Challenging the Narrative: Challenges to ICWA and the Implications for Tribal Sovereignty

By Hannah Taylor*

What does it mean to be an Indian[1] child in the U.S.? In cases such as *Adoptive Couple v. Baby Girl*[2] and *Brackeen v. Bernhardt*,[3] the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, respectively, have tried to answer this question, specifically as it relates to the Indian Child Welfare Act ("ICWA").[4] These two cases involve non-Indian families attempting or hoping to circumvent ICWA to adopt Indian children. While *Adoptive Couple* is final, having been decided by the United States Supreme Court,[5] *Brackeen v. Bernhardt* is currently pending in the Fifth Circuit.[6] ICWA has been upheld by the courts in these cases so far, but, in *Adoptive Couple*, the Supreme Court revealed an ignorance of Indian family dynamics and of the idea that Indian children's ties to their culture are critically important both for the children and the tribes. This failure, coupled with the Court's apparent disapproval of basic principles related to tribal sovereignty, presents the risk that the Supreme Court may overturn ICWA if *Brackeen* reaches it. Such a result would very likely have widespread implications for the entire field of federal Indian law.

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* Candidate for Juris Doctor, 2021, Northeastern University School of Law. I would like to thank Professor Heather Whiteman Runs Him for her incredible wisdom and the grace with which she shares it. Her guidance has been invaluable.

[1] In this article, I use the term "Indian" to refer to indigenous peoples of North America, as that is the term used in federal statutory and case law in the United States. *See generally, e.g.*, 25 U.S.C. §§ 1–5636 (2018); Herrera v. Wyoming, 139 S. Ct. 1686 (2019); Montana v. United States, 450 U.S. 544 (1981); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[2] 570 U.S. 637 (2013).

[3] 937 F.3d 406 (5th Cir.) (upholding ICWA), *reh'g granted*, 942 F.3d 287 (5th Cir. 2019).

[4] 25 U.S.C. §§ 1901–1963 (2018).

[5] *Adoptive Couple*, 570 U.S. at 655–56.

[6] Brackeen v. Bernhardt, 942 F.3d 287 (2019) (granting rehearing). Oral arguments were heard on January 22, 2020, and the Court's opinion is still forthcoming. Brackeen v. Bernhardt – *Indian Child Welfare Act*, NATIVE AM. RTS. FUND, https://www.narf.org/cases/brackeen-v-bernhardt/ (last visited June 21, 2020).

I. Background

ICWA was passed, pursuant to "the Federal responsibility to Indian people,"[7] to establish "minimum Federal standards" for Indian children's removal and, therefore, end the states' ability to freely remove Indian children from their homes and communities and place them with non-Indian families, a practice that led to anywhere from twenty-five to thirty-five percent of Indian children being so placed prior to ICWA's enactment in 1978.[8] While the separation of Indian children from their homes was often done with the specific intent of destroying tribal nations through the theft of their homelands,[9] it was also the result of an implicit belief that Indian familial structures are inherently inferior to white ones.[10] While white Americans view the family as a discrete, nuclear unit, Indian family dynamics emphasize and involve extended family to a much greater extent.[11] What white society may deem a distant relative, or even a stranger, may be a close relative according to Indian cultural norms.[12] Thus, where white social workers thought they were seeing cases of familial neglect and abandonment meriting removing children from their homes, they were actually destroying thriving, intact Indian families.[13]

Although Congress framed the problem they were addressing as originating in the states, the federal government also implemented destructive practices targeting Indian children, the negative effects of which are still felt among tribes today. During the allotment and assimilation

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[7] 25 U.S.C. § 1901 (2018).
[8] 25 U.S.C. § 1902 (2018); H.R. REP. NO. 95-1386, at 9 (1978); Angelique EagleWoman & G. William Rice, *American Indian Children and U.S. Indian Policy*, 16 TRIBAL L.J. 1, 18 (2016); *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N, https://www.nicwa.org/about-icwa/ (last visited June 21, 2020).
[9] *See* Nick Estes, *The U.S. Stole Generations of Indigenous Children to Open the West*, HIGH COUNTRY NEWS (Oct. 14, 2019), https://www.hcn.org/issues/51.17/indigenous-affairs-the-us-stole-generations-of-indigenous-children-to-open-the-west (discussing the role of Indian boarding schools "in pressuring the West's most intransigent tribes to cede and sell land by taking their children hostage.").
[10] EagleWoman & Rice, *supra* note 8, at 16 ("The standards adopted by the legal systems to govern child-rearing practices were based on non-Indian culture, experience, and family values and were in large part antithetical to Indian culture, experience, and family values.").
[11] *Id.* at 16–17.
[12] *Id.* at 17.
[13] *Id.*

period,[14] the U.S.'s Indian boarding school policy removed thousands of Indian children from their families and tribes and forced them to attend boarding schools designed to assimilate them into white society.[15] Over the years, countless children died at such schools.[16] Due to the policies and practices of the federal government, an unknown number of these children were never returned to their homelands and many remain unidentified.[17] Imagine for a moment that, in the community in which you live, every family has a relative who was kidnapped decades ago and whose fate, to this day, remains unknown. This is the trauma with which Indian peoples continue to live.

Pursuant to the Supremacy Clause[18] and Congress's plenary power under the Indian Commerce Clause,[19] ICWA was enacted to create "minimum Federal standards" governing the removal of Indian children from their families and communities that states could not violate, existing state family law doctrines notwithstanding.[20] Congress enacted ICWA to prevent further traumatic separation of Indian children from their families and their peoples and to promote the welfare of indigenous peoples rather than to undermine it, finally recognizing "that

[14] This period is generally thought to encompass the years 1887 to 1934. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 8–10 (4th ed. 2012).
[15] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1065–66 (2012); Estes, *supra* note 9; Mary Annette Pember, *Death by Civilization*, ATLANTIC (Mar. 8, 2019), https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/.
[16] Pember, *supra* note 15.
[17] Alleen Brown & Nick Estes, *An Untold Number of Indigenous Children Disappeared at U.S. Boarding Schools. Tribal Nations Are Raising the Stakes in Search of Answers.*, INTERCEPT (Sep. 25, 2018, 12:37 PM), https://theintercept.com/2018/09/25/carlisle-indian-industrial-school-indigenous-children-disappeared/.
[18] U.S. CONST. art. VI, cl. 2.
[19] U.S. CONST. art. I, § 8, cl. 3.
[20] 25 U.S.C. § 1902 (2018) ("[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families . . . ."). Among other things, ICWA provides for Indian tribes to have exclusive jurisdiction over most child custody proceedings involving an Indian child and provides strict guidelines for foster and adoptive placement preferences to which states must adhere. 25 U.S.C. § 1911 (2018); 25 U.S.C. § 1915(b) (2018).

there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[21]

II. *Adoptive Couple v. Baby Girl* and Contempt for Tribal Sovereignty

While Congress, by incorporating the Indian extended family concept into ICWA, has shown a readiness to acknowledge the validity of once-ignored or rejected Indian childcare practices,[22] the judiciary appears less ready to do so. *Adoptive Couple v. Baby Girl* involved a highly contentious custody battle between the white adoptive couple with whom Baby Girl's biological mother placed her without her biological father's informed consent, and Baby Girl's biological father, who was a member of the Cherokee nation.[23] Despite her father's desire to parent his daughter and ICWA's apparent protection of the Indian parent-child relationship, the Supreme Court held that ICWA does not protect the parental rights of an Indian parent who never had physical custody of their Indian child.[24]

The majority framed ICWA's purpose as "stem[ming] the unwarranted removal of Indian children from *intact* Indian families."[25] This framing seems to adhere to the non-Indian concept of a "nuclear family" rather than the broader Indian concept of family which incorporates extended family members to a much greater extent.[26] Further, it completely fails to address the interest of tribal nations in ensuring their children continue to have meaningful connections with

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[21] 25 U.S.C. § 1901 (2018).
[22] 25 U.S.C. § 1903(2) (2018) (defining "extended family member," first, "by the law or custom of the Indian child's tribe"); EagleWoman & Rice, *supra* note 8, at 22.
[23] Adoptive Couple v. Baby Girl, 570 U.S. 637, 643–45 (2013); Jacqueline Pata, *Baby Veronica and Native American Family Values*, INDIAN COUNTRY TODAY (Apr. 16, 2013), https://newsmaven.io/indiancountrytoday/archive/baby-veronica-and-native-american-family-values-jSLjqQOahkOCjbjUZGwk4Q; Hansi Lo Wang, *Happy Ruling for Adoptive Couple, Uncertainty for Baby Girl*, NPR (June 26, 2013), https://www.npr.org/sections/codeswitch/2013/06/26/195787510/Supreme-Court-Sides-With-Adoptive-Family-In-Dispute.
[24] *Adoptive Couple*, 570 U.S. at 641.
[25] *Id.* at 649 (emphasis added).
[26] *See* EagleWoman & Rice, *supra* note 8, at 16.

their tribes and cultures. This ignorance of the tribe's interest in the child's placement is also indicated by the majority's statement that ICWA was enacted to prevent "the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts."[27] While this certainly was one of Congress's goals in passing ICWA, the focus was not solely on the Indian child and her family – it was also undeniably on the tribe.[28]

Interpreting ICWA so narrowly, then, contradicts both Congress's express purpose and the historical context in which ICWA was enacted.[29] It is also indicative of the Supreme Court's general contempt for and wish to narrow or eliminate federal Indian law.[30] ICWA was designed to counteract policies that had been used to commit cultural genocide against indigenous peoples in the U.S. for decades.[31] In light of Congress's plenary power over federal Indian law and the federal government's fiduciary responsibility to tribes,[32] it would seem that a court would be

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[27] *Adoptive Couple*, 570 U.S. at 649 (emphasis in original).
[28] *See* 25 U.S.C. § 1911 (2018) (providing for exclusive jurisdiction of tribes over "child custody proceeding**[**s**]** involving an Indian child who resides or is domiciled within the reservation of such tribe"); 25 U.S.C. § 1915 (2018) (creating a preference for placement of an Indian child with caregivers who are "members of the Indian child's tribe"). *See also supra* note 20 and accompanying text.
[29] *See* 25 U.S.C. § 1902 (2018) (declaring Congressional policy to be "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families"). As discussed *supra*, ICWA was passed after the United States spent decades forcibly removing Indian children from their families and tribes. *See generally* EagleWoman & Rice, *supra* note 8.
[30] This contempt is seen in statements such as "[i]t is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law." *Adoptive Couple*, 570 U.S. at 646. While this statement tells the reader that Baby Girl classifies as Indian for purposes of ICWA, its placement after a section describing her biological father as unfit serves to frame Baby Girl as a victim in this case due to her Indian classification. The Supreme Court's holding also has the narrowing effect of removing an entire group of people from ICWA's protections – Indian parents who are seeking, but have not previously had, legal or physical custody of their biological child. *Id.* at 650. *See also infra* note 39 and accompanying text.
[31] *About ICWA*, *supra* note 8. These policies include allotment, Indian boarding schools, and forced removal of Indian children from their families and communities, among others. *American Indian Historical Timeline*, NAKANI.ORG, https://nakani.org/wp-content/uploads/2020/02/American-Indian-Historical-Timeline.pdf (last visited June 21, 2020); *American Indian History Timeline*, INDIAN LAND TENURE FOUND., https://iltf.org/wp-content/uploads/2016/11/American-Indian-History-Timeline_small.pdf (last visited June 21, 2020).
[32] Deriving from the history of conquest of sovereign Indian nations by the United States, the federal government now has a unique "general trust relationship" with Indian peoples. PEVAR, *supra* note 14, at 29–30 (quoting United States v. Jicarilla Apache Tribe, 564 U.S. 162, 176 (2011)). This trust relationship is the foundation for federal Indian law and countless federal programs for Indian tribes and peoples. *Id.* at 29.

obligated to read ICWA's provisions broadly so as to effectuate Congress's purpose. However, the Supreme Court, in *Adoptive Couple*, seemed to do the opposite in viewing ICWA's goal as narrowly limited to preventing only certain types of removal (i.e., removal where an Indian parent has pre-existing custody of the child), rather than viewing it as a tool to implement a broader policy of assisting tribes in recovering from the multitude of horrific assimilation policies inflicted on them and ensuring their existence into the future.

The Supreme Court also made its contempt for tribal sovereignty plain from the opening paragraphs in *Adoptive Couple*, taking issue with the fact that a child who is "1.2% (3/256) Cherokee" and who had not had prior contact with her Indian biological father could be a Cherokee Nation citizen.[33] This citizenship, however, is beyond the power of the Court to determine – it is part of a tribe's inherent sovereignty to determine the rules for citizenship and enrollment. This contempt carried over into the majority's presentation of the facts, in which it framed Baby Girl's biological father as unengaged and unfit, while minimizing the ethically dubious practices of the adoptive couple's and biological mother's attorneys that were designed to prevent the biological father from receiving notice of the pending adoption and to obscure Baby Girl's tribal citizenship.[34]

The Court also seemed to take issue with the federal government's plenary power over Indian affairs when it noted that, "had Baby Girl not been 3/256 Cherokee," her biological father

[33] *See* 570 U.S. at 641.

[34] *Id.* at 643–46, 656 (describing the biological father as someone who relinquished his parental rights via a text message, avoided paying child support, and waited until the eleventh hour to contest the adoption by "play[ing] his ICWA trump card"); Andrew Cohen, *What the Court's 'Baby Veronica' Ruling Means for Fathers and Native Americans*, ATLANTIC (June 25, 2013), https://www.theatlantic.com/national/archive/2013/06/what-the-courts-baby-veronica-ruling-means-for-fathers-and-native-americans/277215/ (noting that Justice Alito, who authored the opinion, "barely concealed his contempt for Brown and his cause"); Pata, *supra* note 23 (discussing that it was largely attorney misconduct that prevented the biological father from learning of the pending adoption until four months after Baby Girl's birth, which also coincided with his deployment to Iraq).

would not have been able to contest her adoption under South Carolina law.[35] This statement, along with the Court's later indignant observation that ICWA may discourage some non-Indian families from trying to adopt Indian children,[36] suggests a belief that Baby Girl's adoption, and others like it, should be governed solely by state law. That, however, is precisely the situation that Congress was trying to address and stop in passing ICWA.[37]

Underlying the majority's opinion in *Adoptive Couple* was a poorly disguised belief that ICWA is harmful to Indian children.[38] This belief contributed to perhaps the most (although certainly not the only) disturbing aspect of the *Adoptive Couple* case. In ignoring the larger story and implications of the custody dispute at issue in the case, the Court tacitly endorsed a movement that is again targeting Indian children for removal – the Christian adoption movement.[39] The adoption agency involved in the *Adoptive Couple* case, Nightlight Christian Adoptions, states on its website:

> Jesus said, "Go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." We know this as the Great Commission to share the good news about salvation through Jesus with all people. Adoption is one of the most effective ways to make disciples of all nations.[40]

Further, an organization supporting the adoptive couple, "the Christian Alliance for Indian Child Welfare" started a campaign called "Save Veronica,"[41] which, particularly when considered in

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[35] 570 U.S. at 646.
[36] *Id.* at 653.
[37] *See* 25 U.S.C. § 1911 (2018) (granting Indian tribes exclusive jurisdiction over most child custody proceedings involving Indian children).
[38] 570 U.S. at 655 ("[U]nder the State Supreme Court's reading [which applied the Act to this case], the Act would put certain vulnerable children at a great disadvantage solely because an ancestor – even a remote one – was an Indian.").
[39] *See* Trace A. DeMeyer, *The Baby Veronica Case: David vs. Goliath*, INDIAN COUNTRY TODAY (Aug. 12, 2013), https://newsmaven.io/indiancountrytoday/archive/the-baby-veronica-case-david-vs-goliath-yPZwR9aVBE21jqHu-sREEg (discussing that the organizations supporting the adoptive couple are evangelical adoption organizations "actively working to erase ICWA altogether and open the flood gates to more adoptions from Indian country").
[40] *Statement of Faith*, NIGHTLIGHT CHRISTIAN ADOPTIONS, https://nightlight.org/statement-faith/ (last visited Feb. 19, 2020) (quoting Matthews 28:19-20 (New Int'l Version)).
[41] DeMeyer, *supra* note 39; SAVEVERONICA.ORG, http://www.saveveronica.org/ (last visited Feb. 19, 2020).

light of the fact that these Christian adoption organizations view their mission as making "disciples of all nations," has an alarmingly similar ring as "Kill the Indian, save the man."[42] The language used on the "Save Veronica" website only furthers this narrative, in part by referring to Baby Girl's biological father only as "birth father" or "biological father" while referring to Baby Girl's adoptive parents by their first names of "Matt and Melanie."[43] This is clearly an effort to dehumanize Baby Girl's father by refusing to use his name, while purposefully invoking the first names of the adoptive parents to try to create an emotional connection between the reader and the adoptive parents. Unfortunately, this targeting of indigenous peoples and cultures is not new.[44] Receiving the tacit endorsement of the U.S. Supreme Court, however, may only embolden those who oppose ICWA to bring further challenges.[45]

III. *Brackeen v. Bernhardt* and a Tentative Recognition of Tribal Sovereignty

After *Adoptive Couple*, the Bureau of Indian Affairs promulgated a new rule clarifying states' obligations under ICWA.[46] The rule was adopted, in part, in response to the events of that

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[42] This comes from a statement made by Captain Richard H. Pratt, the founder of the notorious Carlisle Indian Industrial School, in a speech he gave in 1892 on the education of Indian children. The idea behind Indian boarding schools was to destroy the Indian cultural identity of the students in order to assimilate them into white American culture. *"Kill the Indian, and Save the Man": Capt. Richard H. Pratt on the Education of Native Americans*, HIST. MATTERS, http://historymatters.gmu.edu/d/4929 (last visited June 21, 2020); Estes, *supra* note 9.

[43] *Veronica's Timeline*, SAVEVERONICA.ORG, http://www.saveveronica.org/veronicas-story/veronicas-timeline/ (last visited Feb. 19, 2020).

[44] Mary Annette Pember, *Indian Child Welfare Legal Challenge is About Ending Tribal Sovereignty*, INDIAN COUNTRY TODAY (Nov. 24, 2019), https://newsmaven.io/indiancountrytoday/news/indian-child-welfare-legal-challenge-is-about-ending-tribal-sovereignty-29j3SYrhUUu8fFsABOa5Og.

[45] The main opposition to ICWA comes from two groups: those who see adoption of indigenous children as part of their evangelical Christian duty, and those who are simply trying to destroy tribal sovereignty. *E.g.*, Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, VOX (Feb. 20, 2020, 7:30 AM), https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care; 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. *See also* Kathryn Joyce, *The Trouble with the Christian Adoption Movement*, NEW REPUBLIC (Jan. 11, 2016), https://newrepublic.com/article/127311/trouble-christian-adoption-movement (discussing the implications of the increase in American evangelical Christians adopting non-white children from all over the world).

[46] 25 C.F.R. §§ 23.101–23.144 (2019); Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (codified at 25 C.F.R. pt. 23). *See also* Brackeen v. Bernhardt, 937 F.3d 406, 418 (5th Cir. 2019).

case in order to prevent another prolonged and painful custody battle from happening again with another Indian child.[47] Its express purpose was to "ensure that ICWA is applied in all States consistent with [ICWA's] express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families."[48] The rule specifies, among other things, when ICWA does and does not apply,[49] what obligations a State court has to determine whether a child is an Indian child,[50] how and to whom notice of a child custody proceeding pertaining to an Indian child must be sent,[51] and when and how ICWA's placement preferences apply to foster and adoptive placements.[52] Altogether, the rule's provisions enable more uniform and robust implementation and enforcement of ICWA and remove the job of interpreting several of ICWA's provisions from the judiciary.

Recently a group of evangelical, non-Indian adoptive parents along with three states sued to challenge the constitutionality of both the new regulations and ICWA itself.[53] That case has not yet gone to the Supreme Court. The Fifth Circuit initially upheld the constitutionality of ICWA and the related regulation in an opinion issued in 2019.[54] However, since then the court has agreed to rehear the case en banc[55] and heard oral arguments in January 2020.[56]

In its first opinion for *Brackeen v. Bernhardt*, the Fifth Circuit examined whether ICWA's definition of "Indian child" was a political or race-based classification, determining that

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[47] Michael Overall, *Dusten Brown Makes First Public Comments Since 'Baby Veronica' Custody Battle*, TULSA WORLD (May 15, 2015), https://www.tulsaworld.com/news/local/dusten-brown-makes-first-public-comments-since-baby-veronica-custody/article_b9da8f5f-7aa1-55d4-a960-39b2fc2add05.html.
[48] 25 C.F.R. § 23.101 (2019).
[49] 25 C.F.R. § 23.103 (2019).
[50] 25 C.F.R. §§ 23.107–.109 (2019).
[51] 25 C.F.R. § 23.111 (2019).
[52] 25 C.F.R. §§ 23.129–.132 (2019).
[53] Brackeen v. Zinke, 338 F. Supp. 3d 514, 519–20 (2018). *See also* Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019); Asgarian, *supra* note 45.
[54] *Bernhardt*, 937 F.3d at 441.
[55] Brackeen v. Bernhardt, 942 F.3d 287 (5th Cir. 2019) (granting the rehearing).
[56] Brackeen v. Bernhardt – *Indian Child Welfare Act*, NATIVE AM. RTS. FUND, https://www.narf.org/cases/brackeen-v-bernhardt/ (last visited Feb. 19, 2020).

it was a political one.[57] Because of this determination, the court then analyzed the constitutionality of ICWA under the rational basis review standard instead of the much more stringent strict scrutiny standard.[58] However, it is unclear, if this case were to go to the Supreme Court, whether those justices would uphold the principle that to be "Indian" is a political and not a race-based classification, given the majority's clear focus in *Adoptive Couple* on Baby Girl's percentage of Cherokee heritage and disbelief that it could qualify her as an "Indian child" under ICWA.[59] If the court were to hold that to be Indian is a race-based classification, they would have to analyze any classification based on Indian identity in ICWA using strict scrutiny, a much more stringent standard that is only satisfied where a law is necessary to meet a compelling government interest.[60]

The Fifth Circuit in *Brackeen v. Bernhardt* appeared much more deferential than the Supreme Court in *Adoptive Couple* to Congressional intent, noting that Congress included "explicit findings and stated objectives" in enacting ICWA and observing that ICWA affirmatively "confer[s] rights upon Indian children and families."[61] Conferral of rights upon one party naturally requires a related restriction of rights of an opposing party. In enacting ICWA, Congress determined that, when it comes to the welfare of Indian children, the interests of the Indian child, family, and tribe are paramount.[62] Implicitly, then, Congress also determined that, when it comes to the welfare of Indian children, the interests of non-Indian foster and

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[57] *Bernhardt*, 937 F.3d at 426. The Supreme Court has held that "Indian" is a political, as opposed to a racial, classification on other occasions as well. In *Morton v. Mancari*, the Court so held in determining that an employment preference at the Bureau of Indian Affairs based on tribal citizenship was not impermissible. 417 U.S. 535, 553–54 (1974).
[58] *Bernhardt*, 937 F.3d at 430.
[59] *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 641, 646, 655 (2013).
[60] "Necessary" is often interpreted to require that the law be narrowly tailored. For more on the development of the strict scrutiny doctrine, *see generally, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214 (1944).
[61] *Bernhardt*, 937 F.3d at 430, 434–35.
[62] 25 U.S.C. § 1902 (2018).

adoptive parents is of secondary importance. In *Adoptive Couple*, however, the Supreme Court seemed most concerned with the rights of the non-Indian adoptive parents. In *Brackeen v. Bernhardt*, the Fifth Circuit recognized Congressional intent inherent in ICWA and properly placed its focus on the express beneficiaries of the statute – the Indian child and family.

The Fifth Circuit likewise seemed much more respectful of tribal sovereignty and fundamental concepts of federal Indian law than the Supreme Court. It expressly stated that the provisions of ICWA being challenged by the plaintiffs "preempt conflicting state law,"[63] whereas the Supreme Court in *Adoptive Couple* seemed unwilling to allow ICWA to override conflicting state law, despite that being precisely ICWA's purpose.[64] In discussing ICWA's placement preferences for Indian children removed from their biological parents, the Fifth Circuit recognized that, in creating such placements, it incorporated "tribal law as binding federal law,"[65] a recognition rooted in respect for tribal sovereignty. The Fifth Circuit's decision, therefore, represents a marked departure from the overt contempt for federal Indian law and tribal sovereignty as expressed by the Supreme Court in *Adoptive Couple.* At first glance, it may appear to indicate the federal judiciary moving in a direction in which the courts of the conqueror provide some semblance of justice to indigenous peoples.

IV. Conclusion – An Uncertain Future for ICWA and Tribal Sovereignty

Unfortunately, in granting a motion for rehearing, the Fifth Circuit vacated its decision. Its reasoning for doing so is unclear. Theoretically, the Fifth Circuit could reissue largely the same opinion as before, upholding the constitutionality of ICWA in its entirety, or it could narrow or even strike down the statute. Regardless of the outcome at the Fifth Circuit, an appeal

[63] *Bernhardt*, 937 F.3d at 430.
[64] *See supra* notes 34–36 and accompanying text.
[65] *Bernhardt*, 937 F.3d at 437.

to the Supreme Court seems likely, given the case's high stakes for Indian tribes and the powerful Christian adoption lobby working with the plaintiffs to dismantle the statute.[66] If the Fifth Circuit's forthcoming opinion reaffirms its first, the plaintiffs will likely seek to continue their challenge to ICWA. If the Fifth Circuit reverses course, however, those advocating on behalf of tribal nations may have no choice but to petition for certiorari in an attempt to protect this critical piece of legislation. Although already cast in doubt, once in the Supreme Court, ICWA's future would seem to be in even greater danger than it is now, given the Supreme Court's treatment of ICWA in *Adoptive Couple* in which the Court expressed open contempt for many of the principles underlying ICWA specifically and the entire body of federal Indian law more generally.

A decision striking down ICWA as unconstitutional could have broad repercussions for federal Indian law, inviting challenges to other laws upholding the rights of Indian tribes and peoples.[67] The plaintiffs in *Brackeen* make several arguments that implicate the entire body of federal Indian law upon which tribal nations now rely – that the federal government's authority over Indian affairs is limited solely to commerce with tribes,[68] that statutes such as ICWA unconstitutionally commandeer the states by requiring them "to apply federal standards to state-created claims,"[69] that statutes incorporating tribal law violate the nondelegation doctrine,[70] and that the determination of who is an "Indian child" involves a racial, not a political, classification.[71] If the plaintiffs were to prevail on any of these claims, and particularly if the Supreme Court were to decide that "Indian" is a racial classification, every piece of legislation

[66] *See* Pember, *supra* note 15.
[67] *Id.*; Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167/.
[68] Brackeen v. Zinke, 338 F. Supp. 3d 514, 546 (2018); *Bernhardt*, 937 F.3d at 434–35.
[69] *Zinke*, 338 F. Supp. 3d at 538–39; *Bernhardt*, 937 F.3d at 420, 430.
[70] *Zinke*, 338 F. Supp. 3d at 536; *Bernhardt*, 937 F.3d at 420, 435–36.
[71] *Zinke*, 338 F. Supp. 3d at 530–35; *Bernhardt*, 937 F.3d at 425–26.

that distinguishes between Indians and non-Indians – virtually the entire body of federal Indian law – would be in jeopardy.[72]

If ICWA is to be upheld, the Supreme Court justices will need to demonstrate a greater understanding and respect for Indian cultures and sovereignty than they have shown previously. If they do not, it would be an abdication of the federal government's fiduciary duty to right the harms created by its policies and those of its people. While the law and morality don't always align, upholding ICWA is both the legally sound and moral option and one that would send an important message that the United States will not allow a return to the devastating assimilation and termination era policies of the far-too-recent past.

[72] The Supreme Court in *Morton v. Mancari* noted that "[l]iterally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Codes (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." 417 U.S. at 552.