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“The Past Got Broken Off”: Classifying “Indian” in the Indian Child Welfare Act

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"THE PAST GOT BROKEN OFF": CLASSIFYING "INDIAN" IN THE INDIAN CHILD WELFARE ACT

LUCIA KELLO

INTRODUCTION

In her 1993 novel, *Pigs in Heaven*, Barbara Kingsolver chronicles the story of an American Indian child,[1] Turtle, and her young, white, adoptive mother, Taylor Greer.[2] In what has been criticized as a controversial imagined fact pattern,[3] Kingsolver writes that while stopped in a parking lot in the middle of the night, Taylor is approached by an American Indian woman holding a baby.[4] Rather mysteriously, the woman informs Taylor that the baby's mother died and the baby was being abused, upon which Taylor notes that "it looked like someone had been hurting [the woman] too."[5] After placing the baby in Taylor's arms, the woman

1 There is no universally acknowledged term to identify the groups of peoples known colloquially as "Native Americans." *See* Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, 23 AM. INDIAN QUARTERLY 1, 3, 8, 18–19 (1999). While both "American Indian" and "Native American" were terms given by the U.S. in its role as a colonizer, a 1995 Bureau of Labor Statistics survey found that "American Indian" is the more accepted of the two terms, and I will therefore utilize that term when discussing the indigenous population as a whole in the United States. *See id.* at 3–4, 7, 9–10. As a white woman with no tribal background, I will also (wherever possible) refer to American Indians in the terms most widely accepted amongst their individual communities, which, according to research, is an individual's tribe. *See id.* at 8, 12, 15. That being said, "Indian" is the term used in statutes protecting American Indians, and I will refer to it in quotations to acknowledge this.

2 BARBARA KINGSOLVER, PIGS IN HEAVEN 11, 23, 64 (1993).

3 *See* Kathleen Godfrey, *Barbara Kingsolver's Cherokee Nation: Problems of Representation in Pigs in Heaven*, 36 W. AM. LITERATURE 259, 259–60, 262 (2001) ("[D]espite her politicized sensibility, Kingsolver's depiction is undercut by authorial and rhetorical practices which commodify, ritualize, and idealize the Cherokee.").

4 *See* KINGSOLVER, *supra* note 2, at 66–67, 362–63 (discussing the finding of Turtle, who was "abandon[ed]" in "a parking lot").

5 *Id.* at 66–67.

gets into an unlit car and drives off into the darkness.[6] To her surprise, Taylor begins to bond with the child and eventually seeks to adopt her. However, when a Cherokee attorney, Annawakee, learns of the adoption, its legality is threatened by the ominous Indian Child Welfare Act ("ICWA"), which dictates (for the novel's purposes) that "you can't adopt an Indian kid without tribal permission."[7]

The novel manages to capture—though not without an artistic license—the conflicting interests often involved in the adoption of an American Indian child by non-American Indians.[8] The line between reality and representation is a thin one at best here,[9] for the novel's real-life counterpart is often just as dramatic and polarizing.[10] Nevertheless, most American Indian children are not bestowed upon young women in the middle of the night, and Barbara Kingsolver—though certainly knowledgeable about American Indian issues—is a white woman from Maryland who has never adopted an American Indian child before.[11]

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6 *See id.* at 67.

7 *Id.* at 66–67.

8 *See* Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act*, 28 ARIZ. ST. L. J. 589, 590 (1996) (comparing the novel to several real life cases questioning the ICWA and finding that the novel "explores legal and emotional problems as they play out in the lives of both the adoptive family and the Cherokee tribal members involved").

9 *See id.* at 595 (discussing Kingsolver's novel's notable resemblance to real cases and its creative origins); *In re* Bridget R. et al., 49 Cal. Rptr. 2d 507, 515–16 (Cal. Ct. App. 1996) (addressing a case where the biological American Indian parents of adoptees sought to regain custody over their biological children from the adoptive parents using the ICWA). The novel's events so "appalled" one attorney, who was herself an adoptive mother, that she later represented an adoptive family in a landmark case that limited the ICWA's applicability to children who have demonstrated "sufficient Indian ties" Metteer, *supra* note 8, at 594–95 n.47, 623 n.255.

10 Many news and media outlets have discussed the ICWA, and they generally tend to show bias in their coverage. *See, e.g.*, *NPR Airs Inaccurate Story About ICWA Case*, NATIVE AM. JOURNALIST'S ASS'N (Dec. 18, 2018), https://najanewsroom.com/2018/12/18/npr-airs-inaccurate-story-about-icwa-case/ [https://perma.cc/RC3J-C4GX] (criticizing an NPR article for overly sympathizing with the adoptive couple in *Adoptive Couple v. Baby Girl* and not thoroughly fact-checking); Lorelai Laird, *Lawsuits Dispute Whether the Indian Child Welfare Act is in the Best Interests of Children*, A.B.A. (October 1, 2016, 5:00 AM), https://www.abajournal.com/ featured (click on "featured" from the dropdown menu; then search the title and select the article) (criticizing the ICWA and discussing recent challenges to the Act from the perspective of the prospective adoptive families); Ken Paxton, *Opinion: A Federal Law is Hurting Native American Children. It Must Be Struck Down.*, WASH. POST (Jan. 31, 2019), https://www.washingtonpost.com/opinions/a-federal-law-is-hurting-native-american-children-it-must-be-struck-down/2019/01/31/f00f9570-24a9-11e9-90cd-dedb0c92dc17_story.html [https://perma.cc/8CFT-2NX7] (discussing *Brackeen v. Bernhardt* from the perspective of the Brackeen family and concluding that the ICWA must be struck down).

11 *See* Godfrey, *supra* note 3, at 260 (noting that Kingsolver is an "Anglo[]" woman);

Much of what Kingsolver correctly shares, however, pertains to the history and intent of the ICWA. Annawakee describes the Act as a response to the "wholesale removal" of American Indian children through federal policies of "dividing up families" and "selling off land."[12] Indeed, this "wholesale removal" most notoriously took place during the "Boarding School Era," when, from 1860 to 1973, American Indian families were coerced by the federal government into sending their children off-reservation to live at boarding schools.[13] These government-run establishments aimed to introduce American Indian children to the "habits and arts of civilization" while forcing them to abandon their traditional languages, cultures, and practices.[14] Although the policy was framed as a peaceful solution to the "Indian problem,"[15] the boarding school era gave birth to the more well-known motto: "Kill the Indian, Save the Man."[16]

Autobiography, BARBARA KINGSOLVER: THE AUTHORIZED SITE, http://barbarakingsolver.net/autobiography/ [https://perma.cc/9AMY-JGPJ] (last visited Mar. 8, 2022) ("I was born April 8, 1955, in Annapolis, Maryland . . . .").

12 KINGSOLVER, *supra* note 2, at 95, 360–61.

13 *See* Ann M. Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 151–52 (2007) ("[T]he boarding schools marked a clear upsurge in the government's resolve to eliminate Indian culture."); *Alia Wong, The Schools That Tried but Failed to Make Native Americans Obsolete*, THE ATLANTIC (Mar. 5, 2019), https://www.theatlantic.com/education/archive/2019/03/failed-assimilation-native-american-boarding-schools/584017/ [https://perma.cc/H9RF-DEY7] ("[A]s the novelist and historian David Treuer notes in his latest book . . . government workers often coerced Native parents [to send their children to boarding school] through police seizures and threats.").

14 *See* Act of March 3, 1815, ch. 85 (enacting the law which ushered in the boarding school era by authorizing an annuity of $10,000 to stimulate the "civilization" process by "employ[ing] capable persons of good moral character, to instruct [the Indians] . . . ."); Mary Annette Pember, *Death by Civilization,* THE ATLANTIC (Mar. 8, 2019), https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/ [https://perma.cc/DV7F-YZDP] (recalling the experience of the author's mother at a boarding school and the subsequent trauma it inflicted, including stories about school officials forcing the author's mother to cut her hair, attempts to stop her from using her native language, and school officials' frequent shaming and beating of the author's mother).

15 *See* Nelson A. Miles, *The Indian Problem*, 128 N. AM. REV. 304, 304 (Mar. 1879), https://www.jstor.org/stable/pdf/25100734.pdf [https://perma.cc/EXJ7-FL9F]. The phrase "Indian Problem" originated from a report written by General Nelson A. Miles. Kennedy Hickman, *Indian Wars: Lieutenant General Nelson A. Miles*, THOUGHT CO. (July 3, 2019), https://www.thoughtco .com/lieutenant-general-nelson-a-miles-2360132 (noting General Miles served during the "Indian wars").

16 *See Official Report of the Nineteenth Annual Conference of Charities and Correction* (1892) 1, 46–59. Reprinted in Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN 1880–1900 (1973), 260, http://carlisleindian.dickinson.edu/sites/all/files/docs-resources/CIS-Resources_PrattSpeech.pdf [https://perma.cc/8LDQ-M3BN].

Though the schools began closing their doors in the 1970s,[17] the removal of American Indian children from their tribal lands persisted through their overrepresentation in the child welfare system.[18] By 1973, 25-35% of all American Indian children nationwide were removed from their families, and 75-80% of American Indian families living on reservations lost at least one child to the foster care system.[19]

These figures are now understood as the product of cultural divides and presumptions of child neglect by American Indian parents or caretakers.[20] For instance, where abuse had been reported, American Indian parents were twice as likely to be investigated and twice as likely to have allegations of abuse substantiated, and American Indian children were four times more likely to be placed in foster care than white children.[21] What

This motto originated from a speech delivered by Captain Richard H. Pratt, founder of the Carlisle Indian School, at George Mason University in 1892.

17 *See Navigating Record Group 75: BIA Schools*, NAT'L ARCHIVES AM. INDIAN RECORDS, https://www.archives.gov/research/native-americans/bia-guide/schools [https://perma.cc/B2P6-HUK9] (last visited Mar. 10, 2021) (listing the dates boarding schools remained open by state).

18 *See* 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, 735 (2006) (describing how the removal of American Indian children continued in the 1960s and 1970s, when state welfare workers and other officials "worked hard to find non-American Indian homes for American Indian children, because of a lack of cultural sensitivity, and paternalistic and assimilationist motives").

19 *See* Nevada Children's Justice Act Task Force, *Indian Child Welfare Resource Guide*, STATE OF NEVADA DIV. OF CHILD AND FAMILY SERVS. (2006), https://dcfs.nv.gov/uploadedFiles/dcfsnvgov/content/Programs/CWS/ICWA/ICWAResourceGuideInPDF.pdf [https://perma.cc/J83B-S5VB]; Adam Meier, *ICWA History and Purpose*, MONT. DEP'T OF HEALTH AND HUMAN SERVS., DEP'T OF PUBLIC HEALTH AND HUMAN SERVS., https://dphhs.mt.gov/cfsd/icwa/icwahistory#:~:text=Prior%20to%20the%20passage%20of,to%20the%20foster%20care%20system [https://perma.cc/L3NF-GZYJ] (last visited Feb. 28, 2022).

20 *See* Bureau of Indian Affairs, *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38777, 38780 (June 16, 2016), https://www.federalregister.gov/documents/2016/06/14/2016-13686/indian-child-welfare-act-proceedings [https://perma.cc/7HRU-MYET] ("Congress found that . . . state agencies and courts had often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."); Meier, *supra* note 19 (noting that Child Welfare agencies were often ignorant of or indifferent or insensitive to cultural differences in child rearing and parenting practices and, as a result, many unnecessary, and unwarranted, foster and adoptive placements were made).

21 *See* Robert B. Hill, AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS 1, 1 (2007), https://www.issuelab.org/resources/8256/8256.pdf [https://perma.cc/T48S-BV7T] (finding that American Indian children are "overrepresented disproportionately within the foster care system at the national level").

is more, 90% of children removed from their American Indian families were placed in non-native homes.[22]

Further, although a child's removal from the home must serve the child's "best interests,"[23] higher percentages of substance abuse, mental health issues, and self-injury were reported among American Indian children subjected to this system.[24] American Indian children placed in foster care, adoptive homes, and institutions experienced a suicide rate twice that of the reservation rate and four times that of the general population.[25] Many well-known studies have since determined that the loss of cultural identity seriously compounds these negative outcomes.[26]

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22 *See To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. On Indian Affairs*, 95th Cong. (1977) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, noting that Task Force Four of the Policy Review Commission reported the American Indian adoption statistics).

23 *See Determining the Best Interests of the Child*, CHILD. BUREAU, ADMIN. FOR YOUTH AND FAM., U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.childwelfare.gov/pubPDFs/best_interest.pdf [https://perma.cc/J6SN-LEUU] (last visited January 14, 2021) (discussing that all States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes describing the "best-interests" standard and the factors that must be considered to ensure that decisions regarding a child's custody or placement serve that child's best interests).

24 *See To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. On Indian Affairs*, 95th Cong. (1977) (providing statistics to support enactment of the ICWA pending senate approval); Carrie E. Garrow, *Government Law and Policy and the Indian Child Welfare Act*, N.Y. ST. B.A.J. (March/April 2014), https://www.srmt-nsn.gov/_uploads/site_files/Garrow-Mar-Apr2014.pdf [https://perma.cc/94NT-LE8G] (providing an overview of the statistics presented in the congressional hearing pending approval of the ICWA); Ashley Landers et al., *American Indian and White Adoptees: Are There Mental Health Differences?*, AM. INDIAN AND ALASKA NATIVE MENTAL HEALTH RESEARCH (Jan. 2017), https://www.researchgate.net/scientific-contributions/2131625959-Sandy-White-Hawk [https://perma.cc/8T6G-2SM6]. This well-known and frequently-cited study reported higher percentages of problems for American Indian adoptees than White adoptees on all mental health problem measures (e.g. substance abuse, mental health, self-injury, and suicide). *Id.*

25 *See* Landers et al., *supra* note 24.

26 *See, e.g.*, Carol Locust, *Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children*, ONTARIO ASS'N CHILD. AID SOC'Y J. 44 (2000), https://splitfeathers.blogspot.com/p/split-feathers-study-by-carol-locust.html [https://perma.cc/94TT-DSE7] (coining "Split Feather Syndrome," Carol Locust hypothesizes that a direct result of the loss of cultural experiences and the transmission of a cultural identity is the psychological and emotional wounding of an American Indian child placed outside of their community, which has lifetime consequences); Maria Yellow Horse Brave Heart et al., *Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research, and Clinical Considerations*, J. PSYCHOACTIVE DRUGS (2003) (concluding that the social and cultural upheaval experienced by American Indian/Alaska Natives, including forced removal from tribal lands and the placement of children in boarding schools, has created lasting intergenerational effects that are strongly linked to alcohol abuse and other psychosocial issues); Schweigman et al., *The Relevance of Cultural Activities in Ethnic*

A more in-depth analysis of boarding schools and their aftermath provides the historical context for Annawakee's poignant assertion: because generations of American Indians "never learned how to be in a family," despite family "being their highest value," "the past got broken off."[27] In less poetic terms, these policies amounted to an "assault on Native identity,"[28] inflicting intergenerational trauma that persists to this day.[29]

To address this pervasive crisis, Congress enacted the Indian Child Welfare Act in 1978.[30] The Act provides "minimum federal standards for the removal of Indian children from their families," where compliance with the ICWA in all state custody proceedings is required.[31] In these proceedings, the ICWA mandates procedural and jurisdictional safeguards that prevent the breakup of the American Indian family.[32] In so doing, the Act preempts state child welfare laws[33] in acknowledgment of the consequences former federal policies have had on tribal life.[34]

The ICWA has withstood opposition since its inception, most routinely from the LDS Church and the Catholic Church.[35] The

Identity Among California Native American Youth, 43 J. OF PSYCHOACTIVE DRUGS 343, 343 (2011) (finding that the association between cultural activities and ethnic identity was significant among urban youth but not significant among reservation youth, suggesting that urban youth who do not live and grow up in their tribal communities are the minorities in their urban communities, and it is important for them to maintain a strong connection to their American Indian heritage).

27 *See* KINGSOLVER, *supra* note 2, at 289–90.

28 *See* Virender Pal, *Unlearning at White Settlers' School; Erasure of Identity and Shepherding the Indian into Christian Fold: A Study of Shirley Sterling's My Name is Seepeetza*, 9 RUPKATHA J. ON INTERDISC. STUD. HUMAN. 195, 202–05 (2017) (analyzing *My Name is Seepeetza* by Shirley Stirling within a broader discussion of narratives inspired by experiences at boarding schools).

29 *See* U.S. COMMISSION OF CIVIL RTS., *Continuing Federal Funding Shortfall for Native Americans*, https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf [https://perma.cc/N9JS-U2S5] (last visited Mar. 10, 2021) (noting the U.S. Commission on Civil Rights' 2018 Broken Promises Report found that American Indian communities continue to experience historical and intergenerational trauma resulting from boarding schools' assimilation practices that divided cultural family structures, damaged Indigenous identities, and inflicted chronic psychological damage on AI/AN children and families).

30 *See* 25 U.S.C. §§ 1901–1963; § 1911 (a)–(c).

31 *See* § 1902 (Congressional declaration of policy).

32 *See* 25 CFR § 23.2 (2019).

33 *See id.*

34 *See* § 1902 (congressional declaration of policy).

35 *See* Trace L. Hentz, *ICWA and the States With Existing Indian Family Exception*, STOLEN GENERATION PRESSBOOKS, https://stolengenerations.pressbooks.com/back-matter/timeline/ [https://perma.cc/8CW2-A4P5] (last visited Mar. 10, 2021) (noting that during congressional consideration, huge opposition was raised by several states, the LDS Church, the Catholic Church, and several social welfare groups, but despite their protests,

Act has also faced its fair share of legal challenges, the most highly publicized of which is the 2013 Supreme Court case, *Adoptive Couple v. Baby Girl*.[36] There, the Court severely limited the reach of the ICWA by finding several of its provisions inapplicable if the parent seeking their invocation never had legal or physical custody of the American Indian child.[37] In applying its holding to the facts, the Court ruled that an incarcerated American Indian father who never had custody of his daughter could not invoke his or his tribe's right to block the child's adoption.[38]

As *Adoptive Couple* is only the second ICWA case ever heard by the Supreme Court, it has signaled a "new interest in the law," which in turn inspired a wave of challenges to the ICWA that have placed it in a precarious position.[39] These challenges are supported and often funded by wealthy interest groups,[40] the most notorious of which is the Goldwater Institute.[41] Most recently, the institute bankrolled *Brackeen v. Zinke* (now *Brackeen v. Bernhardt*),[42] a case challenging the constitutionality of the ICWA in its entirety.[43] There, the plaintiffs claim that the statute's definition of "Indian" is a racial classification prohibited by the

the ICWA bill was pushed through by Representative Morris Udall of Arizona, who lobbied President Jimmy Carter to sign this historic law).

36 *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2557–58 (2013); Scott Trowbridge, *Legal Challenges to ICWA: An Analysis of Current Case Law*, AM. BAR ASS'N (January 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/january-2017/legal-challenges-to-icwa—an-analysis-of-current-case-law/ [https://perma.cc/Y5F5-HG6M] (noting that *Adoptive Couple* "placed the ICWA in the public spotlight").

37 *See Adoptive Couple*, 133 S. Ct. at 2562.

38 *See id.* at 2564.

39 *See* Trowbridge, *supra* note 36.

40 *See* Mary Annette Pember, *The New War On the Indian Child Welfare Act*, POL. RES. ASSOCIATES (Nov. 11, 2019), https://www.politicalresearch.org/2019/11/11/new-war-indian-child-welfare-act [https://perma.cc/PXC6-997C]. Since 2013, challenges to ICWA have gained new urgency and support from wealthy right-wing interest groups.

41 *See About*, GOLDWATER INST., https://goldwaterinstitute.org/about/ [https://perma.cc/R6NV-NHXT] (last visited Mar. 10, 2021) (noting this conservative and libertarian think tank promotes itself as a leading "free-market public policy research and litigation organization").

42 *See* Brackeen v. Zinke, 338 F. Supp. 3d 514, 521 (N.D. Tex. 2018); Brackeen v. Bernhardt, 937 F.3d 406, 416 (5th Cir. 2019).

43 *See* Pember, *supra* note 40 (noting that *Brackeen* was bank-rolled by the Goldwater Institute); *Ensuring Equal Protection—Regardless of Race, Brackeen v. Zinke*, GOLDWATER INST. (April 26, 2018), https://goldwaterinstitute.org/brackeen-v-zinke/ [https://perma.cc/A5BE-RB2D] ("As part of our Equal Protection for Indian Children Project, we're participating in this new federal lawsuit to ensure that all American kids, regardless of race, receive the same legal security . . . .").

Fourteenth Amendment, despite precedent that says otherwise.[44] Consequently, the U.S. District Court for the Northern District of Texas became the first federal court to declare the ICWA unconstitutional.[45] Although overturned by a three-judge panel, the Fifth Circuit agreed to rehear the argument *en banc,* this time with all 17 judges present.[46] If appealed once again, many predict that given the publicity of *Adoptive Couple,* the case is likely to reach the Supreme Court.[47]

Further, although required to comply with the Act, states have been circumventing its provisions since 1982 through a judicial "loophole" known as the Existing Indian Family Exception" (EIFE).[48] In essence, the doctrine limits the applicability of the

44 U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

45 *Zinke*, 338 F. Supp. 3d at 521.

46 *Bernhardt*, 937 F.3d at 406.

47 Roxana Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, VOX (February 20, 2020, 7:30 AM), https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care [https://perma.cc/99WL-G58C] (noting that it is likely that whatever the ruling, there will be an appeal to the Supreme Court).

48 *See, e.g.*, *In re* Baby Boy L., 231 Kan. 199, 643 P.2d 168 (Kan. 1982) (holding that the ICWA did not apply to the child of an incarcerated American Indian father because the child was not a part of an existing American Indian family); Rye v. Weasel, 934 S.W. 2d 257 (Ky. 1996) (holding that there was no existing American Indian family where the child, though having Indian heritage through her grandfather and a legal ward of the Sioux tribe, was placed into foster care with a family that did not adopt American Indian culture as a day to day way of life); Hampton v. J.A.L., 27,869 (La. App. 2 Cir. 07/06/95), 658 So. 2d 331 (holding that the ICWA did not apply to a child whose mother was 11/16 Cherokee, had left the reservation at age 9, and attended two powwows since, because the mother maintained no ties to the Indian tribe); *In re* S.A.M., 703 S.W. 2d 603 (Mo. Ct. App. 1986); *In re* T.S., 801 P.2d 77 (Mont. 1990) (holding that the ICWA did not apply to a child whose mother is part Eskimo but neither the child nor mother resided on reservation during the child's lifetime); *In re* S.C., 833 P.2d 1259 (Okla. Civ. App. 1992) (holding that the ICWA did not apply to a child whose father was Cherokee but never had custody of the child); *In re* D.M.J., 741 P.2d 1386 (Okla. 1985) (holding that the ICWA did not apply to a ten year old, half Cherokee girl of divorced parents who had lived with her non-American Indian mother since the divorce eight years earlier); *In re* Crews, 825 P.2d 305 (Wash. 1992) (holding that the ICWA did not apply where a child nor her family ever lived on a reservation nor made plans to relocate the family onto a reservation); S.A. v. E.J.P., 571 So.2d 1187 (Ala. Civ. App. 1990) (holding that the ICWA did not apply to a 4 year old child who only resided with her Cherokee father for one month, and not on a reservation); *In re* S.A.M., 703 S.W. 2d 603 (Mo. Ct. App. 1986) (holding that there was no existing American Indian family where the father, a member of the Kickapoo tribe, had never petitioned for custody and the child lived with a non-American Indian mother); *In re* T.R.M., 525 N.E.2d 298 (Ind. 1988) (holding that the child, although being "biologically Indian," resided with a white family since five days after birth, thus precluding the ICWA's application); Jaffke, *supra* note 18, at 741 n.43.

statute to those cases where a child, or the child's family members, have demonstrated "sufficient Indian ties."[49] In other words, even though the Act defines who is considered an "Indian" child, the EIFE allows courts to question whether a child is "Indian" enough.

This Note maintains that the arguments underlying *Brackeen*, the EIFE and *Adoptive Couple* conflate race and ancestry, leading to the misclassification of "Indian" in the ICWA as racial rather than political. Because of *Adoptive Couple*, it is imperative for the ICWA's survival and effectiveness that courts utilize the opportunity presented by *Brackeen* to finally clarify that "Indian" within the ICWA is a political classification. This decision would serve the best interests of both American Indian children *and* American Indian tribes by recognizing the significance of cultural ties to the sovereignty and survival of these distinct, political bodies.

Part I will provide an overview of the structure and provisions of the ICWA and elaborate on legal precedent regarding how statutory definitions of "Indian" have traditionally been categorized. Part II will demonstrate how *Brackeen* and the EIFE are based on the misclassification of "Indian" as a racial group, which poses a serious threat to the ICWA when considered alongside *Adoptive Couple*. Part III will discuss the nuances between ancestry and race, and further posit that given the historical role ancestral inquiries have played in defining American Indian identity, ancestral inquiries can be reframed as a meaningful way for tribes to renew intergenerational bonds, restore historical continuity, and self-define their political status. Finally, Part IV discusses the potential benefits of distinguishing between race and ancestry when applied to kinship care within the child welfare system by placing cultural ties central to the best interests of the child.

49 *In re* Baby Boy L., 231 Kan. 199, 643 P.2d 168 (Kan. 1982) (holding that the ICWA did not apply to the child of an incarcerated American Indian father because the child was not a part of an existing American Indian family, thus creating the EIFE doctrine).

I. THE ICWA'S PROVISIONS AND THE MISCLASSIFICATION OF "INDIAN" AS RACIAL

The ICWA contains several controversial provisions that differ substantively and procedurally from state child welfare proceedings. That said, to trigger the Act's provisions at all, a child must be "Indian" under the statute. While the question of whether the classification of "Indian" is political or racial is at the root of both the plaintiffs' claim in *Brackeen* and the state justification for the EIFE, it is not a novel one.[50] Throughout the last century, the Supreme Court has litigated the nature of federal legislation aimed at "Indians"[51] and has conclusively demonstrated that it is a political classification.

A. The ICWA: Background and Provisions

The ICWA was enacted in recognition that the "wholesale removal of [Tribal] children by nontribal government and private agencies constitutes a serious threat to [Tribes'] existence as ongoing, self-governing communities."[52] As such, its provisions override the traditional "best interests of the child" standard that applies to non-American Indian children because it is presumed that an American Indian child's best interests lie in being placed in conformance with the Act's preferences.[53]

The Act applies when an "Indian" child is the subject of a custody hearing (defined as any hearing that contemplates adoptive and pre-adoptive placements), foster care placements, and

50 *See infra*, Background, Section B.

51 *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 554 (1974); Fisher v. District Court of Sixteenth Judicial Dist., 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976) (litigating the Indian Reorganization Act of June 18, 1934, ch. 576, § 5, para. 4, 48 Stat. 984- 988 (codified as amended at 25 U.S.C. § 465).

52 25 U.S.C. § 1901.

53 Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10158 F.4(c)(3) (Feb. 25, 2015); *In re* C.H., 997 P.2d 776, 782 (Mont. 2000) ("[W]hile the best interests of the child is an appropriate and significant factor in custody cases under state law, it is improper to apply a best interests standard when determining whether good cause exists to avoid the ICWA placement preferences, because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences.").

terminations of parental rights, and centralizes tribal involvement in these proceedings.[54] For instance, the ICWA recognizes exclusive tribal court jurisdiction over proceedings involving American Indian children on reservations, mandating that the court transfer custody proceedings to tribal jurisdiction "absent good cause to the contrary" or objections by either parent.[55] It also gives tribal courts concurrent jurisdiction over child custody matters involving American Indian children who are not domiciled on the reservation.[56]

The Act also dictates that higher legal standards apply regarding the termination of American Indian parental rights and the foster care placement of American Indian children.[57] For instance, as discussed in *Adoptive Couple*, the ICWA provides for a higher standard of proof in the termination of the parental rights of an American Indian parent, requiring that a petitioner show evidence "beyond a reasonable doubt" that continued custody is likely to result in serious emotional or physical damage to the child.[58]

Finally, the Act codifies that in a case where the removal of an "Indian" child from his/her parents is warranted, and in the absence of good cause to the contrary, preference is given to the child's placement with (1) a member of the child's extended family;

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54 *A Guide to Compliance with the Indian Child Welfare Act*, NAT'L INDIAN CHILD WELFARE ASS'N, https://www.nicwa.org/wp-content/uploads/2016/11/Guide_ICWA_Compliance.pdf [https://perma.cc/99UJ-L96G] (last visited Mar. 10, 2021) (explaining that the Act exempts itself from application in custody proceedings that are the result of divorce or custody proceedings between two parents, or juvenile delinquency proceedings).

55 § 1911(a).

56 § 1911(b).

57 § 1912(d). For instance, 25 U.S.C. § 1912 (d) provides that any party seeking to terminate the parental rights to an American Indian child must demonstrate that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *A Guide to Compliance with the Indian Child Welfare Act*, NAT'L INDIAN CHILD WELFARE ASS'N (2016), https://www.nicwa.org/wp-content/uploads/2016/11/Guide_ICWA_Compliance.pdf [https://perma.cc/CUL6-P4HR] (noting that procedurally, the ICWA requires that notice be given to a child's tribe or all tribes for which the child may be eligible for membership, and provides that the tribe can request a transfer of jurisdiction from state court to tribal court).

58 § 1912(d). On the other hand, state statutes govern standards of proof for proceedings regarding the termination of parental rights, and generally provide that a parent must be shown by clear and convincing evidence to be unfit. *See* Santosky v. Kramer 455 U.S. 745 (1982) (holding that the standard of proof in TPR proceedings must at least be clear and convincing evidence); *State Statutes Current Through December 2016*, CHILD. BUREAU, ADMIN. FOR YOUTH AND FAM., U.S. DEP'T OF HEALTH & HUMAN SERVS. (2016), https://www.childwelfare.gov/pubPDFs/groundtermin.pdf [https://perma.cc/72R8-NQQ4].

(2) other members of the child's tribe; or (3) other American Indian families.[59] In practice, because these provisions aim to keep American Indian families together, they also make it more difficult for a non-American Indian family to adopt an American Indian child as compared to other children.[60]

To be protected by the Act, of course, one must be an "Indian child," defined as "any unmarried person who is under the age of eighteen and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[61] As such, the preliminary factual investigation in proceedings where the ICWA may apply is to determine whether the child is a tribal member or eligible for membership.[62] This involves an inquiry into not only the family's self-identification but also their ancestry, which can include consulting with extended family members and other relatives and contacting the suspected tribe(s) to which the family may belong.[63] The statute also requires that the child's potential tribe receive notice regarding the proceeding and confirm the child's membership or eligibility.[64] If a child falls under the protection of the ICWA due to their tribal eligibility, the tribe must also confirm the tribal membership of a biological parent.[65]

Rather than imposing federal requirements for what constitutes an "Indian" child, the Act defers to tribal authority by allowing for tribes' definitions of eligibility or membership to determine

59 § 1915.

60 *See* Mary Katherine Nagle, *Fact Check: The Goldwater Institute's Statements About the Indian Child Welfare Act*, HIGH COUNTRY NEWS (Dec. 20, 2018), https://www.hcn.org/articles/tribal-affairs-fact-check-the-goldwater-institutes-statements-about-the-indian-child-welfare-act [https://perma.cc/3QLX-W4LT]. In her article, Mary Katherine Nagle fact checks a speech given by Timothy Sandefur, vice president of litigation at the Goldwater Institute, at the Cato Institute, another libertarian think tank. Although many of his statements were disputed, Sandefur correctly notes that the ICWA makes it difficult for an American Indian child to find an adoptive home with a non-American Indian. *See* Derek Williams, *Can I Adopt a Native American Child If I'm Not Native American?*, ADOPTION ARTICLES (Apr. 26, 2018), https://adoption.com/can-i-adopt-a-native-american-child-if-im-not-native-american [https://perma.cc/XN4N-W5SR]. Williams, a non-American Indian adoptive parent of two American Indian children, discusses that it is possible, but more difficult and complicated, to adopt an American Indian child if you are not an American Indian under the ICWA's placement preferences and jurisdictional requirements.

61 § 1903(4).

62 *See* NAT'L INDIAN CHILD WELFARE ASS'N, *supra* note 57.

63 *Id.*

64 *Id.*

65 *Id.*

whether a child belongs to a tribe and is thereby "Indian" under the statute.[66] In turn, many tribes determine their membership eligibility through blood quantum, the percentage or amount of "Indian blood" an individual possesses.[67] That quantum can often be satisfied by tracing one's ties to the original enrollees of a tribe counted on census rolls.[68] The emphasis that many tribes place on ancestral ties, particularly when satisfied through a blood quantum, has been the catalyst to many subsequent challenges to the ICWA and its provisions.[69]

B. Precedent Demonstrates that "Indian" Within Federal Statutes Is a Political Classification

Many opponents to the ICWA, including the plaintiffs in *Brackeen*, take issue with the required initial inquiry of who qualifies as an "Indian" child.[70] In particular, opponents to the Act presume that because many tribes require a particular blood quantum for membership, one can be classified as "Indian" based solely on one's ethnic ancestry.[71] As such, they conclude that the Act's definition of "Indian" relies upon a child's race.[72]

When a classification based on race appears on the face of a law, it is generally prohibited by both the Equal Protection Clause of

66 § 1903(4).

67 Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 85 FR 5462 (Jan. 30, 2020), *available at* https://www.federalregister.gov/documents/2020/01/30/2020-01707/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of [https://perma.cc/R5X3-HZ7L] (including a complete list of federally recognized tribes); *see Tracing American Indian and Alaska Native (AI/AN) Ancestry*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS, *available at* https://www.bia.gov/guide/tracing-american-indian-and-alaska-native-aian-ancestry [https://perma.cc/XFW9-YQMT] (describing some qualifications for membership in recognized Tribes); *see* The Code Switch Podcast, *So What Exactly is Blood Quantum?*, *available at* https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum [https://perma.cc/CG5D-X4LN] .

68 *Id.*

69 Timothy Sandefur, *Escaping The ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 8 (2020) (noting that "the problems begin with the definition of an 'Indian child,'" and ultimately arguing that the ICWA harms children by denying them placement in loving homes).

70 *Id.*

71 *Id.* at 3.

72 *Id.*

the Fourteenth Amendment and the Fifth Amendment's Due Process Clause. The Equal Protection Clause prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[73] Unlike the Fourteenth Amendment, the text of the Fifth Amendment does not contain an equal protection clause, but courts employ the same test to evaluate alleged equal protection violations under both.[74] The Supreme Court has long established that a classification based on race must satisfy strict scrutiny, the highest level of judicial scrutiny, to be constitutional.[75] To do so, a law must be proven to be "narrowly tailored to further a compelling government interest."[76]

However, in the 1974 case *Morton v. Mancari*, the Supreme Court concluded that legislation aimed at American Indians as a group did not constitute a race-based classification because of their unique political status.[77] As such, the Court established that the relevant test to apply in cases challenging the constitutionality of legislation aimed at American Indians is not strict scrutiny, but the less stringent rational basis test,[78] which only requires that legislation be rationally related to a legitimate government interest.[79]

In *Mancari*, a group of non-American Indian employees of the Bureau of Indian Affairs brought a class action lawsuit claiming that an employment preference within the Bureau for qualified American Indians constituted racial discrimination.[80] This

73 U.S. CONST. amend. XIV, § 1.

74 U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .").

75 *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and as such subjected to tests of "the most rigid scrutiny"; United States v. Carolene Products Co., 304 U.S. 144, 154 n.4 (1938) (introducing the notion of levels of judicial scrutiny).

76 *See id.*

77 Morton v. Mancari, 417 U.S. 535, 554 (1974) (holding that the hiring preferences in the Bureau of Indian Affairs for "Indians" was a political, rather than racial, classification).

78 *Id.*

79 *See Carolene Products*, 304 U.S. 154 n.4.

80 *Id.* Congress passed the Indian Reorganization Act in 1934, including a provision that gave hiring preference to Native Americans for positions in the Bureau of Indian Affairs (BIA). 25 U.S.C. § 465. Congress then passed the Equal Employment Opportunity Act of 1972, which prohibited racial discrimination in federal employment. Equal

argument was explicitly rejected by the Court, which instead found that the issue's resolution turned upon the unique legal status of "Indian tribes under both federal law and the plenary power of Congress" based upon a history of treaties and "the assumption of a guardian-ward status" that gives the federal government authority to legislate on their behalf.[81] If these laws were found to constitute invidious racial discrimination, the Court reasoned, "the solemn commitment of the Government toward the Indians would be jeopardized."[82] Given that unique history, the Court determined that as long as a codified preference afforded to American Indians is reasonably and rationally designed to further self-government, it "shall not be disturbed."[83] Therein, the employment preference for American Indians who are "1/4th or more degree Indian blood and a member of a federally-recognized tribe" was "political rather than racial in nature."[84]

Since its decision, the Court has routinely found *Mancari* dispositive in cases that challenge legislation granting American Indians preferential treatment on equal protection grounds. In so doing, it has consistently rejected the argument that statutes directed at American Indians are race-based.[85] For instance, even before the enactment of the ICWA, the Court applied the rational basis test in an adoption case where the Tribal Court of the Northern Cheyenne Tribe was found to have exclusive jurisdiction over the adoption of a child domiciled on the reservation.[86] The Court rejected the adoptive couple's argument that a denial of access to state courts constituted invidious racial discrimination since the tribal court's exclusive jurisdiction derived not from the child's race, but the Tribe's "quasi-sovereign status under federal law."[87] Even if this occasionally meant denying an American

Employment Opportunity Act of 1972, amending Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000e–2000e-8; 5 U.S.C. § 5108).

81 *Mancari*, 417 U.S. at 554.

82 *Id.*

83 *Id.*

84 *Id.*

85 *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658 (1979) (awarding tribes preferential fishing rights); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (upholding tribal immunity from state taxation); Fisher v. District Court of Sixteenth Judicial Dist., 424 U.S. 382 (1976); Antoine v. Washington, 420 U.S. 194 (1975) (upholding preferential hunting rights to tribes).

86 *Fisher*, 424 U.S. at 390.

87 *Id.*

Indian plaintiff access to a forum to which a non-American Indian has access (such as a state court), it was justified as "a benefit to the class to which he is a member by furthering the congressional policy of Indian self-government."[88]

The following year, the Supreme Court affirmed the political nature of American Indian tribes in declining to apply state law to two American Indians in *United States v. Antelope*.[89] There, two Coeur d'Alene American Indians were convicted of felony murder of an American Indian woman while on the reservation.[90] If the two men had not been American Indian, they would have been prosecuted under Idaho state law which had no felony murder statute and thus required the prosecutor to also prove premeditation.[91] As such, they argued that their convictions were racially discriminatory based on their status as American Indian tribal members.[92] The Supreme Court rejected their claim, concluding that *Mancari* was dispositive and that "the decisions of this Court leave no doubt that federal legislation concerning Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."[93]

More recently, the Supreme Court affirmed the political status of American Indians in *United States v. Lara*.[94] There, the Court held that both a tribe and the federal government could concurrently prosecute a nonmember of a tribe for the same crime if it was committed on a reservation without violating the Fifth Amendment right against double jeopardy.[95] The Court affirmed that tribal prosecution derived from tribal authority as a sovereign, and the tribe's possession of this criminal jurisdiction "is consistent with our traditional understanding of tribes' status as domestic dependent nations."[96] The Court also cited *Mancari* to conclude that Congressional authority to legislate in the field of

88 *Id.*
89 United States v. Antelope, 430 U.S. 641, 645 (1977).
90 *Id.* at 642–43.
91 *Id.* at 644.
92 *Id.* at 642.
93 *Id.* at 645.
94 *See* United States v. Lara, 541 U.S. 193 (2004); U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .").
95 *Lara*, 541 U.S. at 193.
96 *Id.* at 203 (internal quotiation marks omitted).

American Indian affairs stemmed from the unique political relationship between tribes and the federal government.[97]

Nevertheless, while often quickly finding *Mancari* dispositive, the Supreme Court engaged in a more in-depth analysis of *Mancari*'s holding in *Rice v. Cayetano*.[98] *Rice* involved the constitutionality of a Hawaiian voting restriction limiting those who could vote for the state's Office of Native Hawaiian Affairs to Native Hawaiians.[99] A Native Hawaiian was in turn defined by state law as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to [European contact] . . . [or] to the descendants of such blood quantum of such aboriginal peoples."[100]

Despite some similarities between the experiences of Native Hawaiians and American Indian tribal members, the Court declined to extend *Mancari* to Native Hawaiians because it was "a matter of dispute . . . whether Congress *may treat* the native Hawaiians as it does the Indian tribes."[101] It further distinguished between *Rice* and *Mancari* because the employment preference, like the ICWA, was aimed specifically at federally recognized American Indian tribes, and so was "political rather than racial in nature."[102] Because of this distinction, the Supreme Court found the voting restriction violative of the Fifteenth Amendment because it used "ancestry [] as a proxy for race."[103]

Ultimately, although legislation targeted at American Indians has been continuously challenged in the Supreme Court as impermissible racial classifications, none have been successful. In fact, in these decisions, the Court is quick to specifically acknowledge the unique legal status of tribes as compared to other marginalized or minority groups. Further, even though in *Rice,* the Court recognized that ancestry *can* be used as a proxy for race, it also implied that this logic is inapplicable to legislation aimed at tribes because of their unique political status. Nevertheless, the ICWA's definition of "Indian" continues to be challenged in the

97 *Id.* at 198.
98 Rice v. Cayetano, 528 U.S. 495, 516 (2000).
99 *Id.*
100 *Id* (quoting HAW. REV. STAT. § 10-2 (1993)).
101 *Id.* at 517 (emphasis added).
102 *Id.* at 518 (quoting Morton v. Mancari, 417 U.S. 535, 554 (1974)).
103 *Id.* at 513.

lower courts and used as justification for the EIFE in the seven states applying it today.[104]

II. THE MISCLASSIFICATION OF "INDIAN" AS RACIAL IN THE EIFE AND *BRACKEEN*

Although there is an established line of precedent confirming that legislation protecting American Indian tribes is based on their political status, the Supreme Court has never confirmed that this precedent applies to the ICWA.[105] This ambiguity has consequently presented an opportunity for grounds to challenge the statute's constitutionality, as in *Adoptive Couple* and *Brackeen v. Bernhardt*.[106] What is more, it has also given states the flexibility to misinterpret the statute and seriously undermine its reach through the application of the EIFE. What both the legal challenges to the ICWA's constitutionality and the EIFE's continued relevance have in common is misclassification of "Indian" as a racial group, which results from the conflation of ancestry and race. Because the Supreme Court's dicta in *Adoptive Couple* gave more credibility to this legal error, *Brackeen* presents the courts with a golden opportunity to clarify this misconception.

104 For a list of states applying the EIFE, *see infra, Background, Section B* n.123.

105 To date, the Supreme Court has only heard two cases regarding the ICWA, being *Adoptive Couple* and *Miss. Band of Choctaw Indians v. Holyfield.* In *Adoptive Couple*, the Court did not discuss the nature of "Indian" within the ICWA but instead limited its provisions regarding termination of parental rights proceedings to American Indian parents who had custody of the child. *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013). In *Miss. Band of Choctaw,* the Supreme Court dealt only with the ICWA provision concerned with exclusive tribal jurisdiction and held that the definition of "domicile" was not meant to be a matter of state law. *See* Mississippi Choctaw Indians v. Holyfield, 490 U.S. 30, 30–31 (1989).

106 *See* Pember, *supra* note 40; *Ensuring Equal Protection—Regardless of Race, Brackeen v. Zinke*, GOLDWATER INST. (April 26, 2018), https://goldwaterinstitute.org/brackeen-v-zinke/ [https://perma.cc/3W36-CYVY].

A. Brackeen v. Bernhardt*: Challenging the ICWA's Constitutionality by Misclassifying "Indian" as Racial*

The ICWA's definition of "Indian" is at the heart of the most recent, and most ominous threat to the Act's survival, *Brackeen v. Bernhardt*. The case is brought by a foster couple from Texas who, in 2016, brought a 10-month-old Navajo and Cherokee boy into their home after he had been removed from his mother's care because of her drug use just a few months after she had left the Navajo reservation in Texas.[107] However, the Brackeens' efforts to formally adopt the child were stalled when the Navajo tribe intervened by locating an American Indian family unrelated to the child that would have placement preference to the Brackeens under the ICWA, absent a showing of good cause to the contrary.[108]

Consequently, the Brackeens filed a federal lawsuit in the United District Court for the Northern District of Texas with the assistance of the Goldwater Institute alleging that the ICWA's provisions violated the Fourteen and Fifth amendments and seeking injunctive and declarative relief.[109] Several private parties, which primarily included non-American Indian couples who also sought to adopt American Indian children as well as three state attorney generals in Texas, Louisiana, and Indiana joined in the suit.[110]

At the root of the Brackeens' challenge is the fact that whether a child is "Indian" under the Act depends upon either the child's active tribal membership or the child's eligibility for membership, which can often be triggered by ancestry and genetics. The plaintiffs further conclude that this emphasis on ancestry is race-

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107 Brackeen v. Zinke, 338 F. Supp. 3d at 514, 521 (N.D. Tex. 2018). The Brackeens sued the U.S. Department of the Interior and its now-former Secretary, Ryan Zinke, who was succeeded by David Bernhardt, hence the name change from *Brackeen v. Zinke* to *Brackeen v. Bernhardt. See Brackeen v. Bernhardt Case Summary*, NAT'L INDIAN CHILD WELFARE ASS'N (October 17, 2019), *available at* https://www.nicwa.org/wp-content/uploads/2019/10/2019-10-17-Brackeen-v-Bernhardt-Case-Summary-Final.pdf [https://perma.cc/S995-AX6Z] (summarizing the facts of *Brackeen*).

108 *Id.*; 25 U.S.C. § 1901(5).

109 *See Ensuring Equal Protection—Regardless of Race, Brackeen v. Zinke*, GOLDWATER INSTITUTE, (April 26, 2018), https://goldwaterinstitute.org/brackeen-v-zinke/ [https://perma.cc/PY35-27G7].

110 *Zinke*, 338 F. Supp. 3d at 514.

based, relying in large part on the Supreme Court's dicta in *Rice v. Cayetano*, that "ancestry can be used as a proxy for race."[111]

Sufficiently persuaded, the Northern District of Texas became the first federal court to declare the ICWA unconstitutional, granting summary judgment for the plaintiffs.[112] Judge Reed O'Connor opined that because one "is an Indian child if the child is related to a tribal ancestor by blood," the ICWA was more similar to the voting restriction in *Rice* than in *Mancari*,[113] where the employment preference only provided special treatment to current tribal members.[114] In essence, he found a crucial difference between a statute aimed at active tribal members and the ICWA, which also includes those eligible for membership. In the absence of any arguments from the government regarding how the statute would withstand strict scrutiny and finding the statute overly broad, the Court concluded that the classification was not narrowly tailored to serve a compelling government interest.[115]

As a result, the defendants appealed the decision to the Fifth Circuit[116] and on August 19, 2019, a three-judge panel overturned the district court's decision and found that the ICWA was constitutional.[117] In particular, the Court rejected the District Court's reliance on the eligibility requirement of the ICWA, stating that "conditioning a child's eligibility for membership, in part, on whether a biological parent is a member of the tribe is . . . not a proxy for race, as the District Court concluded, but rather for not-yet-formalized tribal affiliation, particularly where the child is too young to formally apply for membership in a tribe."[118] Thus, it held that "Indian" pursuant to the ICWA was political in nature.[119]

In turn, the Brackeens requested and were granted an *en banc* rehearing before all members of the Fifth Circuit.[120] The Fifth

111 528 U.S. 495, 513 (2000).
112 *Zinke*, 338 F. Supp. 3d at 519.
113 *Id.* at 533.
114 *Id.* at 532.
115 *Id.* at 535 ("Here, the statute is broader than necessary because it establishes standards that are unrelated to specific tribal interests and applies those standards to potential Indian children.").
116 Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019).
117 *Id.*
118 *Id.* at 429.
119 *Id.*
120 Asgarian, *supra* note 47.

Circuit heard oral arguments in January 2020,[121] and it released a splintered opinion affirming the Circuit's panel decision; the United States Supreme Court granted certiorari in the case, and it heard oral arguments in November 2022.[122]

B. EIFE: Circumventing the ICWA by Misclassifying "Indian" as Racial

Although media coverage of the ICWA has focused on legal challenges to its constitutionality, several states have long been evading the statute's provisions through a judicially created loophole known as the "Existing Indian Family Exception" or EIFE.[123] However, this doctrine only remains relevant as long as the classification of "Indian" within the ICWA remains unresolved,

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121 *Fifth Circuit Hears Oral Argument on ICWA Case,* NAT'L COUNCIL ON URB. INDIAN HEALTH (Jan. 23, 2020), https://www.ncuih.org/policy_blog?article_id=345 [https://perma.cc/RVZ3-9H8H].

122 Brackeen v. Haaland, 994 F.3d 249, 267 (5th Cir. 2021), *cert. granted sub nom*. Nation v. Brackeen, 212 L. Ed. 2d 215, 142 S. Ct. 1204 (2022), and *cert. granted*, 212 L. Ed. 2d 215, 142 S. Ct. 1205 (2022), and *cert. granted sub nom*. Texas v. Haaland, 212 L. Ed. 2d 215, 142 S. Ct. 1205 (2022), and *cert. granted*, 212 L. Ed. 2d 215, 142 S. Ct. 1205 (2022).

123 *In re* Baby Boy L., 231 Kan. 199 (Kan. 1982) (holding that the ICWA did not apply to the child of an incarcerated American Indian father because the child was not a part of an existing American Indian family); Rye v. Weasel, 934 S.W. 2d 257 (Ky. 1996) (holding that there was no existing American Indian family where the child, though having Indian heritage through her grandfather and a legal ward of the Sioux tribe, was placed into foster care with a family that did not adopt American Indian culture as a day to day way of life); Hampton v. J.A.L., 27,869 (La. App. 2 Cir. 07/06/95), 658 So. 2d 331 (holding that the ICWA did not apply to a child whose mother was 11/16 Cherokee, had left the reservation at age 9, and attended two powwows since, because the mother maintained no ties to the Indian tribe); *In re* S.A.M., 703 S.W. 2d 603 (Mo. Ct. App. 1986); *In re* T.S., 801 P.2d 77 (Mont. 1990) (holding that the ICWA did not apply to a child whose mother is part Eskimo but neither the child nor mother resided on reservation during the child's lifetime); *In re* S.C., 833 P.2d 1259 (Okla. Civ. App. 1992) (holding that the ICWA did not apply to a child whose father was Cherokee but never had custody of the child); *In re* D.M.J., 741 P.2d 1386 (Okla. 1985) (holding that the ICWA did not apply to a ten year old, half Cherokee girl of divorced parents who had lived with her non-American Indian mother since the divorce eight years earlier); *In re* Crews, 825 P.2d 305 (Wash. 1992) (holding that the ICWA did not apply where a child nor her family ever lived on a reservation nor made plans to relocate the family onto a reservation); S.A. v. E.J.P., 571 So.2d 1187 (Ala. Civ. App. 1990) (holding that the ICWA did not apply to a 4 year old child who only resided with her Cherokee father for one month, and not on a reservation); *In re* S.A.M., 703 S.W. 2d 603 (Mo. Ct. App. 1986) (holding that there was no existing American Indian family where the father, a member of the Kickapoo tribe, had never petitioned for custody and the child lived with a non-American Indian mother); *In re* T.R.M., 525 N.E.2d 298 (Ind. 1988) (holding that the child, although being "biologically Indian," resided with a white family since five days after birth, thus precluding the ICWA's application); *see* Jaffke, *supra* note 18.

for the states that apply it do so because of the incorrect belief that "Indian" is a racial group.[124]

The doctrine finds its roots in a Kansas adoption case, *In the Matter of the Adoption of Baby Boy L,* where the child belonged to the Kiowa tribe, the child's father had been incarcerated since the child's birth, and the child's mother was not an American Indian.[125] There, the child was voluntarily put up for adoption at birth by the mother and was in the process of being adopted by a non-American Indian couple when the father and his tribe invoked the ICWA to transfer the proceedings to tribal court.[126]

Although the child was an enrolled Kiowa tribe member, and thus "Indian" under the ICWA, the court declined to apply the statute and held instead that Congress had not intended for the ICWA to apply to a child who "had never been a part of any Indian family or relationship."[127] In particular, it found that despite being explicitly enrolled in the Kiowa tribe, the child's tribe could not invoke the statute because his incarcerated father had not been an active participant in his life, the child had never lived on a reservation, and his mother was not an American Indian.[128]

After *Adoption of Baby Boy L.* several other states adopted the EIFE, utilizing it to retain jurisdiction, place American Indian children in contravention of the placement preferences, or refuse to allow American Indian parents to revoke consent to voluntary foster care or adoption placements.[129] To justify their decisions to keep the doctrine alive, courts have stated that the EIFE is necessary to avoid violating the Equal Protection Clause by classifying a child as "Indian" based only on their genetic connection to a tribe.

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124 Jaffke, *supra* note 18, at 743 (noting that the courts listed apply the EIFE to protect the constitutionality of the ICWA, which they argue is a race-based statute).

125 *In re Baby Boy L.*, 643 P.2d at 175.

126 *Id*.

127 *Id.* at 205.

128 *Id.*

129 These states are Alabama (S.A. v. E.J.P., 571 So.2d 1187, 1189 (Ala. Civ. App. 1990)), Indiana (*In re* Adoption of T.R.M., 525 N.E.2d 298, 303 (Ind.1988)), Missouri (In Interest of S.A.M., 703 S.W.2d 603, 609 (Mo. Ct. App. 1986)), Kentucky (Rye v. Weasel, 934 S.W.2d 257, 262 (Ky. 1996)), Louisiana (Hampton v. J.A.L., 658 So. 2d 331, 335 (La. Ct. App. 1995)), Tennessee (*In re* Morgan, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997)), and Nevada (In the Matter of the Parental Rights as to N.J., 221 P.3d 1255, 1264 (Nev. 2009). *See* Jaffke, *supra* note 18.

This logic is dictated succinctly in *In re Bridget R*, where the court concluded:

> "[A]ny application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the Equal Protection Clause. . . . If ICWA is applied to such children, such application deprives them of equal protection of the law."[130]

The logic follows that without "sufficient" ties to an American Indian community, such as through social or political relationships, the only remaining basis for applying the ICWA is the child's race.[131] Implicit in this conclusion is that a reliance on ancestry and genetics is race-based, which foreshadows the *Brackeen* plaintiffs' use of the Supreme Court's dicta in *Rice*.[132]

A case concerning the EIFE has never reached the Supreme Court, leaving the decision of whether to apply it up to state courts and legislatures.[133] This is significant because although the doctrine is waning,[134] it continues to undermine the ICWA in recent cases.[135] What is more, as recently as 2009, the Supreme Court in Nevada adopted the exception more than thirty years after the ICWA's enactment.[136] In so doing, it relied primarily

130 *In re* Bridget R., 49 Cal. Rptr. 2d 507, 528 (Cal. Ct. App. 1996).

131 *Id.* at 527.

132 Rice v Cayetano, 528 U.S. 495, 513 (2000).

133 Shawn L. Murphy, *The Supreme Court's Revitalization of the Dying "Existing Indian Family" Exception*, 46 MCGEORGE L. REV. 629, 645 n.225 (2014) (noting that the Supreme Court has never granted cert to any case challenging the application of the EIFE, and listing several cases where cert was denied); *see, e.g.*, Kiowa Tribe of Oklahoma v. Lewis, 777 F.2d 587 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986) (refusing to grant cert. upon the federal court's upholding of Baby Boy L.); *In re Bridget R.*, 41 Cal. App. 4th at 1483.

134 *See* Jaffke, *supra* note 18, at 741 n.43. The seven states still applying the EIFE today are Alabama, Indiana, Missouri, Kentucky, Louisiana, Tennessee, and Nevada. *Id.*

135 *See In re* D.C., et al.; J.C. v. J.C., 49A02-0909-CV-862. For instance, in 2010, the Indiana Court of Appeals upheld the adoption of an 11-year-old boy by his stepfather, even though his biological father contested the proceeding on the basis that he was a member of the Sitka Tribe of Alaska. The biological father specifically requested that the Court overturn the EIFE, but the Court declined to engage in its analysis, finding that because the father had not demonstrated any connection between the tribe and the child the child's eligibility, the EIFE applied.

136 *In re* N.J., 221 P.3d 1255, 1264 (Nev. 2009).

upon a case that deemed the EIFE as necessary to prevent the ICWA from unconstitutionally classifying a child based on race.[137]

The durability and continued relevance of the EIFE are also demonstrated by its recent use by the plaintiffs in *Brackeen,* who cite the doctrine in their appellate briefs for the Fifth Circuit's *en banc* case. Particularly, the briefs stated that "proof of the ICWA's race-based nature comes from the state courts attempt to 'adopt a legal test . . . predicated on political, cultural, or social affiliation,'" because without it, a child's connection would be based on race alone.[138] Consequently, the continued relevance of the EIFE may provide some insight into why, despite the ICWA's enactment forty years ago, American Indian children are still placed into foster care at a rate 2.7 higher than their proportion in the general population.[139]

C. Adoptive Couple*: Promoting a Misclassification of Indian as Racial?*

Unfortunately, the conflation of race and ancestry within legislation aimed at American Indian tribes that underlie both *Brackeen* and the EIFE has recently been afforded misplaced credibility in *Adoptive Couple v. Baby Girl*.[140] *Brackeen* thus presents the Court with a timely—if not urgent—opportunity to clarify the issue.

Adoptive Couple concerned a child whose father was a registered member of the Cherokee nation and whose mother was Hispanic.[141] The child neither lived with nor was supported by the father, who informed the mother via text message that he did not

137 *In re* Alexandria Y., 53 Cal. Rptr. 2d 679, 686 (citing *In re* Bridget R., 49 Cal. Rptr. 2d 507 (1996)) (holding that the "recognition of the [EIFE] doctrine is necessary to avoid serious constitutional flaws in the ICWA").

138 Brief for Brackeen et al. as Amici Curiae Supporting Appellees at 6, Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479), 2019 WL 495931, *on reh'g en banc sub nom*. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021).

139 *See Indian Child Welfare Act,* ASS'N ON AM. INDIAN AFFAIRS, *available at* https://www.indian-affairs.org/indian-child-welfare-act.html [https://perma.cc/5WCQ-KVD6] (last visited March 7, 2022).

140 *See* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).

141 *Id.* at 2558.

have an interest in raising the child.[142] When the mother voluntarily placed the child for adoption, the father invoked the ICWA to intervene, seeking custody.[143] The issue for the Court was whether the father's parental rights could be terminated under South Carolina state law, or whether Section 1912 (d) and (f) of the ICWA applied.[144]

The Court concluded that Section 1912 (d) and (f) did not apply because the father had voluntarily relinquished his parental rights and had never had custody.[145] In reaching its conclusion, the Court emphasized that "when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinued' . . . by the termination of the Indian parent's rights.'"[146] The Court further expressed that characterizing the child as Indian only because "an ancestor—even a remote one—was an Indian" would raise equal protection concerns,[147] but declined to take its analysis further.

Although its holding was limited to sections 1912 (d) and (f) of the ICWA, the case has serious implications for the ICWA's future. Firstly, the Court's uncertainty about the constitutionality of the eligibility requirement gives credence to the plaintiffs' argument in *Brackeen* because much of Justice Alito's majority opinion is preoccupied with ancestry and blood quantum, suggesting several times that the ICWA's eligibility requirement denotes a racial inquiry.[148]

142 *Id*.

143 *Id*. at 2559.

144 *See id*. Under the ICWA, the state cannot terminate a father's parental rights unless the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. *See* 25 U.S.C. §§ 1912 (d), (f); *but see* 8 S.C. CODE ANN. § 63-7-2570(4) (2010). *Cf.* § 63-9-310 (2010) (stating that under South Carolina law, a parent's failure to provide financial support for a child constitutes grounds for involuntary termination of that parent's parental rights).

145 *See Adoptive Couple,* 133 S.Ct. at 2557.

146 *See id.* at 2562; § 1912(f) ("No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the *continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.") (emphasis added).

147 *Adoptive Couple*, 133 S. Ct. at 2552 ("This case is about a little girl . . . who is classified as an Indian because she is 1.2% (3/256) Cherokee.").

148 *See id.* at 2565–66.

For instance, the opinion opens with an observation that the child was "only 1.2% (3/256) Cherokee,"[149] and when tallied together, mentions the child's blood quantum—which the opinion seemingly finds insufficient for the ICWA to apply— four times in its first six pages.[150] In fact, in her dissent, Justice Sotomayor took issue with the majority's "repeated, analytically unnecessary references to the fact that Baby Girl is 3/256 Cherokee" which "do nothing to elucidate its intimation that the statute may violate the Equal Protection Clause."[151] Her dissent also marks the case's only mention of *Mancari,* and notes the difficulty in "mak[ing] sense of this suggestion in light of our precedents, which squarely hold that classifications based on Indian tribal membership are not impermissible racial classifications."[152] As such, some activists have raised attention to the fact that this decision's preoccupation with the percentage of the child's blood quantum "[is] a racial question—a very charged racial question."[153] Unsurprisingly, the case is also heavily cited in the *Brackeen* plaintiffs' appellate briefs.[154]

Secondly, although the EIFE precludes the ICWA's application in its entirety and *Adoptive Couple* only limits the scope of two of its provisions, the decision has also been interpreted as a revitalization of the EIFE.[155] This suggests that the Court supports state action to limit the reach of the ICWA in cases where there is no "existing" American Indian family unit.

For one thing, the facts in *Adoptive Couple* and *Baby Boy L.* are nearly identical. Both involve a non-custodial American Indian father's invocation of sections 1912(f) and 1912(d) to stop the voluntary adoption placement of a child by a non-American Indian

149 *Id.* at 2556.

150 *Id.* at 2555, 2558–59, 2565.

151 *Id.* at 2584 (Sotomayor, J., dissenting).

152 *Id.*

153 Matt Trotter, *Baby Veronica Stirs Questions about Blood Quantum*, PUB. RADIO TULSA (Aug. 22, 2013), https://www.publicradiotulsa.org/post/baby-veronica-case-stirs-questions-about-blood-quantum-hear-our-special-report [https://perma.cc/NT5F-BRGF].

154 *See Brief for Brackeen*, *supra* note 138.

155 *See* Murphy, *supra* note 133, at 630 (suggesting that in light of *Adoptive Couple*, and because the Supreme Court has never reached a decision on the EIFE, the Supreme Court implicitly endorses the EIFE doctrine).

mother.[156] Both also involve hesitancy on behalf of the courts to apply the ICWA's provisions solely because of the American Indian blood quantum of the child.[157] What is more, the Supreme Court's language closely mirrors that of jurisdictions following the EIFE, as it notes that the Act was passed in order "to stem the unwarranted removal of Indian children from *intact* Indian families."[158] The synonymity of "intact" and "existing," as well as the Court's emphasis on the ancestry of the child, could be interpreted as an implicit endorsement of the EIFE, and a readiness to limit the ICWA's applicability to those cases where the court has determined that a child or family is "Indian" enough.[159] In effect, it could very well be interpreted as a green light to states to further circumvent the Act's provisions and undermine its goals. As *Brackeen* progresses through the courts, then, it is increasingly urgent that the courts find that the ICWA's definition of "Indian" is a political classification to strengthen the ICWA from future challenges and render the EIFE irrelevant.

III. THE LEGAL IMPLICATIONS OF CLASSIFYING "INDIAN" AS POLITICAL IN THE ICWA

More generally, a decision holding that "Indian" within the ICWA is a racial group would conflate race and ancestry in a way that ignores the history between the federal government and tribes. It is therefore imperative to not only understand the nuances between ancestral and racial inquiries generally but also the historical role ancestry has played in defining the status of American Indians. Against this background, the significance of ancestral inquiries can be reframed from originally being a way

156 *Id.* at 643–44 (analyzing the facts of *Baby Boy L.* and *Adoptive Couple* and finding them "nearly identical").

157 *See In re* Baby Boy L., 643 P.2d 168, 175 (Kan. 1982) (holding that the ICWA did not apply to a child who was 5/16th Kiowa when his incarcerated Kiowa father had never had custody); *Adoptive Couple*, 133 S.Ct. at 2556 ("This case is about a little girl . . . who is classified as an Indian because she is 1.2% (3/256) Cherokee.").

158 *Adoptive Couple*, 133 S.Ct. at 2561 (emphasis added).

159 Murphy, *supra* note 133, at 648–49 (noting that the words are virtually synonymous in this context).

for the American government to identify tribes in their assimilationist efforts into a meaningful mechanism for tribes to self-define, self-regulate, and renew the disrupted intergenerational ties that resulted from these policies. This will further demonstrate that the EIFE, *Brackeen,* and *Adoptive Couple*'s emphasis on genetics and the individual ties between a child and tribe, rather than the reciprocal relationship between a tribe and American Indian children, is not only incorrect but also undermines the ICWA's goals of furthering tribal agency by keeping American Indian families together.

A. Untangling Race and Ancestry

To accept the plaintiffs' argument in *Brackeen* would be to accept a conflation of race and ancestry which propagates an oversimplified understanding of "race" within the law. Though the dictionary definition of race has historically included little more than ancestry and bloodlines,[160] race as we have come to understand it is much more nuanced. Today, the dominant view is that race is a shifting, social construct where the assignment of differences, both external as well as presumed internal, serve to justify the subordination of those groups.[161] Across disciplines, "the consensus is clear: race is a social construct, not a biological attribute."[162]

160 Race refers to "any one of the groups that humans are often divided into based on physical traits regarded as common among people of shared ancestry." *Race*, Merriam-Webster Dictionary (11th ed. 2016), https://www.merriam-webster.com/dictionary/race.

161 Ian F. Haney López, *The Social Construction of Race*, 29 HARV. L. REV. 1, 7 (1994) (discussing that race is a fluid social construction rather than a fixed essence); *see* Angela Onwuachi-Willig, *Race and Racial Identity Are Social Constructs*, N.Y. TIMES (Sept. 6, 2016, 5:28 PM), https://www.nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity/race-and-racial-identity-are-social-constructs#:~:text=Race%20is%20not%20biological.,would%20remain%20constant%20across%20boundaries [https://perma.cc/Z3Z6-5E27]; David Williams, *A Missouri Woman Asked Merriam-Webster to Update its Definition of Racism and Now Officials Will Make the Change*, CNN (June 12, 2020, 11:39 AM), https://www.cnn.com/2020/06/09/us/dictionary-racism-definition-update-trnd/index.html [https://perma.cc/LRJ7-DR2Q] (discussing how some dictionaries have edited their definitions to reflect a more modern and nuanced understanding of race).

162 Vivian Chou, *How Science and Genetics are Reshaping the Race Debate of the 21st Century*, HARV. U. GRAD. SCH. ARTS AND SCI. NEWS (Apr. 12, 2017), http://sitn.hms.harvard.edu/flash/2017/science-genetics-reshaping-race-debate-21st-

Ancestry, on the other hand, or blood ties, reflect the "fact that human [genetic] variations *do* have a connection to the geographical origins of our ancestors."[163] The difference is that in the former, the central inquiry is whether one fits into a category or not, whereas, in the latter, it focuses on "understanding how a person's history unfolded."[164] Thus, one's ancestry is not the same as one's race because ancestry is a personal inquiry into one's geographic and historical roots, whereas race is an exploration of how those roots have been represented and exploited by others.

In her article for the American Sociological Review, "American Indian Ethnic Renewal: Politics and the Resurgence of Identity," Joane Nagel, a racial and ethnic scholar, applies this framework to American Indians, positing: "Indian in terms of its categorization as a racial group is informal and external to Indian communities, and involves ascription mainly, though not exclusively, by non-Indians."[165] Conversely, Indian in terms of a legally recognized political sovereignty is regulated *by* American Indians through recognition as an "enrolled" tribal member or not.[166]

Within the ICWA, determining whether a child is "Indian" has little to do with external notions of "Indianness" or ascribed "Indian" characteristics or stereotypes; instead, it is a way for American Indians to *self*-regulate their political status in a way that is unique to them as compared to other marginalized groups. When framed in this way, the difference between the voting restriction for Native Hawaiians in *Rice* and the employment preference in *Mancari* is clear, because while the latter "had a racial component," it was nonetheless "not directed towards a 'racial' group consisting of 'Indians'" but rather "only to members of federally recognized tribes."'[167] In other words, because of the unique relationship between American Indian tribes and the U.S.

century/ [https://perma.cc/F69D-44CQ] (finding that given advances in genetic testing, we should delineate between race as a social construct, and ancestry, which describes human diversity based on geographical origins).

163 *Id.*

164 *Id.*

165 Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 AM. SOC. REV. 947, 950 (1995).

166 *See id.*

167 *Mancari*, 417 U.S. at 553 n.24.

government, *Rice* affirmed that some laws regarding American Indians can include racial components, such as the use of blood quantum, and nevertheless remain political classifications, rather than racial classifications by proxy of ancestry. Especially when considering that four years later, the Supreme Court in *Lara* confirmed that no change was made to the political status of federally recognized tribes, *Brackeen's* conflation of ancestry and race becomes clear.[168]

B. The Historical Role of Ancestry and Blood Quantum in Defining American Indian Identity

In conflating blood ties and ancestry with race, opponents of the ICWA seemingly disregard what distinguishes American Indians from other distinctive and subordinated groups: their status as the peoples indigenous to the United States. To briefly summarize, after years of the systematic subordination and exploitation of American Indians, their sovereignty was finally recognized through a series of treaties and important Court decisions.[169] As such, the U.S. Constitution recognizes American Indian tribes as distinct governments,[170] and the Constitution's text recognizing such—authorizing Congress to regulate commerce with the "Indian tribes"—has been interpreted to mean "domestic dependent nations," where the federal-tribal relationship "resembles that of a ward to his guardian."[171] Significantly, not

168 *See Lara*, 541 U.S. at 204.

169 "The Marshall Trilogy" refers to three Supreme Court cases that established tribal governance authority and excluded state law from American Indian country. Johnson v. M'Intosh, 21 U.S. 543 (1823) (confirming national authority over "Indian" affairs to find that American Indians could not sell their property interests to anyone except the national sovereign); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (holding that Indian tribes retain status as "state[s]"); Worcester v. Georgia, 31 U.S. 515, 561 (1832) (recognizing that Indian treaties were within the meaning of treaties as understood in the Supremacy Clause, rendering any state laws that interfered with their operation as having "no force").

170 *See* U.S. CONST. art. I § 8, cl. 3. Article I, Section 8 of the Constitution states that "Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian tribes," indicating that Indian tribes were separate from the federal government, the states, and foreign nations.

171 *Cherokee Nation*, 30 U.S. at 1 (holding that Indian tribes retain status as "state[s]"); *see Worcester*, 31 U.S. at 561 (recognizing that Indian treaties were within the meaning of

all tribes signed these treaties,[172] but those that did were *federally recognized*.[173] Therefore, not all tribes in the U.S. have the same legal status.[174] To date, there may be about 245 federally non-recognized or state-recognized tribes, if not more.[175]

Further, the use of blood quantum to ascribe legal identity as "Indian" was introduced by the federal government as a means to determine which American Indian, male heads-of-household would receive an allotment of land during the formation of reservations.[176] Consequently, "[t]he 'allotment era' (1887 to 1934) saw the concept of 'blood quantum' become officially integrated into the legal status of Indian identity."[177] Following this period, under the Indian Reorganization Act of 1934, many tribes adopted constitutions that included blood quantum in their membership inquiries.[178] Today, many tribes have chosen to retain these constitutions or have ratified them to include blood quantum measurements that are tribe-specific.[179] This is different from federal laws, which often include "pan-tribal" or

treaties as understood in the Supremacy Clause, rendering any state laws that interfered with their operation as having "no force").

172 Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, *supra* note 67.

173 *Id.*

174 *Id.*

175 *See* Paula Giese & Troy Brown, *U.S. Federally Non-Recognized Indian Tribes – Index by State* (Apr. 5, 1997), http://www.kstrom.net/isk/maps/tribesnonrec.html [https://perma.cc/K4SE-DWCN].

176 *See* Dawes Act, ch. 119, 24 Stat. 388-91 (1887). The Dawes Act of 1887 formalized the allotment of reservation land. Reservation-bound male heads of households received allotments, and in many cases, a blood quantum of one-quarter of American Indian blood was used to determine who was eligible for an allotment. *Id.*

177 R. W. Schmidt, *American Indian Identity and Blood Quantum in the 21st Century: A Critical Review*, J. ANTHROPOLOGY 1, 4 (2011) (discussing how blood quantum was used to identify American Indians and provide them with legal status such that they received an allotment of land).

178 *See* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 446 (2002).

179 *See* Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States,* 33 AM. INDIAN L. REV. 243, 247 (drawing on an empirical study of 322 current and historical tribal constitutions to conclude that tribes are increasingly likely to use lineal descent and blood quantum rules after 1970 that are generally tribe-specific).

racial measures of "Indian blood" without reference to specific tribes.[180]

C. Reframing Blood Quantum as a Tool for Tribal Survival

While tribes tend to be genealogical in determining eligibility, for many, blood quantum is not based on being "Indian" generally (as the *Brackeen* plaintiffs suggest),[181] but is a way to trace individual connection to a specific tribe and its history. When reframed this way, blood quantum requirements can be viewed as a response to federal policies that disrupted tribal life and a means of retaining the historical continuity of tribal communities.[182] It can also be used to further tribal agency and viability by self-regulating and self-identifying their communities.[183]

Conversely, to accept that ancestry denotes race and that "Indian" in the ICWA is a racial classification would allude to a uniform and universal identity for all American Indian tribes. This was explicitly rejected by Congress, which chose not to impose a federal blood quantum but instead defer to tribal authority in acknowledgment of the wide range of characteristics used by tribes to define their own.[184] Thus, the plaintiffs in *Brackeen* falsely

180 *See id.* at 244 n.2 (listing the following statutes with a requirement that the individual be an "Indian"); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C § 450b(d) (2000) ("'Indian' means a person who is a member of an Indian tribe"); Indian Financing Act of 1974, 25 U.S.C § 1452(b) (2000) ("'Indian' means any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the federal government as eligible for services from the Bureau of Indian Affairs and any 'native' as defined in the Alaska Native Claims Settlement Act."); Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1603(d) ("'California Indian' means 'any member of a federally recognized tribe' or 'any descendent of an Indian who was residing in California on June 1, 1852, if such descendant is a member of the Indian community served by a local program of the Service' and 'is regarded as an Indian by the community in which such descendant lives.'").

181 *See* Brief for Petitioners at 9–10, Brackeen, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479).

182 *See* Gover, *supra* note 179, at 248.

183 *See id.* at 245 (noting that "tribes retain the inherent sovereign power to regulate membership except where congressional legislation limits their ability to do so").

184 *See id.* at 248–49, 254–55; Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, *supra* note 67.

assume that tribes are universal in requiring a blood quantum in their membership criteria,[185] a claim that is far from the truth; for instance, where one group may require a fifty percent blood quantum, other tribes require none.[186]

As an example, in their original briefs for the Northern District Court of Texas's decision in *Brackeen v. Zinke,* plaintiffs refer to the Navajo tribe's membership criteria and claim that "to be a member of the Navajo, a child must have 25 percent Navajo blood—but need not have any cultural, political, or social affiliation with the tribe."[187] This has been refuted by the Navajo Nation which explained that, under its laws, "blood alone is never determinative of membership," and membership applications are only granted if the individual has "some tangible connection to the Tribe."[188]

Incorrectly citing the Navajo Nation as evidence that all tribes are universal in their blood quantum requirements is just one example of how misclassifying "Indian" as racial strips tribes of their uniqueness and undermines their ability to self-define. Instead, it imposes Western stereotypes on tribes by assuming that all tribes prioritize the same characteristics in members without confirming membership codes with the tribes themselves. This demonstrates the irony of the Goldwater Institute's parading as a champion for "Indian rights,"[189] especially when coupled with

185 Brief for Petitioners at 9, Brackeen, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479).

186 *See id.* at 24; Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, *supra* note 67. For example, the Mississippi Band of Choctaw Indians, Mississippi, require fifty percent blood quantum for enrollment; on the other side of the spectrum, the Kaw nation has no blood requirement. *See* Constitution of the Kaw Nation 1, 4 (2011), https://kawnation.com/?page_id=3312 [https://perma.cc/5WWN-PJPX].

187 Brief for Petitioners at 24, Brackeen, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479).

188 *See* Brackeen v. Bernhardt, 937 F.3d 406, 427 n.10 (5th Cir. 2019) ("The Navajo Nation's membership code is instructive on these points, despite the district court's reliance on it to the contrary. The Navajo Nation explains that, under its laws, 'blood alone is never determinative of membership.' The Navajo Nation will only grant an application for membership 'if the individual has some tangible connection to the Tribe,' such as the ability to speak the Navajo language or time spent living among the Navajo people. 'Having a biological parent who is an enrolled member is per se evidence of such a connection.'").

189 *See Ensuring Equal Protection for Native American Children – Challenging the Indian Child Welfare Act*, GOLDWATER INST., https://goldwaterinstitute.org/indian-child-welfare-act/ [https://perma.cc/RKL3-D2KE] ("The Goldwater Institute is fighting in courts nationwide to ensure that Indian children have the same constitutional protections afforded their peers of other races.").

the fact that 486 federally recognized tribes joined as amicus curiae for the defendants, and not a single tribe or American Indian joined the plaintiffs' side.[190] In essence, though the Institute may claim to have the best interests of American Indian children at heart, it has earned no support from tribes themselves in practice.[191]

D. The Reciprocal Relationship Between American Indian Children and Tribes and the Error of EIFE, Brackeen*, and* Adoptive Couple

Not only does a reframing of ancestral inquiries and blood quantum highlight their usefulness as tools to further the agency of tribes and renew intergenerational connections, but it also demonstrates the implicit error of the EIFE, *Brackeen,* and *Adoptive Couple's* unilateral focus on the individual ties between a child and tribe.

For one thing, it is erroneous to believe that absent an "intact"[192] American Indian family, as in *Adoptive Couple*, "relinquishing control over a child born to parents uninvolved in Indian life costs the tribe nothing."[193] As explicitly referenced in the Congressional findings for the statute, the removal of American Indian children is a serious threat to tribes' existence as "on-going, self-governing communities."[194] Thus, "[n]o resource is more vital to the continued existence and integrity of Indian tribes than their children" because the "chances of Indian survival are significantly reduced if our children, the only real means for the transmission

190 *See* Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018).

191 *See generally* GOLDWATER INST., *supra* note 189 ("The Goldwater Institute is fighting in courts nationwide to ensure that Indian children have the same constitutional protections afforded their peers of other races.").

192 Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2561 (2013).

193 *In re* Baby Boy C., 27 A.D.3d 34 (N.Y. App. Div. 2005) (holding that the ICWA "generally applied to a private placement adoption proceeding involving an 'Indian child' born of a one-half Native American Indian mother and a non-Indian father, irrespective of whether the child or his parents had significant connections to his mother's tribe").

194 25 U.S.C. § 1901.

of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people."[195]

This is appropriately acknowledged by the Fifth Circuit three-judge panel's description of the ICWA's eligibility requirement as a "not-yet formalized tribal affiliation" as opposed to an unconstitutional reliance on race by proxy of ancestry and demonstrates the error of the EIFE's unilateral inquiry into an individual child's or parent(s) American Indian ties as severed from that of the tribes.[196] Because of policies of removal and assimilation, many American Indian children never *had* the opportunity to learn the culture, religion, and language of their tribes.[197] The EIFE thereby allows courts to "deny the right of tribes to establish or renew these ties with American Indian children who, though perhaps born to tribal members, have now assimilated into Western culture."[198] Attempting to redress this injustice is precisely what precipitated Congress's enactment of the ICWA in the first place.

Lastly, classifying "Indian" as racial perpetuates racialized notions of what it means to be an American Indian. For instance, courts that follow the EIFE distinguish between "real" American Indian children, who "adopt American Indian culture as a day to day way of life,"[199] and those who do not. This allows state court judges, the majority of whom are not American Indians,[200] to impose their conceptions of what it means to be "Indian" onto American Indians themselves and to evaluate whether it is sufficient.

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195 *Id.*; Sloan Philips, *The Indian Child Welfare Act in the Face of Extinction*, 21 AM. INDIAN L. REV. 351, 361 (1997).

196 Brackeen v. Bernhardt, 937 F.3d 406, 428 (5th Cir. 2019).

197 *See* Melissa L. Walls & Les B. Whitbeck, *The Intergenerational Effects of Relocation Policies on Indigenous Families*, J. FAM. ISSUES (2012) (a study on current structural contexts of extreme poverty and isolation that characterizes many reservation and reserve lands, finding that ethnic cleansing and the erosion of cultural ways through years of government policies are the root cause).

198 Jaffke, *supra* note 18, at 748–49 (noting that the EIFE fails to consider the possibility that children could be exposed to their cultures later in life).

199 Rye v. Weasel, 934 S.W.2d 257, 263 (Ky. 1996) (reversing a court of appeals decision allowing for a transfer of tribal jurisdiction).

200 *See* Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887, 1903 (2017) (finding that state court judges are overwhelmingly white).

Further, the EIFE's "focus on either (1) the bond between the Indian parent and child, or (2) the parents' or child's ties to the reservation or tribal culture,"[201] as well as *Adoptive Couple*'s suggestion that the Act should only protect "intact" families[202] ignores the fact that many American Indian families and communities follow an "extended family model."[203] In this structure, various members of the child's extended family have child-rearing responsibilities,[204] and cultural identity is transmitted by parents and extended family and community to the child.[205] Thus, gauging how closely a child is connected to their tribe through an analysis of the child or individual parents completely undermines Congress's intent to allow tribes to exercise the "cultural and social standards prevailing in *Indian* communities and families."[206]

To summarize, the connection between a child and a child's potential tribe is reciprocal, extends beyond individual ties, and can be both broken and renewed by circumstance. Although blood quantum was once utilized by the federal government to pursue its assimilationist agenda, today, it has been repurposed as a way to trace an individual's lineage to a federally recognized tribe in recognition of a history of removal and displacement. Therein, blood quantum and ancestral inquiries within the ICWA are not measurements of a static, pan-tribal category of "Indian," but instead a means to renew intergenerational ties and foster connections within this political body.

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201 Wendy T. Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 436–37 (1997) (critiquing the EIFE as subversive to tribal interests).

202 Adoptive Couple v. Baby Girl, 570 U.S. 637, 649 (2013).

203 Marcia Carteret, *Cultural Differences in Family Dynamics* DIMENSIONS OF CULTURE (Nov. 2, 2010), https://www.dimensionsofculture.com/2010/11/culture-and-family-dynamics/ [https://perma.cc/N7B9-W248] (finding that the typical American Indian society is collectivistic and follows an extended family model).

204 *See id.*

205 *See* Harrison et al., *Family Ecologies of Ethnic Minority Children*, 61 CHILD DEV. 347, 351 (1990) (finding that responsibility for raising children belongs to the larger community, whereby extended family members transmit tribal culture to the children).

206 25 U.S.C. § 1901(5) (emphasis added).

IV. THE ICWA, KINSHIP CARE, AND CHILD WELFARE POLICY

Finally, framing "Indian" as a political classification, whereby the preservation of cultural ties is in the best interests of both the tribe and the child, presents the Courts with an opportunity to facilitate a greater dialogue regarding the potential role culture and kinship care should play in adoption processes and the welfare system as a whole. By utilizing the ICWA's positioning of kinship care as a culturally competent approach and differentiating this from a child's race, child welfare policies can continue to prioritize a child's cultural ties, often established through kinship and community bonds, which leads to better outcomes overall.

A. The ICWA as a "Gold Standard"

Not only has the ICWA been praised for its impact on tribal self-sovereignty, but it has also been lauded as a model standard in child welfare policy and practice.[207] Eighteen national child advocacy organizations go so far as to name it "the gold standard."[208] Accordingly, in *Brackeen v. Bernhardt*, thirty-one child welfare organizations were amongst the many advocacy groups that filed briefs urging the Fifth Circuit to uphold the law.[209]

Particularly, child welfare groups applaud the ICWA's prioritization of kinship placement, which research proves leads to

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207 For instance, the Child Welfare League of America, the nation's oldest and most preeminent organization dedicated to vulnerable children in foster care, issued a statement denouncing the Northern District Court of Texas's opinion in *Brackeen v. Zinke*, affirming that the ICWA "continues to be the gold standard in child welfare policy." *See CWLA Position Statement on the Indian Child Welfare Case Brackeen v. Zinke Ruling*, CHILD WELFARE LEAGUE AM., *available at* https://www.cwla.org/cwla-position-statement-on-the-indian-child-welfare-case-brackeen-v-zinke-ruling/ [https://perma.cc/A7Z9-AHKB] (last visited Mar. 12, 2021).

208 *See* National Indian Child Welfare Association, *Setting the Record Straight: The Indian Child Welfare Act* 1 (2015).

209 *See Joint Press Release from National Indian Child Welfare Association on the Overwhelming Support for the Indian Child Welfare Act*, NAT'L INDIAN CHILD WELFARE ASS'N, available at https://www.nicwa.org/latest-news/overwhelming-support-indian-child-welfare-act/ [https://perma.cc/4SZL-MLGF] (last visited Mar. 12, 2021).

children being less likely to be moved multiple times as well as more likely than those in non-relative foster care to be successfully reunited with their parents.[210] The ICWA, which requires that state courts consider the relationship that American Indian children have with their extended family, siblings, and community, has the highest rate of kinship care when compared to different populations of children in foster care.[211] As such, advocates see it as a "culturally competent approach" that "could serve as an effective model for all state child welfare programs."[212]

However, the importance of preserving cultural ties through kinship placement as recognized by the ICWA need not be limited to "Indian" children. A "kinship-first" approach has gained traction concerning African-American children in the welfare system.[213] Just as many tribes follow extended family models, kinship care has historically been a way for African-Americans to preserve their families during slavery and through the modern era.[214] As such, as with American Indian families, the "nuclear family structure is not the norm within African American families."[215] In response to this reality, within many marginalized communities that have faced social and economic disadvantages in the U.S., kinship care is "the long-established solution when a child is unable to reside with their biological parent."[216]

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210 Christine James-Brown, the CEO of the Child Welfare League of America, notes that her organization is among the "hundreds of child welfare groups that heartily supports the ICWA . . . because it enables state child welfare agencies and courts to act in the best interests of Native American children." Christine James-Brown, *Indian Child Welfare Act is Leading the Way on Child Welfare Practice*, THE IMPRINT (Jan. 1, 2020, 3:00 AM), https://imprintnews.org/child-welfare-2/indian-child-welfare-act-is-leading-the-way-on-child-welfare-practice/40435 [https://perma.cc/7KTF-A38B].

211 *Id.*

212 Kathy D. LaPlante, *The Indian Child Welfare Act and Fostering Youth Cultural Identity*, AM. PSYCH. ASS'N CHILD YOUTH AND FAM. PUB. (Dec. 2017), https://www.apa.org/pi/families/resources/newsletter/2017/12/indian-child-welfare [https://perma.cc/S8LV-742W].

213 *See* Maria Scannapieco & Sondra Jackson, *Kinship Care: The African American Response to Family Preservation*, 41 SOC. WORK J. 190, 190 (1996).

214 Jill Theresa Messing, *From the Child's Perspective: A Qualitative Analysis of Kinship Care Placements*, 28 CHILD & YOUTH SERVS. REV. 1415, 1418 (2006) (aiming to provide a descriptive analysis of kinship care from the child's perspective, and finding that kinship care is not a new phenomenon).

215 *Id.*

216 *Id.*

Subsequently, many studies have demonstrated that kinship care among African-American children is a culturally responsive approach[217] associated with providing children with a positive sense of self, a sense of belongingness, and a way to form positive ties that assist children in recuperating from grief, loss, or trauma.[218] Further, kinship care has been a successful way to solidify a cultural and ethnic identification for African American adolescents, who may have more favorable ethnic identity perspectives than those who reside in non-kinship care.[219]

Finding the ICWA, and particularly its placement preferences, unconstitutional will quell the national dialogue surrounding the ability of kinship care to foster cultural ties and lead to better outcomes for children. It could also have negative implications for current federal childcare law, which is already shifting in this direction.

B. Kinship Care and Racial Preference within Federal Child Welfare Law

The ICWA has led the way in facilitating dialogues concerning the benefits of kinship care and the importance of cultural preservation within child welfare law generally. This shift is currently gaining national traction, especially with the passing of the Family First Prevention Services Act.[220] Under the Act, states can receive federal reimbursement for "up to 50 percent of their expenditures on kinship navigator programs," which assist kinship caregivers in learning about and accessing programs and resources to meet the needs of the children they are raising.[221] In so doing, the Act recognizes that kinship placement provides the

217 *See* Scannapieco & Jackson, *supra* note 213, at 190 (discussing kinship care as a resilient response by the African American community and a means to preserve the family).

218 *See id.* at 194.

219 *See id.* at 192–94.

220 *See* Family First Prevention Services Act, H.R. 1892-169, 115th Cong. (2017–18).

221 *See Kinship Navigator Programs*, U.S. DEP'T HEALTH & HUMAN SERVS. ADMIN. CHILD. & FAMILIES, ADMIN. CHILD. YOUTH & FAMILIES BUREAU, https://www.childwelfare.gov/pubPDFs/kinshipnavigator.pdf [https://perma.cc/286J-F27L] (last visited Mar. 8, 2022).

opportunity for children to remain connected to their families and cultures,[222] demonstrating a nationwide recognition of the value of cultural identity that encompasses so much of the ICWA.

On the other hand, the Multi-Ethnic Placement Act (MEPA), passed in 1994, expressly prohibits public child welfare agencies from delaying or denying a child's foster care or adoptive placement based on race, color, or national origin.[223] It has been interpreted as barring public agencies from systematically considering race when placing children in foster homes.[224]

Both the ICWA and FFPSA comply with MEPA because the statutes distinguish between decisions made regarding a child's race and those regarding a child's kinship and cultural ties. Implicitly, they recognize that many children of different races come from cultures with a history of oppression, displacement, and economic marginalization and may not follow traditional nuclear family models.[225] The ICWA was the first federal statute to codify this and did so with Congressional authority to promote the interests and self-sovereignty of tribes. It should not be read narrowly, and instead, continue to have far-reaching implications for the role culture and kin should play in child welfare policymaking.

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222 *See* Jesse J. Helton, *Children with Behavioral, Non-behavioral, and Multiple Disabilities, and the Risk of Out-of-home Placement Disruption*, 35 CHILD ABUSE & NEGLECT 956, 960–64 (2011) (concluding that placement with kin decreases the likelihood of disruption for a majority of children); Nicholas Lovett & Yuhan Xue, *Family First or the Kindness of Strangers? Foster Care Placements and Adult Outcomes*, 65 LAB. ECON. J. 1, 1 (Aug. 9, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116459 [https://perma.cc/46ZU-2NRH] (evaluating the effects of placing foster children with extended family, rather than unrelated caregivers, and finding that kinship care conveys significant benefits in the form of improved life outcomes at age 21).

223 The Multiethnic Placement Act ("MEPA"), Pub. L. 103-382 § 551, 108 Stat. 4056 (1994) (codified as amended at 42 U.S.C. §1996b (2000) and 42 U.S.C. § 5115a (1994) (repealed 1996)).

224 David J. Herring, *The Multiethnic Placement Act: Threat to Foster Child Safety and Well-being?*, 41 U. MICH. J. L. REFORM 89, 89 (2007) (analyzing the consequences of MEPA on foster care placements, and finding that children placed with non-kin, same-race foster parents are likely to be safer and healthier than children placed with non-kin, different-race foster parents).

225 *See* Samantha Godwin, *Children's Oppression, Rights and Liberation*, 4 NW. INTERDISCIPLINARY L. REV. 248, 255–57 (Mar. 7, 2011) (discussing the social construction of childhood and the history of children's rights under the law through an interdisciplinary lens).

If the Court in *Brackeen* classifies "Indian" in the ICWA as racial, it would further blur the lines between inquiries into a child's race, culture, and blood ties in determining their best interests. In practice, this could very well have the effect of undermining the progress child welfare advocates have made in promoting a focus on the culture and kinship relations of a child without fear of implicating the Fourteenth or Fifth Amendments or MEPA.

CONCLUSION

In most situations where the ICWA is found to apply, there is a high risk that a family, whether adoptive or biological, will be broken up. And in many situations, one cannot help but sympathize with well-meaning parents whose efforts to give a child a better life are thwarted. However, while what it means to be a "family" is always changing, the formation of American Indian families has been prevented by a history that cannot be undone. In acknowledgment of this history, the federal government enacted the ICWA, which not only prevents the breakup of American Indian families but better facilitates the ability of tribes to renew intergenerational bonds destroyed by the boarding school era and culturally incompetent child welfare practices.

Further, although blood quantum had once been used by the federal government as a means to identify the tribes it aimed to exploit, it has been repurposed into a way for tribes to identify those eligible for membership and to place those individuals in relation to that history. What that individual does as they mature into an adult is up to them, but tribes must have the opportunity to renew those bonds before the child's placement with a non-American Indian family occurs. As demonstrated by numerous studies, this has been proven to better ensure that the best interests of American Indian children are met, especially as they often suffer mental health consequences after placement with non-American Indian families that are compounded by the cultural displacement they may feel. It is also a way to ensure that the best interests of tribes are met because their connections to subsequent generations are crucial to their longevity and survival.

In conclusion, classifying "Indian" as political within the ICWA would strengthen the Act from both future and current challenges by rendering the EIFE irrelevant and disproving the main argument underlying the statute's opposition in *Brackeen* and *Adoptive Couple*. In so doing, it would also preserve the agency currently afforded to tribes by their ability to define and regulate who is "Indian," and it would strip courts of the authority to question whether a child is "Indian" enough. Lastly, strengthening the ICWA would continue to facilitate conversations regarding the nuances of race, culture, and ancestry and the important roles they play in determining the best interests of a child.

The enactment of the ICWA is one step towards accountability for a country with a history of oppression, subordination, and exploitation of marginalized groups. For American Indians, the consequences of these policies have allowed for the past to get "broken off," but in *Brackeen,* our legal system has an opportunity to ensure that it does not become forgotten.