Why *Haaland v. Brackeen* Is Not the End of the Story

*Timothy Sandefur**

> *The story does not end with the last word. It goes on in the silence of the mind . . . . I profess the conviction that there is only one story, but there are many stories in the one.*
>
> —*N. Scott Momaday*†

Introduction

The Indian Child Welfare Act (ICWA) is a federal law which establishes a set of rules state governments must follow in "child custody proceedings" involving "Indian children."[1] Shockingly enough, these rules are less solicitous of the child's welfare than are the rules that apply to children of non-Native ancestry, and they actually put Indian children at greater risk of harm. For example, ICWA overrides the "best interests of the child" rule that is the standard guidepost in cases involving all other kids, replacing it with race-based "placement preferences" that effectively bar non-Natives from adopting Indian children. Other provisions of ICWA make it harder for states to rescue Indian children from abuse or neglect than children of other races. As a result, ICWA, although passed with good intentions, harms the very children it was meant to protect, depriving them of legal protections that children of other races enjoy.

* Vice President for Legal Affairs, Goldwater Institute. Mr. Sandefur authored several amicus briefs in the *Brackeen* litigation on behalf of the Goldwater Institute, the Cato Institute, the Texas Public Policy Foundation, and individual victims of ICWA. Thanks to Alethea Chaney for helpful edits.

† N. Scott Momaday, The Death of Sitting Bear: New and Selected Poems xiv (2022).

[1] 25 U.S.C. § 1903. This article uses the term "Indian" because ICWA uses that term, and does so as a term of art. Under ICWA, not all Native Americans are "Indian." This article also uses the term "tribal membership" as synonymous with "tribal citizenship" because ICWA uses the former term. No pejorative is intended.

In the process, it violates an astonishing number of constitutional rules: It treats children differently based on their biological ancestry, in violation of the Constitution's prohibitions against racial or national-origin-based discrimination; it deprives birth parents of their fundamental right to make choices about the care and custody of their children; it forces citizens into court systems that lack Bill of Rights protections, in violation of due process; it "commandeers" state officials, compelling them to implement federal rules that contradict state policy; it unconstitutionally delegates lawmaking power; and it even violates the principles that govern the personal jurisdiction of courts.[2]

Only two of those issues—ICWA's racially discriminatory provisions and the commandeering question—were before the Supreme Court in *Haaland v. Brackeen*,[3] and only the latter was ultimately decided. The Court declined to address other questions, finding 7–2 that the plaintiffs (both private citizens and state governments) lacked standing. The decision therefore invites future litigation over ICWA's race-based restrictions—restrictions that, as Justice Brett Kavanaugh observed in his concurrence, "raise significant questions under bedrock equal protection principles."[4] Given the Court's choice not to address these significant issues, the *Brackeen* ruling has little immediate effect beyond postponing the day when the injustices ICWA inflicts are confronted. But as a matter of constitutional law, the most interesting aspect of the competing opinions—especially Justice Neil Gorsuch's concurrence and Justice Clarence Thomas's dissent—may be the dispute over a fundamental theoretical question: What is the source and scope of Congress's power *vis-à-vis* tribes, and particularly Congress's allegedly "plenary" power?

[2] For thorough discussions of these and other constitutional problems with ICWA, see Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 Child. Legal Rts. J. 1 (2017); Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. 55 (2021); Timothy Sandefur, *The Federalism Problems with the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. 429 (2022).

[3] 143 S. Ct. 1609 (2023).

[4] *Id.* at 1661 (Kavanaugh, J., concurring).

I. How ICWA Works

ICWA is not a well-known statute, and although it is relatively brief, it is also extremely unusual compared to other federal laws. For example, it appears to be the only federal statute that is *exclusively* enforced by *state* officers. And it is the only federal Indian law triggered not by tribal membership or residency on tribal lands, but by a person's biological ancestry alone. Given unusual features like these, and the fact that most people, including many experienced family-law attorneys, are unfamiliar with ICWA, a brief background is necessary to appreciate what was at stake in *Brackeen*.

A. "Indian Child"

Before Congress passed ICWA in 1978, state and federal governments often pursued policies aimed at coercively assimilating Native Americans into white society. Among other things, they sought to take Native American children from their parents' custody and place them in boarding schools or with white families, where they were sometimes abused, forced into manual labor, and punished for speaking Native languages or practicing their religions. The injustices inflicted through these policies—policies often rationalized as a way of "helping" Natives—were the principal focus of Justice Gorsuch's concurring opinion in *Brackeen*.[5]

But instead of halting such policies and providing strong legal protections for Indian children—and instead of focusing on children residing on tribal lands—ICWA focused on enhancing the powers of tribal government officials and curtailing the powers of state officials with respect to proceedings that do *not* occur on tribal lands.[6] It did this by dictating how state child welfare departments and state courts may act when dealing with "Indian children." And the problems with ICWA begin with its definition of that term.

ICWA defines an "Indian child" as a minor who is either (1) a tribal member or (2) *"eligible"* for membership and the *biological child* of a tribal member.[7] Different tribes have different eligibility criteria, but all rely exclusively on biological ancestry. (No tribe, for example,

[5] *See id.* at 1641–47 (Gorsuch, J., concurring).

[6] ICWA's substantive and procedural requirements do not apply in tribal court, only in state court. 25 C.F.R. § 23.103(b)(1).

[7] 25 U.S.C. § 1903(4) (emphasis added).

conditions membership on fluency in a tribal language or participation in tribal ceremonies.) This means children may be deemed "Indian" under ICWA even if they are not and never become tribal members; all that matters is biological eligibility and the existence of a biological parent who is a member. Indeed, not only are the presence of cultural, political, religious, linguistic, or social ties between the child and a tribe considered irrelevant, but most state courts today consider it positively unjust to consider these factors.[8]

This explains why, in 2016, a six-year-old California girl known as Lexi qualified as an Indian child even though her sole connection to the Choctaw tribe was a centuries-distant ancestor.[9] On the other hand, a child who is *fully* acculturated to a tribe will *not* qualify as an Indian child if she lacks the biological prerequisites for tribal membership—for example, if she is the adopted, rather than the biological, child of a tribal member.[10] Under ICWA, the fictional Linda Wishkob from Louise Eldrich's novel *The Round House* (a white child raised by an Ojibwe family, who is fully acculturated to the tribe) would not qualify, due solely to biological factors. Neither would William Holland Thomas (a white man who became chief of the Eastern Band of Cherokees in the nineteenth century) or Sam Houston (who was adopted by the Cherokee as a teenager and served as the tribe's Ambassador to the United States). This is because no amount of cultural or political affiliation with a tribe will make children "Indian" under ICWA if they lack the required DNA—and no lack of political

[8] Beginning in the 1980s, some courts began employing the so-called existing Indian family doctrine, whereby ICWA was held inapplicable to cases in which a child's sole connection to a tribe was biological. The doctrine was a "saving construction," designed to prevent ICWA from being applied based solely on a child's race. But it came under severe criticism from Indian law scholars, who characterized it as a form of racism, on the theory that it empowered state judges to determine whether a child was "Indian enough." *See, e.g.*, Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 La. L. Rev. 733, 748 (2006). Consequently, virtually all state courts have now repudiated the doctrine, and as a result ICWA not only *does* apply based exclusively on a child's biological ancestry, but *must* apply only on that basis. There is lingering debate, however, whether the Supreme Court effectively mandated some version of the doctrine in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), when it said that ICWA did not apply to a child with whom no tie to an Indian family had been established.

[9] *See In re* Alexandria P., 204 Cal. Rptr. 3d 617 (Cal. Ct. App. 2016).

[10] *See, e.g.*, *In re* Francisco D., 178 Cal. Rptr. 3d. 388, 396 (Cal. Ct. App. 2014).

or cultural connection will *dis*qualify children who *do* fit the racial profile. In short, ICWA is triggered by what the Supreme Court has elsewhere called "an immutable characteristic determined solely by the accident of birth."[11]

It's worth emphasizing that "Indian child" status under ICWA is *not* synonymous with tribal membership.[12] Tribal membership is a function of tribal law, and tribes are free to set their criteria however they want.[13] By contrast, "Indian child" status is a function of federal and state[14] law, which means the definition must conform to constitutional limitations. ICWA does not, therefore—as some commentators would have it—preserve the power of tribes to determine their own membership. Tribes would have the same sovereign authority to do that even if ICWA did not exist. Instead, ICWA dictates to state governments how they must act with respect to children that federal and state law classify as "Indian," based on the possibility that they could, due to their biological ancestry, become tribal members someday.

B. ICWA's Separate and Less-Protective Rules for Indian Children

ICWA imposes a set of procedural and substantive rules on cases involving Indian children—rules that, shockingly enough, are *less* protective of children than are the rules that apply to their non-Indian peers. In *Brackeen*, the plaintiffs challenged two of these: the "active efforts" rule and the "placement preferences" for adoption and foster care.

1. "Active Efforts"

If a child is being abused by her parents and the state seeks to protect her, the state may take her into protective custody or put her

[11] Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality op.).

[12] *See In re* Abbigail A., 375 P.3d 879, 885 (Cal. 2016) (noting this distinction).

[13] Federal regulations do require that tribal membership be based on ancestry. *See* 25 C.F.R. § 83.11(e).

[14] Some states have their own state-law versions of ICWA, which sometimes differ from the federal version. The Minnesota Indian Family Preservation Act (MIFPA), for example, defines "Indian child" based solely on biological eligibility for tribal membership; it does not require that a biological parent be a tribal member. Minn. Stat. § 260.755(8). Consequently, a child is deemed "Indian" under MIFPA based exclusively on ancestry.

in foster care. Under the laws of every state, as well as the federal Adoption and Safe Families Act,[15] the state must first make "reasonable efforts" to restore that child to her family.[16] These "reasonable efforts" typically take the form of making social services available to the parents—sobriety programs, for example, or anger management classes—to help them get back on their feet. This is a sensible precaution for avoiding the unnecessary breakup of families. But, reasonably enough, this is *not* required in cases that involve "aggravated circumstances," such as drug addiction or child molestation.[17] The reason is obvious: It would be irrational to return abused children to homes where the state knows they are only going to be harmed again.

ICWA imposes a different rule for Indian children. It mandates that states make not "reasonable efforts," but "*active* efforts."[18] Although ICWA does not define this term,[19] state courts have interpreted it as requiring more than "reasonable" efforts,[20] and the obligations this standard imposes can be burdensome and vague. For example, the South Carolina Supreme Court declared in one case that it required state child protection officers to "stimulate [a] Father's desire to be a parent," whatever that means.[21] What's more, unlike "reasonable efforts," the "active efforts" requirement is *not* excused by the existence of aggravated circumstances. That means state social workers are legally required to return abused Indian children to parents who have abused them, even where evidence shows they will only be harmed again—a requirement that does not apply to children who are white, black, Asian, Hispanic, etc. The consequences have been—in case after case—the preventable murders of Indian children by parents

[15] Pub. L. No. 105-89, §§ 101-501, 111 Stat. 2115, 2116-21.

[16] *Id*. § 101.

[17] 42 U.S.C. § 671(a)(15)(D)(i). State law is the same. *See, e.g.*, *In re* A.L.H., 468 S.W.3d 738, 744–45 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

[18] 25 U.S.C. § 1912(d) (emphasis added).

[19] Federal regulations, however, define "active efforts" as "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family," which can include such things as "employing all available and culturally appropriate family preservation strategies." 25 C.F.R. § 23.2.

[20] *See, e.g.*, People *ex rel.* A.R., 310 P.3d 1007, 1015 (Colo. Ct. App. 2012).

[21] Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 562 (S.C. 2012), *rev'd*, 570 U.S. 637 (2013).

whom the state knew to be unfit, but to whom ICWA required the state to return those children.[22]

Although ICWA was intended to restrict the power of government and private adoption agencies, rather than to apply to interfamily disputes, some courts have interpreted it to apply to the latter as well. This has had the perverse consequence of blocking Native parents from protecting their own children from harm. In *S.S v. Stephanie H.*,[23] for example, a tribal-member father sought to terminate the rights of his ex-wife due to her drug addiction and abandonment of the children. Had they been non-Indian, state law would have applied and the termination would likely have been approved. But because the children were Indian, ICWA's "active efforts" rule applied instead. That meant the father—a tribal member—was prohibited from terminating the mother's rights due to his not having taken steps to "prevent the breakup of the Indian family."[24] In other words, he had not tried to reunite the children with the same mother he was seeking to protect them from. This irrational outcome did not prevent the breakup of the Indian family, which is ICWA's stated purpose.[25] Instead, it blocked an Indian parent from promoting the best interests of his own kids.

This is far from unusual. ICWA frequently blocks Native parents from pursuing their children's best interests. For example, it often obstructs adoption by stepparents when Native parents, wishing to terminate the rights of unfit exes, seek to have their new spouses

[22] *See* Timothy Sandefur, *Suffer the Little Children,* Regulation, 16, 18 Winter 2017/18 (describing the case of Declan Stewart, a 5-year-old Cherokee boy beaten to death by his mother's boyfriend despite the state knowing of the abuse); Angie Koehle, *DCS Claims "Jurisdictional, Legal Issues" in Phoenix Toddler's Death Case,* ABC15.com, Oct. 16, 2018 https://bit.ly/3E3t3w2 (case of one-year-old Josiah Gishie, killed by mother's neglect despite the state knowing the risk); Nora Mabie, *A Deeper Look into the Indian Child Welfare Act and its Possible Role in Antonio Renova's Death,* Great Falls Tribune, Nov. 25, 2019 https://bit.ly/3KPoqJK (5-year-old beaten to death by parents after he was returned to them under ICWA); Mark Flatten, *Death on a Reservation*, Goldwater Inst., June 10, 2015 https://bit.ly/3P5qY96 (describing the cases of Laurynn Whiteshield, who was murdered after being sent to live on a reservation pursuant to ICWA, and Shayla H. and her sisters, who were sexually molested after being returned to a custodial adult pursuant to ICWA).

[23] 388 P.3d 569 (Ariz. Ct. App. 2017).

[24] *Id.* at 572 (quoting 25 U.S.C. § 1912).

[25] *See* 25 U.S.C. § 1901(4).

legally adopt their children.[26] Consider the case of Arizona mother Justine R.[27] Justine is a member of Tohono O'odham nation, but she does not live on the reservation, which is only a short distance from her Tucson home. She sought to terminate the rights of her ex due to his criminal activity, in hopes that her new husband could legally adopt her son. Had her child been white, black, Asian, Hispanic, or of any other ancestry, Arizona law would have applied—with its "reasonable efforts" requirement.[28] And if she had lived on reservation, Tohono O'odham law would have applied—which happens to be identical with Arizona law on this subject, meaning that, again, "reasonable efforts" would have been the rule.[29] But because the child is Indian and lived off-reservation, ICWA applied, with its "*active* efforts" requirement. That and other requirements[30] are so burdensome that they barred Justine from terminating her ex's rights.

Even more irrational was the case of *In re Adoption of T.A.W.*,[31] in which a tribal-member mother sought to terminate the parental rights of her non-Native ex-husband, who was in jail and against whom she had obtained a restraining order. She did so because she had remarried—to a tribal member—and wanted her new husband to legally adopt her son. Yet the Washington Supreme Court ruled that because the child was an Indian child, ICWA required her to make "active efforts" to reunite the child with the birth father, even though the birth father was not even of Indian ancestry. ICWA was intended to prevent the breakup of Indian families. Yet here, and in other cases, it prevented the *formation* of an Indian family—for the benefit of a non-Indian.

Outcomes like these not only contradict ICWA's alleged goals, but also violate the fundamental rights of Native American parents. The Supreme Court held in *Troxel v. Granville* that birth parents have a fundamental constitutional right to make decisions about the "care,

[26] *See further* Timothy Sandefur, *Family Malpractice,* Washington Examiner, Apr. 13, 2018 https://bit.ly/47DXMgP.

[27] Justine R. v. Quigley, No. CV-17-0298-PR (Ariz. Feb. 13, 2018) (on file with the Goldwater Institute).

[28] Ariz. Rev. Stat. § 8-846(A).

[29] Tohono O'Odham Code tit. 3, ch. 1, art. 5, § 1501; *see also* § 1514(E).

[30] The other requirements include the "beyond a reasonable doubt" and expert witness requirements discussed below in part III.

[31] 383 P.3d 492, 502 (Wash. 2016).

custody, and control of their children."[32] Yet ICWA deprives the parents of Indian children of this right—*not* in order to protect these children, let alone their parents, but to serve the interests of tribes as corporate units, of whom the children are treated as mere constituent parts.[33] *Troxel* held it unconstitutional for the government to empower "third part[ies]" to "overturn [a] decision by a fit custodial parent."[34] But, as the Supreme Court admitted in *Mississippi Band of Choctaw Indians v. Holyfield*, ICWA gives tribal governments rights over Indian children "distinct from but on a parity with the interest of the parents."[35] In short, the active efforts provision deprives Indian children of the protections that state law would otherwise provide, forces state officials to place Indian children in harm's way, and even blocks the parents of Indian children from promoting their best interests.

2. The "Placement Preferences"

ICWA also imposes a series of "placement preferences" on foster care or adoption—rules that specify who may open their homes to Indian children in need. These preferences are based on the racial ancestry of the adults in question.

ICWA specifies that a child in need of a foster home must be placed (1) with family members if possible (which is unobjectionable), but, if that is not possible; (2) with a foster home approved by the child's tribe, and if this is also not possible; (3) with "*an* Indian foster home" or with "an Institution . . . approved by *an* Indian tribe."[36] Note that

[32] 530 U.S. 57, 65 (2000) (plurality op.). Although there was no majority opinion in *Troxel*, a majority of the Justices agreed that this is a fundamental right. *See id.* at 66; *id.* at 78 –79 (Souter, J., concurring); *id*. at 80 (Thomas, J., concurring).

[33] ICWA's purposes section states that it is intended to "protect[] and preserv[e] . . . Indian tribes and their resources." 25 U.S.C. § 1901(2). The "resources" in question are, of course, children. As Justice Gorsuch put it, ICWA is intended to help preserve "an enduring place . . . in the structure of American life" for "the Tribes" and to preserve "Indian communities"—which is a fundamentally different goal than the protection of Indian children *qua* children. *Brackeen*, 143 S. Ct. at 1661 (Gorsuch, J., concurring). Illogically, Justice Gorsuch's concurrence celebrates the fact that "Indian children are not (these days) units of commerce," *id.*, while simultaneously affirming the constitutionality of a statute predicated on treating these children as "resources" subject to regulation under the Commerce Clause.

[34] 530 U.S. at 67 (plurality op.).

[35] 490 U.S. 30, 52 (1989) (quoting *In re* Adoption of Halloway, 732 P.2d 962, 969–970 (1986)).

[36] 25 U.S.C. § 1915(b) (emphasis added).

this does not say *the child's* tribe—*any* tribe will do. ICWA does not seek to place, for example, Shoshone children in Shoshone homes and Penobscot children in Penobscot homes, but to place "Indian" children in "Indian" homes, and to keep them out of black, white, Asian, Hispanic, etc. households. ICWA imposes similar placement preferences on adoption. An Indian child seeking a permanent, loving, adoptive home must be placed (1) with family where possible, and if not possible; (2) with other members of the child's tribe, and, if that is not possible; (3) with "other *Indian* families," rather than with families of different ethnic backgrounds.[37]

No similar rule applies to children of other races. On the contrary, federal law makes it illegal to delay or deny an adoption on the basis of race.[38] Yet Congress carved out one exception from that guarantee: It does not apply to Indian children. They are the only children in America against whom it is legal—indeed, mandatory—to discriminate based on their biological ancestry.

The consequence of these preferences is, of course, to deprive abused and neglected Indian children of opportunities for finding safe, loving, permanent homes with adults willing to help them. There is a drastic shortage of Indian foster homes—for example, in all of Los Angeles County, with its population of over 10 million people, there is only *one*.[39] Consequently, Indian children are typically placed in what is called "non-ICWA-compliant" foster care with adults of other races, and because this is not ICWA-compliant, tribal governments can then demand that such children be removed on a moment's notice from their foster families and placed elsewhere. This, indeed, is the typical move of tribal governments whenever a non-Indian foster family expresses interest in adopting an Indian child. That accounts for such shocking episodes as the Lexi case, in which a six-year-old child was taken from the foster family with whom she had lived for four years and sent to live with strangers in another state, instead.[40]

The emotional trauma caused by snatching a child away from the only parents she has ever known—with whom she has lived for

[37] 25 U.S.C. § 1915(a) (emphasis added).

[38] 42 U.S.C. § 1996b.

[39] *See* Daniel Heimpel, *L.A.'s One-and-Only Native American Foster Mom*, The Imprint, June 14, 2016 https://bit.ly/45h1Wtz.

[40] *See* Charlotte Alter, *Inside the Agonizing Custody Fight over Six-Year-Old Lexi*, Time, Mar. 27, 2016 https://bit.ly/3E3M69F.

two-thirds of her life—is certainly extreme. Yet federal regulations explicitly prohibit state judges from considering that fact when deciding an Indian child's fate.[41] This, again, is exactly the opposite of the rule for non-Indian children; in their cases, emotional well-being is the court's foremost concern. As one California court put it, a child is not "like an old lamp" that can be moved from place to place at will: "As time passes, the paramount concern becomes the stability of the child, who has a fundamental interest in a safe and permanent home; indeed, there is a compelling state interest in protecting this need."[42] But ICWA overrides that compelling interest with respect to Indian children, depriving them of the stability their welfare demands. What's more, given the emotional strain that ICWA inflicts on adults willing to foster or adopt an Indian child—not to mention the bureaucratic and legal burdens—many families who would otherwise volunteer to help these children choose not to.[43]

3. An "Indian Best Interests" Test?

At this point, it's natural to ask: What about the child's best interests? The best interests of the child standard is traditionally the "lodestar,"[44] the "primary consideration,"[45] and the "foremost concern"[46] in child welfare cases. The best-interests test is a totality-of-the-circumstances evaluation; it's individualized, meaning it requires a judge to assess the *particular* needs of that *specific* child in his or her *individual* situation.[47] This makes the test effectively the

[41] 25 C.F.R. § 23.132(e).

[42] Guardianship of Ann S., 41 Cal. Rptr. 3d 709, 727 (Cal. Ct. App. 2006) (quoting Guardianship of Kassandra H., 64 Cal. App. 4th 1228, 1239 (1998)). *See also* Guardianship of Ann S. 45 Cal 4th 1110, 1136 n.19 ("[T]he child's best interest becomes the paramount consideration after an extended period of foster care.").

[43] *See* Elizabeth Stuart, *Native American Foster Children Suffer under a Law Originally Meant to Help Them,* Phoenix New Times, Sep. 7, 2016 https://bit.ly/45xsOWp. *See also In re* Bridget R., 49 Cal. Rptr. 2d 507, 529 (Cal. Ct. App. 1996) ("[O]n the sole basis of race, [ICWA] deprives [children]of equal opportunities to be adopted that are available to non-Indian children and exposes them, like the twin girls in this case, to having an existing non-Indian family torn apart through an after the fact assertion of tribal and Indian-parent rights.").

[44] State v. Matthew W. (*In re* Jaydon W.) 909 N.W.2d 385, 395 (Neb. Ct. App. 2018).

[45] Tex. Fam. Code § 153.002.

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

[47] *See, e.g.*, *In re* Adoption of Kelsey S., 1 Cal. 4th 816, 845–50 (1992) ("best interests" standard focuses on the child's individual circumstances).

opposite of a legal "presumption." In fact, the Supreme Court has said that due process bars states from substituting presumptions for an individualized assessment of the child's best interests. In *Stanley v. Illinois*, it struck down a state law that established a legal presumption that unmarried fathers were unfit to raise children.[48] "Procedure by presumption is always cheaper and easier than individualized determination," it said. "But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child."[49]

Yet ICWA overrides the best interests rule and imposes a blanket presumption: specifically, that it is virtually always in all Indian children's best interest to be placed with "Indian" households.[50] Indeed, the Bureau of Indian Affairs (BIA) has said that "ICWA establishes the placement preferences as being in the child's best interest"[51]—that is, ICWA creates a single, nationwide standard purporting to dictate what is in every Indian child's best interest per se.

Some courts have viewed this as meaning that there are two different best interests tests: one for children of non-Indian ancestry, and one for Indian children. Under this theory, a child's specific needs are the "paramount"[52] concern if the child is white, black, etc.—but if the child is Indian, that is *not* the paramount concern. Instead, an Indian child's specific needs are only to be "take[n] . . . into account as one of the constellation of factors,"[53] to be compromised with respect to other considerations. Of course, the usual term for a situation in which there are two different legal standards going by the same name—pursuant to which children are treated differently based solely on their ancestry—is "separate but equal."

[48] 405 U.S. 645 (1972).

[49] *Id.* at 656–57.

[50] *See, e.g.*, Dep't of Hum. Servs. v. Three Affiliated Tribes of Fort Berthold Rsrv. (*In re* K.R.C.), 238 P.3d 40, 48 (Or. Ct. App. 2010) (ICWA "establishes a presumption that an adoptive placement in accordance with the preference criteria is in an Indian child's best interests.").

[51] 81 Fed. Reg. at 38826 (2016).

[52] *Guardianship of Ann S.*, 202 P.3d at 1106 n.19.

[53] *In re Alexandria P.*, 204 Cal. Rptr. 3d at 634. Amazingly, Texas courts have even declared the best interests test an "Anglo" principle, inapplicable to "Indians." Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 168 (Tex. App. 1995).

Other state courts have used more moderate terms to characterize ICWA's Indian-best-interests rule, seeing it not as overriding the traditional best interests inquiry, but as merely creating a rebuttable presumption.[54] But this does not resolve the problem, because unless a court bases its decision on all relevant factors and circumstances—that is, unless it uses the traditional, individualized best interests test—such a presumption is still constitutionally inadequate.[55] And ICWA sharply limits a party's ability to challenge that presumption. A party must show "good cause" to depart from the placement preferences, but ICWA does not define that phrase, and the BIA's regulations sharply limit the considerations that a court may weigh.[56] For example, good cause may exist when the child has "extraordinary physical, mental, or emotional needs" which cannot be met "in the community where families who meet the placement preferences live," but *ordinary* physical, mental, or emotional needs do not suffice.[57]

It's worth mentioning here that the traditional best interests test *would* include consideration of a child's tribal connections, meaning there is no reason to suppose that applying the standard, individualized best-interests test would bar a court from placing an Indian child in an Indian household, where doing so would best serve the child's needs.[58] Because the traditional test is an all-things-considered

[54] *See, e.g.*, *Dep't of Hum. Svs.*, 238 P3d at 48; *In re* G.C., 157 Cal. Rptr. 3d 826, 831 (Cal. Ct. App. 2013).

[55] *See, e.g.*, Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1992) (A court may employ presumptions, but when a party challenges that presumption, "[a] court should consider all factors relevant to [the best interests] determination.").

[56] 25 U.S.C. §§ 1915(a), (b).

[57] *Compare* 25 C.F.R. § 23.132(4) (listing factors) *with id*. § 23.132(e) (specifying that "ordinary bonding or attachment" do *not* count).

[58] Responding to this argument, some scholars and judges have defended ICWA's presumption by contending that the traditional best interests standard is too subjective. *See, e.g.*, *In re* Custody of S.E.G., 521 N.W.2d 357, 363 (Minn. 1994). But the best interests test is no more subjective than any other legal test, and a blanket presumption which purports to declare what is in the best interests of all Indians—based on their biological ancestry—is hardly an improvement. Actually, technically speaking, ICWA's placement preferences are not "presumptions"; they're a *prejudice*. A presumption is a rebuttable default rule, based on a rational calculation of costs and benefits of likely outcomes. A prejudice, by contrast, is an assumption that people with some logically unrelated trait—such as biological ancestry—must have certain psychological or social characteristics. ICWA's rule that Indian children should not be raised by adults with of non-Native ancestry falls into the latter category.

evaluation, it probably is in a child's best interests to retain tribal connections where they exist. But rather than apply such an individualized assessment, ICWA replaces the all-things-considered evaluation with what the *Holyfield* Court called "a Federal policy that, where possible, an Indian child should remain in the Indian community."[59] In other words, it displaces the individualized assessment with a stereotype that Indian kids should virtually never be raised by white, black, Asian, Hispanic, etc., adults.

There are many other ways in which ICWA puts abused or neglected Indian children at a legal disadvantage—such as its rules giving tribal courts jurisdiction over their cases absent the "minimum contacts" required for such jurisdiction,[60] or provisions that force their cases into tribal courts where the Bill of Rights does not apply[61]—but there is no room to address them here. Instead, we must turn to the two questions at issue in *Brackeen*: Whether ICWA unconstitutionally commandeers the states, and whether it constitutes race-based lawmaking.

II. The *Brackeen* case

A. The Facts and the Litigation

A.L.M. was born in 2015 to a Navajo mother and a Cherokee father. They were unable to care for him, so when he was ten months old, the state placed him in foster care with Chad and Jennifer Brackeen, a non-Native family in Texas. After A.L.M. had lived with the Brackeens for two years, they and his birth parents decided it would be best for him if the Brackeens legally adopted him. It is worth emphasizing that the adoption here was not involuntary. A.L.M. was not being forcibly removed from his birth parents.[62] Thus, had he been of any other race, adoption would have been quickly resolved as a matter of Texas law, which prioritizes a child's best interests and prohibits discrimination in adoption cases based on race.[63]

[59] *Holyfield*, 490 U.S. at 37 (citation omitted).

[60] *See* Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 Tex. Rev. L. & Pol. 425, 456–61 (2019).

[61] *See* Timothy Sandefur, *Federalism Problems*, *supra* note 2, at 448–52.

[62] In *Holyfield*, too, the birth parents volunteered the child for adoption, and the Court held that ICWA allowed the tribe to veto that choice.

[63] *See In re* Adoption of Gomez, 424 S.W.2d 656, 657–658 (Tex. Civ. App.—El Paso 1967) (per curiam).

But because he is an Indian child, ICWA applied, which meant the tribe[64] was allowed to intervene and demand that A.L.M. be placed with tribal members in Utah, instead.[65] A state trial court accordingly ordered him taken from the Brackeens—who, as A.L.M.'s birth father testified, were the only family he had ever known[66]—and sent to live with strangers he had never met, in a state he had never visited. Fortunately, the court stayed that order, and the Brackeens' petition to adopt A.L.M. was ultimately approved. Yet the Brackeens also sought to adopt his half-sister, known as Y.J. Given the risk that ICWA would again be applied and potentially bar the Brackeens from adopting her, they brought a federal lawsuit for injunctive relief.[67]

They were joined in that effort by two other families: the Librettis and the Cliffords. The Librettis sought to adopt Baby O., a Pueblo child whose biological mother volunteered her for adoption by the Librettis. The tribe intervened and moved to block the adoption, but after litigation began, the tribe changed its position and allowed the Librettis to adopt. The Librettis, however, hoped to foster and possibly adopt additional children in need. Given the emotional stress, financial expense, and delay of ICWA-related proceedings, the Librettis sought injunctive relief to prevent the application of ICWA in future cases. The Clifford family wished to adopt a child referred to as P. Although Child P. is of Ojibwe ancestry, she was not eligible for tribal membership, given her blood quantum. Yet once litigation began, the tribe asserted that Child P. was a tribal member "for purposes of ICWA only,"

[64] Just before the adoption hearing, attorneys for the Cherokee and Navajo tribes decided in the hallway of the state courthouse to deem A.L.M. a Navajo child. *See* First Amended Complaint, Brackeen v. Zinke, No. 4:17-cv-868-O ¶ 120 (N.D. Tex. filed Dec. 15, 2017). This despite the immense cultural, linguistic, and historical differences between the Cherokee and Navajo tribes, whose homelands are nearly as far apart as Paris and Moscow.

[65] 25 U.S.C. § 1911(c).

[66] *See* Transcript of Aug. 1, 2017 Adoption Hearing (Appellant's Appendix, Tab H), *In re* A.L.M., Nos. 02-17-00298-CV & 02-17-00300-CV (Tex. Ct. App. 2d Judicial Dist.) at 55:20-58:6 ("I would love for him to stay with the foster parents . . . [b]ecause he's been with them ever since he was basically born almost . . . . [They are] the only parents he knows."). Bizarrely, some commentators have asserted that the phrase "the 'only parents' the child had ever known" is a racist rhetorical device for "demoniz[ing] Indian families"—even though this phrase was the testimony of A.L.M.'s Cherokee father. *See* Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 Mich. L. Rev. 1755, 1757, 1780 (2022).

[67] At the time of this writing, Y.J.'s case was still pending in Texas court.

whatever that means.[68] As a consequence, state courts ordered Child P. removed from the Cliffords' custody and placed with a tribal member, instead—where she remains today.

In their federal lawsuit, the Brackeens, Librettis, and Cliffords argued that ICWA is unconstitutional because, among other things, it constitutes a race-based distinction. They were joined as plaintiffs by the states of Indiana, Louisiana, and Texas, who argued that ICWA also unconstitutionally commandeers state officials and violates a host of other federalism-related rules.[69]

The plaintiffs prevailed in the federal district court, but the Fifth Circuit reversed in a 2–1 decision which upheld ICWA in all respects, over a dissent by Judge Priscilla Owen, who believed ICWA violates the anti-commandeering principle.[70] Then came en banc rehearing, which resulted in a labyrinthine set of overlapping opinions totaling more than 300 pages—a ruling so complicated that the court was forced to provide an "issue-by-issue summary" so lawyers could figure out what had been decided.[71] In the end, the judges were fairly evenly split. A bare majority rejected the argument that ICWA is race-based, but a bare majority also found the law problematic on commandeering grounds.[72]

[68] Brackeen v. Zinke, 338 F. Supp. 3d 514, 527 (N.D. Tex. 2018). ICWA does not contemplate such a creature as tribal membership "for purposes of ICWA only." *Cf.* Nielson v. Ketchum, 640 F.3d 1117, 1124 (10th Cir. 2011) ("Congress did not intend the ICWA to authorize this sort of gamesmanship on the part of a tribe—e.g. to authorize a temporary and nonjurisdictional citizenship upon a nonconsenting person in order to invoke ICWA protections.").

[69] Among other things, the plaintiffs argued that ICWA unconstitutionally delegates power to tribal governments, because it permits tribal governments to establish alternatives to the placement preferences, which states are then forced to follow. *See generally* Sandefur, *Federalism Problems*, *supra* note 2, at 474–84.

[70] Brackeen v. Bernhardt, 937 F.3d 406, 441–42 (5th Cir. 2019), *aff'd in part, rev'd in part en banc sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *aff'd in part, rev'd in part sub nom.* Haaland v. Brackeen, 143 S. Ct. 1609 (2023).

[71] Brackeen v. Haaland, 994 F.3d 249, 267 (5th Cir. 2021) (en banc), *aff'd in part, rev'd in part sub nom.* Haaland v. Brackeen, 143 S. Ct. 1609 (2023).

[72] The court of appeals was equally divided on whether the "other Indian families" provisions in ICWA's placement preferences satisfy the rational basis test. 994 F.3d at 268 (en banc). This meant the district court's finding that these provisions are unconstitutional remained in place, but without a precedential opinion, and the Supreme Court did not address the question. The court of appeals also found that ICWA does not unconstitutionally delegate lawmaking authority to tribes. For more on that issue, *see* Sandefur, *Federalism Problems*, *supra* note 2, at 474–84.

The Supreme Court was therefore presented with four separate petitions. Because each side of the case had won some and lost some, all parties sought Supreme Court review—and the oral arguments consumed some four hours. Then, after all that buildup came the anticlimax: the Court issued a modest, 34-page ruling rejecting the state's[73] federalism challenges and finding that nobody had standing to argue that ICWA is unconstitutionally race-based. On the race question, in fact, the majority remained studiously silent. Yet the majority opinion by Justice Amy Coney Barrett, the concurring opinion by Justice Gorsuch, and the dissent by Justice Thomas clashed over a more fundamental issue: the source and nature of Congress's authority to legislate with respect to tribes. Before addressing that, we will examine how the Court resolved the two primary disputes.

III. Commandeering

The anti-commandeering rule says that while Congress may pass laws that states must obey, states cannot be required to implement those laws. States may not *interfere* with federal implementation of federal law, but they can stand back and refuse to participate. As the Supreme Court put it in *Printz v. United States*, "[i]t is no more compatible with [states'] independence and autonomy that their officers be 'dragooned' . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws."[74] There is a significant caveat, however: A federal mandate does not qualify as "dragooning" if it is "even-handed"—that is, if it applies to both private and public parties equally. For example, provisions of the Affordable Care Act that require employers to provide certain kinds of insurance to employees do not violate the anti-commandeering rule when they apply to government employers, since private employers must do the same.[75]

Two categories of commandeering arguments were at issue in *Brackeen*. The first involved a typical commandeering claim: that ICWA forces state executive-branch officials to implement its

[73] By the time it reached the Supreme Court, Illinois and Louisiana had dropped out of the case, leaving Texas as the sole state petitioner.

[74] 521 U.S. 898, 928 (1997) (citation omitted).

[75] *See* Ohio v. United States, 849 F.3d 313, 322 (6th Cir. 2017).

substantive mandates. It does this by forcing state child welfare officers to take steps they otherwise would not take—for example, seeking racially matched households to provide foster care for abused Indian children whom the state has taken into custody, or maintaining various special types of records regarding the placement of Indian children, which are not necessary in cases involving non-Indian children.

The second commandeering argument was more unusual. It involved the commandeering of state *judges*. The Supreme Court has never before addressed how, or even whether, the anti-commandeering rule applies to state courts. The Constitution itself requires state judges to implement federal law notwithstanding anything in a state's constitution or laws to the contrary.[76] There is thus an intuitive difficulty with the idea that it is even logically possible for a state judiciary to be unconstitutionally "dragooned." Yet the argument made sense in *Brackeen*, given an unusual feature of ICWA.

Ordinarily, a federal law will create some substantive right or establish a legal cause of action, which state courts must then enforce. This presents no commandeering problem. But ICWA doesn't do that. Instead, it dictates the evidentiary or procedural rules that state judges must follow when they apply *state* law. In other words, whereas federal laws usually create the *what*, ICWA dictates the *how*—forcing state judges to use ICWA's methods when applying *state* law regarding child welfare. That, the plaintiffs argued, is "dragooning."

Consider the rules that govern the termination of parental rights (TPR): If a state seeks to terminate the rights of an abusive parent, it must prove to a state judge that certain facts exist—facts that *state law* says will justify TPR. Those facts must be proven by "clear and convincing evidence." That is the standard in every state, because it was mandated by the Supreme Court in *Santosky v. Kramer*, a 1982 case which said that the "preponderance of the evidence" standard was too lax and that the "beyond a reasonable doubt" standard was too demanding.[77] The former risked making it too easy for the state to take people's children away, while the latter "would erect an unreasonable barrier to state efforts to free permanently

[76] *See* U.S. Const. art VI cl. 2.

[77] 455 U.S. 745, 768–69 (1982).

neglected children for adoption."[78] ICWA, however, imposes that unreasonable barrier; in fact, it goes further. It requires that in a TPR case involving an Indian child, the state court must find the existence of the required facts beyond a reasonable doubt, based on the testimony of expert witnesses.[79] This is an evidentiary burden even more severe than that which applies to criminal law (where expert witness testimony is not required). Given that TPR is a necessary step before adoption, this provision of ICWA literally makes it easier to put a criminal on death row than to find an adoptive home for an Indian child in need. To reiterate, ICWA does not set forth the substantive standards for TPR or create a federal substantive right involving TPR. It dictates to state judges how they must implement the state's *own* TPR statute.[80] This presents a unique commandeering problem.

Yet in *Brackeen*, the Court rejected the argument that ICWA commandeers either the state executive or judicial branches. With respect to the executive branch, the Court concluded that while ICWA does require state executive entities to take certain actions, this isn't commandeering, because private parties must also take those steps. For example, the "active efforts" requirement, which forces state child welfare agencies to return abused Indian children to abusive households, also applies to private parties, as in the *T.A.W.* and *S.S.* cases described above.[81] Thus ICWA is "even-handed."

[78] *Id.* at 769.

[79] 25 U.S.C. § 1912(f). The statute specifically requires *qualified* expert witnesses, a term the BIA defines as someone "qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe." 25 C.F.R. § 23.122(a). This sharply narrows the number of available experts—how many child psychologists, capable of testifying about a child's needs, also happen to be experts on the culture of any particular tribe? Moreover, this regulation inherently biases ICWA proceedings by effectively giving the tribe—which is typically a party to the case—veto power over which experts are allowed to testify. A non-Native would-be adoptive parent seeking TPR might wish to offer testimony from (say) a world-renowned child psychologist who can prove that granting TPR is crucial to the child's well-being—but because the psychologist is not also an expert on the prevailing standards of (say) the Augustine Band of Cahuilla Indians, the psychologist's testimony would simply not count.

[80] Some state courts have said ICWA doesn't impose an evidentiary standard on state law, but merely adds an additional element to federal law. But the latter is just as much commandeering as the former—perhaps more so. *See* Sandefur, *Federalism Problems*, *supra* note 2, at 459 n.155.

[81] *See Brackeen*, 143 S. Ct. at 1631–33.

There are three problems with that conclusion: First, there's no reason to believe ICWA was intended to apply to interfamily disputes such as *T.A.W.* and *S.S.* at all. On the contrary, ICWA declares that it was intended to apply to "agencies," and it expressly does not apply to divorce proceedings.[82] That and its historical background suggest that state courts have erred in holding, as they did in *T.A.W.*, *S.S.*, and similar cases, that ICWA applies to interfamily disputes. Yet the *Brackeen* majority simply assumed that these decisions were correct.

Second, while ICWA does impose mandates on private parties in other situations—it expressly applies to private adoption agencies, for example—it does so as a condition of their obtaining a state-court judgment. ICWA is not like, say, a statute that requires state governments to provide certain types of insurance to its employees, just as private employers must do—which would be a typical "even-handedness" situation. Rather, ICWA provides that a state judge may not grant a judgment to a party (on a matter of state law) without first finding that the party has taken certain steps (i.e., "active efforts"). Viewed that way, ICWA does not regulate plaintiffs; it regulates state courts. Its unique evidentiary rules therefore straddle the line between executive and judicial commandeering in ways that cause the common-sense notion of "even-handedness" to collapse.

Third, even if it is true that ICWA, correctly interpreted, theoretically applies both to public and private entities, the reality on the ground is that the vast majority of cases involving TPR are those in which a state child protection agency is the moving party. They are the entities that states entrust to protect abused and neglected children, and the historical record shows that they are the entities at which ICWA was principally aimed. The fact that ICWA might incidentally also apply to private parties should not be taken as an excuse to ignore the degree of commandeering at issue. Yet on this point, the *Brackeen* Court struck a highly formalistic note, brushing aside this argument on the grounds that "[t]he record contains no evidence supporting the assertion that States institute the vast majority

[82] 25 U.S.C. § 1903(1).

of involuntary proceedings."[83] If formalism means "screening off . . . [the] factors that a sensitive decisionmaker would otherwise take into account" and blindly following "the force of the language in which rules are written,"[84] then surely this appeal to the text instead of the facts that any reasonable person knows is an extraordinary exercise in formalism.

Even more striking was the short shrift the *Brackeen* majority gave to the judicial commandeering argument. It found that ICWA's provisions dictating how state courts must apply their own state statutes are just an ordinary application of the Constitution's Supremacy Clause. Rejecting the plaintiffs' "distinction between requiring state courts to entertain federal causes of action and requiring them to apply federal law to state causes of action," the majority concluded that when Congress adopts a law, states must comply, "[e]nd of story."[85]

But that is surely not the end of the story. The Supremacy Clause does not give Congress power to override all matters of state law. If it did, the Constitution would be only a single sentence long. It would consist only of the Supremacy Clause, and ours would be a consolidated, national government—which, as the Framers and the Court have repeatedly explained, it is not.[86] Congress could not, for example, forbid state courts from convicting any defendant of robbery under state law absent a confession, or forbid state judges from giving effect to holographic wills unless there are four witnesses.[87] If that is because such matters fall so clearly within the province of state law that no fair reading of congressional authority would allow Congress to dictate to state courts how to implement such state-law principles, then exactly the same is true of

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

[84] Frederick Schauer, *Formalism*, 97 Yale L.J. 509, 510 (1988).

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

[86] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 618 n.8 (2000); United States v. Lopez, 514 U.S. 549, 552 (1995).

[87] *See, e.g.*, The Federalist No. 33 at 199–200 (C. Rossiter, rev. ed. 2003) (Alexander Hamilton) (regarding it as fanciful that Congress could ever "attempt to vary the law of descent [i.e., intestacy] in any State"); Sandefur, *Federalism Problems*, *supra* note 2, at 461–62.

state-court child welfare proceedings, which are also quintessential matters of state law.[88]

The only way to justify ICWA, therefore, is to appeal to some source of congressional power that supersedes the ordinary rules of federalism. And the *Brackeen* majority tried this move by asserting that Congress has "plenary" power with respect to tribes. That argument fails, for reasons we will see in part V below. Yet there is a more theoretically plausible move the Court could have made—a clause never invoked by any party, but which would have provided a firmer basis for ICWA's mandates on state executive and judicial branches: Section Five of the Fourteenth Amendment.

Section Five gives Congress extraordinarily broad power over states when necessary to remedy perceived violations of constitutional rights. For example, the Court has already held that Congress can use this power to strip states of sovereign immunity.[89] It thus seems likely that Congress could also use this power to mandate variances from state-law evidentiary burdens, even with respect to state law causes of action. Indeed, the Fourteenth Amendment was created specifically

[88] The Court cited three examples of federal law dictating the mechanism for applying substantive state law: the Federal Employees' Group Life Insurance Act (FEGLIA), the National Service Life Insurance Act (NSLIA), and the Employee Retirement Income Security Act (ERISA). *See Brackeen*, 143 S. Ct. at 1635. None of these are analogous, however. FEGLIA created a federal insurance program—i.e., it created substantive federal rights—and then dictated how state courts should implement those rights. *See* Hillman v. Maretta, 569 U.S. 483, 486–87 (2013). NSLIA likewise creates substantive federal rights, such as the right to designate the recipients of life insurance policies, which obviously overrode contrary California law in *Wissner v. Wissner*, 338 U.S. 655, 661 (1950). ERISA regulates plan administrators by directing them to take certain actions, notwithstanding state law to the contrary—it does not dictate to state judges what procedural or evidentiary standards to use when applying their own substantive state law. *See* Sandefur, *Federalism Problems*, *supra* note 2, at 467 (discussing Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141 (2001)). None of these statutes bears any resemblance to ICWA, which does *not* create substantive federal rights or a substantive cause of action. Rather, ICWA simply dictates to state judges what evidentiary standards they must use when applying *state law* causes of action or implementing *state law* rights. The Fifth Circuit in *Brackeen* actually offered a better analogy: the Servicemembers Civil Relief Act, which allows members of the military to re-open adverse state-court judgments (involving state law causes of action) rendered in their absence while on duty. *See Brackeen*, 994 F.3d at 318 (opinion of Dennis, J.). But even that example fails, because under that act, state courts can refuse to reopen such cases if (inter alia) the party lacks a meritorious *state-law* defense. *See* Sandefur, *Federalism Problems*, *supra* note 2, at 463. Thus, that Act respects federalism in ways ICWA does not.

[89] *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

to enable Congress to protect citizens from the kinds of abuses that, as Justice Gorsuch detailed, inspired ICWA's adoption. Of course, had this issue been raised, the Court would have had to decide whether ICWA's mandates are "congruent and proportional" to the harms Congress sought to redress.[90] Whether or not ICWA could pass that test is debatable, but no such debate occurred. One thing is clear: This approach would be far more constitutionally rational than the ill-conceived "plenary" power theory that the majority employed.

IV. Is ICWA Race-Based?

Before proceeding to the dispute over "plenary" power, however, a word about the blockbuster argument in *Brackeen*: whether ICWA is unconstitutional race-based legislation. The majority chose not to answer this question, adopting a weirdly strict interpretation of the all-too-malleable doctrine of standing. This was disappointing not only as a legal matter—because this application of standing appears opportunistic—but as a practical matter, too, given that the Court has shown so little interest in ICWA. In the 45 years of that Act's existence, the Justices have addressed it in only three cases—about once a generation. It is only too possible that the *Brackeen* decision could doom another generation of Indian children to the deprivations ICWA imposes on them.

A. Standing: The Lack of State Defendants Proves Fatal

Federal courts will not resolve a dispute unless the parties have standing to raise it, meaning the kind of direct stake in the case that makes them the appropriate litigants to present it. Unfortunately, standing can be an amorphous concept, and as Clark Neily has written, it can, "[w]hen misapplied, . . . amount to little more than a 'get out of court free' card for the government."[91] That is what happened in *Brackeen*.

The Court found that the plaintiffs lacked standing to challenge ICWA as race-based because although the Brackeens were then in the midst of state-court adoption proceedings to which ICWA would probably make all the difference, no state officials responsible for implementing ICWA were named as defendants. That, said the Court,

[90] *See, e.g.*, Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736–38 (2003).

[91] Clark Neily, District of Columbia v. Heller*: The Second Amendment Is Back, Baby*, 2007–2008 Cato Sup. Ct. Rev. 127, 138 (2008).

meant "an injunction would not give petitioners legally enforceable protection from the allegedly imminent harm."[92] In other words, the Brackeens needed to have sued Texas state judges in order for any potential judgment to provide relief.

This seems like motivated hair-splitting, however, given that state officials implement ICWA because they are forced to by federal law. The *Brackeen* majority opinion itself says that when Congress mandates something, state judges must comply, "[e]nd of story."[93] Why, then, is that not the end of the story as far as standing is concerned? On the merits, the Court considers it natural to regard state officials as mere instruments in the hands of Congress—but in its standing inquiry, the Court shifts gears and acts as if state officers have sufficient discretion that a plaintiff must enjoin them separately from the federal officials responsible for ICWA's implementation. That seems to be trying to have it both ways.

Further, existing precedent does not require such particularity in choice of defendants. Ordinarily, the question in a standing inquiry is whether the plaintiffs' injuries would be *redressed* by a favorable decision. That redress need not be perfect or total; plaintiffs only need to show that the relief they request "would lessen" their injuries or "significant[ly] increase . . . the likelihood" of their being shielded from future injuries.[94] A ruling that ICWA is unconstitutionally race-based would unquestionably have accomplished that, because state judges would then not apply ICWA's racially discriminatory provisions. That, in turn, would have eliminated the race-based barriers placed on the Brackeens' efforts to adopt, and would have enabled the Clifford family to seek to recover custody of Child P., who was taken from them under ICWA. Yet the *Brackeen* Court effectively said the plaintiffs could not sue the master without also suing the servant. That is certainly not the law.[95]

[92] *Brackeen*, 143 S. Ct. at 1639.

[93] *Id.* at 1635.

[94] *See, e.g.*, Utah v. Evans, 536 U.S. 452, 464 (2002); Inclusive Cmtys. Project, Inc. v. Dep't of Treasury, 946 F.3d 649, 655 (5th Cir. 2019).

[95] *See, e.g.*, Graham v. Fed. Emergency Mgmt. Agency, 149 F.3d 997, 1003 (9th Cir. 1998) ("Plaintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision."); Beno v. Shalala, 30 F.3d 1057, 1065 (9th Cir. 1994) ("[T]o have standing, a federal plaintiff must show only that a favorable decision is *likely* to redress his injury, not that a favorable decision *will inevitably* redress his injury.") (emphasis in original); *cf.* Poulin v. Graham, 147 A. 698, 699 (Vt. 1929) (plaintiff in *respondeat superior* need not sue servant to sue master).

B. Race and Rice, Membership and Mancari

The majority declined to address the question of whether ICWA violates rules against race-based legislation,[96] as did—rather surprisingly—the concurring opinion by Justice Gorsuch. But Justices Kavanaugh, Thomas, and Samuel Alito did proceed to address these questions. Kavanaugh, in a brief concurrence, said that while he believed the plaintiffs lacked standing, "the equal protection issue is serious."[97] Thomas, in dissent, observed that a law like ICWA would never be tolerated if it "tried to regulate the child custody proceedings of U.S. citizens who are eligible for Russian, Mexican, Israeli, or Irish citizenship."[98] And Alito's dissent noted that ICWA "advance[s] [tribal government] interests at the expense of vulnerable children and their families," "even when the child is not a member of a tribe and has never been involved in tribal life, and even when a child's biological parents object."[99]

It might seem obvious that a law which deprives children of legal protections based on their biological ancestry qualifies as race-based discrimination.[100] Race-based laws are laws "which single[] out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'"[101] Such laws are subject to the virtually insurmountable test of "strict scrutiny." Yet in the 1974 case of *Morton v. Mancari*,[102] the Court said that laws differentiating between Indians and non-Indians are not necessarily race-based. Tribes are political communities, it reasoned, which means tribal membership is "political rather than racial in nature."[103] Consequently, laws triggered by tribal membership are subject only to the more lenient "rational basis" test.

[96] The Court notably characterized its holding as "declin[ing] to disturb" the Fifth Circuit, rather than affirming it or upholding ICWA's constitutionality. *Brackeen*, 143 S. Ct. at 1631.

[97] *Id.* at 1661 (Kavanaugh, J., concurring).

[98] *Id.* at 1664 n.1 (Thomas, J., dissenting).

[99] *Id.* at 1688–89 (Alito, J., dissenting).

[100] Or, in the alternative, discrimination based on national origin, which implicates the same strict scrutiny as race-based laws. *See* Sandefur, *Unconstitutionality*, *supra* note 2, at 64–67.

[101] Rice v. Cayetano, 528 U.S. 495, 515, (2000) (citations omitted).

[102] 417 U.S. 535 (1974).

[103] *Id.* at 553 n.24.

Nevertheless, the Court has indicated that *Mancari* does not give Congress carte blanche to differentiate between Indians and non-Indians. In *Rice v. Cayetano*, it said *Mancari* was quite limited—"confined to the authority of the [Bureau of Indian Affairs], an agency described as *'sui generis*'"[104]—and the *Mancari* case itself made a point of emphasizing that the law at issue there was "not directed towards a 'racial' group consisting of 'Indians,'" but at people who had chosen to become or remain members of tribes.[105]

Into which bucket, then, does ICWA fall? Does it treat people differently based on their political affiliations, in which case it is subject to *Mancari*'s rational basis standard? Or does it treat identifiable classes of people differently based on ancestry or ethnicity and therefore trigger strict scrutiny under *Rice*? The answer is plainly the latter. As Ojibwe writer David Treuer puts it, "[c]ulture isn't carried in the blood, and when you measure blood, in a sense you measure racial origins."[106] Blood, however, is all that counts under ICWA. It applies based not on political, cultural, linguistic, or religious connections to a tribe—which, again, are considered irrelevant—but on "a characteristic determined solely by the accident of birth."[107] Its placement preferences even mandate that children be placed with Indian families of different tribes rather than with non-Indians—based, again, on "a Federal policy that, where possible, an Indian child should remain in the Indian community."[108] All of this can only be explained by the fact that ICWA is premised not on tribal identity, but on "Indian" identity. That concept of generic "Indianness," however, is a racial, not a political category. In short, ICWA actually *is* aimed at a racial group consisting of Indians—whom it deprives of legal protections that other Americans enjoy.

Rather than confronting those questions, however, the majority focused its attention on the nature and scope of Congress's power to adopt a statute such as ICWA in the first place. And on this issue, so much depends upon the unhelpfully ambiguous word "plenary."

[104] *Rice*, 528 U.S. at 520.

[105] 417 U.S. at 553 n.24.

[106] David Treuer, The Heartbeat of Wounded Knee: Native America from 1890 to the Present 382 (2019).

[107] Jimenez v. Weinberger, 417 U.S. 628, 631 (1974).

[108] *Holyfield*, 490 U.S. at 37 (citation omitted).

V. The "Plenary" Power Theory

A. Does "Plenary" mean "Exclusive" or "Unlimited"?

Where does Congress get authority to adopt a statute like ICWA? Questions of child neglect, adoption, and so forth are quintessentially matters of state law, and Congress has no enumerated power to regulate such things. It is not plausible to interpret the Commerce Clause as authorizing such a statute; child abuse is not a commercial matter, and the Court has repeatedly made clear that Congress cannot use that Clause as an excuse to intrude into the realm of state criminal or domestic law.[109] While Congress may have power over child welfare matters on tribal lands, ICWA does not regulate these; it controls state courts addressing ordinary child welfare matters involving kids who live *off* reservation—cases that, but for ICWA, would fall within state jurisdiction. Obviously, Congress could not adopt a law dictating to states how they may treat child custody cases involving, say, American children whose Jewish ancestry makes them eligible for Israeli citizenship. How, then, can Congress purport to pass such a law governing children eligible for tribal membership?

The answer the Court embraced was the "plenary" power. It acknowledged that the "contours" of this power are "undefined," but it made no effort to consider what those contours might be.[110] And this raises some significant problems, given the ambiguity of the word "plenary." In short, the word has two distinct meanings, and *Brackeen*—like many cases in the realm of Indian law—relies heavily on blurring that distinction.

One definition of "plenary" is *supreme*. In that sense, "plenary" means that Congress may legislate in this area without interference from states. But that cannot be what "plenary" means here, because under the Supremacy Clause, states can never interfere, even implicitly, with *any* legislation Congress constitutionally adopts. If "plenary" is a mere synonym for the Supremacy Clause, then it really tells us nothing, because the Constitution's federalism and Bill of Rights principles still limit what Congress can do, regardless of the Supremacy Clause. After all, the Court has also characterized other

[109] *See, e.g.*, *Morrison*, 529 U.S. 598, 613; Jones v. United States, 529 U.S. 848, 857 (2000); *Lopez*, 514 U.S. 549, 567–68.

[110] *See Brackeen*, 143 S. Ct. at 1628 (citations omitted).

federal powers as "plenary" in the sense that states cannot interfere: It has called Congress's power to regulate interstate commerce plenary.[111] It has called the foreign affairs powers plenary.[112] It has described Congress's power over the military,[113] over the residents of Washington, D.C.,[114] over immigration,[115] and over "all persons and things for [purposes of] taxation"[116] as "plenary." Yet nobody would contend that Congress can, in these contexts, disregard federalism principles such as the anti-commandeering rule or Bill of Rights principles such as the prohibition on race-based laws. Thus, *Brackeen* could not have meant the word plenary as a synonym for supreme—if that is what it meant, then the word does nothing to answer the question of whether ICWA's commandeering or race-based provisions are constitutional.

The other definition of "plenary" is *absolute* or *unlimited*.[117] But this definition cannot apply, because Congress does not have limitless power over *anything whatever*. It only has those powers enumerated in the Constitution, or necessary and proper to effectuating such powers, and all these powers are subject to Bill of Rights limitations.[118] Nothing in the Constitution empowers Congress to write a code of federal family law that states must abide by, and a statute that deprives Indian children of due process rights based on their ancestry plainly violates the Bill of Rights. In other words, if "plenary" is used as a synonym for "limitless" or "extra-constitutional," then it clearly cannot apply to Congress.

Nevertheless, the courts have often described Congress's power to legislate with respect to tribes as "plenary" in this second sense, and the Fifth Circuit claimed that this "plenary" power gives the federal government the power to do whatever is "reasonably related to the special government-to-government political relationship between

[111] *See* Gonzales v. Raich, 545 U.S. 1, 29 (2005); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 46 (1824).

[112] *See* Bd. Of Trs. Of Univ. of Ill. v. United States, 289 U.S. 48, 56 (1933).

[113] *See* Chappell v. Wallace, 462 U.S. 296, 301 (1983).

[114] *See* El Paso & N.E. Ry. Co. v. Gutierrez, 215 U.S. 87, 94 (1909).

[115] *See* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972).

[116] *See* Smith v. Turner, 48 U.S. (7 How.) 283, 421 (1849).

[117] *See Brackeen*, 143 S. Ct. at 1684–85 (Alito, J., dissenting) (citing dictionaries).

[118] *Lopez*, 514 U.S. at 552; *Raich*, 545 U.S. 1.

the United States and the Indian tribes."[119] That is a truly startling proposition. If true, it would mean that Congress could disregard *all* constitutional and legal protections for individual rights whenever it acts in a way that it believes will foster the "relationship" between federal and tribal governments. During oral argument, Justice Alito underscored the extreme implications of this idea when he asked,

> Could Congress go further than it has gone in ICWA and say that an Indian child may not be adopted by . . . a non-Indian couple under any circumstances . . . ? Could Congress enact a law that alters the substantive law that states apply in areas like contracts or torts or rules of evidence when one of the parties in the case is an Indian?[120]

Indeed, if Congress truly has the power to do anything reasonably related to preserving the existence of tribes as collective entities, it could presumably forbid tribal members from marrying outside of the tribe,[121] or from using birth control,[122] or from surrendering their tribal citizenship,[123] or from advising others to do any of these things.[124]

The *Brackeen* majority paid little attention to such questions. It paid lip service to the principle of enumerated powers and purported to

[119] *Brackeen*, 994 F.3d at 334 (en banc).

[120] Transcript of Oral Argument at 107, 109–10, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, and 21-380).

[121] *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.").

[122] Some ICWA scholars have even argued that ICWA applies to children *before conception*, based on a future child's genetic makeup. *See* 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 with the federal mandates under ICWA.").

[123] *Contra* United States *ex. rel.* Standing Bear v. Crook, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) ("The question of expatriation has . . . always been claimed and admitted by our government, and it is now no longer an open question [that] . . . the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it.").

[124] The First Amendment does not prohibit laws that bar speech soliciting illegal acts. United States v. Williams, 553 U.S. 285, 298 (2008). So if Congress could make it illegal to quit a tribe, it could also ban speech encouraging others to do so.

acknowledge that "Congress's Indian affairs power 'is not absolute'" and "not unbounded."[125] Yet it gave no hint as to what the boundaries might be. And if Congress can use this plenary power to strip children of legal protections based on their biological ancestry, force American citizens into courts where the Bill of Rights is inapplicable, and dictate to state judges how to interpret state statutes, it's hard to imagine where the boundaries could lie.

What's more, the source of this allegedly plenary power remains obscure. The majority opinion stitched it together out of what Justice Thomas called a "smorgasbord" of constitutional provisions:[126] the Commerce Clause (which entitles Congress to regulate "commerce with foreign nations, and among the several states, and with the Indian tribes"), the Treaty Clause (which entitles the President to "make treaties" with senatorial advice and consent), and something the majority called "preconstitutional powers" that are "inherent in the Constitution's structure."[127] According to the majority, this congeries of constitutional elements overlaps to generate a power not actually specified in the Constitution—one which overrides the limits normally applicable to federal authority.

Certainly none of these clauses by itself would support ICWA. Child welfare matters are not "commerce" any more than violence against women or carrying firearms near a school are "commerce."[128] Nor would the treaty power suffice, because among other things, ICWA is a statute, not a treaty.[129] As for "preconstitutional" or "structural principles," this concept owes its origin to *United States v. Curtiss-Wright Export Corporation*, which concerned foreign affairs.[130] Foreign affairs precedents might be instructive

[125] *Brackeen*, 143 S. Ct. at 1629 (citations omitted).

[126] *Id.* at 1662 (Thomas, J., dissenting).

[127] *Id.* at 1628 (majority op.) (citations omitted).

[128] *See* Lopez, 514 U.S. 549; *Morrison*, 529 U.S. 598. *See further* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201 (2007).

[129] The majority's response to this point was truly odd. It brushed aside this argument by saying it "does not get [the petitioners] very far . . . since Congress did not purport to enact ICWA pursuant to the Treaty Clause power." *Brackeen*, 143 S. Ct. at 1631. But the plaintiffs were not seeking to justify ICWA on the basis of the treaty power; they were arguing that ICWA was *not* constitutional, and that the Treaty Clause would not have authorized it *even if* Congress had relied upon that Clause. Thus, the fact that ICWA was not based on the treaty power can hardly count against the plaintiffs.

[130] 299 U.S. 304, 315–322 (1936).

in understanding Congress's power *vis-à-vis* tribes, but no principle of federal or international law suggests that Congress could use foreign affairs powers to dictate to states how to decide child custody cases involving children and adults who are American citizens. On the contrary, the Court made clear as recently as 2014, in *Bond v. United States*, that Congress may not use a treaty to aggrandize to itself powers that belong to the states.[131] And in *Reid v. Covert*, the Court said that an international treaty was unconstitutional because it subjected American citizens to legal proceedings that lacked Bill of Rights protections.[132]

In any event, among the most basic "structural principles" of the Constitution are the principles that Congress has only "few and defined" powers[133] and that neither Congress nor the states may treat people differently based solely on biological ancestry.[134]

Even stranger is that the "plenary" theory the majority embraced is exactly what caused the abuses which led to ICWA's creation in the first place. As Justice Gorsuch explained in his concurrence, the "plenary" theory owes its origins to the 1886 case of *United States v. Kagama*,[135] a case decided toward the end of the Indian wars, when most of the tribes on the western plains had been militarily defeated and relegated to reservations. The *Kagama* Court characterized indigenous Americans as conquered foreign enemies whose fates were at the federal government's mercy, and over whom it had corresponding charitable obligations. Being the "weak and diminished" "remnants" of "a separate people," *Kagama* said, Indians were now "wards of the [United States]" due to their "weakness and helplessness."[136] As Justice Gorsuch observed, that proposition was interpreted in subsequent years as justify-

[131] 572 U.S. 844, 866 (2014).

[132] 354 U.S. 1, 6 (1957). ICWA requires state courts to transfer child welfare proceedings into tribal court. 25 U.S.C. § 1911(b). Bill of Rights protections do not apply in tribal court. *Duro*, 495 U.S. at 693. *See further* Sandefur, *Unconstitutionality*, *supra* note 2, at 78–79.

[133] The Federalist No. 45, *supra* note 87, at 289 (James Madison).

[134] Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

[135] 118 U.S. 375 (1886).

[136] *Id.* at 381, 384.

ing "a 'virtually unlimited [federal] authority to regulate [T]ribes' in every respect."[137] And one of the things this allegedly absolute power was viewed as authorizing was the program of coercive assimilation of Indian children.

For that reason, it was truly bizarre that in *Brackeen*, it was the tribal governments who defended this plenary power theory and the plaintiffs who attacked it. Justice Alito brought out the irony, not to say cynicism, of this fact by asking Deputy Solicitor General Edwin Kneedler during oral argument, "What about the boarding school law? Congress had the power to do that?"—to which Kneedler, defending ICWA, replied affirmatively: "Congress had the power."[138] Justice Gorsuch was right in concluding that "Indian boarding schools and other assimilationist policies" would "[not] have been possible without this Court's plenary-power misadventure."[139] Yet in *Brackeen*, the majority persisted in that misadventure, relying on the plenary theory as the constitutional basis for ICWA—and without seeking to justify the plenary theory beyond the fact that a "long line of cases" supports it.[140] As Justice Thomas wrote in dissent, the plenary power "appears to have been born of loose language and judicial *ipse dixit*," and the *Brackeen* majority chose to continue indulging this ill logic.[141] This brings us to another irony of *Brackeen*: the fact that Justices Gorsuch and Thomas joined in rejecting the "plenary" power, even while reaching opposite conclusions regarding ICWA's constitutionality.

B. The Concurrence of the Dissents

After describing the historical abuses that led to ICWA's enactment and detailing the "incoherence" of the plenary power theory, Gorsuch concluded that ICWA "must stand."[142] Yet he did not address, let alone resolve, whether ICWA is a race-based statute, con-

[137] *Brackeen*, 143 S. Ct. at 1658 (Gorsuch, J., concurring) (quoting Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. Rev. 666, 670 (2016)).

[138] Transcript, *supra* note 120, at 108.

[139] *Brackeen*, 143 S. Ct. at 1658–59 (Gorsuch, J., concurring).

[140] *Id.* at 1627 (majority op.).

[141] *Id.* at 1662 (Thomas, J., dissenting).

[142] *Id.* at 1659, 1660 (Gorsuch, J., concurring).

cluding his concurrence instead with an unusual address to the reader: "You must decide for yourself if ICWA passes constitutional muster."[143] Gorsuch's concurrence is therefore clearly not the end of the story.

Instead, Gorsuch focused on the meaning of the Indian Commerce Clause, which he interpreted expansively as encompassing "the management of tribal relations," rather than as limited to commercial transactions and the like.[144] In other words, despite the fact that the word "commerce" appears only once in the Commerce Clause ("Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"), Gorsuch interpreted that word as having two, perhaps three different meanings, based on the object to which it applies.[145] He justified this counterintuitive—indeed, ungrammatical—move by appeal to the history of federal-tribal relations. In his view, the Indian Commerce Clause authorizes federal control over not just commercial matters, but over anything relating to "how non-Indians . . . engage with Indians."[146]

Justice Thomas reached a different conclusion, concluding that ICWA is unconstitutional, but he shared Gorsuch's view that the plenary power theory is untenable. Rejecting the majority's appeal to penumbras formed by emanations from the treaty, commerce, and other powers, Thomas observed that all the historical examples of federal Indian laws that the majority mustered to demonstrate the existence of a plenary power actually fell "easily" within the "normal understanding of the Constitution's enumerated powers."[147] They did not prove that Congress has a free-floating plenary authority.[148] Indeed, he observed that the majority was "treating [the]

[143] *Id.* at 1660.

[144] *Id.*

[145] *Id*. at 1655.

[146] *Id*. at 1661.

[147] *Id.* at 1670 (Thomas, J., dissenting).

[148] Days after *Brackeen* was announced, Justice Thomas concurred in *Arizona v. Navajo Nation*, 2023 WL 4110231 (U.S. June 22, 2023), writing that the concept of the tribal "trust" in Indian law is likewise infected with ambiguity and that it "seems to lack a historical or constitutional basis." *Id.* at *9 (Thomas, J., concurring).

loose 'plenary power' language as talismanic," in order to "transform[] that power into the truly unbounded, absolute power that [it] disclaim[s]."[149]

Thomas therefore agreed with Gorsuch that ICWA must stand or fall on the Commerce Clause—but he concluded that it must fall. The Constitution's authors, he noted, expressly chose *not* to give Congress power to regulate "Indian affairs"—the phrase which occurred in the Articles of Confederation, and which the Constitution replaced with the more limited power to regulate "commerce."[150] And Thomas offered evidence that "[w]hen discussing 'commerce' with Indian tribes, the Founders plainly meant buying and selling goods and transportation for that purpose," not an expansive power over all relations between Native Americans and American citizens.[151] Still, Thomas saw a "saving grace" in the decision: The majority had not decided that ICWA is actually within Congress's authority, but merely postponed that question for a later day.[152] He, too, recognized that *Brackeen* is far from the end of the story.

Justices Kavanaugh and Alito also found ICWA troubling. While Kavanaugh agreed that the plaintiffs lacked standing, he wrote a separate concurrence to "emphasize that . . . the equal protection issue remains undecided" and that the law's race-based differential treatment "raise[s] significant questions under bedrock equal protection principles."[153] Alito, too, concluded in his dissent that ICWA "run[s] roughshod" over constitutional principles "when the State seeks to protect one of its young citizens" who, for biological reasons alone, is statutorily defined as "Indian."[154] Chiding the majority for exploiting the ambiguity of the word "plenary," Alito concluded that nothing in American legal history can justify ICWA's violation of "the fundamental structure of our constitutional order."[155]

[149] *Brackeen*, 143 S. Ct. at 1678 (Thomas, J., dissenting).

[150] *Id. See further* Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. Chi. L. Rev. 413 (2021).

[151] *Brackeen*, 143 S. Ct. at 1672 (Thomas, J., dissenting).

[152] *Id.* at 1683.

[153] *Id.* at 1661 (Kavanaugh, J., concurring).

[154] *Id.* at 1687 (Alito, J., dissenting).

[155] *Id.* at 1685.

C. The Ignored Citizenship of Indian Children

Yet in all the debate over history, one crucial—indeed, decisive—historical incident was left unmentioned, one that, if properly appreciated, would render much of that debate irrelevant: the Indian Citizenship Act of 1924.[156]

Virtually all of the historical discussion in the competing *Brackeen* opinions about the meaning of the word "commerce," or the "smorgasbord" of war, treaty, and foreign affairs powers, relied on legal conceptions fashioned at a time when Indians were not American citizens. Consequently, much of this debate implicitly assumed some sort of analogy between Indians and foreign nationals. Yet that analogy has not been tenable for a century.

When the Indian Commerce Clause and the Fourteenth Amendment were ratified, Indians were viewed as aliens, outside the American polity; they were even expressly exempted from constitutional citizenship.[157] It was natural, therefore, that the framers of these and other provisions viewed federal power with respect to Indians as quite extreme. Federal power is at its zenith with respect to foreign nationals. They can be deported, their property rights can be limited, their employment opportunities can be restricted, their entitlement to government benefits can be curtailed—even their freedom of speech can be abridged.[158] But citizenship moved Native Americans out of the class of people against whom federal power has its greatest leverage and placed them in the same category as natural-born citizens. And Congress does not have plenary power over citizens—quite the contrary.[159]

That means legal theories about federal power with respect to Indians that were fashioned before the Indian Citizenship Act can be enormously misleading. *Kagama*, for example, explicitly based its expansive notion of federal authority on the fact that Indians "owe[d] no allegiance to the states."[160] Citizenship changed that: Indeed, it

[156] 8 U.S.C. § 1401b.

[157] U.S. Const. amend. XIV.

[158] *See* Mathews v. Diaz, 426 U.S. 67, 80 (1976); *Kleindienst*, 408 U.S. at 769–70; Graham v. Richardson, 403 U.S. 365, 376–78 (1971); Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952).

[159] *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1116 (2004) ("[T]he federal government does not have plenary power over all U.S. citizens.")

[160] *See Kagama*, 118 U.S. at 384.

marked a tectonic shift in the nature of the relationship between Native Americans and federal and state governments—because those governments owe duties of protection to citizens, particularly minors, that they do not owe non-citizens.[161] As the Court said in *Duro v. Reina*, "That Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits . . . [but] Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.'"[162]

Yet none of the Justices recognized this distinction in *Brackeen*. Justice Gorsuch's concurrence, for example, relied overwhelmingly on the fact that during the founding and for many years afterwards, Indians were members of "a 'distinct community'"[163] who were "simply not part of the state polities."[164] But that's not true today. Now they are citizens entitled to the same legal protections as all other citizens. Gorsuch likewise favorably quoted John Marshall's 1832 reference to Indians as members of "a 'distinct community'" to support the proposition that states can no more legislate with respect to tribes "than they could legislate for one another or a foreign sovereign."[165] But while tribal members were analogous to foreigners in 1832 and stood outside state authority in most respects, today they are dual citizens. They are *within* state jurisdiction in most respects, at least when living off tribal lands. Again, Gorsuch relied on an 1866 decision to assert that "the power to regulate commerce with Indian Tribes . . . extends to the entire 'intercourse between the citizens of the United States and those [T]ribes.'"[166] But in 1866, it was

[161] *See, e.g.*, *In re* E.G., 549 N.E.2d 322, 327 (Ill. 1989) ("[T]he State has a *parens patriae* power to protect those incompetent to protect themselves. '[I]t is well-settled that the State as parens patriae has a special duty to protect minors . . . .'") (quoting *In re* Hamilton, 657 S.W.2d 425, 429 (Tenn. App. 1983)).

[162] 495 U.S. 676, 692 (1990) (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).

[163] *Brackeen*, 143 S. Ct. at 1649 (Gorsuch, J., concurring) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832)).

[164] *Id.* at 1648 (quoting Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1150 (1995)).

[165] *Id.* at 1652.

[166] *Id.* at 1655–56 (quoting United States v. Holliday, 70 U.S. (3 Wall.) 407, 417 (1866)).

natural for the Court to use a locution like "between the citizens of the United States and [Indians]," a phrase that is tautologous today, since Indians are citizens of the United States.

The point is that pre-citizenship precedents interpreted federal authority with respect to Native Americans based on the assumption that they were foreigners, subject simultaneously to the strongest form of government power and the weakest degree of government responsibility. That assumption is no longer applicable, and the ancient maxim *cessante rationae, cessat ipsa lex*—when the reason for a legal principle changes, the principle itself changes[167]—indicates that the lessons of those precedents can no longer govern. Surely, if it is wrong to "disdain[] present realities in deference to past formalities,"[168] then constitutional theories based on circumstances that later changed so fundamentally can no longer be blindly followed. The Indian Citizenship Act means Native Americans do not stand outside the American polity, and that means pre-1924 understandings of federal power with respect to them cannot be uncritically followed in modern times.

Ignoring the significance of citizenship resulted in *Brackeen*'s final irony. Gorsuch remarked that "when this Court elides text and original meaning in favor of broad pronouncements about the Constitution's purposes," the result can "bake[] in the prejudices of the day"[169]—and he then proceeded to do precisely that. By anchoring his theory of the Indian Commerce Clause on precedents that assumed (or said outright) that Indians were owed none of the fiduciary duties owed to citizens, he baked into his interpretation of federal authority the prejudices of a long-ago era when Indians were "a separate people" whose rights Congress could override at will.[170]

[167] *See generally* Frederick G. McKean, Jr., *A Useful Maxim*, 4 N.C. L. Rev. 118 (1926).

[168] *Stanley*, 405 U.S. at 657.

[169] *Brackeen*, 143 S. Ct. at 1658 (Gorsuch, J., concurring). *But see* United States v. Vaello Madero, 142 S. Ct. 1539, 1557 n.4 (2022) (Gorsuch, J., concurring) ("In the last few years, some have attempted a revisionist account of the *Insular Cases* . . . [according to which] this Court's decision to withhold full constitutional protection from 'unincorporated' Territories (now) serves the beneficial end of safeguarding traditional cultures . . . . [This] merely drape[s] the worst of their logic in new garb . . . . Our government may not deny constitutionally protected individual rights out of (purportedly) benign neglect any more than it may out of animus.").

[170] *Kagama*, 118 U.S. at 381.

VI. Striding Toward Freedom?

Notwithstanding the Court's assertion, *Brackeen* is certainly not the end of the story. On the contrary, its refusal to address ICWA's race-based differential treatment must leave all sides of the issue unsatisfied. The Justices merely postponed the debate everyone cares about—and put litigators in child custody cases on notice that they must raise constitutional challenges to ICWA's application in *every* appropriate proceeding, to preserve the issue for appeal. Eventually, courts will have to confront this question.

Unfortunately, time is not something Indian children can afford. They are the most at-risk demographic in the United States, facing greater threats of neglect,[171] violence,[172] gang activity,[173] drug and alcohol addiction,[174] and suicide[175] than any other group of children. They suffer higher rates of abuse than kids of any other race[176] and are overrepresented in foster care; although they make up only one percent of the national population, they account for two percent of children in foster care.[177] They also tend to spend far longer in foster care than children of other races,[178] meaning they are more likely to "age out" instead of finding permanent, loving

[171] *See, e.g.*, Tara Culp-Ressler, *The Shocking Rates of Violence and Abuse Facing Native American Kids*, ThinkProgress, Nov. 18, 2014, https://bit.ly/47THhNU.

[172] *See, e.g.*, Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence: Ending Violence so Children Can Thrive (U.S. Dep't of Justice, 2014), https://wapo.st/3E57ZoO.

[173] *See, e.g.*, Aline Major et al., *Youth Gangs in Indian Country*, OJJDP Juv. Just. Bull., Mar. 2004, https://bit.ly/3Z0ZPYB.

[174] Bettina Friese et al., *Drinking among Native American and White Youths: The Role of Perceived Neighborhood and School Environment*, 14 J. Ethnicity in Substance Abuse 287 (2015).

[175] Suicide Prevention Resource Center, Suicide Among American Indians/Alaska Natives, https://bit.ly/3KRVgdf.

[176] U.S. Dep't of Health & Hum. Servs., Child Maltreatment 2019 at 21, https://bit.ly/3YIFHu3.

[177] U.S. Dep't of Health & Hum. Servs., The AFCARS Report (June 23, 2020) at 2, https://bit.ly/3QJc0XM.

[178] Richard P. Barth et al., *Adoption of American Indian Children: Implications for Implementing the Indian Child Welfare and Adoption and Safe Families Acts*, 24 Child. & Youth Servs. R. 139, 142 (2002).

adoptive homes.[179] The good news is that there are many people of all races who stand ready and willing to help these children. The bad news is that ICWA says they're not allowed to—because their skin is the wrong color.

The first step toward fixing this problem is to erase that color line—to recognize that every child has a right to have his or her *individual* interests take precedence over racial or political considerations. Indian children cannot be regarded as outsiders, relegated to a system that deprives them of legal protections and bars their parents from promoting their best interests. But even when the day comes that Indian children are given the equal protection of the laws, that will not be the end of the story. It will be just the start of the hard labor of fixing what this country has so badly damaged. "The Indian story does not, of course, end with an intellectual accommodation with the past or even a moral coming to terms," writes historian Fergus Bordewich. "Indeed, the story does not end at all . . . . There will be no end to history, but an end may be put to the invention of distorting myth. With that may come a recognition that Indians are not, at last, poignant vestiges of a lost age, but men and women of our own time, struggling to solve [modern] problems with the tools of our shared civilization."[180]

[179] Tribal governments typically blame these disparities on racism by child welfare agencies. *See, e.g.*, National Indian Child Welfare Association, *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet* (Sept. 2015), https://bit.ly/3OOfzZY (blaming "widespread non-compliance" by state governments). But the more plausible explanation is that Native children disproportionately suffer from poverty, isolation, lack of access to services, and other risk factors. As one expert observes, ICWA "does little to alter the conditions that Congress held responsible for the unwarranted breakup of Indian families . . . . [Its] emphasis is on removal and placement, not prevention." Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 Hastings L.J. 1287, 1334 (1980).

[180] Fergus M. Bordewich, Killing the White Man's Indian: Reinventing Native Americans at the End of The Twentieth Century 343 (1996).