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Articles

THE REAL WRONGS OF ICWA

JAMES G. DWYER*

ABSTRACT

Haaland v. Brackeen rejected federalism-based challenges to the Indian Child Welfare Act (ICWA) but signaled receptivity to future challenges based on individual rights. The adult-focused rights claims presented in Haaland, however, miss the mark of what is truly problematic about ICWA. This Article presents an in-depth, children’s-rights based critique of the Act, explaining how it violates a fundamental right against state exertion of power over central aspects of persons’ private lives to their detriment for illicit purposes. In fact, the Act’s defenders are complicit in the same sort of government violence that motivated ICWA’s enactment—erasing aspects of children’s heritage and experience incompatible with a state-preferred identity and destroying children’s relationships and worlds in order to transform them in service to ideological and political aims, under the guise of child saving.

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Imagine: The just-passed federal Indian Woman Welfare Act (IWWA) will henceforth govern state response to requests for assistance by any victim of domestic violence who is an “Indian woman.”\(^1\) A woman is legally an Indian if either (1) declared by any Indian tribe to be one of its members or (2) eligible for membership in a tribe and an offspring of a tribe member. IWWA applies to all such women regardless of whether they live within or associate with any tribal community, and regardless of whether they self-identify as Indian. Characterizing them as a resource vital to the continued existence and integrity of Indian tribes, but also asserting that it is in their best interests to live in a tribal community and Indian family, IWWA commands states to (1) condition their agencies’ assistance of any abused Indian woman, if she is the wife or domestic partner of an Indian man, on her demonstrating by clear and convincing evidence that she would be seriously damaged if she returned to her abuser, and on her agreeing to enter a shelter operated by a tribe on tribal lands; (2) allow divorce from an Indian husband only after the state has made active efforts to fix the marriage and only if she can prove beyond a reasonable doubt that she will incur serious physical or emotional damage if she returns to the Indian man; and (3) permit remarriage by such a woman only to a member of an Indian tribe, unless she demonstrates by clear and convincing evidence good cause for marrying a non-Indian.\(^2\) The federal Bureau of Indian Affairs (BIA) has declared that such demonstration may not refer to any person’s socioeconomic situation. Advocates for Indian men characterize IWWA as “the gold standard” of state response to domestic violence.

A companion law, the Indian Mentally Disabled Person Welfare Act (IMDPWA), will govern state handling of all “Indian mentally disabled adults” whose family members mistreat them or are unable to care for them. For these persons also, the “Indian” label is predicated on whoever tribes claim as their members, without regard to residence in or experiential connection to a tribal community. Characterizing such persons and their internal organs as resources vital to the continued existence and integrity of Indian tribes, while also insisting it is in the best interests of such adults to live in a tribal community, IMDPWA requires states to transport any such mentally disabled adult to a care facility operated by a tribe on tribal lands, regardless of conditions there or opportunities for care elsewhere.

The above laws are hypothetical. Advocates for women would be outraged by the Indian Woman Welfare Act, and advocates for

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1. “Indian” and “tribe” are offensive to many, but I use them in this Article, with apologies, because ICWA, courts, and other scholars do so.

2. Federal constitutional law doctrine is not directly applicable on tribal lands, so a given tribe might limit her marriage options to a male tribe member if its courts have chosen not to adopt the Supreme Court’s holding in Obergefell v. Hodges as an interpretation of the Indian Civil Rights Act (ICRA). See Elizabeth A. Reese, The Other American Law, 73 Stan. L. Rev. 555, 588 (2021) (“Federal constitutional precedent does not bind tribal courts’ interpretations of ICRA.”).
mentally disabled adults would be outraged by the Indian Mentally Disabled Person Welfare Act. Tribes and Congress would not dare propose either. In contrast, the Indian Child Welfare Act of 1978 (ICWA or the Act)\(^3\) is real, yet it does essentially the same things to children. ICWA dictates states’ response to abuse or neglect of, and foster care placement or adoption approval regarding, any child the Act labels an “Indian child.” It labels children based on whatever membership rules Indian tribes happen to have—not on a child’s residence, social ties, past experience of community or culture, or primary ethnicity.\(^4\) The vast majority so labeled, in fact, have not lived in a tribal community, and the vast majority of those not living in a tribal community have more non-Indian than Indian ancestry.\(^5\) Yet the Act treats those children, merely because of an assumed modicum of ancestral relation to some tribe, as a “resource . . . vital to the continued existence and integrity of Indian tribes.”\(^6\) Positing that the federal government “has assumed the responsibility for the protection and preservation of Indian tribes and their resources,”\(^7\) the Act constrains state efforts to protect those children from parental maltreatment and to provide stability and permanency for children previously removed from parental custody who cannot safely return.\(^8\) It does so for the explicit purpose of tying the

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4. Id. § 1903(4); cf. 25 C.F.R. § 23.103(c) (2023) (“In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum.”).


7. Id. § 1901(2).

8. See infra Part I.
children to some Indian tribe for the sake of tribal survival. The Act also alludes vaguely to children’s interests, but for children whose fate state courts are deciding (i.e., those not living on tribal lands), the Act is actually detrimental, as shown below.

Many judges over time have, in fact, acknowledged that Congress, in enacting ICWA, aimed to serve tribal interests that can conflict with children’s basic welfare. That now includes all Justices of the current Supreme Court. In Haaland v. Brackeen, the Court rejected challenges to ICWA on federalism grounds, and it declined for the moment to decide challenges on equal protection grounds. However, in her opinion for the seven-Justice majority, Justice Amy Coney Barrett acknowledged that the Act often disserves children’s well-being in order to serve tribal interests. Yet the

9. 25 U.S.C. § 1901; id. § 1902 (“The Congress hereby declares that it is the policy of this Nation . . . to promote the stability and security of Indian tribes . . . .”).
10. Id. § 1901(3) (“[T]he United States has a direct interest, as trustee, in protecting Indian children.”); id. § 1902 (“[I]t is the policy of this Nation to protect the best interests of Indian children.”).
11. See, e.g., Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989) (“Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.”); In re Bridget R., 49 Cal. Rptr. 2d 507, 522–23 (Ct. App. 1996) (“[T]he interests of the tribe and the biological family may be in direct conflict with the children’s strong needs.”), as modified on denial of reh’g (Feb. 14, 1996).
13. The federalism claims asserted that Congress exceeded its constitutional authority by legislating in an area—family law—traditionally left to states and not involving “commerce” with Indian tribes, and that ICWA improperly “commandeer[ed]” state actors to carry out a federal regulatory scheme. Id. at 1627, 1631.
14. Id. at 1638.
15. Id. at 1622 (“This case is about children who are among the most vulnerable: those in the child welfare system . . . . [ICWA] requires a state court to place an Indian child with an Indian caretaker, if one is available. That is so even if the child is already living with a non-Indian family and the state court thinks it in the child’s best interest to stay there.”).
16. Id. at 1662 (Thomas, J., dissenting) (“As the majority acknowledges, ICWA often overrides state family law by dictating that state courts place Indian children with Indian caretakers even if doing so is not in the child’s best interest.”); id. at 1663 (“[E]ven if the biological parents, the child, the adoptive parents, and the court all agree on what is best for the child, the tribe can intervene at the eleventh hour, without any consent from the parents or child, and block the proceedings. In fact, that is exactly what happened here . . . .”); id. at 1683 (Alito, J., dissenting) (“The paramount concern in these cases has long been the ‘best interests’ of the children involved. But in many cases, provisions of the Indian Child Welfare Act (ICWA) compel actions that conflict with this fundamental state policy, subordinating what family-court judges—and often biological parents—determine to be in the best interest of a child to what Congress believed is in the best interest of a tribe.”)
plaintiffs had presented no claim to the Court alleging the Act violates any right of children, and indeed did not name any child as plaintiff nor purport to sue on behalf of any child. The Court was thus not in a position to consider the permissibility of this instrumental state treatment of a particular group of children, most of whom have previously suffered maltreatment at private hands. The only individual-right claim before the Court alleged discrimination against non-Indian adults seeking to foster or adopt a child. Consequently, even if the Court had considered and granted the equal protection claim, its ruling could have invalidated only one small part of the ICWA scheme—namely, its categorical prioritizing of Indians over non-Indians for foster care or adoption when no relatives or members of the same tribe are available. The Court did not consider this adult-centered claim because it determined that the plaintiffs lacked standing to raise it; they had named the wrong defendants (federal officials rather than the state actors who carry out ICWA’s commands), so a favorable decision would not redress their injury. In a footnote, Justice Coney Barrett effectively invited a new equal protection challenge by those adults, naming the proper defendants.

In addition, though, at least three Justices signaled openness to an equal protection claim on behalf of children, recognizing that ICWA compels state courts to act contrary to what they find to be, after hearing all relevant empirical evidence, in a child’s best interests, solely because the child falls into the class of “Indian child.” Some view this classification not solely on the best interest of the child, but also on “the stability and security of Indian tribes.” . . . [T]he mandates harm vulnerable children.” (quoting 25 U.S.C. § 1902 (2018)).

17. Id. at 1638 (majority opinion).
18. As to the categorical prioritizing of extended family and fellow tribe members, non-Indians stand in the same position as Indians who are neither kin nor members of the same tribe.
19. Id. at 1639.
20. Id. at 1640 n.10 (“Of course, the individual petitioners can challenge ICWA’s constitutionality in state court, as the Brackeens have done in their adoption proceedings for Y. R. J.”); see also id. at 1638 (“The racial discrimination they allege counts as an Article III injury.”).
21. Id. at 1661–62 (Kavanaugh, J., concurring) (“In my view, the equal protection issue is serious. Under the Act, a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child’s race—even if the placement is otherwise determined to be in the child’s best interests. . . . [U]ltimately this Court, will be able to address the equal protection issue when it is properly raised by a plaintiff with standing—for example, by a . . . child in a case arising out of a state-court foster care or adoption proceeding.”); id. at 1663 (Thomas, J., dissenting) (“ICWA displaces the normal state laws governing child custody when it comes to only one group of citizens: Indian children.”); id. at 1683 (Alito, J., dissenting) (“The first line in the Court’s opinion identifies what is most important about these cases: they are ‘about children who are among the most vulnerable.’ But after that opening nod, the Court loses sight of this overriding concern and decides one question after another in a way that disregards the rights and interests of these children . . . .” (quoting id. at 1622 (majority opinion))); cf. Adoptive Couple v. Baby Girl, 570 U.S. 637, 655–56 (2013) (majority opinion by Justice Alito, joined by Chief Justice Roberts and Justices Thomas, Breyer, and Kennedy, stating: “The Indian Child Welfare Act was enacted to help preserve the cultural identity and
of children as race-based, which would trigger strict scrutiny, whereas others insist it is a political classification warranting only rational basis review. The Court put off resolving that anamorphic puzzle. If it determines that, in the particular context of ICWA, “Indian” is a racial classification, ICWA appears doomed, given the hostility toward such classifications even for supposedly noble purposes expressed in the Supreme Court’s latest equal protection decision, *Students for Fair Admissions v. President & Fellows of Harvard College*. If a political classification, those wishing to invalidate the Act will need a deeper critique, showing the Act infringes fundamental rights or is utterly irrational. This Article does both.

In fact, although an equal protection claim is probably the best litigation strategy, that lens does not reveal especially well the inherent defects in the law. ICWA’s essential malignancy is the abuse of state power it mandates, which would be constitutionally offensive even if inflicted on all children. It is not simply that ICWA requires affording one group of children less protection from abuse, attachment disruption, and impermanency than other children receive. It is that ICWA compels states to dictate and manipulate fundamental aspects of children’s private lives to serve aims other than the children’s well-being, with the profoundly detrimental impact for many of destroying their psychological-family heritage of Indian tribes, but under the State Supreme Court’s reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. . . . Such an interpretation would raise equal protection concerns . . . .  


24. I do not address this question here but invite those who insist Indian is a political classification to take a position on these questions: Would clear legal disadvantages heaped on “Indian children”—for example, a state law saying state agencies should entirely ignore reports of violence against off-reservation children classified as Indian under ICWA—or on “Indians” more broadly—for example, a law saying police should not respond to reports of inter-partner violence against anyone known to be a member of or eligible for membership in an Indian tribe—be subject only to rational basis review? Would a public law school that prohibited members of the Black Law Students Association from entering its cafeteria be engaging in race discrimination, organization-based discrimination, or both? Nothing inherent in discrimination among groups marked by something other than race precludes its constituting racial discrimination as well. Cf. Jamelle Bouie, Opinion, *The Racism at the Heart of Trump’s ‘Travel Ban’*, N.Y. Times (Feb. 4, 2020), https://www.nytimes.com/2020/02/04/opinion/trump-travel-ban-nigeria.html [https://perma.cc/2V5F-BVBL]. And finally, why would ICWA not survive strict scrutiny if, as its defenders assert, it is necessary to serve important interests of children?

relationships and severely diminishing their life prospects. ICWA as a whole reflects a basic misunderstanding of the state’s proper role when it takes custody of children or presumes to dictate their family relationships. Critics allude in disparaging tones to the Act’s treatment of children as a “resource,” but they have not explained why that is problematic. This Article does so. The core defect of ICWA is that it makes certain persons’ intimate associations and very identity subject to the state’s police power. As a result, the state can dictate those aspects of those persons’ lives in a way that subordinates their fundamental well-being to interests of other individuals and of cultural groups, or even to broad national aims like redressing past injustices.

Children are alone in our legal system in being subjected to such instrumental treatment in state control of their family lives, as reflected in the reaction readers will have had to the hypothetical laws presented at the outset of this Article. For any group of adults—even those who, like children, are not autonomous—the law treats decisions to form, avoid, continue, or terminate intimate relationships with other persons as a matter of individual right. For autonomous adults it is a right to self-determination, and for nonautonomous adults it is a right to proxy decision-making by state officials acting in a fiduciary capacity, aiming solely to instantiate the choice they would likely make if able. This Article will show that the only proper role of the state when it assumes control over central aspects of the private life of a nonautonomous person, regardless of age, is a parens patriae role in which no one’s interests may influence decision-making except those of the person whose fate the state presumes to dictate. ICWA is patently contrary to this precept.

For these reasons, major portions of ICWA are also unconstitutional, in ways not presented in Haaland. The Act violates a fundamental right against state exertion of power over central aspects of private persons’


27. Cf. Elizabeth Bartholet, We Can Do Better for American Indian Children, Bos. GLOBE (Dec. 7, 2022, 3:01 AM), https://www.bostonglobe.com/2022/12/07/opinion/we-can-do-better-american-indian-children/ [https://perma.cc/96HS-ZGN8] (“Had Congress truly intended to improve Native people’s situation, it could and should have addressed issues of employment, housing, substance abuse treatment, and other factors key to socioeconomic opportunity. Congress instead did the easy and cheap thing . . . .”).

28. See MONT. CODE ANN. § 72-5-312(3) (2023) (“[T]he court shall select [as guardian] the person, association, or nonprofit corporation that is best qualified and willing to serve.”); id. § 72-5-325(1) ("On petition of the ward or any person interested in the ward’s welfare, the court, after hearing, may remove a guardian if in the best interests of the ward."); MASS. GEN. LAWS ch. 190B, § 5-305 (2023).
lives to their detriment for improper purposes. Its jurisdictional transfer rules, evidentiary standards, and disposition priorities, particularly as interpreted by the BIA, are inherently antithetical to children’s basic welfare. The Act arbitrarily grants power over their lives to another, sometimes territorially distant sovereign. It operates to destroy existing intimate associations, without rational justification, and to thrust children into unsafe and unhealthy environments. It denies children, because of their supposed Indian-ness, the dignity inherent in personhood, both by treating them instrumentally and by assigning to them an unchosen ethnic and cultural identity, in most instances with no reason to suppose they would choose that for themselves if autonomous, and then assigning that artificial identity a grossly exaggerated and scientifically baseless importance.

Yet the law has many defenders who unabashedly speak of children as a resource for tribes and, to that end, support forcing a particular identity on children regardless of the irrationality of doing so. This Article explains why they are wrong and how they are complicit in the same forms of violence against children that motivated passage of ICWA in the first place—namely, erasing any aspects of children’s heritage or experience incompatible with a state-preferred identity and destroying children’s relationships and worlds in order to transform them in service to ideological and political aims under the guise of child saving.

Part I identifies the most problematic aspects of ICWA. Part II describes constitutional challenges to date and their deficiencies. Part III presents the child-centered case for invalidating ICWA when the Supreme Court again, inevitably, assesses its constitutionality. Further, it explains how pro-ICWA scholarship and advocacy promote the same sort of ideologically-driven identity violence to which ICWA was originally a reaction.

I. Channeling Children to Tribes

ICWA’s avowed purpose in 1978 was to end a practice of federal and state agency employees going onto tribal land and taking children from their homes, on the pretense of protecting them from neglect or abuse but without actual basis in their welfare, then moving them away from the tribal community and their extended families to boarding schools designed to “Americanize” them with brutal tactics, and/or placing them for adoption in non-Indian families. No one today disputes that such practices were condemnable.

29. See infra Section III.B.
30. See infra Part III.
One ICWA provision directly addressed that phenomenon, dictating that a Native American tribe is to have exclusive jurisdiction over maltreatment cases involving “an Indian child who resides or is domiciled within the reservation of such tribe.” That part of ICWA has gone unchallenged, and it has for many years effectively prevented removal of children from Indian territories. Children whose cases are in state courts, by implication, do not live in a tribal community but rather in mainstream American society, presumably by their parents’ choice.

Another ICWA provision that has been mostly uncontroversial (though complained of by the Haaland plaintiffs) requires that when a child not residing within any tribal territory is reported for maltreatment and turns out to fall under the federal-law label of Indian, a responding state agency must make “active efforts” to (1) obviate the need for removal from parental custody and, if that is unsuccessful, (2) enable safe return home. On the surface, this mandate hardly differs from state laws governing response to maltreatment of non-Indian children, which require “reasonable efforts” to avoid removal and to effect reunification when removal occurs. Likely, few social workers could articulate a difference between active efforts and reasonable efforts.

reiterated, its foundations are of questionable soundness... [T]here is good reason to question the accuracy. (footnote omitted)).


33. Lack of legal challenge does not mean it is good for children living on tribal lands for Congress to leave protection of them entirely to tribal agencies. This provision is not constitutionally compelled. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022) (“[T]he Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. . . . [F]ederal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country.”). In fact, it could be invalidated on equal protection grounds if detrimental to those children. See id. at 2502 (“The State’s interest in protecting crime victims includes both Indian and non-Indian victims. If his victim were a non-Indian, Castro-Huerta could be prosecuted by the State, as he acknowledges. But because his victim is an Indian, Castro-Huerta says that he is free from state prosecution. Castro-Huerta’s argument would require this Court to treat Indian victims as second-class citizens. We decline to do so.”).


37. See Megan Scanlon, Note, From Theory to Practice: Incorporating the “Active Efforts” Requirement in Indian Child Welfare Act Proceedings, 43 Am. Indian L.J., 629, 655 (2011) (“[I]t is clear from an analysis of court opinions, testimony before Congress, state surveys, and reports from caseworkers that . . . . [T]here is no general understanding about what active efforts should involve. As stated by one caseworker,
that the caseworker take a more proactive approach with clients and actively support the client in complying with the service plan rather than requiring the service plan be performed by the client alone."

That seems something good caseworkers would do under a “reasonable efforts” mandate as well, if they have the time and resources. As between leaving a maltreated child in the home or in foster care while waiting to see if parents can transform themselves without help, versus assisting parents to get prescribed services so they have a better chance of succeeding (or cannot blame lack of success on practical obstacles), the latter seems intuitively preferable from a child-welfare perspective.

It might be, though, that the “active efforts” language leads caseworkers to believe they must tip the scale even further toward parental rights than they already do, leaving more children in danger. Additionally, child protection services agencies (CPS) might interpret the active-efforts prescription as obviating general state-law provisions that authorize agencies to forego rehabilitative efforts when they would clearly be futile (so-called “reunification bypass”), so that the agencies can pursue permanency more expeditiously. Most state courts that have addressed this issue have concluded that agencies do have that discretion even with Indian parents. But even in those jurisdictions, social workers might use the active-efforts dictate as an excuse never to fast-track petitions to terminate parental rights (TPR) of Indian parents, thus delaying permanency for some children.

A final ICWA provision that has largely escaped criticism directs state agencies to look to extended family members for substitute care when parents cannot retain custody. As discussed below, that provision goes too far from a child-welfare perspective, insofar as it gives categorical priority to kin placements, rather than simply mandating consideration of kin alongside other available placements, with choice among them based on fulfilling the active efforts requirement in her mind simply involves providing transportation.”.


In 1978, prioritizing might have been necessary to counteract cultural bias and racism. Two generations later, it is likely doing more harm than good.

Thus, there are relatively uncontroversial ICWA provisions designed to keep children labeled Indian with their parents or, if domiciled on tribal lands, within the tribal community. And there is a provision commanding recognition that extended family can be the best alternative to parents for some children, particularly children who already have a relationship with such kin (though when that is true, one would expect the kin to have intervened before CPS involvement was triggered). Together, arguably, these provisions are all the federal government ever needed to do to address past bad practices. If they were all ICWA did, the federal law might never have been subject to constitutional challenge.

The several portions of ICWA that are frequently contested dictate states’ handling of maltreatment reports as to children living in mainstream American society, which on the whole aim to tether and transport those children to a tribal community even though they most likely do not have any existing social or experiential connection to such community nor any significant interest in acquiring such connection. These are not ICWA poster children—that is, older children of predominantly Indian ancestry who have lived for years immersed in tribal culture. Most are infants or young children whose ancestry is predominantly non-Indian and whose culture—if it is sensible to ascribe any to them—is that of mainstream American society. Applying ICWA to them severs them from their existing actual culture. Further, these ICWA provisions accomplish this forced relocation to reservations—many of which are, by Native Americans’ own account, in many ways quite ininhospitable environments for children—by means that can endanger, traumatize, and permanently damage children. The Act channels “resource” children to tribes by several means.


44. See infra Section III.C.4.


46. See infra Section III.C.3.
A. Casting a Wide Net

First, ICWA’s bases for labeling children as Indian are extremely broad, creating a huge pool of potential transferees to tribal lands, likely over two million. An “Indian Child” is any minor who “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.” The nearly six hundred federally-recognized tribes in the United States have collective membership of several million, most of whom do not live on tribal lands. State courts must accept tribes’ rules and representations as to eligibility for membership. Typical tribal rules require some ancestry in the tribe, but the minimum quantum can be as low as not zero—that is, a tribe might deem eligible for membership anyone with any ancestor in recorded tribal history, no matter how remote, who was a tribe member. And under (a) any tribe can, in fact, declare a child to be its member even if the child has no Indian ancestry whatsoever nor a parent who is a member or has any connection to the tribe, and even over the objections of the child’s parents, as recently occurred in a New Hampshire case. Under (b), at least one parent of the child must be an enrolled member, but that parent might have been enrolled by their parents rather than by their own choice, and might also have no connection with the tribe. Under (a), a tribe can simply declare that

47. Cf. Haaland, 143 S. Ct. at 1663 (Thomas, J., dissenting) (“ICWA defines ‘Indian child’ capaquiously.”).
50. See supra note 5.
51. Cf. 25 C.F.R. § 23.108(b) (2023) (“The State court may not substitute its own determination regarding a child’s membership in a Tribe, a child’s eligibility for membership in a Tribe, or a parent’s membership in a Tribe.”).
52. See Timothy Sandefur, Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children, 37 CHILD.’S LEGAL RTS. J. 1, 9 (2017).
53. See Objection to Mother’s Motion for Stay & CASA’s Assent to Such at 1, In re Connor Fortier Johnson, Nos. 619-2022-JV-00092, 619-2022-JV-00099 (N.H. 7th Cir. Fam. Div. Feb. 8, 2024) (demand by Houlton Band of Maliseet Indians tribe for effectuation of permanency plan to transfer to the tribe a twenty-one-month-old child who has been since birth in the care of a foster mother who seeks to adopt him, even after learning that the tribe member fraudulently named on the child’s birth certificate is not the biological father).
54. See, e.g., In re Santos Y., 112 Cal. Rptr. 2d 692, 723–24, 726 (Ct. App. 2001) (presenting that scenario); Johnston Moore, The Misapplication of the Indian Child Welfare Act, IMPRINT (Apr. 1, 2015, 11:53 AM), https://imprintnews.org/child-welfare-2/the-misapplication-of-the-indian-child-welfare-act/10872 [https://perma.cc/N2W7-AJPY] (describing case of boy in foster care discovered to be one-sixteenth Indian, claimed by a relative he had never met, governed by ICWA because his mother’s abusive father had enrolled her as a child in a tribe, unknown to her, 1,500 miles from where she now lives, and relating several other similar cases).
any and all such persons are in fact members, whether they or their parents choose that or not. 55 Two children whom plaintiffs in Haaland had sought to adopt were declared by tribes to be their members, when the tribes learned the children were in the care of non-Indians, seemingly without a request by the children’s parents to confer membership on the children, and even though their parents were not members. 56

The Supreme Court’s most momentous pre-Haaland ICWA decision, Adoptive Couple v. Baby Girl, 57 illustrated the Act’s extreme reach. The child at issue, removed because of ICWA from the adoptive home where she had lived since birth, was a mere 1.2% Cherokee in biological ancestry and had no interaction with any Cherokee community. 58 Nevertheless, in the view of the courts, legal scholars, and the law, she simply was “an Indian,” 59 rather than Hispanic (like her birth mother) or Italian-American (like her adoptive parents and possibly many of her biological ancestors), or simply a child living in mainstream American society. 60 Her biological father, though having just 2.4% Cherokee ancestry, was a registered member of the Cherokee tribe and participated to some degree in Cherokee life but had not lived in a Cherokee community. 61 The child herself had no experience of anything Cherokee, and there was no basis for supposing she would, if left undisturbed in her adoptive family, ever feel the need for connection with the tribe—any more so than she would feel a need for connection with any culture represented in the other 98.8% of her ancestry. Under ICWA, however, her residence, relationships, life experience, and other ancestry were irrelevant to her branding as Indian.

B. Transfers of Children from Mainstream Society to Tribal Lands

Second, even as to children who have always lived in mainstream American society, ICWA orders state courts to transfer cases involving out-of-home placement of any children labeled Indian to tribal courts, if, after notification, the tribe or a parent requests, again without regard to whether the child has any experiential tie to the tribe. 62

55. See Haaland v. Brackeen, 143 S. Ct. 1609, 1663 (2023) (Thomas, J., dissenting) (“[T]ribes can enroll children unilaterally, without the parent’s consent.”); Navajo Nation Code Ann. tit. 1, § 701(e) (2023) (“Children born to any enrolled member of the Navajo Nation shall automatically become members of the Navajo Nation and shall be enrolled, provided they are at least one-fourth degree Navajo blood.”); Cherokee Nation Code Ann. tit. 11, § 11A (2023).
56. Haaland, 143 S. Ct. at 1625.
58. Id. at 641.
59. See infra Section III.A.
60. Adoptive Couple, 570 U.S. at 643.
61. Id. at 641 (indicating Baby Girl was classified as Indian because she was 1.2% Cherokee).
62. 25 C.F.R. § 23.118(e) (2023) (“In determining whether good cause exists [not to transfer a case], the court must not consider . . . (4) [t]he Indian child’s cultural connections with the Tribe or its reservation.”); cf. Sandefur, supra note 52, at 23–32 (arguing this violates constitutional limits on personal jurisdiction).
objection can prevent this transfer of jurisdiction, but not demonstration that it would be contrary to the child’s welfare. 63 Presumably, transfer would typically entail relocating the child to a tribe’s territory; tribal courts would put the child in a living situation on tribal lands if any is available and apply to that child their own rules regarding conditions for return to parental custody, selection of foster homes, TPR, and adoption.64 Those rules and decisions are unconstrained by any external or superordinate law, so the transfer operates much like deportation to a foreign country.65 Tribal rules or agencies could be completely indifferent to child welfare, putting children in great danger, without running afoul of U.S. federal constitutional or statutory law.66 This aspect of ICWA thus results in a dramatic transformation of children’s legal status and civil rights.

C. Heightened Obstacles to Protection and Permanency

Third, when state courts retain jurisdiction over a removal or TPR proceeding, they must impose on CPS more demanding evidentiary burdens and substantive standards for removal and TPR as to an Indian child than as to a non-Indian child, thus making less likely separation from an abusive parent (whom legislators must have assumed would be Indian, though today that is more often not the case). In practice, this amounts to mandating that state courts permit greater harm to Indian children before acting to protect them.67 ICWA stipulates that state courts may

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63. There is a “good cause” exception to the transfer rule. See 25 U.S.C. § 1911(b) (2018); 25 C.F.R. § 23.117. However, most courts to consider the question have held that avoiding adverse impact on the child does not constitute good cause. See Dinwiddie Dep’t of Soc. Servs. v. Nunnally, 764 S.E.2d 526, 528–29 (Va. 2014) (Millette, J., concurring) (citing cases); see also 25 C.F.R. § 23.118(c)(5) (asserting that state courts may not consider “any negative perception of Tribal or BIA social services or judicial systems” in deciding whether there is good cause not to transfer a case).

64. Cf. In re A.B., 663 N.W.2d 625, 636 (N.D. 2003) (addressing challenge to transfer rule on the assumption it would result in disruption of child’s two-and-a-half-year foster care placement with parent figures who intended to adopt).


order removal of a maltreated child from the custody of “its” parent only if CPS shows by clear and convincing evidence that “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

Typical state child protection laws, in contrast, authorize removal based on lesser evidence of lesser danger. For example, Texas authorizes state custody of a child if CPS presents “sufficient evidence to satisfy a person of ordinary prudence and caution that . . . there was a danger to the physical health or safety of the child . . . and for the child to remain in the home is contrary to the welfare of the child.”

Though a generally libertarian state, and one that wholeheartedly embraces the idea of parental rights over children, Texas has thereby deemed this sufficient cause for separating children from their parents.

Further, ICWA provides that a state court may terminate a dysfunctional or absent parent’s rights as to a child labeled Indian only if the agency presents evidence beyond a reasonable doubt that parental custody would likely result in serious emotional or physical damage. Typical state laws for non-Indian children, in contrast, authorize TPR based on a finding of clear and convincing evidence that there has been a lasting deficiency in parental conduct, plus a finding by a preponderance of the evidence that it would be in the child’s best interests.

Texas statutes list twenty-two types of parental default, including various forms of abandonment, non-support, allowing a child to remain in circumstances that endanger well-being, educational neglect, felony conviction for harming some other child, having had rights terminated as to another child, substance abuse, incarceration, and violence against the child’s other parent. If any one of those is shown, the child’s best interests become the determinant of whether the legal relationship continues. ICWA, in contrast, forces state court judges in Texas to keep children labeled Indian in the limbo of foster care in many such circumstances, not freed for adoption even when that would be in their best interests.

As a result, the law can prevent many “Indian” children from ever

consequences: a study of all children born in California between 1999 and 2006 found that children who had been the subject of a maltreatment allegation, whether substantiated or not, were six times more likely to die from an intentional injury and two times more likely to die from an unintentional injury.

68. 25 U.S.C. § 1912(e) (emphasis added); see also 25 C.F.R. § 23.121(a).
69. TEX. FAM. CODE ANN. § 262.201(g)(1) (West 2023).
70. See also Ariz. Rev. Stat. Ann. §§ 8-844 to -845 (2023) (CPS must show by a preponderance of the evidence that child has been abused or neglected and that “placement with the child’s parents is contrary to the child’s welfare”).
71. 25 U.S.C. § 1912(f); see also 25 C.F.R. § 23.121(b).
73. TEX. FAM. CODE ANN. § 161.001(b)(1).
74. Cf. Haaland v. Brackeen, 143 S. Ct. 1609, 1688 (2023) (Alito, J., dissenting) (stating ICWA “requires States to replace their reasoned standards for termination of parental rights and placement in foster care with standards that favor the interests of an Indian custodian over those of the child”).
realizing the permanency, security, and nurturing that adoption offers.\textsuperscript{75} For example, in \textit{In re W.D.H.},\textsuperscript{76} a Texas court held that parental rights of a father just sentenced to twenty-five years in prison were improperly terminated, and therefore that the child could not be adopted, because the ICWA test of serious damage in parental custody governed, not the state law that made long-term incarceration and the child’s developmental needs sufficient basis for TPR.\textsuperscript{77}

\textbf{D. Categorical Priorities in Substitute Care Placements}

Fourth, when courts do remove a child from parental custody or terminate parental rights, ICWA aims to ensure the child goes to live with members of some tribe rather than any non-Indians, by imposing categorical placement priorities. ICWA’s first priority is for “extended family,”\textsuperscript{78} whom Congress in 1978 likely supposed would typically include many tribe members. This kin priority goes beyond prevailing state laws, which require merely searching for willing relatives and considering them as possible placements.\textsuperscript{79} If no kin are available, under ICWA courts must look next to tribe members and institutions. In the case of removal and placement in temporary care, the court must try to place the child in a foster home chosen by the tribe that has claimed the child.\textsuperscript{80} In the case of adoption, the court should look to members of the tribe that has claimed the child, whether kin or not and even if there is no existing social relationship between such member and the child, rather than to those who have been caring for the child.\textsuperscript{81} The final preference is for a member of any other tribe.\textsuperscript{82} Non-Indians are a last resort as foster and adoptive parents, after every Indian option has been tried.

Today, a child captured by ICWA despite living in mainstream society is likely to have mostly non-Indian kin,\textsuperscript{83} so the kin preference could operate against the Act’s channeling aim. However, the Act also confers on tribes the power to define who constitutes a child’s “extended

\textsuperscript{75} Cf. \textit{id.} (“[T]he sad consequence is that ICWA’s provisions may delay or prevent a child’s adoption by a family ready to provide her a permanent home.”).
\textsuperscript{76} 43 S.W.3d 30 (Tex. Ct. App. 2001).
\textsuperscript{79} \textit{See, e.g.,} 22 Va. ADMIN. CODE § 40-201-40(B)(1) (2023) (“The local department shall exercise due diligence to locate and assess relatives as a foster home placement for the child . . . .”). Federal law requires states to search for and "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child." 42 U.S.C. § 671(a)(19) (2018).
\textsuperscript{80} 25 U.S.C. § 1915(b)(ii) (“[A] foster home licensed, approved, or specified by the Indian child’s tribe.”).
\textsuperscript{81} \textit{Id.} § 1915(a).
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{See supra} note 5.
family,” which a tribe might do in a way that ties it to tribal membership. Further, the Act empowers tribes when they intervene in a state court proceeding simply to insist on a different order of placement priorities for that case. Thus, in practice, a tribe can always ensure its members—even those entirely unrelated to the child biologically or socially—have priority as foster or adoptive parents, even over kin who are not tribe members—including, for example, non-Indian grandparents who have been extensively involved in a child’s life.

Categorically prioritizing kin or tribe members can result in developmental harm to children. It can result in placement with relatives or tribe members who do not provide a safe and stable environment. Or transfer to relatives might come so long after initial removal from parental custody that it entails severing a child’s attachment relationship with long-term, non-kin foster parents. Aversion to attachment disruption, the harm of which is clearly established, partly explains why most states have not gone so far as to enact such a categorical preference for kin in non-ICWA cases. Child welfare experts do not use the term “gold standard,” but if they did they would, with respect to the youngest children, say that it is to nurture secure attachment relationships with capable caregivers and then protect those relationships vigorously against disruption—an aim that hard kin preferences frequently defeat. Yet ICWA makes attachment disruption quite likely because it prioritizes channeling children to tribes over preservation of existing relationships. It can in many cases also inflict a disorienting culture shock. For example, a child who has lived for years with and has securely attached to pre-adoptive foster parents in midtown Atlanta might, because a biological parent has a nominal membership in the Seminole tribe, suddenly be sent to live with strangers in a remote area of Wyoming and never again see the people they know as parents, siblings, aunts and uncles, friends, mentors, etc.

In contrast, state laws applicable to children not labeled Indian generally embody an overall aim of securing foster and adoptive placement in children’s best interests all things considered. Significantly, they do

85. See id. § 1915(e).
86. See infra Section III.C.3.
87. See infra Section III.C.4.
88. See, e.g., Doris Chateauneuf, Karine Poitras, Marie-Claude Simard & Camille Buisson, Placement Stability: What Role Do the Different Types of Family Foster Care Play?, 130 CHILD ABUSE & NEGLECT 1, 3 (2022) (stating “negative effects of moving the children and separating them from their foster-care families, in terms of developmental, socio-affective, educational, and relational aspects have been widely documented” and citing studies).
89. See id. at 2 (“[S]tudies have shown that adoption of a child by its foster family contributes to the child’s stability, promotes permanence, and leads to a lower risk of breakdown once the adoption is finalized.”).
90. Cf. Haaland v. Brackeen, 143 S. Ct. 1609, 1688 (2023) (Alito, J., dissenting) (“It forces state courts to give Indian couples (even those of different tribes) priority in adoption and foster-care placements, even over a non-Indian couple who would better serve a child’s emotional and other needs.”).
91. See supra note 43.
not list ancestry among factors relevant to that assessment, and no child development expert has ever suggested that, for example, a child with one-third Bulgarian ancestry would suffer if deprived of connection to Bulgarian culture following adoption. Likewise, no state law directs case-workers to ask whether a parent is a citizen of another country and, if so, to give preference to foster or adoptive parents who are also citizens of that country. Moreover, state agencies in non-ICWA cases are prohibited from considering the race of children or potential foster or adoptive parents in choosing placements.92

ICWA does permit deviation from its placement preferences, but only after demonstration by clear and convincing evidence of “good cause,” a term the Act left undefined.93 The BIA issued a Final Rule in 2016 setting forth a seemingly exclusive list of potential bases for finding good cause, and it does not include already-existing attachment relationships to long-term foster parents.94 In fact, the Final Rule explicitly precludes deviation for the sake of preserving such a relationship if it arose while a child was in a “non-preferred placement” as a result of a violation of the Act.95 Like the hypothetical Indian Woman Welfare Act, it also precludes consideration of financial resources in selection of persons for family formation.96 More generally, a finding that some other placement would be more consistent with a given child’s best interests, all things considered, does not suffice as good cause as far as the BIA is concerned.97

Some state versions of ICWA identify additional factors courts may not consider. For example, the Oregon Indian Child Welfare Act precludes a state court from deviating from the placement priorities based on:

(i) The socioeconomic conditions of the Indian child’s tribe;
(ii) Any perception of the tribal . . . social services or judicial systems;
(iii) The distance between a placement . . . and the Indian child’s parent; or
(iv) The ordinary bonding or attachment between the Indian child and a nonpreferred placement arising from time spent in the nonpreferred placement.98

95. Id.; cf. In re Desiree F., 99 Cal. Rptr. 2d 688, 700 (Ct. App. 2000) (holding that because CPS failed to give timely notice to tribe claiming child as a potential future member, “bonding with her current foster family and the trauma which may occur in terminating that placement, shall not be considered in determining whether good cause exists to deviate from the placement preferences set forth in the ICWA”), as modified on denial of reh’g (Sept. 19, 2000).
96. 25 C.F.R. § 23.132(d).
98. OR. REV. STAT. § 419B.654(D) (2023).
The last of these is not limited to cases of non-compliance with ICWA procedures; Oregon does not care how an attachment relationship arose for an “Indian child”—in all cases, it must be ignored.

These people and factors that the BIA and some states exclude from consideration in dictating placement of Indian children do matter in reality to children’s welfare, potentially in profound ways. In fact, most state laws and regulations governing fostering and adoption of non-Indian children mandate consideration of such things as existing relationship, personal resources, neighborhood quality, community resources, mental health, and anything else that might affect a child’s development. In Oregon, for example, the Code provision for foster care or adoption of non-Indian children directs courts to give preference to placement “with current caretakers and with persons who have a caregiver relationship with the child” and to consider “[w]hich person has the closest existing personal relationship with the child.”

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Notably, ICWA does not require that states respond at all to reports of maltreatment of “Indian children.” Thus, a state would not run afoul of ICWA if it reacted to Haaland—in particular, its rejection of Tenth Amendment objections—by amending its laws to direct that child protection agencies henceforth simply disregard reports of abuse of children who fall under ICWA’s definition of Indian, regardless of where the children reside, and so leave the welfare and even survival of “Indian children” entirely in the hands of abusive custodians. If those who insist Indian is a political classification are correct, such state indifference to maltreatment of Indian children would seem constitutionally unproblematic. The discriminatory treatment would need satisfy merely rational basis review, and presumably it would serve the government aims of reducing spending on child welfare and preventing breakup of “Indian families,” perhaps also that of bolstering tribal membership.

If, however, state agencies do choose to respond to reports of maltreatment of children whom federal law labels Indian, as it does with other children, and try to protect them from harm at parents’ hands and to achieve permanency for them, ICWA precludes the agencies from pursuing what they deem in the children’s best interests unless that happens to coincide with ICWA’s higher burdens of proof, narrower substantive bases for removal and TPR, and placement preferences. There is no reason to suppose such coinciding occurs more often than would a coinciding of the hypothetical Indian Woman Welfare Act with an abused Indian woman’s assessment of her own best interests. Moreover, state


100. See, e.g., Ga. Comp. R. & Regs. 290-9-2-.06(3) (2023) (home study elements); supra note 43.

agencies might immediately lose authority regarding a child if ICWA dictates transfer of the child’s case to tribal courts.

II. CONSTITUTIONAL CHALLENGES

Prior to Haaland, the Supreme Court had rendered decisions interpreting a few provisions of ICWA.102 Haaland was the first constitutional challenge to reach the Court, despite the law’s operating for nearly a half-century, and the complaint entirely missed the mark. It named no children as plaintiffs, the named plaintiffs did not assert representational or third-party standing to advance claims on behalf of any children, and the complaint did not directly predicate any claims on rights of children.103 It instead based its constitutional challenges on states’ rights, equal protection rights of non-Indian adoption applicants, and, glancingly, an alleged right of birth parents to select who adopts their child.104 The rights claims were thus entirely adult-centered.

Invalidating ICWA on federalism grounds would have been unsatisfying to child-welfare critics of ICWA, both because they hope for a pronouncement of children’s rights and because that would have left in place any state-law versions of ICWA and state agency regulations adopted to comply with ICWA.105 Change to practice in many states’ courts would

102. See Adoptive Couple v. Baby Girl, 570 U.S. 637, 641–42 (2013) (holding that ICWA’s heightened protections for biological parents against termination of their rights do not apply when a parent has never had custody of the child in question, and that the Act’s placement preferences do not preclude adoption by non-Indians when no one in the preferred categories has filed a petition to adopt); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989) (construing “domicile” in the ICWA provision to give exclusive jurisdiction to tribes over maltreatment cases arising on tribal lands).

103. The only hint at children having rights at stake was in connection with a claim that the BIA’s 2016 Final Rule violates the Administrative Procedure Act (APA) because it is “not in accordance with law,” in light of, inter alia, its “discrimination against Indian children . . . [in violation] of equal protection.” Second Amended Complaint and Prayer for Declaratory and Injunctive Relief at 58–59, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 17-cv-868-O). The complaint at a later point alleges that the Final Rule, insofar as it causes disruption of established family bonds by expressly excluding them as justification for deviation from placement preferences, also “violates the substantive due process rights of non-Indian prospective adoptive couples raising Indian children, and the rights of those Indian children.” Id. at 77. This might be read to assert a substantive due process right of children, though it is not explicit and is only in the context of an APA challenge to the Final Rule, as to which the Court did not grant certiorari; there is no claim in the complaint alleging that ICWA itself violates any right of children.

104. Id. at 57–83. The Court also did not include this parents’ rights argument in its grant of certiorari.

105. Cf. Jessica Lussenhop, The Supreme Court Upheld the Indian Child Welfare Act: The Long Struggle to Implement the Law Continues, ProPublica (June 21, 2023, 11:00 AM), https://www.propublica.org/article/scotus-icwa-decision-questions-native-american-families [https://perma.cc/4LNT-877Z] (“In the lead-up to the Supreme Court decision, advocates pushed legislatures across the country to put the tenets of ICWA into state law, preserving at least some protections on the local level if the federal law were struck down. Several states introduced ICWA-like bills, and four passed. Today, 13 states have such laws on the books.”).
therefore have required either a fresh constitutional challenge against state laws on individual-rights grounds or unpromising legislative battles in many jurisdictions. Additionally, from a child-centered perspective, federal imposition of child welfare mandates is not inherently bad; advocates for children welcome some federal dictates and lament others, and when federal mandates are good for children, they have an efficiency advantage over state-by-state legislative efforts.

Even a ruling based on equal protection rights of non-Indian adults seeking adoption would have settled little, given that only two narrow aspects of ICWA discriminate against them qua non-Indians—namely, the last of the placement preferences for adoption (for “other Indian families”) and for foster care providers (for “an Indian foster home”). Striking those would have left in place the categorical preferences for kin and members of the same tribe, as well as the enlarged shield ICWA gives parents against removal and TPR. If those provisions violate equal protection rights, it must be rights of children. The entire set of preferences treats children labeled as Indian differently from other children in a way that subordinates their welfare to tribal interests, as members of the current Court have emphasized. A ruling based on children’s equal protection right would therefore be more comprehensive, and it would extend to state versions of ICWA.

Prior to the Supreme Court’s Haaland decision, several lower courts considered individual-rights challenges to ICWA. There were the proceedings below in Haaland, which did address equal protection. But because the complaint contained no claim based on children’s rights and did not name any children as parties, those rulings struggled to say anything clear and definite about the discrimination among children. The federal district court focused on the statutory classification of children and deemed it racial rather than political, so the court applied


109. See supra notes 16, 21.
strict scrutiny. It then found ICWA’s placement priorities not narrowly tailored to serve the asserted tribal interest in creating or cementing children’s connection to tribes, which the court assumed compelling for sake of analysis. The court thus held that as to the placement preference portions of ICWA as a whole, plaintiffs were entitled to “summary judgment on their equal protection claim.” But the court failed to state directly whose equal-protection right was violated. “Their” presumably refers to the named parties—that is, the adoptive parents. Yet the court could not coherently say the classification of children violated equality rights of adoption applicants, for that classification per se does not treat any group of applicants differently from others. It also could not say it was invalidating the scheme as a violation of children’s equal protection right without explaining how it could base a decision on a right not asserted in the complaint and belonging to persons who are neither parties to nor represented in the litigation. So, the court fudged by not identifying any holder of the violated equality right.

In the first appeal, a Fifth Circuit panel initially characterized the equal protection problem as discrimination against “non-Indian families seeking to adopt Indian children,” which obliquely suggests focus on rights of adoption applicants. Consistent with that interpretation, the appellate panel characterized the district court decision as resting on injuries to the adoptive parents, then determined that those adults had standing because of those injuries and the potential for their recurrence. Yet the appellate panel, too, went on to focus its substantive equal protection analysis on ICWA’s classification of children, not its classification of potential adopters, also without explaining the connection between discrimination among children and any right of the plaintiffs. Unlike the district court, the panel rejected this amorphous equal protection claim. It first concluded that Indian is a political rather than racial classification and so triggers mere rational basis review. It then cursorily asserted without explanation or evidence that “the special treatment ICWA affords Indian children is rationally tied to Congress’s fulfillment of its unique obligation toward Indian nations and its stated purpose of

111. Id. at 534–36.
112. Id. at 536.
113. Cf. Powers v. Ohio, 499 U.S. 400, 410 (1991) (“In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.”).
114. Bernhardt, 937 F.3d at 421.
115. Id. at 421–24. The panel did not address the redressability problem the Supreme Court found decisive.
116. Id. at 426.
‘protect[ing] the best interests of Indian children and [1] promot[ing] the stability and security of Indian tribes.’”

The full Fifth Circuit Court of Appeals reheard the case en banc. It replicated the pattern of beginning the equal protection discussion by considering whether the plaintiff adopters were injured but then focusing the substantive analysis on the Act’s disparate treatment of groups of children. The en banc decision also applied rational basis review and upheld the challenged provisions of ICWA after concluding they serve tribal interests. The en banc court did not claim that the Act serves children’s interests. Yet it asserted without explanation that ICWA does not implicate any fundamental right of children or anyone else, despite its dramatic impact on family relationships.

Thus, Haaland came to the Supreme Court with a focus on, but consistently peculiar treatment of, equal protection (along with the federalism issues). Briefing by or in support of the plaintiffs was similarly vague about whose right is violated by the alleged racial discrimination. This made the Court’s consideration of children’s rights highly unlikely, even though briefing on the other side failed to call attention to the indefiniteness of the equal protection claim or the absence of children as parties. Presumably the Court would have anyway rejected such a claim on behalf of children named as parties for the same reason it rejected the parents’ claim—lack of redressability in light of who the plaintiffs’ lawyers had named as defendants. But presumably those wishing to abolish ICWA have learned from Haaland that they should: (1) name children as parties, (2) clearly base claims on the children’s constitutional rights,

117. Id. at 429–30 (alterations in original) (quoting 25 U.S.C. §§ 1901–1902 (2018)).
119. Id. at 336–40.
120. Id. at 341 (asserting ICWA’s provisions “have some rational connection to Congress’s goal of fulfilling its broad and enduring trust obligations to the Indian tribes,” as they “ensure that children who are eligible for tribal membership are raised in environments that engender respect for the traditions and values of Indian tribes, thereby increasing the likelihood that the child will eventually join a tribe and contribute to ‘the continued existence and integrity of Indian tribes’” (quoting 25 U.S.C. § 1901(3))).
122. If an ICWA challenge emanates from state court child-welfare proceedings, the children at issue would necessarily be parties, represented by guardians ad litem. In an independent federal court challenge, the court can confer “next friend” standing on a representative for children. F.B. R. Civ. P. 17(c); see, e.g., A.D. by Carter v. Washburn, No. CV-15-01259, 2017 WL 1019685, at *11 (D. Ariz. Mar. 16,
and (3) name state officials as defendants or inject these claims into state court proceedings that can ultimately be appealed to the Supreme Court.

In any event, an equal protection claim on behalf of children is at best an indirect way of getting at the fundamental problem with ICWA. Being treated differently per se is not a wrong; different treatment could be better treatment, and those treated better than others would not have standing to complain. For the same reason, discrimination among children based on race is not inherently a wrong to any children, though it might be inherently bad for society if it reinforces race-based thinking. What makes ICWA’s different rule wrongful to the children it impacts is that the disparate treatment they receive is destructive to their basic welfare. ICWA’s real problem is that it harms children, in ways that clearly sound in the fundamental rights aspect of Fifth and Fourteenth Amendment jurisprudence (and possibly Fourth Amendment seizure as well)—namely, the state’s forcing some children to remain in the custody of people who are neglecting or abusing them; removing other children from healthy and stable home environments (pre-adoptive placements with non-Indian caregivers) without legitimate child-welfare justification, thereby destroying those children’s existing relationships that entail developmentally vital emotional connections; and forcibly relocating some to distant and unfamiliar places.

The Supreme Court has to date displayed little inclination to ascribe rights to children in connection with their relationships, home life, or protection. However, it also has not ruled out the possibility of acknowledging fundamental liberty interests on the part of children, and many lower courts in non-ICWA cases have recognized that children have constitutionally protected liberties against such state actions.

2017) (complaint challenging ICWA filed partly on behalf of children, represented by a “next friend”), vacated as moot sub nom. Carter v. Tahsuda, 743 F. App’x 823 (9th Cir. 2018).


125. See, e.g., Heartland Acad. Cmty. Church v. Waddle, 595 F.3d 798, 809 (8th Cir. 2010) (holding CPS mass removal of children from a boarding school violated children’s clearly established “Fourteenth Amendment rights to family integrity, Fourth and Fourteenth Amendment rights to be free from unreasonable seizures, First and Fourteenth Amendment rights to free association, and Fourteenth Amendment rights to procedural due process”); Doe ex rel. Johnson v. S.C. Dep’t of Soc. Servs., 597 F.3d 163, 176 (4th Cir. 2010) (holding social service officials had constitutional obligation to refrain from placing foster child in a “dangerous environment in deliberate indifference to her right to personal safety and security”); Whisman v. Rinehart, 119 F.3d 1303, 1309 (8th Cir. 1997) (“Both parents and children have a
Moreover, though the current Court is generally unreceptive to substantive due process claims, one area in which rights have swelled in the U.S. legal system more broadly in recent years is legal protection for non-traditional intimate relationships, including relationships between children and biologically-unrelated caregivers. If courts were persuaded to view the adverse treatment of children labeled Indian as an

liberty interest in the care and companionship of each other."); Jordan v. Jackson, 15 F.3d 333, 346 (4th Cir. 1994) (protecting "child’s interests in his family’s integrity and in the nurture and companionship of his parents"); Pfoltzer v. Fairfax Cnty, Dep’t of Hum. Dev., No. 91-1844, 1992 U.S. App. LEXIS, at *12 (4th Cir. 1992) ("[C]hildren possess a similar liberty interest in family integrity."); McLaughlin v. Pernsley, 876 F.2d 308, 315–17 (3d Cir. 1989) (upholding order to return child to original foster parents, the child’s attachment figures, after the foster care agency moved the child to be with same-race foster parents); Rivera v. Marcus, 696 F.2d 1016, 1026 (2d Cir. 1982) ("The Ross children surely possess a liberty interest in maintaining, free from arbitrary state interference, the family environment that they have known since birth. The children lived with their half-sister for more than five years before the state intervened and . . . removed them . . . . If the liberty interest of children is to be firmly recognized in the law, we must ensure that due process is afforded in situations like that presented here where the state seeks to terminate a child’s long-standing familial relationship."); J.E.C.M. ex rel. Saravia v. Lloyd, 352 F. Supp. 3d 559, 585 (E.D. Va. 2018) (protecting children’s interests in freedom from physical detention in immigration context and in reunification with sibling); F.K. v. Iowa Dist. Ct. for Polk Cnty., 630 N.W.2d 801, 808 (Iowa 2001) ("[T]he child’s liberty interest in familial association [is] likewise protected by the Due Process Clause."); as amended on denial of reh’g (July 27, 2001); Fedorova v. United States, No. 17cv0868, 2018 WL 2445037, at *4 (S.D. Cal. May 31, 2018) (affirming constitutional right of one-year-old child against deportation and citing precedents); Brown v. San Joaquin Cnty., 601 F. Supp. 653, 658–61 (E.D. Cal. 1985) (holding children in foster care have protected liberty interest in maintaining relationship with foster parents); cf. Troxel, 530 U.S. at 88 (Stevens, J., dissenting) ("[T]o the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests."); Parham v. J. R., 442 U.S. 584, 600 (1979) ("[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily."). In Smith, the Supreme Court assumed without deciding that children in foster care have a protected interest in preserving their relationship with long-time foster parents, observing that "the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association," and that for a child who is placed in foster care right after birth and who remains there through the attachment period of development, "it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family," and so "we cannot dismiss the foster family as a mere collection of unrelated individuals." Smith, 431 U.S. at 844–45. The Court’s reluctance to declare that foster children do have a constitutional right against relationship disruption rested on the false premise that foster care is the only childrearing situation that arises by state action, when in fact all legal parent-child relationships, with the legal right to custody they entail, do so as well. But see infra note 129 for cases denying that children have a protected liberty interest in relationships.


127. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 667–68 (2015) (identifying protection of child’s relationship with biologically unrelated caregiver as one basis for finding a constitutional right to legal marriage for same-sex couples); Courtney G. Joslin & Douglas NeJaime, How Parenthood Functions, 123 COLUM. L. REV. 319,
infringement of fundamental rights, that would itself trigger strict scrutiny and so would obviate the racial-versus-political classification debate in connection with ICWA.

In some earlier cases that ended in lower courts, plaintiffs did clearly allege that particular ICWA provisions violate equal protection rights of children, but they did not manage to get the courts to apply strict scrutiny. The courts in those cases read Supreme Court precedent to say Indian is a political classification, meaning mere rational basis review applies, so the law need only serve some legitimate state purpose, such as fulfilling Congress’s obligation to tribes.128 In other cases, reference to equal protection has been as vague as in Haaland, without clear statement of whose rights are violated by which provisions of the Act, and the plaintiffs have generally been unsuccessful for the same reason.129

Rarely has a challenge to the Act alleged that it violates substantive due process rights of children. When pled, though, that claim has had some success. In In re Bridget R.,130 a California Court of Appeals held that ICWA must be applied consistently with children’s fundamental constitutional right to protection of their established familial bonds, whether those bonds are with foster parents or biological parents.131 The court opined that if applying any ICWA provision would disrupt a child’s attachment relationships, it must be necessary to serve a compelling state interest, and that tribal interests are insufficient, at least when neither the child nor the biological parents ever participated in tribal life.132


128. See, e.g., In re Baby Boy C., 805 N.Y.S.2d 313, 324, 326 (App. Div. 2005) (rejecting argument that ICWA is unconstitutional unless interpreted to apply only where there is an “existing Indian family”); In re A.B., 663 N.W.2d 625, 636 (N.D. 2003) (rejecting challenge to jurisdiction-transfer rule, finding disparate treatment of children labeled Indian is “rationally related to the protection of the integrity of American Indian families and tribes and is rationally related to the fulfillment of Congress’s unique guardianship obligation toward Indians”).

129. See, e.g., In re Baby Boy L., 103 P.3d 1099, 1106 (Okla. 2004) (“The mother insists that a refusal to apply the ‘existing Indian family exception’ to the present cause could result in an unconstitutional application of the Acts.”).

130. 49 Cal. Rptr. 2d 507 (Ct. App. 1996), as modified on denial of reh’g (Feb. 14, 1996).

131. Id. at 526 (“[T]he twins do have a presently existing fundamental and constitutionally protected interest in their relationship with the only family they have ever known.”).

132. Id. (“Indian culture’ will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture. This being so, it is questionable whether a rational basis, far less a compelling need, exists for applying the requirements of the Act . . . .” (quoting 25 U.S.C. § 1902 (2018))); see also A.D. by Carter v. Washburn, No. CV-15-01259, 2017 WL 1019685, at *11 (D. Ariz. Mar. 16, 2017) (dismissing for lack of standing complaint filed partly on behalf of children, represented by “next friends,” challenging as a violation of children’s substantive due process right ICWA’s failure to consider children’s best interests in removal, TPR, and foster care or adoption placement decisions, for failure to show injury traceable to that aspect of the statute), vacated as moot sub nom. Carter v. Ta'ohsida, 743 F. App’x 823 (9th Cir. 2018).
In *In re Santos Y.*, six years later, another California court reached the same conclusion. It observed that the federal Constitution protects private persons against state destruction of their intimate relationships and that children are persons. It then found that the state failed strict scrutiny of its decision to remove a child from social parents in order to transport him to a distant tribe—in part because the child’s parents had no connection with the tribe and in part because the child’s bond with foster parents was substantial. This is a step in the right direction. But the wrongs of ICWA go deeper, in ways yet to be acknowledged.

### III. THE REAL WRONGS OF ICWA

Analytical depth is lacking in ICWA scholarship. Supporters recite the tragic history of European-Americans destroying tribal communities, one part of which was unwarranted removal of children, as if that justifies anything and everything Congress and the BIA might do today to any children under a banner of making amends. They hoist Indian culture as a talisman that transcends and ends debate. They manifest no openness to considering whether ICWA oversteps, whether labeling children as Indian might ever be problematic, or whether the extent of a child’s experiential connection to tribal life should matter to judgments about their culture-related interests. Critics are more focused, honing on particular aspects of ICWA that interfere with adoptions of children who have always lived in mainstream America. But they typically focus on individual cases and Equal Protection Clause analysis rather than developing a broader child-centered critique. Analysis of ICWA that is both

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133. 112 Cal. Rptr. 2d 692 (Ct. App. 2001).

134. *Id.* at 724–27. Courts in just a few other jurisdictions have addressed a substantive due process challenge. They have rejected it because the Supreme Court has not yet ascribed such right to children in connection with established family relationships. See, e.g., *In re T.F.*, 972 N.W.2d 1, 16 (Iowa 2022) (overruling a prior holding that denying child ability to challenge transfer violated her procedural and substantive due process rights (citing *In re J.L.*, 779 N.W.2d 481, 489 (Iowa Ct. App. 2009))); *In re Beach*, 246 P.3d 845, 849 (Wash. Ct. App. 2011) (“A child has no fundamental constitutional right to a stable and permanent home.”); *In re N.B.*, 199 P.3d 16, 23 (Colo. App. 2007) (“Neither the United States Supreme Court nor the Colorado Supreme Court has recognized a child’s substantive due process right to a stable home.”).


136. An exception is the nuanced analysis in Atwood, *supra* note 34, at 676, though it does not go beyond identifying the complexities and tensions that arise in applying ICWA.

137. See, e.g., Sandefur, *supra* note 52; Bartholet, *supra* note 27.
comprehensive and deep could fill a book, but below is a fuller account of three core normative defects, the first two of which have received little to no attention.

A. **Imposing an Identity**

Some judges and commentators have alluded to the irrationality of characterizing children as Indian, and then applying a set of life-altering rules to them on the basis of that characterization, when they have only slight Indian ancestry and have never been immersed in tribal life.\(^{138}\) ICWA defenders, conversely, routinely speak of any children who meet the law’s definition of Indian as in fact Indian, as if that is their essence, regardless of ancestry distribution or lived experience, and they bemoan separation of any such children from “their culture” and “their heritage.”\(^{139}\) When confronted with the reality that children captured by ICWA in state court typically have only a small fraction of Indian ancestry,\(^{140}\) they ask rhetorically, “shall we have courts judging degrees of Indianness, deciding whether a person is ‘Indian enough’?”\(^{141}\) Deeper analysis of this labeling of children is warranted.

ICWA imposes a legal identity of “Indian” on millions of children for purposes of state response to parental unwillingness or inability to care

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138. See, e.g., Haaland v. Brackeen, 143 S. Ct. 1609, 1688 (2023) (Alito, J., dissenting) (“It is worth underscoring that ICWA’s directives apply even when the child is not a member of a tribe and has never been involved in tribal life . . . .”); Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013) (“This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known . . . .”).

139. See, e.g., Lussenhop, supra note 105 (quoting the director of a university Indian law clinic: “[P]eople who are removing Native children from their family and culture, you’re not doing good things for Native people.”); J.D. Cooley, Note, Baby Girl’s Fate: Adoptive Couple v. Baby Girl – Placing a Child’s Chosen Parental Path in the Hands of the United States Supreme Court, 8 S.J. Pol’y & Just. 99, 131 (2014) (stating Adoptive Couple “implies that it is appropriate to remove a child from his or her culture heritage because it is ‘best’ financially and mentally for the child. However, such an idea is counter-intuitive to Congress’ intent to preserve and promote the racial identity of American Indian children”); Kate Shearer, Mutual Misunderstanding: How Better Communication Will Improve the Administration of the Indian Child Welfare Act in Texas, 15 Tex. Tech. Admin. L.J. 423, 437 (2014) (“Veronica would have benefitted from a more collaborative examination of her best interests in light of her culture.”); Cohen, supra note 135.

140. Supra note 5.

141. See, e.g., Krakoff, supra note 65, at 754 (employing the racialized stereotype that anyone with a drop of minority race blood must be categorized in that minority, stating: “The Court’s unsubtle implication . . . was that Baby Veronica was not really Indian enough to warrant the ICWA’s coverage. . . . [T]he Court employed tired and racialized stereotypes of Indians (that the only real Indians are ‘full-bloods’).”); Berger, supra note 135, at 350–53; In re N.B., 199 P.3d 16, 22 (Colo. App. 2007) (“Applying the [existing Indian family] exception would result in each state court using its own value system to decide whether a child is ‘Indian enough’ for the ICWA to apply, which would limit the tribes’ efforts to regain members who were lost because of earlier governmental action.”).
for them. This is not mere categorizing for sake of administrative convenience, as polling places do when they divide voters by the first letter of their last name. Nor is it inert, as might be Congress’s legally classifying me as a dual citizen, for no particular reason and to no effect, if Ireland happened to declare me one of its citizens without my request. ICWA labeling has fateful consequences. It is more like Congress classifying as Syrian any Americans whom Syria decides to declare to be its citizens, at a time when Syria is on a list of countries whose nationals are to be deported. Or like the hypothetical Indian Woman Welfare Act’s labeling of women as Indian because a tribe considers them such, with the result of channeling them to a tribe and constraining their relational freedom. ICWA labeling causes involuntary physical relocation of citizens from mainstream American society to a quasi-sovereign territory whose government has claimed them. It also has ethnic connotations that serve as a predicate for tribes and their sympathizers to ascribe an anomalous set of interests, which likely causes many people (including family court judges) to accept the ascription unthinkingly. Yet the vast majority of persons living in mainstream American society on whom ICWA impresses this label have not chosen that membership or identity; they are too young to comprehend the choice, or they do not feel sufficient (or any) connection to that part of their ancestry, and they have given no manifestation that they actually have the interests imputed to them.

Imposing an unchosen personal identity on individuals, political or racial, with life-altering legal consequences and messaging about how they and others ought to view them, is something the government presumptively should not do. Many believe this true of gender and sexual orientation, that it is wrong for the government to categorize a child as “boy” or “girl” and assume gender-specific needs based simply on some aspect of the child’s genetics (chromosome) or biology (genitalia). Many believe even parents and other private individuals should tread


143. See Marita MInow, Not Only for Myself: Identity, Politics, and the Law 78 (1997) (“The legal treatments of identity may trap people in categories that deprive them of latitude for choice and self-invention; legal assignments of identity may also fail to recognize affiliations that are meaningful or weighty in the lives of individuals.”); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990); Sandra Lee Bartky, Femininity and Domination: Studies in the Phenomenology of Oppression (1990).

lightly and respectfully in assuming or influencing important aspects of a child’s self-conception.\footnote{145}

Thus, the aspects of the hypothetical Indian Women Welfare Act that would make some women legally Indians as far as the federal government is concerned, without their having chosen this identity, on the same basis that ICWA imposes Indian identity on children, would offend even if there were no legal consequences attached to that labeling. Similarly, if the U.S. government passed a law declaring that anyone on U.S. soil who has any Russian ancestry, or who has a parent with Russian citizenship, shall hereafter legally be identified as Russian, that would seem objectionable even if it had no significant practical implications (e.g., if those persons were merely required to check a box on government forms, or were simply identified as Russian in any court proceedings in which they might be involved). A person might have had no idea they had such ancestry, and upon learning they have one percent or ten percent or even fifty percent might well say, “But I do not think of myself as that, so what business does the government have pronouncing that to be what I am?” When such labeling does have great consequence, including government seizure and relocation of persons to a distant and isolated community of which they are not currently members,\footnote{146} where they might never be viewed by existing members as belonging there,\footnote{147} arrogantly proclaiming it to be in their interests (as well as the community’s) to live there, it might fairly be characterized as state aggression against the individual.

Further, what has generally gone unrecognized is that ICWA’s labeling not only attaches to a person consequences and connotations of one particular identity, but also erases other actual or potential identities. A person can, of course, have more than one identity; I can be American, of both Irish and German heritage, lawyer, scholar, father, and so on. With ICWA, though, there is a practical erasure of non-Indian ethnic identities and heritages. One ostensible justification for labeling children as Indian is that they supposedly have an interest in living on tribal lands and being immersed in Indian life and culture. Implicitly,

\footnote{145. Cf. A.B. 957, 2023 Leg., Reg. Sess. (Cal. 2023) (adding to the factors for determining a child’s best interests in custody disputes between parents “a parent’s affirmation of the child’s gender identity or gender expression”). Some legislators have even introduced legislation that would treat as child maltreatment aggressive parental efforts to suppress a child’s natural expression of gender identity. See, e.g., H.B. 580, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (adding to the definition of “abused or neglected child” one whose parents inflict “physical or mental injury on the basis of the child’s gender identity or sexual orientation”).}

\footnote{146. Cf. Reese, supra note 2, at 595–96 (“The Navajo Nation is a traditional, isolated, and sparsely populated place. Navajo is still spoken by at least half of the population and nearly 20% of households claim they do not speak English ‘very well.’” (footnote omitted) (quoting Julie Siebens & Tiffany Julian, U.S. Census Bureau, U.S. Dept’ of Com., ACSBR/10-10, Native North American Languages Spoken at Home in the United States and Puerto Rico: 2006–2010, at 2 tbl.1 (2011)).}

\footnote{147. Cf. Jim Kristoff, Navajos Wear Nikes: A Reservation Life 18–19 (2011) (describing bullying the author incurred from Navajo youth who saw him as a “white apple” when he moved to the reservation at age seven).}
ICWA makes that supposed interest legally dominant for ideological and political reasons rather than based on any empirical research regarding children in general or on any objective, fact-based assessment of an individual child’s needs. This, in addition to subordinating other types of interests children have, renders legally irrelevant all other aspects of a child’s ancestry, which likely will receive no recognition or expression on tribal lands. ICWA does this even though other components of ancestry dwarf the Indian component for most off-reservation children captured in ICWA’s net. Yet there is no consideration of the rest of the child’s ancestry, and no concern that the child be connected to the other cultures that their ancestry represents.

This is, first of all, utterly irrational. For there is no plausibility to an assumption that Indian ancestry is the only sort of ancestry a person can have that is meaningful. The point here is certainly not that the government ought to be focused on relative degrees of ancestry and ensure a child has extensive experiences with, for example, the top three. It is rather that ICWA’s basic child welfare assumption, even on its own terms—that is, grossly inflating the significance for a child of the culture of their ancestors—is nonsensical in most off-reservation cases.

But secondly, in this era when people complain loudly of “micro-aggressions,” including impositions of identity that individuals have not chosen (e.g., gender), and ascribing interests and needs based on stereotypes (e.g., about perceived race), ICWA’s imprinting a singular identity on certain children and erasing all their actual or potential non-Indian identities, with concomitant imputation of fabricated needs, might fairly be characterized as mega-aggression, even state violence. It is of a piece with the very practices that motivated ICWA—namely, the government’s taking control of children and attempting to erase one identity in favor of another, for ideological and political purposes, while also claiming with no evidentiary support to serve children’s well-being. The Act’s defenders cannot justifiably remain silent about this aspect of its operation; they are complicit in this identity violence.\(^\text{148}\) They need to explain why it is permissible for the government to declare that a child who is, for example, five percent Navajo but thirty percent Congolese, and possibly

148. See, e.g., Atwood, \textit{supra} note 34, at 654 (ironically invoking tribes’ rights to “self-definition” and “self-determination” as justification for giving tribes other-regarding power to define children as Indian on whatever basis they wish); Brief of National Association of Counsel for Children and Thirty Other Children’s Rights Organizations as Amici Curiae in Support of Federal and Tribal Defendants at 11–13, 20–21, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3924324, at *11–13, *20–21; Brief of the Hamline University School of Law Child Advocacy Clinic as Amicus Curiae in Support of Respondents Birth Father and the Cherokee Nation at 4, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1247775, at *4 (asserting that a guardian ad litem (GAL) must recommend for every child governed by ICWA, including the child in that case with only 1.2% Indian ancestry, placement that ensures connection to a tribe); \textit{id.} at 4–5 (complaining the GAL “ignored Baby Girl’s heritage as a Native American,” while completely ignoring Baby Girl’s heritage associated with the other 98.8% of her ancestry); \textit{id.} at 13 (“Baby Girl’s best interests as an Indian child were altogether ignored.”).
being fostered by Congolese-Americans, just is “Indian,” with all the consequences and connotations that entails, and to erase the much greater part of their heritage—to treat Congolese ancestry as worthless.

The point here is also not that Native American ancestry is never relevant to any child’s welfare. But state regulations governing care of maltreated children can themselves take account of any genuine interest any children living in mainstream society have in being connected to a particular tribe’s culture. Those regulations direct social workers, courts, and guardians ad litem to conduct comprehensive assessments of children’s needs, in light of the children’s past experience and existing relationships, to inform the choice of placements and the guidance given to foster or adoptive parents. Any interest in being connected to a tribal community is, objectively speaking, no greater than an interest in being connected to any other culture reflected in a child’s ancestry, unless (1) the child previously spent substantial time in a particular tribal community and is now actually suffering from being separated from it, or (2) a non-tribal community in which a child ends up living is likely to attribute Indian identity to the child because that portion of their genetics is so dominant and such attribution makes them feel they are missing out on something important (belonging and acceptance, self-understanding, social support, knowing extended family, etc.) by not participating during childhood in tribal life.

There is little reason to expect either of these things ever actually happens today with many children living in mainstream American society who fall within ICWA’s grasp. Again, children entering state child welfare systems are disproportionately quite young, so if now living in mainstream society, they are unlikely to have had much experience of tribal life or to self-identify as a member of a tribe. Further, there is no research basis for supposing a change of cultural environment per se is harmful to children. If it were, we would criticize any parents who relocate with children to a different culture, perhaps charge them with psychological abuse. In reality, we commend parents for doing just that if it gives their children a richer life experience or extracts them from a potentially damaging culture. The trauma inflicted on on-reservation children prior to ICWA, judging from their stories, was not so much from being separated from an existing value system and way of life per se, but rather from being forcibly wrench away from people they loved and then having their selfhood aggressively assaulted by people determined to “kill the Indian.” No one today, at least no one who is not a tribal Indian, would charge an Indian parent with harming a child by taking the child away from tribal lands to live in mainstream society, regardless of whether the parents continued to instill Indian culture or to involve the child in Indian cultural practices. Nor would anyone think American parents who take their children to live in distant countries with very different cultures have harmed them. The U.S. is an immigrant nation, with children continually being transplanted from distant lands to America,

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149. See, e.g., GA. COMP. R. & REGS. 290-9-2-.05 (2023).
yet we do not regard children brought from another country as traumatized by whatever cultural discontinuity that entails. Nor do we think physical return to a past cultural environment is the only or best way to deal with any sense of loss or disorientation an older child might have. In short, ICWA’s conception of children’s interests, in which connection to Indian culture is dominant, is ideological, not reality-based. Scientifically speaking, it is nonsense.150

With respect to societal ascription of Indian identity to children, this is much less likely than is ascription in the case of children who have more distinctive physical characteristics. For example, a child with substantial African ancestry is likely to be viewed by others as a Black American simply because of appearance. That child might therefore benefit significantly from being connected in some way to Black American culture and community. But even as to such children, there is no research on welfare outcomes to support the proposition that it is better for them to be raised by Black adoptive parents rather than by White adoptive parents. The federal prohibition on race matching in adoption rests on a congressional finding that children’s interest in simply being parented and a member of a family is far more important than any ethnicity-related interests.151

Moreover, children whose ancestry is mostly other than Native American will likely never be viewed by others in their community as Indian unless they choose to represent themselves to others as such; the rest of society is likely to see them simply as typical Americans with a mix of ancestries from other parts of the world. Those with a substantial fraction might be viewed as among the one-fifth of the U.S. population that is Hispanic or Latino. One tragic manifestation of this reality about the appearance of most Native Americans is that sex traffickers target girls on reservations in part (along with the destitution and abuse that make many such girls willing to leave) because they can present the girls to

150. Justice Gorsuch’s Haaland concurrence cited an amicus brief, filed by some psychologist organizations, for the proposition that “considerable research ‘[s]ubsequent to Congress’s enactment of ICWA’ has ‘borne out the statute’s basic premise’—that ‘[i]t is generally in the best interests of Indian children to be raised in Indian homes.’” Haaland, 143 S. Ct. at 1647 (Gorsuch, J., concurring) (alterations in original) (citing Brief of the American Psychological Association, Society of Indian Psychologists, Indiana Psychological Association, Louisiana Psychological Association, and Texas Psychological Association as Amici Curiae in Support of the Federal and Tribal Petitioners at 10–24, Haaland, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3682219, at *10–24). The brief is advocacy, not objective professional analysis, and the reports it cites are both irrelevant and of poor quality, some not even published, let alone peer reviewed. None of the studies that the brief cites compare children raised by Indians with children raised by non-Indians. None assign a relative weight to cultural connection compared to other factors in selection of foster care and adoption placements. The brief’s failure to cite any research that actually supports Justice Gorsuch’s conjecture about children’s well-being suggests there is none.

the real wrongs of ICWA

predator-customers as being of any of a variety of ethnicities. Further, such children might never even come to know that they have any Indian ancestry absent the search ICWA requires, yet they would never suffer in any way as a result of not knowing. Anyone who has submitted a genetic sample to a genealogical company is likely to have discovered portions of their ancestry they never suspected existed and is highly unlikely to have experienced an identity crisis as a result.

ICWA defenders say it is improper for state actors to decide if a child is “Indian enough.” But nothing is more common in child welfare practice than assessing the degree of psycho-emotional or social connection a child has with individuals, groups, schools, and communities, or the likelihood that a child will wish to have such connection in the future in light of their personal characteristics. Moreover, tribes themselves scrutinize whether children are “Indian enough” in determining eligibility for membership. Most have a blood quantum or lineage requirement. For some it is a particular fraction, and some require that ancestors have been on the Dawes Rolls.

ICWA supporters say it is more appropriate for tribes to make such judgments than state courts, but that is far from clear. The notion of a group right to decide criteria for membership is far more plausible with choices to exclude than with ability forcibly to include; a basic right of dissociation (corollary to the right to freedom of association) supports the former but conflicts with the latter. Consider again the hypothetical Indian Mentally Disabled Person Welfare Act and its provision empowering tribes to impose membership on nonautonomous adults. Moreover, a tribal decision to deem a child Indian is also a decision, practically

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153. See supra note 141.

154. See Sandefur, supra note 52, at 9–10; Krakoff, supra note 65, at 754 (“[T]here are people with much greater degrees of Cherokee blood who are not eligible for membership because they cannot trace their ancestry to the historic rolls.”). The Dawes Rolls were lists of persons, compiled by a federal commission between 1898 and 1914, deemed members of five of the largest native tribes and therefore eligible for a land allotment.

155. See, e.g., Marcia A. Yablon-Zug, Adoptive Couple v. Baby Girl: Two-and-a-Half Ways to Destroy Indian Law, 111 Mich. L. Rev. FIRST IMPRESSIONS 46, 48 (2013) (objecting to “giving states, rather than tribes, the power to determine who is an Indian child”); id. at 53 (“[T]he Act simply reinforces the right of tribes to define their members.”); Keith C. Smith, Tribal Membership: Its Role and Application, in BEST PRACTICES FOR DEFENDING TRIBAL MEMBERSHIP CASES: LEADING LAWYERS ON NAVIGATING TRIBAL MEMBERSHIP ENROLLMENT ISSUES 7, 10 (2013) (“Clearly, the decision that an individual belongs to a tribe is exclusively within the jurisdiction of that particular tribe.”).
speaking, to deem the child’s non-Indian ancestry inconsequential, and the tribe stands in no better position to judge the value of non-Indian ancestry than non-Indians stand to judge the value of Indian ancestry. Further, we should ask on what basis tribes establish their particular criteria—that is, what is their rationale for including some and excluding others? Does it arise from unique insight tribal leaders have about when blood quantum or some other attribute is great enough for a person to fit in or contribute sufficiently or deserve membership (whether they want it or not)? If so, how could that vary so much from one tribe to another? Is it not likely that tribes set their criteria based simply on how much they want to increase or shrink their ranks?\textsuperscript{156}

The typical model for decision-making on behalf of a nonautonomous person entails appointing a disinterested surrogate who endeavors to look at the situation from the dependent person’s standpoint and perspective,\textsuperscript{157} and on this question of identity tribal leaders are not disinterested. They also might not be especially knowledgeable about the experience of off-reservation children, nor inclined or able to see the world from a child’s standpoint (especially if they have a collectivist outlook). What American governments and legal scholars should be deferring to is not the perspective of tribes but the perspective of the child whose life they presume to dictate, imagining possible future life paths, informed by objective child development professionals. It can be difficult in some cases to do this with great confidence, just as is often true of relationship and life-course decision-making by or for any adult. In many other cases, however, the best decision from a disinterested, evidence-based, nonideological child well-being standpoint will be clear. Child protection caseworkers must make this kind of judgment routinely.

Finally, ICWA is inherently predicated on a congressional judgment of which children are “Indian enough” to be channeled to tribes. That Congress established a minimalist criterion—effectively, having any ancestor who was a member of a tribe, subject to exclusion by tribes who adopt a higher threshold—does not mean it is not judging.\textsuperscript{158} ICWA defenders are implicitly doing the same, themselves judging that having any Indian ancestor makes a child “Indian enough” to be sent away to a reservation. Conversely, Congress implicitly also decided in 1978 that viewing oneself as Hopi or Sioux, perhaps because one grew up on tribal lands,\textsuperscript{159} is not enough—indeed, is irrelevant. And that looking Indian is


\textsuperscript{158} Cf. 25 C.F.R. § 83 (2023) (setting requirements for federal recognition as a tribe, including limiting membership to descendants from an historical tribe).

\textsuperscript{159} Cf. Reese, \textit{supra} note 2, at 595 (stating ten percent of people living on the Navajo reservation are not Indian); Gary D. Sandefur & Carolyn A. Liebler,
not enough—indeed, is irrelevant. And that being an adopted child of a tribe member is not enough—indeed, is irrelevant. And so forth. States also make judgments of “Indian enough” for other purposes, including some based on blood quantum.\textsuperscript{160}

In sum, state courts objectively assessing the strength of a child’s already existing ties to a tribe or tribal culture, along with all other significant aspects of a child’s life, in order to make a surrogate decision from the child’s standpoint about which foster or adoptive placement would be best among all available, would be neither anomalous nor improper. In doing so, courts should refrain from imposing an unchosen and fateful identity on children on the basis of tribe-serving, ideological, or racist impulses.

B. Fundamental Misunderstanding of Government’s Role in Foster Care and Adoption

ICWA critics refer derisively to the Act’s characterization of children as a “tribal resource” without explaining what is wrong with that.\textsuperscript{161} Surely it is not always problematic to refer to persons as resources; large employers have a “human resources” department. Moreover, there are accepted ways governments treat private individuals instrumentally—for example, drafting adults into the military or using tax revenue to incentivize career choices that serve the national economy.

For their part, ICWA defenders and some courts unabashedly speak of children in instrumental terms and emphasize that Congress intended through ICWA not just to serve children’s interests but also to serve the potentially conflicting aim of bolstering tribal populations and ensuring tribal survival, as redress for damage state and federal governments have done to tribes historically.\textsuperscript{162} They implicitly take the stance that


\textsuperscript{160}. See Fletcher, supra note 65, at 553–54.


it is appropriate for the state to use children, in ways that go to fundamental aspects of the children’s lives, for the purpose of helping tribes. More neutral commentators recommend a balancing of tribal interests and child welfare, as if they are commensurable and on an equal moral footing.  

Which of these positions is correct? Is it appropriate to use child welfare cases to serve tribal interests, to the potential detriment of children, as ICWA patently does? Is the problem with the Act just that it strikes the wrong balance in many cases? To answer thoughtfully, one should take a large step back from the debate to ask in the broadest terms what the state is doing in ICWA cases, what normative constraints there are on that type of state activity, and what basic framework of decision should apply to that realm of government action.

ICWA governs state response to situations in which a nonautonomous and vulnerable person cannot safely, or because of parental choice will not, remain in parental custody and in which kin have not stepped in to care for the child. State agencies assume control of the nonautonomous person and decide what alternative caregiver the child will have, temporarily or permanently. Usually, the state itself takes legal custody of these persons and houses them with caregivers it has recruited and trained. These activities—taking possession of private individuals and assigning them to homes and families—are ones in which the state presumptively should not engage. Intimate relations form a central aspect of individuals’ private lives, which is one thing that distinguishes them normatively from military service and university course selection. There is now robust constitutional doctrine presumptively prohibiting the government from interfering with or commandeering intimate relationships. The aspect of the hypothetical Indian Women Welfare Act constraining women to choose an Indian husband offends this norm of noninterference in central aspects of private life.

With nonautonomous persons, the state is nevertheless justified in making decisions that largely determine their family life, including who

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163. See, e.g., Christina Lewis, Note, Born Native, Raised White: The Divide Between Federal and Tribal Jurisdiction with Extra-Tribal Native American Adoption, 7 GEO. J.L. & MOD. CRIT. RACE L. & POL’Y 417, 424 (2018) (“ICWA is not just about children and families, but also about tribal sovereignty and integrity.”); Yablon-Zug, supra note 155, at 48 (“Congress enacted ICWA to ensure the survival of Indian tribes . . . .”)

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be preserved . . . .”); Matthew H. Birkhold, The Indigenous McClain Doctrine: A New Legal Tool to Protect Cultural Patrimony and the Right to Self-Determination, 97 WASH. U. L. REV. 113, 161 (2019) (“ICWA recognizes . . . that the tribe occupies the best position to protect and preserve tribal resources.”); Brief of the Amicus States of California & Alaska et al. in Support of the United States and Intervenor Tribes and Reversal at 7, Brackeen v. Zinke, 994 F.3d 249 (5th Cir. 2021) (No. 18-11479), 2019 WL 261978, at *7 (“[T]he United States assumes responsibility to protect tribal resources and redress ‘depredations’ committed against the tribe.”); Allison Krause Elder, “Indian” as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act, 13 NW. J.L. & SOC. POL’Y 417, 424 (2018) (“ICWA is not just about children and families, but also about tribal sovereignty and integrity.”); Shearer, supra note 139, at 424 (“[M]any weighty interests hang in the balance, and it is impossible to determine which interest is most important.”).
their caregivers will be, because those persons need legally effective choices to be made yet cannot make them themselves.\(^{164}\) The state is the creator of legal relationships and of legal protections for social relationships, so it is the natural choice for surrogate decision-maker. The state therefore makes such choices for persons from the moment of birth through parentage and custody laws, and sometimes later in life as well.\(^{165}\) At times, the state is justified in taking possession of children or nonautonomous adults because their welfare is endangered and they are unable to protect themselves or to seek help on their own.

Importantly, however, despite the commonness of such state actions, the state is doing something extraordinary in dictating persons’ close relationships and family life and in taking custody of them. It is operating outside the normal bounds of government envisioned by political theorists, who generally presuppose private parties are autonomous and self-determining. In Anglo-American jurisprudence, the state’s extraordinary exertion of power over central aspects of individuals’ private lives, in the case of nonautonomous persons—whether children or adults, has always been predicated upon the “\textit{parens patriae}” authority of the state—ultimate guardian of persons unable effectively to make relationship choices and to protect their own interests.\(^{166}\) It is not a component of the state’s more familiar police power function—preventing private harms, adjudicating conflicts, and serving collective societal ends.

\textit{Parens patriae} is not just a fancy name applied to normal government activity when nonautonomous persons are centrally involved. It is a distinct state function, as to which a different normative and constitutional framework of decision should apply, just as other state functions (e.g., employer, jailor, business operator, international actor) are governed by distinctive norms.\(^ {167}\) Courts, commentators, and, it seems, members of Congress, sometimes fail to recognize that state exertion of paternalistic


\(^{166}\) See Daniel L. Hatcher, \textit{Purpose vs. Power: \textit{Parens Patriae} and Agency Self-Interest}, 42 \textit{N.M. L. Rev.} 159, 159–60 (2012) (“The purpose of state human service agencies to serve vulnerable populations such as abused and neglected children derives from the common law doctrine of \textit{parens patriae} . . . .”).

\(^{167}\) See, e.g., Enquist v. Or. Dep’t of Agric., 553 U.S. 591, 598 (2008) (“[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising ‘the power to regulate or license, as lawmaker,’ and the government acting ‘as proprietor, to manage [its] internal operation.’” (second alteration in original) (quoting Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 896 (1961))); Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (“[W]hen public employees make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline.”); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (“[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker.”).
control over the lives of children is a distinctive state function. They tend unthinkingly to assimilate it to the state’s police power role in which government serves all members of society, balancing competing interests to advance aggregate welfare. But that is not an appropriate framework for controlling central aspects of a nonautonomous person’s life.

Rather, when operating in the parens patriae role, the state steps into the shoes of the nonautonomous person, serves as agent for that individual, and exercises for them their rights vis-à-vis other private parties. In doing so, the state is constrained by the constitutional rights of that nonautonomous individual. The substantive due process right against state intrusion and incursions on private life shapes the parens patriae role and constrains how the state may carry it out. The state may not use that power for any purpose other than that which justifies it—namely, the child’s need for a proxy to act in their behalf. Accordingly, in that role the state is not constrained by, and in fact may not aim to serve, interests of the state or of any other individuals, nor should it ascribe rights to any other persons in connection with that proxy decision-making for the ward. The state effectuates for the nonautonomous person rights analogous to autonomous persons’ rights of self-determination, which include entitlement to choose whether to join in or continue a relationship with another, willing person, unconstrained by interests or desires of third adults.

168. See, e.g., James G. Dwyer, Smith’s Last Stand: Free Exercise and Foster Care Exceptionalism, 24 U. PA. J. CONST. L. 856, 859–61 (2022) (describing how disputes over school vouchers, boy scout leaders, discriminatory foster care agencies, and other childrearing issues are framed as contests between competing interests of adults).

169. See Developments in the Law—The Constitution and the Family, 93 HARV. L. REV. 1156, 1199 (1980) ("When the state acts as parens patriae, it should advance only the best interests of the incompetent individual and not attempt to further other objectives, deriving from its police power, that may conflict with the individual’s welfare."); id. at 1200–02 ("Given the different premises and purposes of the police power and the parens patriae power, courts should apply different principles when they analyze laws based on these two powers. . . . It should exercise the parens patriae power solely to further the best interests of the child.").

170. See Michael J. Higdon, Parens Patriae and the Disinherited Child, 95 WASH. L. REV. 619, 642–43 (2020) (characterizing parens patriae as "the right and the duty of the state" to make decisions in the best interests of vulnerable persons (footnote omitted)); Hatcher, supra note 166, at 171–72 ("State child welfare agencies exist to protect the interests, and the rights, of abused and neglected children. . . . The agencies serve in the nature of a fiduciary for children’s rights, and the agencies’ interests and actions are intended to align with the best interests of the children.").


172. JOHN NORTON POMEROY, TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA; ADAPTED FOR ALL THE STATES, AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE § 1307, at 330 n.1 (1887) ("The exercise of the jurisdiction depends on the sound and enlightened discretion of the court, and has for its sole object the highest well-being of the infant.").
parties or groups. Lack of autonomy does not transform one’s normative position relative to third parties and does not render those central aspects of one’s private life subject to others’ preferences or use for ulterior purposes. Thus, for example, the interests and desires of pro-life activists are no more relevant to surrogate abortion decision-making for a mentally disabled woman than they are to abortion decision-making by an autonomous woman. And Indian tribes’ need for members is irrelevant to the constitutional and moral relationship rights of both women and children.

_Parens patriae_, in other words, is a fiduciary role, governed by a duty of loyalty that requires exclusive focus on the well-being of the ward. Instrumental use of the ward to serve other persons, groups, and causes is ruled out. In constitutional terms, state seizure of children from their homes and court orders that children be transplanted from mainstream

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173. _See James G. Dwyer, The Relationship Rights of Children_ 80–93 (2006); Brief of the Ohio Ass’n of Juvenile Court Judges as Amicus Curiae at 8, _In re Gault_, 384 U.S. 997 (1966) (No. 116), 1966 WL 100788, at *8 (“It is the unquestioned right and imperative duty of every enlightened government, in its character of _parens patriae_, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy . . . are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise.” (alteration in original) (quoting _Cnty. of McLean v. Humphreys_, 104 Ill. 378, 383 (1882))); _cf._ _Cruzan ex rel. Cruzan v. Dir., Mo. Dep’t of Health_, 497 U.S. 261, 286 (1990) (rejecting parents’ assertion that they have a right to decide regarding life-sustaining care of adult offspring, stating “we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself”); _In re Quinlan_, 355 A.2d 647, 661–62 (N.J. 1976) (rejecting claim by parents of woman in persistent vegetative state that they had a right to decide on the basis of their religious beliefs whether life support would be terminated, stating “we do not recognize an independent parental right of religious freedom to support the relief requested”).

174. _Cf._ Thompson v. Oklahoma, 487 U.S. 815, 825 n.23 (1988) (“Children, the insane, and those who are irreversibly ill with loss of brain function . . . all retain ‘rights,’ to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind.”).

175. _See Sallyanne Payton, The Concept of the Person in the Parens Patriae Jurisdiction over Previously Competent Persons_, 17 J. Med. & Phil. 605, 617 (1992) (“Under the law that has governed the _parens patriae_ jurisdiction ever since it was created in the middle ages in England, a person whose powers of self-management have been taken from him by the state has a right that those who exercise the power to manage his affairs on his behalf do so in a fiduciary capacity. . . . The state takes jurisdiction only as a trustee: the jurisdiction has been designed to avoid vesting in the state any authority or incentive to act in a self-interested manner vis-a-vis the incompetent . . . .”).

176. _Cf._ Lionel Smith, _Parenthood Is a Fiduciary Relationship_, 70 U. TORONTO L.J. 395, 428 (2020) (“When a person, the fiduciary, acquires powers not for her own benefit but, rather, to allow her to attend to the interests of her beneficiary, then the fiduciary must use those powers in what she perceives to be the best interests of the beneficiary. That is what the powers are for; that is the basis on which and the purpose for which they are acquired; and that is how they must be used. Any other use is a misuse.”); Evan J. Criddle, _Liberty in Loyalty: A Republican Theory of Fiduciary Law_, 95 Tex. L. Rev. 993, 995 (2017) (explaining that the duty of loyalty guards against domination “by ensuring that a fiduciary’s actions are legally required to track the terms of her mandate and the interests of her beneficiaries”).
society to tribal lands amount to infringements of fundamental liberties, and they require justification by a compelling and legitimate purpose as well as furtherance of that purpose by the least restrictive means. Serving tribal interests is not a legitimate purpose at all in this *parens patriae* context, let alone a compelling one, any more than it would be as justification for the Indian Woman Welfare Act. Balancing children’s well-being against tribal or other interests, however natural that might feel, is simply improper. This is our intuitive response to the hypothetical laws at the outset of this Article, including that concerning nonautonomous adults, and it should be our response to ICWA as well.

Thus, for the federal government to take advantage of some children’s predicament of being without fit parents, by using them to settle a societal debt owed to a minority cultural group, is a condemnable abuse of state power. What the Supreme Court should have said in *Mississippi Band of Choctaw Indians v. Holyfield* 177 is that Congress had an additional aim in passing ICWA, one that can conflict with children’s welfare, and that this was profoundly wrong and violated children’s fundamental rights. It rendered a group of children vulnerable to serious harm, as explained below, for a purpose illegitimate in child welfare practice. Instrumental treatment of children is the immoral, unconstitutional essence of ICWA.

C. Harmful Rules

ICWA’s third fundamental defect is simple: its procedural and substantive rules governing state response to maltreatment or relinquishment of children are very bad for them. Briefing in *Haaland* and other cases has shown this in individual instances. This section presents a broader critique based on a deeper account of child welfare practice and empirical research on best practices.

This third problem results from the first two above. Both (1) the unwarranted imposition of identity, with the assumptions about interests that it carries, and (2) the overt aim of serving interests of people other than the maltreated children on whom that identity is imposed, have produced in ICWA rules that diverge widely from a research-based, child-centered approach. Generally applicable state laws for child protection response are themselves skewed in many respects contrary to child well-being, because of legislative and judicial acquiescence to exaggerated claims of parental entitlement and adult-centered demands by advocates for the poor and minority race communities.178 ICWA pushes the needle still further away from child well-being in several respects: forcing children to remain in harmful home environments, delaying

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permanency, compelling inferior foster and adoptive placements, and destroying attachment relationships children form in initial post-removal placements.

1. *Leaving Children in Harmful Home Environments*

ICWA makes it too difficult to remove a child from parental custody following substantiated reports of maltreatment, by raising the evidentiary standard to clear and convincing and narrowing the substantive basis for removal to likelihood of serious damage. Courts explain ICWA’s additional obstacles to removal as necessary to counteract cultural ignorance in CPS workers. Before ICWA, it is said, social service employees wrongly perceived children as endangered simply because they were being cared for by extended family members. Whatever the truth of the matter a half-century ago, this is not something that would happen today, for several reasons.

First, child protection workers do not roam the countryside looking for children to protect; agencies react to reports, which come mostly from neighbors and family members, doctors and teachers in the local community, and police. These people perceive sufficient threat to a child’s welfare to go through the trouble of contacting CPS. It is implausible to think anyone would do this today simply because a child is staying with an aunt.

Second, even if unwarranted reports come in, agency intake workers screen out reports whose observations are insufficient to match state law definitions of abuse or neglect, which require actual or threatened injury. A report simply that a child has been living with an extended family member instead of a parent would certainly be screened out, and no case would be opened. Moreover, with excessive caseloads and insufficient foster care beds, agencies err on the side of inaction, and many states have adopted the “differential response” system under which many or most opened cases result only in offers of assistance—no investigation, no finding, no coercion, no removal.

Third, even if cultural, ethnic, and racial biases were prevalent among CPS caseworkers in the 1970s and made them more heavy-handed with families perceived as Indian, today consideration of culture and ethnicity generally does the opposite; it makes caseworkers more hesitant and deferential to parents. Schools of social work have for decades now hammered students over the head with a social justice ideology that likens removal of children from minority race households to pre-Emancipation plantation owners’ callous destruction of slave families, characterizes

181. *Id.* at 6–7.
transracial foster or adoptive placements as genocide, and makes cultural sensitivity the prime virtue of child welfare workers. Child protection agencies have also been subjecting caseworkers to cultural sensitivity training for many years. Couple this with CPS workers’ knowledge that ICWA cases entail much additional aggravation, investigation, and paperwork, and the more plausible assumption is that they are less, rather than more, inclined to remove a child when they learn a parent is a tribe member. “Indian children” are, like Black children, in foster care at a disproportionate rate, but for both groups the disproportionality is entirely explicable in terms of higher rates of actual maltreatment. Thus, there is no justification today for making the rules for child removal more demanding in the case of a child labeled Indian.

ICWA’s removal rules are patently too demanding to allow adequate protection. For example, in a common case with newborns, the birth mother has a serious, chronic substance abuse problem. Statistically this substantially elevates the chances the mother will cause the child suffering, injury, or death—for example, by failing to feed or change the baby, leaving the baby unattended while strangers are in the household or something is cooking on the stove, rolling on top of the baby while sleeping, etc. ICWA tells a caseworker responding to a positive toxicology finding as to an “Indian” newborn not to take custody of the baby unless she can present to a court clear and convincing evidence (the standard ordinarily applied only in a TPR action) that the mother, if she takes the baby home with her, is “likely” to “serious[ly] . . . damage . . . the child.” How could the caseworker possibly show that? Likewise with a six-month old thrown against a wall by mom’s boyfriend. What would constitute clear and convincing evidence that something like that will probably happen again if the baby remains with the mother, especially if she states that (for now) the boyfriend has moved out? Imagine if a domestic violence victim were required to present clear and convincing evidence that additional harm in the future is likely, as a prerequisite to securing a stay-away order.


So, escalating abuse of a child, which is common, that has not yet reached the level of causing serious damage might be insufficient. Long-term failure to supervise because of incapacitation by drugs might be insufficient if the child has been lucky enough so far to survive without serious damage. Some judges might conclude that even ongoing sexual activity with a child is not grounds for removal if they do not yet manifest "serious emotional . . . damage."  

2. Delaying Permanency

With older children, there is somewhat less urgency to achieve final resolution. They are likely to have some attachment to birth parents and need time to process their past experience and plans for their future and to form new bonds. At some point, though, they need to feel embedded and secure in a "forever family." With babies and infants, there is great urgency to get them into permanent placements with capable, nurturing caregivers—back with birth parents, if possible, otherwise with alternate parent figures. Prime time for attachment is ages seven months to twenty-four months, and the process takes many months. In addition, children are more adoptable the younger they are and the fewer adverse early childhood experiences they have had, and placement instability during the reasonable/active-efforts period constitutes a significantly adverse experience.

ICWA prolongs the child welfare process considerably. It requires investigating tribal connections and affording tribes time to search records, decide if they wish to intervene, and identify members willing to take in a child. Then, agencies must conduct home studies on any tribe members put forward (who might be geographically distant, so require cooperation with an unfamiliar agency in that locale). Every hearing becomes more complicated than normal because of involvement of tribe representatives, a tribe’s proposed placement family, and more lawyers and social workers. Anyone who has spent time in juvenile court knows that even when there are few participants maltreatment cases routinely get dragged out by scheduling complications and missing paperwork. The complexity of ICWA cases is likely to lead judges to waive the usual deadlines for each step of the court process, and to find at a permanency hearing that the agency has not yet made active effort to reunify, thus necessitating adjournment.

ICWA’s TPR rules further delay permanency if efforts at parental rehabilitation fail. They ratchet up the state’s evidentiary burden for

188. Id.
190. See, e.g., Merav Jedwab, Yanfeng Xu & Terry V. Shaw, Kinship Care First? Factors Associated with Placement Moves in Out-of-Home Care, 115 Child. & Youth Servs. Rev. 1, 2 (2020) (“Placement moves have a negative effect on different developmental outcomes of children in care, including physical development and brain development and increase the risk for children’s behavioral, social, and academic problems.” (citations omitted)).
TPR to the level of a criminal trial and greatly narrow the substantive bases, making it nearly impossible for the state to end an unsalvageable parent-child relationship and free the child for adoption. For example, if a baby’s parents were just sentenced to twenty years in prison for armed robbery, it is unclear how an agency could prove beyond a reasonable doubt that the child would incur serious damage if returned to the parents’ custody. Or recall the example of a baby born to an addicted mother. Suppose the agency convinces a court to order removal and then undertakes addiction treatment with the mother, and the mother goes through the common cycle of sobriety and relapse recurrently for years. Can the agency prove beyond a reasonable doubt at any point in time that the baby would be seriously damaged if returned to the mother despite active efforts to prevent further relapse? The mere fact that the child is bouncing around foster care interminably and never attaching to any caregiver presumably would not satisfy the rule. ICWA forces prolonging that psychologically corrosive experience indefinitely. Even if the child has been in a stable foster care placement and securely attached to foster parents, ICWA puts the child under persistent threat of disruption and the trauma and developmental damage that disruption can cause, by precluding the TPR that must precede permanency through adoption and the security that provides. Further, to the extent rules for removal or TPR have subjected a child to more adverse experiences and delayed availability for adoption, it is less likely the child will be adopted.

3. Worse Living Situations

Two features of ICWA—transfer rules and placement priorities—result in children relocating from mainstream society to tribal lands. What that means for environment quality and caregiver capability can vary immensely based on community resources, rates of individual and family dysfunction, robustness of tribal foster care systems, and other factors. In normal child welfare practice, caseworkers and courts consider for each potential placement how conducive to child well-being are the household, extended family, neighborhood, and community. Ample research shows that parental dysfunctions, such as mental health struggles and substance abuse, typically extend through much of the extended family.\textsuperscript{191} Also well documented is the developmental harm assessed on children placed into inegalitarian and economically disadvantaged environments that may not be capable of providing a child a safe and stable home.\textsuperscript{192} The Indian Child Welfare Act, by its transfer rules and placement priorities, disrupts the possibility for a child to remain in a stable and nurturing environment free from substance abuse, violence, and neglect.

\textsuperscript{191} See Sarah A. Font, \textit{Kinship and Nonrelative Foster Care: The Effect of Placement Type on Child Well-Being}, 85 Child Dev. 2074, 2075 (2014) (“[M]ental health, substance abuse, violence, and some forms of neglect have been shown to be transmitted through both biological and environmental conditions that are shared within a family or bloodline. Consequently, a kin placement may be placing a maltreated child in the same conditions that influenced the parent of that child, who was identified by the child protection and juvenile court systems to be unfit.” (citations omitted)); N. Hindley, P.G. Ramchandani & D.P.H Jones, \textit{Risk Factors for Recurrence of Maltreatment: A Systematic Review}, 9 Archives Disease Childhood 744, 750 (2006) (citing research finding “associations between recurrence of maltreatment and the child’s primary caretaker themselves having been maltreated as a child”); Elizabeth Barholet, \textit{Nobody’s Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative} 93 (1999) (“[W]e should be willing to face up to the fact that child
adverse neighborhood conditions cause. An outsider need not pass
independent judgment on conditions in tribal lands based on the many
studies showing dramatically elevated rates of sexual and other child
abuse, domestic violence, rape, other violent crime, addiction, school
dropout, depression, teen suicide, teen pregnancy, parental aban-
donment, unemployment, poverty, dependency on government, homes that
lack plumbing and utilities, adults without homes, etc.

An outsider might fail to appreciate positive aspects of tribal life, so forbearance of
judgment might be appropriate. But tribal leaders and other residents of
reservations themselves lament the bleak conditions in their commu-
nities, and they do not say “but the positive aspects of tribal life make up
for the suffering.” To the standard reaction that problems on tribal
lands are the result of historical and ongoing injustices, the morally and
constitutionally proper response is: “Yes, true, but children, like adults,
maltreatment is only rarely aberrational. It ordinarily grows out of a family and
community context. Keeping the child in that same context will often serve the
child no better than keeping him or her with the maltreating parent.”).  

192. See Font, supra note 191, at 2075 (describing direct and indirect adverse
effects on children of concentrated-poverty neighborhoods); James G. Dwyer, No
Place for Children: Addressing Urban Blight and its Impact on Children Through Child
Protection Law, Domestic Relations Law, and “Adult-Only” Residential Zoning, 62 Ala. L.
Rev. 887, 897-99 (2011).

193. For an in-depth account of conditions on reservations, see generally RILEY,
supra note 66. See also Timothy Sandefur, Why Haaland v. Brackeen Is Not the End
of the Story, 2023–2024 CATO SUP. CT. REV. 169, 206 (stating, with citation to reports,
that Indian children “are the most at-risk demographic in the United States, facing
greater threats of neglect, violence, gang activity, drug and alcohol addiction, and
suicide than any other group of children. They suffer higher rates of abuse than kids
of any other race” (footnotes omitted)); RILEY, supra note 66, at 125 (“[M]embers
of First Nations are doing abysmally by every economic and social indicator.”); id.
at viii (stating that a fourth of girls and a sixth of boys on tribal lands are sexually
molested during childhood); id. at 152–54 (showing extraordinary rates of sex
offenders present on tribal lands, unconstrained in their contact with children, and
of children manifesting sexual abuse); id. at 155–56 (finding tribal government
indifferent to sexual abuse); Chrystal Begay & Tinesha Zandamela, Sexual Assault on
byu.edu/issue-briefs/sexual-assault-on-native-american-reservations-in-the-us
[https://perma.cc/4EAI-3FXQ] (showing one in three Native American women
have reported being raped, and noting “[s]exual assault victims may often suffer
from mental illnesses”).  

194. See, e.g., The Opioid Crisis in Tribal Communities: Oversight Hearing Before the
15–20 (2022) (statement of Maureen Rosette, Board Member, National Council on
Urban Indian Health); Hearing on COVID-19 in Indian Country: The Impact of Federal
Broken Promises on Native Americans Before the U.S. Comm’n on C.R., 116th Cong. 1
(2020) (statement of Fawn Sharp, President, National Congress of American Indians)
(“Indian Country is in a national emergency.”); Hearing on the Need to Reauthorize
the Violence Against Women Act Before the S. Judiciary Comm., 115th Cong. 1–116
(2018) (statement of the National Congress of American Indians); RILEY, supra note
66 (relating numerous interviews with residents of reservations); id. at 36 (“The best advice [the Whispering Pines/Clinton band’s chief] can give his children and the children of others in the band is to get an education and leave . . . .”); Living
Feb. 28, 2024).
have a right to the residential choice that is best for them now among available alternatives and should not be forced to bear the cost of ameliorating harms from injustices.”

In addition, channeling children to tribes causes them to lose whatever protections state law affords child well-being, replacing them with whatever laws a tribe happens to have for maltreatment, foster care supervision, service provision, school standards, student rights, entitlement to medical care and counseling, etc. Federal law does not impose on tribes any requirements for child welfare protection or promotion.195 Likewise, relocation to tribal lands withdraws from youth whatever rights federal and state constitutions confer, as interpreted by federal and state courts.196 Congress has enacted a basic civil rights law that governs tribal communities, but tribal courts interpret it, and their decisions are not subject to appeal in federal or state courts.197 Any supposition that tribes generally have a more collectivist orientation incompatible with individual rights would suggest some might be resistant to giving the Indian Civil Rights Act much effect on their lands.198 Research finds, for example, that tribal communities in general are more hostile to LGBTQ persons than the rest of the country.199 Autonomous adults are free to choose to live in this different legal environment, but the normative argument for that freedom provides no support for the state’s choosing to shift nonautonomous, non-choosing persons to it.200

ICWA defenders seem to believe that whatever deficit in living conditions tribes present, every “Indian child” has an overriding interest in growing up immersed in tribal culture. There are best interests and then there are “Indian best interests.” This is utterly implausible and

195. Since 2008, tribes have had access to Title IV-E funds the federal government uses to dictate child welfare practices, but few have qualified and thereby come under the federal law’s requirements. See Lauren van Schilfgaarde & Brett Lee Shelton, Using Peacemaking Circles to Indigenize Tribal Child Welfare, 11 COLUM. J. RACE & L. 681, 699–702 (2021).

196. See supra note 65.

197. Reese, supra note 2, at 586 (“Congress . . . has largely let tribal governments decide for themselves how to balance their citizens’ individual rights and tribal governments’ powers.”).

198. See Donna J. Goldsmith, Individual vs. Collective Rights: The Indian Child Welfare Act, 13 HARV. WOMEN’S L.J. 1, 1 (1990) (“Indian cultures focus on the collective rights of the community; permitting individual rights to bow more readily to the needs of the community.” (footnote omitted)).


unsupported by empirical research. It is no more rational than saying there are a different sort of best interests for every group of children or individual child, to be defined by whoever happens to have power over them, without reference to empirical research. The logical conclusion of such invoking of a metaphysical measure of well-being is that anyone should be able to assert their own view of what children need and demand deference from child protection agencies and courts. Certainly, every racial group should be able to claim its own conception of best interests, and every immigrant group, perhaps every religious group as well. There are best interests and then there are “Branch Davidian best interests” and “best interests of daughters of Shafi’i Muslims.” Why not every family? If the claim resonates with your ideology as a legislator or judge or member of the public, you accept it. Or you shrink into relativity paralysis.

Alternatively, we could acknowledge that there are mountains of well-done empirical research (though also mountains of poorly done research) that can inform objective assessments of what is important to children’s well-being. That includes study of the significance of attachment relationships, caregiver capacity, neighborhood quality, and educational opportunity. Notably nonexistent is research demonstrating need for connection to cultures in which a fraction of one’s ancestors lived.

Some suggest state courts should not think so much in terms of an individual child’s well-being because tribes have a more collectivist, less individualist outlook. Thus, some children living in mainstream American society are, because of some tribe’s membership rules, not to be viewed as having rights in connection with state control over their family lives, even in a state court, because that tribe does not live by such individualistic notions. The state court judge should, they suggest, adopt the perspective of a tribal judge or tribal leader and treat the child as the tribe would—namely, a resource or an undifferentiated participant in a communal spirit. Of course, state judges are not trained to do this. So, they must suppose that what a tribe would do is simply make sure the child is living on tribal lands, for the sake of the collective, and not worry about the child as an individual and how the child is doing.

Whether or not this accurately depicts the outlook of many or any tribal leaders (it makes ICWA’s emphasis on preserving individual

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203. On the absence of support for claims of culture’s importance in connection with transracial and international adoption, even when a child’s ethnicity is quite distinctive, see, e.g., Rebecca Compton, Adoption Beyond Borders: How International Adoption Benefits Children 57–82 (2016).

204. See Sandefur, supra note 52, at 49–50 (describing court opinions); id. at 71–72 (describing legal scholars’ views).
parents’ rights puzzling).\textsuperscript{205} This take on the implications of cultural difference multiplies the offense of taking away a person’s rights, relationships, resources, opportunities, and identity on arbitrary grounds. Our legal system would never contemplate doing this to adult victims of abuse, whether autonomous or not, who happen to have some ancestral connection to a tribe but have never signed on to its “non-Western” values nor agreed to become a member of a collective to which their individuality is subordinated, stripping them of their legal status as right holders, deeming their personal well-being irrelevant to how the state disposes of them. That some American judges and legal scholars would contemplate doing this to children is inexplicable except in terms of a bare denigration of children’s personhood—a disregard for children’s equal moral standing in the human community.\textsuperscript{206} That moral standing requires the state to keep its hands off except insofar as it aims to serve the child, just as with intervention in the private life of a mentally disabled adult or a domestic violence victim. If a state court judge should try to adopt any other person’s perspective in a child maltreatment case, it is that of the child.

4. \textit{Destroying Children’s Secure Attachments}

When CPS removes children from their homes, it routinely does a quick search for relatives willing and able to take the child in. In a substantial portion of cases, however, no relative steps forward initially, so CPS places the child with nonrelatives pre-qualified as foster parents. With infants, the foster parents are typically willing from the outset to have adoption as the backup plan if parental rehabilitation fails. Having found a placement, CPS is then likely to deprioritize the search for relatives while waiting to see whether reunification efforts succeed. The child therefore stays with the non-relative caregivers for many months, and then many more months, and forms a bond with them. ICWA, as noted above, is likely to further prolong foster care. A tribe might intervene right after removal, but it too might decide to wait to see how things go with parent rehabilitation before investing effort in identifying potential alternative placements.\textsuperscript{207}

Then comes time to change the permanency plan from reunification to TPR and adoption, and the CPS caseworker suddenly makes a more aggressive search for relatives. The tribe might now proffer someone for the first time. The foster parents renew their expression of interest in adopting, and the child is probably old enough at that point to say, if asked, “yes” to the question “do you want to stay with your mommies

\textsuperscript{205} Cf. \textit{id.} at 77 (stating that this “generalization [is] not supported by history”).

\textsuperscript{206} Cf. \textit{James G. Dwyer, Moral Status and Human Life: The Case for Children’s Superiority} (2011).

\textsuperscript{207} See, e.g., \textit{Haaland v. Brackeen}, 143 S. Ct. 1609, 1626 (2023) (stating that for one child at issue, the tribe was notified at initial removal but waited to intervene until an adoption proceeding began years later).
[or daddies, or mommy and daddy]?" But whereas state law would instruct the agency and court to support the adoption option best for the child, which development research would clearly say is the foster parents if there is a secure attachment to them,208 ICWA creates a hard preference for any newfound relative or tribe member and thus destruction of the attachment relationship with foster parents.

Defenders of a kin preference typically allude to research they think proves kin placements are generally better for children, or simply assert that to be fact without bothering about research.209 The reality is that there is no research showing kincare to be generally superior.210 In fact, some researchers have found significant negative outcomes associated with kincare placement—explainable in terms of pervasive dysfunction in families, old age and poor health of caregivers (usually grandmothers), and family dynamics.211 But above all, there is no research that even

210. Cf. Sarah A. Font, Is Higher Placement Stability in Kinship Care by Virtue or Design?, 42 CHILD ABUSE & NEGLECT 99 (2015) (debunking claims about stability); Font, supra note 191, at 2077 (explaining flaws in the research on welfare outcomes that kincare advocates cite); Marc Winokur, Amy Holtan & Keri E. Batchelder, Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment, COCHRANE LIBR. 1, 20 (2014) (noting “the pronounced methodological and design weaknesses of the included studies” and stating, "[i]t is clear that researchers and practitioners must do better to mitigate the biases that cloud the study of kinship care"); id. at 21 (referring to “the weak standing of quantitative research on kinship care” and “high risks of performance, detection, reporting, and attrition bias”).
211. See, e.g., Kierra M.P. Sattler, Sarah A. Font & Elizabeth T. Gershoff, Age-Specific Risk Factors Associated with Placement Instability Among Foster Children, 84 CHILD ABUSE & NEGLECT 157, 166 (2018) (“Kinship care was associated with a 18% higher risk of a substandard care disruption than non-relative foster care . . . .”); Sarah A. Font, Are Children Safer with Kin? A Comparison of Maltreatment Risk in Out-of-Home Care, 54 CHILD. & YOUTH SERVS. REV. 20, 22 (2015) (“[C]hildren in formal kin placements were found to have significantly higher exposure to physical violence when compared with children in non-relative care. Formal kin caregivers have also been found to use harsher disciplinary techniques . . . [and] scored significantly higher on the Child Abuse Potential Index as compared with non-relative foster parents.” (citations omitted)); Christina Sakai, Hua Lin & Glenn Flores, Health Outcomes and Family Services in Kinship Care: Analysis of a National Sample of Children in the Child Welfare System, 165 ARCHIVES PEDIATRICS & ADOLESCENT MED. 159, 162 (2011) (finding “nearly 7 times the risk of pregnancy . . . and 2 times the risk of substance abuse” with youth raised in kincare versus non-kin foster care); Eun Koh & Mark F. Testa, Children Discharged from Kin and Non-Kin Foster Homes: Do the Risks of Foster Care Re-Entry Differ?, 53 CHILD. & YOUTH SERVS. REV. 1497, 1502 (2011) (“[C]hildren discharged from kinship homes are more likely to re-enter substitute care than children from non-kinship homes.”).
attempts to measure whether any benefits for children of growing up in a household with biological, nonparent relatives outweigh the well-established harm of destroying a secure attachment relationship that has formed with existing caregivers, whether biologically related or not. The small and inconsistent findings as to comparative welfare outcomes in the two types of placement when both are long-term suggests that attachment dwarfs co-residence with kin per se in importance.

But ICWA, courts frequently remind us, is not just about the children. It is about repaying tribes for injustices done, and it would be ironic to pass any negative judgments on tribes or Indian kin in the course of doing that if their problems might be explicable in terms of the injustice. So, the BIA and ICWA defenders would like to preclude courts from doing that, just as Indian men might wish to preclude women from passing negative judgment on them because of their circumstances and characteristics that have resulted from historical injustices. Just as any parent, Indian or not, might wish not to be judged for their abusive behaviors that stem from being abused themselves as children. But surrogate decision-making for children about central aspects of their private lives is not supposed to be constrained by third-party interests, as explained above, and in any event, it is not about passing moral judgment on people but just identifying and effectuating the best available options for a child who needs the state to act on their behalf.

Finally, in this and in non-ICWA contexts, some point to the danger of incentivizing delaying tactics if foster parents’ position grows stronger the longer a child is in their care. And from this empirical premise they leap to the normative conclusion that the relationship should not have priority or even be considered. The missing major premise must be that no intimate human relationship should receive protection against state interference if anyone’s misconduct played a role in its formation. That is not a principle we would apply to voluntary intimate relationships between competent adults. In the case of children in foster care, allowing concern about incentivizing delay tactics in future cases to justify severance of an attachment relationship amounts to illicitly injecting interests of other persons or of institutions into what is supposed to be surrogate exercise of this individual child’s rights by the state in a fiduciary, parens patriae capacity. All that should matter is what is now best for the individual child whose family life the state is presuming to dictate. The state must find some other way to address any legitimate concerns about strategic delays.

Conclusion

Child protection politics today are paradoxical. Most people who choose careers devoted to child welfare are politically liberal, but the field has become so dominated by a radical left, postcolonial,

213. See Font, supra note 191.
anti-subordination, adult- and group-oriented ideology that most liberals have become inclined to support any laws governing children pitched as redress to “communities” for historical injustices done to them. ICWA is a clear example. The past injustices were real and cause for collective shame, but use of children’s lives today to provide redress is immoral and unconstitutional, as well as tragically counterproductive, inflicting damage on a new generation of persons viewed as part of those communities. Conservatives, generally not expected to care much about (or think it the government’s job to address) the plight of vulnerable people in subordinated groups, nevertheless often lead the way with changes to maltreatment law that move the pendulum in the child-protective direction—whether because of the social costs created by the intergenerational cycle of dysfunction (foster care, crime, welfare, etc.), belief in color blindness, or other reason. The writing is on the wall for ICWA, it seems, as conservatives now dominate the Supreme Court and some have made plain their disapproval of the law. This Article provides child-centered support for their inclination to abolish it.

That will not mean state courts must cease paying attention to whatever genuine interest some children under their jurisdiction actually have in being connected to, even members of, a tribe. State law mandates comprehensive assessment of a child’s interests, including any religious or cultural background, and identification and consideration of relatives as foster and adoptive placements. State agencies have established and can continue pathways of communication with tribes, so tribal officials and members can be consulted about a child’s past experience with the tribe, if any, and whether there are tribe members who are relatives, known to the child, and well-prepared to care for the child. But liberals or conservatives who are truly child-centered might soon be able to expect that no children in the United States will ever again, in state determination of their family lives, be treated as anyone’s resource. Tribes have a strong claim to much greater material support from the rest of American society to help them achieve flourishing and lasting self-sufficiency. Giving them children is a condemnable form of corrective justice on the cheap.

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214. See, e.g., Maggie Blackhawk, Foreword: The Constitution of American Colonialism, 137 Harv. L. Rev. 1, 15 (2023) (extolling ICWA as “a law that was crafted specifically to mitigate paradigmatic dynamics of American colonialism”); see also Stoesez, supra note 183 (describing ideological abstractions driving left advocacy in child welfare); Gelles, supra note 39 (same).