

Equal Protection and the Indian Child Welfare Act: States, Tribal Nations, and Family Law

by
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The complex legal relationship between states, the United States, and Native nations can produce serious confusion in family law. Our system of federal Indian law, developed over several centuries, recognizes tribal sovereignty and defines the scope of state power with respect to federally-recognized Indian lands and communities.¹ For the most part, however, this body of federal law has not directly addressed family law, where there may be a significant overlap between tribal and state authority.

In the Indian Child Welfare Act of 1978 (ICWA),² Congress defined the jurisdiction of state and tribal courts in cases involving Indian children,³ and established substantive and procedural rights for parents in these proceedings.⁴ ICWA recognizes that Indian tribes have a profound interest in their children and provides a path for protecting these interests structured within the long and complicated relationship between the United States, tribal nations, and state governments.

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¹ The terms “Indian” and “tribes” are used in the U.S. Constitution, statutes, and several centuries of case law, and are used here in that context, along with terms such as Native, indigenous and nation. See generally the discussion in the Reporter’s Introduction, *RESTATEMENT OF THE LAW OF AMERICAN INDIANS* (2021) (hereafter *RESTATEMENT*).

² ICWA, 92 Stat. 3069, 25 U.S.C. §§ 1901-1963 (2022).

³ “Indian child” is defined in § 1903(4) as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” See generally *KELLY GAINES-STONER ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK* 52-57 (3d ed. 2018).

⁴ See generally *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* ch. 11 (2012 ed.) (hereafter *COHEN HANDBOOK*); *GAINES-STONER ET AL., supra* note 3, ch. 3-5.

The Supreme Court considered ICWA in *Mississippi Band of Choctaw Indians v. Holyfield*⁵ and *Adoptive Couple v. Baby Girl*;⁶ and will hear a third case during its new term. *Haaland v. Brackeen*⁷ comes to the Court from a sharply divided *en banc* ruling in the Fifth Circuit, in a case that sought to overturn the statute.⁸ A majority of the Fifth Circuit rejected this challenge, overruling the court below and affirming Congress's authority to enact ICWA. The judges divided equally on one aspect of the plaintiffs' equal protection challenge.⁹ In addition to reviewing this question, subject to a determination of the plaintiffs' standing, the Supreme Court also agreed to hear issues raised by several state plaintiffs under the anticommandeering doctrine of the Tenth Amendment that divided the Fifth Circuit.¹⁰

In upholding the broader constitutionality of ICWA, the Fifth Circuit followed long-settled Supreme Court precedent recognizing Congress's broad powers and responsibilities for Native communities. In the past, the Court has taken a highly deferential approach in equal protection challenges to federal legislation that includes classifications based on tribal membership.¹¹ The test was first articulated in *Morton v. Mancari*:¹² "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."¹³

Unpacking the complexities of ICWA and the *Brackeen* case begins with the principles of federal Indian law. Our Constitution gives the federal government exclusive authority to recognize In-

5 490 U.S. 30 (1989), discussed *infra* at part I.A.

6 570 U.S. 637 (2013), discussed *infra* at part I.B.

7 *Brackeen v. Haaland*, 994 F.3d 249 (2021) (*en banc*), *cert. granted sub nom.* *Haaland v. Brackeen*, No. 21-376, 2022 WL 585885 (U.S. Feb. 28, 2022).

8 *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018). See *infra* notes 159-162 and accompanying text.

9 This split left the district court ruling in place. See *Brackeen*, 994 F.3d at 268. The judges disagreed on ICWA provisions that prioritize placement for Indian children with "other Indian families," 25 U.S.C. § 1915(a)(3), or "Indian foster homes," 25 U.S.C. § 1915(b)(iii), when a placement with another member of the child's family or tribe is not available. See *infra* part II.B.

10 See *infra* note 106 and accompanying text.

11 See *Brackeen*, 994 F.3d at 333-35. See *infra* part II.A.

12 *Morton v. Mancari*, 417 U.S. 535 (1974).

13 *Id.* at 555. See *infra* part II.A.

dian nations or tribes, to legislate with respect to tribes and their members, and to define the powers of states with respect to Indian governments and communities.¹⁴ The right of Indian nations to self-government has been respected in American law for centuries. Decisions from the Marshall Court to the present day affirm that tribes retain an inherent sovereignty that predates the Constitution, distinct from that of the state and federal governments.¹⁵ This authority is at its strongest with respect to tribal members and questions of family law.¹⁶

At the same time, family law disputes involving tribal members also come up in state courts.¹⁷ Divorce, child support, custody, and inheritance cases may cross reservation borders, presenting complex conflict of laws questions that highlight the importance of comity and cooperation between tribes and states. In child welfare cases, ICWA has helped to build this cooperation, and many states have signaled their strong support for the law.¹⁸ This story is easily lost amid the challenges directed to the statute, but it presents more important lessons for family lawyers. With its careful balancing of tribal and state responsibilities, ICWA has allowed more effective protection for the interests of Indian children and their families.

This article offers family law practitioners an introduction to the unique balance of federal, tribal, and state authority with respect to Native American communities and tribal members, and the Supreme Court's distinctive equal protection jurisprudence in this context. It considers the challenges posed by cross-border family litigation from this perspective, arguing that states have an important role to play in recognizing and supporting the ties between tribes and their members.

Part I frames the discussion with an overview of federal power in Indian affairs, tribal government authority with respect

¹⁴ *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). See *infra* part I.A. See generally Matthew L. M. Fletcher, *Politics, Indian Law and the Constitution*, 108 CALIF. L. REV. 495 (2020).

¹⁵ See *id.* at 558; *Cherokee Nation v. Georgia*, 30 U.S. 1, 4 (1831).

¹⁶ See *infra* part I.B.

¹⁷ See *infra* part I.C.

¹⁸ The States of Indiana, Louisiana, and Texas were plaintiffs in *Brackeen*, 338 F. Supp. 3d at 519. In the Supreme Court, a group of 25 states and the District of Columbia appeared as amicus supporting the United States and the tribal parties. See *infra* note 186 and accompanying text.

to membership and family law questions, and the interaction of state and tribal courts in family law matters including ICWA. Part II describes the Supreme Court's approach to Equal Protection in federal Indian law cases and considers the equal protection issues before the Court in *Brackeen*. Part III argues for building on the experience gained with ICWA to expand state and tribal comity and collaboration in child welfare and other family law matters, including domestic violence, child support, custody, and divorce.

I. Federal, Tribal, and State Powers

A. Federal Power in Indian Affairs

Since the Constitution was adopted, Congress has exercised exclusive power to regulate relations with Native American peoples and their property and communities. Initially, this authority was understood as deriving from the Indian Commerce Clause¹⁹ and the war, treaty, and foreign relations powers of the federal government,²⁰ and it applied only to the external relations of Indian nations.²¹ During the reservation period that began after the Civil War, the Court began to characterize Congress's power as a "guardianship," extending to the internal affairs of Indian nations.²² At the same time that it expanded its conception of federal authority over tribes, the Court described Congressional power in Indian affairs as plenary and nonjusticiable, with no legal remedy available when tribes sought to challenge federal action.²³

Exercising these expansive and unreviewable powers, the U.S. government engaged in wholesale removal of Native children from their families, placing them in strictly regimented boarding schools located far from their homes in the name of

¹⁹ U.S. CONST. art. I, § 8, cl. 3. See *Worcester*, 31 U.S. at 558-59.

²⁰ See generally COHEN HANDBOOK, *supra* note 4, at § 5.01; RESTATEMENT, *supra* note 1, at § 7; Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015); Fletcher, *supra* note 14, at 520-32.

²¹ *Cherokee Nation*, 30 U.S. at 17 (describing tribes as "domestic dependent nations").

²² *United States v. Kagama*, 118 U.S. 375, 383-84 (1886); see generally, Ann L. Estlin, *Federal Plenary Power in Indian Affairs After Weeks and Sioux Nation*, 131 U. PA. L. REV. 235, 246-50 (1982).

²³ See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

civilization and assimilation.²⁴ The federal government also promoted transracial adoption of Native children during the 1950s and 1960s, through a partnership between the Bureau of Indian Affairs and the Child Welfare League of America.²⁵

During the twentieth century, federal policies cycled between attempts at assimilation and termination of Native communities, and periods of somewhat greater respect and support for tribal self-government. During the Termination era in 1953, Congress enacted P.L. 280, authorizing a number of states to assume criminal and civil adjudicatory jurisdiction over Indian reservations and tribal members within their borders.²⁶ Despite changes in federal policy since that time, P.L. 280 and similar laws still apply in many states. Absent a law such as P.L. 280, however, states may not exercise criminal or civil jurisdiction in “Indian country.”²⁷

During the Nixon Administration, Congress and the Executive Branch embraced a new policy of “Indian Self-Determination,” recognizing tribes as governments and supporting their authority through means such as contracts to administer federal

²⁴ See BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 155-63 (2010); COHEN HANDBOOK, *supra* note 4, at 76-77. The Department of Interior released the first volume of a report investigating the history of Federal Indian Boarding Schools in May 2022. See *Federal Indian Boarding School Initiative Investigative Report (May 2022)*, https://www.bia.gov/sites/default/files/dup/in-line-files/bsi_investigative_report_may_2022_508.pdf. On the long history of federal intervention in Indian families, see Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L.R. 885, 910-28, 938-44, & 952-55 (2017).

²⁵ See Karen Balcom, *The Logic of Exchange: The Child Welfare League of America, The Adoption Resource Exchange Movement and the Indian Adoption Project, 1958-1967*, 1 ADOPTION & CULTURE 5 (2007); Margaret D. Jacobs, *Remembering the “Forgotten Child”: The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 140-45 (2013). See also Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 331-32 (2015); 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, 733-35.

²⁶ See 11 U.S.C. § 1162; 28 U.S.C. § 1360. There are many other similar federal statutes. See generally COHEN HANDBOOK, *supra* note 4, at § 6.04.

²⁷ Defined at 18 U.S.C. § 1151. See COHEN HANDBOOK, *supra* note 4, at § 6.04.

programs.²⁸ ICWA was a central component of this policy, designed to reverse a century of practices that had broken Native families apart.²⁹ Congress reaffirmed its commitment to ICWA in 1994 when it enacted the Multiethnic Placement Act (MEPA) with language providing that MEPA's prohibition on racial matching policies did not affect application of ICWA.³⁰ During this time period, the Supreme Court also softened its approach to the plenary power doctrine, allowing for the possibility of constitutional challenges to federal Indian legislation while maintaining a high level of deference to Congress.³¹

In *Mississippi Band of Choctaw Indians v. Holyfield*,³² the Supreme Court discussed the history of ICWA and the special Congressional responsibility for Indian affairs. The issue was whether a state could exercise adoption jurisdiction over children born to parents who were enrolled members of the Mississippi Band of Choctaw Indians, both residents of and domiciled on the Choctaw reservation.³³ ICWA provides for exclusive tribal court jurisdiction in proceedings involving "an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."³⁴ The Court rejected Mississippi's claim that children who were born off the reservation were not "domiciled within the reservation" for ICWA purposes, concluding that Congress did not intend for the meaning of "domicile" to vary based on state law.³⁵ Given the common legal understanding that a child's

²⁸ See, e.g., Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 5301-5423.

²⁹ See 25 U.S.C. § 1901; House Report 95-1386, 95th Cong. (July 24, 1978), reprinted in 1978 U.S.C.C.A.N. 7530. See also *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-36 (1989) (discussing the legislative history of ICWA). See generally ATWOOD, *supra* note 24, at 163-67.

³⁰ 42 U.S.C. § 1996b. On the tension between ICWA and MEPA, see ATWOOD, *supra* note 24, at 185-91.

³¹ See generally Estin, *Federal Plenary Power*, *supra* note 22.

³² 490 U.S. 30 (1989).

³³ *Id.* at 37.

³⁴ 25 U.S.C. § 1911(a). Jurisdiction could be "otherwise vested in the State" under a federal law such as P.L. 280, discussed *supra* at note 26 and accompanying text. See ATWOOD, *supra* note 24, at 171-72.

³⁵ 490 U.S. at 43-47 ("We therefore think it beyond dispute that Congress intended a uniform federal law of domicile for the ICWA.").

domicile follows that of the child's parents,³⁶ the Court reversed the Mississippi courts, sending the case to the Choctaw Tribal Court.³⁷

Mississippi Band pointed out that “Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA.”³⁸ The Court noted: “In enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States.”³⁹ Given Congress’s concern in ICWA for the effects of state child welfare practices on Indian children placed outside their culture and on the Tribes themselves, the Court also concluded that “a rule of domicile that would permit individual Indian parents to defeat the ICWA’s jurisdictional scheme is inconsistent with what Congress intended.”⁴⁰ Ultimately, the Court emphasized that ICWA defined “*who* should make the custody determination concerning these children – not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. . . . [W]e must defer to the experience, wisdom and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy.”⁴¹

B. Tribal Nations and Family Law

Although many federal enactments and court decisions have set limits on the scope of tribal sovereignty, the Supreme Court has often repeated the rule that: “The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which

³⁶ 490 U.S. at 47-50.

³⁷ The Choctaw Tribal Court granted Joan Holyfield’s adoption petition for several reasons, and also ordered that she maintain contact between the twins and their extended family and Tribe. See Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 17-18 (2008).

³⁸ 490 U.S. at 42 (citing *Fisher v. District Ct.*, 424 U.S. 382 (1976), discussed *infra* at notes 52-53 and accompanying text).

³⁹ *Id.*

⁴⁰ *Id.* at 49-53. Three justices dissented, believing that the court should adopt an interpretation that allows parents of Indian children to choose state jurisdiction by expressing the intent that their child be domiciled off the reservation. *Id.* at 54-65 (Stevens, J. dissenting).

⁴¹ *Id.* at 53-54 (emphasis in original; quoting *Adoption of Holloway*, 732 P.2d 962, 972 (Utah 1986)).

has never been extinguished.”⁴² Until Congress acts to curtail those powers, tribes retain “those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”⁴³ Even in its decisions concluding that a particular tribal government power has been extinguished, either expressly (by Congress) or by implication (by the Court), the Court has emphasized the powers that tribal governments continue to exercise.⁴⁴ At the core of these continuing powers, central to tribal self-government, are family matters and the determination of who is a member of the tribe.⁴⁵

Supreme Court cases defining the scope of tribal jurisdiction have distinguished between tribal members and nonmembers, curtailing tribal jurisdiction over nonmembers and affirming jurisdiction over members.⁴⁶ At the same time, the Court has made clear that the determination of who is a tribal member belongs exclusively to tribal authorities. In *Santa Clara Pueblo v. Martinez*,⁴⁷ the Court observed that: “A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as a political community.”⁴⁸ Indian nations have different membership rules, with some requiring descent through the maternal or paternal line, some imposing a minimum

⁴² *E.g.* *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

⁴³ *Id.* at 323. The Court has accorded itself authority to determine that some aspects of tribal sovereignty have been lost by implication. *E.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (holding that “by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”).

⁴⁴ *See, e.g.*, *Montana v. United States*, 450 U.S. 544, 564 (1981) (“Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.”) *See also Wheeler*, 435 U.S. at 326 (“The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.”).

⁴⁵ *See Fisher*, 424 U.S. 382, discussed *infra* at notes 52-53 and accompanying text. *See also* ATWOOD, *supra* note 24, at 72-80.

⁴⁶ *See generally* COHEN HANDBOOK, *supra* note 4, at 599-601, 765-69.

⁴⁷ 436 U.S. 49 (1978).

⁴⁸ *Id.* at 72 n.32 (holding that a dispute over tribal membership ordinance filed in federal court under the Indian Civil Rights Act was barred by the tribe’s sovereign immunity). *See also* RESTATEMENT, *supra* note 1, at § 18.

“blood quantum,” and some, like the Cherokee Nation, opening their membership to any descendant.⁴⁹

Many early cases noted the authority of Native communities over the marriages, divorces, parent-child relationships, and inheritance rights of tribal members.⁵⁰ With the establishment of contemporary tribal court systems, this area of jurisdiction has been a central concern.⁵¹ The Supreme Court made this point forcefully in *Fisher v. District Court*,⁵² a per curiam opinion issued before enactment of ICWA. *Fisher* emphasized that Congress had repeatedly protected the right of the Northern Cheyenne Tribe to govern itself. Noting the creation of the Northern Cheyenne Tribal Court under the Tribe’s Constitution and bylaws, the opinion held that state court jurisdiction over a tribal adoption dispute “plainly would interfere with the powers of self-government” of the Tribe, creating a “substantial risk of conflicting adjudications affecting the custody of the child and a . . . corresponding decline in the authority of the Tribal Court.”⁵³ As formulated in the Restatement of the Law of American Indians, “Indian tribes have inherent power to regulate the domestic relations of their tribal members domiciled in Indian country.”⁵⁴

The ICWA provision considered in the *Mississippi Band* case, placing exclusive jurisdiction with the tribal court for proceedings concerning an Indian child domiciled on the reservation, is consistent with *Fisher* and the history of tribal authority.

⁴⁹ See generally COHEN HANDBOOK, *supra* note 4, at 175-76. See also *infra* notes 126-137 and accompanying text.

⁵⁰ E.g. *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605-06 (Mich. 1889) (recognizing tribal jurisdiction over marriage); *Earl v. Godley*, 44 N.W. 254 (Minn. 1890); *Ortley v. Ross*, 110 N.W. 982 (Neb. 1907). This approach was confirmed by the Supreme Court; see *United States v. Quiver*, 241 U.S. 602 (1916) (dismissing an adultery prosecution under a federal statute); *Jones v. Meehan*, 175 U.S. 1, 29-31 (1899) (holding that inheritance rights were controlled by tribal law). See also Antoinette Sedillo Lopez, *Evolving Indigenous Law: Navajo Marriage – Cultural Traditions and Modern Challenges*, 17 ARIZ. J. INT’L & COMP. L. 283, 304-05 (2000).

⁵¹ On tribal court systems, see COHEN HANDBOOK, *supra* note 4, at 263-69. On tribal family law, see ATWOOD, *supra* note 24, at ch. 3.

⁵² 424 U.S. 382 (1976) (per curiam).

⁵³ *Id.* at 387-88. See also e.g. *McKenzie Cnty. Soc. Servs. Bd. v. V.G.*, 392 N.W.2d 399 (N.D. 1986) (dismissing an action to determine parentage and establish child support where all the parties were tribal members).

⁵⁴ RESTATEMENT, *supra* note 1, at § 19.

ICWA applies to an important subset of family law cases: foster care placement, termination of parental rights, preadoptive placement, and adoptive placement of Indian children.⁵⁵ It does not apply to other family law proceedings, such as custody disputes between divorcing or unmarried parents.⁵⁶ Under *Fisher*, however, jurisdiction in these non-ICWA family cases clearly belongs to the tribe when all parties are tribal members living on the reservation.⁵⁷

ICWA has helped to facilitate the development of tribal courts.⁵⁸ Like their colleagues in state courts, tribal court judges making decisions regarding children emphasize the child's best interests.⁵⁹ Tribal courts apply modern codes, often based on principles of customary law, in family law and inheritance cases.⁶⁰ Many tribal courts exercise jurisdiction over children who are tribal members, even if they reside outside the reservation borders,⁶¹ and have exercised jurisdiction over adult tribal members and their families, including nonmembers who are

⁵⁵ 25 U.S.C. § 1903. See generally GAINES-STONER ET AL., *supra* note 3, at 48-60.

⁵⁶ *Id.* See also John v. Baker, 982 P.2d 738, 746-47 (Alaska 1999) (*Baker I*); Cherino v. Cherino, 176 P.3d 1184 (N.M. Ct. App. 2007); *In re DeFender*, 435 N.W.2d 717 (S.D. 1989).

⁵⁷ In states with civil adjudicatory jurisdiction under P.L. 280 or a similar law, the tribe and state have concurrent jurisdiction in ICWA and other family law cases. See *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005). See also *infra* note 70.

⁵⁸ See Terry L. Cross & Robert J. Miller, *The Indian Child Welfare Act of 1978 and Its Impact on Tribal Sovereignty and Governance*, in *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT* AT 30 at 13, 16, 19-20 (Matthew L. M. Fletcher, Wenona T. Single & Kathryn E. Fort, eds. 2009).

⁵⁹ *Id.*; see also Lisa L. Atkinson, *Best Interest of the Child: A Tribal Judge's Perspective*, 58(1) *JUDGES J.* 6 (2019); Lorinda Mall, *Keeping It in the Family: The Legal and Social Evolution of ICWA in State and Tribal Jurisprudence*, in *FACING THE FUTURE*, *supra* note 58, at 164, 190-99.

⁶⁰ On tribal family law, see ATWOOD, *supra* note 24, ch. 3; Lopez, *supra* note 50; Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 *COLUM. J. RACE & L.* 681 (2021).

⁶¹ *E.g.*, *Father J v. Mother A*, No. MPTC-CV-FR-2014-207, 6 Mash. Rep. 297, 2015 WL 5936866 (Mash. Pequot Tribal Ct. Aug. 21, 2015) (holding that the tribe has jurisdiction over parentage and custody cases involving tribal children); *Miles v. Chinle Fam. Ct.*, No. SC-CV-04-08, 7 *Am. Tribal L.* 608, 2008 WL5437146 (Navajo S. Ct. Feb. 21, 2008). See also *Baker I*, 982 P.2d at 748-59 (holding that Native American nations retain independent sovereign power to

domiciled on the reservation.⁶² For cases involving families with both tribal members and nonmembers, state courts have exercised concurrent jurisdiction.⁶³

In recent years, the Supreme Court has steadily narrowed the scope of tribes' civil jurisdiction over non-Indians and non-member Indians.⁶⁴ This trend has uncertain implications for family law,⁶⁵ but it is likely to increase the number of family law cases crossing reservation borders that are heard in state courts. In these situations, determination of jurisdiction, choice of law, and recognition of judgments present enormously important and complicated questions for tribal and state courts.

C. *Native American Families in State Courts*

Contemporary Native communities are not tightly enclosed within reservation borders. A majority of tribal citizens live outside of Indian country, often as a result of federal policies,

regulate the internal affairs of members even when they do not occupy Indian country).

⁶² *E.g.*, *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988) (affirming the jurisdiction of a tribal court); *In re A.H.*, 6 Am. Tribal L. 164 (Ft. Peck Ct. App. 2006); *Walker v. Tiger*, No. SC 2003-01, 10 Okla. Trib. 650, 2004 WL 7081139 (Muscogee May 12, 2004). *See generally* ATWOOD, *supra* note 24, at ch. 2.

⁶³ *See infra* notes 71-72 and accompanying text. Tribal court cases addressing concurrent jurisdiction include *Tupling v. Kruse*, 15 Am. Tribal L. 23 (Colville Tribal Ct. App. 2017) (noting concurrent domestic relations jurisdiction in state and tribal courts); *Bahe v. Platero*, No. SC-CV-48-12, 11 Am. Tribal L. 104, 107-108, 2012 WL 6775428 (Navajo S. Ct. Dec. 20, 2012) (deferring jurisdiction to the state court). State law cases addressing concurrent jurisdiction include *Kelly v. Kelly*, 759 N.W.2d 721 (N.D. 2009). Barbara Atwood mapped the jurisdictional framework for cases with overlapping tribal and state jurisdiction in 2009. *See* ATWOOD, *supra* note 24, at 81-90. *See also infra* notes 73 to 83 and accompanying text.

⁶⁴ *See generally* COHEN HANDBOOK, *supra* note 4, at § 7.02.

⁶⁵ *E.g.* *Nygaard v. Taylor*, 563 F. Supp. 3d 992 (D. S.D. Sept. 24, 2021) (allowing non-Indian fathers to challenge tribal court custody jurisdiction in federal court). *Cf.* *DeMent v. Oglala Sioux Tribal Ct.*, 874 F.2d 510 (8th Cir. 1989) (holding that a father was required to exhaust tribal remedies before challenging tribal court jurisdiction in federal court). *See also* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1053-67 (2005). Berger's survey of cases decided by the Navajo Nation appellate courts from 1969 to 2005 identified 122 cases involving non-Navajo litigants, six of which were child custody disputes. *See id.* at 1088-94.

even as they continue to maintain citizenship in their tribes.⁶⁶ State courts regularly exercise jurisdiction over family law matters involving tribal members, including individuals who are not domiciled on their reservation,⁶⁷ but also those living on a reservation that has been “diminished,”⁶⁸ or in a Native community that does not occupy Indian country,⁶⁹ or in states where Congress has extended civil adjudicatory authority to the state under P.L. 280 or a similar law.⁷⁰ State courts also routinely hear cases in which families include both Indian and non-Indian members,⁷¹ or members of different tribes.⁷²

⁶⁶ See Indian Child Welfare Act Proceedings; Final Rule, 25 CFR Part 23, 81 Fed. Reg. 38778, 38782-83 (June 14, 2016) (“Final Rule”) (authorized by 25 U.S.C. § 1952).

⁶⁷ *E.g.* Rolette Cnty. Soc. Serv. Bd. v. B.E., 697 N.E.2d 333 (N.D. 2005) (child support action) Wells v. Wells, 451 N.W.2d 402 (S.D. 1990) (divorce). *Cf.* Francisco v. State, 556 P.2d 1 (Ariz. 1976) (finding that the state court was without jurisdiction in a child support action against an alleged father who was a tribal member living on a reservation) State *ex rel.* Flammond v. Flammond, 621 P.2d 471 (Mont. 1980) (determining that the state court had no jurisdiction over a father where there were no significant off-reservation acts within the state).

⁶⁸ *E.g.* DeCouteau v. District Cnty. Ct., 420 U.S. 425 (1975) (state courts have civil and criminal jurisdiction over conduct of tribal members within reservation borders on non-Indian unallotted lands returned to public domain by Congress).

⁶⁹ See, *e.g.*, Baker I, 982 P.2d at 759-61 (deciding that the state has concurrent jurisdiction in family disputes involving members of Alaska Native communities).

⁷⁰ *E.g.* Charles v. Charles, 701 A.2d 650, 652-55 (Conn. 1997). *Cf.* Estate of Big Spring, 255 P.3d 121, 133-35 (Mont. 2011) (finding exclusive tribal jurisdiction in an inheritance case where the state had not assumed civil adjudicatory jurisdiction under PL 280). See generally RESTATEMENT, *supra* note 1, at §§ 33-34. On P.L. 280, see *supra* notes 26-27 and accompanying text. Note that P.L. 280 includes choice of law rules directing state courts to apply tribal ordinance or custom if it is not inconsistent with state law. 25 U.S.C. § 1322(c); 28 U.S.C. § 1360(c). See, *e.g.*, WASH. REV. CODE § 37.12.070. On choice of law issues more generally, see, *e.g.*, Baker I, 982 P.2d at 761 (ruling that tribal law applies to custody disputes adjudicated by tribal courts). See also Gary C. Randall & Katti Telstad, *Community Property Rules or American Indian Tribal Law: Which Prevails?*, 31 IDAHO L. REV. 1071 (1995).

⁷¹ *E.g.*, Lonewolf v. Lonewolf, 657 P.2d 627 (N.M. 1982); Harris v. Young, 473 N.W.2d 141 (S.D. 1991).

⁷² *E.g.*, Duwyenie v. Moran, 207 P.3d 754 (Ariz. Ct. App. 2009); State v. Peltier, 915 N.W.2d 115 (N.D. 2018); Doe v. Roe, 649 N.W.2d 566 (N.D. 2002).

1. Divorce, Custody, and Child Support

In cases that cross boundaries of reservations and tribal membership, tribal and state courts attempt to apply familiar conflict of laws principles,⁷³ including the divisible divorce rule.⁷⁴ State courts extend comity to tribal court rulings, and tribal courts have done the same with state court judgments.⁷⁵ A number of states and tribes have enacted comity statutes.⁷⁶ Comity

⁷³ See generally ATWOOD, *supra* note 24, at 90-109. Tribal court cases include Matter of A.B.V.M., 11 Am. Tribal L. 368 (Ft. Peck Ct. App. 2014) (affirming a ruling that the tribal court was an inconvenient forum). State court cases include Begay v. Miller, 222 P.2d 624 (Ariz. 1950) (extending recognition to a tribal divorce decree and dismissing state court proceedings); Garcia v. Gutierrez, 217 P.3d 591, 607 (N.M. 2009) (holding that the tribe and the state have concurrent jurisdiction in custody dispute); *In re Absher Children*, 750 N.E.2d 188 (Ohio Ct. App. 2001) (saying that the state court should have communicated with the tribal court before exercising custody jurisdiction). See also Jackie Gardina, *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts*, 35 AM. INDIAN L. REV. 1 (2010); James M. Janetta, *Reciprocity Between State and Tribal Legal Systems*, 71 MICH. B.J. 400, 403 (1992).

⁷⁴ E.g. Byzewski v. Byzewski, 429 N.W.2d 394 (N.D. 1988) (finding that the state court had jurisdiction to enter a divorce decree but not to address custody and support).

⁷⁵ Comity cases in state courts include *Baker I*, 982 P.2d at 761-64; John v. Baker, 30 P.3d 68 (Alaska 2001) (*Baker II*); Leon v. Numkena, 689 P.2d 566 (Ariz. Ct. App. 1984); Wells v. Wells, 451 N.W.2d 402 (S.D. 1990); Custody of Sengstock, 477 N.W.2d 310 (Wis. Ct. App. 1991). In tribal courts, see, e.g., Husband v. Wife, No. CV-FR-2000-0226, 3 Mash. App. 37, 2003 WL 25586059 (Mash. Pequot Ct. App. Jan. 24, 2003) (extending comity to a Connecticut divorce judgment). See generally RESTATEMENT, *supra* note 1, at § 35; ATWOOD, *supra* note 24, at 90-94. See also Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L. REV. 381, 387-89 (2004).

⁷⁶ See, e.g., Recognition and Enforcement of Tribal Court Civil Judgments Act, IOWA CODE §§ 626D.1-626D.8 (2022); S.D. CODIFIED LAWS § 1-1-25 (2022); 1991 WIS. STAT. § 806.245 (2022). Oklahoma's statute allows for extension of full faith and credit to tribal court judgments. 12 OKLA. STAT. ANN. § 728 (2022), applied in Barrett v. Barrett, 878 P.2d 1051 (Okla. 1994).

Some state courts have extended full faith and credit to tribal judgments. E.g., Jim v. CIT Fin. Servs. Corp., 533 P.2d 751 (N.M. 1975); *In re Buehl*, 555 P.2d 1334, 1342-43 (Wash. 1976). Other state courts have held that comity applies but full faith and credit does not. E.g., Begay v. Miller, 222 P.2d 624 (Ariz. 1950); Marriage of Red Fox, 542 P.2d 918 (Or. Ct. App. 1975). See generally ATWOOD, *supra* note 24, at 90-91; Janetta, *supra* note 73, at 402; Stoner & Orona, *supra* note 75, at 382-87.

may be denied on due process grounds, such as a lack of jurisdiction or failure to provide notice and an opportunity for a hearing.⁷⁷ The jurisdictional picture remains complex and unwieldy, however, with enormous variation among the tribes and states.

Uniform laws including the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)⁷⁸ have been drafted to apply to “an Indian nation or tribe” on the same basis as other states. A significant majority of states have enacted the UCCJEA provisions regarding tribes into their statutes,⁷⁹ and courts in these states apply the UCCJEA to cases involving children living on reservations.⁸⁰ However, as Barbara Atwood has thoughtfully explored, applying the UCCJEA can present serious difficulties, particularly when tribal lands do not fit the traditional definition of Indian country,⁸¹ or when tribal courts exercise jurisdiction over children who are members but do not reside on the reserva-

Tribal comity and recognition statutes include 9 NAVAJO CODE § 1718 (2022) (Foreign Orders and Comity); 23 MASHANTUCKET PEQUOT TRIBAL LAWS ch. 1 §§ 1-5 (2022) (Recognition of Foreign Judgments); SWINOMISH TRIBAL CODE § 8-02.060 (2022) (Recognition of Orders from Foreign Courts).

⁷⁷ See, e.g. *Duwyenie v. Moran*, 207 P.3d 754 (Ariz. Ct. App. 2009); *Langdeau v. Langdeau*, 751 N.W.2d 722, 734 (S.D. 2008); *In re J.D.M.C.*, 739 N.W.2d 796 (S.D. 2007).

⁷⁸ See UCCJEA § 104(b) (requiring state courts to treat tribes as states for jurisdictional purposes), § 104(c) (requiring recognition and enforcement of a child-custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA). Note that cases within the scope of ICWA are not subject to the UCCJEA. *Id.* at § 104(a). See generally ATWOOD, *supra* note 24, at 94-111.

⁷⁹ ATWOOD, *supra* note 24, at 99-100, identifies 37 states that have enacted UCCJEA § 104(b) and (c). In addition, these provisions have been enacted in Indiana, Michigan, Missouri, New Hampshire Utah and Wyoming. Seven jurisdictions have enacted the UCCJEA without 104(b) and (c): Alabama, Alaska, Colorado, Connecticut, the District of Columbia, Idaho and Vermont. Massachusetts has not yet enacted the UCCJEA. On the interaction between ICWA and the UCCJEA, see *Holly C. v. Tohono O’odham Nation*, 452 P.3d 725 (Ariz. Ct. App. 2019).

⁸⁰ E.g., *Langdeau*, 751 N.W.2d 722 (applying UCCJEA § 104(b) when the children’s home state was on the reservation); *Schirado v. Foote*, 785 N.W.2d 235 (N.D. 2010). See also *Garcia v. Gutierrez*, 217 P.3d 591, 595-602 (N.M. 2009) (Pueblo was not the home state for UCCJEA purposes); *Billie v. Stier*, 141 So.3d 584 (Fla. Dist. Ct. App. 2014) (concluding that the tribal court did not exercise jurisdiction in substantial conformity with the UCCJEA).

⁸¹ ATWOOD, *supra* note 24, at 100-04. See *supra* note 27 (definition of Indian country).

tion.⁸² For similar reasons, state and tribal courts have generally declined to apply the federal Parental Kidnapping Prevention Act (PKPA) in these cases, noting that it does not apply expressly to tribes.⁸³

Notably, in contrast to the PKPA, the federal Violence Against Women Act (VAWA) recognizes full tribal court civil jurisdiction to issue and enforce protection orders, and expressly requires states and tribes to give full faith and credit to protection orders in cross-border situations.⁸⁴ VAWA reauthorization in 2013 and 2022 expanded the opportunities for tribes to exercise criminal jurisdiction in domestic violence cases.⁸⁵ Some states have developed procedures for cooperation in these cases.⁸⁶

States have exercised jurisdiction in child support cases crossing reservation borders seeking future support or repayment of public assistance benefits.⁸⁷ The most recent version of the Uniform Interstate Family Support Act (UIFSA), in effect in every state, applies to tribes on the same basis as states.⁸⁸ About sixty tribes participate directly in the federal child support enforcement program.⁸⁹

⁸² *Id.* at 105-09; *see supra* note 61.

⁸³ 28 U.S.C. § 1738A (2022). *E.g.*, *Tulping v. Kruse*, 15 Am. Tribal L. 23 (Colville Tribal Ct. App. 2017); *Garcia v. Gutierrez*, 217 P.3d 591 (N.M. 2009). *Contra* *Marriage of Susan C. & Sam E.*, 60 P.3d 644, 648-50 (Wash. Ct. App. 2002). *See also* *Stoner & Orona*, *supra* note 75, at 399-400.

⁸⁴ 18 U.S.C. § 2265 (2022). *See Stoner & Orona*, *supra* note 75, at 389-96; Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Requirements of the Violence Against Women Acts*, 90 KY L.J. 123, 165-93 (2001-02). Professor Tatum notes the additional problem of when VAWA mandates recognition of tribal protection orders issued pursuant to divorce or child custody laws. *Id.* at 185-88.

⁸⁵ *See* 25 U.S.C. § 1304.

⁸⁶ *See generally* Dayna Olson, *Protecting Native Women from Violence: Fostering State-Tribal Relations and the Shortcomings of the Violence Against Women Act of 2013*, 46 HASTINGS CONST. L.Q. 821, 846-52 (2019).

⁸⁷ *E.g.* *New Mexico v. Jojola*, 660 P.2d 590 (N.M. 1983); *Jackson Cnty. v. Swayney*, 352 S.E.2d 413 (N.C. 1987). Where all the parties were tribal members, however, *Swayney* concluded that the tribal courts had exclusive jurisdiction to determine the child's paternity.

⁸⁸ UIFSA § 102(26) (defining "State" to include "an Indian nation or tribe"). Congress required states to enact UIFSA 2008 to participate in the federal child support program. 42 U.S.C. § 666(f).

⁸⁹ 42 U.S.C. § 455(f); 45 CFR Part 309. *See also* U.S. Dep't of Health & Human Servs., Office of Child Support Enforcement, *Tribal Agencies*, <https://>

2. ICWA Cases in State Courts

Like uniform and federal legislation, including the UCCJEA, VAWA, and UIFSA, ICWA sets the parameters for jurisdiction in a subset of family law cases that might be heard in either state or tribal court. In contrast to these statutes, it is far more carefully tailored to the unique complications of family law cases that bridge state and tribal jurisdiction.

Congress carefully defined a zone of cases in ICWA that fall within the exclusive jurisdiction of tribal courts.⁹⁰ In states where a federal law such as P.L. 280 has vested civil adjudicatory jurisdiction in state courts, these cases may be subject to concurrent jurisdiction in state and tribal courts.⁹¹ ICWA also requires that states extend full faith and credit to the “public acts, records, and proceedings of any Indian tribe applicable to Indian child custody proceedings” on the same basis that they would to another state.⁹²

For adoption and child welfare cases that fall within the scope of ICWA but outside the zone of exclusive tribal jurisdiction, ICWA sets the ground rules for concurrent state and tribal jurisdiction.⁹³ Proceedings in state court involving an Indian child who is not domiciled on the reservation are subject to transfer to tribal court at the request of either the child’s parent or the tribe, unless the tribal court declines jurisdiction, the parent objects to the transfer, or the state court concludes that there is good cause to retain jurisdiction.⁹⁴

www.acf.hhs.gov/css/child-support-professionals/tribal-agencies (last visited May 11, 2022). States pursuing child support may need to file in tribal courts. *See, e.g.,* Jackson Cnty. *ex rel.* Smoker v. Smoker, 459 S.E.2d 789 (N.C. 1995).

⁹⁰ 25 U.S.C. § 1911(a). *See Mississippi Band*, 490 U.S. at 36, 42-53. *See supra* notes 55-57. On exclusive tribal jurisdiction, *see also supra* notes 32-40.

⁹¹ *See Doe v. Mann*, 415 F.3d 1038, 1047-68 (9th Cir. 2005), *cert. denied* 547 U.S. 1111 (2006) (concluding that actions under California child dependency statute are within P.L. 280’s civil adjudicatory jurisdiction). ICWA authorizes tribes in P.L. 280-type states to reassume jurisdiction over child custody proceedings. 28 U.S.C. § 1918. *See also* Cross & Miller, *supra* note 58, at 17-18.

⁹² 25 U.S.C. § 1911(d).

⁹³ 25 U.S.C. § 1911(b). *See generally* RESTATEMENT, *supra* note 1, at § 40.

⁹⁴ 25 U.S.C. § 1911(b); 25 C.F.R. § 23.118. *See generally* GAINES-STONER ET AL., *supra* note 3, at 84-99 (discussing transfer jurisdiction); RESTATEMENT, *supra* note 1, at § 44. Some state courts have refused to transfer cases that come

The content of this “good cause” standard has been disputed, particularly when courts have seemed to treat this as a purely discretionary best interests determination.⁹⁵ Since 1979, the Bureau of Indian Affairs guidelines for state courts have included a list of factors for determining when “good cause” exists to deny a transfer.⁹⁶ These guidelines were followed by binding regulations promulgated by the BIA in 2016.⁹⁷ Courts and legislatures in a number of states have made efforts to implement the BIA’s approach to the good cause determination,⁹⁸ though courts in several other states have opposed it.⁹⁹

Procedurally, ICWA requires notice to “the parent or Indian custodian and the Indian child’s tribe” in any “involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved.”¹⁰⁰ The notice rule is an important component of the concurrent jurisdiction system that

within ICWA but do not involve what they characterize as an “existing Indian family.” See *infra* notes 154-158 and accompanying text.

⁹⁵ ATWOOD, *supra* note 24, at 173-74.

⁹⁶ Bureau of Indian Affairs, Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67591 (Nov. 26, 1979) (BIA Guidelines). These were updated in 2015 at 80 Fed. Reg. 10146 (Feb. 25, 2015).

⁹⁷ Final Rule, *supra* note 66. In *Brackeen* a majority of the *en banc* Fifth Circuit upheld most of the aspects of the Final Rule challenged under the Administrative Procedure Act. *Brackeen*, 994 F.3d at 269. A different majority held invalid portions of the Final Rule that implemented statutory provisions these judges also found to be invalid. See *infra* note 106.

⁹⁸ See *Interest of T.F.*, 972 N.W.2d 1, 13 (Iowa 2022) (noting the split and citing cases). In addition to Iowa, caselaw from Colorado, Illinois, Missouri, Nebraska, North Dakota, Utah, and Texas holds that a best interests determination is not appropriate at the jurisdictional stage, while cases from Montana and Oklahoma point in the other direction. See *id.* at 15-16. Cf. *Children of Shirley T.*, 199 A.3d 221 (Me. 2019); *Thompson v. Fairfax Cnty. Dep’t of Soc. Servs.*, 747 S.E.2d 838, 850-52 (Va. Ct. App. 2013).

⁹⁹ See *supra* note 98. An *en banc* majority of the Fifth Circuit concluded that the requirement in the Final Rule that good cause to transfer be established by clear and convincing evidence violated the APA. *Brackeen*, 994 F.3d at 429-31 (Duncan, J.) The United States did not seek certiorari on this issue. Petition for a Writ of Certiorari at 14 n. 1, *Haaland v. Brackeen*, No. 21-376 (Sept. 3, 2021).

¹⁰⁰ 25 U.S.C. § 1912(a); 25 CFR § 23.11. See generally *GAINES-STONER ET AL.*, *supra* note 3, at 116-23. See also *In re Isaiah W.*, 373 P.3d 444 (Cal. 2016) (holding that a juvenile court has a continuing duty to inquire into a child’s Indian status).

Congress established. The statute also gives the child's Indian custodian and tribe a right to intervene at any point in the proceeding.¹⁰¹ It provides protections for parental rights, including access to court-appointed counsel for an indigent parent or Indian custodian,¹⁰² and the right to examine reports and documents.¹⁰³

Beyond procedural protections, ICWA provides substantive protections, including a requirement that active efforts be made to prevent breakup of the Indian family before a state court may order a foster care placement or termination of parental rights.¹⁰⁴ There must be "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" before parental rights may be terminated.¹⁰⁵ These substantive protections and ICWA's notice requirement were challenged in *Brackeen* under the anticommandeering doctrine of the Tenth Amendment.¹⁰⁶ The challenged provisions have been defended by the United States as within the scope of federal power in Indian affairs and operating like any other federal law with preemptive effect, conferring substantive rights on private actors.¹⁰⁷

¹⁰¹ 25 U.S.C. § 1911(c). *See generally* GAINES-STONER ET AL., *supra* note 3, at 123-24.

¹⁰² 25 U.S.C. § 1912(b). *See generally* GAINES-STONER ET AL., *supra* note 3, at 125-26.

¹⁰³ 25 U.S.C. § 1912(c).

¹⁰⁴ 25 U.S.C. § 1912(d); 25 CFR § 23.120. *See generally* GAINES-STONER ET AL., *supra* note 3, at 128-35. *Cf.* 42 U.S.C. § 671(a)(15) (requiring states to make reasonable efforts to prevent or eliminate the need to remove children from their homes).

¹⁰⁵ 25 U.S.C. § 1912(e) & (f); 23 CFR §§ 23.121-122. *See generally* GAINES-STONER ET AL., *supra* note 3, at 135-41. *Cf.* *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring clear and convincing evidence for termination of parental rights).

¹⁰⁶ The United States asked for review on this question, after an *en banc* majority of the Fifth Circuit concluded that § 1912(a) (d) (e) & (f) violate the Tenth Amendment. *Brackeen*, 994 F.3d at 268-69. The Fifth Circuit was equally divided with respect to other provisions that the Supreme Court will also consider.

¹⁰⁷ Petition for a Writ of Certiorari at 16-20, *Haaland v. Brackeen*, No. 21-376 (Sept. 3, 2021), 2021 WL 4080795

As pointed out by the Supreme Court in the *Mississippi Band* case, state courts hearing cases within ICWA must follow the statute's placement preferences in the absence of good cause to the contrary. These give priority for adoptive or foster care placement of Indian children, to members of the child's extended family, to other members of the child's tribe, and to other Indian families.¹⁰⁸ Cases in a number of states have disputed the good cause standard for avoiding ICWA's placement preferences, with some state courts approaching this as a best interests determination,¹⁰⁹ and others rejecting this approach.¹¹⁰ The central equal protection question in *Brackeen* concerns the third priority category: placement with other Indian families.¹¹¹

Many state courts and legislatures have demonstrated strong support for ICWA, including through enactment of state-level ICWA statutes.¹¹² Most controversies under ICWA since the *Mississippi Band* ruling have involved cases that fall outside the tribes' exclusive jurisdiction, in state courts that have been reluctant to follow the other requirements of the statute.¹¹³ Barbara Atwood has pointed out that judges seem more likely to hesitate

¹⁰⁸ 25 U.S.C. § 1915 (a) & (b); 25 CFR §§ 23.129 – 23.132. See *Mississippi Band*, 490 U.S. at 40 n.13. See also ATWOOD, *supra* note 24, at 181-82.

¹⁰⁹ See ATWOOD, *supra* note 24, at 219-23; see generally GAINES-STONER ET AL., *supra* note 3, at 191-213.

¹¹⁰ *In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994), *cert. denied sub nom. Campbell v. Leech Lake Band of Chippewa Indians*, 513 U.S. 1127 (1995); *In re C.H.*, 997 P.2d 776, 779-82 (Mont. 2000). Cf. *In re M.K.T.*, 368 P.3d 771, 787-88 (Okla. 2016) (“The ICWA placement preferences are designed to achieve the best interests of the child and they are consistent with state law.”). See ATWOOD, *supra* note 24, at 223-28.

¹¹¹ See *Brackeen*, 994 F.3d at 268 (the district court ruling striking these preferences was affirmed without precedential opinion by an equally divided en banc court). See *infra* part II.B. Note that other federal laws require states to give preference to placements with adult relatives in child welfare cases. See 42 U.S.C. § 671(a)(19) (listing requirements for state foster care and adoption assistance plans).

¹¹² E.g. CAL. WELF. & INST. CODE §§ 224-224.6 (2022); IOWA CODE §§ 232B.1-232B.14 (2022); MICH. COMP. LAWS §§ 712B.1712B.41 (2022); MINN. STAT. §§ 260.751-260.835 (2022); OKLA. STAT. tit. 10 §§ 40.1-40.9 (2022); WASH. REV. CODE §§ 13.38.010-13.38.190 (2022). See generally GAINES-STONER ET AL., *supra* note 3, at 27-28 & App. D (listing ICWA-related statutes in 36 states and the District of Columbia).

¹¹³ See Mall, *supra* note 59, at 173-190 (discussing evolving ICWA case law in Arizona and South Dakota).

in transferring jurisdiction to the tribe or following the placement preferences in cases involving an Indian child who has lived for a significant period with a particular caregiver, and cases involving children of mixed heritage, who are often described as “part Indian.”¹¹⁴ She and others have written about these flashpoints, including the position of some state courts that ICWA should be limited to situations involving the breakup of an “existing Indian family.”¹¹⁵

These tensions were clearly at play in the Supreme Court’s ruling in *Adoptive Couple v. Baby Girl*,¹¹⁶ where Justice Alito’s majority opinion began by noting that the Indian child involved in the case had a small percentage of Cherokee ancestry, though there was no question that she qualified for membership under the rules of the Cherokee Nation.¹¹⁷ The case involved a child born in Oklahoma to a non-Indian mother, who placed her for adoption with a couple in South Carolina, and a Cherokee biological father who objected to the adoption and sought custody. The state courts in South Carolina followed the requirements of ICWA, eventually denying the adoption and awarding custody to the child’s father.¹¹⁸ The Supreme Court reversed, with a majority opinion that interpreted ICWA’s protections against involuntary termination of parental rights to exclude Indian parents who have “never had legal or physical custody of [the child] at the time of the adoption proceedings.”¹¹⁹ This construction of the statutory language was strongly disputed by four of the Justices, however, including Justice Scalia,¹²⁰ and raised serious concerns from both a family law and Indian law perspective.¹²¹

114 See generally ATWOOD, *supra* note 24, at 167-69, 202, 221-23.

115 See *infra* notes 154-158 and accompanying text.

116 570 U.S. 637 (2013).

117 *Id.* See generally Berger, *supra* note 25, at 325-29.

118 *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012). For important further details, see Berger, *supra* note 25, at 301-10.

119 *Adoptive Couple*, 570 U.S. at 650.

120 Justice Scalia agreed that the reading of the disputed sections of the statute in Justice Sotomayor’s dissent was “much more in accord with the rest of the statute,” and commenting that the majority opinion “needlessly demeans the rights of parenthood.” *Id.* at 2571-72 (Scalia, J., dissenting).

121 See generally Berger, *supra* note 25.

II. Equal Protection and Federal Indian Law

A. *Equal Protection and Federal Indian Law*

One of the enduring ironies of federal Indian law is that the first equal protection case to reach the Supreme Court was brought by non-Indian employees of the Bureau of Indian Affairs, complaining about a statute giving employment preference in the BIA to qualified Indian employees.¹²² In *Morton v. Mancari*, the United States was required to defend a rule that favored Native Americans, rather than its many actions harming Native communities.¹²³ In a unanimous opinion upholding the statute, the Supreme Court invoked the “unique legal status of Indian tribes under federal law and . . . the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes.”¹²⁴ The Court wrote:

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, 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 Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government would be jeopardized.¹²⁵

The Court went on to reject the characterization of the employment preference as a racial one. It emphasized that the preference was narrowly targeted, “reasonably designed to further the cause of Indian self-government and make the BIA more responsive to its constituent groups.”¹²⁶ Moreover, the Court emphasized that the preference “is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA

¹²² *Morton v. Mancari*, 417 U.S. 535 (1974). See generally COHEN HANDBOOK, *supra* note 4, at 410-12; RESTATEMENT, *supra* note 1, at § 9.

¹²³ Note that this was also the Supreme Court’s first consideration of an affirmative action program, coming four years before its ruling in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

¹²⁴ *Morton*, 417 U.S. at 551.

¹²⁵ *Id.* at 552.

¹²⁶ *Id.* at 554.

in a unique fashion.”¹²⁷ Pointing to previous cases in which it had upheld “legislation that singles out Indians for particular and special treatment,” the Court concluded that the employment preference was reasonable and “rationally designed to further Indian self-government.”¹²⁸ It provided this guidance for future cases: “As long as the special treatment can be tied rationally to the fulfillment of Congress’s unique obligation toward the Indians, such legislative judgments will not be disturbed.”¹²⁹

Within a few years, the Court had applied the *Morton* test in a series of cases.¹³⁰ One ground for its ruling in *Fisher v. District Court*¹³¹ was that the Tribe’s exclusive adoption jurisdiction “does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.”¹³² Taking *Morton* a step further, the Court wrote: “Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.”¹³³

With *United States v. Antelope*,¹³⁴ the Court extended *Morton* to uphold federal criminal jurisdiction in “Indian country,”¹³⁵ in a situation where the defendants would have faced less serious charges under state law.¹³⁶ The Court repeated its conclusion

¹²⁷ *Id.* The Court quoted the criteria in a footnote: to be eligible for the preference in appointment, promotion, and training, “an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.” *Id.* at 553 n.24.

¹²⁸ *Id.* at 555.

¹²⁹ *Id.*

¹³⁰ See generally Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165 (2010); Sarah Krakoff, *Inextricably Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012).

¹³¹ 424 U.S. 382 (1976) (per curiam). See *supra* notes 52-53 and accompanying text.

¹³² *Id.* at 390.

¹³³ *Id.* at 390-91 (citing *Morton*).

¹³⁴ 430 U.S. 641 (1977).

¹³⁵ See *supra* note 27.

¹³⁶ As enrolled tribal members charged with a crime committed within the boundaries of their reservation, the defendants were subject to the Major

that “federal regulation of Indian affairs” is not based on an impermissible racial classification, noting: “Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d’Alene Tribe.”¹³⁷

During the same term that it decided *Antelope*, the Supreme Court cited *Morton* in a case challenging Congress’s distribution of funds awarded by the Indian Claims Commission for breaches of an 1854 treaty with the Delaware nation. In *Delaware Tribal Business Committee v. Weeks*,¹³⁸ a group of Delaware descendants, whose ancestors had severed their relations with the tribe at the time of the treaty, challenged their exclusion from the fund distribution. After noting its precedents giving Congress broad power “to prescribe the distribution of property of Indian tribes,” the Court concluded that its distribution plan was “tied rationally to the fulfillment of Congress’s unique obligation toward the Indians.”¹³⁹

Morton emphasized tribal membership (in a federally-recognized tribe) as the basis for classifications in federal statutes, describing this as “political” rather than “racial.”¹⁴⁰ Federal recognition reflects the government-to-government relationship between the United States and a Native nation, which may originate in a treaty relationship, an act of Congress, or another legal process.¹⁴¹ Recognition of tribes and tribal members is a

Crimes Act, 18 U.S.C. § 1153 rather than Idaho law. The federal statute includes a felony murder rule, which Idaho law does not. 430 U.S. at 642-44. See generally COHEN HANDBOOK, *supra* note 4, at § 9.02.

¹³⁷ *Id.* at 646. In a footnote, the Court noted but put off for another day the question of whether the Major Crimes Act could be applied constitutionally to a non-enrolled Indian defendant living on the reservation. *Id.* at 646 n.7. This is an enormously complex and important question. See Fletcher, *supra* note 14, at 512-13. Cf. *Oklahoma v. Wadkins*, No. 21-1193 (MCA case – cert pending, <https://www.supremecourt.gov/docket/docketfiles/html/public/21-1193.html>).

¹³⁸ 430 U.S. 73 (1977).

¹³⁹ *Id.* at 85. Although the Justices did not disagree as to the appropriate scrutiny, they were not all persuaded that the legislative classification was valid.

¹⁴⁰ *Morton*, 417 U.S. at 553-54.

¹⁴¹ See generally COHEN HANDBOOK, *supra* note 4, at § 3.02; RESTATEMENT, *supra* note 1, at § 2. The process by which indigenous groups may petition for federal recognition is detailed at: Procedures for Federal Acknowledgment of Indian Tribes, 25 C.F.R. pt. 83 (2016). For the current list of federally-recognized tribes, see Indian Entities Recognized and Eligible to

political question, within the scope of Congress's powers in Indian affairs,¹⁴² and the definition of "Indian" comes within this power.¹⁴³ The federal process of defining and recognizing tribes was closely tied historically to the process of extending control over Native people and their land and resources.¹⁴⁴

Some writers have expressed discomfort with the fact that tribal membership criteria, and federal Indian law statutes, typically incorporate a genetic dimension in the form of a lineal descent rule or minimum blood quantum.¹⁴⁵ Scholars have explored the ways in which this aspect of membership rules is an artifact of federal policies and law, including Supreme Court decisions, that imposed racial classifications on Native Americans and defined tribes in explicitly racial (and racist) terms.¹⁴⁶ Under ICWA, Native descent is not sufficient to bring a child within the scope of the statute, which also requires that the child or a parent be a tribal member.¹⁴⁷

The decisions in *Morton*, *Fisher*, and *Antelope* were all unanimous, and the Supreme Court has never questioned these precedents. In other contexts, however, the Court has declined to extend the *Morton* approach. For example, it concluded that *Morton* did not apply to state legislation challenged under the

Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019). See also Sarah Krakoff, *They Were Here First: Tribes, Race and the Constitutional Minimum*, 69 STAN. L. REV. 491, 529-42 (2017).

¹⁴² See Fletcher, *supra* note 14, at 499-500, 508-12.

¹⁴³ See *id.* at 512-16, 532-44. See also Gregory Ablavsky, "With the Indian Tribes:" Race, Citizenship, and Original Constitutional Meanings, 70 STAN. L. REV. 1025 (2018) (discussing understandings of the term "Indian" when the Constitution was drafted).

¹⁴⁴ See Krakoff, *supra* note 130.

¹⁴⁵ See generally Fletcher, *supra* note 14, at 513-14. Sarah Krakoff has pointed out that since *Mancari* the federal government has eliminated supplemental blood quantum requirements from its criteria for participation in federal programs. Krakoff, *supra* note 130, at 1083-85.

¹⁴⁶ *E.g.*, United States v. Sandoval, 238 U.S. 28, 46 (1913); United States v. Rogers, 45 U.S. 567 (1846). See generally Bethany R. Berger, "Power over This Unfortunate Race": Race, Politics and Indian Law in United States v. Rogers, 45 WM. & MARY L. REV. 1957 (2004); Fletcher, *supra* note 14, at 538-44; Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002). See also Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 969-74 (2011).

¹⁴⁷ See *supra* note 3. Enrollment requires an affirmative act. See also ATWOOD, *supra* note 24, at 192-93.

Fifteenth Amendment in *Rice v. Cayetano*.¹⁴⁸ In *United States v. Lara*,¹⁴⁹ dicta suggest that some members of the Court believe that tribes should not be permitted to exercise jurisdiction over nonmember Indians within their reservations on equal protection grounds, despite Congress's approval, in circumstances when the Court has determined that tribes cannot exercise jurisdiction over non-Indians.¹⁵⁰ Justice Alito's majority opinion in *Adoptive Couple v. Baby Girl* also included dicta signaling his belief that a different interpretation of the ICWA provision considered there "would raise equal protection concerns."¹⁵¹ Ironically, the Court's language in *Adoptive Couple* suggests that several Justices allowed their perceptions of race and Indianness to influence their statutory construction.¹⁵²

B. ICWA and Equal Protection

When it enacted ICWA, Congress included findings that clearly articulate the ways it understood the statute to fulfill its unique obligation to Indian tribes.¹⁵³ In the years that followed, however, courts in several states began to limit ICWA's application to cases in which the child had been "a member of an Indian home or culture."¹⁵⁴ Some courts rooted this "existing Indian family" rule in equal protection principles, suggesting that the

¹⁴⁸ 528 U.S. 495, 514 (2000).

¹⁴⁹ *United States v. Lara*, 541 U.S. 193 (2004).

¹⁵⁰ *Id.* at 209; *see also* 211-14 (Kennedy, J., concurring). *See also* Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005).

¹⁵¹ 570 U.S. 637, 656 (2013). *See also supra* notes 118-120 and accompanying text. Looking ahead, Justice Alito's opinion in *Adoptive Couple* was joined by two members of the current Court, Chief Justice Roberts and Justice Thomas. The dissenters included Justices Sotomayor and Kagan, and four new Justices will have joined the Court by the time *Haaland* is argued.

¹⁵² *See Berger, supra* note 25, at 325-29, 332-33.

¹⁵³ 25 U.S.C. § 1901; *Mississippi Band*, 490 U.S. at 32-37.

¹⁵⁴ *E.g.*, *Matter of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 54 (Kan. 2009). Cases are collected in ATWOOD, *supra* note 24, at 204-09, and Krakoff, *supra* note 141, at 515 n.142. *See also* GAINES-STONER ET AL., *supra* note 3, at 61-63. The *Mississippi Band* case, rejecting the state's argument that ICWA did not apply, seems clearly inconsistent with this reading of the law. *See In re Bridget R.*, 49 Cal. Rptr. 2d 507, 521-22 (Ct. App. 1996) *cert. denied sub nom. Cindy R. v. James R.*, 519 U.S. 1060 (1997) (holding that the ICWA applies even when the Indian child has not lived in an Indian family).

statute was only constitutional when applied to children whose parents had “a significant social, cultural, or political relationship with an Indian community.”¹⁵⁵

There are many arguments against the doctrine, not least that it contradicts the plain language of the statute. Moreover, the suggestion that cases such as *Morton*, *Fisher*, and *Antelope* upheld classifications based on a social, cultural, or political status of “Indian” rather than on tribal membership seems impossible to square with the language in those decisions. As scholars have pointed out, courts taking this approach are imposing their own views as to whether a parent or child or family is sufficiently “Indian” to qualify for protection.¹⁵⁶ A majority of states have now rejected this approach by legislation¹⁵⁷ or judicial opinion.¹⁵⁸

The broad constitutional challenges pressed in *Brackeen* reflect a longstanding effort by ICWA opponents to overturn the statute.¹⁵⁹ Plaintiffs’ initial complaint asked the federal district court to declare the entire statute facially unconstitutional, and

¹⁵⁵ See *Bridget R.*, 49 Cal. Rptr. 2d at 527-28. California later enacted a statute rejecting the exception, see CAL. WELF. & INST. CODE §§ 170, 224, but its intermediate appellate courts remain divided. Compare *In re Santos Y.*, 112 Cal Rptr. 2d 692 (Cal. App. 2001) (applying the exception) with *In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Cal. App. 2007) (rejecting the exception). See also Goldberg, *supra* note 146, at 1382-88, 1393.

¹⁵⁶ See, e.g., *Bridget R.*, 49 Cal. Rptr. 2d at 515-16. See generally Suzianne D. Painter-Thorne, *One Step Forward, Two Steps Back: How the “Existing Indian Family” Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 371-80 (2009). The 2016 Final Rule provides that states may not consider these factors in determining whether ICWA applies to a proceeding. 25 C.F.R. § 23.103.

¹⁵⁷ See *supra* note 112.

¹⁵⁸ See, e.g., *Adoption of T.A.W.*, 383 P.3d 492, 505-06 (Wash. 2016). Beyond California, where appellate courts are divided, courts in twenty other states have rejected the doctrine, including Alaska, Arizona, Idaho, Illinois, Michigan, New Jersey, New York, Oklahoma, Oregon, South Dakota, Utah, and Washington. See *ATWOOD*, *supra* note 24, at 204 n.17. Courts in six states apply the doctrine in some circumstances, including Alabama, Kentucky, Louisiana, Missouri, Nevada, and Tennessee. See *id.* at 204 n.8. See also generally *RESTATEMENT*, *supra* note 1, at § 38 cmt. D.

¹⁵⁹ On this litigation campaign see Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 625-26 (2019) (listing cases), and Caroline M. Turner, Note, *Implementing and Defending the Indian Child Welfare Act Through Revised State Requirements*, 49 COLUM. J. L. & SOC. PROBS 501, 514-16 (2016). See

the trial judge was sympathetic.¹⁶⁰ The *en banc* Fifth Circuit Court of Appeals subsequently reversed the lower court and rejected these broad claims. A majority of the court concluded that ICWA was within Congress's powers in Indian affairs,¹⁶¹ and that the statutory definition of "Indian child," based on eligibility for tribal membership, did not violate the equal protection principle of the Fifth Amendment.¹⁶²

Plaintiffs in *Brackeen* and similar cases have urged that classifications based on tribal membership should be treated as racial classifications and subjected to strict scrutiny for equal protection purposes. They point to the fact that tribal membership criteria typically incorporate a genetic dimension, based on lineal descent from an enrolled member or minimum blood quantum.¹⁶³ This was also true of the federal statutes considered in *Morton* and *Antelope*, however, and the *en banc* majority in *Brackeen* squarely rejected this argument.¹⁶⁴ As noted there, citizenship based on descent is a common feature of citizenship laws in many nations.¹⁶⁵

The individual plaintiffs in *Brackeen* also pressed a more focused equal protection challenge to ICWA's placement preferences.¹⁶⁶ The *en banc* Fifth Circuit was equally divided on one aspect of this issue: placement provisions in ICWA that prioritize placement for Indian children with "other Indian families," or "Indian foster homes," when placement with another member of the child's family or tribe is not possible.¹⁶⁷ The Supreme Court agreed to consider this issue, subject to its determination of the plaintiffs' standing to challenge the statute.¹⁶⁸ Under *Morton*, the

also *ATWOOD*, *supra* note 24, at 34-36; *Berger*, *supra* note 25, at 353-56; *Krakoff*, *supra* note 141, at 509-17.

¹⁶⁰ See *Brackeen v. Zinke*, 338 F. Supp. 3d 249 (N.D. Tex. 2018).

¹⁶¹ *Brackeen*, 994 F.3d at 299-316.

¹⁶² *Id.* at 332-45.

¹⁶³ *E.g. Brackeen*, 338 F. Supp. 3d at 533-34. See *supra* notes 145-147 and accompanying text. See generally *ATWOOD*, *supra* note 24, at 34-36; *Krakoff*, *supra* note 141, at 509-17.

¹⁶⁴ *Brackeen*, 994 F.3d at 336-40.

¹⁶⁵ *Id.* at 338 n.51.

¹⁶⁶ See *supra* notes 108-111 and accompanying text.

¹⁶⁷ These are 25 U.S.C. § 1915(a)(3); 25 U.S.C. § 1915(b)(iii).

¹⁶⁸ Compare *Brackeen*, 994 F.3d at 400-01 (Duncan opinion) with *Brackeen*, 994 F.3d at 340-345 (Dennis opinion). Although a substantial majority of

question is whether these preferences “are rationally related to legitimate government interests and therefore consistent with equal protection.”¹⁶⁹

Congress’s determination in 1978 to extend the placement preferences beyond the child’s particular tribe reflected the artificial nature of the “tribe” as a construct and the realities of modern life. As is well known, the list of federally-recognized tribes often does not map cleanly onto the cultural and language groupings of Native people.¹⁷⁰ European explorers and colonists classified all the indigenous people they encountered as Indians, but Native communities were highly diverse and did not identify as part of a single culture or race.¹⁷¹ While this diversity continues today, centuries of contact – and a legal regime that regulated and defined some people as “Indians” and some groups as “tribes” – also built a stronger sense of shared identity among Native people, shaped by common experiences such as reservation life, government-run boarding schools, and mass relocation to urban areas.¹⁷²

Native communities are not insular, and there are significant rates of intermarriage among groups, with many families often having a kind of mixed tribal citizenship. For example, the *Santa Clara Pueblo* case involved children with a Navajo father and Santa Clara mother.¹⁷³ Reservation communities include many

the en banc court concluded that the individual plaintiffs had standing to bring this challenge, a number of judges dissented. See *Brackeen*, 994 F.3d at 267. In addition, as noted *supra* note 106, the Court will consider the state plaintiffs’ argument that various requirements in ICWA violate the anticommandeering doctrine of the Tenth Amendment. A majority of the en banc Fifth Circuit sustained this challenge as to several provisions, and the court was equally divided with respect to other provisions. *Brackeen*, 994 F.3d at 268 (explaining the ruling and the lack of precedential effect).

¹⁶⁹ Petition for a Writ of Certiorari at 26-30, *Haaland v. Brackeen*, No. 21-376 (Sept. 3, 2021), 2021 WL 4080795

¹⁷⁰ See Goldberg, *supra* note 146, at 1381-82. Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC’Y REV. 1123, 1128 (1994), argues that non-Indian law powerfully shaped the forms of Indian group life including tribes, tribal governments, and tribal sovereignty, as well as supra- and intertribal coalition and cooperation.

¹⁷¹ See Goldberg-Ambrose, *supra* note 170, at 1140.

¹⁷² *Id.* at 1139-45.

¹⁷³ See *supra* notes 47-48 and accompanying text.

residents who are members of other tribes, and Congress has recognized this reality in other contexts such as tribal criminal jurisdiction over nonmember Indians.¹⁷⁴

In *Brackeen*, the United States argued that ICWA's placement preferences satisfy the test in *Morton*, based on the federal government's "substantial interests in the welfare of Indian children and their parents, the integrity of Indian families, and 'the stability and security of Indian tribes,'"¹⁷⁵ and its "sound interest in 'protect[ing] the best interests of Indian children' by promoting the placement of those children in settings that are most likely to foster a connection with their Indian tribes and culture."¹⁷⁶ It pointed out that that "social, cultural, and political standards of an Indian community may transcend tribal lines," because many tribes that are now treated as separate political units share a common history and linguistic, cultural, and religious traditions.¹⁷⁷ Moreover, "because of intermarriage and social connections among tribal communities, it is not uncommon for an Indian child to have biological parents who are enrolled in different tribes."¹⁷⁸

The United States argued that these factors provide the rational basis for Congress's conclusion that the preferences for placement in "other Indian families" and "Indian foster homes" would promote an Indian child's connection to those aspects of the child's own tribe.¹⁷⁹ Congress could rationally conclude that placing an Indian child with a member of another tribe would serve the purposes of the statute because the child "would be more likely to be surrounded by others – even if not members of the child's tribe – who had gone through the process of deciding whether to maintain a connection to their own tribe and who personally understood the importance of the decision."¹⁸⁰ For

¹⁷⁴ This includes the 1990 *Duro-fix* legislation, amending 25 U.S.C. § 1301(4). See generally Fletcher, *supra* note 14, at 537-38.

¹⁷⁵ Petition for a Writ of Certiorari at 27, *Haaland v. Brackeen*, No. 21-376 (Sept. 3, 2021), 2021 WL 4080795 (citing 25 U.S.C. § 1902).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* See also *Brackeen*, 994 F.3d at 345 (Dennis, J.).

¹⁷⁸ Petition for a Writ of Certiorari at 27, *Haaland v. Brackeen*, 2021 WL 4080795.

¹⁷⁹ *Id.* at 27.

¹⁸⁰ *Id.* at 28.

their part, the *Brackeen* plaintiffs relied primarily on the argument that ICWA was facially unconstitutional.¹⁸¹

The tribal defendants and intervenors in the *Brackeen* litigation, and the tribes participating as amici, pointed to the history of abusive state child welfare practices that prompted Congress to enact ICWA.¹⁸² They linked ICWA's preferences for placement with other Indian families to the role of extended families addressed in Congressional hearings, and emphasized the ways in which "[p]lacement with an Indian family, even one affiliated with a Tribe different from the child's Tribe," helps to protect and preserve the child's identity as an Indian.¹⁸³ The Tribes also argued that implementation of ICWA has improved state child welfare services for Indian families and fostered important tribal-state cooperation in these cases.¹⁸⁴ Notably, this includes the state of Texas, one of the *Brackeen* plaintiffs, which submitted favorable comments during the BIA's ICWA rulemaking process and enacted legislation to implement ICWA in 2015 with strong bipartisan support.¹⁸⁵

Despite the fact that Indiana, Louisiana, and Texas sought to have ICWA declared unconstitutional, a much larger group of states supported the federal government and the Tribes.¹⁸⁶ The 25 amici states, "home to 86 percent of federally recognized Indian Tribes," described ICWA as a "critical tool for protecting Indian children and fostering state-tribal collaboration."¹⁸⁷ Their brief highlights child welfare agreements between tribes and

¹⁸¹ See Petition for a Writ of Certiorari at 19-24, *Texas v. Haaland*, No. 21-378 (Sept. 3, 2021); 2021 WL 4122397; Consolidated Brief in Opposition at 15-17, *Haaland v. Brackeen*, No. 21-376 (Dec. 8, 2021); 2021 WL 5983316.

¹⁸² See Petition for Writ of Certiorari, *Cherokee Nation v. Brackeen*, No. 21-377 (Sept. 3, 2021); Brief of 180 Indian Tribes, et al. at 9-15, *Cherokee Nation v. Brackeen*, No. 21-377 (Oct. 8, 2021) 2021 WL 4817964 ("Tribal Amicus Brief").

¹⁸³ Tribal Amicus Brief, *supra* note 182, at 17.

¹⁸⁴ *Id.* at 17-24.

¹⁸⁵ *Id.* at 20-24.

¹⁸⁶ See Brief for the States of California et al. as Amici Curiae in Support of Petitioners, *Haaland v. Brackeen*, No. 21-376 (Oct. 8, 2021), 2021 WL 4803866 (amicus brief for 25 states and the District of Columbia supporting the US and Tribal parties) (State Amicus Brief). Ohio has supported the *Brackeen* plaintiffs. See Brief of Amicus Curiae State of Ohio Supporting Petitioners, *Texas v. Haaland*, No. 21-378 (Oct. 2021) 2021 WL 4594795.

¹⁸⁷ State Amicus Brief, *supra* note 186, at 1-9.

states including Alaska, Arizona, Minnesota, New Mexico, Utah, and Washington, expressly authorized by ICWA,¹⁸⁸ as well as specialized ICWA courts or procedures in Arizona, California, Montana, and New Mexico. Many of these states have also enacted statutes implementing or extending the protections ICWA provides.¹⁸⁹ The American Bar Association also supports full implementation of ICWA, and reaffirmed its support after the district Court's ruling in *Brackeen*.¹⁹⁰

III. Tribal Nations, States, and Family Law

The Supreme Court has upheld Congress's power to enact legislation with special application to Native people and nations for almost two centuries. Since *Morton v. Mancari*, the Court has required as a matter of equal protection that such legislation must be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians."¹⁹¹ With ICWA, Congress made the connection between its obligation and the statute explicit, after extensive hearings to establish the need for legislation. As recognized by the Fifth Circuit in *Brackeen*, ICWA clearly satisfies the traditional *Morton* test.

In *Haaland v. Brackeen*, equal protection analysis combines with another longstanding doctrine of federal Indian law: the rule of exclusive federal jurisdiction and preemption of state authority. Here as well, the Court has deferred to Congress, allowing Congress to define the boundaries of tribal and state authority.¹⁹² There are clear parallels to international family law, another area in which important national interests have led Congress to ratify treaties with other governments and enact implementing legislation that is binding on states under the Supremacy Clause. Adop-

¹⁸⁸ *Id.* at 7 (citing 25 U.S.C. § 1919(a)).

¹⁸⁹ *Id.* at 8. *See also supra* note 112 and accompanying text.

¹⁹⁰ American Bar Association, Resolution 115C (August 13, 2019), available at: <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/115c-annual-2019.pdf>. *See also* American Bar Association, *Indian Child Welfare Act Resolution* (August 2013) (advocating various measures to increase state-tribal collaboration and support tribal child protection programs, available at: https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/indian-child-welfare-act-resolution/).

¹⁹¹ *See supra* note 13.

¹⁹² *See* COHEN HANDBOOK, *supra* note 4, at § 6.01[5].

tions in state courts must follow the rules of the Intercountry Adoption Act,¹⁹³ and private custody disputes may be subject to the International Child Abduction Remedies Act.¹⁹⁴

The intersection of tribal and state authority in family law is complicated. State courts and legislatures have had to grapple with a third source of sovereignty, predating the Constitution, with similarities both to states and foreign nations. The puzzle is more difficult because conflict of laws principles are premised on a territorial definition of jurisdiction, and the territorial model has become increasingly difficult to apply to Native nations in the United States.¹⁹⁵

Amid this complexity, ICWA has provided an essential framework for child welfare cases that cross jurisdictional borders. It has helped build the capacity of tribal courts and social services agencies, and fostered important collaborations between states and tribes.¹⁹⁶ There is clearly much more work to be done: Native American children are still more likely to be in state foster care systems than non-Native children.¹⁹⁷ Implementation depends on state cooperation, since ICWA has not provided tools to enforce compliance when a state is determined to resist.¹⁹⁸ Federal resources for family preservation under Title IV-E of the Social Security Act have been slow to reach tribal nations, which have depended on states for a share of federal funding for foster

¹⁹³ International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 9001–9011 (2022) (implementing the Hague Convention on the Civil Aspects of International Child Abduction).

¹⁹⁴ Intercountry Adoption Act, 42 U.S.C. §§ 14901–14954 (2022) (implementing the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption).

¹⁹⁵ Modern rulings of the Supreme Court imposed limits on tribal jurisdiction over nonmembers, even within Indian country. *See supra* notes 64–65.

¹⁹⁶ *See* Le Anne E. Silvey, *A Decade of Lessons Learned: Advocacy, Education and Practice*, in *FACING THE FUTURE*, *supra* note 58, at 235 (describing experience with ICWA in Michigan); Carol L. Tebben, *The Constitution, Public Policy, and Pragmatism*, in *FACING THE FUTURE*, *supra* note 58, at 270, 280–85 (describing ICWA collaboration process in Wisconsin).

¹⁹⁷ *See* Final Rule, *supra* note 66, at 38, 784.

¹⁹⁸ *See, e.g.,* *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018), *cert. denied*, 140 S. Ct. 105 (2019) (holding that the abstention doctrine barred the trial court’s order for injunctive and declaratory relief).

care and adoption assistance.¹⁹⁹ As these issues are slowly resolved, experts have recommended further steps state governments can take to improve child welfare outcomes for Native children.²⁰⁰

IV. Conclusion

Families have long been understood as central to the self-definition of communities, states, and nations. For citizens of tribal nations,²⁰¹ subject to the jurisdiction of the United States, due process and equal protection principles support the same right to bring family disputes to courts in their communities that other Americans enjoy. As the Supreme Court has recognized, access to courts is especially important in family law.²⁰² Fairness to tribal litigants also requires a significant level of comity and respect in family cases, analogous to the full faith and credit extended in interstate cases. Recognition of personal status has had a high priority in the conflict of laws generally,²⁰³ and specifically with respect to Native communities.²⁰⁴

With the Indian Child Welfare Act, Congress gave shape and reality to these principles, reversing a century of federal policies that undermined Indian families and tribal self-determination. States were part of the problem that Congress identified, and ICWA has prompted greater collaboration and respect for tribal courts and governments. Despite the opposition of a handful of states, a far larger number have voiced their strong support

¹⁹⁹ See B.J. Jones, *Differing Concepts of “Permanency”: The Adoption and Safe Families Act and the Indian Child Welfare Act*, in *FACING THE FUTURE*, *supra* note 58, at 127. Provisions for direct funding of tribal IV-E programs were first enacted in the Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351 (Oct. 7, 2008).

²⁰⁰ See, e.g., *ATWOOD*, *supra* note 24, at ch. 6 (discussing alternative models of ASFA permanency); Courtney Lewis, *Pathways to Permanency: Enact a State Statute Formally Recognizing Indian Custodianship as an Approved Path to Ending a Child in Need of Aid Case*, 36 *ALASKA L. REV.* 23 (2019).

²⁰¹ See *supra* note 21.

²⁰² E.g. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

²⁰³ See *Hilton v. Guyot*, 159 U.S. 113, 167 (1895) (discussing judgments affecting the status of persons).

²⁰⁴ See *supra* notes 50-54.

for ICWA in *Haaland v. Brackeen*.²⁰⁵ The challenge on equal protection grounds flies in the face of settled doctrine upholding federal legislation that fulfills Congress's obligations to tribal nations.

Beyond ICWA, there are important unanswered questions for tribes, states, and the lawyers who work with families that cross borders of geography and membership. States and tribes have opportunities to foster pragmatic solutions and good working relationships in other areas of family law, including child custody, child support, divorce, and domestic violence.²⁰⁶ Congress and the Supreme Court share responsibility for the convoluted jurisdictional rules that complicate these cases, which have assumed either a complete separation between Indian and non-Indian people or the assimilation and disappearance of Native communities. In a world with strong tribal nations and more fluid boundaries between states and tribes, the path forward depends on comity and cooperation.

²⁰⁵ See *supra* notes 186-189 and accompanying text.

²⁰⁶ See *supra* notes 73- 89 and accompanying text.