THE UNCONSTITUTIONALITY OF THE INDIAN CHILD WELFARE ACT

TIMOTHY SANDEFUR*

INTRODUCTION

The Indian Child Welfare Act (ICWA) of 1978[1] was passed in hopes of redressing abuses by state and federal agencies that in the prior decades had often taken Native American children away from their families for inadequate or improper reasons—sometimes as a consequence of cultural misunderstandings, and sometimes based on an outright policy of compulsory assimilation with majority society.[2] But despite these good intentions, ICWA in practice frequently harms the very children it is supposed to help. It does so by making it harder for state child welfare agencies to protect children who are deemed "Indian"[3] from abuse and neglect and virtually impossible to find these children stable, loving foster and adoptive homes when needed. ICWA violates constitutional rules against race- and national origin-based classifications, exceeds Congress's authority under the Commerce Clause, and violates the rules governing personal jurisdiction of tribal courts—among other things.

Until recently, however, ICWA was one of the "third rails" of America's fraught discourse on race. Supporters of the ICWA status quo regularly play the race card to stifle questions about ICWA's constitutionality and effectiveness, even though this results in worse outcomes for actual children of Native ancestry. The result is like something from *The Twilight Zone*: even though those seeking to reform ICWA wish to provide *stronger* legal protections for children deemed "Indian," and to eliminate the race-conscious

* Vice President for Litigation, Goldwater Institute. My thanks to Adi Dynar of the New Civil Liberties Alliance for helpful suggestions.

1. 25 U.S.C. §§ 1901–1963.

2. *See, e.g.*, Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 892–928 (2017) (relating the historical background of ICWA).

3. As discussed *infra* in subpart I.B, the classification of "Indian child" is a function of ICWA and is one of the central constitutional problems with the Act. This Article uses the term "Indian" because the Act and the Constitution do. This Article also uses the terms "tribal membership" and "tribal citizenship" synonymously.

elements whereby the Act deprives "Indian children" of the security and resources they need, these advocates are characterized as racist or "anti-Indian."[4] And this is often done by those who simultaneously argue that ICWA does not classify based on race. Such rhetorical tactics, writes Ester C. Kim, "serve[] as an impenetrable shield for supporters of tribal interests," whereby certain criticisms of ICWA "can immediately be discounted without further discussion because of [the critic's] non-Indian ancestry."[5] Journalist Naomi Schaefer Riley agrees: few people are willing to question the status quo out of fear of being falsely accused of racism, she notes, "[b]ut the truth is that, in the name of protecting these communities, we're failing to protect their most vulnerable members."[6]

In April 2021, the en banc Court of Appeals for the Fifth Circuit, in long, sharply divided opinions totaling more than 300 pages, addressed many of the constitutional concerns ICWA raises.[7] The court failed to reach a majority opinion on some issues; on others, it held that ICWA does not violate constitutional rules against racial classifications. But it also struck down some portions of the Act on federalism grounds. This Article examines some of ICWA's constitutional flaws and the defenses that have been offered by academics and Fifth Circuit defenders of the ICWA status quo.[8]

4. *See, e.g.*, Mary Jo Pitzl, *Arizona Supreme Court Ruling Allows Non-Native American Couple to Adopt Native Child*, AZCENTRAL: ARIZ. REPUBLIC (June 14, 2017, 10:15 AM), https://www.azcentral.com/story/news/local/arizona/2017/06/14/arizona-supreme-court-tribal-adoptions-indian-child-welfare-act/393958001/ [https://perma.cc/Z8PS-MYDD] (quoting tribal leader calling ICWA challengers "anti-Indian"); 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 [https://perma.cc/NXP4-S2UD] (characterizing challenges to ICWA as "anti-Indian"). *But see* Timothy Sandefur, *Fact Checking the "Fact-Checkers" on ICWA*, GOLDWATER INST.: DEF. LIBERTY BLOG (Dec. 20, 2018), https://indefenseofliberty.blog/2018/12/20/fact-checking-the-fact-checkers-on-icwa/ [https://perma.cc/Z3R8-LBN8] (detailing misrepresentations in the Nagle article).

5. Ester C. Kim, Mississippi Band of Choctaw Indians v. Holyfield*: The Contemplation of All, the Best Interests of None*, 43 RUTGERS L. REV. 761, 789 (1991).

6. NAOMI SCHAEFER RILEY, THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS 157 (2016).

7. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *petition for cert. filed*, No. 21-380 (U.S. Sept. 3, 2021).

8. Omitted here is discussion of the federalism problems with ICWA—such as concerns about commandeering—which will be addressed in a forthcoming article, Timothy Sandefur, *The Federalism Problems with the Indian Child Welfare Act*, 26 TEX. REV. L. & POL. (forthcoming July 2022).

I. A BRIEF EXPLANATION OF WHAT'S AT STAKE

A. ICWA's Differential Treatment of "Indian Children"

ICWA was intended to rein in decades of perceived abuses by state and federal officials, who had sought to coercively integrate Native children into so-called mainstream American society—in the infamous words of Carlisle Indian Industrial School founder Richard Pratt, to "kill the Indian" in order to "save the man."[9] As part of that movement, officials sometimes took Native American children from their parents on the grounds of neglect or mistreatment—determinations that sometimes reflected personal or cultural biases rather than objective assessments of child welfare—and cleared them for adoption by non-Native families.

In the 1970s, revived interest in the mistreatment of Native Americans led Congress to adopt ICWA, which creates a set of rules governing cases that involve the welfare of "Indian children." Although child welfare is a quintessentially state-law matter, ICWA purports to supersede state law for this group of children and imposes a set of rules that are less protective of their individual needs than state law would be, while being more solicitous of tribal governments. In fact, in *Mississippi Band of Choctaw Indians v. Holyfield*,[10] the Supreme Court explained that ICWA "recognizes that the tribe has an interest in the [Indian] child which is distinct from but on a parity with the interest of the parents,"[11] and allows tribal governments to override even the choices of Native parents regarding the upbringing of their children.[12]

The rules ICWA imposes on cases involving "Indian children" differ from the state-promulgated rules that apply to children not deemed "Indian." Consider just three examples: the standards for the termination of parental rights (TPR), the "active efforts" requirement, and the "preferences" in adoption cases.[13]

TPR. If a white, black, Asian, or Hispanic child is abused by her parents, the state can terminate the parental rights of the abusive

9. DAVID TREUER, THE HEARTBEAT OF WOUNDED KNEE: NATIVE AMERICA FROM 1890 TO THE PRESENT 133 (2019).

10. 490 U.S. 30 (1989).

11. *Id.* at 52 (quoting *In re* Adoption of Halloway, 732 P.2d 962, 969 (Utah 1986)).

12. In *Holyfield*, tribal member parents consented to the adoption of their child by a non-Native family. *Id.* at 37–38, 49. The Court allowed tribal officials to nullify that choice. *Id.* at 53–54.

13. For a discussion of these matters, see Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 35–59 (2017).

parent if there is "clear and convincing" evidence that the statutory grounds for TPR exist. This evidentiary standard is required by *Santosky v. Kramer*,[14] which found that a "preponderance of the evidence" standard would allow states too much power to take children away and that a "beyond a reasonable doubt" standard would be too restrictive of the state's ability to protect children.[15] But if a child qualifies as an "Indian child" under ICWA, the rules are different: TPR may not occur unless there is proof "beyond a reasonable doubt," based on expert witness testimony, that the child is in critical danger.[16] This makes it harder to terminate the rights of neglectful or abusive parents of "Indian children"—even when Native parents themselves wish to terminate such rights[17]—which makes it more likely these children will be harmed.[18] And because TPR is typically a necessary step toward adoption, this also sharply limits the availability of adoptive homes for abused or neglected "Indian children."

"*Active efforts.*" Under both the laws of every state[19] and the federal Adoption and Safe Families Act of 1997,[20] TPR may not occur unless state social workers first make "reasonable efforts" to restore a child to the family from which that child was removed due to abuse or neglect.[21] The "reasonable efforts" standard generally requires that officials make rehabilitative services available. But

14. 455 U.S. 745 (1982).
15. *Id.* at 761–69.
16. 25 U.S.C. § 1912(f).
17. *See, e.g.*, S.S. v. Stephanie H., 388 P.3d 569, 576 (Ariz. Ct. App. 2017) (denying Native father's motion to terminate rights of neglectful ex-spouse); *In re* Adoption of T.A.W., 383 P.3d 492, 500 (Wash. 2016) (en banc) (barring Native mother from terminating rights of (non-Native) ex-spouse).
18. *See* Brackeen v. Haaland, 994 F.3d 249, 268 (5th Cir. 2021) (en banc) (per curiam) (finding that the expert witness requirement in 25 U.S.C. § 1912(e) and (f) are unconstitutional, not because they apply only to cases involving children of one particular ancestry, but because they violate the non-commandeering rule), *petition for cert. filed*, No. 21-380 (U.S. Sept. 3, 2021).
19. *See, e.g.*, ARIZ. REV. STAT. § 8–533(B)(3) (requiring a showing of "reasonable grounds to believe that [a parent's inability to discharge parental responsibilities] will continue for a prolonged indeterminate period" to justify TPR); *In re* J.G.S., 550 S.W.3d 698, 704 (Tex. App.—El Paso 2018, no pet.) (noting that section 161.001(b)(1)(N) of the Texas Family Code requires the state to make "reasonable efforts" to return a child to a parent before termination of the parent–child relationship).
20. Pub. L. No. 105-89, §§ 101–501, 111 Stat. 2115, 2116–21 (codified as amended in scattered sections of 42 U.S.C.).
21. *Id.* § 101.

reasonable efforts are not required under state[22] or federal[23] law in cases of "aggravated circumstances," such as abandonment or sexual molestation. The reason is simple: it would be dangerously counterproductive for the law to require officials to return children to households where they are likely be abused again.

But the rules are different for "Indian children." For them, ICWA requires not "reasonable efforts," but "*active* efforts."[24] Although the term "active efforts" has never been definitively defined,[25] it is generally agreed that it requires more than reasonable efforts. The Bureau of Indian Affairs (BIA) has adopted regulations declaring that it means "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family."[26] Such efforts "must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan."[27] Moreover, courts have ruled that, unlike the "reasonable efforts" requirement, the "active efforts" requirement is *not* excused in cases involving "aggravated circumstances."[28] As a consequence, children deemed "Indian" are often returned to households where they will face continued abuse under circumstances in which children not deemed "Indian" would be rescued by state child welfare officers. This is one way in which ICWA requires that "Indian children" be more abused, and for longer, before the state can take action to protect them.[29]

Adoption restrictions. ICWA imposes a set of "preferences" in cases involving the adoption of an "Indian child," whereby that child must be placed in a home with: (a) a member of the child's extended family, (b) other members of the child's tribe, or, failing

22. *See, e.g.*, *In re* A.L.H., 468 S.W.3d 738, 744–45 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (waiving the "reasonable efforts" requirement in cases of "aggravated circumstances").

[23] 42 U.S.C. § 671(a)(15)(D)(i).

24. 25 U.S.C. § 1912(d) (emphasis added).

25. *See, e.g.*, *In re* Adoption of T.A.W., 383 P.3d at 498 (Wash. 2016) (noting the lack of a statutory definition).

26. 25 C.F.R. § 23.2. These regulations are technically not binding on state courts, but state courts typically obey them anyway.

27. *Id.*

28. *E.g.*, *In re* J.S.B., 691 N.W.2d 611, 618 (S.D. 2005); *In re* JL, 770 N.W.2d 853, 863 (Mich. 2009).

29. Brackeen v. Haaland, 994 F.3d 249, 304–05 (5th Cir. 2021) (opinion of Dennis, J.) (finding the "active efforts" requirement unconstitutional, not because it applies to children based on their ancestry, but because it commandeers state officials in mandating that state child welfare officials provide certain types of services, which exceeds Congress's authority), *petition for cert. filed*, No. 21-380 (U.S. Sept. 3, 2021).

either of those, (c) "other Indian families."[30] This means children who are deemed "Indian" must be adopted by "Indian families"—*regardless of tribe*—before they may be adopted by white, black, Asian, or Hispanic families. Given the drastic shortage of Native adoptive homes,[31] and the extraordinary need for such options, these "preferences" prevent "Indian children" from obtaining the adoptive homes they often need.[32]

B. ICWA's Racial Classification

What, then, is the definition of "Indian child"? One of the most fundamental principles of U.S. constitutional law is that the government may not distinguish between people based on race except in the rarest of cases. In *Korematsu v. United States*,[33] the Court established what came to be known as the "strict scrutiny" requirement for racial classifications.[34] In *Morton v. Mancari*,[35] by contrast, it declared that laws that "single[] out Indians for particular and special treatment" are subject to rational basis scrutiny, because they are "political rather than racial in nature."[36]

Of course, *Mancari* does not automatically exempt from constitutional scrutiny any law that differentiates between Indians and non-Indians. To determine whether ICWA falls into the "political" category of *Mancari* or the "racial" category of *Koremastu*, we must look at how the Act actually draws its distinctions.

ICWA defines "Indian child" as a child who is either a tribal member or is (a) eligible for tribal membership and (b) the biological child of a tribal member.[37] Eligibility is determined by

30. 25 U.S.C. § 1915(a).

31. *See, e.g.*, Daniel Heimpel, *L.A.'s One-and-Only Native American Foster Mom*, IMPRINT (June 14, 2016, 4:00 AM), https://imprintnews.org/news-2/l-a-s-one-native-american-foster-mom/18823 [https://perma.cc/2QYQ-ZE2S] (describing shortage of Native foster homes); Elizabeth Stuart, *Native American Foster Children Suffer Under a Law Originally Meant to Help Them*, PHX. NEW TIMES (Sep. 7, 2016, 7:32 AM), https://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832 [https://perma.cc/DQ3A-MV5W] (same).

32. *See Brackeen*, 994 F.3d at 333, 335 (failing to achieve a majority regarding the constitutionality of these two provisions of ICWA, and leaving in place the district court's holding that § 1915(a)(3)'s adoption placement preference for "other Indian families" and § 1915(b)(iii)'s foster placement preference for foster homes approved by "an Indian tribe" are unconstitutional).

33. 323 U.S. 214 (1944).

34. *Id.* at 216.

35. 417 U.S. 535 (1974).

36. *Id.* at 553 n.24, 554–55.

37. 25 U.S.C. § 1903(4).

tribal law, and although different tribes have different standards, *all* of them have this much in common: they depend exclusively on a person's *biological* ancestry. No tribe defines eligibility based on cultural, religious, or linguistic affiliation.[38] Also, a child's eligibility is not itself sufficient: the child must also be the *biological* child of a tribal member. That means a child who is fully acculturated to a tribe, who practices a Native religion, speaks a tribe's language, considers herself part of the tribe, etc., is *not* considered an "Indian child" if he or she lacks the biological criteria for membership. Thus, for example, a child who is adopted by a tribal member is not an "Indian child" under ICWA, no matter how culturally affiliated.[39] On the other hand, a child who has no cultural affiliation with a tribe—does not speak a language, follow tribal traditions, live on or visit tribal lands, or even know about her Native ancestry—*will* qualify as an "Indian child" based exclusively on biological factors.[40] What matters under ICWA is not tribal affiliation in cultural, political, linguistic, religious, or traditional terms. The only relevant consideration is blood.[41]

38. Federal regulations require as a condition of recognition that tribes define membership based on ancestry. *See* 25 C.F.R. § 83.11(e) (describing the "descent" criterion for acknowledgment as a federally recognized tribe). The Navajo tribe did experiment with a fluency requirement for certain government positions—not for citizenship—but loosened that requirement in 2015. Felicia Fonseca, *Navajo Nation Loosens Language Requirements for Top Leaders*, SEATTLE TIMES (July 21, 2015), https://www.seattletimes.com/nation-world/election-focuses-on-navajo-language-fluency-requirement/ [https://perma.cc/RTF8-Y78A].

39. *See, e.g.*, *In re* Francisco D., 178 Cal. Rptr. 3d. 388, 396 (Ct. App. 2014) (finding that ICWA does not apply to a child adopted by a tribal member). Of course, if the tribe chooses to make an adopted child a tribal member, then the child would be deemed "Indian" by virtue of that membership. 25 U.S.C § 1903(4). However, some tribes prohibit this. For example, the Navajo Code states:

> No Navajo law or custom has ever existed or exists now, by which anyone can ever become a Navajo, either by adoption, or otherwise, except by birth. . . . All those individuals who claim to be a member of the Navajo Nation by adoption are declared to be in no possible way an adopted or honorary member of the Navajo People.

NAVAJO NATION CODE tit. 1, § 702(A)–(B).

40. *See, e.g.*, *In re* Alexandria P., 204 Cal. Rptr. 3d 617 (Ct. App. 2016) (deeming child with no cultural affiliation "Indian" under ICWA).

41. This is why some commentators have noted that ICWA will even apply to frozen human embryos and to children conceived in surrogacy arrangements. *See, e.g.*, Adrea Korthase, *Seminal Choices: The Definition of "Indian Child" in a Time of Assisted Reproductive Technology*, 31 J. AM. ACAD. MATRIM. LAW. 131, 146–47 (2018) (arguing that "a tribe should not be expected to relinquish the ability to enroll any child born of a gamete donation," and that "[i]f an egg donation leads to the birth of an Indian child for two non-biological same sex parents, and the donor learns of the birth and co-parent adoption, the ICWA may give the biological parent the ability to withdraw any consent to the adoption"); Daune Cardenas, *ICWA in a World with Assisted Reproductive Technology*, ARIZ. ATT'Y, Apr. 2019, at 18, 20. ("[P]arents conceiving children via [assisted reproductive technology] who know or have reason to know the resulting child may be an 'Indian child' as defined in ICWA should comply

To be precise, one should keep in mind the distinction between *tribal membership*, on one hand, and "Indian child" status under ICWA, on the other.[42] Tribal membership is a function exclusively of tribal law, and tribes are free to set their eligibility requirements as they please.[43] But "Indian child" status is a function of state and federal law, triggered by tribal membership or eligibility—and because this is a function of state and federal law, "Indian child" status under ICWA is a legal classification that must comply with constitutional constraints, including the requirement that race-based categories survive strict scrutiny.

In *Rice v. Cayetano*,[44] the Supreme Court made clear that a race-based classification is one that "singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'"[45] The *Rice* Court held that the law at issue in that case was a *Korematsu*-style racial classification instead of a *Mancari*-style political classification because it was triggered by an "ancestral inquiry,"[46] whereas the political classification in *Mancari* was triggered by tribal membership, which the Court characterized as an essentially voluntary form of political association.[47] Race is "an immutable characteristic determined solely by the accident of birth."[48] Political association is fundamentally voluntary in at least this important respect: it is not a function of biology, and one can choose to disavow a political affiliation.[49]

Because ICWA can apply to children who are not tribal members and may never become tribal members—simply because they are biologically "eligible" for membership—the classification of "Indian child" must be deemed racial, not political. Considerations of political or cultural affiliation play no role in the determination of "Indian child" status. As a result, a child may be deemed "Indian"

with the federal mandates under ICWA.") In other words, ICWA should govern *before conception*, based on the parents' genetics.

42. *See In re* Abbigail A., 375 P.3d 879, 885–86 (Cal. 2016) (drawing this distinction).

43. Federal regulations require that tribes base membership on descent. 25 C.F.R. § 83.11(e). *But see* Cherokee Nation v. Nash, 267 F. Supp. 3d 86, 116–17 (D.D.C. 2017) (holding that, in some circumstances, tribes are barred from drawing lines based on biological ancestry).

44. 528 U.S. 495 (2000).

45. *Id.* at 515 (quoting Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987)).

46. *Id.* at 517.

47. *Id.* at 519–20.

48. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

49. *Cf.* United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) (No. 14,891) ("[T]he individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it.").

and subject to ICWA even if she never becomes a tribal member.[50]

This conclusion is reinforced by the provisions of ICWA that apply to "Indians" *en masse*, rather than to members of specific tribes. The Act's adoption and foster care preferences, as we have seen, give preference in adoption of an "Indian child" to "other Indian families" regardless of tribe. They also require that an "Indian" foster child be placed in a facility approved by "*an* Indian tribe"—not necessarily the tribe of which the child is a member or is eligible to be a member.[51] These and other provisions of ICWA regard "Indians" as fungible, requiring, for example, that a child of Seminole ancestry be placed with a Penobscot family instead of a white or Hispanic family—despite the fact that the two tribes have wholly different cultures and their ancestral homelands are farther apart than Berlin and Rome.

As Ojibwe writer David Treuer has observed, "Culture isn't carried in the blood, and when you measure blood, in a sense you measure racial origins."[52] The idea of "generic Indianness" is a racial construct fashioned by white settlers in North America and corresponding to no tribal political unit. Yet ICWA is fundamentally predicated on that construct, and the Supreme Court's statement in *Holyfield* that ICWA establishes "a Federal policy that, where possible, an Indian child should remain in *the Indian* community,"[53] says perhaps more than the Court realized: ICWA draws a racial line, and places "Indians" on one side—in "the Indian community," regardless of tribe, culture, or politics—and "non-Indians" on the other.

C. ICWA as a Form of National-Origin Discrimination

In *Brackeen v. Haaland*, the Fifth Circuit concluded that ICWA is not race-based because it uses biological factors as an indicator of "potential but not-yet-formalized affiliation with a current political entity."[54] It observed that ICWA's definition of "Indian child"

50. Certain state-law versions of ICWA are even more obviously race-based. The Minnesota Indian Family Preservation Act (MIFPA), for example, contains no requirement (as ICWA does) that the child have a biological parent who is a tribal member. MINN. STAT. ANN. § 260.755(8). Thus, a parent cannot prevent the application of MIFPA to a child by resigning from the tribe—as parents have sometimes done to block ICWA from applying to a child. *See, e.g.*, *In re* M.K.T., 368 P.3d 771, 776 (Ok. 2016).

51. 25 U.S.C. § 1915(b)(iv) (emphasis added).

52. TREUER, *supra* note 9, at 382.

53. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989) (emphasis added) (citation omitted) (internal quotation marks omitted).

54. 994 F.3d 249, 339 (5th Cir. 2021) (en banc) (per curiam), *petition for cert. filed*, No.

excludes "many racially Indian children, such as those belonging to non-federally recognized tribes."[55] The court therefore concluded that the statutory definition creates a *Mancari*-style political classification rather than a racial classification.

This was fallacious for two reasons. First, the fact that the statutory language excludes some Native children from the definition of "Indian child" is not determinative because, as the *Rice* Court said, "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral."[56] If a statute created a classification of, say, "all black people with driver licenses," that would still be a racial classification, even though it excludes black people without driver licenses. Executive Order 9066, which forced Japanese Americans to relocate to detention camps in World War II, did not apply to persons with less than one-sixteenth Japanese ancestry,[57] yet the *Korematsu* Court found it to be a race-based classification subject to strict scrutiny.[58] Thus, the fact that some racially Native children are excluded from ICWA's definition does not prove that it is not a racial classification.

Second, using biological factors as a proxy for future political affiliation is virtually the definition of racial prejudice.[59] Assuming that persons of Japanese ancestry must be classified as politically affiliated in some way with the government of Japan would obviously cross the strict scrutiny line. To presume that persons of

21-380 (U.S. Sept. 3, 2021).

55. *Id.* at 337–38 n.50.

56. Rice v. Cayetano, 528 U.S. 495, 516–17 (2000).

57. *See* WENDY NG, JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II: A HISTORY AND REFERENCE GUIDE xix–xx, 37 (2002) ("According to Colonel Karl Bendetsen's orders"—Bendetsen was "director of the evacuation program"—"anyone with at least one-sixteenth 'Japanese blood' was to be evacuated.").

58. Korematsu v. United States, 323 U.S. 214, 216 (1944).

59. "Prejudice" is an important term here, and unfortunately too little used in this context. Courts and commentators often speak of ICWA's "presumptions" or "preferences" when referring to the legal assumption that a child falling within the biological criteria of ICWA must be affiliated with a tribe or with "the Indian community." For example, in *In re C.H.*, 997 P.2d 776, 780 (Mont. 2000), the Montana Supreme Court observed that "ICWA expresses the presumption that it is in an Indian child's best interests to be placed in an Indian home." But this is not a presumption. It is a prejudice. A presumption is a logical default or baseline which for some neutral reason is deemed a norm from which deviations must be justified. Such a default is not a priori, but is based on a rational calculation of costs and benefits. A prejudice, by contrast, is a kind of stereotyping; it is the assumption that people with some logically unrelated trait—such as the color of their skin or their biological ancestry—must have certain psychological or social characteristics. The assumption that because a child fits within a biological profile he must therefore have certain psychological or social needs is a prejudice, not a presumption. In fact, it is precisely the prejudice the Supreme Court found unconstitutional in *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984).

African, Jewish, or Mexican ancestry are destined for affiliation with some political or religious association, and may therefore be treated differently today, is to racially classify them. The Constitution typically forbids imposing political or legal consequences on individuals based on their ancestry.

The *Brackeen* majority concluded that ICWA does not classify based on biology at all. "[I]nstead, ICWA's Indian child designation classifies on the basis of a child's connection to a political entity based on whatever criteria that political entity may prescribe."[60] But this cannot absolve ICWA of the fact that it is nevertheless triggered by biological ancestry. If Congress were to impose burdens on or grant benefits to individuals based on their membership in a private organization that was itself open only to members of one particular race, that would constitute a racial distinction, regardless of the formalistic argument that Congress had not *itself* adopted the racial component. When the government treats people differently as a function of private discrimination, that private discrimination becomes prohibited state action. The "white primary" case, for example, held that the primary elections of the Democratic Party—in theory a private entity free to discriminate on the basis of race—were nonetheless state action, because attaching state action to private discrimination in such a way was merely a "device that produces an equivalent" of a racial classification.[61] Likewise, while a private entity may engage in sex discrimination, the government may not develop an "intimate relationship" with that entity, such that the government effectively adopts the private discrimination as its own.[62]

Moreover, ICWA is not actually triggered solely by the membership criteria established by tribal governments. On the contrary, it introduces a biological factor of its own that is not necessarily found in tribal law: under § 1903, to be deemed an "Indian child," a child who is not a member of a tribe must be not only biologically eligible for membership but also the *biological* child of a member of a tribe.[63] This means that even if a tribe were to eliminate all ancestral requirements for membership, an eligible

60. *Brackeen*, 994 F.3d at 338.

61. Terry v. Adams, 345 U.S. 461, 469 (1953) (plurality opinion).

62. *See, e.g.*, Sokolow v. County of San Mateo, 261 Cal. Rptr. 520, 527 (Ct. App. 1989) (finding an intimate relationship between a county sheriff's department and private patrol whose membership was restricted to men, and holding "that the [p]atrol's discriminatory membership policy [therefore] constituted state action").

63. 25 U.S.C. § 1903(4).

child whose biological parent is not a tribal member would still *not* be an "Indian child" under ICWA, solely by virtue of a biological fact: i.e., the identity of the biological parent.[64] It is therefore not true that the "Indian child" classification is "based on whatever criteria that political entity [the tribe] may prescribe."[65] Instead, ICWA adds ancestry-based criteria of its own.

Even if ICWA did not establish a racial classification, the biology-based "'proxy' for the child's not-yet-formalized tribal affiliation"[66] still qualifies as a *national-origin* classification, and is therefore just as unconstitutional as an outright racial categorization.[67] In *Espinoza v. Farah Manufacturing Co.*,[68] the Court explained that a "national origin" classification is not only one predicated on a person's foreign citizenship;[69] it also "refers to [classification based on] the country where a person was born, or, more broadly, the country from which his or her ancestors came."[70] Thus, in *Oyama v. California*,[71] the Court found that California's Alien Land Act constituted a form of national origin discrimination (though not outright racial discrimination) because it was triggered by the citizenship or ancestry of a child's parents: "[A]s between the citizen children of a Chinese or English father and the citizen children of a Japanese father, there is discrimination."[72] The same logic applies to ICWA's definition of "Indian child."[73] Although it

64. *See supra* note 39 and accompanying text.

65. *Brackeen*, 994 F.3d at 338.

66. *Id.* at 398 (internal quotation marks omitted).

67. *Cf.* Dawavendewa v. Salt River Project Agric. Imp. & Power Dist., 154 F.3d 1117, 1120 (9th Cir. 1998) ("Because the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a 'national origin' [discrimination] claim . . . ."). Classifications based on national origin are subject to the same strict scrutiny that applies to classifications based on race. Clark v. Jeter, 486 U.S. 456, 461 (1988).

68. 414 U.S. 86 (1973).

69. *Id.* at 89.

70. *Id.* at 88.

71. 332 U.S. 633 (1948).

72. *Id.* at 645.

73. To anticipate a counterargument: concluding that ICWA's definition of "Indian child" violates the rule against national-origin discrimination would not threaten the validity of other federal Indian laws, because those are true political classifications, based on tribal membership. The prohibition on national origin discrimination does not bar the government from treating either foreigners or dual citizens differently for *that* reason, while it prohibits the government from treating people differently based on their country of origin or that of their ancestors. *See Espinoza*, 414 U.S. at 95 (differentiating between illegal discrimination on the basis of ancestry and legal discrimination based on citizenship or alienage); *see also* Finch v. Commonwealth Health Ins. Connector Auth., 946 N.E.2d 1262, 1269 (Mass. 2011) ("The plaintiffs argue . . . that because '*all* aliens, without exception, have a national origin outside of the United States,' discrimination on the basis of alienage is necessarily discrimination on the basis of national origin. This argument fails because its general

was presented with this argument, the *Brackeen* court failed to address it.[74]

II. WHY THE ARGUMENTS FOR THE CONSTITUTIONALITY OF ICWA'S CLASSIFICATION FAIL

A. Tribal Membership as a Tertium Quid

1. The *jus sanguinis* argument

Some Indian law scholars argue that ICWA does not establish a racial classification, but a special *type* of political classification—one with which American constitutional law, rooted as it is in classical liberalism, is not equipped to deal smoothly. This is normally styled the *jus sanguinis* argument.[75] It holds that while some political associations are grounded in principles of social compact, whereby the individual chooses whether to belong to a political association, other, equally legitimate associations are rooted in biological ancestry (*jus sanguinis*, from the Latin for "right of blood"). Professor Gregory Ablavsky, for instance, contends that Indian tribes follow this latter principle, as indeed do almost all nations to some degree, including the United States, and therefore, there should be no constitutional objection to the use of an "ancestry-based distinction[]" in ICWA.[76]

There are three problems with this argument. First, it is irrelevant. *Jus sanguinis* is a principle of citizenship law, but ICWA is not about citizenship or tribal membership; it is about *child welfare*—that is, the law of abuse, neglect, custody, and so forth, as implemented by state agencies and state courts.[77] The concept of *jus sanguinis* citizenship is simply not relevant to those matters.

premise, that aliens may not trace their national origins to the United States, is incorrect.").

74. Brief of Goldwater Institute, Cato Institute, and Texas Public Policy Foundation as Amici Curiae in Support of Plainitffs–Appellees at 6–8, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (No. 18-11479), 2020 WL 291280, at **5–8.

75. *See, e.g.*, Brackeen v. Haaland, 994 F.3d 249, 388 n.51 (5th Cir. 2021) (en banc) (per curiam) ("For illustrative purposes, we note that *jus sanguinis*, or citizenship based on descent, is a common feature of the citizenship laws of foreign nations."), *petition for cert. filed*, No. 21-380 (U.S. Sept. 3, 2021).

76. Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1071–72 (2018) (arguing that large portions of U.S. foreign policy would be subject to strict scrutiny if all federal classifications were deemed race-based whenever they rely on another sovereign's descent-based citizenship considerations).

77. It is worth keeping in mind that ICWA *does not bind* tribal courts—only state courts. 25 C.F.R. § 23.103(b)(1). Indeed, it is unique in federal law in that it is only ever enforced by state officials.

Except for ICWA, no law provides that states may treat the abuse or neglect of a child differently when committed by a consanguineous caregiver as opposed to a non-consanguineous caregiver, and certainly no law permits the mistreatment of a child by birthright citizens versus, say, naturalized citizens. The standards for abuse, neglect, custody, and so forth, are the same, regardless of the citizenship status (or citizenship source) of the parties. Foreign nationals residing in the U.S. are still subject to state child welfare laws, and these laws do not apply different standards to them than to natural-born citizens.[78] Even with respect to TPR, the law is identical with regard to blood relatives and non-blood relatives: an adoptive caregiver's parental rights can be terminated for the same reasons and in the same manner as a consanguineous caregiver's.[79] In short, the idea that the *jus sanguinis* principle of citizenship can justify courts treating children differently based on their biological ancestry commits a category error. *Jus sanguinis* is a perfectly legitimate basis for tribal membership, but it is entirely irrelevant to the question of "Indian child" status under ICWA, let alone to whether state and federal agents can implement different *child welfare* standards for children within one biologically defined classification.

Second, unlike the citizens of foreign nations, all American Indians are citizens of the United States.[80] This means federal and state governments owe them the same protection that they accord other American citizens. "Indian children" are not foreigners, and their actual or potential tribal membership cannot supersede their entitlement to the equal protection of the laws. Remarkably, this fact is entirely ignored in the *Brackeen* en banc opinion—which, in its discursive introduction on the history of American Indian law skips from the 1880s to 1934 without mentioning the Indian Citizenship Act of 1924.[81]

78. True, some international agreements require notification of a foreign consulate upon a charge of child abuse, but the substantive standards for child protection are no different. *See, e.g.*, *In re* Stephanie M., 867 P.2d 706, 713–15 (Cal. 1994) (holding that a state court had jurisdiction to apply state law to terminate parental rights of foreign national parents who committed abuse in the state).

79. *See, e.g.*, H.D. v. J.L.D., 16 So. 3d 334, 335 (Fla. Dist. Ct. App. 2009) (holding an adoptive father to the same standard as it would the child's mother); *In re* Adoption of Q.R.M., No. 1008 WDA 2012, 2013 WL 11287690, at *3 (Pa. Super. Ct. Jan. 4, 2013) (applying an involuntary-termination-of-parental-rights statute to an adoptive father as it would to a consanguineous father).

80. 8 U.S.C. § 1401(b).

81. *See* Brackeen v. Haaland, 994 F.3d 249, 278–81 (5th Cir. 2021) (en banc) (per curiam) (discussing history of the legal treatment of Indians in the United States), *petition*

Third, the argument confuses tribal membership with "Indian child" status under ICWA. While tribes, like foreign governments, are perfectly free to establish criteria for citizenship based on ancestry, the federal and state governments are not permitted to treat *American citizens* differently based on a factor that is itself a proxy for, or triggered by, race or national origin. As the Court explained in *Palmore v. Sidoti*, a case involving interracial child custody, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[82] Ablavsky notes that "Spain, Germany, Israel, and several other nations all extend citizenship to those who trace their descent through ancestral nationals, some from centuries earlier"[83]—but it would be unthinkable (and unconstitutional) for federal or state law to treat American citizens differently simply because their ancestry might entitle them to Spanish, German, or Israeli citizenship.[84]

And "[d]ifferently" is not a strong enough word in this context. ICWA imposes not just different treatment, but radically different, and sub-standard, treatment on children deemed "Indian." Consider ICWA's jurisdiction-transfer provision, which provides that in a state-court child welfare proceeding involving an "Indian child," the state court must—except in unusual cases—relinquish jurisdiction to the courts of the child's tribe.[85] This provision takes no account of whether that tribal court has personal jurisdiction;[86] it is instead triggered by the biology-based "Indian child" status determination. It would obviously violate the Constitution for Congress to enact a law forcing state courts to transfer their jurisdiction to a Spanish, German, or Israeli court on routine family-

for cert. filed, No. 21-380 (U.S. Sept. 3, 2021).

82. 466 U.S. 429, 433 (1984).

83. Ablavsky, *supra* note 76, at 1071.

84. The *Brackeen* en banc decision observes that the fact that a person "may be eligible for citizenship based on their ancestry does not, of course, alter the fact that citizenship and eligibility therefor . . . are political matters concerning the rights and obligations that come from membership in a polity," and concludes from this that the "Indian child" classification is political rather than racial in nature. 994 F.3d at 338 n.51. But this elides the important question, which is not whether a person can have dual citizenship—obviously she can—but whether it is constitutional for state and federal agencies to treat individuals differently because they are genetically entitled to future dual citizenship. That is, whether Congress could restrict the rights of Irish Americans or Greek Americans to marry or beget children or leave property to their heirs due to the fact that their genetic ancestry makes them eligible for dual citizenship in Ireland or Greece. The *Brackeen* en banc decision never answers this question. The answer is obviously no.

85. 25 U.S.C. § 1911(b).

86. *See* Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 TEX. REV. L. & POL. 425, 456–61 (2019) (discussing recent developments regarding personal jurisdiction in ICWA jurisdiction transfer).

law matters, simply because the children involved had genetic ancestry entitling them to Spanish, German, or Israeli citizenship. A law purporting to allow the King of Spain to decide cases involving the adoption of children in California or Texas—simply because their great-great-great-great grandparents emigrated from Spain in the time of King Carlos IV—would be patently unconstitutional. For the same reason, ICWA's use of an ancestry-based classification cannot survive constitutional scrutiny. As with Indian tribes, foreign nations may certainly determine citizenship standards as they see fit. What is not constitutional is for federal or state governments to treat American citizens differently based on their biological ancestry.

2. Are Individual Rights a Form of Chauvinism?

A variation on the *jus sanguinis* argument holds that the idea of political affiliation being fundamentally voluntary is itself merely a cultural prejudice. According to this theory, the Anglo-American common law and the Constitution may be rooted in the principle that each individual should be regarded as a fundamentally free agent, with rights to be protected against others and against the state, but a different, collectivist model is better suited for Native Americans.[87] Thus, the argument goes, ICWA is "a mandate for cultural pluralism in reaction to the destructive hegemony of majoritarian culture,"[88] meaning that when we try to determine whether ICWA creates a *Mancari*-style political classification or a *Korematsu*-style racial classification, we must do so without using the premise of equal individual rights as a baseline.

This argument is subtle, but unpersuasive. First, all Indian children are citizens of the United States, meaning that they are entitled to the same individual rights as citizens of all other ancestries. Other nations, too, have robust cultures of collectivism—Chinese and Japanese societies, for example, have

87. *See, e.g.*, Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 913 (2003) ("[W]hile both Native societies and United States law value individual liberty, they do so within fundamentally different understandings of the relationship of the individual to the group. . . . In Native communities where this difference prevails, individuals are not free to claim entitlements that contravene well-debated collective plans, either at the kinship group, band, or larger community level."); Debra Dumontier-Pierre, *The Indian Child Welfare Act of 1978: A Montana Analysis*, 56 MONT. L. REV. 505, 523 (1995) ("[T]he Indian community focuses on the collective rights of the community as a large cultural group and not on individual rights.").

88. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 599 (2002).

traditionally been quite hostile to the principles of individualism[89]—but nobody would suggest that federal or state governments may therefore lump all American children of Chinese or Japanese descent together and subject them to a separate set of rules based solely on their ancestry, while claiming that individualism is somehow beyond the pale for them. On the contrary, that is precisely what the *Korematsu* Court said would trigger strict scrutiny.[90] And because, as noted below, "Indian child" status differs from tribal membership in that it is a function of federal and state law, it must also abide by the principles of individual rights that underlie our constitutional regime.

Second, whatever the scope of Congress's authority and obligation to serve the interests of tribal governments, it has already chosen to undertake that obligation within the framework of individual rights (however inconsistently). The Indian Civil Rights Act,[91] for example, announces the protection of individual rights as fundamental federal policy and prohibits tribal governments from "deny[ing] to any *person* within its jurisdiction the equal protection of its laws or depriv[ing] any *person* of liberty or property without due process of law."[92] While federal courts have undermined the enforceability of this protection,[93] it is nevertheless congressionally enacted policy, and it necessarily limits the authority of tribal governments in order to protect *individual* rights. This makes clear that the individual rights paradigm must take precedence.[94]

89. *See, e.g.*, ENCYCLOPEDIA OF CONTEMPORARY JAPANESE CULTURE 212 (Sandra Buckley ed., 2002) ("Individualism has often been treated as a Western corruption or dilution of an essential characteristic of the formation of Japanese identity."); W.J.F. JENNER, THE TYRANNY OF HISTORY: THE ROOTS OF CHINA'S CRISIS 111 (1992) ("Chinese upbringing puts little emphasis on raising sons and daughters to find their own ways in life or on encouraging mental independence.").

90. Korematsu v. United States, 323 U.S. 214, 216 (1944). And it was, of course, precisely this sort of lumping together of all American citizens of Japanese ancestry that led to the internment that *Korematsu* infamously upheld; that Is why that decision was overruled. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.").

91. 25 U.S.C. §§ 1301–1304.

92. *Id.* § 1302(a)(8) (emphasis added).

93. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69–70 (1978) (rendering ICWA effectively unenforceable in federal courts with certain extremely rare exceptions).

94. Many tribes themselves also have adopted the individual rights paradigm into their own fundamental laws. *See, e.g.*, NAVAJO NATION CODE tit. 1, § 3 ("Life, liberty, and the pursuit of happiness are recognized as fundamental *individual* rights of all human beings. . . . [N]or shall any *person* . . . be denied equal protection. . . ." (emphasis added)); CHEROKEE CONST. art. III, § 3 ("[T]he Cherokee Nation shall not deprive any *person* of life, liberty or property without due process of law." (emphasis added)).

Third, as a matter of history, it is simply not true either that the political theory of tribal identity overlaps with the legal concept of "Indian child" status under ICWA or that tribes have practiced the types of collectivism assumed by these arguments. Each tribe is different, of course, but many tribes have traditionally based membership eligibility not on biological ancestry but on cultural, political, religious, or traditional factors.[95] In fact, the idea that Indianness is a function of biology was not fashioned by Natives, but by white settlers. "[I]t wasn't until the 1930s that blood quantum became a widespread marker for racial descent," writes David Treuer.[96] "Until then, for hundreds of years, Indian tribes had various means of including or excluding someone."[97] Indeed, Treuer argues that the use of biological factors to distinguish Indian from non-Indian, though common among tribes today, is actually a hand-me-down from white practice.[98] From Cynthia Ann Parker[99] to Sam Houston[100] to William Holland Thomas,[101] history abounds with examples of tribes basing tribal membership on culture rather than biology.

As to the alleged collectivism of tribal practices, the reality is that many tribes have long been noted for their strongly individualistic mores.[102] The idea that "indigenous societies are organized around principles and values that are alien to liberal democratic political values," so that prioritizing the rights and autonomy of the individual "threatens the 'inner logic' of these communities,"[103] is

95. Allison Krause Elder, Note, *"Indian" as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act*, 13 NW. J.L. & SOC. POL'Y 417, 425 (2018) ("People without any ancestral tie to the tribe could sometimes become incorporated into the tribal structure.").

96. DAVID TREUER, REZ LIFE: AN INDIAN'S JOURNEY THOUGH RESERVATION LIFE 283 (2012).

97. *Id.*

98. *Id.* at 282–84.

99. Parker was kidnapped as a child by members of the Comanche in 1836 and raised as a Comanche. Her life story inspired the film *The Searchers*. *See generally* S.C. GWYNNE, EMPIRE OF THE SUMMER MOON: QUANAH PARKER AND THE RISE AND FALL OF THE COMANCHES, THE MOST POWERFUL INDIAN TRIBE IN AMERICAN HISTORY (2010).

100. Houston was adopted by the Cherokee at the age of sixteen, and later became the Cherokee ambassador to the United States. MARQUIS JAMES, THE RAVEN: A BIOGRAPHY OF SAM HOUSTON 127–28 (Univ. of Tex. Press 1988) (1929).

101. E. STANLY GODBOLD, JR. & MATTIE U. RUSSELL, CONFEDERATE COLONEL AND CHEROKEE CHIEF: THE LIFE OF WILLIAM HOLLAND THOMAS 40 (1990) ("William Holland Smith became chief of the Oconaluftee Indians. He was the only white man to hold that office.").

102. *See, e.g.*, HARRY W. PAIGE, SONGS OF THE TETON SIOUX 59 (1970) (remarking on the "fierce individualism of the Sioux"); JOHN GULICK, CHEROKEES AT THE CROSSROADS 141–42 (1960) (comparing individualistic mores of the Cherokee with those of the Kaska); JAMES F. DOWNS, THE NAVAJO 24 (1972) ("Despite close and absolutely essential familial ties, the Navajo remain highly individualistic people.").

103. Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*,

at best a hasty generalization—one that ignores the differences between tribes and lumps all "indigenous societies" together. Indeed, the idea that individualism is merely a "western" or "European" idea, whereas Native peoples are collectivistic, is a modern variant on the Noble Savage myth that has victimized indigenous peoples worldwide.[104] As Professor Sherry L. Smith writes, the white "impulse to seek authenticity among people of color" has often "trap[ped] Native Americans in conceptions shaped by non-Indian assumptions about them"—conceptions that are "based on deeply flawed notions of native histories and cultures," and are themselves "a form of racism and colonialism."[105] Sadly, the argument that a proper ICWA jurisprudence should avoid "privileging individual rights" because doing so "harm[s] tribal revitalization efforts" appears to engage in precisely that sort of broad-brush romanticism and ascription.[106]

Finally, the framework of universal human rights is amenable to a diversity of lifestyles in a way that is not true of a collectivist framework. In an individualistic regime that prioritizes autonomy and choice, people who prefer to associate on collectivist, or even racial, terms are free to do so—whereas in a collectivist regime, no such choice is accorded to those who prefer to live on individualist terms. This is why the proposition that all people are inherently free and equal serves as a proper baseline for political discourse—*not* as a mere cultural preference, but as a matter of logic.[107] The classical liberal principles of individual rights are just what their advocates have always said they are: genuine facts of reality, not mere cultural habits or personal preferences. That is why as far back as 1688, John Locke could rightly say that these principles are as true for Indians as for Europeans, "[f]or truth and keeping of faith belongs to men, as men, and not as members of society."[108]

45 STAN. L. REV. 1311, 1340–41 (1993).

104. *Cf.* Craig S. Galbraith et al., *False Myths and Indigenous Entrepreneurial Strategies*, *in* SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS 4, 20–21 (Terry L. Anderson et al. eds., 2006) (noting how the reservation system "institutionalized a land tenure and property rights system that was fundamentally collective in nature, forcing a culturally alien legal system upon the indigenous populations that, in fact, carried a strong belief in individual property rights, . . . and had little experience or interest in collective organization").

105. SHERRY L. SMITH, HIPPIES, INDIANS, AND THE FIGHT FOR RED POWER 8 (2012).

106. Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 904 (2003).

107. *See* ANTHONY DE JASAY, JUSTICE AND ITS SURROUNDINGS 151 (2002) ("[O]pting for the presumption of liberty is hardly a matter of ethics, of a liberal temperament, or even of efficient social and economic organization. It is a matter of epistemology.").

108. JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, § 14, at 277 (Peter Laslett ed.,

What's more, *Mancari* itself only makes sense within this framework: if individuals choose to become or remain members of a tribe, they are entitled to that choice and to the legal consequences that flow from it. But for the same reason, legal institutions should not ascribe different status or rights to people based on biology. "Distinctions between citizens solely because of their ancestry," the Court has said, "are by their very nature odious to a free people."[109]

B. Consequences for Other Indian Laws

Similarly, there is no merit to the idea that a court ruling that finds ICWA unconstitutional for creating a race-based (or national-origin based) classification would interfere with the authority of tribes to determine their own citizenship standards or result in the invalidation of other federal Indian laws. First, as explained above, nothing about this debate relates in any way to a tribe's authority to determine its own membership eligibility criteria. Rather, the question here concerns only a classification created by federal law: the "Indian child" classification under ICWA. A decision finding ICWA unconstitutionally race-based would leave tribes entirely free to set their own eligibility criteria, as they are now.

Second, although some advocates claim that finding ICWA unconstitutionally race-based would "jeopardize[]" all federal Indian law,[110] this is simply a falsehood. In reality, the racial classification in ICWA is wholly unique. No provision of Title 25 of the United States Code other than ICWA's definition of "Indian child" is triggered solely by race. The Indian Regulatory Act does not do this—it applies to actual members, and to tribal land.[111] The Indian Self-Determination and Education Assistance Act applies to actual members.[112] The Native American Graves Protection and Repatriation Act applies to items that have a cultural affiliation with an existing tribe.[113] ICWA alone applies to "*potential* Indian children, including those who will never be members of their

Cambridge Univ. Press ed. 1988) (1690) (capitalization modernized).

109. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

110. Brackeen v. Haaland, 994 F.3d 249, 333 (5th Cir. 2021) (en banc) (per curiam) (citing Morton v. Mancari, 417 U.S. 535, 552 (1974)), *petition for cert. filed*, No. 21-380 (U.S. Sept. 3, 2021); *see also* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 501 (2020) (arguing that ICWA "now appears to be the battleground for the decisive determination about . . . the future of Indian law").

111. 25 U.S.C. §§ 479, 2703(4), (5).

112. *Id.* § 5304.

113. *Id.* § 3002.

ancestral tribe."[114] In other words, only ICWA makes race the triggering factor.[115] Thus, a determination that ICWA violates the constitutional prohibition on race-based distinctions would have no effect on other federal Indian laws.

C. "Plenary" Powers and Partnership

Paralleling the fallacious argument that ICWA preserves the rights of tribal governments to determine their own citizenship standards is the argument that it represents an exercise of Congress's purportedly "plenary" authority with regard to tribes. It was on this basis that the *Brackeen* en banc majority upheld ICWA's constitutionality with respect to race, so it deserves particular focus.

According to the *Brackeen* en banc decision, Congress's authority with respect to Indians is not limited to addressing matters that affect individuals who are tribal citizens, but is instead a matter of sovereignty. The court interpreted *Mancari* as holding that "if a statute is reasonably related to the special government-to-government political relationship between the United States and the Indian tribes," it does not violate rules against racial categorization.[116] This is an unreasonably broad interpretation of *Mancari,* and it is hard to see where its limits could possibly lie. Indeed, the *Brackeen* court was at pains to say that its theory is not confined to federal statutes that are "specifically directed at Indian self-government."[117] This suggests that *any* law reasonably related to the federal government's obligation to preserve the existence of tribes as collective entities will survive constitutional scrutiny.

That plainly goes too far. Such a theory would appear to authorize Congress to, for example, forbid tribal members from

114. Brackeen v. Zinke, 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018) (emphasis added), *rev'd sub nom.* Brackeen v. Haaland, 994 F.3d 294 (5th Cir. 2021) (en banc).

115. The only other law that comes close to ICWA's biological trigger is the Indian Major Crimes Act, 18 U.S.C. § 1153, which does not actually include such a provision, but has been interpreted as *possibly* applicable to persons who are only *potential* members of tribes. *See* United States v. Zepeda, 792 F.3d 1103, 1114 (9th Cir. 2015) (en banc) (describing the "*Bruce* test," which may support applying the Act to a defendant with "some quantum of Indian blood" and who "participat[es] in the social life of a . . . tribe"). That interpretation has been criticized for "transform[ing]" the Act "into a creature previously unheard of in federal law: a criminal statute whose application turns on whether a defendant is of a particular race." *Id.* at 1116 (Kozinski, J., concurring in the judgment). But even under that rule, eligibility for tribal membership "is not dispositive of Indian status," as it is in ICWA; it is one factor to be considered in determining whether the Act applies. United States v. Bruce, 394 F.3d 1215, 1225 (9th Cir. 2005).

116. *Brackeen*, 994 F.3d at 334.

117. *Id.*

marrying outside the tribe[118] or from surrendering their tribal membership, since such prohibitions would certainly strengthen tribes and perpetuate their existence. And since Fifith Circuit emphasized that its theory is not limited to laws specifically directed at tribal self-government, this theory would also allow Congress to, say, forbid Natives from practicing birth control, or to impose mandatory sterilization on "unfit" tribal members, or to eliminate the search warrant requirement for people whose ancestry is Native American, as a means of combatting crime. These hypotheticals may be "far-fetched," as the *Brackeen* court said,[119] but they are not more far-fetched than a federal law that basically forbids Native American parents from consenting to the adoption of their own children or terminating the rights of abusive ex-spouses. And in any event, the *Brackeen* decision gives no indication why such hypotheticals would be off-limits.[120]

In fact, they are not as "ridiculous" as the *Brackeen* majority supposes.[121] Some commentators have already argued that ICWA applies to embryos conceived through artificial insemination, and even that ICWA should govern *before conception* based on the potential child's genetic makeup.[122] And given that some tribal governments have expressed hostility to abortion and same-sex marriage,[123] under current Supreme Court jurisprudence, could Congress ban abortion and same-sex marriage in Indian country, on the theory that such bans help preserve tribes and are therefore "reasonably related to the special government-to-government

118. *Cf.* Lesley M. Wexler, *Tribal Court Jurisdiction in Dissolution-Based Custody Proceedings*, 2001 U. CHI. LEGAL F. 613, 646 (2001) ("Marriage outside the tribe . . . currently present[s] the same threat to tribal sovereignty and survival that adoption and foster care once did.").

119. *Brackeen*, 994 F.3d at 331 n.47.

120. It might be said that such laws would violate due process, and that the *Brackeen* decision reserved discussion of the due process claim. *See id.* at 290 n.11 (noting that the plaintiffs did not appeal the district court's denial of their substantive due process claim). But the case's equal protection claim was "really a claim under the Fifth Amendment's Due Process Clause because ICWA is a federal law." *Id.* at 446 (Costa, J., concurring in part and dissenting in part). So to show why these hypotheticals would violate due process, a future court would need to apply precisely the doctrines that the *Brackeen* court said were inapplicable.

121. *Id.* at 377 n.31 (opinion of Duncan, J.) ("We agree with J[udge] D[ennis] that these hypotheticals are 'far-fetched' and 'ridiculous.'").

122. *See* Cardenas, *supra* note 41, at 19 (arguing that ICWA renders gestational agreements "unenforceable when the child is an 'Indian child'").

123. *See, e.g.*, N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 143–50 (2008) (highlighting, for example, the Oglala Sioux tribe's recognition of unborn children as "existing person[s]" and the Cherokee Nation's resistance to same-sex marriage).

political relationship"?[124] The *Brackeen* majority gives no reason why the answer would be no.[125]

The most obvious problem with such an extremely broad reading of the *Mancari* rule is that it takes no account of the fact that "Indian children" are not foreigners but American citizens. Whatever else the Indian Citizenship Act might mean, it certainly means that the analogy of tribes to foreign nations on which the *Brackeen* majority so heavily relies has been fundamentally altered.[126] Yet the majority ignored this fact.

For one thing, Congress cannot, *even under its government-to-government treaty powers*, force American citizens into judicial proceedings that lack the full protections of the Bill of Rights. In *Reid v. Covert*,[127] the Supreme Court held that Congress could not compel the U.S.-citizen wives of servicemen stationed overseas to be tried for crimes in a military tribunal which lacked the panoply of constitutional protections.[128] ICWA does precisely this, however—it forces "Indian children" and the adults who would like to adopt them into tribal courts where "the Bill of Rights . . . does not apply."[129] Nor can Congress, even under its treaty powers, supersede the domestic relations laws of the states with regard to American citizens based simply on their (potential!) future acquisition of dual citizenship.[130] Yet ICWA does just that by

124. *Brackeen*, 994 F.3d at 334 (en banc) (per curiam).

125. In fact, Professor Fletcher would seem to answer yes to my hypotheticals. He has argued that the Indian Commerce Clause should be interpreted broadly in part because Congress's authority in this area may be "less like regulating interstate commerce than like some combination of the exercise of the war and foreign affairs powers." Matthew L.M. Fletcher, *ICWA and the Commerce Clause*, *in* FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30 28, 33 (Matthew L.M. Fletcher et al. eds., 2009) (quoting Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1300 (2006)). This extreme understanding of "plenary"—whereby the federal government has authority not only to override the decisions of Indian birth parents in order to serve the wishes of tribal governments, but also the authority to exercise the equivalent of *the national war power with respect to enemy aliens*—suggests the truly extraordinary conclusion that Congress could override *all* of the individual rights of Indians, regardless of the fact that they are American citizens, whenever it believes such action is in the best interests of tribes as collective entities. The danger implicit in such broad authority should be obvious; the federal government has already done indescribable harm to Native Americans in the name of "doing good." Where exactly is the stopping point? Defenders of the ICWA status quo have so far offered no plausible answer.

126. *Cf.* Fletcher, *supra* note 110, at 533 (noting that "the federal government analogized Indian people to foreigners in many instances" "[b]efore Congress finally extended American citizenship to all Indians").

127. 354 U.S. 1 (1957).

128. *Id.* at 19–20.

129. United States v. Bryant, 579 U.S. 140, 149 (2016).

130. *Cf.* Mark Strasser, *Domestic Relations,* Missouri v. Holland*, and the New Federalism*, 12 WM. & MARY BILL RTS. J. 179, 220 (2003) ("If the Court continues to subscribe to its current

ordering state courts to follow federally mandated evidentiary and procedural rules when adjudicating *state-law* causes of action for child welfare, adoption, and foster care, if the case involves an "Indian child."[131]

Second, while the federal government may have an obligation to promote the sovereign interests of tribal governments, it has at least as strong an obligation to preserve the sovereign interests of the states. The *Brackeen* court asserted that the federal government "assumed a duty of protection to the tribes" under the "law of nations" incorporated into the Constitution,[132] but the federal government owes at least an equal duty of protection to states' sovereignty. This is reflected in several constitutional provisions relating to the states—e.g., the provisions guaranteeing to each state a republican form of government,[133] protecting them from invasion,[134] proclaiming equal treatment with regard to trade,[135] allowing Congress to admit new states,[136] barring Congress from creating new states inside existing states,[137] and, of course, the Commerce Clause.[138] Since child welfare law is a quintessential state-law matter not included in Congress's enumerated powers,[139] and since tribes have no *inherent* sovereignty over non-members not domiciled on tribal lands,[140] the suggestion that Congress's obligation to tribes supersedes its obligation to states in this context is even more strained. In fact, we know from *United States v. Windsor*[141] that Congress may not override non-discriminatory state law and force states to discriminate in quotidian domestic

states' rights jurisprudence, then whole areas of law will likely be viewed as impermissible subjects of treaties." (footnote omitted)).

131. 25 U.S.C. § 1912(e)–(f). This is an important subtlety: ICWA does not create federal causes of action and then require state courts to follow certain evidentiary standards and procedures when reviewing them; rather, it dictates to state courts how they may proceed when reviewing *state-law* substantive causes of action. This is why ICWA "commandeers" in violation of the Tenth Amendment. *See* Sandefur, *supra* note 8 (manuscript at 26–47) (arguing that ICWA violates the non-comandeering principle).

132. Brackeen v. Haaland, 994 F.3d 249, 279 (5th Cir. 2021) (en banc) (per curiam), *petition for cert. filed*, No. 21-380 (U.S. Sept. 3, 2021).

133. U.S. CONST. art. IV, § 4.

134. *Id.*

135. *Id.* art. I, § 9, cls. 5–6.

136. *Id.* art. IV, § 3, cl. 1.

137. *Id.*

138. *Id.* art. I, § 8, cl. 3.

139. *Cf.* United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

140. *See* Strate v. A-1 Contractors, 520 U.S. 438, 445–47 (1997) (explaining that tribes generally lack jurisdiction over nonmembers not on land owned by a tribal member).

141. 570 U.S. 744 (2013).

law.[142] Yet ICWA does something notably similar: it forces state executive and judicial officials to subject "Indian children" (who do not reside on a reservation) to a different set of rules based solely on their ancestry.

There is another angle to this, too, which the *Brackeen* court did not address. In addition to ICWA's interference with state power, it also overrides the rights of Indian birth parents. In *Troxel v. Granville*,[143] the Supreme Court invalidated a Washington statute that allowed grandparents visitation rights even where the birth parents objected. Although the case produced no single majority opinion, a majority of the justices agreed that the statute interfered with the fundamental right of parents to direct the upbringing of their own children and that the government may not elevate the rights of third parties to an equal or greater status than those of the parents.[144] Yet ICWA does just that, by forbidding parents from terminating the parental rights of abusive ex-spouses or agreeing to have their children adopted by non-Indians.

Brackeen, for example, involved a Native mother "who wishe[d] for her Indian biological child to be adopted by non-Indians"[145]—so the case did not involve the "breakup of the Indian family" or the removal of children from their parents, which was the primary concern behind ICWA.[146] Nevertheless, the *Brackeen* majority held that Congress could empower tribal governments to override the mother's choices with respect to the upbringing of her child. ICWA thus deprives Native parents of their parental rights.[147] Similarly, in cases such as *S.S. v. Stephanie H.* and *In re Adoption of T.A.W.*, state courts, in compliance with ICWA, have barred Indian parents from terminating the rights of neglectful or abusive spouses when such

142. *See id.* at 771–72 (condemning the Defense of Marriage Act for "ensur[ing] that if any State decide[d] to recognize same-sex marriages, those unions w[ould] be treated as second-class marriages for purposes of federal law").

143. 530 U.S. 57 (2000) (plurality opinion).

144. *See id.* at 65 ("[T]here is a constitutional dimension to the right of parents to direct the upbringing of their children."); *id.* at 77 (Souter, J., concurring in the judgment) ("We have long recognized that a parent's interest in the nurture, upbringing, companionship, care and custody of children are generally protected . . . ." (citations omitted)); *id.* at 80 (Thomas, J., concurring in the judgment) ("[T]his Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case.").

145. Brackeen v. Haaland, 994 F.3d 249, 267 (5th Cir. 2021) (en banc) (per curiam), *petition for cert. filed*, No. 21-380 (U.S. Sept. 3, 2021).

146. 25 U.S.C. § 1912(d).

147. For more examples of Native parents losing their parental rights under ICWA, see Timothy Sandefur, *Family Malpractice,* WEEKLY STANDARD (Apr. 13, 2018), https://www.washingtonexaminer.com/weekly-standard/family-malpractice [https://perma.cc/YM7A-RB7G].

parents believed TPR to be in their children's best interests.[148] These outcomes came about because, as the *Holyfield* Court said, ICWA gives tribes "an interest in the child which is distinct from but on a parity with the interest of the parents"[149]—precisely what *Troxel* says is unconstitutional.

In other words, *Brackeen*'s theory that Congress may do whatever it believes to be "reasonably related to the special government-to-government political relationship between the United States and the Indian tribes"[150] cannot be squared with the *Troxel* Court's acknowledgment that American citizens, including those of Native ancestry, have a fundamental right to "direct the upbringing of their children."[151] If Congress's powers are truly "plenary" when acting in service of its obligation to tribal governments,[152] then these fundamental rights, and all other fundamental rights, are rendered nugatory.

It therefore must be the case that Congress's allegedly "plenary" power with respect to Indians is cabined by constitutional limitations that protect the rights of Americans, including the prohibition on race- or national origin-based distinctions. The Supreme Court, indeed, has noted that Congress's "plenary" power is "not absolute."[153] Yet the *Brackeen* majority effectively ignored this. In its lengthy discussion of the history of federal–tribal relations, it asserted that the Constitution's framers "endow[ed] the national government with exclusive, plenary power in regulating Indian affairs,"[154] and proceeded to ignore the fact that Native Americans are citizens of the United States today, though they were not at the time of the Constitution's adoption. It brushed aside the question of what exactly it means for Congress to have "plenary" power in this respect, and in a footnote dismissed what it called "the unremarkable fact" that Congress's authority "must still be consistent with . . . other constitutional principles."[155] Yet that supposedly unremarkable question is *the entire* question. If Congress's purportedly "plenary" authority must be exercised

148. *See supra* note 17.

149. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52 (1989) (quoting *In re* Adoption of Halloway, 732 P.2d 962, 969–70 (Utah 1986)).

150. *Brackeen*, 994 F.3d at 334.

151. Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion).

152. Fletcher, *supra* note 110, at 506–07; *In re* Adoption of B.B., 417 P.3d 1, 22–23 (Utah 2017).

153. United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946).

154. *Brackeen*, 994 F.3d at 300.

155. *Id.* at 331 n.47.

subject to "other constitutional principles," then provisions of ICWA that override parental decisions, subject "Indian children" to separate and less protective legal standards, and impose different, less protective rules on them based solely on their ancestry, cannot be constitutionalized by the mere recitation of the word "plenary."

D. The Soundbite Arguments

Among the most common assertions by defenders of the ICWA status quo, in the media as well as in the law reviews, are that ICWA's shortcomings are actually not traceable to the Act itself, but to the failure of states to comply with it, and that ICWA represents the "gold standard" of child welfare. Neither of these claims withstands scrutiny. I refer to these as the "soundbite" arguments because, although pithy and superficially appealing, they are actually both vague and false.

1. Failure to Comply

It is frequently said that the failures attributed to ICWA are really traceable to the failure of states to comply with that Act.[156] Professor Lorie Graham, for instance, claims that "[c]ourts, social welfare agencies, and attorneys who fail to follow the letter and spirit of the law have all contributed to th[e] ongoing crisis"[157] of a disproportionate number of Native children "'still being placed outside of their natural tribal and family environments.'"[158] Putting aside the question of whether there is a "natural" "environment" for children of one biologically defined category, the more likely explanation for the fact that "Indian children" are disproportionately placed in foster care is that they face disproportionate risks of poverty, neglect, abuse, and other factors that necessitate state intervention. And the most likely explanation for the fact that they are being placed in non-Indian foster homes is the drastic shortage of such homes, not the refusal of state officials to follow ICWA.[159]

156. *See, e.g.*, Maire Corcoran, Note, *Rhetoric Versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L. 415, 432 (2009) ("[S]tate officials' ignorance of [ICWA] or refusal to comply with its provisions have detracted from its effectiveness.").

157. Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 3 (1998).

158. *Id.* at 3 (quoting *Introduction*, *in* THE INDIAN CHILD WELFARE ACT: UNTO THE SEVENTH GENERATION: CONFERENCE PROCEEDINGS (Troy R. Johnson ed., 1993)).

159. *See id.* at 3–4 (blaming the "Existing Indian Family Doctrine" for the failure of states to comply with the Act). That Doctrine—which held that children could not be subjected to

Of course, whether ICWA's "effectiveness" is being undermined depends on what one thinks its goals are. Although my primary focus has been on the goal of protecting individual children from harm—which ICWA actually undermines—even those who view it as an effort to bolster the power of tribal governments must admit that it often fails, not because states refuse to obey, but because of its inherent flaws. For example, in *T.A.W.*, the Washington Supreme Court denied the petition of a tribal member mother to sever the rights of an unfit, non-Indian birth parent—a petition the tribe supported—because ICWA required the mother to make "active efforts" to reunite the child with that non-Indian parent.[160] In *S.S.*, a tribal member father was barred from terminating the rights of his neglectful ex-wife despite believing that TPR was in the best interests of his children.[161] Neither of these outcomes helped bolster tribal governments. And although ICWA's purpose section claims that it was intended only for cases involving "nontribal public and private agencies,"[162] it is frequently applied to intra-family disputes where no public or private agencies are involved—such as in *Cuellar v. Portillo*, in which a couple were killed in a car accident and the surviving family members disputed who should take care of the children.[163] In none of these cases did the state fail to comply with ICWA, and in none of these cases did the outcome serve to benefit tribal governments.

If the goal is to protect children rather than tribal governments, ICWA's shortcomings are obvious—and they result not from failure to comply, but from provisions in the Act that increase the evidentiary burden in child abuse cases and prioritize race-matching over the needs of children. In the cases of Declan

ICWA based exclusively on biological ancestry but must have some non-biological indicia of tribal affiliation before ICWA could apply—was a saving construction of the Act fashioned by courts seeking to avoid the conclusion that ICWA violates the rule against racial classifications. Now that courts have largely abandoned it, the argument that ICWA is not race-based is no longer tenable. *See* Sandefur, *supra* note 13, at 65–70 (discussing the Existing Indian Family Doctrine).

160. *In re* Adoption of T.A.W., 393 P.3d 492, 503 (Wash. 2016).

161. S.S. v. Stephanie H., 388 P.3d 569, 576 (Ariz. Ct. App. 2017).

162. 25 U.S.C. § 1901(4).

163. No. VPR-047731 at 3a (Cal. Super Ct. Tulare Cnty. Feb. 3, 2017), *writ of mandate denied sub nom.* Renteria v. Superior Court, No. F075331 (Cal. Ct. App. 5th Dist. July 14, 2017). For further information on *Cuellar*, see Sandefur, *supra* note 86, at 448–49.

Stewart,[164] Larynn Whiteshield,[165] Josiah Gishie,[166] and Antonio Renova,[167] "Indian children" were murdered by Native caretakers who were known to be abusive but whom state officials were powerless to stop because ICWA deprived them of that authority. In those cases, state officials followed ICWA to the letter.

Under state law, a child of any other ancestry who is being abused or neglected at home can be placed in foster care if the state can show by a preponderance of the evidence that the parents are unable to care for the child and that foster care is in the child's best interest.[168] But under ICWA, the higher standard of "clear and convincing" evidence applies,[169] and the state must make "active efforts,"[170] which as noted above, means it must make "active, thorough, and timely efforts" to "reunite [the] Indian child" with the parents who have abused her—even if aggravating circumstances are present.[171] And where a child's parent is so abusive that the state seeks to terminate that parent's rights, the rules are again different: for a child of any other ancestry, the state would be required to establish the statutory grounds for termination by "clear and convincing" evidence[172]—but for an "Indian child," the state must prove these statutory grounds "beyond a reasonable doubt" based on the testimony of expert witnesses, which is a higher evidentiary standard than is required in death penalty cases.[173] These

164. *See* Mark Flatten, *Death on a Reservation*, EPIC (Goldwater Inst.), July 23, 2015, at 25–26, https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/7/8/0715-EPIC-Pamphlet%20Spreads.pdf [https://perma.cc/ZL3N-HHW7] (discussing the death of Stewart).

165. *See id.* at 29 (discussing the death of Whiteshield).

166. *See* Timothy Sandefur, *Arizona DCS Admits ICWA Played a Role in Josiah's Murder*, GOLDWATER INST.: DEF. LIBERTY BLOG (Oct. 17, 2018), https://indefenseofliberty.blog/2018/10/17/arizona-dcs-admits-icwa-played-a-role-in-josiahs-murder/ [https://perma.cc/WZ59-J9UR] (discussing the death of Gishie).

167. Nora Mabie, *A Deeper Look into the Indian Child Welfare Act's Possible Role in Antonio Renova's Death*, GREAT FALLS TRIB. (Nov. 25, 2019, 7:09 PM), https://www.greatfallstribune.com/story/news/2019/11/25/indian-child-welfare-act-icwa-montana-death-5-year-old-foster-care/4297529002/ [https://perma.cc/L9QG-5LQ5].

168. *See, e.g.*, *In re* Comm'r of Admin. for Child.'s Servs. of City of N.Y., 254 A.D.2d 416, 416–17 (1998) (using the preponderance-of-the-evidence standard); Najera v. Chesapeake Div. of Soc. Servs., 629 S.E.2d 721, 722 (Va. App. 2006) (same).

169. 25 U.S.C. § 1912(e).

170. *Id.* § 1912(d).

171. 25 C.F.R. § 23.2.

172. *See, e.g.*, *In re* Angelia P., 623 P.2d 198, 204 (Cal. 1981) (applying the clear-and-convincing standard); *In re* Child of Shayla S., 207 A.3d 1207, 1210–11 (Me. 2019) (same).

173. *See* 18 U.S.C. § 3591(a)(2) (providing that a defendant who has been found guilty of certain crimes beyond a reasonable doubt may be sentenced to death, and making no mention of a need for expert witness testimony).

heightened evidentiary standards make it harder for state officials to rescue "Indian children" who are being harmed or neglected.

Likewise, a child of any other ancestry can be adopted by any family that is willing and able to care for her. In fact, federal statutory law prohibits officials from delaying or denying an adoption based on race.[174] Yet that protection does not apply to "Indian children."[175] And ICWA requires that "Indian children" be placed in foster care, or adoptive homes, with "Indian" adults (again, regardless of tribe).

Even aside from the question of whether this policy is morally and constitutionally sound, it is immensely problematic in practice given the drastic shortage of "Indian" foster homes. Los Angeles County, with its population of more than ten million people, has only *one* licensed Native American foster mother.[176] This shortage means "Indian children" must be placed in "non-compliant" foster homes, where they are subject to removal and placement with other foster families—thus destroying stability and risking emotional trauma to the child.

As the Utah Court of Appeals explained in *In re Interest of P.F.*, when a child is placed in a "non-compliant" foster home, a later court proceeding involving the removal of that child from that home *will not* include consideration of the emotional trauma that removal will cause the child.[177] In the court's view, a child's emotional bonds with a foster family should be taken into account only if the foster family is "Indian." But if the child—through no fault of her own—is placed with a family that, for biological reasons, does not fall within ICWA's statutory definitions, and then forms emotional attachments with that family, such attachments can be simply disregarded by a bureaucratic process that seizes the child from what she regards as her home and her family. This is what the California Court of Appeal blessed in the *Alexandria P.* case,[178] when it allowed state officials to tear a six-year-old girl from the arms of the only family she had known for two-thirds of her life, solely because her great-great-great-great-grandparent was Choctaw.[179]

174. 42 U.S.C. § 671(A)(18).

175. *See id.* § 674(D)(4) ("This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978 [25 U.S.C. § 1901 et seq.].").

176. Heimpel, *supra* note 31.

177. 405 P.3d 755, 760–61 (Utah Ct. App. 2017).

178. 204 Cal. Rptr. 3d 617, 622 (Ct. App. 2016).

179. *Id.* at 643; *see also* SAVE OUR LEXI, http://saveourlexi.com [https://perma.cc/4CSV-

But, as the same court once put it, "The idea that children may be temporarily deposited in the hands of some bailee to be recovered at will—like an old lamp that one doesn't know what to do with, so one puts it in storage—is contradicted by the cases and common experience."[180] The overwhelming psychological evidence shows that children suffer enormously when they are moved from one foster family to another, as so frequently happens to "Indian children." To inflict such harm on them because there is a shortage of "compliant" foster homes is cruel beyond words—and that cruelty cannot be blamed on states' failure to comply with ICWA. The fact that this is done to a group of children who are targeted on biological grounds cannot be squared with constitutional standards or basic morality.

In cases involving children of other races, protecting stability and security is "[o]f foremost concern."[181] But not in cases involving "Indian children," thanks to ICWA. These children are instead treated like old lamps, and are subjected to a literal regime of "separate but equal." The *Alexandria P.* case makes this clear. Even though the California Court of Appeal has said that "stability and continuity in a child's living arrangement are so important in themselves that there must be a 'persuasive showing of changed circumstances affecting the child' to overcome the disruption necessarily inherent in any change of custody,"[182] the court in *Alexandria P.* explicitly decreed that a different standard applies to "Indian children." There, the court ruled that, while the "best interests" of a child are the paramount consideration for children of other ancestral backgrounds, in cases involving "Indian children," courts should only "take . . . best interests into account as *one of the constellation of factors*."[183]

The Utah case *In re P.F.* illustrates perfectly the perverse second-class treatment that results from ICWA's race-based placement mandates.[184] That case involved a child born to a drug-addicted thirteen-year-old mother.[185] The child was deemed neglected at the

DVTL] (stating, in a website dedicated to the cause of reuniting a child with the foster parents who cared for her for most of her life, that Lexi was stripped from her home due to being 1.5% Native American).

180. Guardianship of Kassandra H., 75 Cal. Rptr. 2d 668, 675 (Ct. App. 1998).

181. Demetrius L. v. Joshlynn F., 365 P.3d 353, 356 (Ariz. 2016).

182. Guardianship of Kassandra H., 75 Cal. Rptr. 2d at 675.

183. *In re* Alexandria P., 204 Cal. Rptr. 3d at 351 (emphasis added).

184. 405 P.3d 755 (Utah Ct. App. 2017). For other such examples, see Sandefur, *supra* note 13, at 27–29, 38–42, 45–50, 58–59.

185. *In re* P.F., 405 P.3d at 756.

age of two due to her mother's drug abuse and domestic violence, and this happened again when the child was six.[186] A year later, the child was taken into state custody when her mother and stepfather were imprisoned and her grandparents also tested positive for drugs.[187] Once again, the court deemed the child neglected.[188]

Some weeks later, the mother informed the court that the child might be an "Indian child." The court notified the tribe as required by ICWA, but the tribe answered that the child was not a member or eligible for membership.[189] The child was thereupon placed in foster care with a non-Indian family.[190] The state's "reunification efforts" with the mother failed, due to her refusal to comply with drug testing, attend domestic violence classes, or participate in drug treatment.[191] The state therefore moved for TPR, and again informed the tribe, which again responded that the child was neither a member nor eligible for membership.[192]

Three months later, however, the mother and child were enrolled as tribal members.[193] At that point, the tribe moved to intervene.[194] The mother filed a motion to remove the child from her foster family and place her in the custody of the child's grandmother.[195] The state objected to that motion due to previous incidents of neglect, and the mother also sought to vacate previous custody orders for failing to comply with ICWA.[196] The trial court rejected these motions, noting that removing the child from her foster family "would definitely be detrimental" and would cause the child "further trauma and harm"[197] The court also found that the state had made "active efforts" as required by ICWA, and that these had failed.[198]

On appeal, the mother argued that the fact that the child had bonded with the foster family—with whom she had lived for two years by that point—was of no moment, and that the child's placement should be vacated because it was not ICWA-

186. *Id.*
187. *Id.* at 756–57.
188. *Id.* at 757.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 757–58.
197. *Id.* at 758.
198. *Id.* at 758–59.

compliant.[199] The court of appeals rightly rejected these arguments but did so in a revealing way.[200] The trauma the child would suffer from removal, it declared, would ordinarily *not* count because the child had not been placed in foster care with an "Indian" family.[201] But it *would* count in this case, because "the original placement of Child with her foster family did not run afoul of ICWA" (given that neither the mother nor the child was an enrolled tribal member when the placement occurred).[202]

In other words, because "ICWA was not applicable until July 2015, well after the July 2014 order," the enormous emotional trauma the child would suffer by being snatched from the family where she had found safety and stability *could* be a factor in the court's determination of her future.[203] Had the mother been enrolled in the tribe only a year earlier, that suffering would *not* have been a legitimate consideration.[204]

It is impossible to square this logic with the thesis that the harms caused by ICWA result from the failure of states to comply with its mandates. On the contrary, it was only because of a mere twelve-month difference in paperwork that this child was not treated like an old lamp and torn from the family with whom she had formed emotional bonds. In *Alexandria P.* and countless other cases, children have not been so fortunate. And, of course, the same is true of adoption. ICWA's race-based restrictions on adoption and its higher evidentiary burdens for TPR (typically a necessary step before adoption) do exactly what the Supreme Court warned of in *Santosky v. Kramer*[205]: they "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption"[206]—based solely on the blood in their veins.

The bottom line is simple: bad outcomes result from ICWA's substantive provisions, not from states' failure to comply with them. The Act makes it harder to protect "Indian children" from abuse or neglect than children of any other ethnicity, restricts adoption and foster care options for children in need, and violates the rights of Native parents to take the steps necessary to care for

199. *Id.* at 759.
200. *Id.* at 762–63.
201. *Id.* at 760.
202. *Id.* at 762.
203. *Id.* at 764.
204. *Id.* at 761–62.
205. 455 U.S. 745 (1982).
206. *Id.* at 769.

their children.

2. "Gold Standard"

Probably the favorite soundbite of defenders of the ICWA status quo is that ICWA represents the "gold standard" for child welfare. The phrase is invoked in virtually all magazine and newspaper articles on the subject, as well as in briefs in ICWA cases and countless law review articles, and it appears in *Brackeen*.[207] However, it is not true.

The phrase originated in an amicus brief filed in *Adoptive Couple v. Baby Girl*,[208] where it originally referred not to ICWA as a whole but to the principle that the state should, when possible, "support and develop the bonds between a child and her *fit* birth parents."[209] But, of course, nobody disputes that placement with *fit* birth parents is ideal. The problem is that ICWA's "active efforts" provision is not limited to fit parents; it also restricts the state's ability to protect Indian children from *unfit* parents.

The actual "gold standard" of child protection is the "best interests of the child" rule. This is a principle so central to the law of child welfare that is has been called the "bedrock,"[210] the "lodestar,"[211] the "guiding principle,"[212] the "guiding light,"[213] the "primary consideration,"[214] the "foremost concern,"[215] and—naturally—the "gold standard."[216] The best interests standard is such a long-standing principle of the common law that it may justly be regarded as "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[217]

The best interests standard is inherently individualized. It requires consideration of the circumstances of the *particular* child

207. 994 F.3d 249, 270 (5th Cir. 2021) (en banc) (per curiam), *petition for cert. filed*, No. 21-380 (U.S. Sept. 3, 2021).

208. Brief of Casey Family Programs et al. as Amici Curiae in Support of Respondent Birth Father at 2, 7, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1279468, at *2, *7.

209. *Id.* at 4 (emphasis added).

210. Schisel v. Schisel, 762 N.W.2d 265, 270 (Minn. Ct. App. 2009).

211. *In re* Jaydon W., 909 N.W.2d 385, 395 (Neb. Ct. App. 2018).

212. Ortega v. Bhola, 869 A.2d 1261, 1262 (Conn. App. Ct. 2005).

213. *In re* Y.M., 144 Cal. Rptr. 3d 54, 70 (Ct. App. 2012).

214. TEX. FAM. CODE § 153.002.

215. *In re* Marriage of Pooler, 136 P.3d 1153, 1155 (Or. Ct. App. 2006).

216. Garrett v. Elmore, No. M2013-01564-COA-R3-JV, 2014 WL 3763806, at *7 (Tenn. Ct. App. July 29, 2014); DAVID L. HUDSON, JR., CHILD CUSTODY ISSUES 26 (Alan Marzilli ed., 2011).

217. Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 160–61 (2009) (quoting Michael H. v. Gerald H., 491 U.S. 110, 127 n.6 (1989)).

involved in the case—her *specific* best interests in her *unique* circumstances—as opposed to any one-size-fits-all categorization or automatic presumption. As the Supreme Court made clear in *Stanley v. Illinois*,[218] courts in child welfare cases employing the best interests standard must not proceed on the basis of presumptions, because while that "is always cheaper and easier than individualized determination," it "forecloses the determinative issues of competence and care" and "disdain[s] present realities in deference to past formalities."[219] It thereby "risks running roughshod over the important interests of both parent and child."[220]

ICWA, though, tosses aside the best interests standard—or, more precisely, it overrides that standard and creates a separate, *non*-individualized test that it *calls* the best interests standard, but which is actually the opposite. Some courts have explicitly acknowledged that they apply a different standard based on whether the child fits into the biologically defined category of "Indian child." The California Court of Appeal did this in *Alexandria P*. when it said that "a court should take an Indian child's best interests into account as *one* of the constellation of factors relevant to a good cause determination," while also considering "her connection to extended family *or her cultural identity*."[221] Texas courts have been more candid. They have overtly distinguished between the "the general Anglo-American 'best interest of the child' standard used in cases involving non-Indian children"—which is an inherently individualized examination of a child's specific needs—and the "drastically different" Indian-best-interests (IBI) standard, which lays aside the individualized assessment and applies a one-size-fits-all presumption that "what is best for an Indian child is to maintain ties with the Indian Tribe."[222]

Others have been less frank. They contend that there is only one best interest standard, and that, in passing ICWA, Congress

218. 405 U.S. 645 (1972).
219. *Id.* at 656–57.
220. *Id*. at 657.
221. *In re* Alexandria P., 204 Cal. Rptr. 3d 617, 634 (Ct. App. 2016) (emphasis added).
222. Yavapai–Apache Tribe v. Mejia, 906 S.W.2d 152, 169 (Tex. App.—Houston [14th Dist.] 1995). Jennifer Nutt Carleton frankly called this the "ethnic best interest" standard and acknowledged that ICWA "was an attempt by Congress to codify the 'best interests of the child' standard as it applies to ethnicity," Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21, 44 (1997). Note that this contradicts efforts by defenders of the status quo to argue that ICWA creates a political, rather than a racial classification.

categorically determined that the best interests of all "Indian children" are served by placement with "Indian" adults or in accordance with tribal government dictates. The BIA has made this claim, for example, asserting that "ICWA establishes the placement preferences as being in the child's best interest."[223] But this is duplicitous, since the entire point of the best interests standard is that it is *individualized*. To substitute a blanket presumption for that individualized determination makes as much sense as applying a bright-line rule while calling it a totality-of-the-circumstances test. A combination of best interest and presumption is a contradiction in terms—as *Stanley* itself made clear.[224] And to claim that this legislatively created presumption resolves the best interests question because Congress adopted it again begs the question. The entire point of a court's use of the best interest standard is that it is *not* a legislatively dictated, blanket presumption.

Applying a separate, expressly different, and less protective legal standard for children of one biologically defined category is, of course, unequal treatment under the law. Some seek to justify this difference in treatment by arguing that "Indian children" are fundamentally different—that, for biological reasons, they are uniquely harmed by adoption or foster care placement outside of "the Indian community."[225] The "Split Feathers" or "Apple Syndrome" studies purport to show that "Indian children" suffer in a distinct manner when they are adopted or cared for by non-Indian adults. Professor Randall Kennedy and others have shown that this research is "junk social science,"[226] but even aside from that, the constitutional rule is clear: "[t]he effects of racial

223. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,826 (June 14, 2016).

224. *See Stanley*, 405 U.S. at 656 ("The establishment of prompt efficacious procedures to achieve legitimate state ends [e.g., protecting the best interests of children] is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.").

225. *See* Sandefur, *supra* note 13, at 77 (identifying and responding to scholars who have expressed that view).

226. RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 499–503 (2003); *see also* Bonnie Cleaveland, *Split Feather: An Untested Construct*, INDIAN CHILD WELFARE ACT (Mar. 2015), http://www.icwa.co/split-feather-scientific-analysis/ [https://perma.cc/CX6H-P5BA] ("A person may think of herself as a split feather, an addictive personality . . . , or an alien abductee . . . . But there's no evidence for any of those constructs, so they should not be used in courts of law."); Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 346 n.2 (1996) ("Although extensive, the adoption-as-primal-wound literature is more often anecdotal and passionate than it is supported by credible research findings.").

prejudice, however real, cannot justify a racial classification."[227]

Moreover, the traditional best interest test *already* accounts for whatever unique trauma might be suffered by a particular "Indian child" as a result of being placed in a non-Indian household. Unlike the IBI test, the actual best interest test is "a holistic examination of all of the relevant circumstances that might affect a child's situation," which "include[s] examination of 'the physical, intellectual, social, moral, and educational training and general welfare and happiness of the child,'" and "capture[s] all of the relevant facts and circumstances unique to a particular child's situation."[228] Thus, the difference between the traditional best interest test and the IBI is not that the traditional test disregards the risk of psychological harm to "Indian children," but rather that the IBI elevates other considerations above the welfare of individual children in their particular circumstances. That is to say, the IBI is a contradiction in terms, a nullification of the child's best interests in the guise of a best interest test.

Some have argued that this concern is overblown because ICWA already requires courts to consider a child's individual circumstances via the "good cause" provisions of §§ 1911[229] and 1915.[230] These supposedly act as safety valves to prevent courts from transferring jurisdiction or placing children in custody in accordance with ICWA's preferences if the circumstances do not warrant it. And it is true that these provisions appear to allow state courts to deny jurisdiction transfer and override the race-based placement provisions where there is "good cause" to do so. The problem is that, in both the BIA's regulations and state court caselaw, things do not actually work that way.

The BIA has decreed that the good cause determination in jurisdiction transfer cases must *not* include consideration of the

227. Palmore v. Sidoti, 466 U.S. 429, 434 (1984). To be precise, *Palmore* did not absolutely prohibit courts from considering the consequences of racial discrimination in making placement decisions. Such considerations, rather, are properly part of the individualized, all-things-considered best interests test, employed on a case-by-case basis. ICWA, by contrast, imposes the type of one-size-fits-all, blanket presumption that *Palmore* forbids.

228. *In re* B.T.B., 436 P.3d 206, 219 (Utah Ct. App. 2018) (citation omitted), *aff'd on other grounds*, 472 P.3d 827 (Utah 2020), *as amended* (Aug. 14, 2020); *see also* Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (presenting a nonexclusive list of factors for determining a child's best interest).

229. 25 U.S.C. § 1911(b).

230. *Id.* § 1915(a), (b).

child's individual best interests,[231] and state courts have agreed.[232] As for the placement preferences, the BIA has specified what factors state courts may consider, and they are inherently biased toward the statutory placement mandates. Thus, for example, a state court may consider the child's "extraordinary physical, mental, or emotional needs," including whether "specialized treatment services" are "unavailable in the community where families who meet the placement preferences live."[233] But this means that, if such services are available there, the placement must go forward even though it will result in trauma. Worse, only the *extraordinary* needs of the child are to be considered—not the "ordinary" needs of the child.

The BIA regulations also say that the unavailability of any home that complies with the placement preferences may be a consideration, but this unavailability must be determined in a manner that "conform[s] to the prevailing social and cultural standards of the Indian community"[234] even if the child does not reside in and has never resided in that community. In practice, this means that, in circumstances where state officials would deem existing placements unsuitable for a white child, they may deem them suitable for an "Indian child." In other words, unsuitable placements are good enough for children in this category. Most significantly, the regulations provide that the "good cause" determination may *not* be based on "the socioeconomic status of any placement relative to another placement," or solely on "ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA."[235]

Consequently, if an "Indian child" has lived most or all of her life in a foster placement, she can be removed from that home at any time, despite the fact that it inflicts "ordinary" trauma on her—a cruelty that the law forbids with regard to children of other races. In *Guardianship of Kassandra H.*, a California court refused to take two children from their grandparents and return them to their recovered alcoholic father because

231. *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,827 (June 14, 2016) ("[T]he best interests of [the] child should not be a factor in determining whether there is good cause to deny a transfer motion." (citation omitted)).

232. *E.g.*, *In re* Zylena R., 825 N.W.2d 173, 185–86 (Neb. 2013); *In re* A.B., 663 N.W.2d 625, 634 (N.D. 2003).

233. 25 C.F.R. § 23.132(c)(4).

234. *Id.* § 23.132(c)(5).

235. *Id.* § 23.132(d)–(e).

> children are not dogwood trees, to be uprooted, replanted, then replanted again for expediency's sake . . . . [A]ny new circumstances justifying the termination of a guardianship must be sufficient to overcome the inherent disruption of tearing a child away from a guardian who is doing a good job of caring for and nurturing the child. Anything less would mean that a court would have the authority to terminate a guardianship even when termination would be detrimental—in every sense of the word—to the child.[236]

Yet the BIA regulations deprive "Indian children" of this legal protection. (And although it is debatable whether these regulations can constitutionally bind state courts—for example, the Missouri Court of Appeals says they are not binding[237] while the Utah Court of Appeals says they are[238]—state courts typically follow them anyway.)[239]

In sum, while courts may consider a child's best interests to some degree when deciding whether good cause exists to depart from ICWA's race-based placement preferences, this possibility does not work as a safety valve. The "good cause" determination is stifled because courts are not actually free to apply a holistic, totality-of-the-circumstances approach to an "Indian child's" individual needs. And that means that the *actual* gold standard—the full consideration of a particular child's specific best interests—is muted, if not wholly overridden, by ICWA's mandates.

A law that makes it harder to protect children from violence and deprivation or hinders the state's ability to find stable, loving, permanent families to care for them—and that imposes these handicaps on them due to their genetic ancestry—does not deserve the title of "gold standard."

E. Cases Are All Anecdotes

One of the oddest claims offered by defenders of the ICWA status quo is that the examples of bad outcomes for children—which include well-documented incidents of "Indian children" suffering

236. Guardianship of Kassandra H., 75 Cal. Rptr. 2d 668, 675 (Ct. App. 1998).
237. *In re* S.E., 527 S.W.3d 894, 901 n.5 (Mo. Ct. App. 2017).
238. State *in re* L.L., 454 P.3d 51, 59 n.4 (Utah Ct. App. 2019).
239. *See, e.g.*, *In re* M.R.G., 66 P.3d 312, 315 (Mont. 2003) (recognizing the regulations as nonbinding, but persuasive, and applied when interpreting ICWA); *In re* Louis S., 117 Cal. Rptr. 3d 110, 113 (Ct. App. 2004) (same).

molestation,[240] neglect,[241] beatings,[242] and murder[243] solely because ICWA prevented state officials from protecting them—are mere "anecdotes."[244] This is both false and fallacious.

First, the charge of "anecdote" is bizarre given that ICWA was itself adopted based on anecdotes, as even defenders of the status quo admit.[245] Second, "anecdotes" and lawsuits are essentially all we have to go by, given the lack of reliable statistics about ICWA's consequences.[246] This is worsened by the fact that many of the adults involved in ICWA cases are afraid to discuss their experiences, either because they are subjected to gag orders by courts or because state officials threaten to revoke their foster care licenses if they speak out.[247]

In fact, the conspiracy of silence around ICWA reaches sometimes shocking extremes. In *In re C.J. Jr.*,[248] for example, the court-appointed guardian ad litem (GAL) argued in the juvenile

240. *See, e.g.*, Sandefur, *supra* note 13, at 38–40 (describing the case of *In re Shayla H.*, 846 N.W.2d 668 (Neb. Ct. App. 2014), *aff'd*, 855 N.W.2d 774 (Neb. 2014)).

241. *See, e.g.*, Brandon Stahl, *Saving Themselves, Then Their Family*, STAR TRIB. (Aug. 22, 2016, 1:52 PM), https://www.startribune.com/an-american-indian-couple-s-struggle-to-get-their-kids-back/390461191/ [https://perma.cc/Q3MS-JXA3] (reporting on a Minnesota story of children removed from an abusive and neglectful family yet repeatedly sent back for more abuse).

242. Marlo Pronovost, *Losing Tony*, STILLWATER CNTY. NEWS (Dec. 5, 2019), https://www.stillwatercountynews.com/node/84196 [https://perma.cc/2FP2-PDX9].

243. *Man Charged with Murder of Cherokee Boy, 5*, INDIANZ (Oct. 4, 2007), https://www.indianz.com/News/2007/10/04/man_charged_wit_3.asp [https://perma.cc/DC7C-YT6Z].

244. *See, e.g.*, Kristen Carpenter, *Indian Status Is Not Racial: Understanding ICWA as a Matter of Law and Practice*, CATO UNBOUND (Aug. 9, 2016), https://www.cato-unbound.org/print-issue/2102 [https://perma.cc/W6E2-HZTD] (characterizing bad ICWA outcomes as "anecdotes"); Abigail Abrams, *The Fight Over Native American Adoptions Is About More Than Just the Children*, TIME (July 2, 2019, 3:03 PM), https://time.com/longform/native-american-adoptions/ [https://perma.cc/QV8V-JDA2] (quoting tribal attorney claiming bad outcomes are "anecdotes"); ABA Section of Civil Rights and Social Justice, *Indian Child Welfare Act*, YOUTUBE (Sep. 12, 2019), https://www.youtube.com/watch?v=gcH2ZGjkXyE (video of panel about ICWA in which a panelist characterizes such cases as "anecdotes").

245. *See, e.g.*, Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 604 (2002) (noting Congress's use of "anecdotal evidence" when passing ICWA); Alissa M. Wilson, *The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act in* In Re S.S. and R.S., 28 LOY. U. CHI. L.J. 839, 856 (1997) (noting use of "anecdotal testimony" in *Holyfield*). The BIA itself declared in its 2016 regulations that it was relying on "anecdotal accounts." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,779, 38,780 (June 14, 2016).

246. *See* Alicia Summers & Kathy Deserly, *The Importance of Measuring Case Outcomes in Indian Child Welfare Cases*, 36 CHILD. L. PRAC. 22, 22 (2017) ("While isolated studies focused on various facets of ICWA implementation and compliance, little in-depth data exists on actual child outcomes in ICWA cases.").

247. *See e.g.*, Flatten, *supra* note 164, at 8 (giving examples of threats, intimidation, and revocation of foster care license for family that spoke out about ICWA).

248. Nos. 16AP-891, 15JU-232 (Ohio Ct. Com. Pl.) (filed in Franklin County).

court that it was unconstitutional to impose ICWA on the child, because, inter alia, the child had not been proven to be an "Indian child" and ICWA is unconstitutionally race-based.[249] After objecting to the juvenile court's initial determination to remove the child from foster placement, as requested by the tribe, the GAL prevailed in a court of appeals decision that ordered the juvenile court to reconsider.[250] But on remand, the juvenile court's first step was to *remove the GAL from the case for having the temerity to oppose the tribe*.[251] The court declared the GAL unfit to perform his duties because he "does not support ICWA," and because he obtained legal representation from Goldwater Institute attorneys, and "Goldwater Institute is not a proponent of the Indian Child Welfare Act."[252]

It is, of course, wholly improper[253] and even unconstitutional[254] for a court to remove a GAL due to the content of the non-frivolous

249. Combined Opposition to Gila River Indian Community's Motion to Dismiss and Birth Father's Motion to Dismiss at 2 n.1, *In re* C.J. Jr., No. 16AP-891 (Ohio Ct. App. Feb. 13, 2017).

250. *In re* C.J. Jr., 108 N.E.3d 677, 699 (Ohio Ct. App. 2018).

251. Decision and Judgment Entry, *In re* C.J. Jr., No. 15JU-232 (Ohio Ct. Com. Pl. Nov. 13, 2018).

252. *Id*. at 35.

253. *See, e.g.*, King v. King, No. 12CA0060-M, 2013 WL 3534242, at *3 (Ohio Ct. App. July 15, 2013) (concluding that the trial court did not abuse its discretion in refusing to remove a GAL who a parent argued exhibited bias and prejudice); *In re* T.P., No. 27483, 2015 WL 1932681, at *4 (Ohio Ct. App. Apr. 29, 2015) (same); I.C.-R. v. N.R., 62 N.E.3d 792, 807 (Ohio Ct. App. 2016) (same); Perrouna v. Perrouna, No. FSTFA010183136S, 2014 WL 4817520, *5 (Conn. Super. Ct. Aug. 25, 2014) ("While it is clear that the guardian ad litem disagrees with the plaintiff's present position, that is an insufficient basis for removal of the guardian ad litem."); Zukerman v. Piper Pools, Inc., 556 A.2d 775, 786 (N.J. Super. Ct. App. Div. 1989) ("We thus hold that where the guardian *ad litem* must exercise judgment and discretion in rejecting a settlement, . . . the guardian may not be removed merely because the court disagrees with the guardian's judgment on the issue of settlement."); Hollaway v. Scripps Mem'l Hosp., 168 Cal. Rptr. 782, 784–85 (Ct. App. 1980) (disapproving lower court's decision to remove counsel and GALs); Smith v. Ford Motor Co., 38 A.D.2d 852 (N.Y. App. Div. 1972) (concluding that it was an abuse of discretion for the trial court to remove and replace GAL for infant children).

254. The First Amendment guarantees the right to present arguments to a court regarding one's rights and interests, consistent with applicable rules. *See, e.g.*, Bleiweiss v. State, 24 So.3d 1215, 1216 (Fla. Dist. Ct. App. 2009) ("[T]he failure to allow argument of counsel . . . amounted to a basic denial of petitioner's right to be heard . . . the most fundamental of all due process rights."); Farmers Union Cent. Coop. Exch. v. Tomson, 387 P.2d 202, 205 (Kan. 1963) ("Our system of jurisprudence is founded on the proposition that every litigant has a right to be heard. The right to be heard carries with it the absolute right to be represented by counsel, and the right of counsel to assist the court by oral argument in analyzing the evidence and in applying the law."); Colonial Tr. Co. v. Austin, 133 Conn. 696, 699 (1947) ("A hearing necessarily involves an opportunity by a party to present his arguments."). This included C.J. Jr.'s right, through his GAL, to advocate a considered legal position. Removing the GAL on the basis that he made certain kinds of legal arguments violated the First Amendment. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 537 (2001) (concluding that the First Amendment protects the right of "an attorney [to] argu[e] to a court that . . . a . . . federal statute by its terms or in its application is violative of the United States Constitution"). It is an abuse of discretion to penalize a party for "press[ing] a

arguments he expresses—and the GAL's arguments were not only non-frivolous, but successful in the Court of Appeals. Moreover, a GAL is legally and ethically obligated to make all meritorious arguments in defense of a child's best interests that he can.[255] Nevertheless, the juvenile court replaced the GAL with another GAL whom it viewed as sufficiently "a proponent of the Indian Child Welfare Act."[256] Tactics such as this have stifled fair and open deliberation over the merits and flaws of ICWA.[257]

But perhaps more importantly, the cases demonstrating ICWA's failures are not mere anecdotes but are decisions by state courts that set binding precedent. The *C.J. Jr.* case, in which an Arizona-based tribe obtained an order from its own court commanding an Ohio foster family to send an Ohio child to live on the reservation with race-matched strangers—even though the child had never even been to Arizona[258]—was not an anecdote, but a legally enforceable decision by the Ohio juvenile court. *In re Alexandria P.*,[259] in which a six-year-old was forcibly removed from the home where she had lived for two-thirds of her life and from the family she called her own and sent to live in another state with adults she did not know, based solely on her genetics, was not a mere anecdote, but a precedential, published decision of the California Court of Appeal.[260] The *Renteria* case, in which two orphans who had never resided on reservation were ordered by a tribal court to be removed from the family that had taken them in after their parents' death and sent to live with other relatives who happened to be tribal officials with power over the tribal court—was not an anecdote, but a real case that involved the state and federal courts

legitimate argument" or "protest[ing] an erroneous ruling." Andrews v. Superior Court, 98 Cal. Rptr. 2d 426, 429 (Ct. App. 2000) (citation omitted); *see also* Penson v. Ohio, 488 U.S. 75, 84 (1988) ("[O]ur adversarial system of justice. . . . is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." (citation omitted) (internal quotation marks omitted)).

255. *See* OHIO REV. CODE ANN. § 2151.281(I) (advising that a GAL "shall file any motions and other court papers that are in the best interest of the child"); D.W. v. T.R., No. L-11-1099, 2012 WL 525551, at *5 (Ohio Ct. App. Feb. 17, 2012) (providing a non-exhaustive list of a GAL's duties).

256. Decision and Judgment Entry at 35, 41, *In re* C.J. Jr., No. 15JU-232 (Ohio Ct. Com. Pl. Nov. 13, 2018). The GAL appealed this ruling, but the Ohio Court of Appeals found the appeal premature. *In re* C.J. Jr., No 18AP-862, 2019 WL 2114126, at *4 (Ohio Ct. App. May 14, 2019).

257. In a later proceeding, the juvenile court ruled against the tribe, and in favor of the foster family, which rendered the question of the GAL's removal moot. Decision and Judgment Entry, *In re* C.J. Jr., No. 15JU-232 (Ohio Ct. Com. Pl. May 21, 2020).

258. *In re* C.J. Jr., 108 N.E.3d 677, 681–85 (Ohio Ct. App. 2018).

259. 204 Cal. Rptr. 3d 617 (Ct. App. 2016).

260. *Id.* at 630, 631 n.14.

of California.[261] How many so-called anecdotes are necessary to show that there are problems with this Act?

F. The Bad Motives Arguments

At the bottom of the barrel are arguments that, in one way or another, ICWA's critics have bad motives. Either they are racists, are giving "aid and comfort" to racists,[262] are paid by the "adoption industry,"[263] want to destroy tribal sovereignty,[264] to gain control of resources on tribal lands,[265] or some combination of these.

Such ad hominem arguments deserve little attention, yet they are too common not to be addressed briefly. As to the allegation of racism: those who embrace the perverse and illogical notion that it is racist for the law to treat all people the same without regard to race are perhaps not susceptible to persuasion. But for others, it should suffice to say that the problem with ICWA is *not* that it creates any kind of benefit or "affirmative action" program for "Indian children," but on the contrary, that it deprives these children of the legal protections accorded to children of other races, thereby making it hard to protect their rights and serve their needs. ICWA also violates the rights of Native parents such as the parents involved in *T.A.W.*, *S.S.*, and *Brackeen,* to take steps to serve the interests of their children. In short, it deprives vulnerable people of legal protections based exclusively on their biological ancestry. Those who object to this state of affairs cannot plausibly be accused of racism.

One common variation on the racism charge is the claim that challengers in ICWA cases harbor prejudices against tribal

261. Sandefur, *supra* note 86, at 448–49.

262. *See, e.g.*, ABA Section of Civil Rights and Social Justice, *supra* note 244 (recording attorney Keith Harper accusing ICWA critics of giving "aid and comfort to racists").

263. *See, e.g.*, Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 353–56 (2015) (claiming that the "adoption industry" is behind lawsuits challenging ICWA's constitutionality).

264. *See, e.g.*, Mary Annette Pember, *Indian Child Welfare Legal Challenge is About Ending Tribal Sovereignty*, INDIAN COUNTRY TODAY (Nov. 24, 2019), https://indiancountrytoday.com/news/indian-child-welfare-legal-challenges-is-about-ending-tribal-sovereignty [https://perma.cc/Z8R5-W299] (advancing the view that ICWA challenges are part of an anti-tribal sovereignty agenda).

265. *See, e.g.*, 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/ [https://perma.cc/U6TL-9575] (claiming that lawsuits challenging ICWA are an effort to "undermine the authority of tribal courts, shutter tribal casinos, and open up reservations to privatization, something that could benefit oil and gas developers like the Koch brothers").

government institutions and wrongly assume that tribal courts and tribal child welfare systems are incapable of caring for children in need. That this is false is proven by the fact that nobody disputes that tribal governments should have authority over *on*-reservation child welfare cases. Such cases, in fact, are not governed by ICWA to begin with.[266] The problem, rather, arises when children who are defined as "Indian" based solely on their biology, and who do *not* reside on tribal lands, are subjected to a separate, less protective set of rules via ICWA—as, for example, in the *Alexandria P*. case.

An even better illustration is the case of *In re. J.P.C.*[267] It involved a Tohono O'odham mother residing off-reservation in Tucson and seeking to terminate the rights of her ex-husband, who had a long criminal record. Under Arizona law, the evidentiary standard for TPR is clear and convincing evidence, as required by *Santosky*.[268] And the same is true of Tohono O'odham tribal law: it also requires the clear and convincing standard.[269] In other words, if the mother had been white, black, Asian, or Hispanic, ordinary Arizona family law, with its clear and convincing rule, would have applied. And if the mother had lived *on*-reservation, the case would have been decided in tribal court, and the exact same rule would have applied. But because the child was "Indian," and the family lived off the reservation in Tucson—about twenty miles from the nearest reservation boundary—the case fell under ICWA instead. As a result, the higher "beyond a reasonable doubt plus expert testimony" standard applied. The mother could not afford an expert witness, so when Arizona courts declined to review her case, she abandoned it.[270]

Like so many cases, *J.P.C.* demonstrates the essential problem with ICWA: due solely to the child's biological ancestry, ICWA imposes a different set of rules—rules that are less protective of the child—than would otherwise apply, and in doing so it violates the rights of Native parents and children to be treated equally without regard to their race.

As to the "adoption industry" argument, this has always seemed a bizarre accusation. Lawsuits challenging the constitutionality and

266. ICWA does not apply to tribal court proceedings. 25 C.F.R. § 23.103(b)(1).

267. No. S20150158 (Ariz. Super. Ct.) (petition for termination of parent–child relationship filed in Pima County July 6, 2018).

268. *See, e.g.*, Kent K. v. Bobby M., 110 P.3d 1013, 1014 (Ariz. 2005) (stating that the clear and convincing evidence standard applies to TPR).

269. TOHONO O'ODHAM CODE tit. 3, § 1517(F) (2013).

270. Petition for Review at 3, *In re* J.P.C.,No. CV-17-0298-PR (Ariz. Feb. 13, 2018).

applicability of ICWA are extremely expensive, time-consuming, and emotionally stressful for the families involved. There are many easier ways to make money. In any event, aside from some professional consultations with attorneys knowledgeable about adoption law, I have never had any interaction with, or funding from, anything like an "adoption industry." And even if this were not so, the question is not who is challenging the constitutionality of ICWA, but whether ICWA is constitutional.

Finally, the notion that challenges to ICWA's constitutionality are motivated by a desire to undermine tribal sovereignty and seize resources on tribal lands is a childish conspiracy theory. As noted above, tribal sovereignty would not be undermined in any way by a decision finding ICWA unconstitutional, nor would such a ruling have any effect on oil or gas rights on reservation lands.

Ad hominem arguments, of course, are typically efforts to "distract from the merits" of an argument.[271] All they do is "show[] the paucity of [the speaker's] own reasoning."[272] If defenders of the status quo could actually show that ICWA results in better outcomes for children, that it respects the individual rights of the parents and children involved, that it satisfies the constitutional standards of federalism, due process, equal protection, and so forth, they would make that showing. Instead, many dwell on distractions.

CONCLUSION

Discourse about ICWA is fraught with emotional tension as a result of both historical wrongs and the personal sufferings of many of our fellow American citizens. That cannot, however, justify imposing on American citizens of Native ancestry a separate set of rules that is less protective of their rights and that makes it harder to protect them from harm. ICWA was enacted with good intentions, but in practice it hurts the very children it was supposed to help. We can and must do better.

271. Revson v. Cinque & Cinque, P.C., 221 F.3d 71, 82 (2d Cir. 2000).

272. Huntington Beach City Council v. Superior Court, 115 Cal. Rptr. 2d 439, 448 (Ct. App. 2002).