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Officials seemingly would rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions and, in general, their entire Indian way of life is smothered . . . [Agencies] strike at the heart of Indian communities by literally stealing Indian children. This course can only weaken rather than strengthen the Indian child, the family, and the community . . . It has been called cultural genocide.[1]

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[T]his is the first time ever that a federal statute enacted to benefit Indians has been found to be unconstitutional on the grounds of equal protection . . . this is not just an effort to undermine ICWA, but to undermine all Indian law.[2]

1. *Indian Child Welfare Act of 1977: Hearing Before the United States Senate Select Committee on Indian Affairs,* 95th Cong. 2 (1977) [hereinafter *ICWA Hearing*] (statement of James Abourezk, Senator, Chairman of the Committee). Congress passed ICWA the following year.

2. Dan Lewerenz, quoted in Meagan Flynn, *Court Strikes Down Native American Adoption Law, Saying It Discriminates Against Non-Native Americans*, WASHINGTON POST (Oct. 10, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/10/10/court-strikes-down-native-american-adoption-law-saying-it-discriminates-against-non-native-americans/?utm_term=.a032d27b3e41. Mr. Lewerenz was an attorney-advisor for the U.S. Department of the Interior, Office of the Solicitor, Division of Indian Affairs before becoming a staff attorney with the Native American Rights Fund. *Dan Lewerenz, Staff Attorney*, NARF, https://www.narf.org/profiles/dan-lewerenz/.

The Indian Child Welfare Act (ICWA) governs the custody and adoption of Native American children as well as termination, both voluntary and involuntary, of Native American parental rights.[3] Congress enacted ICWA in 1978 as a response to the high number of Native American children who were removed from their homes and placed with white families and into institutions.[4] In the Supreme Court's 2013 decision in *Adoptive Couple v. Baby Girl*, the majority stated that an interpretation of ICWA that allowed a father who had not supported his child *in utero* to "play his ICWA trump card at the eleventh hour to override the mother's decision" to place that child for adoption would raise equal protection concerns.[5] The Court held that ICWA did not apply to a Native American parent who had never had custody of the child in question.[6] After this decision, various organizations, both those opposed to ICWA and those who argued against Native American sovereignty in general, began to file lawsuits arguing that ICWA as a whole was unconstitutional on equal protection grounds.[7] Five years after *Adoptive Couple*, in *Brackeen v. Zinke*, one such lawsuit resulted in a Texas district court holding that parts of ICWA are unconstitutional.[8] The court found that not only did parts of ICWA violate equal protection, but also that some of the challenged portions violate the Tenth Amendment's "anti-commandeering doctrine" and the Indian Commerce Clause.[9]

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3. 25 U.S.C. §§ 1901–1963 (2012). ICWA applies to all child custody cases that involve a child who is either a member of a Native American tribe or who is eligible for such membership.

4. *About ICWA*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, https://www.nicwa.org/about-icwa/.

5. 570 U.S. 637, 656 (2013).

6. *Id.* at 653–54.

7. Addie Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on* Adoptive Couple*, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. ST. L. REV. 727, 750–54 (2017).

8. 338 F. Supp. 3d 514, 546 (2018).

9. *Id.* at 541.

Although the U.S. Court of Appeals for the Fifth Circuit Court at first issued a ruling overturning the district court's decision[10] on ICWA's constitutionality, the Fifth Circuit granted rehearing en banc in November of 2019.[11]

Part I of this Note discusses the reasoning behind Congress' creation of ICWA and notable Supreme Court decisions dealing with this Act, as well as the Multiethnic Placement Act's intersection with ICWA. Part II contains a detailed discussion of *Brackeen*. Part III contains an analysis of *Brackeen*, along with the foreseeable detrimental effects of this decision that extend beyond adoption cases.

I. BACKGROUND OF ICWA AND NOTABLE CASES

A. *Native American Children Removal Prior to ICWA*

1. The Early Era

Throughout the history of the United States, Native American children have been removed from their homes for the purposes of "education" and "civilization."[12] Beginning in the Colonial Era, these children were used as a way of controlling tribal behavior.[13] As a part of warfare between the colonists and the Native Americans, the colonists often attacked tribes' villages and "target[ed] children and their food source."[14] Native American children were also captured and used as hostages.[15] During the Revolutionary War, Native American boys were sent to Dartmouth, supposedly to be educated but also to prevent their tribes from allying

10. Brackeen v. Bernhardt, 937 F.3d 406, 441 (5th Cir. 2019).

11. Brackeen v. Bernhardt, 2019 U.S. App. LEXIS 33335 (5th Cir. Nov. 7, 2019).

12. *See* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 889 (2017); *see also* JOHN GRENIER, THE FIRST WAY OF WAR: AMERICAN WAR MAKING ON THE FRONTIER, 1607–1814 (2005).

13. Fletcher & Singel, *supra* note 12, at 895.

14. *Id.* at 896.

15. *Id.* at 895.

with the British.[16] Instead of "students," these children were referred to as "hostages."[17]

After the American Revolution, Congress' focus shifted to "civilizing" the Native Americans.[18] The first attempts to accomplish this involved sending missionaries to various tribes.[19] As part of their attempts to convert Native Americans to Christianity, missionaries and the religious organizations that funded them "sought to replace tribal culture, including Indian languages, with Christianity, Euro-American civilization, and the language of Euro-

16. *Id.* at 911. For a further discussion of this event, see COLIN G. CALLOWAY, THE INDIAN HISTORY OF AN AMERICAN INSTITUTION: NATIVE AMERICANS AND DARTMOUTH (2010). The head of Dartmouth, Eleazar Wheelock, asked Congress to appoint $500 to the school for the education of Native American boys. *See* MARILYN IRVIN HOLT, INDIAN ORPHANAGES 87 (2001). Wheelock credited the fact that Dartmouth was never attacked during the Revolution to the presence of these "hostages." Calloway, *supra* note 16, at 40–41.

17. Fletcher & Singel, *supra* note 12, at 911; *see also* Calloway, *supra* note 16, at 40–41.

18. *See* K. TSIANINA LOMAWAIMA, THE UNNATURAL HISTORY OF AMERICAN INDIAN EDUCATION, IN NEXT STEPS: RESEARCH AND PRACTICE TO ADVANCE AMERICAN INDIAN EDUCATION 1, 1–6 (Karen Gayton Swisher & John W. Tippeconnic III eds., 1999).

19. Letter from George Washington, President of the United States, to Benjamin Lincoln, Cyrus Griffin, and David Humphreys, Esq'rs (Aug. 29, 1789), *reprinted in* FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-03-02-0326. On the topic of Native Americans, Washington wrote:

> You will also endeavour [sic] to obtain a stipulation for certain missionaries to reside in the nation provided the General Government should think proper to adopt the measure—These Men to be precluded from trade or attempting to purchase any lands but to have a certain reasonable quantity pr [sic] head, allowed for the purpose of cultivation—The object of this establishment would be the happiness of the Indians, teaching them great duties of religion, and morality, and to inculcate a friendship and attachment to the united [sic] States. If after you have made your Communication to the Creeks and that you are persuaded that you are fully understood by them, they should refuse to treat and conclude a peace on the terms you propose, it may be concluded that they are decided on a continuance of acts of Hostility and that they ought to be gaurded [sic] against as the determined enemies of the United States.

Id.

American society."[20] Because children adapted more easily to a new language, missionaries often focused on them, believing them to be the path to "civilizing" the tribes.[21] Missionaries taught Native American children to read and write while teaching them Christianity, partly to convey religious knowledge through the Bible and other religious texts but also to promote "civilization."[22] Some missionaries believed in using the Native Americans' languages alongside English for the purposes of religious instruction.[23] However, many "viewed [Native American languages] as barbarous and inadequate mediums for conveying Christian doctrines and as incompatible with efforts to foster the civilization of the Indians."[24]

2. Boarding Schools

During the 1800s, the United States sharpened its focus on formal education as a means to "kill the Indian so as to save the man within."[25] In 1819, Congress created the "Civilization Fund" to provide money for schools to educate

20. Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 909 (1999).

21. *See id.* at 905–06, 908.

22. *See id.* at 906–08.

23. Jon Reyhner, *Indigenous and Minority Languages Under Siege: Finding Answers to a Global Threat*, 3 INTERCULTURAL HUM. RTS. L. REV. 151, 168 (2008) (stating that "Some missionaries strongly objected to not using Indian languages in their schools. Missionary societies engaged in foreign missions were very conscious of the importance of using local languages in their work.").

24. Dussias, *supra* note 20, at 908.

25. Col. Richard Pratt, quoted in DAVID H. DEJONG, PROMISES OF THE PAST: A HISTORY OF INDIAN EDUCATION IN THE UNITED STATES 3–21 (1993). Pratt was the founder and first superintendent of the Carlisle Indian Industrial School in Pennsylvania, one of the oldest boarding schools created to educate and "civilize" Native Americans. *See generally* RICHARD H. PRATT, THE INDIAN INDUSTRIAL SCHOOL, CARLISLE, PENNSYLVANIA: ITS ORIGINS, PURPOSES, AND THE DIFFICULTIES SURMOUNTED (1908); *see also* RICHARD H. PRATT, DRASTIC FACTS ABOUT OUR INDIANS AND OUR INDIAN SYSTEM (1917); JACQUELINE FEAR-SEGAL & SUSAN D. ROSE, CARLISLE INDIAN INDUSTRIAL SCHOOL: INDIGENOUS HISTORIES, MEMORIES, AND RECLAMATIONS (2016).

Native Americans.[26] A compulsory attendance law was passed in 1898; if parents refused to send their children to school, the government "[withheld] rations, clothing, and annuities."[27] Native children as young as four and five were removed from their parents and sent to boarding schools, where they were forbidden to speak their tribal languages and forced to speak English.[28] Those who promoted these schools, most often religious groups,[29] saw boarding schools as ideal because they believed that, in order to "civilize" Native children, they had to be taken away from the influence of their families and tribes.[30] This view dominated Native education policy for the next seventy years.[31] In 1928, a team headed by Lewis Meriam published a report on the conditions of Native Americans.[32] This report was the result of studies done throughout the 1920s.[33] The authors stated that although "the boarding school, either reservation or non-reservation, is the dominant characteristic of the school system maintained by the national government for its Indian wards . . . provisions for the care of the Indian children in boarding schools are grossly inadequate."[34] The report stated

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26. GEORGE DEWEY HARMON, SIXTY YEARS OF INDIAN AFFAIRS: POLITICAL, ECONOMIC, AND DIPLOMATIC, 1789–1850 161 (1941).

27. Tabatha Toney Booth, *Cheaper Than Bullets: American Indian Boarding Schools and Assimilation Policy, 1890–1930*, available at https://web.archive.org/web/20160404090314/http://www.se.edu/nas/files/2013/03/NAS-2009-proceedings-Booth.pdf.

28. *See* Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 954 (1999).

29. Dussias, *supra* note 20, at 909.

30. Cross, *supra* note 28, at 952.

31. *Id.* at 960.

32. *See generally* LEWIS MERIAM ET AL., THE PROBLEM OF INDIAN ADMINISTRATION: REPORT OF A SURVEY MADE AT THE REQUEST OF HONORABLE HUBERT WORK, SECRETARY OF THE INTERIOR, AND SUBMITTED TO HIM, FEBRUARY 21, 1928 (1928), https://files.eric.ed.gov/fulltext/ED087573.pdf.

33. *Id.*

34. *Id.* at 11.

that these children were fed a "deficient" diet[35] that contributed to the high occurrence of tuberculosis and trachoma in boarding school students.[36] The report concluded that:

> [t]he most fundamental need in Indian education is a change in point of view. Whatever may have been the official governmental attitude, education for the Indian in the past has proceeded largely on the theory that it is necessary to remove the Indian child as far as possible from his home environment; whereas the modern point of view in education and social work lays stress on upbringing in the natural setting of home and family life.[37]

After this point, enrollment in boarding schools declined, although the Great Depression caused a temporary rise in the number of new students due to many families' economic conditions.[38]

As the Meriam Report noted, boarding schools were often abusive environments that caused the suffering and even death of many students.[39] This was true since their inception and remained so both throughout their heyday and as their popularity declined.[40] Native American students suffered

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35. *Id.*

36. *Id.* at 12. At the Carlisle School, approximately 500 students died from disease throughout the school's existence. PRESTON MCBRIDE, A BLUEPRINT FOR DEATH IN U.S. OFF-RESERVATION BOARDING SCHOOLS: RETHINKING INSTITUTIONAL MORTALITIES AT CARLISLE INDIAN INDUSTRIAL SCHOOL, 1879–1918 195 (2013).

37. MERIAM ET AL., *supra* note 32, at 346.

38. Booth, *supra* note 27, at 48.

39. *See generally* BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES (Clifford E. Trafzer et al. ed., 2006).

40. *See* Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 67 (2006). Negiel Bigpond, who attended the Chilocco Boarding School during the 1950s and 1960s, stated that:

> We were put into solitary confinement and punished. I can remember one night I had to defend myself from one of the counselors who was trying to provoke me and start trouble so he could give me hours of work duty or to make me stand all night in a corner or on top of a one-foot-by-one-foot box with my nose to the wall. If we were caught sleeping, guards would walk up behind us and bang our heads into the wall. I received

both physical and sexual abuse.[41] Many school employees were pedophiles who used their positions to prey upon vulnerable students without repercussions.[42] Extreme corporal punishment was common; teachers and other disciplinarians beat students with whips, baseball bats, coat hangers, and rubber hoses.[43] Some students died as a result of these beatings.[44] Employees who abused students rarely received any consequences for their actions.[45]

Students also suffered emotional and psychological abuse at boarding schools.[46] School employees were instructed "not to comfort and counsel [them]."[47] Students were forced to speak only English and were punished for speaking their native languages.[48] Through this process,

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> many bloody noses and cuts on my forehead. We were also made to scrub floors and walls with small hand brushes and even toothbrushes.
>
> The emotional and mental abuse was very bad. We were made to feel that we were nothing. We were called "dogs" and "stupid" and "Indian" in an angry, degrading and mocking voice. There was sexual abuse as well that I would rather not talk about. I choose not to go into the details of all that happened there. When released and I returned home I would cry a lot. I developed resentments toward my parents and turned against authority. I could not trust authority. I could not adapt to public school.

Apology to Native Peoples: Hearing on S.J. Res. 15, Before S. Comm. on Indian Affairs, 112th Cong. (2005) (statement of Negiel Bigpond, Sr., President, Two Rivers Native American Training Center).

41. Curcio, *supra* note 40, at 67; *see also* Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 666 (2010).

42. Curcio, *supra* note 40, at 67.

43. *Id.*

44. *Id.*

45. *See id.* at 69.

46. *Id.* at 72 (stating that "[a]ttendees' symptoms often mirror those suffered by concentration camp survivors or survivors of child abuse, domestic violence, rape, and hostage situations").

47. Curcio, *supra* note 40, at 70.

48. Dussias, *supra* note 20, at 926. One teacher stated that she "once had thirty-five Mohave kindergartners lie 'like little sardines' across tables, and then spanked them for speaking Mohave." *Id.* (quoting DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL

some children began to associate their native languages with fear.[49] In addition, children who adapted to speaking only English found it difficult to communicate with their parents and relatives once they returned home.[50]

Successive generations suffered the effects of their ancestors' boarding school upbringings.[51] Being raised outside a family environment in an oftentimes abusive situation meant that parents lacked the examples to properly raise their own children.[52] Lynn Eagle Feather's great-great-grandfather was the first member of her family to attend a boarding school; many of his descendants also attended such schools.[53] Lynn's mother, who had also been raised in a boarding school, dropped Lynn and her younger sister off at the Saint Francis Mission School in North

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EXPERIENCE, 1875–1928 141 (1995)). One school that allowed dual instruction in English and Dakota received the following directive:

> [T]he English language only must be taught the Indian youth placed there for educational and industrial training at the expense of the Government. If Dakota or any other language is taught such children, they will be taken away and their support by the Government will be withdrawn from the school.

J.D.C. Atkins, *The English Language in Indian Schools*, in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN," 1880–1900 199 (Francis Paul Prucha, ed., 1973).

49. Dussias, *supra* note 20, at 928. At the Carlisle school, one student spoke a word of her native Sioux and became "so upset that she could not eat her dinner and wept at the dining table." *Id.*

50. *See id.* One former student reported that he could barely form a full sentence in his native Pawneean. *Id.*

51. Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 158 (2007).

52. *Id.* at 159. Ida Amiotte, who had attended a boarding school, stated, "My children always asked me 'Why are you so cold? Why don't you hug us?' I said 'I never learned how.'" *Id.* at n.91.

53. Cecily Hilleary, *Indian Boarding Schools: One Woman's Tragic, Triumphant Story*, VOICE OF AMERICA NEWS (Oct. 20, 2017), https://www.voanews.com/a/indian-boarding-schools-a-family-affair/4078971.html. Lynn's great-great-grandfather, Felix Eagle Feather, was sent 1400 miles away from his tribal home to the Carlisle School in Pennsylvania. *Id.*

Dakota when Lynn was six years old.[54] Her sister was five.[55] Lynn states: "I was abused for years, most of my life. That's why I didn't ever get married. I chose to be on my own. When I did have children, I didn't know how to raise them. I lost my children to the Department of Human Services."[56]

3. Adoption

Following the decline of boarding schools came a new reason to remove Native American children from their homes: adoption.[57] The Indian Adoption Project lasted from 1959 to 1967 and was the product of cooperation between three agencies.[58] Two (the United States Children's Bureau and the Bureau of Indian Affairs) were federal agencies, while the third was a "a federated agency known as the Child Welfare League of America."[59] These agencies collaborated to "remov[e] administrative and racial barriers"[60] in order to place Native American children into white adoptive families.[61] Newspaper articles and television spots labeled

54. *Id.*

55. *Id.* Lynn's son, Paul Castaway, was shot by the police in Denver, Colorado, in 2015. *Id.* Lynn had called the police when Paul, whom she had a protective order against, entered her apartment and threatened her with a knife. Noelle Phillips, *Denver DA Will Not Charge Officer Who Shot, Killed Paul Castaway*, DENVER POST (Sept. 14, 2015), https://www.denverpost.com/2015/09/14/denver-da-will-not-charge-officer-who-shot-killed-paul-castaway/. No charges were filed against the police officer. *Id.*

56. Hilleary, *supra* note 53.

57. Claire Palmiste, *From the Indian Adoption Project to the Indian Child Welfare Act: the Resistance of Native American Communities*, 12 INDIGENOUS POL'Y J., no.1, at 1 (2011); *see also* Gabby Deutch, *A Court Battle Over a Dallas Toddler Could Decide the Future of Native American Law*, ATLANTIC (Feb. 21, 2019), https://www.theatlantic.com/family/archive/2019/02/indian-child-welfare-acts-uncertain-future/582628/.

58. Palmiste, *supra* note 57, at 1.

59. *Id.* The Child Welfare League of America's main role in the partnership was to "remov[e] legal barriers for interstate adoptions [and] solv[e] conflicts in adoption laws and practices." *Id.*

60. *Id.*

61. *Id.* In the preceding decades, adoption agencies had focused on creating "cultural, religious and physical match[es]" between potential adoptive families

Native American babies as "God forgotten [c]hildren" who were doomed to languish in neglect on reservations unless white couples stepped up and adopted them.[62]

During the project's eight-year span, approximately 400 Native American children were adopted by white families.[63] During the 1960s, other agencies took on a similar emphasis on Native American adoption, resulting in white couples adopting over 12,000 Native American children by the mid-1970s.[64] Follow-up studies on these children revealed that, although they usually did well during infancy and early childhood, "once they [reached] adolescence, runaway problems, suicide attempts, drug usage, and truancy [were] extremely common among them, even though they [were] raised away from the reservation and away from Indian society . . . during adolescence, [the teenagers] found that society was not to grant them the white identity that they had."[65]

B. *Creation of ICWA*

The Indian Child Welfare Act was the result of a Congressional investigation that took place over four years.[66] This investigation revealed that between 25 to 35% of Native American children were removed from their families and

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and babies. *Id.* at 1 n.1. However, during the 1950s, the number of white babies available for adoption declined due to "wide use of contraceptive materials amongst white women, the possibility of abortion in some states, and a fading stigma towards unwed mothers." *Id.* at 2. Thus, with white families being the majority of couples seeking adoption, agencies began to abandon their previous "matching" tactics and promote interracial adoption. *See id.* at 2–3. The first widely publicized transracial adoptions of the 1950s were international adoptions from Korea. *Id.* at 2.

62. *Id.* at 2–3.

63. *Id.* at 5.

64. *Id.* at 5–6.

65. *Id.* at 6 (quoting Dr. Joseph Westermeyer, a "psychiatrist who worked with Native patients").

66. Kasey D. Ogle, *Why Try to Change Me Now?: The Basis for the 2016 Indian Child Welfare Act Regulations*, 96 NEB. L. REV. 1007, 1009 (2017).

placed in foster care or institutions such as orphanages and the remaining boarding schools.[67] Oftentimes, the only rationalization behind these removals was that these children would be better off in a home with white parents of a higher socioeconomic status.[68] In order to address this "cultural genocide,"[69] Congress passed ICWA in 1978.[70] This Act gave jurisdiction of all custody proceedings involving "Indian children" to tribal courts.[71] ICWA defined "Indian child" as a child who is either a member of a federally recognized tribe or eligible to be a member of such a tribe and have a biological parent who is a tribal member.[72] Native American parents were no longer required to send their children to boarding school and required that investigations begin to determine the "feasibility" of establishing "locally convenient day schools" on reservations.[73] ICWA also required that involuntary termination of Native American parents' rights be based on evidence beyond a reasonable doubt[74] as opposed to the "preponderance of the evidence" standard traditionally used in such proceedings.[75] ICWA further stated that:

> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended

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67. *ICWA Hearing*, *supra* note 1, at 1.

68. *Id.*; *see also infra* Section III.B.

69. *ICWA Hearing, supra* note 1, at 2; *see also* Andrea Wilkins, *State-Tribal Cooperation and the Indian Child Welfare Act*, 1 (July 2008), https://www.ncsl.org/print/statetribe/ICWABrief08.pdf.

70. 25 U.S.C. § 1901.

71. *Id.* at § 1911.

72. *Id.* at § 1903(4).

73. *Id.* at § 1961.

74. *Id.* at § 1912.

75. *See, e.g.*, UTAH CODE ANN. § 78A-6-314, WIS. STAT. § 48.415 (2017–2018). In contrast to beyond a reasonable doubt, preponderance of the evidence is often defined as "more probable than not." *See* Charlene Sabini, *Burden of Proof: An Essay of Definition*, NALS (Apr. 19, 2018), https://www.nals.org/blogpost/1359892/300369/Burden-of-Proof-An-Essay-of-Definition.

family; (2) other members of the Indian child's tribe; or (3) other Indian families.[76]

C. *Post-ICWA*

The first Supreme Court case regarding ICWA, *Mississippi Band of Choctaw Indians v. Holyfield*, was decided in 1989.[77] In *Holyfield*, two Native parents domiciled on a Choctaw reservation made an adoption plan for their unborn twins.[78] Before giving birth, the mother moved off the reservation.[79] The twins were placed with a white couple and later adopted.[80] The Supreme Court held that the twins were under the jurisdiction of ICWA because both of their parents were domiciled on the Choctaw reservation, regardless of where the twins were actually born.[81] Once the case was removed to the tribal court, that court allowed the twins to remain with the Holyfields for adoption, stating that removing them after nearly five years would be "cruel."[82]

Similar concerns of "cultural genocide" were raised about a different race of children around the same time Congress passed ICWA. During the 1960s, white families began adopting increasing numbers of black children.[83] The National Association of Black Social Workers expressed doubt that white parents could adequately parent black children in a culturally competent way.[84] However, other

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76. 25 U.S.C. § 1915.

77. 490 U.S. 30 (1989).

78. *Id.* at 37.

79. *See id.*

80. *Id.* at 30, 38.

81. *Id.* at 48–49.

82. Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 COLUM. J. GENDER & L. 1, 17 (2008).

83. *Id.* at 33. *See also supra* note 61 and accompanying text.

84. National Association of Black Social Workers, *Position Statement on Trans-Racial Adoption* (1972), https://pages.uoregon.edu/adoption/archive/NabswTRA.htm.

child welfare organizations raised concerns about the large number of black children remaining in foster care for years awaiting adoptive families.[85]

In response to this, Congress passed the Multiethnic Placement Act (MEPA) in 1994 and amended it in 1996.[86] MEPA applied to all agencies that placed children into adoptive homes and received federal funding.[87] The original Act allowed adoption agencies to weigh race and culture as factors when determining the placement of a child.[88] However, some agencies continued to use race as the most important factor when placing children for adoption instead of as just one factor to be considered. As a response to this, the 1996 amendments to the MEPA removed these considerations and prohibited race-based placements.[89] However, the amended MEPA allowed for an exception to conform with ICWA, stating that agencies:

> [may not] delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved . . . This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.[90]

The most recent wave of court cases dealing with ICWA

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85. *Id.* Black children, along with Native American children, were considered "hard to place" along with children who were "developmentally delayed and physically disabled." *Fostering and Foster Care*, THE ADOPTION HISTORY PROJECT (last updated Feb. 24, 2012), https://pages.uoregon.edu/adoption/topics/fostering.htm.

86. Maldonado, *supra* note 82, at 33–34.

87. *Id.*

88. 42 U.S.C.A. § 5115(a) (repealed 1996).

89. *Id.*

90. 42 U.S.C. § 1996(b). MEPA was passed partially in reaction to groups that lobbied for legislation similar to ICWA that would apply to black children. *See* Douglas R. Esten, *Transracial Adoption and the Multiethnic Placement Act of 1994*, 68 TEMP. L. REV. 1941, 1948–49 (1995). Support for such a law still exists. *See generally* Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109 (2008).

can be traced back to the Supreme Court's 2013 decision in *Adoptive Couple v. Baby Girl* (also known as the Baby Veronica case).[91] In this case, an unmarried father, Dusten Brown, agreed to give up his parental rights and proceeded to place the child with a white couple, Matt and Melanie Capobianco, for the purpose of adoption.[92] Because Christina Maldanado, the child's mother, identified the baby's father as being part Cherokee, her lawyer notified the tribe of the pending adoption, although Brown's first name and date of birth were incorrect.[93] The Capobiancos supported Maldanado for the remainder of her pregnancy; Brown did not provide assistance to Maldanado since she refused to marry him after discovering that she was pregnant.[94] Brown also signed a document giving up his parental rights four months after the child's birth, although he stated during later testimony that he was not aware he was doing so for the purposes of adoption.[95] Shortly afterwards, Brown requested a stay of the adoption.[96] After two years of legal proceedings, the child ("Baby Veronica") was placed into Brown's custody by the South Carolina Supreme Court.[97] The court held that Baby Veronica was subject to ICWA due to her father being an enrolled member of the Cherokee Nation.[98] Therefore, in order to terminate Brown's rights, the Capobiancos would have had to show that "custody of [Veronica] would result in serious emotional or physical harm to her beyond a reasonable doubt."[99] Because they

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91. Jane Burke, *The "Baby Veronica" Case: Current Implementation Problems of the Indian Child Welfare Act*, 60 WAYNE L. REV. 307, 307 (2014).

92. Adoptive Couple v. Baby Girl, 570 U.S. 637, 643 (2013).

93. *Id.* at 643–44.

94. *Id.* at 644.

95. *Id.* at 644–45.

96. *Id.* at 645.

97. *Id.* at 645.

98. *Id.*

99. *Id.* at 646.

failed to do so, Brown received custody of the child.[100] The Capobiancos appealed, and the Supreme Court granted certiorari.[101]

The majority held that, because Brown had never been a custodial parent, ICWA did not apply, as this statute had been intended to protect the "continued custody" of Native American parents.[102] Because of this holding, the Capobiancos were able to adopt Veronica, as under the applicable state statutes Brown's parental rights could be involuntarily terminated for not providing support to Maldanado during her pregnancy.[103] In its decision, the majority stated that a reading of ICWA that allowed an absentee father to "play his ICWA trump card at the eleventh hour"[104] and prevent the mother from giving the child up for adoption would raise equal protection concerns, as this would cause many hopeful adoptive parents to hesitate to accept placements of children who had remote Native heritage.[105] The majority also held that ICWA's placement preferences did not apply when "no alternative party has formally sought to adopt the child."[106]

In her dissent, Justice Sotomayor stated that, contrary to what the majority claimed, classifying a case as ICWA-applicable based on blood descent does not raise equal protection concerns.[107] Rather, the Supreme Court had previously held that such a classification was political as opposed to "impermissibl[y] racial."[108] Therefore, Sotomayor

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100. *Id.*

101. *Id.*

102. *Id.* at 653–54.

103. *Id.* at 646–47.

104. *Id.* at 656.

105. *Id.*

106. *Id.* at 655. No paternal relatives of Veronica's, nor any member of the Cherokee tribe, had filed a petition to adopt her. *Id.* at 655–56.

107. *Id.* at 690.

108. *Id.*

stated that the majority's "hint[ing] at lurking constitutional problems [that are] irrelevant" only "[created] a lingering mood of disapprobation of the criteria for [tribal] membership."[109]

After the decision in *Adoptive Couple v. Baby Girl*, later cases seized upon the equal protection language in that case and filed suit on these constitutional grounds. Many of these cases were filed by the Goldwater Institute, a nonprofit group.[110] One of the Goldwater Institute's stated missions is to "ensur[e] equal protection for Native American children" by "challenging the Indian Child Welfare Act."[111]

Courts have dismissed many of these recent cases challenging ICWA for lack of standing.[112] In one such case, *National Council for Adoption v. Jewell*, the court denied the plaintiff's motion for summary judgment.[113] The court held that the plaintiff, an adoption agency, failed to show "a cognizable injury in fact" and a "causal connection" between such an injury and ICWA.[114]

Another case, *A.D. v. Washburn*, challenged ICWA by alleging that it was "unconstitutional racial discrimination."[115] The plaintiffs, several foster parents and adoptive couples and their respective foster and adoptive

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109. *Id.* at 691.

110. *See Ensuring Equal Protection for Native American Children*, GOLDWATER INSTITUTE, https://goldwaterinstitute.org/indian-child-welfare-act/ (last visited Nov. 16, 2019).

111. *Id.*

112. Scott Trowbridge, *Legal Challenges to ICWA: An Analysis of Current Case Law*, AMERICAN BAR ASSOCIATION (Jan. 1, 2017), https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/january-2017/legal-challenges-to-icwa—an-analysis-of-current-case-law/.

113. 156 F. Supp. 3d 727, 738 (E.D. Va. 2015). The plaintiff, National Council for Adoption, Building Arizona Families, filed suit on behalf of itself and its clients, birthparents who sought to give up their infant "T.W." for adoption.

114. *Id.* at 735.

115. 2017 U.S. Dist. LEXIS 38060 at *4 (D. Ariz., Mar. 16, 2017).

children,[116] argued that portions of ICWA violated both the Equal Protection and Due Process Clauses of the Constitution.[117] The court held that, as in *National Adoption Council v. Jewell*, the plaintiffs lacked standing because they failed to show the existence of an injury and a causal connection between that injury and ICWA.[118]

Despite the fact that the continued constitutional challenges to ICWA were not successful, some jurisdictions failed to adhere to it. In 2015, the Oglala and Rosebud Sioux tribes brought a suit against several individuals in the child welfare field alleging that they violated ICWA when removing Native American children from their homes "during state court 48-hour hearings." [119] The defendants included the Honorable Jeff Davis, the presiding judge of the Seventh Judicial Circuit in South Dakota; Mark Vargo, the State's Attorney of Pennington County, South Dakota; Lynne Valenti, the Secretary of the South Dakota Department of Social Services; and LuAnn Van Hunnik, who was in charge of Pennington County's Child Protection Services.[120]

The South Dakota district court found that the defendants had violated both ICWA[121] and the Due Process Clause of the Fourteenth Amendment.[122] ICWA requires that anyone seeking to place a Native American child into foster care must show "that active efforts have been. [sic] made to provide remedial services and rehabilitative programs . . . and that these efforts have proved unsuccessful."[123] If such a showing is not made, the person

116. *Id.* at *9.

117. *Id.* at *10.

118. *Id.* at *33–34.

119. Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749, 755–56 (D.S.D. 2015).

120. *Id.* at 753.

121. *Id.* at 769.

122. *Id.* at 772.

123. *Id.* at 755 (quoting 25 U.S.C. § 1912(d)).

seeking foster care placement must show by "clear and convincing evidence, including testimony of qualified expert witnesses, 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."[124] The court found that the defendants had not followed either provision at hearings which took place forty-eight hours after a child's temporary placement into foster care.[125] In addition, Judge Davis did not allow Native American parents to present evidence at these hearings[126] and the defendants as a whole often did not inform parents why their children were placed into foster care.[127]

In 2016, in response to states' lenient adherence to ICWA, the Bureau of Indian Affairs released new ICWA guidelines.[128] These guidelines clarified key portions of ICWA, such as the definitions of "Indian child" and "extended family."[129] The most significant change was the guidelines' explanation of the "good cause" clause of ICWA. From 1978 to 2016, it had been left to the courts in each individual case to decide what "good cause" meant.[130] The "Final Rule" placed the burden of proof on the non-Native party seeking to adopt.[131] It also stated that courts should not compare the financial situations of Native and non-Native families.[132]

This led to the case that is the subject of this Note.

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124. *Id.* (quoting 25 U.S.C. § 1912(e)).

125. *Id.* at 765.

126. *Id.* at 764.

127. *Id.* at 758.

128. 25 CFR § 23.2 (2019).

129. *Id.*

130. Flynn, *supra* note 2.

131. 25 C.F.R. § 23.132(b) (2019).

132. Flynn, *supra* note 2.

II. *BRACKEEN V. ZINKE*

The case involved seven individual plaintiffs: Chad and Jennifer Brackeen, Nick and Heather Libretti, Altagracia Socorro Hernandez, and Jason and Danielle Clifford.[133] Three states (Texas, Louisiana, and Indiana) also joined the case.[134] A.L.M., the child, was placed with the Brackeens as a foster care placement at the age of ten months.[135] His parents were both enrolled members of Native tribes (Navajo and Cherokee).[136] After sixteen months, the Brackeens, with the approval of A.L.M.'s parents, began the process of adopting him[137] after the state of Texas terminated the biological parents' rights.[138] The Navajo Nation found a potential adoptive placement in New Mexico that was not biologically related to A.L.M.[139] The Brackeens argued that there was good cause for A.L.M. to remain in their home and be adopted by them, as he had lived with them for over a year and was not acquainted with the prospective adoptive resource in New Mexico.[140] They further contended that by moving out of Texas, A.L.M. would lose contact with his biological family, including his parents and grandmother.[141] Under the Final Rule, evidence of good cause must be "clear and convincing" and the non-Native party seeking adoption bears the burden of proof.[142] The Texas Department of Family Services stated that the Brackeens had not met this

133. Brackeen v. Zinke, 338 F. Supp. 3d 514, 519 (N.D. Tex. 2018), *rev'd sub nom.* Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019).

134. *Id.*

135. *Id.* at 525.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.*

141. *See id.* at 526.

142. *Id.*

burden of proof.[143] Despite this, the Brackeens were allowed to petition the court for adoption of A.L.M. in January of 2018; however, they stated that they wished to foster and adopt more children in the future, but will now hesitate to consider children of Native American descent.[144]

Altagracia Socorro Hernandez placed her child, "Baby O.," with the Librettis for the purpose of adoption.[145] Although the baby's father is descended from members of the Pueblo Tribe, he is not himself a member.[146] The Pueblo Tribe intervened in the custody proceedings regarding Baby O. and attempted to move her to a different placement.[147] Once the Librettis joined the instant case, the Pueblo Tribe allowed them to petition for Baby O.'s adoption; however, like the Brackeens, the Librettis state that they too wish to adopt children in the future and will be cautious about pursuing the adoption of any Native American child.[148]

"Child P." was placed with the Cliffords as a foster placement.[149] While Child P. is not a registered member of a Native tribe, her grandmother is a member of the White Earth Ojibwe band.[150] As a result of the placement preferences outlined in ICWA, Child P. was removed from the Cliffords' home and placed with her grandmother, who had previously lost her license to provide foster care.[151]

In a motion for summary judgment, the plaintiffs argued that ICWA violates both the Equal Protection and Due

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 526–27.

149. *Id.* at 527.

150. *See id.*

151. *Id.*

Process Clauses of the Fifth Amendment,[152] the Tenth Amendment,[153] and the "proper scope" of the Indian Commerce Clause.[154] Additionally, the state plaintiffs argued that ICWA "usurps" state authority over child custody and welfare proceedings and also burdens state governments with the cost of complying with ICWA.[155]

The defendants consisted of the Cherokee, Navajo, and Oneida Nations, as well as the Secretary of the United States Department of the Interior and the Director of the Bureau of Indian Affairs.[156] They contended that prior Supreme Court decisions had determined that classification based on Native American ancestry was political, not racial, and thus ICWA should not be subject to strict scrutiny.[157]

The Texas district court granted summary judgment on the plaintiffs' equal protection claim.[158] In its holding, the court found that the classifications made by ICWA were based on race, as ICWA applies not only to children who are members of a federally recognized tribe, but children who are eligible for such membership.[159] Thus, the court held that ICWA was subject to strict scrutiny.[160] Once the court applied this standard, it found that ICWA failed to survive

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152. *Id.* at 530.

153. *Id.*

154. *Id.*

155. *See id.* at 529–30.

156. *Id.* at 519–20.

157. *Id.* at 531.

158. *Id.* at 536. *See generally* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 24 (2017) (noting the plaintiffs in *Brackeen* were not the first to challenge the ICWA on equal protection grounds. Proponents of this view argued that ICWA deprived Native American children of equal protection because "in an ICWA case, the most crucial factor—virtually the deciding factor—is the child's biologically determined Indian status . . . because [this] result[s] in treating them differently than other children due exclusively to their racial or national origin, [ICWA] also deprive[s] Indian children of the equal protection of the law").

159. *Brackeen*, 338 F. Supp. 3d at 534–35.

160. *Id.* at 534.

strict scrutiny because it was not "narrowly tailored to a compelling [governmental] interest."[161] The court stated that ICWA was "overinclusive"[162] because this Act "establishes standards that are unrelated to specific tribal interests and applies those standards to *potential* Indian children," thereby affecting not only children who were tribal members, but those who could possibly enroll.[163]

The court also granted the plaintiffs' motion for summary judgment on their claims that ICWA violates the Tenth Amendment.[164] In doing so, the court relied heavily on the Supreme Court's 2018 decision in *Murphy v. NCAA*, in which the Court held that "[the Constitution] confers upon Congress the power to regulate individuals, not States."[165] The Texas court stated that ICWA "requires states to adopt and administer comprehensive federal standards in state created causes of action" and thus regulates those states.[166] Furthermore, because of this, the court found that ICWA extended beyond the scope of the Indian Commerce Clause and thus granted the plaintiffs' motion for summary judgment on that ground. [167]

The court denied the plaintiffs' motion for summary judgment on their due process claim, stating that the Supreme Court had never "applied [due process] rights in a situation involving either prospective adoptive parents or adoptive parents whose adoption is open to collateral attack."[168] The defendants appealed the Texas court's

161. *Id.* at 535.

162. *Id.*

163. *See id.*

164. *Id.* at 541.

165. Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018) (*quoting* New York v. United States, 112 S. Ct. 2408 (1992)).

166. *Brackeen*, 338 F. Supp. 3d at 541.

167. *Id.* at 546.

168. *Id.*

decision to the Fifth Circuit.[169] In December of 2018, the Fifth Circuit granted a stay pending appeal.[170]

The Fifth Circuit issued a decision on August 9, 2019.[171] The appellate court held that the district court had erred in its ruling and that ICWA did not violate the Constitution. The court determined that ICWA was "based on a political classification that is rationally related to the fulfillment of Congress's unique obligation toward Indians."[172] The Fifth Circuit panel also held that "ICWA preempts conflicting state laws" and "does not violate the Tenth Amendment anticommandeering doctrine."[173] On November 7, 2019, the Fifth Circuit granted rehearing en banc.[174]

III. ANALYSIS AND IMPACT

A. *Analysis of* Brackeen *Decision*

The court in *Brackeen* came to an erroneous decision when it determined that ICWA's placement preferences violated the Equal Protection Clause, and the Fifth Circuit should come to the same conclusion in its rehearing en banc as it did in its panel decision. Had the district court applied the correct standard of judicial review, rational basis review, instead of strict scrutiny, it could not have arrived at the same conclusion. Courts apply strict scrutiny "when the government distributes burdens or benefits on the basis of individual racial classifications."[175] In its decision, the

169. Notice of Appeal, Brackeen v. Zinke, 338 F. Supp. 3d 514 (2018) (No. 18-11479).

170. Brackeen v. Cherokee Nation, 2018 U.S. App. LEXIS 36903, at *6 (5th Cir. Dec. 3, 2018) (No. 18-11479).

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

172. *Id.*

173. *Id.*

174. Brackeen v. Bernhardt, 2019 U.S. App. LEXIS 33335 (5th Cir. Nov. 7, 2019).

175. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

Brackeen court distinguished between laws targeting Native Americans by "racial classifications"[176] as opposed to those that create "political classifications" and found that ICWA made the former type.[177] To illustrate this difference, the court contrasted the holding of the Supreme Court in *Rice v. Cayetano* with that in *Morton v. Mancari*.[178]

At issue in *Rice v. Cayetano* was a Hawaii statute limiting what persons could vote in an election for trustees of the Office of Hawaiian Affairs (OHA).[179] This office oversaw programs which were designed to benefit "Hawaiians."[180] Hawaiians, as defined by the statute at issue, were not the general inhabitants of that state but rather "those persons who are descendants of people inhabiting the Hawaiian Islands in 1778."[181] Only those who qualified as Hawaiian under this definition could vote in the election for the OHA trustee positions.[182] The State argued that the statute was not racially based but rather created classifications based on "whose ancestors were in Hawaii at a particular time, regardless of their race."[183] The Court did not find the State's argument persuasive, stating that the statute in question "used ancestry as a racial definition and for a racial purpose,"[184] and that an "ancestral inquiry" was "not consistent with respect . . . the Constitution itself secures in its concern for persons and citizens."[185] The Court

176. *Brackeen*, 338 F. Supp. 3d at 531 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202 (1995)).

177. *Id.*

178. *Id.*

179. 528 U.S. 495, 498–99 (2000).

180. *Id.* at 499.

181. *Id.* This category was further subdivided into "Hawaiians," as defined above, and "native Hawaiians," who were at least 50% descended from "descendants of people inhabiting the Hawaiian Islands in 1778." *Id.*

182. *Id.*

183. *Id.* at 514.

184. *Id.* at 515.

185. *Id.* at 517.

held that the "demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters . . . attacks the central meaning of the Fifteenth Amendment."[186]

In contrast, in *Morton v. Mancari*, the Supreme Court held that a hiring preference for Native Americans was a political classification and therefore permissible.[187] At issue in *Mancari* was a portion of the Indian Reorganization Act that gave Native Americans hiring preferences for positions at the Bureau of Indian Affairs (BIA).[188] Non-Native employees argued that this preference was impermissible because it denied them "equal employment opportunity."[189] In holding that the classification was political as opposed to racial, the Court pointed to a long series of cases throughout the United States' history that "single[d] out Indians for particular and special treatment."[190] The Court stated this "special treatment" was allowable so long as it was rationally related to the "fulfillment of Congress' unique obligation towards the Indians."[191]

Here, the classification made by ICWA is like that in *Mancari* rather than *Rice*. ICWA applies to children who are members of a federally recognized tribe, as well as those eligible for such membership who have at least one parent

186. *Id.* at 523.

187. 417 U.S. 535, 553–54 (1974). The Court stated that "the preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Id.* at 553 n.24.

188. *Id.* at 537.

189. *Id.* at 539. The district court found that BIA's hiring preferences were "implicitly repealed by § 11 of the Equal Employment Opportunity Act of 1972." *Id.* at 540.

190. *Id.* at 554–55. The specific cases cited by the Court were Bd. of Cty. Comm'rs v. Seber, 318 U.S. 705 (1943); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Simmons v. Eagle Seelatsee, 384 U.S. 209 (1966); and Williams v. Lee, 358 U.S. 217 (1959).

191. *Mancari*, 417 U.S. at 555.

that is already a member.[192] Under *Mancari*, if a statute creates a classification based on membership in a federally recognized tribe, this classification is political, not racial.[193] Therefore, ICWA's first classification is clearly permissible. ICWA's second classification that depends on eligibility and parentage is not an objectionable "ancestral inquiry" such as in *Rice*.[194] Rather, its purpose is to extend the political classification to Native American children who would most benefit from it. Membership in a federally recognized tribe is "not conferred automatically upon birth . . . Instead, an eligible child [or parents] must take affirmative steps to enroll the child."[195] If ICWA did not include this second classification, many children whose parents did not yet have the opportunity to register them as tribal members would lose the statute's protections.[196] Furthermore, other statutes make political classifications based on parentage. For example, children born abroad of U.S. citizens inherit their parents' citizenship.[197] Therefore, the *Brackeen* court incorrectly applied strict scrutiny.

When applying rational basis review, there is no question that ICWA's placement preferences are rationally related to Congress' "unique obligation" toward Native Americans.[198] Native American children have a long history of being forcibly removed from their homes, families, and culture.[199] ICWA was designed to prevent these children from being needlessly removed from their homes. Should removal be necessary, ICWA greatly increases the chances

192. 25 U.S.C. § 1903(4) (2019).

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

194. *Rice*, 528 U.S. at 517.

195. Brief of Defendants-Appellants at 31, Brackeen v. Zinke, 338 F. Supp. 3d 514 (2018) (No. 18-11479).

196. *Id.* at 31.

197. *Id.* at 32 (citing 8 U.S.C. § 1433).

198. *See Mancari*, 417 U.S. at 555.

199. *See supra* Part I.

that these children are placed within their culture in order to maintain it.[200]

B. *Impact*

For these reasons, this author believes that the Fifth Circuit will issue the same ruling on rehearing en banc as it did in its panel decision. However, there is a possibility, however remote, that the Fifth Circuit en banc will instead affirm the lower court. Such a decision would have multiple negative effects. Although the decision would only be binding on the Fifth Circuit, it would create a persuasive precedent for other circuits to follow.

The most obvious consequence of the appellate court affirming the ruling in *Brackeen* is the effect on adoption. If ICWA is declared unconstitutional, the termination of the parental rights (TPR) of Native Americans would be based on a preponderance evidentiary standard as opposed to beyond a reasonable doubt. This lowering of the evidentiary standard would make it easier for child welfare workers who are unfamiliar with Native culture to argue that parental rights should be terminated. Officially, poverty alone is not permitted to provide the basis for TPR; however, in practice, it often does.[201] This would put Native American parents at an even greater risk of losing their parental rights; Native Americans experience poverty at nearly twice the national average.[202] This would also put relatives seeking placement of a child at risk. Non-ICWA child welfare proceedings are

200. *See supra* Section I.B.

201. *See* Janet L. Wallace & Lisa R. Pruitt, *Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95, 112–22 (2012) (discussing the effects that poverty and rurality has on the termination of parental rights).

202. *American Indian and Alaska Native Heritage Month: November 2017*, UNITED STATES CENSUS BUREAU (Oct. 6, 2017), https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-ff20.pdf. (stating that while the national average of U.S. residents living below the poverty line was 14%, amongst Native Americans this number was 26.2%).

guided by the "best interest of the child."[203] This would increase the risk of Native American children being placed with white couples of a higher socioeconomic class instead of relatives who could provide a vital link to their culture but who fall into a lower income bracket.

The plaintiffs in a recent Texas case, *In the Interest of A.M.*, relied upon the holding in *Brackeen* to argue this changed evidentiary standard.[204] In *A.M.,* the biological mother of a three-year-old boy appealed the termination of her parental rights, alleging ICWA violations.[205] Because A.M. met the definition of an "Indian child," ICWA applied.[206] The Department of Social Services argued that the holding in *Brackeen* "render[ed] [the mother's] complaints moot."[207] However, the court stated that *Brackeen* could still be appealed and that the Supreme Court had "upheld" ICWA in *Holyfield*; therefore, it addressed the case on its merits.[208]

The placement preferences of ICWA would no longer apply, raising concerns that the "culture genocide" mentioned in the 1978 Congressional hearings would make a resurgence.[209] Disproportionate numbers of Native American children are currently in foster care despite ICWA's more stringent requirements for removal.[210] This

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203. *See, e.*g., In re M.S., 115 S.W.3d 534, 548 (Tex. 2003) ("The State's fundamental interest in parental-rights termination cases is to protect the best interest of the child."); In re Michael B., 80 N.Y.2d 299, 312 (1992) ("The key element in the court's disposition is the best interest of the child.").

204. In re A.M., 570 S.W.3d 860, 863 (Tex. Ct. App. 2018).

205. *Id.* at 861, 863.

206. *Id.* at 863.

207. *Id.*

208. *See id. Brackeen* was indeed appealed. *See supra* note 169.

209. *ICWA Hearing, supra* note 1, at 2.

210. *See, e.g.*, *Disproportionality Table*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, https://www.nicwa.org/wp-content/uploads/2017/09/Disproportionality-Table.pdf (last visited Nov. 16, 2019). Native American children as a whole are represented in foster care at approximately two-and-a-half times their

disproportionality would only increase if child welfare workers could adhere to a lower standard when removing children. With ICWA no longer good law, MEPA would apply instead. Native American children would be placed into foster and adoptive homes with no consideration given to their race or culture. Because the majority of adoptive parents are white, most of these children would be placed into white homes.[211] This harkens back to boarding schools and the Indian Adoption Project, harms that ICWA sought to remedy.

However, the effects would most likely extend beyond adoption cases. If the Fifth Circuit upholds that classification based on Native American descent is an impermissible racial classification, this will pave the way for other laws that use this classification to be declared unconstitutional as well using strict scrutiny. Despite the Supreme Court's holding in *Morton v. Mancari* that this classification is political rather than racial,[212] considering the reasoning of the majority in *Adoptive Couple*, the possibility certainly exists that *Mancari* will be overturned, or that enough exceptions will be created that it is overturned in all but name. Based on the number of cases immediately following *Adoptive Couple* that seized on the opening left by the Supreme Court and attempted to widen it, as well as how quickly the plaintiff's

representation in the general population. *Id.* As a comparison, white children are underrepresented in foster care. *Id.*; *see also* Laura Sullivan & Amy Walters, *Incentives And Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011), https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system ("In South Dakota, Native American children make up only 15 percent of the child population, yet they make up more than half the children in foster care."); Katie Hickey & Liz June, *Native American Disproportionality in the Foster Care System*, https://newscenter.sdsu.edu/education/csp/files/04541-FY_Disproportionality_Native_Amer.pdf.

211. *Adoption USA: A Chartbook Based on the 2007 National Survey of Adoptive Parents. Race, Ethnicity, and Gender*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Nov. 1, 2009), https://aspe.hhs.gov/report/adoption-usa-chartbook-based-2007-national-survey-adoptive-parents/race-ethnicity-and-gender (noting around 73% of adoptive parents are white).

212. Morton v. Mancari, 417 U.S. 535, 553 (1974).

arguments in *A.M.* relied on the holding in *Brackeen*, attacks on *Mancari* would likely come sooner rather than later.

If this occurs, all federal statutes involving Native Americans could potentially be at risk.[213] The "political classification" doctrine established in *Mancari* served as the basis for courts to defend "a broad array of legislation benefiting Indians and tribes against challenges by non-Indians."[214] Such legislation includes tax exemptions for Native Americans that live on reservations,[215] fishing rights,[216] the ability of the federal government to take land into trust for Native American tribes,[217] exclusive coal, mineral, and timber rights on reservations,[218] and federal criminal jurisdiction over reservations.[219]

Brackeen is a "prime candidate"[220] to come before the Supreme Court. The recent appointment of Justice Brett Kavanaugh to the Supreme Court has heightened many ICWA advocates' concerns that ICWA will be overturned.[221]

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213. Delia Sharpe & Jedd Parr, *The Indian Child Welfare Act is Under Attack Yet Again—And This Time Far More is at Stake*, CALIFORNIA INDIAN LEGAL SERVS. (Oct. 12, 2018), http://www.calindian.org/the-indian-child-welfare-act-is-under-attack-yet-again-and-this-time-far-more-is-at-stake/ (stating that "Indian Health Services and similar programs could disappear. Tribal lands, owned by the federal government and held in trust for tribes, could be sold off or opened to oil, gas, or minerals extraction . . . [e]ven tribes' status as sovereign entities is potentially at risk.").

214. Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 993 (2011).

215. Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 463 (1976).

216. Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 673 (1979).

217. Cent. N.Y. Fair Bus. Ass'n v. Salazar, No. 6:08-CV-660, 2010 U.S. Dist. LEXIS 17772 at *6 (N.D.N.Y. Mar. 1, 2010).

218. N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 656–57 (1976).

219. United States v. Antelope, 430 U.S. 641, 646–47 (1977).

220. Jefferson Keel et al., *Protecting ICWA After* Brackeen v. Zinke, NATIONAL CONGRESS OF AMERICAN INDIANS (Oct. 21, 2018), http://www.ncai.org/resources/resolutions/protecting-icwa-after-brackeen-v-zinke.

221. Daniel Perle, *'Lack of Understanding of Tribes': Brett Kavanaugh Deemed*

Kavanaugh replaced Justice Anthony Kennedy, a "key vote on important tribal issues."[222] Native American attorneys and leaders have accused Kavanaugh of not understanding why statutes regarding Native Americans exist.[223] Prior to his appointment to the Supreme Court, Kavanaugh wrote an op-ed in support of the decision in *Rice v. Cayetano*, calling it, "one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government."[224] Concerned Native Americans fear that Kavanaugh's "willing[ness] to split hairs regarding the rights and interests of Indigenous groups" based on whether or not those groups are "technically a federal Indian tribe does not bode well for how he would treat other Indigenous groups of people in this country."[225]

Unfriendly to Indian Country, INDIANZ (Sept. 21, 2018), https://www.indianz.com/News/2018/09/19/lack-of-understanding-of-tribes-brett-ka.asp (stating that "Tribal and legal officials . . . said his writings as a lawyer and his rulings in environmental and voting rights cases give them pause."). Kavanaugh was sworn in as a Supreme Court Justice on October 6, 2018. Clare Foran & Stephen Collinson, *Brett Kavanaugh Sworn in as Supreme Court Justice*, CNN (Oct. 6, 2018), https://www.cnn.com/2018/10/06/politics/kavanaugh-final-confirmation-vote/index.html.

222. Cecily Hilleary, *Native Americans Worry Trump Supreme Court Pick Threatens Sovereignty*, VOA NEWS (Sept. 7, 2018), https://www.voanews.com/a/native-american-tribes-worry-trump-supreme-court-pick-poses-threat-to-sovereignty/4561888.html.

223. *See* Perle, *supra* note 221 (quoting an attorney who stated, "[Kavanaugh] fails to recognize what's been done to put them (Native Americans) at a historical disadvantage"); *see also* Nancy LeTourneau, *Brett Kavanaugh Poses a Threat to Native American Sovereignty*, WASHINGTON MONTHLY (Sept. 11, 2018), https://washingtonmonthly.com/2018/09/11/brett-kavanaugh-poses-a-threat-to-native-american-tribal-sovereignty/ (quoting Richard Peterson, president of the Central Council of Tlingit & Haida Indian Tribes of Alaska, who wrote that all 30,000 citizens of those tribes "would be endangered by Judge Kavanaugh's confirmation because of his errorenous [sic] views on indigenous rights and tribal sovereignty.").

224. Anna V. Smith, *Justice Brett Kavanaugh's Impact on Indian Country*, HIGH COUNTRY NEWS (Oct. 12, 2018), https://www.hcn.org/articles/tribal-affairs-justice-brett-kavanaughs-impact-on-indian-country.

225. *Id.* (quoting Dylan Hedden-Nicely, director of Native American Law at the University of Idaho); *see also* Press Release, Tom Udall, *Kavanaugh's*

IV. CONCLUSION

Congress enacted ICWA as an attempt to prevent a continuance of the harms done to Native American children throughout the history of this country. An astounding number of Native American children lived in out-of-home placements before Congress passed ICWA. Native American children are overrepresented in foster care even with ICWA's protection. If the Fifth Circuit en banc affirms the lower court's decision that ICWA is unconstitutional, there is a genuine risk that these numbers will return to pre-ICWA levels. The only method that the court in *Brackeen* could have used to arrive at this result was to apply the wrong standard of review. Had it applied the correct standard, it would have been impossible for that court to reach the same result. The Fifth Circuit en banc will mostly likely apply the correct standard of review and issue the same holding as in its panel decision. If the court en banc instead affirms the district court's decision, or if the case is granted certiorari by the Supreme Court and the decision is affirmed there, this country runs the risk of returning to the "cultural genocide" of the past.[226] As the director of the Navajo Office of Resource Security stated during the ICWA confirmation hearings:

Confirmation Hearings Reveal Deeply Troubling Views on Indian Law and Policy, DEMOCRATIC NEWS (Sept. 13, 2018), https://www.indian.senate.gov/news/press-release/udall-kavanaugh-s-confirmation-hearings-reveal-deeply-troubling-views-indian-law. Senator Udall wrote that:

> From the documents I have reviewed so far, and based on information revealed during the hearings, I am convinced that Judge Kavanaugh is no friend to Indian Country. He openly characterized federal protections for Native Hawaiians as unconstitutional, and argued that "any racial group with creative reasoning can qualify as an Indian tribe." He even questioned the constitutionality of programs dedicated specifically to Native Americans, a view that could upend decades of progress for Indian Country on everything from housing to government contracting. And considering the sheer number of documents that are still being shielded from public and Senate view, we may have only seen the tip of the iceberg when it comes to Judge Kavanaugh's willful misunderstanding of the rights held by Native communities, including Alaska Native Villages.

226. *See* discussion *supra* Part III.

"[t]he ultimate preservation and continuation of [Native American] cultures depends on our children and their proper growth and development."[227]

227. *ICWA Hearing*, *supra* note 1, at 169 (statement of Bobby George, director of the Navajo Office of Resource Security).