioners' position—emphasize the Act's importance in protecting Native American children and families and remind the Court of the tragic practices that necessitated the Act.[288] The briefs supporting the respondents' position focus on the constitutional violations,[289] the need for the Court to clarify the scope of Congress's powers over Native American affairs,[290] and the claim that "Native children are at greater risk of abuse and neglect than any other children in the United States, but ICWA prevents states from protecting them."[291] The Supreme Court granted and consolidated the petitions for writs of certiorari[292] and heard oral arguments in November 2022.[293]

A. THE FATE OF ICWA AFTER *BRACKEEN*

Advocates for and against ICWA anxiously await the Supreme Court's decision on *Brackeen*, given the far-reaching effects of the ruling on not only states and tribes but on "many

---

[287] *Tribal Supreme Court Project*, NATIVE AM. RTS FUND, https://sct.narf.org/caseindexes/haaland_v_brackeen.html (last visited Feb. 2, 2023).

[288] *Amicus Briefs Filed to Uphold the Indian Child Welfare Act and Support Indian Children and Families in* Brackeen v. Haaland *(formerly* Brackeen v. Bernhardt*)*, *supra* note 6. "The Tribal Amicus Brief focuses on the Indian child welfare crisis that led Congress to enact the ICWA. The States' Brief describes how ICWA has become a critical tool for protecting Indian children and fostering state-tribal collaboration. And the Casey Family Programs Brief highlights how ICWA exemplifies child welfare best practices and leads to better outcomes for Indian children." *Id.*

[289] *See* Brief for Christian Alliance for Indian Child Welfare and ICWA Children and Families as Amici Curiae Supporting Petitioners, Brackeen v. Haaland 142 S. Ct. 1205 (2022) (Nos. 21-367, 21-377, 21-378 & 21-380); Brief for the Project on Fair Representation as Amicus Curiae in Support of Respondents, Brackeen v. Haaland 142 S. Ct. 1205 (2022) (No. 21-378).

[290] Brief for Ohio and Oklahoma as Amici Curiae Supporting Petitioners at 15, Brackeen v. Haaland 142 S. Ct. 1205 (2022) (No. 21-376).

[291] Brief for Goldwater Institute, Texas Public Policy Foundation, and Cato Institute as Amici Curiae Supporting Respondents at ii, Brackeen v. Haaland 142 S. Ct. 1205 (No. 21-378).

[292] Brackeen Headed to the U.S. Supreme Court, supra note 145.

[293] Oral Arguments, *supra* note 3.

other entities affected by these constitutional-law issues in other contexts."[294] "Indian law, long considered a 'tiny backwater' of constitutional law,"[295] has become a major question of congressional power, tribal sovereignty, discrimination, and child welfare best practices. If the constitutional challenges to ICWA succeed, the decision "could . . . unsettle[] a large swath of settled federal Indian law."[296]

Historically, the Court often employed an interpretive lens to cases implicating tribal powers that "prioritizes . . . a federal–state–tribal hierarchy" in which tribes tend to receive the short end of the stick.[297] A recent shift from that approach has emerged, however, that "encourages the bottom-up thinking that Congress has prioritized since the 1970s, giving tribes room to propose, adopt, and implement solutions."[298] Given the relatively recent changes to the Supreme Court's membership and the infrequency with which the Court addresses Native American affairs, especially in the context of child welfare,[299] a degree of uncertainty surrounds this ICWA challenge's final outcome.

---

[294] Kian Hudson, *SCOTUS Cert Recap: The Indian Child Welfare Act*, 13 THE NAT'L L. REV. (Mar. 2, 2022), https://www.natlawreview.com/article/scotus-cert-recap-indian-child-welfare-act. For example, the Major Crimes Act and the Indian Civil Rights Act "would likely be subject to equal protection challenges." Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 1024 (Jan. 1, 2022) [hereinafter Fletcher, *Muskrat Textualism*].

[295] Fletcher, Muskrat Textualism, supra note 295, at 965.

[296] *Id.* at 1023.

[297] *Id.* at 972.

[298] *Id.* at 973.

[299] *See* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, ABA (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/.

Five Supreme Court Justices who presided over the 2013 *Adoptive Couple v. Baby Girl* case[300] are still on the Supreme Court, three of which joined the majority in that decision.[301] However, the 5-4 decision did not fall into a perfect conservative-liberal split, with the conservative-leaning Justice Scalia among some of the more liberal justices disagreeing with the majority and the liberal-leaning Justice Breyer agreeing with some of his more conservative counterparts.[302] Likewise, in a more recent Supreme Court case implicating Native American affairs, Neil Gorsuch, one of the conservative-leaning justices, authored the majority opinion and four liberal justices joined him in that opinion.[303] Thus, despite presumptions one may have about a six-justice conservative majority on the Court right now,[304] the ideological makeup is not necessarily determinative of the outcome in this case.[305]

Regardless of the Supreme Court's forthcoming ruling on ICWA's constitutionality, the fact remains that more work must be done to address the persistent disproportionalities in the child welfare system. If the Act is struck down in whole or in part, states across the country must take

---

[300] The ruling in that case was less favorable for ICWA proponents. *See supra* Section III.B.

[301] *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 640 (2013); *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Jan. 14, 2023). Justices Roberts, Thomas, Alito, Sotomayor, and Kagan heard the *Adoptive Couple* case and are still on the Supreme Court for *Brackeen*. *See Adoptive Couple*, 570 U.S. at 640; *Current Members*, *supra* note 302. Alito drafted the majority opinion in *Adoptive Couple*, joined by Thomas and Alito. *Adoptive Couple*, 570 U.S. at 640

[302] *Adoptive Couple*, 570 U.S. at 640.

[303] McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[304] Justices Roberts, Kavanaugh, Coney Barrett, Gorsuch, Alito, and Thomas all lean conservatively in their judicial ideology. *Ideological Scores of Supreme Court Justices in the United States in 2022*, STATISTA (Jan. 3, 2023), https://www.statista.com/statistics/1322613/ideological-scores-supreme-court-justices-us/.

[305] That said, some justices have earned a reputation in Native American affairs. *See* Fletcher, *Muskrat Textualism*, *supra* note 295. Justice Clarence Thomas, for example, "is well known for challenging the foundational precedents of Indian law." *Id.* at 1023 n.399. The District Court in *Brackeen v. Zinke* "relied heavily on solitary concurrences from Justice Thomas." *Id.* at 1023.

care to fill the subsequent void to ensure protections for tribal culture and Native American children. Even if the Court upholds the Act in full, however, steps still must be taken on the state and federal levels to strengthen and better apply ICWA and confront the issues that ICWA does not reach—the unfortunate circumstances that lead to child welfare involvement to begin with.

B. Addressing the Issues That Remain, With or Without ICWA

The United States must address three major pillars concurrently to bring about improvement in Native American child welfare: legislation on state and federal levels, coordination between states and resident tribes, and root issues creating child welfare concerns. This paper proposes the following: States must 1) draft their own Native American child welfare statutes and apply those and ICWA consistently and completely; 2) collaborate with resident tribes to create § 1919 agreements that work for their specific needs; and 3) identify and ameliorate the root issues leading to child welfare involvement.

1. Applying The Law Consistently and Completely

While the federal government is yet to compile nationwide data on ICWA's effectiveness and the degree to which states have complied with the law, analysis of individual states "revealed that state plans for ICWA compliance were vague," resulting in inconsistent or incomplete applications of the law.[306] North Dakota, for example, boasts "a high level of compliance among child welfare workers" in following ICWA's eligibility determination requirements, but the state frequently fails to meet placement and notice requirements, resulting in state courts placing Native American children in non-Native American foster homes and tribal courts missing the opportunity to intervene.[307] Additionally, some states, like Minnesota, have diffused responsibility for

[306] WILKINS, *supra* note 131, at 2–3.

[307] *Id.* at 3.

compliance too broadly, resulting in great variance between counties.[308] States must create clear, statewide plans to implement all aspects of the law consistently and effectively, while still paying attention to the individual needs and circumstances in specific tribes and counties.[309] These laws must do more than instruct courts to follow ICWA[310] given the possibility that *Brackeen* or some other challenge will result in the Supreme Court stripping major ICWA provisions or striking down the law altogether. The state statutes need sufficient detail to stand alone.

The provision of resources is vital to fully implement ICWA and state versions of the law. Arizona officials "reported that they are interested in seeing these cases handled by the tribal courts more often, but a lack of resources and appropriate tribal foster/adoptive homes prevented this from happening more often."[311] In order to assert jurisdiction and take control of ICWA cases, "a tribe must first establish the governance structures necessary to have and operate a court,"[312] and adequate resources are necessary to create and maintain it.[313] In 2021, the National Indian Child Welfare Association (NICWA) president testified to the Senate Committee on Indian Affairs that, when tribes "have the resources, our communities have shown that they can develop and operate some of the most successful child abuse and neglect prevention programs anywhere in the

[308] Regan, *supra* note 74. In Minnesota, the Ombudsperson for American Indian Families with the State of Minnesota has noted that having a county-based system means that "'[t]here are 87 counties doing child welfare in 87 ways. It all depends on where you are'" as to how ICWA and related statutes are applied. *Id.*

[309] States may accomplish this latter aim through tribal-state agreements. *See infra* Section V.B.2.

[310] *See, e.g.*, La. Child. Code § 661.1 (2018).

[311] WILKINS, *supra* note 131, at 3.

[312] Cross & Miller, *supra* note 118, at 15.

[313] *See id.* at 16. "In reality, [the decision to develop or not develop a tribal court has] more often been based on the availability of resources to effectively carry out the responsibilities of operating a tribal court." *Id.*

nation."[314] However, "inequity in access to funding for child abuse and neglect prevention between the tribes and states . . . has stymied tribal efforts to address child" maltreatment.[315] Moreover, the Government Accountability Office (GAO) conducted a nationwide study finding that the "lack of licensed American Indian foster and adoptive homes" is a pervasive issue preventing states from complying with ICWA's preference system for placements.[316] As a result, less than a quarter of Native American children in out-of-home care reside with a Native American caregiver.[317]

> This problem is tied to Native families' inability to meet state licensing standards necessary to be eligible to receive financial assistance for caring for a foster child, the failure of state licensing standards to recognize communal living situations common in Native communities (thereby excluding appropriate Indian caretakers), lack of tribal access to federal (Title IV-E) funds needed to reimburse foster families, and a failure of states to actively recruit Native families to provide foster homes.[318]

The funding issue comes up often when discussing inconsistent application of ICWA provisions. States and tribes can access funding for foster care, adoption and guardianship assistance, and other programs through Title IV-E of the Social Security Act.[319] As of April 2023, only nineteen tribes in twelve states "have an approved title IV-E plan," and only thirteen of those tribes "are currently implementing or in process of implementing the program."[320] Tribes do not

---

[314] NAT'L INDIAN CHILD WELFARE ASS'N, *supra* note 82, at 1.

[315] *Id.*

[316] WILKINS, *supra* note 131, at 4.

[317] ERIN J. MAHER, MELISSA CLYDE, ADAM DARNELL, JOHN LANDSVERK & JINJIN ZHANG, PLACEMENT PATTERNS 6 (2015), https://www.casey.org/media/NSCAW-Placement-Patterns-Brief.pdf.

[318] Wilkins, *supra* note 133, at 4.

[319] *Title IV-E – Tribal Resources*, NAT'L INDIAN L. LIBR., https://narf.org/nill/resources/title-iv-e/index.html (last visited Mar. 19, 2022).

have automatic access to these funds absent a Title IV-E agreement with the state in which the tribe resides.[321] Additionally, these funds are not generally available to support kinship care, which is a traditional aspect of Native American culture and is a vital option to keep the child close to her family and cultural roots.[322] Congress must revisit its Title IV-E provisions with these failures in mind.

Addressing the disproportionalities in the child welfare system through legislative means might not fix the issue on its own, but it is a necessary step in combination with efforts on other fronts. When state legislatures prioritize fixing a child welfare disparity, they shorten the gap and bring about positive progress toward racial equity.[323]

2. PRIORITIZING STATE AND TRIBAL COOPERATION TO PREEMPTIVELY FILL THE VOID SHOULD THE COURT STRIKE DOWN ICWA

Many states have passed legislation regarding Native American child welfare, but very few have passed comprehensive legislation that could stand alone without the federal law in place.[324] In order to protect the Native American child welfare process from current and future constitutional challenges, states must take initiative to enact their own versions of ICWA. That said, only passing state legislation to complement or reinforce ICWA does not necessarily solve the

---

[321] WILKINS, *supra* note 131, at 4; *see Title IV-E Program Funding*, NAT'L CHILD WELFARE RESOURCE CTR. FOR TRIBES, http://nrc4tribes.org/Direct-Tribal-Title-IV-E-Funding.cfm (last visited Apr. 10, 2023).

[322] WILKINS, supra note 131, at 4. See Title IV-E Program Funding, supra note 322; see also supra Section II.C.

[323] *See supra* note 48 (demonstrating the way states have successfully lessened racial disproportionalities for African Americans in the child welfare system after "national attention to the problem" led to state legislatures placing high priority on addressing the issue).

[324] *State Statutes Related to the Indian Child Welfare Act*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 12, 2019), https://www.ncsl.org/research/human-services/state-statutes-related-to-indian-child-welfare.aspx#:~:text=Six%20states%20(Iowa%2C%20Michigan%2C,child%22%20and%20the%20notification%20requirements.

disproportionalities in child welfare involvement, as exemplified by Minnesota.[325] States must also collaborate closely with resident tribes through § 1919 tribal-state agreements.

ICWA leaves room for states and tribes to fill in the gaps left by federal law and curate the process to their specific needs using tribal-state agreements.[326] These agreements can lead to positive outcomes in Native American child welfare cases, as evidenced by reduced disparities in Minnesota after its 2007 agreement with the state's tribes[327] Washington has similarly seen improvements since forming numerous such agreements.[328] Moreover, these agreements ensure that states and tribes commit themselves to cooperative efforts and continue addressing disparities even if the Court strikes down ICWA in whole or part in the future.

Designing child welfare practices with a specific region in mind can account for variances in "local conditions, resources, and policies."[329] Given the unique conditions and child rearing practices that may be found on reservations and in Native American homes,[330] this more local approach through tribal-state agreements is appropriate and may help lessen the effects of bias and misunderstandings by mandatory reporters and child welfare officials.[331] Tribal-state agreements would also benefit from designing alternative response practices, as studies show such practices

---

[325] *See supra* Section IV.B.

[326] *See supra* Section IV.C.2.

[327] *See supra* Section IV.B.

[328] *See supra* Section IV.A.

[329] *National Study of Child Protective Services Systems and Reform Efforts: Summary Report*, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION (Apr. 30, 2003), https://aspe.hhs.gov/reports/national-study-child-protective-services-systems-reform-efforts-summary-report.

[330] *See supra* Section II.C.

[331] *See supra* Section II.B.

involve law enforcement less and "serve[] as an opportunity to engage families more openly and to introduce more prevention services."[332] Child welfare agencies around the country appear to have begun "recognizing that the needs of children and families cannot be addressed by CPS alone."[333] Creating culturally sensitive alternative response practices specific to a tribe's needs and passing legislation on the federal and state level to ensure funding for non-CPS programs[334] may lessen the need for child removal and contribute to the efficacy of child welfare involvement in Native American households.

3. IDENTIFYING AND AMELIORATING THE ROOT ISSUES THAT LEAD TO CHILD WELFARE INVOLVEMENT

Even in Washington, which has taken great care to follow ICWA and craft specialized agreements with its resident tribes, Native American children still make up a disproportionate share of those in the system.[335] Washington's situation evidences issues beyond the reach of ICWA that may require more creative and individualized solutions by states, counties, and tribes.

In part, racial bias and cultural misunderstandings played an unfortunate role in perpetuating the disparities throughout this country's history.[336] Providing more cultural training and, even more importantly, encouraging more Native Americans to work in child welfare services

---

[332] National Study of Child Protective Services Systems and Reform Efforts: Summary Report, supra note 330.

[333] *Id.*

[334] *See supra* note 129 (describing programs that Congress designed but never sufficiently funded). Creating a tribal service does nothing if it exists only in name but lacks the resources to actually function.

[335] *See supra* Section IV.A.

[336] Disproportionality and Race Equity in Child Welfare, supra note 45.

may lessen that occurrence.[337] The long history of rampantly removing Native American children from their homes and communities has left the communities more reliant on the state legal and social systems that are too often "alien to the traditional culture," thus leading to "[c]onflicts . . . [that] obscure the central focus: protection of the maltreated child and restoration of a functioning family unit."[338]

Bias affecting caseworker decisions extends beyond purely racial grounds.[339] While racial bias and discrimination are not "completely absent from the CPS process[,] . . . the role of race within CPS is complex."[340] Poverty, for example, is accompanied by certain realities that may catch a caseworker's negative attention but that are not actually of themselves indicative of the child's safety.[341] Child welfare services should not mistake socioeconomic realities and cultural distinctions for neglect, but unfortunately, these factors may affect their assessments.[342] Given that Native American families often face poverty[343] and tribal child rearing traditions differ in many ways from other cultures,[344] caseworkers would benefit from training that enables them to distinguish between cultural nuances or the realities of life in a low-income home and actual cases

[337] Courtney, Barth, Berrick, Brooks, Needell, & Park, *supra* note 28, at 110.

[338] Fischler, *supra* note 72, at 96.

[339] *See supra* Section II.B.

[340] Font, Berger, & Slack, *supra* note 54, at 2199.

[341] Regan, *supra* note 74.

[342] Milner & Kelly, *supra* note 38.

[343] Regan, *supra* note 74.

[344] *See supra* Section II.C.

of neglect. However, costs associated with cultural competency training are uncertain[345] and such resources may, from a long-term perspective, be better focused toward tribes rather than state agencies.

In particular, states should focus more attention and resources toward community programs for tribal families that are culturally sensitive and respect tribal traditions in order to address poverty and other unfortunate realities in Native American homes. Poverty and out-of-home placement for children are strongly correlated,[346] and thus steps must be taken to lift more Native American families out of that low socio-economic status to put a stop to that frequent occurrence. Other issues, like substance abuse, have also plagued Native American communities for generations and merit attention from state-funded tribal programs.[347] When combining data across states as well as racial and ethnic groups, nearly 40% of child removal cases involved parental alcohol or drug abuse.[348] Not only does substance abuse create unsafe environments for children, but it also drains the "[a]lready limited" tribal resources for healthcare and law enforcement.[349]

State-funded tribal programs that empower communities, build family bonds, provide rehabilitation and treatments outside of the criminal justice realm, and help the next generation

---

[345] Marie Parker, Xiangming Fang, & Andrew Bradlyn, Costs and Effectiveness of a Culturally Tailored Communication Training Program to Increase Cultural Competence Among Multi-Disciplinary Care Management Teams, 20 BMC HEALTH SERVS. RSCH. (2020), https://bmchealthservres.biomedcentral.com/articles/10.1186/s12913-020-05662-z.

[346] *Id.*

[347] *Alcohol & Substance Abuse*, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/policy-issues/education-health-human-services/alcohol-substance-abuse (last visited Mar. 17, 2022).

[348] *Child Welfare and Alcohol and Drug Use Statistics*, NAT'L CTR. ON SUBSTANCE ABUSE AND CHILD WELFARE, https://ncsacw.acf.hhs.gov/research/child-welfare-and-treatment-statistics.aspx#:~:text=When%20calculating%20the%20national%20average,from%203.6%25%20to%2069.0%25 (last visited Mar. 17, 2022).

[349] Alcohol & Substance Abuse, supra note 348.

make better choices than the last are promising ways to address many of the issues that necessitate child welfare involvement.[350] Focusing state and federal funds toward such programs, and then building culturally sensitive programs through collaborative efforts with states' resident tribes can provide long-term stability and heal generational trauma, thereby lessening the disproportionalities in the child welfare system over time.

States may argue that they lack the resources for such programs, but "[t]he economic and social costs" of issues that lead to child welfare involvement "are high[,] . . . [w]hile investing in anti-poverty and social programs has economy-wide benefits" in the long-run.[351] Redirecting resources toward well-run prevention programs can result in long-term reduction in expenditures on child welfare services, law enforcement, and the judicial system, as well as improvements in the stress-levels, health, functioning, and achievements of all state residents.[352]

This proposal is not an immediate solution; it requires patience to sow seeds that will benefit generations to come. However, combining future-minded local programs to break cycles of poverty and substance use with present-focused legislation and tribal-state agreements to

---

[350] *See* U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS, PROMISING STRATEGIES TO REDUCE SUBSTANCE ABUSE (2000), https://www.ojp.gov/pdffiles1/ojp/183152.pdf.

[351] *Costs of Poverty Fact Sheet*, POOR PEOPLE'S CAMPAIGN (Jun. 9, 2020), https://www.poorpeoplescampaign.org/resource/costs-of-poverty-fact-sheet/. States should review results of various programs to determine what sorts of services are likely to produce "positive returns" in the future on this present expenditure. *See* WASH. STATE INST. FOR PUB. POL'Y, EVIDENCE-BASED PROGRAMS TO PREVENT CHILDREN FROM ENTERING AND REMAINING IN THE CHILD WELFARE SYSTEM: BENEFITS AND COSTS FOR WASHINGTON (July 2008), https://www.wsipp.wa.gov/ReportFile/1020/Wsipp_Evidence-Based-Programs-to-Prevent-Children-from-Entering-and-Remaining-in-the-Child-Welfare-System-Benefits-and-Costs-for-Washington_Report.pdf (examining policies and programs around the country and assessing their costs, results, and other long-term effects, and concluding that "a number of specific programs and policies . . . can produce statistically significant improvements in key child welfare outcomes.").

[352] *Cost-Benefit Analysis*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/preventing/developing/economic/cost-benefit/ (last visited Jan. 14, 2023).

address institutional causes for disproportionalities and promote tribal control over the process can attack the issue from all sides and bring a more lasting solution to the heartbreaking disparities in the child welfare system.

VI. CONCLUSION

Tribes have noted "that there is no resource more vital to the [tribes'] continued existence and integrity . . . than its children,"[353] who "are the future of their tribes and vital to their very existence."[354] States and tribes have recognized that "[t]he long-term survival of the Tribe involves an interest in child welfare and child protection proceedings concerning the Tribe's children,"[355] and thus tribes should have prominent roles in such proceedings. While child welfare proceedings are overall meant to prioritize the child's best interests,[356] "[t]he best interests of Indian children are inherently tied to the concept of belonging,"[357] so preserving cultural connections—especially when removal from the home is necessary—is paramount when handling the proceedings.

Concerns about ICWA as it stands are not unfounded. The non-Native American families who have had their adoption plans dashed by placement preference requirements are understandably upset that they cannot be the ones to provide that child with a loving home.[358]

---

[353] Alabama-Coushatta-Texas Agreement, *supra* note 268.

[354] Tribal/State Agreement, *supra* note 223, at 3.

[355] Alabama-Coushatta-Texas Agreement, *supra* note 268.

[356] CHILD WELFARE INFO. GATEWAY & CHILDS. BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf.

[357] Tribal/State Agreement, *supra* note 223, at 2–3.

[358] These prospective parents must also remember, however, the difficulties a child has when he is separated from his cultural ties, and they should thus be sensitive to requests that they make room for more culturally suitable options for the child to grow up in. *See supra* Section II.C.

Further, while tribes are likely the best entity to ensure that cultural nuances are accounted for in child welfare proceedings and cultural connections are maintained, lack of funding prevents many tribes from creating tribal courts that can fully take charge of the process.[359] The recent constitutional challenge raised the opportunity to reassess ICWA, and systemic failings are also evident across the states.[360] Additionally, while imperfect in its substance and application, ICWA addressed the mistakes that led to Native American children losing their cultural ties through foster care and the adoption process, but it does not seek to solve the unfortunate circumstances that often lead caseworkers to investigate Native American homes to begin with.[361] Though improvements have resulted since the Act's passage, the Act may require updating to address the issues that have prevented ICWA from fully achieving its goals.[362]

Regardless of whether ICWA is upheld by the Supreme Court, states must do a better job of identifying the unique situations and concerns faced by their resident Native American communities and pass legislation, draft tribal-state agreements, and fund community programs accordingly. This is not to say that broader federal legislation is unnecessary; when the system allows room for broad interpretation by too many entities, consistency breaks down and disparities persist,[363] and congressional funding requirements need revisiting.[364] However, changes must occur beyond the reach of ICWA.

---

[359] *See supra* Section V.B.1.

[360] *See supra* Section IV.

[361] *See supra* Section V.B.3.

[362] *See supra* Section V.

[363] *See* Regan, *supra* note 74 (discussing the issues state officials have faced in Minnesota, where each county applies the law a bit differently).

[364] *See* Section V.B.1.

Child welfare officials and offices must make necessary changes to breed more cultural awareness at every stage of the investigatory and legal process, in part by giving non-Native American employees cultural training, encouraging more Native Americans to work in the social services and legal realms, and coordinating with tribes regularly to ensure cooperation, understanding, and the meeting of tribal needs in the child welfare process. At the same time, however, the unfortunate realities that trigger the investigatory process, such as poverty, substance abuse, and others, must be addressed at the state and local levels so that the need for intervention will continue to decline. Ultimately, improvements will only come about if states decide to make it a priority, focusing their attention and resources toward helping Native American communities rather than waging legal attacks on a federal law that sought to halt the disparities perpetrated by the state child welfare systems. Once the continuance of ICWA is secured by the Supreme Court (or especially if it is not), states must do the work to ensure their own compliance with the law, fill in missing gaps, and creating lasting, cooperative relationships with resident tribes to find the solutions their communities need to drastically lower the need for ICWA to ever be invoked.