

# LAWYERING THE INDIAN CHILD WELFARE ACT

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*This Article describes how the statutory structure of child welfare laws enables lawyers and courts to exploit deep-seated stereotypes about American Indian people rooted in systemic racism to undermine the enforcement of the rights of Indian families and tribes. Even when Indian custodians and tribes are able to protect their rights in court, their adversaries use those same advantages on appeal to attack the constitutional validity of the law. The primary goal of this Article is to help expose those structural issues and the ethically troublesome practices of adoption attorneys as the most important Indian Child Welfare Act (ICWA) case in history, *Brackeen v. Haaland*, reaches the Supreme Court.*

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#### INTRODUCTION

Several years ago, the United States Supreme Court decided *Adoptive Couple v. Baby Girl*, an emotional, passionately litigated dispute between a Cherokee father and a non-Indian adoptive couple over who would be allowed to raise the Cherokee father’s biological child.<sup>1</sup> The opening paragraph of the opinion betrayed the Court’s prejudices by referring to the non-Indian family as the “only parents” the child had ever known.<sup>2</sup> One would not know from reading the opinion that the Indian child had been living with their Cherokee father and extended family for over a year.<sup>3</sup> But for Justice Alito, the author of the majority opinion, the “only parents” the child ever knew were the non-Indian adoptive couple. Counsel arguing against the Cherokee family had framed their client as the “only family” since the case’s inception, demonizing their opponents.<sup>4</sup> Needless to say, it worked. The Indian parent—and the statute he used to protect his family—became irrelevant.

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1. 570 U.S. 637 (2013).

2. *Id.* at 641 (“Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from *the only parents she had ever known* and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child.” (emphasis added)).

3. *Id.* at 692 (Sotomayor, J., dissenting).

4. *E.g.*, Brief for Guardian Ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal at 41, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399). *See generally* Matthew Fletcher, *How the ‘Only Family’ Argument Is Used Against Indigenous Families*,

This “only family” claim represents, in a nutshell, the powerful forces arrayed against Indian families and tribes who attempt to invoke the Indian Child Welfare Act (ICWA).<sup>5</sup> In the hotly contested, tragic atmosphere of Indian child welfare, all too often, the side who presents the most compelling *emotional* case prevails. The robust federal protections available to prevent the breakup of Indian families sometimes work to the disadvantage of good, non-Indian parents. Too often in family law, as in Indian law, the law does not matter. When emotion prevails over law, lawyering matters a great deal—in particular, control over the narrative of a case involving ICWA practically pre-determines the outcome.

This Article describes how the statutory structure of child welfare laws enables lawyers and courts to exploit deep-seated stereotypes about American Indian people rooted in systemic racism to undermine the enforcement of the rights of Indian families and tribes. Even when Indian custodians and tribes are able to protect their rights in court, their adversaries use those same advantages on appeal to attack the constitutional validity of the law. The primary goal of this Article is to help expose those structural issues and the ethically troublesome practices of adoption attorneys as the most important ICWA case in history, *Brackeen v. Haaland*, reaches the Supreme Court.<sup>6</sup>

Part I briefly surveys the history of Indian lawyering. Part II then describes modern Indian lawyering, with an eye toward civil rights and child welfare lawyering. Part III delves into the ICWA itself, offering a historical and legal backdrop for the Act. Part IV surveys the constitutional challenges to the ICWA that have arisen in the *Brackeen* suit. Part V concludes by arguing that the structural issues permeating Indian lawyering have made the ICWA an especially vulnerable statute in the Supreme Court. Those structural issues may have skewed the strategic defense of the ICWA, further threatening the law and Indian families.

## I. A BRIEF HISTORY OF INDIAN LAWYERING

Professor Kate Fort recently told us about a rule of thumb that lawyers who work on Indian child welfare cases in state court—lawyers trained first in Indian law and then later in family law—are surprised at how quickly the factual narrative of a case can derail a legal strategy; those trained first in family law know that facts in child welfare cases are outcome determinative. Like

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HIGH COUNTRY NEWS (July 9, 2020), <https://www.hcn.org/articles/indigenous-affairs-justice-how-the-only-family-argument-is-used-against-indigenous-families> [perma.cc/MT8K-CN97] (“There’s a powerful dog whistle attacking American Indian families and tribes who assert their rights to keep Native children with Native families under the Indian Child Welfare Act (ICWA). Increasingly, foster and adoptive parents are fighting those families and tribes who seek to reunite with their children by claiming to be ‘the only family the child has ever known.’ It was the racism in the child welfare system against Indian families that initially compelled Congress to establish ICWA in 1978.”).

5. See Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963.

6. 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022) (mem.).

Professor Fort, we were first trained in federal Indian law and tribal law. We therefore start this Article on lawyering with Indian law.<sup>7</sup>

Lawyering for individual American Indians and Indian tribes can be very strange.<sup>8</sup> Federal laws permeate much of Indian law and policy. Indian lawyering is no different. For example, there is a little-known federal law that provides that the Department of Justice “shall” represent Indians “in all suits at law and in equity.”<sup>9</sup> Naturally, this provision has been interpreted in all but one reported case to be unenforceable by Indians against the United States.<sup>10</sup> Even stranger, until the beginning of this century, federal law required tribes to seek permission from the federal government to hire lawyers; it provided that “the choice of counsel and fixing of fees” was “subject to the approval of the Secretary [of the Interior].”<sup>11</sup> The federal government sometimes employed its approval power to quash tribal claims against the government.<sup>12</sup> Nowadays, as a practical matter, these laws have little impact on Indian lawyering, but they skewed the field for generations.

Civil rights lawyering for Indians is also strange in that many claims are brought by tribes rather than individual Indians. Indian tribes are collectives, after all, and tribal governments often possess interests that overlap with the interests of individual tribal members. Perhaps the best example of this phenomenon involves treaty rights to hunt and fish. The tribe is the signatory to the treaty and the possessor of the right,<sup>13</sup> but state and local governments

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7. Indian lawyering enjoys an absolutely fascinating history, with hundreds of hard-to-believe anecdotes and war stories. *E.g.*, Matthew L.M. Fletcher, *Bullshit and the Tribal Client*, 2015 MICH. ST. L. REV. 1435. We will not use this Article to delve deeply into those stories, but someday we will. Instead, this Section will survey the history of Indian lawyering.

8. The best scholarly review of tribal lawyering is Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085 (2013).

9. 25 U.S.C. § 175.

10. Most recently, a federal judge reaffirmed that § 175 is “discretionary.” *Mattwaoshshe v. United States*, 557 F. Supp. 3d 28, 38 (D.D.C. 2021) (citing *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974)). The one reported case to the contrary is *Chemehuevi Indian Tribe v. Wilson*, 987 F. Supp. 804 (N.D. Cal. 1997). Weirdly, the codified version of this statute leaves out the full text of the law, which seemingly grants discretion of the attorney general to file or defend suits against Indians. Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 631 (providing funds to “enable the Secretary of the Interior, in his discretion, to pay the legal costs incurred by Indians in contests initiated by or against them”). The “shall” part of the law apparently means that when the attorney general exercises their discretion to intervene, the U.S. attorney for the relevant district will then engage. None of the cases we reviewed on this question invoke the original version of the statute.

11. 25 U.S.C. § 476(e), *repealed in relevant part by* Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, § 3, 114 Stat. 46, 47.

12. See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 78 (7th ed. 2020).

13. See, *e.g.*, *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

violating the treaty right do so by regulating or prosecuting individual Indians.<sup>14</sup> Similar examples include tax<sup>15</sup> and jurisdictional<sup>16</sup> disputes, where the tribes often step in to litigate on their own behalf, which usually benefits individual tribal members. These are often enormous disputes, the types of Indian law cases that reach the United States Supreme Court.

Individual Indians bring civil rights claims, too, but these claims definitionally differ from tribal rights claims and rarely reach the Supreme Court.<sup>17</sup> These claims tend to involve voting rights claims against state governments<sup>18</sup> or claims against tribal governments.<sup>19</sup> Section 1983 claims by Indian people tend to involve prisoner rights.<sup>20</sup> Civil rights claims by individual Indians tend to be subsumed into claims brought by tribes as noted above or, in some instances, raised by tribes acting as *parens patriae* on behalf of individual Indians.<sup>21</sup>

Until the 1970s, virtually all lawyers who represented Indian tribes were either actual federal government attorneys or private lawyers primarily financed by federal dollars.<sup>22</sup> The primary federal statute governing Indian lawyering was Section 16 of the Indian Reorganization Act, which granted broad powers to the federal government to oversee the tribal retention of lawyers.<sup>23</sup> The statute provided for the federal government's mandatory defense of tribal

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14. *E.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

15. *E.g.*, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019).

16. *E.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

17. Outside of a single § 1983 claim brought by a tribal member against Nevada law enforcement, *see Nevada v. Hicks*, 533 U.S. 353 (2001), there have been no Supreme Court decisions in individual civil rights cases brought by individual Indians since 1978, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

18. *E.g.*, *Brakebill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019).

19. *E.g.*, *Cross v. Fox*, 497 F. Supp. 3d 432 (D.N.D. 2020).

20. *E.g.*, *Pasaye v. Dzurenda*, 375 F. Supp. 3d 1159 (D. Nev. 2019).

21. *E.g.*, *Miccosukee Tribe of Indians of Fla. v. United States*, 680 F. Supp. 2d 1308 (S.D. Fla. 2010); *Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166 (N.D. Okla. 2009).

22. *See generally* G. William Rice, *Of Cold Steel and Blueprints: Musings of an Old Country Lawyer on Crime, Jurisprudence, and the Tribal Attorney's Role in Developing Tribal Sovereignty*, KAN. J.L. & PUB. POL'Y, Winter 1997, at 31, 31–32 (describing the first generation of Native lawyers beginning to practice in the 1960s and 1970s); Rennard Strickland, *Redeeming Centuries of Dishonor: Legal Education and the American Indian*, 1970 U. TOL. L. REV. 847, 861–66 (describing the shortage of Indian lawyers in the 1960s).

23. 25 U.S.C. § 476(e), *repealed in relevant part* by Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, § 3, 114 Stat. 46, 47. *See generally* Jill E. Martin, *An Attorney of One's Choosing: Regulating Indian-Attorney Contracts in the 1950s*, 21 W. LEGAL HIST. 165, 166–70 (2008) (describing federal powers over attorney contracts until the 1950s). In the 1950s, the federal government routinely abused this power. Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 355–56 (1953).

property interests.<sup>24</sup> In 1946, Congress created the Indian Claims Commission,<sup>25</sup> which provided an additional avenue for attorney representation of Indian tribes.<sup>26</sup>

Since the 1970s—the beginning decade of the current era of self-determination—Congress has acknowledged and enabled the power of tribes to govern themselves.<sup>27</sup> For most tribes, Congress appropriates a certain amount of funding.<sup>28</sup> Relevant federal agencies (most often the Bureau of Indian Affairs and the Indian Health Service) pass that funding on to tribes, who have significant discretion on how to allocate those funds through self-determination and self-governance contracts.<sup>29</sup> Tribes with other revenue sources, usually gaming or natural resource extraction money, supplement federal money in that way.<sup>30</sup> Tribal attorneys are often funded with a combination of federal and tribal dollars.<sup>31</sup>

In 2001, tribal leaders formed the Tribal Supreme Court Project after a decade or more of failures before the Court.<sup>32</sup> Prior to that time, tribal attorneys, boutique Indian law firms, and law professors usually represented tribal interests in high-profile Indian law cases.<sup>33</sup> Now it is common for members of the “Supreme Court bar,” such as Neal Katyal, Carter Phillips, and others, to represent tribes.<sup>34</sup> Those in opposition to tribes, notably states and corporations, are also represented by this cadre of lawyers. Indian lawyering has changed much in the past few years. We now turn to a description of lawyering in Indian child welfare cases.

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24. 25 U.S.C. § 175.

25. Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946) (formerly codified at 25 U.S.C. §§ 70–70w). See generally Martin, *supra* note 23, at 170–72 (describing attorney contracts authorized by the Indian Claims Commission Act).

26. Indian Claims Commission Act § 15 (formerly codified at 25 U.S.C. § 70n).

27. See Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301–5423. See generally Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1 (2014).

28. See, e.g., ELAYNE J. HEISLER, CONG. RSCH. SERV., R46490, INDIAN HEALTH SERVICE (IHS) FY2021 BUDGET REQUEST AND FUNDING HISTORY 1 (2020).

29. See, e.g., *id.*

30. See MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 275, 324 (2017).

31. See 25 U.S.C. §§ 3661–66.

32. Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695 (2003).

33. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 354 (2001) (tribal respondents represented by law professor S. James Anaya).

34. See, e.g., Press Release, Hogan Lovells, Hogan Lovells Secures Major Win for Bay Mills Indian Community in Tribal Immunity Supreme Court Suit (May 27, 2014), <https://www.hoganlovells.com/en/news/hogan-lovells-secures-major-win-for-bay-mills-indian-community-in-tribal-immunity-supreme-court-suit> [perma.cc/B6VN-DZ]9 (describing a Supreme Court case in which Neal Katyal represented an Indian tribe).

## II. LAWYERING INDIAN CHILD WELFARE CASES

Far and away, the majority of civil rights cases involving Indians and tribes arise under the ICWA.<sup>35</sup> Weirdly, few observers think of these cases as civil rights actions. The ICWA is the most important federal civil rights statute enacted by Congress to protect Indians and tribes specifically. Congress found that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”<sup>36</sup> Congress was also “alarm[ed]”<sup>37</sup> to find that 25 to 35 percent of Indian children had been removed from their homes by state courts, state agencies, and private entities.<sup>38</sup> Due process was virtually nonexistent for Indian parents and custodians; for example, states rarely afforded counsel to indigent parents.<sup>39</sup> Congress exercised its power through the ICWA to enhance the individual rights of Indian people<sup>40</sup> and the rights of Indian tribes.<sup>41</sup>

However, as Part III details, the ICWA can be very difficult to enforce.<sup>42</sup> The ICWA requires state actors to do more to rehabilitate Indian parents and reunify Indian families than state law requires normally.<sup>43</sup> Many state actors simply do not comply with or enforce the ICWA due to ignorance or overt opposition.<sup>44</sup> Further, many state actors object to federal obligations in areas

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35. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963. There are an average of 200 appellate cases involving ICWA matters each year. Kathryn E. Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, AM. INDIAN L.J., Spring 2019, at 105, 105. Conversely, there are rarely more than a few dozen cases brought each year under the Indian Civil Rights Act, 25 U.S.C. § 1302.

36. 25 U.S.C. § 1901(3).

37. *Id.* § 1901(4).

38. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–33 (1989); H.R. REP. NO. 95-1386, at 9 (1978).

39. H.R. REP. NO. 95-1386, at 11 (1978).

40. *See, e.g.*, 25 U.S.C. § 1913 (providing for Indian parental rights).

41. *See, e.g., id.* § 1911 (providing for tribal court jurisdiction over Indian child welfare proceedings).

42. Matthew L.M. Fletcher & Kathryn E. Fort, *The Indian Child Welfare Act*, in *CHILD WELFARE LAW AND PRACTICE* 311, 312 (Donald N. Duquette, Ann M. Haralambie & Vivek S. Sankaran eds., 3d ed. 2016).

43. *See* 25 U.S.C. § 1912(d).

44. *E.g.*, Kate Shearer, *Mutual Misunderstanding: How Better Communication Will Improve the Administration of the Indian Child Welfare Act in Texas*, 15 TEX. TECH ADMIN. L.J. 423, 438–39 (2014) (“Inefficiencies, inconsistencies, and miscommunications in the removal and subsequent permanency plan can harm the child by delaying the time before permanency. The primary problems with implementation of the ICWA are a lack of preparation for the ICWA administration by the DFPS, untimely discovery of the ICWA implication resulting in undue delay in the child’s placement and permanency plan, and untimely notification on the part of the tribal member. Mistakes in the ICWA application in Texas often involve procedural errors, and the ICWA requires that judgments made in violation of those procedures remand and reset for proceedings that do comply with the ICWA.” (footnotes omitted)). *See generally* KATHRYN E. FORT, AMERICAN INDIAN CHILDREN AND THE LAW 108 (2019).

the states believe (in this case, erroneously) are states' rights issues.<sup>45</sup> And many adoption agencies fight fervently in opposition to the ICWA's provisions that make it harder for non-Indians to adopt Indian children.<sup>46</sup> Four decades since the ICWA's enactment, outlier states and adoptive families have coalesced their objections to the ICWA's constitutionality in *Brackeen v. Haaland*,<sup>47</sup> the massive federal lawsuit pending before the Supreme Court that has the potential to upset the foundations of federal Indian law forever. If the challengers prevail on their equal protection claims, for example, then the federal laws establishing Indian country criminal jurisdiction are likely next to fall.<sup>48</sup>

Moreover, there are a lot of lawyers involved in child welfare proceedings. These proceedings are complicated by the sheer number of parties that are (or should be) individually represented by counsel: the government,<sup>49</sup> each parent or guardian,<sup>50</sup> and each child are entitled to counsel.<sup>51</sup> Persons that have moved to adopt are also likely to be represented by counsel.<sup>52</sup> ICWA proceedings in state court can include the tribe as a party as well.<sup>53</sup> Unlike many other civil rights statutes, the ICWA does not allow for prevailing civil rights claimants to seek attorney fees, but it does allow states to seek funding for the appointment of counsel from the federal government.<sup>54</sup> There is no provision for funding tribal counsel.<sup>55</sup>

Additionally, structural matters in child welfare cases generally, and the ICWA specifically, complicate efforts to enforce the ICWA. For example, determining which order in an ICWA case is an appealable final order can be

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45. Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167> [perma.cc/C9H9-PUY6] (“Texas and three other states maintain that ICWA is unconstitutional because it ‘commandeers’—i.e., forces—the states to carry out federal law.”).

46. E.g., Mary Annette Pember, *The New War on the Indian Child Welfare Act*, POL. RSCH. ASSOCS. (Nov. 11, 2019), <https://www.politicalresearch.org/2019/11/11/new-war-indian-child-welfare-act> [perma.cc/PAH8-SNLG] (describing the activities of the National Council for Adoption and Nightlight Christian Adoptions).

47. 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), cert. granted, 142 S. Ct. 1205 (2022) (mem.).

48. See *infra* Sections III.B–C.

49. See generally Brooke N. Silverthorn, *Agency Representation in Child Welfare Proceedings*, in CHILD WELFARE LAW AND PRACTICE, *supra* note 42, at 751, 752.

50. See generally Vivek S. Sankaran, *Representing Parents in Child Welfare Cases*, in CHILD WELFARE LAW AND PRACTICE, *supra* note 42, at 767, 768–70.

51. See generally Donald N. Duquette & Ann Haralambie, *Representing Children and Youth*, in CHILD WELFARE LAW AND PRACTICE, *supra* note 42, at 817, 818–19.

52. See generally Amanda Tamayo, Comment, *A State Survey—Dual Representation in Adoption*, 27 J. AM. ACAD. MATRIM. LAWS. 481 (2015); Malinda L. Seymore, *Specialty Bar Associations and the Marketing of Ethics: The Example of the Academy of Adoption Attorneys*, 35 NOTRE DAME J.L. ETHICS & PUB. POL’Y 49, 50 (2021).

53. 25 U.S.C. § 1911(c).

54. *Id.* § 1912(b).

55. *Cf. id.* § 1911(c) (allowing tribes to intervene in state court proceedings but with no mention of federal funding for tribal counsel).



particularly difficult. Would a temporary placement order that violates § 1915(b)'s foster care placement preferences be appealable?<sup>56</sup> What about a disposition order after adjudication that makes an active effort finding under § 1912?<sup>57</sup> An order before adjudication denying transfer to tribal court?<sup>58</sup> The lack of attorney fees and difficult appellate positions are structural issues that make it even more difficult to enforce the ICWA.

Modern, twenty-first century Indian lawyering is a dynamic and complex mix of governmental and private lawyering. This Part describes the primary categories of Indian lawyers and their respective roles in civil rights lawyering for Indian families.<sup>59</sup>

#### A. Tribal General Counsel

In-house counsel for Indian tribes potentially have several important roles in civil rights lawyering affecting Indian families. Because tribal in-house counsel represent Indian tribes, and because tribes may be parties to Indian child welfare matters in state and tribal courts,<sup>60</sup> the tribes' attorneys are often but not always important. Their importance comes in managing the tribes' interests in ICWA cases and overseeing any appellate work that stems from those cases.

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56. See, e.g., *Alexandra K. v. Dep't of Child Safety*, No. 1 CA-JV 19-0081, 2019 WL 5258095, at \*2 (Ariz. Ct. App. Oct. 17, 2019) (assuming without deciding that an order denying transfer of Indian child to Indian family is appealable); *State v. Darlene H. (In re Enrique P.)*, 813 N.W.2d 513, 515 (Neb. Ct. App. 2012) (noting prior appeals of decisions that arguably violated ICWA placement preferences had been dismissed for lack of an appealable order).

57. See, e.g., *Riverside Cnty. Dep't of Pub. Soc. Servs. v. C.B. (In re K.B.)*, 93 Cal. Rptr. 3d 751, 758–59 (Ct. App. 2009) (resolving whether active efforts were required before the disposition hearing); *A.D.T. v. State (State ex rel. C.D.)*, 200 P.3d 194, 196 (Utah Ct. App. 2008) (noting appeal by birth mother after disposition hearing involving Indian child was not appealable).

58. See, e.g., *In re Child. of Shirley T.*, 199 A.3d 221, 229 n.12 (Me. 2019) (noting denial of transfer in an ICWA case is an appealable interlocutory order); *In re C.J., Jr.*, 108 N.E.3d 677, 690–91 (Ohio Ct. App. 2018) (noting complex procedural history of appeals from multiple parties arising out of order transferring case to tribal court).

59. We do not describe some types of Indian lawyering, such as gaming and other enterprise lawyers, natural resource lawyers, and tribal court counsel and judges, because they are not relevant to this discussion.

60. Indian tribes may intervene as of right in state court cases, 25 U.S.C. § 1911(c), or act as the governmental party in tribal court cases, *see id.* § 1911(a), (b).

There are 574 federally acknowledged Indian tribes, and many of them employ in-house counsel.<sup>61</sup> General counsel for smaller tribes tend to be generalists.<sup>62</sup> They deal with all internal tribal matters, everything from tribal constitutional questions to tribal economic development.<sup>63</sup> Very small tribes, both in terms of citizenry or land base, are far less likely to retain in-house counsel.<sup>64</sup> Those tribes often retain lawyers from law firms to serve as counsel for the tribe.

Larger tribes tend to employ much larger numbers of lawyers in-house.<sup>65</sup> These larger tribes also tend to divide in-house counsel into more specialized offices. The Navajo Nation, the largest tribe in terms of members and land, employs dozens of lawyers in numerous specialized offices.<sup>66</sup> The tribe is the client for most in-house counsel, although in-house counsel might be retained separately by the executive or legislative branches of government.<sup>67</sup> In some very small tribes, however, general counsel might do it all. They might litigate in state, federal, and tribal courts<sup>68</sup> or serve as tribal prosecutors and tribal presenting officers in Indian child welfare matters.<sup>69</sup> They might also be the lead attorney in both governmental and commercial matters.<sup>70</sup>

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61. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs; Correction, 86 Fed. Reg. 18552 (Apr. 9, 2021).

62. See Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 36 (2008); Fletcher, *supra* note 7, at 1449.

63. Gerald L. Hill, *Conflicts of Interest for Tribal Lawyers Representing Their Own Tribes*, KAN. J.L. & PUB. POL'Y, Spring 1999, 147, 149–50; Dale T. White, *Tribal Law Practice: From the Outside to the Inside*, 10 KAN. J.L. & PUB. POL'Y 505, 508 (2000).

64. Fletcher, *supra* note 7, at 1442–43.

65. See White, *supra* note 63, at 510.

66. See NAVAJO NATION CODE ANN. tit. 2, §§ 1961–1999 (2010).

67. See *id.* tit. 2, §§ 960–969, 1961–1999 (2010).

68. White, *supra* note 63, at 508.

69. *Id.* at 509–10.

70. *Id.* at 508. In our collective experience as in-house counsel for relatively small tribes (which included tribes with 1500–4500 members and relatively small land bases of less than a few thousand acres, except Hoopa, which has a massive reservation), in-house work covers an extraordinary range of matters. See generally Fletcher, *supra* note 7, at 1440–48. Examples include: working as part of a team of in-house counsel and outside counsel to negotiate an omnibus tax agreement on behalf of the Grand Traverse Band of Ottawa and Chippewa Indians, Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1 (2004); litigating employment cases, see *Short v. Hoopa Health Ass'n*, 6 NICS App. 67 (Hoopa Valley Tribal Sup. Ct. 2001), and membership cases, see *In re Menefee*, No. 97–12–092–CV, 2004 WL 5714978 (Grand Traverse Band of Ottawa & Chippewa Indians Tribal Ct. 2004); helping write employee manuals, Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J.L. REFORM 273 (2005); developing drug testing policies, Matthew L.M. Fletcher, *The Drug War on Tribal Government Employees: Adopting the Ways of the Conqueror*, 35 COLUM. HUM. RTS. L. REV. 1 (2003); helping draft Congressional testimony for a tribal client, see, e.g., *Bay Mills Indian Community Land Claims Settlement Act: Hearing on S. 2986 Before the S. Comm. on Indian Affs.*, 107th Cong. 51–87 (2002) (prepared statement of George Bennett, Councilor & Former Chair, Grand Traverse Band of Ottawa & Chippewa Indians); assisting with

Though they work in vastly different legal worlds, the role of tribal general counsel is not much different from that of corporate general counsel. Indian tribes are governments but are usually organized along corporate lines.<sup>71</sup> Indian tribes also own corporate entities.<sup>72</sup> There is a lot of corporate work for tribal general counsel to do. That said, tribal counsel roles often change dramatically depending on the governing practices of the elected officials. Yet, it is fair to say that tribal general counsel do not litigate much.<sup>73</sup> It is primarily a transactional job; most days, in-house counsel review contracts and draft tribal legislation. For example, Singel served as the general counsel for the Grand Traverse Resort after the Grand Traverse Band purchased it in 2003.<sup>74</sup> Singel reviewed contracts, guided the merger of the resort into the tribal enterprise's portfolio, and dealt with state law implications of a tribe-owned resort.

In terms of civil rights lawyering, tribal general counsel are not often directly involved. However, when they are, they are usually on the defensive, representing a branch of the tribal government or a tribal official or employer.<sup>75</sup> On rare occasions, the tribal client might ask tribal general counsel to represent an individual tribal member in a civil rights matter. The Grand Traverse Band tribal council once asked Fletcher to assist outside counsel in defending a tort claim brought against a tribal member who was sued in state court over treaty fishing.

Tribal general counsel are more likely to be involved in Indian child welfare matters, either in state court or tribal court. This is especially true where the tribe has limited resources and does not staff a separate office to handle child welfare matters, although some larger tribes dedicate an attorney in the

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research in a massive federal case involving the Grand Traverse Band's Turtle Creek Casino; writing an early draft of a motion to dismiss in a land use claim, *see* Ass'n of Property Owners/Residents of Port Madison Area (APORPMA) v. Individual Council Members of the Suquamish Tribal Council, No. C01-5317FDB (W.D. Wash. Apr. 17, 2002), *aff'd*, 76 F. App'x 126 (9th Cir. 2003); and drafting an amicus brief in an Indian gaming case in the Michigan Supreme Court, *see* Brief of Amicus Curiae Grand Traverse Band of Ottawa & Chippewa Indians et al., Taxpayers of Mich. Against Casinos v. State, 685 N.W.2d 221 (Mich. 2004) (No. 122830).

71. Duane Champagne, *Challenges to Native Nation Building in the 21st Century*, 34 ARIZ. ST. L.J. 47, 53 (2002); *see also* 25 U.S.C. § 5123(a) (extending right of tribes to organize under a constitutional structure).

72. 25 U.S.C. § 5124 (federally chartered corporations).

73. White, *supra* note 63, at 508–09.

74. John Gallagher, *Tribe Buys Resort in Grand Traverse; Owner Wants a Casino, Plans Hotel Renovations*, DETROIT FREE PRESS, Mar. 6, 2003, at A1.

75. As tribal judges, Fletcher and Singel have observed in-house counsel defend wrongful termination-type claims, which regularly involve civil rights issues against tribal employers. *E.g.*, Carey v. Victories Casino, Nos. A-004-0605, C-062-1005, 2007 WL 6918017 (Tribal App. Ct. of the Little Traverse Bands of Odawa Indians Mar. 27, 2007) (Singel); Cholewka v. Grand Traverse Band of Ottawa & Chippewa Tribal Council, No. 2013-16-AP (Tribal App. Ct. for the Grand Traverse Band of Ottawa & Chippewa Indians Oct. 14, 2014), <https://turtletalk.files.wordpress.com/2013/05/cholewka-v-gtb-tribal-council.pdf> [perma.cc/YTL5-FFNY] (Fletcher).

general counsel's office to handle those types of cases.<sup>76</sup> The potential for conflicts of interest is high, though. For example, it is unusually likely for tribal-elected officials, who speak for the tribal client, to be biologically related to the individual tribal members who are parties in those cases.

As noted above, tribal general counsel usually do not litigate. Tribes generally retain specialists to handle complex federal and state court cases. In our experience, outside counsel dealt with a number of cases in federal and state courts for our tribal client while we worked in-house on other matters. Examples included the previously mentioned Turtle Creek Casino litigation<sup>77</sup> and a case involving the Hoopa Valley Tribe's effort to regulate nonmember logging activities.<sup>78</sup> Normally, in a corporate environment, the general counsel's office manages the selection and oversight of outside counsel brought in to handle litigation or whatever matter is at hand. Even in a state or local governmental situation, governmental attorneys strictly manage outside counsel.

Often, and unfortunately, this is where tribal general counsel and corporate general counsel deviate. In the retention of outside counsel, many tribal general counsel offices have no role.<sup>79</sup> Unlike states or corporations, very few tribes follow a bidding or procurement policy governing the retention of outside counsel. The reality is that in many, if not most, tribal governments, outside counsel are retained by elected officials without much input from the tribal general counsel's office. Additionally, in-house counsel often do not have a role in managing or overseeing outside counsel.<sup>80</sup> Law firms that practice in Indian country know this and exploit it.<sup>81</sup>

Not all tribes are like that. However, enough of them are that the situation places in-house counsel in near-impossible situations when the tribal client may soon be facing high-stakes litigation with the potential to reach the Supreme Court.

### B. Tribal Prosecutors, Presenting Officers, and Others

Tribal governments also retain attorneys to represent the tribe or a branch of tribal government in more specific areas, such as criminal justice, health, and housing. For purposes of this Article, we mean to include prosecutors and presenting officers in child welfare matters. Tribal prosecutors and presenting officers are most likely to represent the tribes' interests in Indian child welfare matters in state and tribal courts.<sup>82</sup>

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76. See, e.g., *Office of the Attorney General: Meet the Staff*, CHEROKEE NATION, <https://attorneygeneral.cherokee.org/meet-the-staff/laina-vaughn> [perma.cc/XK4R-G5FA].

77. *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for the W. Dist. of Mich.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

78. *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (en banc).

79. See *Fletcher*, *supra* note 7, at 1448–49.

80. See *id.* at 1460–61.

81. See *id.*

82. NAT'L TRIBAL JUD. CTR., *WALKING ON COMMON GROUND 23* (Christine Folsom-Smith ed., 2008).

Indian tribes possess law enforcement authority over all Indians within their Indian country,<sup>83</sup> although not all tribes exercise that authority. Tribal prosecutors serve as the chief law enforcement officer for the tribe and retain significant discretion over enforcement.<sup>84</sup> Tribal prosecutors might also serve as presenting officers in child welfare matters.<sup>85</sup> Some tribes have created a child welfare commission of appointed tribal community members to advise these officers.<sup>86</sup>

Serving as prosecutors or presenting officers is often a thankless task. They are obligated to charge Indian people with crimes, to seek removal of Indian children from their homes, and to terminate (or its equivalent) the parental or custodial rights of Indian people. These are intensely difficult decisions, which can lead to these lawyers becoming unpopular quickly. Turnover and burnout are endemic,<sup>87</sup> though some tribal prosecutors and presenting officers are retained for many years.

Prosecutors and presiding officers focus almost exclusively on trial-level work, primarily because there are relatively few appeals. In tribal court, they advise the child welfare investigators and file the petitions for removal, if any,

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83. 25 U.S.C. § 1301(2).

84. *E.g.*, WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. I, art. X, § A (2022), <https://ltbbodawa-nsn.gov/wp-content/uploads/2021/02/TribalCode.pdf> [perma.cc/LU2G-TDUE] (detailing the duties of the tribal prosecutor); GRAND TRAVERSE BAND CODE, tit. 3, § 104 (2007), [https://narf.org/nill/codes/grand\\_traverse/Title\\_3.pdf](https://narf.org/nill/codes/grand_traverse/Title_3.pdf) [perma.cc/X6KY-7WAJ] (describing the duties of the tribal prosecutor).

85. *E.g.*, WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. I, art. X, § A (2022), <https://ltbbodawa-nsn.gov/wp-content/uploads/2021/02/TribalCode.pdf> [perma.cc/LU2G-TDUE] (“In any and all child welfare cases, . . . the Tribal Prosecutor shall have the power and authority, on behalf of the Tribal membership as a whole, to sign, file and present any and all complaints, subpoenas, affidavits, motions, process and papers of any kind and to appear before all courts, commissions or tribunals in any such proceeding within the Tribe’s jurisdiction.”); GRAND TRAVERSE BAND CODE, tit. 3, § 104(a)(4) (2007), [https://narf.org/nill/codes/grand\\_traverse/Title\\_3.pdf](https://narf.org/nill/codes/grand_traverse/Title_3.pdf) [perma.cc/X6KY-7WAJ] (“The Tribal Prosecutor shall . . . serve as presenting officer in the Tribe’s Children’s Court and represent the Tribe in Indian Child Welfare cases in state jurisdictions upon the authorization of the ICW Committee or the Tribal Court.”); NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL CODE, tit. VII, § 7.5-9(A) (2021), <https://ecode360.com/31807219> [perma.cc/JUT5-AKVG] (“Presenting officer . . . [i]s authorized to represent [the tribe] in proceedings arising under this code and proceedings in state courts under the ICWA.”); SAGINAW CHIPPEWA TRIBAL LAW, tit. II, § 2.405(c) (2019) <http://www.sagchip.org/tribalcourt/ordinance/2019/TITLE%20II%20Children%20082819.pdf> [perma.cc/NT2E-ASZ2] (“The presenting officer shall represent the People of the Saginaw Chippewa Tribe in all proceedings under [the children’s] code.”).

86. *E.g.*, SAGINAW CHIPPEWA TRIBAL LAW, tit. II, § 2.404 (2019) <http://www.sagchip.org/tribalcourt/ordinance/2019/TITLE%20II%20Children%20082819.pdf> [perma.cc/NT2E-ASZ2]; WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. V, §§ 5.201–.206 (2022), <https://ltbbodawa-nsn.gov/wp-content/uploads/2021/02/TribalCode.pdf> [perma.cc/LU2G-TDUE].

87. ROE WALKER BUBAR & IRENE S. VERNON, CONTEMPORARY NATIVE AMERICAN ISSUES: SOCIAL LIFE AND ISSUES 63 (2006).

on behalf of the tribal client. In Indian child welfare situations, the tribal prosecutor or presiding officer may represent the social services agency,<sup>88</sup> but many, many tribes rely on non-lawyer “ICWA workers” to represent the tribes’ interests in state court.<sup>89</sup> In state court, they represent the tribe’s interests under the ICWA on matters such as whether to intervene, whether to seek transfer of a case to tribal court, and so on. It is rare to find tribal prosecutors and presiding officers with significant appellate experience.

### C. Defenders, Legal Services Lawyers, and Law School Clinics

As should be expected, tribal public defenders and legal services lawyers play enormous roles in Indian country civil rights lawyering. And, to a somewhat lesser extent, these lawyers play important roles in Indian child welfare proceedings. Because these lawyers usually represent Indian parents or custodians, we refer to them as “parents’ attorneys” throughout this Article.

In many parts of Indian country, regional legal services agencies represent Indian parents and custodians in state and tribal court child welfare proceedings.<sup>90</sup> Indian legal services originated during the Johnson-era War on Poverty with the creation of the Office of Economic Opportunity.<sup>91</sup> On occasion, tribal public defenders will be called to represent parents and custodians.<sup>92</sup> Law school clinicians also occasionally represent Indian parents and custodians.<sup>93</sup>

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88. *E.g.*, GRAND TRAVERSE BAND CODE, tit. 10, § 108(b)(3) (2007), [https://narf.org/nill/codes/grand\\_traverse/Title\\_10.pdf](https://narf.org/nill/codes/grand_traverse/Title_10.pdf) [perma.cc/6Y4V-T32T] (“The presenting officer shall represent the Tribe in all proceedings under this Code and the Indian Child Welfare Act. The presenting officer or an assistant presenting officer shall serve as legal counsel for the Anishinaabek Family Services Program.”). Although it is our understanding and experience that most tribes follow what some refer to as an agency representation model, some tribal codes are silent or ambiguous on this point. *E.g.*, WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. VI, § 6.3308(A)(3) (2022), <https://ltbbodawa-nsn.gov/wp-content/uploads/2021/02/TribalCode.pdf> [perma.cc/LU2G-TDUE] (listing the duties of the tribal prosecutor in state court Indian child welfare proceedings but remaining silent on tribal court duties).

89. *E.g.*, Susanne DiPietro, *Evaluating the Court Process for Alaska’s Children in Need of Aid*, 29 JUST. SYS. J. 187, 190–91 (2008) (“Most tribes—there are 225 federally recognized tribes in Alaska—rely on trained tribal members, referred to as ICWA workers, to intervene and participate in these cases.”).

90. James A. Keedy, *The History of Indian Legal Services*, MICH. BAR J., Aug. 2019, at 26, 27–28.

91. *Id.* at 26.

92. *See* DOROTHY ROBERTS, SHATTERED BONDS 125 (2002).

93. For example, the Tribal Court Clinic at the University of Washington represents parents in the Muckleshoot Tribal Court, and the ICWA Law Center, which is affiliated with the University of Minnesota and takes students each semester, represents Native moms in the Twin Cities and some tribal courts. *Tribal Court Clinic: Criminal Defense and Family Advocacy*, UNIV. OF WASH. SCH. OF L., <https://www.law.uw.edu/academics/experiential-learning/clinics/tribal-court> [perma.cc/A39R-YWZU]; ICWA LAW CTR., ANNUAL REPORT 4 (2013), <http://www.ic-wlc.org/wpsite/wp-content/uploads/2014/05/ICWA-Annual-Report-2013.pdf> [perma.cc/34QD-5WM3].

And many other times, tribal courts appoint private counsel to represent parents and custodians.<sup>94</sup> It is our understanding that all of the lower peninsula Michigan tribes that manage child welfare cases in their dockets appoint counsel to represent parents who are not already represented by legal services or another attorney.<sup>95</sup>

In state court, where compliance with the ICWA is often low to nonexistent, parents' attorneys and tribal attorneys sometimes work in tandem in their efforts to enforce the ICWA.<sup>96</sup> However, parents' and tribes' interests may quickly deviate if the tribe concurs with the state to remove an Indian child from their home. In tribal court, where tribal law applies, parents and tribes are adverse since the tribe is the government filing petitions against the Indian parents.

Parents' attorneys, who work at the trial level, like tribal prosecutors and presenting officers, are unlikely to have much appellate litigation expertise. However, some legal services attorneys and most law school clinicians have significant appellate expertise.

#### D. Outside Litigation Firms

While governmental and legal services attorneys permeate trial-level civil rights work arising in Indian country, private law firms tend to predominate in appellate work. Tribal in-house counsel, who tend to represent the tribal governmental defendant in such cases, might handle trial-level civil rights work in tribal courts, but they largely turn over that work to outside law firms, especially when the cases reach the appellate level.<sup>97</sup> Complex litigation specialists are typically based in law firms that can manage difficult and large cases. Some Indian tribes can readily afford the costly fees. And even tribes with severely limited resources might still feel compelled to retain specialized litigation counsel. On occasion, especially if an Indian law case might reach (or already has reached) the Supreme Court, a firm with a Supreme Court practice group might take the case pro bono or at a reduced fee. Finally, in many civil rights cases, courts award the prevailing parties attorney fees, making such cases more attractive to for-profit firms.

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94. See ROBERTS, *supra* note 92, at 125.

95. E.g., NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL CODE, tit. VII, § 7.5-9(B)(2) (2021), <https://ecode360.com/31807219> [perma.cc/JUT5-AKVG]; SAGINAW CHIPPEWA TRIBAL LAW, tit. II, § 2.503(a)(3) (2019), <http://www.sagchip.org/tribalcourt/ordinance/2019/TITLE%20II%20Children%20082819.pdf> [perma.cc/NT2E-ASZ2]; WAGANAKISING ODAWA TRIBAL CODE OF LAW., tit. V, § 5.108(B) (2022), <https://tbbodawa-nsn.gov/wp-content/uploads/2021/02/TribalCode.pdf> [perma.cc/SSB6-BYDK]; POKAGON BAND OF POTAWATOMI INDIANS COURT RULES FOR APPOINTMENT OF COUNSEL, ch. 10, § 6(A) (2013), <https://www.pokagonband-nsn.gov/sites/default/files/attachments/Chapter%2010%20-%20Court%20Rules%20for%20Appointment%20of%20Counsel%20%28Updated%2003-18-2013%29.pdf> [perma.cc/7JSX-5MRZ].

96. About ICWA, NAT'L INDIAN CHILD WELFARE ASS'N, <https://www.nicwa.org/about-icwa> [perma.cc/WE9V-DDZZ].

97. See, e.g., White, *supra* note 63, at 508–09.

As we discuss in more detail below, law firms are rarely involved in Indian child welfare matters. There are no attorney fee award statutes, and Indian families in the child welfare system have no resources. Indian tribes usually do not expect to spend their limited resources on outside counsel to litigate Indian child welfare matters.

#### E. *Public Interest Litigation Organizations*

There are also several nonprofit organizations that litigate complex civil rights cases arising in Indian country. Most famously, the Native American Rights Fund (NARF) has represented Indian tribes and individual Indians since the early 1970s.<sup>98</sup> A few other nonprofits have represented Indians and tribes during that time as well. In recent decades, nonprofits tied to movement conservatism and corporate interests have begun to represent non-Indian persons and entities in opposition to tribal interests.<sup>99</sup>

The nonprofit litigation groups that represent Indians and tribes in civil rights cases depend on donations and attorney fee award statutes to fund their work.<sup>100</sup> That means their work involves a lot of voting rights cases, environmental protection cases, and even some prisoner cases.<sup>101</sup> If a claim does not result in a potential attorney fee award, non-profits will be forced to take on litigation costs, often an insurmountable burden.

On the other hand, the nonprofits that oppose Indian and tribal interests are often nationally prominent and extraordinarily well funded.<sup>102</sup> Powerful and wealthy interests that seek to eliminate government regulation of polluters, for example, are behind these groups. They have brought claims on behalf of (or defended) industry groups, private property owners, and others who

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98. Susan Sanders, *Native American Rights Fund: Our First 20 Years*, 26 CLEARINGHOUSE REV. 49, 49 (1992).

99. Fletcher saw this type of work at Hoopa when a non-Indian property owner challenging the tribe's land use regulations was represented by James Burling of the Pacific Legal Foundation. *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (en banc).

100. See, e.g., NATIVE AM. RTS. FUND, ANNUAL REPORT 2020, at 27 (2020), <https://www.narf.org/nill/documents/narf-ar/2020.pdf> [perma.cc/JY64-F7V4].

101. See, e.g., *id.* at 14–15, 17, 20–21.

102. See Alleen Brown, *How a Right-Wing Attack on Protections for Native American Children Could Upend Indian Law*, INTERCEPT (June 17, 2019, 12:10 PM), <https://theintercept.com/2019/06/17/indian-child-welfare-act-goldwater-institute-legal-battle> [perma.cc/HCM8-VLYA]; Rebecca Clarren, *A Right-Wing Think Tank Is Trying to Bring Down the Indian Child Welfare Act. Why?*, NATION (Apr. 6, 2017), <https://www.thenation.com/article/archive/a-right-wing-think-tank-is-trying-to-bring-down-the-indian-child-welfare-act-why> [perma.cc/4ZW6-UU4C].



oppose Indian and tribal interests.<sup>103</sup> In recent years, these groups have embarked on a litigation strategy to eliminate the ICWA.<sup>104</sup> Ironically, these groups—who did not previously advocate for children at all—claim to be defending the rights of Indian children from those children’s own biological families.<sup>105</sup>

So far, given the structural disadvantages plaguing tribal governments and Indian families, this cynical strategy is working, as the next Part will show.

### III. THE INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act, or the ICWA, is likely the most comprehensive and far-reaching, acutely needed, and successful civil rights law that Congress has ever enacted in the history of Indian affairs. In 1978, Congress found that states had removed about one-third of all Indian children from their homes and placed nearly all of them in non-Indian homes without even the barest pretense of due process for Indian parents and custodians.<sup>106</sup>

Congress enacted the ICWA by quoting the Indian Commerce Clause, its “plenary power over Indian affairs,” and “other constitutional authority.”<sup>107</sup> In the ICWA, Congress announced a national policy that remains incredibly ambitious, aspirational, and progressive. Congress spoke of minimum national standards, efforts to support stable Indian families, and the need to prioritize Indian values and culture.<sup>108</sup>

#### A. Overview of the Act

The ICWA is primarily a procedural statute, although Congress did impose several substantive requirements on state child welfare matters designed to ensure greater protection for Indian families. At bottom, Congress never intended for the ICWA to be a comprehensive statute; rather, it was enacted

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103. *E.g.*, *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (en banc) (property owner represented by Pacific Legal Foundation); Brief of Amici Curiae Env’t Fed’n of Okla., Inc., et al. in Support of Respondent State of Okla., *McGirt v. Oklahoma*, 140 S. Ct. 2542 (2020) (No. 18-9526), 2020 WL 1478584 (state commercial interests opposing tribal member’s reservation boundaries claim).

104. Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 YALE L. & POL’Y REV. 292, 304–11 (2020).

105. *Id.* at 305; Mary Katherine Nagle, *Fact Check: The Goldwater Institute’s Statements About the Indian Child Welfare Act*, HIGH COUNTRY NEWS (Dec. 20, 2018), <https://www.hcn.org/articles/tribal-affairs-fact-check-the-goldwater-institutes-statements-about-the-indian-child-welfare-act> [perma.cc/H87P-F733].

106. *About ICWA*, *supra* note 96. See generally Neoshia R. Roemer, *Finding Harmony or Swimming in the Void: The Unavoidable Conflict Between the Interstate Compact on the Placement of Children and the Indian Child Welfare Act*, 94 N.D. L. REV. 149, 152 (2019) (“Historically, ICWA was a remedy for the genocidal effect that decades of federally-sanctioned removal programs caused in removing Indian children from their families and communities.”).

107. 25 U.S.C. § 1901(1).

108. *Id.* § 1902.

to provide a baseline. As a result, state child welfare laws will mostly still apply in Indian child welfare matters. Congress did provide an interpretive guide, though: in the event that the ICWA provides greater protection for the Indian family, the ICWA must be followed, but if state law provides greater protections, state law must be followed.<sup>109</sup>

Core to the ICWA is tribal jurisdiction over children who are tribal members or eligible for membership.<sup>110</sup> If the child is domiciled on an Indian reservation, tribal jurisdiction is exclusive.<sup>111</sup> That rule is similar to a pre-ICWA Supreme Court decision, *Fisher v. District Court*,<sup>112</sup> which stripped state courts of jurisdiction over Indian child custody matters arising in Indian country. When the child is not domiciled on the reservation, then the state court presumptively must transfer the case to tribal court if the tribe petitions for transfer, with limited exceptions.<sup>113</sup> The ICWA makes Indian tribes parties to Indian child welfare proceedings in state courts regardless.<sup>114</sup> These provisions add significant teeth to Congress' mandate to states to allow tribes to assert their interest in their own children.

The ICWA provides minimum procedural protections for Indian custodians and tribes. Indian parents cannot consent to the termination of their parental rights outside of the presence of a judge.<sup>115</sup> States must comply with specific notice provisions for Indian parents, custodians, and tribes.<sup>116</sup> States must also provide counsel for indigent parents and custodians.<sup>117</sup> At the time of the ICWA's enactment, states rarely afforded basic procedural protections to Indian families.<sup>118</sup> State agencies and law enforcement routinely coerced Indian families into consenting to the removal and to the termination of their custodial rights *at the time of the removal*.<sup>119</sup> If there was a formal removal hearing before a judge, the courts rarely gave notice about the hearing to Indian families. And if they did appear at a hearing, state courts would not allow them to testify, present evidence, confront witnesses, or even see the affidavits presented to the court.<sup>120</sup> Of course, the states did not offer Indian parents the right to counsel, and their tribes were never involved.

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109. *Id.* § 1921.

110. *Id.* § 1903(4).

111. *Id.* § 1911(a).

112. 424 U.S. 382 (1976).

113. 25 U.S.C. § 1911(b).

114. *Id.* § 1911(c).

115. *Id.* § 1913(a).

116. *Id.* § 1912(a).

117. *Id.* § 1912(b).

118. H.R. REP. NO. 95-1386, at 11 (1978).

119. *E.g., id.*

120. *Id.* One instructive example is the story of Cheryl Spider DeCoteau, who testified before Congress that the State of South Dakota removed her children without providing her notice of the court hearing where the state would justify the removal of her children. FORT, *supra* note 44, at 22–24. Decades later, little had changed in some South Dakota courts:

The ICWA's substantive requirements include higher burdens of proof to terminate the parental rights of Indian parents and custodians.<sup>121</sup> State courts may not terminate parental rights without the testimony of a witness qualified to understand and explain to the court the child-rearing practices of the tribe to which the child and parents belong.<sup>122</sup> State courts must give preference in foster care placement and adoption to biological relatives, members of the same tribe as the family, and other Indians before granting placement with non-Indians.<sup>123</sup> States must also take "active efforts" to reunify the Indian family prior to termination.<sup>124</sup> Prior to the ICWA (and now, frankly), state social workers and judges applied a white, nuclear family standard to Indian families.<sup>125</sup> State agencies overtly discriminated against Indian families, sometimes even adopting policies that treated any Indian child living on a reservation as automatically being in a state of neglect, justifying removal.<sup>126</sup> Prior to the

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Plaintiffs claim Judge Davis initiated six policies, practices and customs for 48-hour hearings which violate the Due Process Clause and ICWA. Those are:

1. Not allowing parents to see the ICWA petition filed against them;
2. Not allowing the parents to see the affidavit supporting the petition;
3. Not allowing the parents to cross-examine the person who signed the affidavit;
4. Not permitting the parents to present evidence;
5. Placing Indian children in foster care for a minimum of 60 days without receiving any testimony from qualified experts related to "active efforts" being made to prevent the break-up of the family; and
6. Failing to take expert testimony that continued custody of the child by the Indian parent or custodian is likely to result in serious emotional or physical damage to the child.

Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749, 763 (D.S.D. 2015) (citation omitted), *rev'd on other grounds sub nom.* Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018).

121. 25 U.S.C. § 1912(e)–(f).

122. *See id.*

123. *Id.* § 1915.

124. *Id.* § 1912(d).

125. *See generally* Thomas L. Crofoot & Marian S. Harris, *An Indian Child Welfare Perspective on Disproportionality in Child Welfare*, 34 CHILD. & YOUTH SERVS. REV. 1667, 1671 (2012) ("From an Indian Child Welfare perspective, an on-going systemic bias against Indian children and families has been established beyond a reasonable doubt and has been admitted to be official child welfare policy.").

126. *See generally* Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, in *FACING THE FUTURE* 50, 56 (Matthew L.M. Fletcher, Wenona T. Singel & Kathryn E. Fort eds., 2009) ("The cultural values and social norms of Native American families—particularly indigenous child-rearing practices—were viewed institutionally as the antithesis of a modern-day 'civilized' society.").

ICWA, Congress found that states' removal of Indian children was "whole-sale."<sup>127</sup>

The ICWA was the first time Congress adopted standards governing child welfare. Most states did not provide many (or any) of the protections required in the ICWA to any child, let alone Indian children.<sup>128</sup> Within a few decades after the ICWA's enactment, state legislatures greatly enhanced due process protections for all children.<sup>129</sup> However, states continue to lag, for example, in providing active efforts to support the reunification of families.<sup>130</sup> Tribes usually are far more progressive than states in seeking reunification.<sup>131</sup>

Worse, in some jurisdictions in the United States, the percentages of Indian children being removed by states have not changed much for the better;<sup>132</sup> indeed, bias abounds.<sup>133</sup> The ICWA did not solve the ravages of poverty nor did the ICWA solve the perception of most Americans that poverty is the equivalent of neglect.<sup>134</sup> The law has had one generation to change generations of trauma,<sup>135</sup> but there is so much more work to be done. And the ICWA is

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127. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affs. of the S. Comm. on Interior & Insular Affs.*, 93d Cong. 3 (1975) [hereinafter *Senate Hearing*, Byler Statement] (statement of William Byler, Executive Director, Ass'n on Am. Indian Affs.).

128. Marvin Ventrell, *The History of Child Welfare Law*, in *CHILD WELFARE LAW AND PRACTICE* *supra* note 42, at 189, 193.

129. See generally Brief of Casey Family Programs et al. as Amici Curiae in Support of Respondent Birth Father at 6–7, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12–399) (“[In 1978,] Congress adopted the experience-tested, best-practices framework for custody decisions. . . . [A]s the parallel laws of many States reflect, ICWA enforces the gold standard for child welfare decisions for all children.”).

130. See generally Eliza M. Hirst & Annika L. Jones, *Breaking the Cycle of Intergenerational Child Maltreatment: A Case for Active Efforts for Dependent Minor Parents and Their Children in State Custody*, 67 *JUV. & FAM. CT. J.*, no. 3, 2016, at 45, 51–52 (comparing ICWA’s “active efforts” requirement to state law’s “reasonable efforts” requirement).

131. *FORT*, *supra* note 44, at 403 (“[Tribal child welfare] departments . . . often do a better job ensuring that tribal cultural norms are followed when working to keep families together and children safe.”).

132. Crofoot & Harris, *supra* note 125, at 1671.

133. E.g., Vernon B. Carter, *Prediction of Placement into Out-of-Home Care for American Indian/Alaskan Natives Compared to Non-Indians*, 31 *CHILD. & YOUTH SERVS. REV.* 840, 846 (2009) (“[T]he decision-making that occurred when choosing to remove American Indian/Alaskan Native children from their homes may have been biased.”); Crofoot & Harris, *supra* note 125, at 1671 (“A continuing lack of compliance, from the Indian Child Welfare perspective, suggests that a systemic racial bias continues to exist in federal and state child welfare systems. This means, at least for Indian children, that racial bias is a recent part of the child welfare system.”).

134. Cf. Jody Levison-Johnson, *Poverty and Neglect Are Not the Same—It’s Time to Realign Our Response*, APHSA: AM. RESCUE PLAN SERIES (May 21, 2021) <https://aphsa.org/APHSABlog/mhshpp/poverty-and-neglect-are-not-the-same.aspx> [perma.cc/2JL8-MLTG] (“For far too long our human and social services systems have been governed in a way that confuses poverty with neglect.”).

135. Christopher D. Campbell & Tessa Evans-Campbell, *Historical Trauma and Native American Child Development and Mental Health: An Overview*, in *AMERICAN INDIAN AND*

critical to that work for Indian families; compliance with it is closely associated with better outcomes for Indian children.<sup>136</sup>

### B. Realism in Lawyering Indian Child Welfare Matters

Since the ICWA is not a comprehensive child welfare law, there are several critical gaps in the law and ambitious provisions open to interpretation. And because state courts exercise incredible discretion that is infrequently reviewable by an appellate court,<sup>137</sup> the ICWA is vulnerable to manipulation by the parties that oppose its application. Parties in an Indian child welfare matter that come to the proceeding intending to undercut the ICWA's protections for Indian parents and custodians possess almost unstoppable advantages at virtually every step. Indeed, "[b]ecause [the] ICWA is a federal statute enforced by the states, tribes are in a particularly vulnerable position when information about their children is dependent on the actions of state social workers."<sup>138</sup> It is sadly not unusual when a party attempts to defraud a court in order to avoid the application of the ICWA.<sup>139</sup>

For example, consider an emergency removal matter where the state removes an Indian child from their home.<sup>140</sup> The state will frequently place the

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ALASKA NATIVE CHILDREN AND MENTAL HEALTH 1 (Michelle C. Sarche, Paul Spicer, Patricia Farrell & Hiram E. Fitzgerald eds., 2011).

136. See Crofoot & Harris, *supra* note 125, at 1672 ("Successful Indian programs provide a model of culturally appropriate foster care delivery. They are based on Indian strengths such as the interdependence of extended family, mutual respect and mutual help from family members, and the esteemed role of tribal elders in leadership, discipline, and spiritual guidance. Services are home-based and include outreach. They recruit Indian foster parents, have services provided by Indian workers and have small caseloads. They integrate culturally relevant professional services with traditional Indian therapies." (citations omitted)); Gordon E. Limb, Toni Chance & Eddie F. Brown, *An Empirical Examination of the Indian Child Welfare Act and Its Impact on Cultural and Familial Preservation for American Indian Children*, 28 CHILD ABUSE & NEGLECT 1279, 1288 (2004) ("Evidence indicates that compliance with ICWA promotes better outcomes through reunification.").

137. Vivek S. Sankaran, *Child Welfare Appellate Advocacy*, in CHILD WELFARE LAW AND PRACTICE *supra* note 42, at 731, 733.

138. Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529, 537 (2012).

139. *E.g.*, Collins v. Mo. Bar Plan, 157 S.W.3d 726, 734 (Mo. Ct. App. 2005) (reversing a decision where an adoption attorney recommended removal of evidence of Native heritage to avoid the application of the ICWA); E.T. v. R.K.B. (*In re* Adoption of B.B.), 417 P.3d 1, 4 (Utah 2017) ("Birth Mother admitted to having perpetrated a fraud on the district court and suborning perjury from her brother-in-law, all in an effort to keep Birth Father from intervening in the proceedings, and all against the backdrop of what I believe was untimely and therefore invalid consent.").

140. See generally Josh Gupta-Kagan, *Due Process of Law and Child Protection*, in CHILD WELFARE LAW AND PRACTICE *supra* note 42, at 387, 411; Ann M. Haralambie & Donald N. Duquette, *A Child's Journey Through the Child Welfare System*, in CHILD WELFARE LAW AND PRACTICE, *supra* at 419, 432-34. We could begin before the emergency hearing because states should work with families *before* a crisis erupts that compels the state to take emergency action, but they rarely do. In our experience, tribal members throughout Indian country talk about how

child with foster parents,<sup>141</sup> perhaps because of ethnocentric bias of the worker or the foster care licensing process.<sup>142</sup> At that first emergency removal hearing, the court must determine whether there is any reason to know the child is an Indian child under the ICWA.<sup>143</sup> It is here where states first and most routinely fail to comply with the ICWA.<sup>144</sup> Failure to notify the tribe means that the tribe's interests under the ICWA will not be heard. If the tribe doesn't know about a case, it cannot intervene or offer useful resources to the Indian parents and their children.<sup>145</sup> If it does not intervene, the tribe cannot participate in the court hearings where it could seek transfer to tribal court or demand compliance with the ICWA's procedural and substantive rules.

If the tribe does not intervene, courts naturally consider the case not to fall under the ICWA. However, if a tribe is notified, it might decide not to seek transfer to tribal court if the state agency represents to the tribe that it will comply with the ICWA or not seek termination of parental rights, for example.<sup>146</sup> The tribe's decision not to transfer stems from its believe that reunification will happen or because the tribe's court is geographically distant from the parents.<sup>147</sup> Later on, perhaps months or years later, if the tribe finds that

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the state agency ignores early reports of a family in crisis, only to swoop in and remove the child once that crisis explodes. That means there is no time to find a relative, no time to notice the tribe, the child is placed far from home, and the emergency proceeding often happens with no tribal input. Most emergency proceedings happen within 24 to 72 hours. *Id.* at 433. This is certainly not enough time to get a tribal representative to attend and, likely, insufficient time for a parent to have competent representation.

141. *E.g.*, B.J. Jones, *In Their Native Lands: The Legal Status of American Indian Children in North Dakota*, 75 N.D. L. REV. 241, 246 (1999) ("An Indian child in North Dakota is over eight times more likely to be placed in foster care than a non-Indian child.").

142. *Cf.* Kelly Halverson, Maria Elena Puig & Steven R. Byers, *Culture Loss: American Indian Family Disruption, Urbanization, and the Indian Child Welfare Act*, 81 CHILD WELFARE 319, 333 (2002) ("The authors of this article have personally experienced how intimidating such a process can be, particularly when representatives of the child welfare system exhibit cultural bias and distrust.").

143. 25 C.F.R. § 23.107 (2017).

144. *See* Lorelei Laird, *Tribal Rights*, A.B.A. J., May 2015, at 15, 16 ("widespread noncompliance"); CAL. ICWA COMPLIANCE TASK FORCE, REPORT TO THE CALIFORNIA ATTORNEY GENERAL'S BUREAU OF CHILDREN'S JUSTICE 25 (2017).

145. *See generally* Shanna Knight, Victoria Sweet & David Simmons, *Improving Outcomes in Indian Child Welfare Cases: Strategies for State-Tribe Collaboration*, 36 CHILD L. PRAC. 16, 16 (2017) ("One of the best ways to improve ICWA practice is for state and tribal workers to build strong, cooperative relationships. In some jurisdictions, state social workers will call tribal representatives to let them know formal notice will be sent regarding a child who may be a member or eligible for membership in their tribe. This gives the tribes the chance to verify the information immediately and provide a formal response quickly. In other locations, these relationships have led to state social workers collaborating with tribal social workers on case plans.").

146. *Cf. id.* at 18 ("All of this was done through the tribe's social services with state court oversight since the tribe lacked its own court system . . .").

147. For example, see *Puyallup Tribe of Indians v. State (In re M.S.)*, where, in some of the more heartbreaking testimony to make it into an appellate case, the tribal caseworker from Puyallup Tribe in Washington explained to a trial court in Oklahoma why they waited two years to transfer the case: "We were very hopeful they would get their children back." 237 P.3d 161,

the state is not fulfilling its promises, then it has no recourse as a practical matter. Even if the tribe appeals, which could lead to the tribe prevailing on the notice issue months or years later, the remedy is to remand for compliance with the ICWA, further delaying a permanent placement for the Indian child.<sup>148</sup>

States often do not comply with the notice requirements to tribes.<sup>149</sup> And many state courts drag their feet in transferring cases to tribal courts.<sup>150</sup> Private adoption agencies and their attorneys, as their allies in the children's bar, can be relentless—and unethical—in fighting the application of the ICWA to Indian children they are trying to adopt out to non-Indian families.<sup>151</sup> Rebecca Nagle's *This Land* podcast played a tape of Jay McCarthy, a prominent adoption attorney who claims to specialize in the adoption of Indian children, advising his non-Indian clients that the ICWA does not require notice to tribes of private adoption petitions; his advice was exactly wrong.<sup>152</sup> Enforcement of the ICWA at the trial level can depend entirely on the choices (even whims) of the trial judge, on whether the tribe chooses to intervene or seek transfer in the case, and on whether the state provides the tribe timely notice at all.

Indian parents also lose when the tribe is not involved.<sup>153</sup> Although the tribe's interests and the Indian parents' interests do not always align, they do align in many state court cases because they share the same procedural

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168 (Okla. 2010). It is our understanding that this reason is perhaps the most common reason tribes choose not to transfer cases during the reunification stage. The second is the tribal concern about the availability of sufficient tribal resources for the families, though it is our experience that tribes with limited resources still commit and spend time with families that need help.

148. See Sarah Krakoff, *Indian Child Welfare Act: Keeping Families Together and Minimizing Litigation*, COLO. LAW., Feb. 2001, at 81, 82–83.

149. Laird, *supra* note 144, at 16 (describing “widespread noncompliance” with notice requirements).

150. See Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 646 (1994) (noting “inherent biases” and “cultural hostility” of state courts); see also Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 589–90 (2002) (canvassing the literature on state court reluctance to transfer Indian child welfare cases to tribal courts).

151. See Gregory D. Smith, *ICWA Adoptions: An Indian Child Welfare Act Primer*, 5 ACCORD, LEGAL J. FOR PRAC. 81, 88–91 (2016) (describing several cases of professional misconduct designed to avoid the application of ICWA to an Indian child).

152. This Land Podcast, *Supply and Demand*, CROOKED MEDIA, at 15:18–15:37 (Sept. 7, 2021) [hereinafter *This Land, Supply and Demand*], <https://crooked.com/podcast/4-supply-and-demand> [perma.cc/D6UJ-K3ZS] (“But when it’s a voluntary proceeding like this, the tribe doesn’t have rights that are equal to a parent. And even 40 years now since it’s been enacted, that’s still not understood. It’s like a myth that somehow the tribe has the upper hand in a voluntary proceeding, and that’s just not the law.”). The ICWA does allow the tribe to intervene and demand the state court comply with placement preferences, even in voluntary adoption proceedings. 25 U.S.C. § 1911(c) (“In any State court proceeding for the . . . termination of parental rights to[] an Indian child, . . . the Indian child’s tribe shall have a right to intervene at any point in the proceeding.” (emphasis added)).

153. See Knight et al., *supra* note 145, at 18 (“Connecting with a tribe and accessing available services and supports also benefits parents.”).

rights.<sup>154</sup> That often means that if the tribe is not notified, the Indian parents' rights under the ICWA are less likely to be enforced. Parents' attorneys are too frequently unaware of the benefits of learning and invoking the ICWA on behalf of their clients. It is important for tribes and parents' counsel to work together to the extent that they can. If the tribe is not involved, Indian parents are almost always on their own.

Foster parents are not usually parties to a child welfare matter, but their involvement can be deeply impactful. There is a good chance the foster parents came to the foster care system intending to permanently adopt children (almost always infant babies); they are often called "foster-to-adopt" families.<sup>155</sup> Adoption agency representatives regularly encourage families to go this route. However, this is not a real thing as a matter of law.<sup>156</sup> The "foster-to-adopt" strategy does not vest rights in those parents, but foster-to-adopt families too often do not understand this even when they are warned.<sup>157</sup> Congress's mandate in the ICWA (and of state legislatures under state law) to reunify the family typically becomes secondary to the wishes of the foster-to-adopt family.<sup>158</sup> The same is true under state law.<sup>159</sup> From that point on, every discretionary state action is a chance to benefit the foster-to-adopt family. Initial emergency foster care placements likely last for a few months, but they

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154. *E.g.*, *State v. Elise M. (In re Interest of Zylena R.)*, 825 N.W.2d 173 (Neb. 2012) (requiring transfer of a case to tribal court under 25 U.S.C. § 1911(b) where tribe and birth mother made motion to transfer).

155. Abbie E. Goldberg, April M. Moyer, Lori A. Kinkler & Hannah B. Richardson, "When You're Sitting on the Fence, Hope's the Hardest Part": Challenges and Experiences of Heterosexual and Same-Sex Couples Adopting Through the Child Welfare System, 15 ADOPTION Q. 288, 290 (2012); Maggie Wong Cockayne, Note, *Foster to Adopt: Pipeline to Failure and the Need for Concurrent Planning Reform*, 60 SANTA CLARA L. REV. 151, 152 (2020).

156. *Cf.* Cockayne, *supra* note 155, at 153 ("Fost-adopt is a misnomer that has been incorrectly used to describe concurrent planning.").

157. Kelley Porter, *What a Foster-To-Adoption Process Is Really Like*, HUFFPOST (Jan. 23, 2013), [https://www.huffpost.com/entry/foster-to-adoption-process\\_n\\_2496567](https://www.huffpost.com/entry/foster-to-adoption-process_n_2496567) [perma.cc/6GZ8-UFSZ] ("I do not think there is any amount of training that can truly prepare a person to understand the opposing elements of fostering-to-adopt, and the State's number one goal, which is reunification of families. Sure they warn you, sure your head 'understands.' Logically you can spout off to any person who will listen that it is important to keep families together. Realistically, though, to the heart, it is a different matter.").

158. Cockayne, *supra* note 155, at 164 ("With the two goals of adoption and reunification at direct odds with each other, it is no surprise that foster parents often sabotage reunification to increase their chances of adoption."). *Cf.* This Land, *Supply and Demand*, *supra* note 152, at 21:58–22:33 ("And except for Robyn, Piper's grandma, every other Native family lost. These foster parents, Jennifer and Chad Brackeen, Danielle and Jason Clifford, and their [co-plaintiffs] the Librettis, didn't just fight ICWA, they fought to adopt a child over what their foster training told them to expect and do, over kinship placements that studies and experts say are best for all children, over what federal and state laws say should have happened.") (referencing the facts of the *Brackeen* case).

159. Goldberg et al., *supra* note 155, at 290 ("Although foster-to-adopters may have a strong sense of emotional responsibility for the children in their care, they are not their legal parents.").



could also last years. During that time, foster-to-adopt families, usually enabled by state workers and judges,<sup>160</sup> emotionally attach themselves to the Indian child.<sup>161</sup> They bide time until the moment they believe is inevitable, based on the representations of the state workers and adoption agency counsel, that they will be able to adopt the child. State workers and judges usually see potential adoptive parents as worthy of support, especially if they view them as the “only family” of the foster child.<sup>162</sup> Additionally, the foster-to-adopt family can send a child back if they decide for whatever reason they do not want the child, hoping for a different child instead.<sup>163</sup>

The underlying racism of the foster care system is well documented,<sup>164</sup> and we have seen it first-hand in our work. It is well established, given the history of colonization of Indigenous peoples in America, that the state workers, foster-to-adopt families, and children’s attorneys demonize the Indian parents and custodians during the fostering process.<sup>165</sup> The parents almost always suffer from abject poverty and the resulting mental health issues and additional problems. The longer the fostering period, the greater the intensity of foster-to-adopt families’ desire to adopt. That intensity often leads foster-to-adopt families to employ desperate, adversarial actions designed to protect their status and undermine the chance for Indian families to be reunified. Likely advised by adoption attorneys, foster-to-adopt parents occasionally employ social media tools and, in extreme circumstances, take their cases to shows like Dr. Phil.<sup>166</sup>

The end goal of foster care is the reunification of the family, but the reality of the child welfare system is that the state will frequently move to terminate

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160. Cockayne, *supra* note 155, at 166–67 (“One study found that foster parents were likely to avoid all contact with parents, in part because of active discouragement from child caseworkers . . . . However, in practice, caseworkers actively discouraged foster parents from initiating contact with parents or attending court hearings.”).

161. Carolyn Lipp, *Fostering Uncertainty?: A Critique of Concurrent Planning in the Child Welfare System*, 52 FAM. L.Q. 221, 236 (2018).

162. *E.g.*, L.A. Cnty. Dep’t of Child. & Fam. Servs. v. Arturo G. (*In re Santos Y.*), 112 Cal. Rptr. 2d 692, 697 (Ct. App. 2001) (“The trial court, feeling compelled by the Indian Child Welfare Act, ordered the minor in this dependency case removed from *the home of the only parents the minor knows*, and transferred to a home on a Chippewa Indian reservation in Minnesota. We apply the ‘existing Indian family doctrine’ to reverse the trial court’s placement order.” (emphasis added)).

163. See Cockayne, *supra* note 155, at 162–63.

164. Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 217–19 (2013); Darcey H. Merritt, *Lived Experiences of Racism Among Child Welfare-Involved Parents*, 13 RACE & SOC. PROBS. 63, 63 (2021). See generally ROBERTS, *supra* note 92 (documenting extensive racism against Black families in particular).

165. See Crofoot & Harris, *supra* note 125, at 1671 (“From an Indian Child Welfare perspective, an on-going systemic bias against Indian children and families has been established beyond a reasonable doubt and has been admitted to be official child welfare policy.”).

166. See *infra* Section V.B on abusive media practices.

parental rights.<sup>167</sup> Under state child welfare systems, states do not have to provide the “active efforts” that are required under the ICWA for Indian parents and custodians.<sup>168</sup> The Adoption and Safe Families Act required states to seek termination of parental rights as soon as fifteen months after removal,<sup>169</sup> regardless of whether the parents have had much of a chance to rehabilitate themselves. Less than half (47 percent) of families are reunified.<sup>170</sup> Numerous states have been hauled into court to respond to state-wide civil rights claims about physical, sexual, and emotional abuse of their foster children, so we know many states have terrible foster care systems.<sup>171</sup>

Prior to the termination of the rights of Indian parents or custodians, the tribe (if it has been noticed and has intervened) might consent to the foster care placement pending the outcome of the reunification process.<sup>172</sup> Keep in mind that during these many months, a foster-to-adopt family is waiting out the clock. Once the state moves to terminate parental rights, the process usually turns its focus to looking for a permanent placement. Typically, the foster-to-adopt parents will file a petition to adopt, but the tribe might want to bring that child home and place the child with their relatives or other tribe members, which then leads to a contested adoption proceeding. If the state placed an Indian child with a non-Indian family early enough in the child’s life, we often see the foster-to-adopt families and their counsel employ the “only family” argument to demonize Indian families, Indian tribes, and the ICWA.<sup>173</sup> And it almost always works. Child welfare cases rarely go up on appeal until the

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167. Haralambie & Duquette, *supra* note 140, at 445 (“[A]gencies are moving more quickly to termination.”).

168. See generally Hirst & Jones, *supra* note 130, at 52 (comparing ICWA’s “active efforts” requirement to state law’s “reasonable efforts” requirement).

169. Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska’s Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, 19 ALASKA L. REV. 57, 66 (2002).

170. CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT 3 (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf> [perma.cc/2RUV-3A4V].

171. E.g., Emily Palmer & Campbell Robertson, *Mississippi Fights to Keep Control of Its Beleaguered Child Welfare System*, N.Y. TIMES (Jan. 17, 2016), <https://www.nytimes.com/2016/01/18/us/mississippi-fights-to-keep-control-of-itsbeleaguered-child-welfare-system.html> [perma.cc/A5RJ-6K8Z] (“A rash of deaths of children in custody has plagued Texas’ system in recent years. After a trial on the lawsuit there, a District Court issued a ruling in December saying children who spent more than 18 months in custody ‘almost uniformly leave state custody more damaged than when they entered.’”).

172. Cf. L.A. Cnty. Dep’t of Child. & Fam. Servs. v. J.E. (*In re Alexandria P.*), 176 Cal. Rptr. 3d 468, 487–88 (Ct. App. 2014) (noting that placement preferences for foster care placement differ from that of adoptive placements).

173. E.g., Petition for a Writ of Certiorari at 2, R.P. v. L.A. Dep’t of Child. & Fam. Servs., 137 S. Ct. 713 (2017) (No. 16-500) (“The California state courts below interpreted federal law to require a six-year-old ‘Indian child’ to be removed from Petitioners—the *only parents she had ever known*, who had raised her for more than four years—and placed for adoption with a party preferred under the Indian Child Welfare Act.” (emphasis added)).

court terminates the parents' rights.<sup>174</sup> By the time the parents or the tribe seeks to appeal, all the damage is done; it is usually too late.

Despite the reality that non-Indian adoptive parents usually prevail over Indian parents and tribes, ICWA's opponents want the ICWA gone completely. In the past decade, nonprofit organizations dedicated to the eradication of civil rights laws designed to protect underprivileged minorities have argued that the ICWA is unconstitutional.<sup>175</sup> Since no federal court had ever held that the ICWA was unconstitutional on any ground, these anti-ICWA advocates applied a shotgun strategy. Part IV describes their various arguments.

#### IV. THE CONSTITUTIONAL CHALLENGES TO THE ICWA

Congress possesses plenary power in Indian affairs.<sup>176</sup> That power derives from several sources that work alone and in conjunction with each other. First, the Commerce Clause delegates Congress power over commerce with Indian tribes.<sup>177</sup> Second, the Treaty Power extends federal powers over Indian affairs where the United States agreed to take Indian tribes under its duty of protection, or what we usually now refer to as the "trust relationship."<sup>178</sup> Third, the duty of protection itself, the existence of which is implied by the structure of the Constitution, is a source of federal powers.<sup>179</sup> Fourth, the Supremacy Clause ensures that any federal laws enacted concerning Indian affairs preempt contrary state laws.<sup>180</sup> Fifth, the Property and Territory Clause grants Congress plenary powers over the lands owned by the United States in trust for the benefit of Indians and tribes.<sup>181</sup> Sixth, the earliest federal statutes enacted in Indian affairs, the Trade and Intercourse Acts, completely preempted the field of Indian affairs by prohibiting anyone not licensed as a representative of the federal government from engaging in trade or intercourse with Indian tribes.<sup>182</sup> Finally, the Supreme Court has even held that Congress possesses powers in Indian affairs that predate the Constitution.<sup>183</sup>

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174. Cf. Sankaran, *supra* note 137, at 733.

175. Brown, *supra* note 102; Clarren, *supra* note 102.

176. United States v. Lara, 541 U.S. 193, 200 (2004).

177. *Id.* (citing U.S. CONST. art. I, § 8, cl. 3).

178. *Id.* at 201–02 (citing U.S. CONST. art. II, § 2, cl. 2) (discussing import of Treaty Power in Indian affairs).

179. United States v. Kagama, 118 U.S. 375, 384 (1886).

180. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

181. Lara, 541 U.S. at 200 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 209–10 (1982 ed.)).

182. Act of July 22, 1790, ch. 33, 1 Stat. 137; see RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 77 cmt. a (AM. L. INST., Proposed Final Draft 2021).

183. Lara, 541 U.S. at 201.

## A. Congressional Authority Under the Commerce Clause

ICWA opponents claim that the Commerce Clause was an insufficient source of authority for Congress to enact the law.<sup>184</sup> This argument derives partly from the exceptionally poor historical scholarship by Robert Natelson, who was cited extensively in Justice Thomas's concurring opinion in *Adoptive Couple*. Greg Ablavsky eviscerated Natelson's scholarship, pointing out that his key source was misquoted and his overall historical research was deeply flawed.<sup>185</sup> The argument only makes the remotest semblance of sense if one starts from the proposition that congressional authority under the Constitution is limited to the exact terms of the Constitution. In Indian affairs, Indian tribes are mentioned in the Commerce Clause.<sup>186</sup> Therefore, in this world created by racial gaslighting,<sup>187</sup> Congress may only regulate commerce and nothing else. As Indian child welfare is not commerce,<sup>188</sup> ICWA opponents see no congressional authority.

They are wrong, and every court has so held. Even if we take commerce out of the plenary powers equation, the United States possesses a duty of protection for every federally acknowledged Indian tribe. That duty of protection not only *enables* Congress to act to protect Indian people, including Indian children, it *obligates* Congress to act. As we wrote a few years back, the United States has interfered with the lives of Indian families since the Founding.<sup>189</sup> The United States took Indian children hostage during the Indian wars.<sup>190</sup> It also took Indian children from their homes and placed them in military and religious boarding schools.<sup>191</sup> Even more, the federal government—and

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184. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658–59 (2013) (Thomas, J., concurring).

185. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1033–37 (2015) (discussing Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007)); see also Brief for Amici Curiae Gregory Ablavsky & Matthew L.M. Fletcher on Behalf of Petitioner Navajo Nation at 24–26, *In re Y.J.*, No. 20-0081, 2021 Tex. LEXIS 977 (Aug. 18, 2021) (detailing fatal flaws in Natelson's work).

186. U.S. CONST. art. I, § 8, cl. 3. "Indians not taxed" are mentioned in the Fourteenth Amendment, but more on that later. *Id.* amend XIV, § 2.

187. Angeliq M. Davis & Rose Ernst, *Racial Gaslighting*, 7 POL., GRPS., & IDENTITIES 761, 763 (2019) ("Just as racial formation rests on the creation of racial projects, racial gaslighting, as a process, relies on the production of particular narratives.").

188. Ironically, and unfortunately, child welfare absolutely *is* commerce. Adoption agencies charge adoptive parents as much as \$40,000 per adoption. David Dodge, *What I Spent to Adopt My Child*, N.Y. TIMES (Feb. 18, 2020), <https://www.nytimes.com/2020/02/11/parenting/adoption-costs.html> [perma.cc/A6EY-VD9C]. Adoption attorneys like Jay McCarthy add an additional \$10,000 to that fee, blaming the ICWA, raising that figure to \$50,000. This Land, *Supply and Demand*, *supra* note 152, at 12:55–13:04, 16:42–17:09.

189. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 892–910 (2017) (describing the control over Indian children exercised by the Founding generation).

190. *Id.* at 895–910.

191. *Id.* at 938–44.

states—placed Indian children in non-Indian homes.<sup>192</sup> While each of those examples is likely unconstitutional under the Fifth and Fourteenth Amendments, congressional plenary power to take those actions was never questioned by the Supreme Court.<sup>193</sup> In 1978, Congress chose to protect Indian families through the enactment of the ICWA.<sup>194</sup> Given this long history, congressional power to carry out that remedial action obviously should not be questioned.

### B. Equal Protection

Congress possesses the power to enact Indian affairs statutes that create classifications based on Indian status.<sup>195</sup> So long as the classification is rationally related to the federal government's fulfillment of the duty of protection, it is valid.<sup>196</sup> If courts subjected every federal law that created a classification based on Indian status to strict scrutiny under the Fifth Amendment, then there would be very little left of Title 25 of the United States Code.<sup>197</sup>

Federal laws establish several types of Indian status classifications.<sup>198</sup> The oldest federal laws provided that Indian affairs laws applied to "Indians."<sup>199</sup> Throughout most of the nineteenth century, federal laws used this classification.<sup>200</sup> Even today, critically important laws, such as laws providing for Indian country criminal jurisdiction, depend on "Indian" status.<sup>201</sup> Eventually, Congress began to enact laws that applied to Indians based on their blood quantum or tribal membership status.<sup>202</sup> The ICWA uses multiple definitions for different purposes. Congress defined an "Indian child" as a child who is a tribal member or eligible for membership.<sup>203</sup> Congress also extended prefer-

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192. *Id.* at 952–56.

193. *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) ("We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.").

194. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963.

195. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

196. *Id.* ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.").

197. *Id.* at 552–53.

198. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 512 (2020).

199. *E.g.*, 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").

200. Fletcher, *supra* note 198, at 512–13.

201. *E.g.*, 18 U.S.C. § 1153(a) ("Any Indian who commits against the person or property of another Indian or other person any of the following offenses . . .").

202. Fletcher, *supra* note 198, at 513–14.

203. 25 U.S.C. § 1903(3) (defining "Indian" as a tribal member); *id.* § 1903(4) (defining "Indian child" as either a tribal member or a child eligible for membership).

ences in adoption placements to other family members who are tribal members, other tribal members, and other “Indians” who are not members of the child’s tribe.<sup>204</sup>

Anti-ICWA opponents focused on the Indian children who are not tribal members, but merely eligible for membership, and the Indian families who are not members of the child’s tribe.<sup>205</sup> Rather than challenge the ICWA directly as a racial classification, a non-starter,<sup>206</sup> they have decided to focus on the parts of the ICWA that apply to persons who are Indians but not members of a tribe. This strategy is based on a gloss on Indian law introduced by disgraced Judge Kozinski, who theorized that all classifications based on Indian status not rooted in tribal membership are unconstitutional.<sup>207</sup> If Kozinski is right, then every Indian affairs statute that applies to “Indians” or to Indian people based on their blood quantum should be subjected to strict scrutiny under the equal protection component of the Fifth Amendment’s Due Process Clause. That would include, to name a few, the Indian Civil Rights Act,<sup>208</sup> much of the Indian Reorganization Act,<sup>209</sup> and the large thrust of the federal Indian country criminal jurisdictional statutes.<sup>210</sup>

Needless to say, Kozinski was wrong. As Fletcher has argued, Congress possesses the power to make classifications based on Indian status, whether it

204. *Id.* § 1915(a) (referencing, without definition, “other Indian families”).

205. The Goldwater Institute sarcastically invoked *Plessy v. Ferguson* in its attack on the ICWA. Gale & McClure, *supra* note 104, at 312. How deeply cynical they have to be to claim to be racial justice warriors, given that the institute is advocating against the teaching of critical race theory. *America’s History Wars*, ECONOMIST (July 10, 2021), <https://www.economist.com/united-states/2021/07/10/americas-history-wars> [perma.cc/5XAB-ZBZ6] (“The Goldwater Institute [is] a conservative think-tank seeking to prevent the teaching of critical race theory in schools . . .”); see also Charles H.F. Davis III, *Suppressing Campus Protests and Political Engagement in U.S. Higher Education: Insights from the Protest Policy Project*, 1 CURRENTS 105, 107 (2019) (“Goldwater’s interests in free speech, though not explicit, have been to (re)establish a discriminatory precedent in higher education by suppressing and punishing political dissent.”).

206. Even the deeply split Fifth Circuit en banc panel rejected this claim. *Brackeen v. Haaland*, 994 F.3d 249, 267–68 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022) (mem.).

207. Fletcher, *supra* note 198, at 502 n.39 (discussing Kozinski’s argument).

208. 25 U.S.C. § 1301(4) (“‘Indian’ means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.”).

209. *Id.* § 5129 (“The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.”).

210. *E.g.*, 18 U.S.C. § 1153(a) (“Any Indian who commits against the person or property of another Indian or other person any of the following offenses . . .”); *id.* § 1152 (“This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.”).

uses the term “Indians” standing alone, or blood quantum, or tribal membership.<sup>211</sup> The Constitution provides that Indian tribes are entities about which Congress can legislate,<sup>212</sup> and it further provides that “Indians not taxed” are classifications of persons.<sup>213</sup> But the Constitution defines neither of those two terms. Fletcher has argued that Congress, as the holder of the Indian affairs plenary power, is the logical source for the definition of those terms.<sup>214</sup> So long as Congress acted rationally in defining an entity as an “Indian tribe” or a person as an “Indian,” the classification is valid under the Constitution.<sup>215</sup>

In enacting the ICWA, Congress acted rationally to fulfill its trust responsibility to Indians and tribes. Congress chose to acknowledge children who were eligible for tribal membership but not yet members for several reasons.<sup>216</sup> First, Indian children are not born tribal members; they must apply for membership. For example, though Fletcher and Singel’s children are eligible for membership in multiple Michigan Anishinaabe tribes, they had to choose which tribe their children would claim membership in. Second, Congress acknowledged that, for whatever reason, Indian custodians might not yet have made that choice for their children. Such reasons could include that the state or another group (like a religious adoption agency) took the child at birth. Therefore, Congress was acting rationally in including children who are not yet members of a tribe but are eligible.

The ICWA also extended placement preferences to Indian families who are not members of the child’s tribe.<sup>217</sup> Prior to the ICWA, state agencies openly discriminated against all Indian families.<sup>218</sup> States declined to license Indian families as foster families;<sup>219</sup> this is still a serious problem because states like South Dakota do not contact Indian foster families, preferring to place children with non-Indian families.<sup>220</sup> States also intentionally place Indian

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211. Fletcher, *supra* note 198, at 532–46, 550–53.

212. U.S. CONST. art. I, § 8, cl. 3.

213. *Id.* amend. XIV, § 2.

214. Fletcher, *supra* note 198, at 546.

215. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

216. Fletcher, *supra* note 198, at 551–52.

217. 25 U.S.C. § 1915(a).

218. *Senate Hearing*, Byler Statement, *supra* note 127, at 5 (“The discriminatory standards applied against Indians parents and against their children in removing them from their homes are also applied against Indian families in their attempts to obtain Indian foster or adoptive children.”); *cf.* 25 U.S.C. § 1901(4) (“[A]n alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”); *id.* § 1901(5) (“[T]he 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.”).

219. Bruce Davies, *Implementing the Indian Child Welfare Act*, 16 CLEARINGHOUSE REV. 179, 182 (1982).

220. Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011, 12:00 PM), <https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system> [perma.cc/Q7J]-5SU6 (“In that year, hundreds of native children

children with non-Indian families: in the early 1970s, 85 to 90 percent of Indian children in foster care were placed in non-Indian homes.<sup>221</sup> By including Indian families who are not members of the child's tribe, Congress forced states to put Indian families back in the mix of placement preferences.

Additionally, many Indian tribes are interrelated, like the tribes of the Three Fires Confederacy of Anishinaabe nations in the western Great Lakes or the tribes of the Haudenosaunee Confederacy of the eastern Great Lakes. While it is true not all Indian tribes are alike, it is also true that states and the federal government discriminated against all Indians alike; for example, the federal government forced Indian children from across the country to attend boarding schools like Carlisle and Haskell.<sup>222</sup> It is also true that placement preferences are not mandates, and state courts must still find that a placement is in the best interest of the Indian child. Finally, it is rare for Indian children to be placed with Indian families who are not members of their tribe.<sup>223</sup>

If the plaintiffs prevail in persuading the Court that the ICWA is subject to strict scrutiny, perhaps providing a path for the Court to strike down the ICWA altogether, the likely immediate consequences will be a series of attacks on the federal statutes that establish and govern federal criminal jurisdiction over Indian country. These statutes date back to the 1790s,<sup>224</sup> and the jurisdictional hook is the classification "Indian."<sup>225</sup> If these classifications are subject to strict scrutiny, then it is very possible that the bulk of federal criminal jurisdiction in Indian country would be thrown into complete disarray.

### C. Tenth Amendment Commandeering

The Fourteenth Amendment mandates that states must ensure equal protection and due process.<sup>226</sup> Section 5 of the Fourteenth Amendment extends enormous enforcement power to Congress.<sup>227</sup> The Supreme Court has held that Congress may not "commandeer" state legislatures in the effectuation of

in South Dakota were placed in white foster homes. Officials on the Pine Ridge reservation, several hours away, also say they have 20 empty homes.").

221. H.R. REP. NO. 95-1386, at 9 (1978).

222. BRENDA J. CHILD, BOARDING SCHOOL SEASONS 3-6 (1998).

223. See 25 U.S.C. § 1915(a).

224. The Indian Country Crimes Act, 25 U.S.C. § 1152, dates back to the 1790 and 1793 Trade and Intercourse Acts. MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 7.4, at 317 (2016) (citing Act of July 22, 1790, ch. 33, 1 Stat. 137, and Act of Mar. 1, 1793, ch. 19, 1 Stat. 329).

225. 18 U.S.C. § 1152 ("This section shall not extend to offenses committed by one *Indian* against the person or property of another *Indian*, nor to any *Indian* committing any offense in the Indian country who has been punished by the local law of the tribe . . . ." (emphases added)); *id.* § 1153 ("Any *Indian* who commits against the person or property of another *Indian* or other person any of the following offenses . . ." (emphases added)).

226. U.S. CONST. amend. XIV, § 1.

227. *Id.* amend. XIV, § 5.



federal policy, but Congress may engage in “remedial commandeering” under Section 5.<sup>228</sup>

Anti-ICWA opponents claim that the ICWA runs roughshod over state government powers to handle child welfare. They argue that states possess exclusive power, reserved by the Tenth Amendment, to regulate child welfare. Specifically, they contend that the ICWA’s obligations upon states to provide active efforts to reunify the Indian family,<sup>229</sup> to take into consideration the testimony of a qualified expert witness on Indian child-rearing,<sup>230</sup> and to keep records regarding placements,<sup>231</sup> violate the Tenth Amendment by commandeering states—a position that a majority of the Fifth Circuit adopted in *Brackeen v. Haaland*.<sup>232</sup> The anti-ICWA opponents view these provisions as merely congressional preference on the best practices of child welfare generally.

Nonetheless, they are wrong on the merits of a straight-up commandeering analysis.<sup>233</sup> But more fundamentally, the ICWA is authorized by Section 5 of the Fourteenth Amendment. The broad sweep of the statute is therefore consistent with an effort to stop state discrimination against Indian families that led to one-third of Indian children being removed from their homes, with the large majority of those children being placed with non-Indian families.<sup>234</sup>

The ICWA’s active efforts, qualified expert witness, and recording requirements are all designed to enforce the Fourteenth Amendment’s equal protection and due process requirements on states. Congress found that states had been discriminating against Indian families on the basis of race, leading to the “wholesale” removal of Indian children from their homes.<sup>235</sup> States were intentionally targeting Indian children for removal because of their race, occasionally deeming any children residing on a reservation, by definition, as experiencing neglect.<sup>236</sup> States believed that Indians’ extended family parenting was inappropriate, applying a nuclear family standard without regard to Indian child-rearing practices.<sup>237</sup> States also coerced Indian custodians into

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228. Rebecca Aviel, *Remedial Commandeering*, 54 U.C. DAVIS L. REV. 1999, 2022–55 (2021).

229. 25 U.S.C. § 1912(d).

230. *Id.* § 1912(e).

231. *Id.* § 1915(e).

232. 994 F.3d 249, 268 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022) (mem.).

233. Gale & McClure, *supra* note 104, 315–35.

234. H.R. REP. NO. 95-1386, at 9 (1978).

235. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (quoting *Senate Hearing*, Byler Statement, *supra* note 127, at 3).

236. *Cf. Graham*, *supra* note 126, at 56 (“The cultural values and social norms of Native American families—particularly indigenous child-rearing practices—were viewed institutionally as the antithesis of a modern-day ‘civilized’ society.”).

237. *See Senate Hearing*, Byler Statement, *supra* note 127, at 18, 22.

voluntarily terminating their parental rights by threatening to terminate their welfare benefits, or through “entrapment.”<sup>238</sup>

Finally, at least nine states, most of which have significant Indian child welfare dockets or Indian country lands within their territories, have incorporated much of the ICWA’s protections into state law.<sup>239</sup> These states have no commandeering concerns at all.

If any one of the ICWA’s provisions is found to violate the Tenth Amendment’s anti-commandeering principle, the immediate potential impact could be the end of much state criminal jurisdiction in Indian country. Public Law 280, the federal law that extended state criminal jurisdiction into six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—is a mandatory, unfunded federal mandate imposed on those states.<sup>240</sup> States are not even authorized to tax Indian country property or property rights in order to fund the mandatory extension of criminal jurisdiction.<sup>241</sup> If commandeering applies robustly to Indian affairs statutes like Public Law 280, then it seems likely that challenges to that statute will likely follow—and perhaps succeed.

#### D. Nondelegation

Invoking its Indian affairs powers, Congress required state courts to follow tribally promulgated placement preferences.<sup>242</sup> Some, but not all, tribes have adopted placement preferences that differ from the default preferences in the ICWA.<sup>243</sup> Opponents claim that the ICWA violates the nondelegation doctrine, which prohibits Congress from delegating its legislative function to another branch of government, or in this case, another government.<sup>244</sup> These opponents, again, are wrong. As the Fifth Circuit held, either Congress validly incorporated another sovereign’s law as its own, or the tribal placement preferences are a valid delegation of regulatory authority to tribes.<sup>245</sup> Congress regularly delegates authority to Indian tribes; Indian country liquor regulation

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238. *Id.* at 21–22.

239. See *Comprehensive State ICWA Laws*, TURTLE TALK, <https://turtletalk.blog/icwa/comprehensive-state-icwa-laws> [perma.cc/JY78-E5YA] (compiling state ICWA laws from California, Iowa, Michigan, Minnesota, Nebraska, Oklahoma, Oregon, Washington, and Wisconsin).

240. See 18 U.S.C. § 1162(a) (providing that the six states “shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country”).

241. *Id.* § 1162(b) (“Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . .”). In *United States v. Bryant*, the Supreme Court recently acknowledged that states are not doing their jobs under Public Law 280. 579 U.S. 140, 146 (2016) (“Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country.”).

242. See 25 U.S.C. § 1915(c).

243. For examples of tribal laws, see FORT, *supra* note 44, at 406–12.

244. *E.g.*, State Appellees’ En Banc Brief at 28–36, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479).

245. *Brackeen v. Haaland*, 994 F.3d 249, 361 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022) (mem.).

and environmental protection are examples of this delegation.<sup>246</sup> In both instances, tribes employ their own legislative powers and adopt rules to fulfill federal regulatory prerogatives.

This Part merely summarizes the constitutional questions raised by ICWA opponents. Absent a radical change in Indian law, the seriousness of these questions is significantly overblown. Settled law going back literal centuries protects the ICWA. But other factors have skewed the defense of the ICWA. In Indian law, everything can change with five votes at the Supreme Court.

#### V. LAWYERING THE CONSTITUTIONALITY OF THE ICWA BEFORE THE SUPREME COURT

By any measure, the strategies of the anti-ICWA groups have been a dramatic success. In 2013, when the Court decided *Adoptive Couple v. Baby Girl*,<sup>247</sup> in which Justice Thomas' concurring opinion all but begged for a direct constitutional challenge,<sup>248</sup> no federal court had ever declared even a single provision of the ICWA unconstitutional. Nine years later, as *Brackeen*<sup>249</sup> puts the overall constitutionality of the ICWA before a Court now flooded with radically conservative justices, anti-ICWA groups have reached the last stage of their crusade.

The strategy employed by ICWA opponents, who are incredibly well funded, targeted the weakest parts of national tribal interests. ICWA opponents intervened or brought original actions in state and federal jurisdictions from the East Coast to the West Coast.<sup>250</sup> Moreover, the ICWA's primary defenders and advocates are almost exclusively trial-level attorneys.<sup>251</sup> Because

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246. *E.g.*, 18 U.S.C. § 1161 (liquor regulation); 33 U.S.C. § 1377 (water quality standards).

247. 570 U.S. 637 (2013).

248. *Id.* at 656 (Thomas, J. concurring) (arguing that interpretations of the ICWA offered by respondents raise "significant constitutional problems").

249. The Supreme Court recently granted four separate certiorari petitions to review *Brackeen*. Reagan Priest, *Supreme Court to Hear Indian Child Welfare Act Case Involving Navajo Child*, NAVAJO TIMES (Mar. 8, 2022), <https://navajotimes.com/reznews/supreme-court-to-hear-indian-child-welfare-act-case-involving-navajo-child> [perma.cc/T3F6-U6H8].

250. *E.g.*, *Carter v. Tahsuda*, 743 F. App'x 823, 824 (9th Cir. 2018) (challenging the constitutionality of the ICWA), *cert. denied sub nom. Carter v. Sweeney*, 139 S. Ct. 2637 (2019); *Nat'l Council for Adoption v. Jewell*, No. 15-cv-675, 2015 WL 12765872, at \*1 (E.D. Va. Dec. 9, 2015) (challenging 2015 ICWA regulations), *vacated as moot*, No. 16-1110, 2017 WL 9440666 (4th Cir. Jan. 30, 2017); *Complaint for Declaratory and Injunctive Relief at 2, Whitney v. United States*, No. 19-cv-00299 (D. Me. June 27, 2019) (challenging the constitutionality of the ICWA); *Defendant Cherokee Nation's Brief in Support of Motion to Dismiss at 4, Fisher v. Cook*, No. 19-cv-02034 (W.D. Ark. May 6, 2019) (challenging the constitutionality of the ICWA as applied); *Doe v. Piper*, 165 F. Supp. 3d 789, 793 (D. Minn. 2016) (challenging the constitutionality of the state's ICWA law).

251. Typically, attorneys representing parties attempting to enforce the ICWA in appellate court are family court specialists retained by tribes or sole-practice or small-firm generalists. *E.g.*, *People ex rel A-J.A.B. v. H.J.B.*, No. 21CA0764, 2022 WL 711105 (Colo. App. Mar. 10, 2022) (reversing a judgment in which the Indian mother's attorney was the sole practitioner); *In re*

there are no attorney fee award statutes, nonprofit litigation firms cannot dedicate sufficient resources to defend the ICWA. Professor Fort is the only full-time appellate attorney defending the ICWA in the entire nation. Tribes and national tribal organizations do not have the resources to dedicate even one attorney to ICWA appellate cases full-time. Of course, for-profit litigation firms do not handle ICWA cases except in rare circumstances, such as when a case becomes sufficiently notorious for justifying pro bono or reduced-fee work.

Because states are so lax at notifying tribes of Indian child welfare matters, tribes often do not hear about cases that involve existential challenges to the ICWA until far too late. What's more, states usually do not even notify tribes of ICWA appeals at all, even when the tribe intervened below.<sup>252</sup> Often, a tribal attorney, social worker, or Professor Fort would hear about a case because attorneys representing anti-ICWA groups would promote their anti-ICWA work on social media.<sup>253</sup> Or the tribe would receive notice of a case already decided at the first level of appeal and must then attempt to force a second appeal so that it can participate (an effort that would be futile if the state does not have an intermediate court of appeal).<sup>254</sup> Moreover, in most instances where anti-ICWA parties bring an appeal, the attorney defending the ICWA would have limited or no appellate practice experience. Professor Fort's ICWA defense clinic attempts to fill that gap. The ICWA clinic has filed dozens of amicus briefs in such cases or represents tribes directly,<sup>255</sup> but this is not enough.

There are thousands upon thousands of ICWA cases pending in trial and family courts throughout the nation at any given time. Moreover, there are about thirty reported state court ICWA appellate opinions filed each year,<sup>256</sup> and many, many more unreported cases. Indeed, there is more appellate work than several large law firms can handle.

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T.F., 972 N.W.2d 1 (Iowa 2022) (reversing a judgment in which the tribe's attorney was a family court specialist); *In re D.H. Jr.*, 501 P.3d 376 (Kan. Ct. App. 2021) (unpublished table decision) (reversing a judgment in which the Indian mother's attorney was the sole practitioner).

252. Kathryn Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, AM. INDIAN L.J., Spring 2020, at 105, 115.

253. Cf. Alyosha Goldstein, *Possessive Investment: Indian Removals and the Affective Entitlements of Whiteness*, 66 AM. Q. 1077, 1080 (2014) (describing social media campaign of the adoptive parents in *Adoptive Couple v. Baby Girl*).

254. Compare *In re Dependency of Z.J.G.*, 471 P.3d 853 (Wash. 2020) (reversing a judgment in which the Central Council of the Tlingit and Haida Indian Tribes of Alaska, backed by several amici, filed a brief), with *In re Dependency of Z.J.G.*, 448 P.3d 175 (Wash. Ct. App. 2019) (affirming a judgment in which no tribe or amicus filed a brief).

255. E.g., *MSU Law Professor Kathryn Fort Argues Indian Child Welfare Act (ICWA) Case Before Colorado Supreme Court*, INGHAM CNTY. LEGAL NEWS (Apr. 8, 2021), <http://www.legal-news.com/ingham/1498199> [perma.cc/6HUA-758Z] (describing Professor Fort's work on behalf of the Chickasaw Nation).

256. Fort & Smith, *supra* note 252, at 109 ("Every year there are usually around thirty reported state appellate court cases involving ICWA.").

The anti-ICWA groups knew this—and exploited it. Given the structural disadvantages tribal interests face, it was inevitable that the strategy to inundate state and federal courts with attacks on the ICWA would lead to a Supreme Court showdown.

#### A. *Abusive Procedural Strategies*

In contested ICWA cases, the plaintiff or petitioner owns almost all of the procedural advantages, which allows the petitioner to control the narrative. And in Indian child welfare matters in state court, the narrative almost always is non-Indian parties claiming that Indian custodians and potential foster parents are terrible, tragic perhaps, but still terrible.<sup>257</sup> In a state court system where few officials and judges are Indian, this narrative fits the historical legacy that demonizes Indian people and Indian tribes.

It starts with the complaint or the petition since it is the first pleading the court sees. The complaint in a child welfare proceeding is accompanied by affidavits by law enforcement and state workers, which assert that parents and custodians neglect their children. The petition often will claim that there are no Indian foster parents available, and in a contested adoption proceeding, the petition will explain how the petitioners can provide better emotional and financial security than the biological Indian families. Because these cases are typically resolved in motions to dismiss, where the court must presume the facts as stated in the complaint and affidavits are true, the petitioner then controls the narrative at the trial level and beyond. If the state says the Indian custodians are neglectful, for purposes of motion practice, they are. And if the non-Indian parents petitioning for adoption claim that there are no viable Indian families to adopt, then for purposes of motion practice, this is the truth—even when it is not.

Consider the case *Adoptive Couple v. Baby Girl*.<sup>258</sup> There, a non-Indian birth mother, a non-Indian petitioning adoptive couple, and counsel for them both attempted to keep the identity of the Indian child from her tribe, the Cherokee Nation.<sup>259</sup> Counsel sent a notice to the tribe with the Cherokee birth father's name misspelled and an incorrect birthdate for the child.<sup>260</sup> When the Cherokee Nation responded by stating it could not verify the child's eligibility

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257. One line of questioning at oral argument before the en banc panel of the Fifth Circuit appellate court involved the “drunken Indian” stereotype. This Land Podcast, *Before the Court*, CROOKED MEDIA, at 21:20–21:57 (Aug. 30, 2021), <https://crooked.com/podcast/7-before-the-court> [perma.cc/LFH7-WSRL] (“This is purely hypothetical, not, not, not pejorative. Suppose Congress decided that Native Americans were particularly subject to alcohol abuse and that when they were off the reservation, they got into an excessive number of DUI cases and they were treated excessively harshly. Could Congress pass a law that, that enacted a new sentencing regime for, quote, Indians defined similar to this who would get into DUIs?”).

258. 570 U.S. 637 (2013).

259. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 554 (S.C. 2012) (“[I]t appears that there were some efforts to conceal his Indian status.”), *rev'd*, 570 U.S. 637 (2013).

260. *Id.*

for citizenship with the information provided,<sup>261</sup> the family moved the child from Oklahoma to South Carolina, an act they took based on their false representations to the State of Oklahoma, which violated the Interstate Compact on the Placement of Children.<sup>262</sup> The ploy succeeded; the Supreme Court reversed the lower court, concluding that no Indian family had ever been established that the ICWA could protect.<sup>263</sup>

Similarly, the federal suit brought by the states and three non-Indian adoptive couples in *Brackeen* has allowed the anti-ICWA parties to privilege their narrative of the case over the ICWA defenders.<sup>264</sup> For instance, the plaintiffs alleged in the pleadings that the Indian grandmother with whom the Indian child was placed into foster care (and then later adopted) had previously lost her foster care license.<sup>265</sup> That allegation is false (and the plaintiffs likely knew that when they made the allegation),<sup>266</sup> but the procedural posture of the case ensures that no court will have to address this issue. The district court and many of the Fifth Circuit judges relied upon the grandmother's alleged loss of her foster care license in condemning the application of the ICWA to that placement—effectively relying upon a falsehood perpetrated by the plaintiffs, one that procedural rules allow to occur. One would think that ethical rules requiring candor to the tribunal<sup>267</sup> would also require counsel for plaintiffs to correct the record.

Additionally, the post-decision “shadow docket”<sup>268</sup> machinations in *Adoptive Couple* involved potentially abusive procedural maneuvering that

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261. 570 U.S. at 644 (“The inquiry letter misspelled Biological Father’s first name and incorrectly stated his birthday, and the Cherokee Nation responded that, based on the information provided, it could not verify Biological Father’s membership in the tribal records.”).

262. 731 S.E.2d at 554–55.

263. 570 U.S. at 650 (“Biological Father should not have been able to invoke § 1912(f) in this case, because he had never had legal or physical custody of Baby Girl as of the time of the adoption proceedings.”).

264. See *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), cert. granted, 142 S. Ct. 1205 (2022) (mem.).

265. *Id.* at 289.

266. Compare *In re Scott*, No. 27-JV-15-483, at 7 (Minn. Dist. Ct. Jan. 17, 2019), <https://turtletalk.files.wordpress.com/2022/03/in-re-child-p.-case-file.pdf> [perma.cc/QYA3-3QG7] (“[The grandmother] is currently licensed for foster care and adoption.”), with *Brackeen*, 994 F.3d at 289 (Dennis, J., concurring and dissenting) (asserting the grandmother’s license had been “revoked”). See also This Land Podcast, *Grandma Versus the Foster Parents*, CROOKED MEDIA, at 12:03–12:17 (Aug. 30, 2021), <https://crooked.com/podcast/3-grandma-versus-the-foster-parents> [perma.cc/7MFH-TYXE] (“And here’s the most important detail about what happened to [the grandmother.] [H]er license was never revoked or denied because she was discouraged from even applying.”).

267. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (AM. BAR ASS’N 2020) (“A lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”).

268. Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2027 n.1 (2021) (“The shadow docket refers to ‘emergency orders and summary decisions that are outside the high court’s main docket of argued cases and decisions.’”).

undermined child welfare best practices. After the Court reversed and remanded the matter back to the South Carolina Supreme Court,<sup>269</sup> a split state supreme court panel remanded the case to the family court “for the prompt entry of an order approving and finalizing Adoptive Couple’s adoption of Baby Girl, and thereby terminating Birth Father’s parental rights.”<sup>270</sup> The dissent from that order pointed out that “[m]uch time has passed, and circumstances have changed” since the state court had ordered the Indian child to be placed with their biological Indian father.<sup>271</sup> The usual practice in child welfare proceedings is to conduct a “best-interest-of-the-child” hearing at every critical stage of a child’s journey through the system,<sup>272</sup> just as the dissent insisted.<sup>273</sup>

After the state supreme court’s decision, the Cherokee birth father petitioned the Supreme Court for a stay to allow the family court to conduct the hearing; the Court denied the motion without comment.<sup>274</sup> There was no best-interests hearing before the Court ordered the removal of the Indian child from their Cherokee father. When the Indian parent asked for it, the Court barred the lower court from conducting the hearing. If the hearing had occurred, it is possible, even likely, that the Cherokee father would have won. Perhaps the Court was unaware that the typical route for family law practice is to conduct a best-interests hearing. But we will never know—the Court’s reasoning in blocking the hearing remains veiled.

Finally, the selection of the Indian child’s attorney has enormous consequences in the process for the permanent placement of a child.<sup>275</sup> The child’s attorney speaks on behalf of the child, and if the child’s attorney was selected by the parties opposing the ICWA, it is likely that they were selected to oppose the application of the ICWA. Consider the guardian ad litem (GAL) in the *Adoptive Couple* matter chosen by the adoptive couple.<sup>276</sup> In a report to the Court, the GAL ridiculed Cherokee culture by asserting that the only benefit to tribal citizenship was “free lunches” and “little get togethers and their little

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269. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013).

270. *Adoptive Couple v. Baby Girl*, 746 S.E.2d 51, 54 (S.C. 2013).

271. *Id.* (Pleicones, J., dissenting in part).

272. Ironically, in most private adoption cases, the demand for a “best interests” hearing usually comes from the adoptive couple, who tend to prevail in adversarial hearings where they are pitted against underprivileged birth parents and families, leading to what some refer to as “wrongful” adoptions. See Daniel Pollack & Steven M. Baranowski, *Ethical Challenges Remain in the World of Private Adoptions*, IMPRINT (Mar. 18, 2021, 7:00 PM), <https://imprintnews.org/adoption/ethical-challenges-remain-world-private-adoptions/52748> [perma.cc/CTX7-8WDC].

273. 746 S.E.2d at 54 (Pleicones, J., dissenting in part) (“[T]his is a situation where the decisions that are in the best interests of this child, given all that has happened in her short life, must be sorted out in the lower court(s).”).

274. *Birth Father v. Adoptive Couple*, 570 U.S. 940 (2013) (order denying stay).

275. Matthew L.M. Fletcher & Kathryn E. Fort, *Indian Children and Their Guardians Ad Litem*, 93 B.U.L. REV. ANNEX 61 (2013).

276. *Id.* at 61.

dances.”<sup>277</sup> The GAL was so overtly biased in that case that the adoptive couple even agreed to disregard the report.<sup>278</sup> But to ensure success in the case, the adoptive couple then recruited a prominent member of the Supreme Court bar to attack the constitutionality of the ICWA through an amicus brief submitted to the Court.<sup>279</sup> In that brief, counsel serving as the GAL abdicated their role as attorney dedicated to articulating the best interests of the child and instead became merely another line of attack on the ICWA.<sup>280</sup>

Each of these specific kinds of procedural abuses is incredibly impactful, routine, and virtually impossible to remedy in Indian child welfare cases.

### B. *Abusive Media Strategies*

In the past decade, counsel for adoption agencies and adoptive couples have utilized media strategies to demonize Indian families and tribes attempting to enforce the ICWA. As part of the strategy in *Adoptive Couple v. Baby Girl*, the petitioning adoptive parents and their advisors appeared on the television show, Dr. Phil, and on ABC News.<sup>281</sup> They revealed the Indian child’s name and showed images of them on national television, successfully garnering national media attention that repeatedly disparaged the Cherokee Nation, the ICWA, and the Cherokee biological father especially, without any nuance whatsoever.<sup>282</sup> The media followed the wishes of the non-Indian party by referring to them as the “only family” the Indian child had ever known, reinforcing a horrible dehumanization of the child’s biological family, who had custody of the child at that time.<sup>283</sup>

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277. *Id.* at 63 (quoting Brief for Respondent Birth Father at 13, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1191183).

278. *Id.* at 61 n.4.

279. *Id.* at 63 n.21 (noting that the GAL’s brief listed Paul Clement as counsel).

280. *Id.* at 63.

281. Jessica Di Palma, *Adoptive Couple v. Baby Girl: The Supreme Court’s Distorted Interpretation of the Indian Child Welfare Act of 1978*, 47 LOY. L.A. L. REV. 523, 523 n.4 (2014).

282. *See This Land, Supply and Demand*, *supra* note 152, at 28:49–36:35 (describing two separate occasions, the second involving the adoptive parents and adoption attorneys who appeared on Dr. Phil to attack the ICWA).

283. *E.g.*, Thomas Sowell, *Indian Child Welfare Act Does Not Protect Kids*, DENTON RECORD-CHRON., Feb. 1, 2013, at 6A (“This little girl is just the latest in a long line of Indian children who have been ripped out of the only family they have ever known and given to someone who is a stranger to them, often living on an Indian reservation that is *foreign* to them.” (emphasis added)). Observers called out *New York Times* reporter Adam Liptak’s coverage of *Adoptive Couple* as one-sided as well:

Unfortunately, Liptak misrepresents the real issue in this case by making the case about ICWA and the tribe versus the prospective white adoptive parents and ends up promoting the myth that Native American children would be better off with white families. He spends the majority of the article writing about the Native American biological father and the adoptive white parents in a rather biased way. When he talks about the adoptive parents, he quotes the South Carolina Supreme Court that stated that they were “ideal parents who have exhibited the ability to provide a loving family environment” and he



These media strategies are endemic to contested Indian child welfare matters. As a tribal judge, Fletcher witnessed this practice firsthand. He sat on a panel in an Indian child welfare matter that had been transferred from state court to tribal court after a series of lengthy and difficult appeals.<sup>284</sup> The non-Indian foster family, who presumably hoped to adopt the Indian children, and their counsel invited the media to interview and publicize the case upon transfer to tribal court to attack the tribe and the ICWA.<sup>285</sup>

Moreover, these media strategies almost always involve violations of the Indian child's privacy. Anyone who follows ICWA matters knows an incredible amount of personal information about the Indian child in *Adoptive Couple*—personal information that the public will know about that child forever. This type of information is typically considered confidential in child welfare proceedings<sup>286</sup> but becomes sensationalized fodder for anti-ICWA groups.<sup>287</sup>

Like abusive procedural practices, abusive media strategies are difficult to remedy. As far as we can tell, no attorney has ever been sanctioned or disciplined for revealing confidential information about Indian children. Therefore, because it is so effective, it will continue to occur.

### C. The Judiciary's Institutional Capacity Issues

No Supreme Court justice, perhaps in all of history, has much experience in family law.<sup>288</sup> Lawyers rarely rise to political prominence representing traumatized families or adoption agencies. In both *Adoptive Couple v. Baby Girl*

mentions that the adoptive father works at Boeing and the adoptive mother has a doctorate in psychology. However, when [Liptak] mentions the biological father, he only identifies him as a member of the Cherokee Nation and as absent from the child's life. He does not mention that the father is a member of the United States military that served in Iraq and that as soon as he realized that he had mistakenly signed away his rights, he pursued legal help to reverse the action right away.

Laurie Rottach, *ICWA and the Responsibility of Adoption Agencies*, CTR. FOR ADVANCED STUD. IN CHILD WELFARE: STABILITY, PERMANENCY, & ADOPTION (Apr. 3, 2013), [https://casw.umn.edu/spa/icwa\\_and\\_the\\_responsibility\\_of\\_adoption\\_agencies](https://casw.umn.edu/spa/icwa_and_the_responsibility_of_adoption_agencies) [perma.cc/3HEY-LWNN] (discussing Adam Liptak, *Case Pits Adoptive Parents Against Tribal Rights*, N.Y. TIMES (Dec. 24, 2012), <https://www.nytimes.com/2012/12/25/us/american-indian-adoption-case-comes-to-supreme-court.html> [perma.cc/EHR5-JCSK]).

284. *In re Spears*, 872 N.W.2d 852 (Mich. Ct. App. 2015).

285. Patti Brandt Burgess, *Two Foster Children Speak Out About Leaving Home They Love*, TRAVERSE CITY RECORD-EAGLE (June 17, 2018), [https://www.record-eagle.com/news/local\\_news/two-foster-children-speak-out-about-leaving-home-they-love/article\\_7ad7dbd8-e355-51c3-b62c-a64f3456fe05.html](https://www.record-eagle.com/news/local_news/two-foster-children-speak-out-about-leaving-home-they-love/article_7ad7dbd8-e355-51c3-b62c-a64f3456fe05.html) [perma.cc/4THU-TDP6]. The tribal court proceedings are sealed and will not be disclosed here.

286. See Casey Trupin, *System and Policy Advocacy*, in CHILD WELFARE LAW AND PRACTICE, *supra* note 42, at 951, 961–62.

287. See generally Harman Bual, *Native American Rights & Adoption by Non-Indian Families: The Manipulation and Distortion of Public Opinion to Overthrow ICWA*, AM. INDIAN L.J., May 2018, at 270.

288. Cf. Jordan S. Rubin, *Sotomayor Laments Lack of Professional Diversity on High Court*, BLOOMBERG LAW (Oct. 13, 2021, 7:03 PM), <https://news.bloomberglaw.com/us-law-week/sotomayor-laments-lack-of-professional-diversity-on-high-court> [perma.cc/N8TT-X94P] (“The

and the Fifth Circuit's en banc decision in *Brackeen v. Haaland*, the courts made embarrassing mistakes that demonstrated a lack of sufficient expertise in child welfare cases.

In *Adoptive Couple*, Justice Sotomayor's dissent pointed out that the majority's interpretation of the ICWA would have severe unintended consequences in family law cases.<sup>289</sup> The Court held that since the Cherokee father never had physical custody of the Indian child, ICWA protections never accrued.<sup>290</sup> The dissent noted that there could be anomalous, unjust results from this interpretation:

Consider an Indian father who, though he has never had custody of his biological child, visits her and pays all of his child support obligations. Suppose that, due to deficiencies in the care the child received from her custodial parent, the State placed the child with a foster family and proposed her ultimate adoption by them. Clearly, the father's parental rights would have to be terminated before the adoption could go forward.<sup>291</sup>

As Justice Sotomayor correctly pointed out, that Indian father would have no protection under the ICWA. The case's outcome derived from the Court's focus on the Cherokee father's agreement to terminate his parental rights via a text message outside of the presence of the family court judge,<sup>292</sup> which would have otherwise violated the due process protections available to Indian parents.<sup>293</sup> The State of Oklahoma's legislature debated a bill in the aftermath of *Adoptive Couple* that would have prevented the termination of a parent's rights outside of the presence of a judge in open court.<sup>294</sup> These reforms that "echo the requirements of [the] ICWA" would protect all parents, not just Indian parents.<sup>295</sup> The Court demonized the Cherokee birth father because his claims arose under a law that protected his family due to their Cherokee citizenship. The Court further validated the efforts of counsel for the adoptive

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justices lack legal experience with women's rights, racial rights, disability rights, immigration, environmental law, or criminal defense 'outside of perhaps some white collar work,' [Justice Sotomayor] said."); SUSAN NAVARRO SMELCER, CONG. RSCH. SERV., R40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789–2010, at 13 (2010) (noting some current justices have little or no practice experience at all).

289. See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 670 (2013) (Sotomayor, J., dissenting).

290. See *id.* at 654–55.

291. *Id.* at 680–81 (Sotomayor, J., dissenting).

292. *Id.* at 643.

293. See 25 U.S.C. § 1912(f).

294. H.B. 2442, 54th Leg., 2d Sess. § 3(B)(1) (Okla. 2014). The bill seems to have gone nowhere. Counsel for the adoptive couple in *Adoptive Couple* claimed, without evidence, that it would lead to more abortions. Michael Overall, *Oklahoma Lawmakers Hear Debate on Adoption Reform Bill*, TULSA WORLD (Aug. 31, 2020), [https://tulsaworld.com/news/local/oklahoma-lawmakers-hear-debate-on-adoption-reform-bill/article\\_e9fcb007-fcde-5903-b104-a7fe04c590f6.html](https://tulsaworld.com/news/local/oklahoma-lawmakers-hear-debate-on-adoption-reform-bill/article_e9fcb007-fcde-5903-b104-a7fe04c590f6.html) [perma.cc/ZR54-Y569].

295. FORT, *supra* note 44, at 249.

couple to mislead the Cherokee Nation and perpetuate a fraud on the judiciary, hardly an ethical practice.<sup>296</sup> Is this how low the Court has sunk?

In *Brackeen*, Judge Costa's separate opinion pointed out that the Fifth Circuit's en banc decision would "not have binding effect in a single adoption."<sup>297</sup> Apparently, the majority of the Fifth Circuit sitting en banc in *Brackeen* was unaware or uninterested in the fact that all of the relevant contested adoptions in the case had already been concluded.<sup>298</sup> Even if there had been standing, according to Judge Costa, a federal court order on the ICWA would not be binding on any state court,<sup>299</sup> where almost all ICWA matters are decided.<sup>300</sup> In the rush to issue enormous and lengthy opinions on broad constitutional questions, the Fifth Circuit's judges seemed to have ignored their obligation to serve as caretakers of the federal judiciary's jurisdiction.

#### CONCLUSION

Many Anishinaabe people know the aadizookaan (sacred story) of Toad Woman.<sup>301</sup> Toad Woman snuck into a young Anishinaabe couple's lodge and stole their infant child. The young couple tried to find the child but gave up and turned on each other. The trauma of losing their child destroyed their relationship, but the mother kept on looking. Eventually, she found Toad Woman's lodge. Toad Woman had used her powers to magically age the child into a young man. She wanted his labor to provide material resources for her, such as a lodge, deer meat, fish, farmed grains and vegetables, and so on. At first, the mother did not recognize her own child, but she had her suspicions. Toad Woman engaged in what we now call "gaslighting" to trick the mother into leaving, but the mother soon saw through the ruse. She never gave up, and eventually, the young man realized Toad Woman was exploiting him and left with his mother. He returned to his community.

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296. Pollack & Baranowski, *supra* note 272, at 3 ("Improved ethical practice in this area would include requiring the extended family to be researched and appropriately included in the pregnancy planning process, ensuring that any potential biological father is engaged in and informed about the existence of the child, and ensuring the completion of a thorough medical and developmental assessment.").

297. *Brackeen v. Haaland*, 994 F.3d 249, 445 (5th Cir. 2021) (en banc) (Costa, J., concurring and dissenting), *cert. granted*, 142 S. Ct.1205 (2022) (mem.).

298. *Id.* at 370.

299. *Id.* at 445 (Costa, J., concurring and dissenting) ("Texas state courts are 'obligated to follow only higher Texas courts and the United States Supreme Court.'" (quoting *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam)); *see also id.* ("[S]tate courts 'render binding judicial decisions that rest on their own interpretations of federal law.'" (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989))).

300. The ICWA does not apply in tribal courts, and federal courts hear exceptionally few ICWA cases.

301. *E.g.*, MATTHEW L.M. FLETCHER, *THE GHOST ROAD*, 157–62 (2020); *Old Toad-Woman Steals a Child*, in 2 WILLIAM JONES, *OJIBWA TEXTS* 427–441 (Truman Michelson ed., 1919); *The Toad Woman*, in JOHN C. WRIGHT, *THE CROOKED TREE* 53–58 (2d ed. 1915).

The lives and stories of the struggles of American Indian families are only recently being told. Prior to the ICWA, American Indian families had few legal rights and little opportunity to enforce them. Those stories matter a great deal. In the legal arena, the attorneys usually frame those stories and make them available to the judges, the agencies, and the public generally. How these stories are told is especially important in the United States Supreme Court, where lawyers can win or lose a case depending on this framing.

The attacks on the ICWA are attacks on the ability of Indian parents and their children to tell their stories. The ICWA mandates that state agencies and courts hear the stories of Indian families. These are moving stories, stories that non-Indian listeners are not used to hearing, and stories that are uncomfortable and require thoughtful consideration. Cases like *Adoptive Couple v. Baby Girl* and *Brackeen v. Haaland* are decided on the impact of the stories as much as they are law. It is no wonder that those in opposition to the ICWA want it gone. They don't want anyone to know the stories of Indian people, stories of irrepressible and profound love and humility.