FAMILY LAW

SUFFER THE LITTLE CHILDREN

U.S. law treats Native American children very different from other children.

BY TIMOTHY SANDEFUR

It is hard to believe that more than a half-century after *Brown v. Board of Education*, racial segregation of children still exists—in explicit, legally mandated form—not just in some places, but all across the United States. Children of one racial group are separated from all others and subjected to different laws—laws that give them less protection against abuse and neglect than their peers enjoy—solely on account of their genetic ancestry.

This is done under the auspices of the 1978 Indian Child Welfare Act (ICWA), a law that applies to any child who is "eligible for membership" in a tribe and whose parent is a member, regardless of whether that child has ever lived on a reservation or has any familiarity with a tribe's culture, language, religion, or history. The ICWA forces state child protection officers to return abused children to the parents who have mistreated them, makes it harder to rescue them from neglect, and renders it next to impossible to find them the permanent, loving adoptive homes they need. It even overrides the choices of Indian parents themselves when they try to protect their children's best interests.

Most remarkably, the Bureau of Indian Affairs (BIA) and several state courts have declared that the ICWA overrides the "best interests of the child" test that applies to cases involving children of other races. Given that Native American kids face higher risks of poverty, abuse, alcoholism, gang activity, and suicide than any other U.S. demographic, these discriminatory limits on child protection, foster care, and adoption worsen the lives of America's most vulnerable citizens.

Recently, a series of lawsuits over the ICWA—brought by adoption attorneys, state attorneys general, and the Goldwater Institute—have drawn increasing attention to these problems. But ensuring equal protection for Indian children is likely to be a difficult and slow process.

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SEPARATE AND UNEQUAL

The ICWA was adopted in reaction to abuses by child welfare agencies that sometimes took a jaundiced view of Native American culture and tradition. These agencies were accused of taking Native children away from their parents for insufficient reasons and depriving the parents of fair legal proceedings to challenge those actions. But the ICWA also embodied racist conceptions of its own—most significantly the notion of the "generic Indian" that disregards the dramatic differences between tribes. And because it deprives Native children of crucial legal protections, the law relegates them to second-class status and subordinates their individual interests to the desires of tribal governments.

To understand the differences between the ICWA and the laws that apply to other children, imagine a white child whose parents are abusing him. State child welfare officers would typically take him into temporary foster care while making "reasonable efforts" to restore the family by helping his parents get psychological or economic assistance. These "reasonable efforts" are required by both state and federal law. But "reasonable efforts" are not required in cases involving "aggravated circumstances"—for instance, if the child is being molested or subjected to continuous abuse. That makes sense; it would be foolish to return a child to a dangerous family environment where he will only suffer more.

If "reasonable efforts" fail, the child might be cleared for adoption through a multi-stage legal process that begins with a "termination of parental rights" proceeding, during which the court must use the "clear and convincing" standard of evidence to decide whether the parents' rights over the child should be severed. That standard—more demanding than the "preponderance of the evidence" standard used in most civil cases, but less demanding than the "beyond a reasonable doubt" rule criminal courts use—is required by a 1982 Supreme Court decision that held that terminating a parent's rights over his child is a drastic measure that must not be taken lightly. Yet the Court also refused to impose the extremely demanding "reasonable doubt" standard

because that would "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption."

After parental rights are terminated, the foster family (or anyone else) can file an adoption petition and the court must decide whether the adoption would be in the child's best interests. If so, the court creates a new family by approving the adoption. Race is not supposed to dictate these decisions. On the contrary, the Supreme Court ruled in 1984 that courts could not make custody decisions based on race because "whatever problems racially mixed households may pose," those problems "cannot justify a racial classification" or "directly or indirectly" permit racial prejudices to have any legal effect.

But if the child is an "Indian child," the case is entirely different. The ICWA defines "Indian child" as any minor who is either a tribal member or is "eligible" for membership and whose parent is a member. Eligibility criteria differ from tribe to tribe, but all are based on genetics: the Navajo, for instance, require a child to be at least 25% Navajo, while the Choctaw require only that a child be directly descended from a signer of a 1906 Indian census. Still others, such as the Gila River Indian Community, require 25% "Indian blood" regardless of tribe.

Political, religious, or cultural factors play no role, nor does residency. A child with the right DNA is an "Indian child," regardless of whether he knows anything about tribal culture or has ever visited a reservation. Meanwhile, an adopted white child who lives on a reservation, speaks a tribal language, practices a Native religion, and is otherwise fully acculturated with the tribe does not qualify as Indian under the ICWA because he lacks the right genes.

And the rules for Indian children differ from those that apply to non-Indian children. When state child welfare officers seek to rescue an Indian child from abuse or neglect, the ICWA requires them to make "active efforts"—not "reasonable efforts"—to return her to her parents. While the law doesn't define "active efforts," state courts and the BIA have said that it requires more than "reasonable" efforts—and the "aggravated circumstances" exception does *not* apply.

This means Indian children must be returned to abusive families time and again, which would not happen if they were white, black, Asian, or Hispanic. In one shocking 2016 case, Minnesota social workers took three Duluth children, ages 7, 8, and 9, into protective custody so often that they stopped counting the number of days spent in state care after it reached 500. Officers reported that the home was soaked in urine, with the family sleeping on the floor among piles of rotting food. Had the chil-

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dren been of any other race, they would have been rescued from their alcoholic, neglectful parents. But because they were Indian, they were repeatedly sent back to experience more mistreatment.

In 2008, three young Nebraska girls were taken into custody because of their father's physical abuse, and the father spent seven months in psychological counseling. When problems persisted, the state took the children away permanently—only to have the Nebraska Supreme Court reverse that order because the state had not made enough "active efforts." By the time that ruling came down in 2014, the father had molested them again, leading one judge to lament that the girls had "experienced lifetimes of trauma"—trauma they could have been spared were it not for the ICWA.

The 2006 case of 5-year-old Declan Stewart was even worse. He was an Oklahoma Cherokee boy who was sent back to his mother and her boyfriend despite repeated trips to the emergency room—until at last the boyfriend beat him to death.

RACE-MATCHING

If social workers need to put an Indian child in foster care, the ICWA requires that she be placed with tribal members or with "an Indian family" whenever possible. This is problematic because Indian foster parents are scarce. Los Angeles County, with its population of 10 million people, has only one. But when Native kids are placed in non-Indian foster homes, they can be shifted from one family to another at the behest of tribal governments, which deprives them of the stability and permanence they need.

If the foster parents wish to adopt that Indian child, the rules are even more restrictive. The ICWA mandates that she be adopted by tribal members or by "other Indian families"—even if they are from a different tribe—rather than members of other ethnic groups. And instead of the "clear and convincing evidence" rule that applies to cases involving kids of other races, termination-of-parental-rights cases involving Indian children are governed by an especially stringent version of the "beyond a reasonable doubt" test.

This means it is literally easier to send a defendant to death row than to find an adoptive home for a Native American child.

In a case now underway in Texas, a 2-year-old Navajo boy lived with a non-Indian foster family for nearly a year and a half. They decided to adopt, and the natural parents agreed, but tribal officials said no. They insisted that he be adopted by a Navajo family, instead—a couple he had only met once, for three hours. The court agreed, and within days state officials announced that they would take the boy away from his foster parents and send him to New Mexico. (That has been postponed to allow an appeal, and the Texas attorney general filed a federal lawsuit on the child's behalf in October.)

Heartbreaking cases like these are shocking because Americans are accustomed to the "best interests of the child" standard that courts apply in lawsuits involving children's welfare—a rule judges have called the "lodestar" and the "overriding concern" in child welfare cases. But some judges and the BIA have decreed that courts should *not* apply this rule—or should apply a different *kind* of "best interests" rule—to cases involving Indian children. The Texas Court of Appeals, for instance, has held that "the term 'best interests of Indian children,' as found in the ICWA is different than the general Anglo American 'best interest of the child' standard" because it forbids an Indian child from being placed with non-Indians in all but rare cases. In 2016, California judges agreed, declaring that while the child's individual best interest is the paramount consideration in cases involving white or black kids, courts should only "take an Indian child's best interests into account as *one of the constellation of factors*." In other words, their "best interests" should be compromised to benefit tribal government authority.

This separate-but-equal—more accurately, separate-and-substandard—treatment is reinforced by the federal Interethnic Placement Act, which forbids states from denying an adoption based on race. This law nevertheless expressly excludes Indian children from that protection. That's because while state laws impose no racial limits on adoption or foster care, the ICWA overrides those laws and *mandates* race-matching by requiring that Indian children be placed with Indians except in unusual cases. The racial nature of this requirement is made clear by the fact that it gives priority to "Indian" families even if they are of different tribes, meaning that an Inuit child must be placed with a Seminole or Penobscot family instead of a white family regardless of the vast differences between those cultures. The law thus incorporates the concept of "generic Indianness"—a notion invented by white settlers who ignored the distinctions between aboriginal North Americans and regarded them as fungible. As Justice Clarence Thomas recently observed, "treating all Indian tribes as an undifferentiated mass" is "ahistorical." It is also fundamentally racist.

PRIVATE FAMILY DISPUTES

Although the ICWA was written to restrain abuses by state governments and adoption agencies, courts have recently begun applying it even to private family disputes in which no government agency is involved—in the process, overriding the wishes of Indian parents themselves.

This is particularly common in step-parent adoption cases in which a re-married birth parent seeks to terminate the parental rights of an ex-spouse so that the new spouse can adopt the child. In one 2016 case, for instance, a Native American mother asked Washington state courts to sever the rights of her son's natural father—who had abused her and was jailed for multiple felonies—so that her new husband could legally adopt her son. The tribe supported her choice, but the state supreme court refused. Despite the fact that the birth father was not Native American, it ruled that the ICWA required the mother to engage in "active efforts" to reunite him with the boy.

In January 2017, the Arizona Court of Appeals ruled that the ICWA barred an Indian father from terminating the rights of his non-Indian ex-wife when he decided that her neglect and drug abuse rendered her unfit. He had failed to make "active efforts" to reunite her with the children, the court said, because he prohib-

ited the kids from visiting her on account of her behavior. Months later, another Arizona court held that the ICWA barred a tribal member from terminating the rights of her child's father, who was then serving a prison sentence for a drive-by shooting. Had she lived on the reservation, tribal law would have applied—and those rules happen to be the same as the ordinary Arizona law that applies to non-Indian children. Under either state or tribal law, her request would likely have been granted. But because the child was Indian and did not live on a reservation, the ICWA applied instead—and its more stringent rules overrode the mother's judgment about her son's best interests.

Given the deleterious treatment the ICWA imposes on Native American children, one might assume that state and federal courts would be quick to intervene to ensure the equal treatment that the Constitution promises.

Even more shockingly, a California court recently held that the ICWA applied to a dispute between family members over who should take care of three children whose parents were killed in a car accident. The father's family—which included a member of the Miwok tribal council—invoked the ICWA to insist that they be given priority over the non-Indian mother's family. No adoption agency or state government was involved, and the children were not being removed from their parents' custody. But the court held that the ICWA's race-matching requirements applied anyway because the orphans were Indian.

Yet it is common for the ICWA to deprive Indian parents of the right to make decisions about their children's upbringing—a right the Supreme Court has called "fundamental." In *Troxel v. Granville* (2000), it struck down a Washington state law that forced parents to allow visitation between their children and the children's grandparents, holding that parental decisions about childrearing must be given "special weight." But in the 1989 case of *Mississippi Band of Choctaw Indians v. Holyfield*, the Court allowed a tribal government to veto the decisions of an Indian couple who chose an adoptive family for their baby and left the reservation in an effort to ensure that the adoption would proceed. The ICWA, said the Court, gives tribes rights "on a parity" with those of parents.

TRIBAL POWER

But the *Troxel* decision forbids the government from giving such rights to people other than the parents. For Congress to do so also clashes with the principles of federalism. Family law is a role for state governments alone. The only exception is when states impose discriminatory laws, such as the prohibitions on interracial marriage invalidated in the 1960s or the restrictions on same-sex marriage struck down in recent years. The ICWA reverses this trend, however, and forces states to discriminate when they otherwise would not. What's more, the Supreme Court has held that the federal government cannot compel state officials to enforce federal laws—yet the ICWA forces state social workers to act in certain ways, including "active efforts."

These federalism concerns are severe in ICWA cases because states have primary responsibility for protecting their citizens—especially minors—against mistreatment and neglect. Yet state child welfare officials often find themselves forbidden to act when Indian children are suffering, and are sometimes even forced to send children out of state—literally to extradite them—at the behest of tribal governments. That happened in the highly publicized 2016 case involving "Lexi," a 6-year-old girl who lived with a California foster family for four years and came to think of them as her parents. The Choctaw tribe ordered her removed and sent to Utah to live with a different family instead. State judges admitted that this would cause Lexi psychological trauma, but held that her best interests took a back seat to tribal authority.

The ICWA also disregards the longstanding "minimum contacts" rule that forbids judges from reaching across borders to decide lawsuits involving parties who have no connection to the place where the court sits. As the Supreme Court has put it, the Constitution "does not contemplate that a [court] may make binding a judgment" against a person or a business "with which [it] has no contacts, ties, or relations." Yet the ICWA allows tribes to transfer cases out of any state court in the country, and into their own tribal courts, based solely on the child's biological ancestry.

One can hardly imagine a judge in Florida claiming authority to decide an adoption case involving a Texan child simply because the child's great-grandfather lived in Florida. Yet tribal courts frequently do just this. In the California case involving the three Miwok orphans, a tribal judge ordered the non-Indian relatives to relinquish the children even though neither the relatives, nor the deceased parents, nor the children, ever lived on a reservation. In another ongoing case, a tribal court in Arizona ordered Ohio social workers to turn over a 2-year-old boy who was born in Ohio and lived there his whole life. It had decided that he should live on a reservation nearly 2,000 miles from his home state with a family he had never met.

RACIAL OR POLITICAL DISTINCTIONS?

Given the deleterious treatment the ICWA imposes on Native American children, one might assume that state and federal courts would be quick to intervene to ensure the equal treatment that the Constitution promises. But in fact, most courts have refused to do this, thanks to a 1974 case called *Morton v. Man-*

cari. That case upheld an affirmative-action law that gave tribal members hiring preferences for jobs at the BIA. The Supreme Court held that the law was "not directed towards a 'racial' group consisting of 'Indians'" and therefore did not violate the constitutional ban on racial distinctions. Tribal membership is "political, rather than racial in nature," it declared.

Many courts have interpreted *Mancari* as meaning that Congress is entirely free to treat Indians differently than non-Indians. But in 2000 the Court made clear that there are limits when it struck down a Hawaii law that only allowed descendants of Native Hawaiians to vote in elections for certain state offices. That was an unconstitutional racial distinction, said the justices, because it "single[d] out 'identifiable classes of persons … solely because of their ancestry or ethnic characteristics.'" Hawaii lawyers relied on the *Mancari* precedent, but the justices rejected that argument and called *Mancari* "*sui generis*" because it had involved the BIA, which has a unique relationship to tribal governments. Outside such limited circumstances, the Court said, laws that treat people differently based solely on their genetics are unconstitutional.

Some California courts have also declared that *Mancari* does not shield the ICWA from constitutional challenges. A three-judge panel ruled in a 1996 case called *In re. Bridget R.* that while *Mancari* allows the government to treat children differently if they have a "social, cultural or political tribal affiliation" with a tribe, it does not permit the government to treat them differently if based solely on a child's "genetic heritage." But the court stopped short of striking down the law and instead adopted a theory called the "existing Indian family doctrine," which holds that the ICWA simply does not apply to cases where a child's only connection to a tribe is biological.

California lawmakers reacted to *Bridget R.* by passing a law aimed at eliminating that doctrine, but in 2001 another three-judge panel held that the doctrine remained in effect. Other California courts have disagreed, leading to confusion that remains unresolved after more than a decade and a half.

AMERICA'S MOST VULNERABLE

Since the ICWA's enactment, the U.S. Supreme Court has only addressed it twice: in *Holyfield* and again in the 2013 case involving "Baby Veronica," a Cherokee infant whose non-Indian mother arranged an adoption by a non-Indian adoptive couple. Although Veronica's Cherokee father initially refused to have anything to do with her, he changed his mind after adoption papers were signed and invoked his power under the ICWA to block the adoption because of a lack of "active efforts." The Supreme Court upheld the adoption. The ICWA was designed to prevent the "breakup" of Indian families, it reasoned, and since the father had never had a relationship with Veronica, there was no Indian family to begin with, and therefore no "breakup" was imminent.

That case did not resolve the ICWA's constitutional problems, but used a version of the "existing Indian family doctrine," instead. Yet the justices did note that using the ICWA as a "trump card" to "override the mother's decision and the child's best interests … would raise equal protection concerns" because it "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian."

In fact, this problem is immense. Children of Native American ancestry are more likely than their peers in other ethnic groups to suffer almost every imaginable disadvantage. They are twice as likely to live in poverty. Their infant mortality rate is nearly double the rate among whites. Some 15% are involved in gangs, and 16% are drug-dependent. Fifteen out of every 1,000 Indian youths suffer physical abuse (compared to about 11 among whites) and violence accounts for 75% of the deaths of Native Americans between the ages of 12 and 20. Suicide is the leading cause of death among Indian boys 10–14. Fewer than 5% of Native American high school graduates go on to college, and fewer than 10% of those graduate in four years.

Given the right circumstances, of course, Indian kids do as well as other kids. But the ICWA often prevents them from getting the support and protection they need and compromises their best interests in order to perpetuate racial separatism. Its burdensome requirements deter foster parents from taking in Indian children and makes them less likely to try adopting. Although it was passed with good intentions—to prevent abuses by state officials who wield tremendous power over families that are often unable to protect themselves in court—the law often ends up harming the very children it was supposed to protect.

Unfortunately, reforming the ICWA presents real difficulties. Tribal officials are protective of the powers it gives them, and memories of the abuses that led to the law's passage are still fresh in many people's minds. Judges have generally been reluctant to confront the constitutional problems created by the law, perhaps out of an aversion to involving themselves in such emotionally charged issues or to interfere with Congress's extraordinary powers with regard to tribes. Any dispute involving Native Americans tends to be politically sensitive, given the painful history of U.S.–Indian relations. Thus state and federal supreme courts have often simply chosen not to hear cases involving the ICWA.

But ignoring the problems will only make them worse. Every day, Native American children are denied the legal protections they desperately need, and it is well past time they were given the equal treatment before the law that they, like all people, deserve. We cannot remedy the injustices of the past, but we can treat people justly in the present. *R*

READINGS

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