U.S. Supreme Court Holds the Indian Child Welfare Act Is Constitutional

The Indian Child Welfare Act (ICWA) was enacted by Congress in 1978 and applies to designated "child custody proceedings" that involve an "Indian child." An Indian child is a person who is under 18 years old and is either (1) a member of a federally recognized Indian tribe or (2) eligible for membership in a federally recognized Indian tribe and a biological child of a member of a federally recognized Indian tribe. 25 U.S.C. 1903(4). There are four types of child custody proceedings that are governed by ICWA: (1) foster care placements, (2) preadoptive placements, (3) termination of parental rights (TPR), and (4) adoptions.

The purpose of ICWA is to set minimal federal standards for four types of child custody proceedings that involve the removal and placement of Indian children. Through ICWA, Congress sought to address "an alarmingly high percentage of Indian families that are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. 1901(4). ICWA encompasses a national policy of protecting the best interests of Indian child and promoting the stability and security of Indian tribes and families. 25 U.S.C. 1902. ICWA has many provisions that apply to abuse, neglect, dependency; TPR; guardianship of minors; and adoptions of minors (including stepparent adoptions) when an Indian child is involved. (For more information about ICWA and its requirements, see Chapter 13, section 13.2 of the A/N/D-TPR Manual here.)

In 2019, ICWA was challenged as and held to be unconstitutional because it exceeded federal authority, infringed on state sovereignty, and discriminated on race. That federal district court opinion was appealed and ultimately heard by the U.S. Supreme Court. Last Thursday, in a 7-2 opinion, the U.S. Supreme Court rejected every challenge made by the petitioners in Haaland v. Brackeen, 599 U.S. ___ (2023) and held that ICWA is constitutional. This opinion has two concurrences and two dissents, all of which are discussed below.

The Petitioners

The petitioners include both individuals and the states of Texas, Indiana, and Louisiana. The case arises from three child custody proceedings where an Indian child was involved; the child was placed in a non-Indian placement; and the child's tribe sought to enforce the placement preferences designated in ICWA.

One of the petitioners was a couple who provided foster care to an Indian child and who wanted to adopt the child with the support of the child's parents and grandmother. The child's tribe opposed the adoption by the petitioners and sought to enforce the placement preferences for the child with a nonrelative tribal member. A second petitioner was the Indian child's biological mother and prospective non-Indian adoptive parents who were selected by the biological mother. Although both

biological parents supported the adoption, the tribe intervened and sought to enforce the placement preferences of ICWA. The third petitioner fostered an Indian child and sought to adopt the child. The tribe intervened and because of the placement preferences of ICWA, the child was moved from the non-Indian placement and placed with their grandmother. During the pendency of this appeal, the first two petitioners were able to adopt the children. All the individual petitioners expressed an interest in fostering or adopting Indian children in the future.

The Constitutional Challenges

Petitioners argued ICWA was unconstitutional because (1) Congress lacked authority to enact ICWA, (2) numerous ICWA requirements violated the Tenth Amendment anticommandeering principle, (3) race classifications for placement preferences discriminated against non-Indian families who wanted to foster or adopt Indian children, and (4) placement preferences that can be altered by the tribes violated the nondelegation doctrine.

Procedural History

A Texas federal district court granted summary judgment for the petitioners on all of their claims. In an *en banc* decision, the Fifth Circuit affirmed in part and reversed in part. The Firth Circuit held ICWA does not exceed Congress's power, the tribe's placement preferences do not violate the nondelegation doctrine, and some of the placement preferences satisfy equal protection guarantees. The Fifth Circuit evenly split on whether other placement preferences unconstitutionally discriminated on race and on issues related to notice requirements, placement preferences, and some recordkeeping requirements. Because of the even split, the Fifth Circuit affirmed the district court's ruling that these provisions were unconstitutional. The Fifth Circuit held the active efforts requirements, expert witness requirements, and the recordkeeping requirements violated the Tenth Amendment anticommandeering principle. The U.S. Supreme Court granted certiorari. Louisiana and Indiana did not pursue the appeal before the U.S. Supreme Court.

The U.S. Supreme Court Decision: Haaland v. Brackeen, 599 U.S. ___ (2023)

Congress Has the Power to Enact ICWA

The majority opinion held that precedent has established that Congress has "plenary and exclusive" power to legislate with respect to Indian tribes. Op. 10. This plenary power comes from (1) the Indian Commerce Clause (U.S. Constitution, Art. I, sec. 8, cl. 3); (2) the Treaty Clause (U.S. Constitution, Art. II, sec. 2, cl. 2); (3) principles inherent in the structure of the Constitution to act on Indian affairs, described as "necessary concomitants of nationality" (Op. 11); and (4) "the trust relationship between the United States and the Indian people" (Op. 12). Congress has the power to legislate a wide range of areas with respect to Indians, including the areas of criminal law, domestic violence, employment, property tax, and trade.

The opinion focuses on Congress's plenary power over Indian affairs under Article I and the Indian Commerce Clause. In discussing Congress's power to enact legislation under Article I of the Constitution, the majority recognized that Congress generally lacks power over domestic relations and that state courts apply state law when hearing cases involving foster care and adoptions. ICWA, a federal statute, applies when the child is an Indian child. The majority held ICWA is permissible because "the Constitution does not erect a firewall around family law", and there is not a family law carve out to Congress's power to enact legislation under Article I. Op.14. In contrast, Justices Thomas and Alito in their dissents discuss how the federal government's powers are limited by the Constitution and that family law is under the authority of the states.

Regarding the Indian Commerce Clause, the majority and concurrence (Gorsuch, joined by Sotomayer and Jackson) rejected the petitioners' argument that the Indian Commerce Clause does not apply to Congress's power to enact ICWA. The opinion held that the Indian Commerce Clause does not apply only to Indian tribes. Precedent has established that "commerce with Indian tribes, means commerce with the individuals composing the tribes." Op. 15 (citation omitted). Although petitioners argued that children are not commerce, the majority noted that the argument is a rhetorically powerful point but ignores precedent that the Indian Commerce Clause addresses trade as well as "Indian affairs." Op. 16. The majority stated that the petitioners ignore precedent and argue "as if the slate were clean[,but m]ore than two centuries in, it is anything but." Op. 17. Agreeing with the majority, Justice Gorsuch stated that the Indian Commerce Clause gives Congress the " 'authority to regulate commerce with Native Americans' as individuals … [and] cover[s] 'something more' than just economic exchange." Gorsuch Concur 28, 29. As a result, the Indian Commerce Clause gives Congress the power to enact ICWA. In his dissent, Justice Thomas agreed with petitioners that the Indian Commerce Clause applies to commerce, which is economic activity, and does not involve children or child custody matters.

The majority opinion and the Gorsuch concurrence recognize that legal precedent about Congress's plenary power over Indian affairs is confusing as it has become broader over time. The status of the case law on plenary power was discussed by the majority, Justice's Gorsuch's concurrence, and Justice Thomas's dissent. The majority opinion holds that Congress's plenary power is not unbounded, free-floating, or absolute but derives from the Constitution. Justice Gorsuch explained that the Supreme Court has started to correct its mistake of expanding the meaning of plenary from what was first employed. The opinion recognizes that what Congress can legislate with respect to Indian tribes results from the Constitution and the Indian Commerce Clause and so Congress has limits. The concurrence also determined that ICWA falls under Congress's constitutional authority and limits how non-Indians may interact with Indians. Through the enactment of ICWA ,"Congress exercised its authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history. All of that is keeping with the Constitution's original design." Gorsuch Concur 28.

The Two Dissents

In a dissent, Justice Thomas concludes that Congress did not have authority to enact ICWA. Justice Thomas was unable to find any constitutional basis for the federal government's plenary power over Indian affairs. The Indian Commerce Clause applies to economic activity and not children. ICWA is not based on a treaty. The inherent foreign affairs power does not apply to domestic child custody proceedings of U.S. citizens who reside in the States. Because there is no constitutional basis for ICWA, ICWA is unconstitutional. ICWA is an intrusion on states' powers as it "regulates child custody proceedings, brought in state courts, for those who need never have set foot on Indian lands. It is not about tribal lands or tribal governments, commerce, treaties, or federal property." Thomas Dissent 39.

Justice Alito also dissents. The basis for his dissent is that "ICWA violates the fundamental structure of our constitutional order." Alito Dissent 4. The provisions of ICWA are contrary to the best interests of children and require courts to consider what Congress believes is in the best interests of tribes. Congress's authority over Indian affairs does not allow it to (1) promote the tribe's interests over a child's best interests and (2) force state judges to follow the tribe's priorities for placement. States govern family relations. ICWA requires a state to abandon its own judicial procedures and laws when addressing a child's welfare and apply a federal law that focuses on the tribes and not solely on the child's best interests. This overrides the state's authority and harms vulnerable children and their parents.

ICWA Does Not Violate the Anticommandeering Principle of the Tenth Amendment

The petitioners argued that certain requirements of ICWA, including the provision of "active efforts," expert testimony, heightened evidentiary standards, notice requirements, and placement preferences, violate the anticommandeering principle of the Tenth Amendment. They argue these provisions that apply to involuntary child custody proceedings (which in NC are abuse, neglect, dependency, and TPR actions) command the states to administer or enforce a federal regulatory program.

The majority opinion recognizes that ICWA provides heightened protections to parents and tribes. For example, any party who seeks a foster care placement or TPR must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful." Op. 18-19 (quoting 25 U.S.C. 1912(d)). The opinion holds that the active efforts requirement does not command the state's legislative or executive authority to administer or enforce a federal regulatory program. The active efforts requirement is not directed primarily or exclusively to the states but applies to "any party" initiating an involuntary proceeding. "Any party" includes private individuals and agencies along with government entities. When legislation applies evenhandedly to state and private actors, the Tenth Amendment is not typically implicated. Despite an argument by petitioners, there is no evidence that states initiate the vast majority of involuntary proceedings. Additionally, Texas law authorizes private parties to initiate a TPR proceeding. Although the state initiates child protection cases, active efforts apply to cases that do not involve abuse or neglect.

For example, active efforts apply to a private adoption where one parent does not consent. The state is also not the only entity that can protect a child; for example, a grandmother can seek guardianship of her grandchild when the parents are neglectful. The majority noted that requiring active efforts in these private child custody proceedings is consistent with ICWA's findings about the role of public and private actors in unjustly separating Indian children from their families and tribes. The opinion also held that the provisions of ICWA that address notice requirements to the tribes, expert witness requirements, and evidentiary standards apply to both private and state actors and do not pose an anticommandeering problem.

Similarly, the placement preferences for the child under 25 U.S.C. 1915 do not violate the anticommandeering principle of the Tenth Amendment because the preferences apply to private and public parties. These preferences are hierarchical, starting with the child's extended family and then prioritizing Indian providers over non-Indian providers. However, ICWA "does not require *anyone*, much less the States, to search for alternative placements" so the state is not commanded to do anything. Op. 23 (emphasis in original). Although state courts must apply the placement preferences, Congress can require state courts to enforce federal law under the Supremacy Clause. The majority reiterated that as held in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), no preference applies if an alternative party who meets the preferred preference has not come forward. The tribe or party objecting to the placement has the burden of producing the preferred (meaning higher-ranked) placement.

Two challenged recordkeeping requirements do not violate the anticommandeering principle of the Tenth Amendment. The challenged provisions require (1) the state court to provide the Bureau of Indian Affairs with a copy of the final adoption order and other information to show the child's tribal affiliation and name, the names and addresses of the biological parents and adoptive parents, and the identity of any agency that has information about the adoptive placement (25 U.S.C. 1951(a)) and the state to maintain a record that documents the efforts that were made to comply with the placement preferences and to make the record available at any time to the Bureau of Indian Affairs or the tribe (25 U.S.C. 1915(e)). "Congress may impose ancillary recordkeeping requirements related to state-court proceedings without violating the Tenth Amendment." Op. 28.

Lack of Standing for Equal Protection and Nondelegation Challenges on Placement Preferences

The individual petitioners and the State of Texas do not have standing to raise an equal protection challenge to the placement preferences or a nondelegation challenge to the tribe's ability to modify the placement preferences. The equal protection challenge was based on the argument that the placement preferences discriminate on race.

For standing, petitioners must show they suffered an injury that will be redressed by the requested relief. The placement preferences are applied by state courts, and state agencies carry out the court-ordered placements. None of the parties to the lawsuit are state officials who implement ICWA. As a result, any order would not be binding on the state actors. Since a judgment remedies

an injury, addressing this issue would not result in a remedy. Instead, the judgment would be nothing more than an opinion. Texas has no equal protection rights and cannot bring an action against the federal government as *parens patriae* on behalf of its citizens. Texas has not been injured.

In his concurrence, Justice Kavanaugh emphasizes that the court did not address or decide the race-based equal protection issue because of the lack of standing. He notes that this serious issue is undecided.

Concurrence Explains Historical Context for ICWA

Some may wonder why ICWA was and is necessary. In his concurrence, Justice Gorsuch discusses the almost 150-year history of the removal of Indian children from their families and tribes and the resulting existential threat to the tribes. Justice Gorsuch starts his discussion with the creation and widespread use of Indian boarding schools, which started in 1879 with one school in Pennsylvania and grew to 408 schools across the country. The goal of the boarding schools was "the abolition of the old tribal relations." Gorsuch Concur 4. Children came to the schools through either abduction or from coercing parents by withholding rations. Once at the schools, the children were stripped of their identity – they were given English names, had their hair cut and their traditional clothes confiscated, were prohibited from speaking their native language or engaging in their customary or religious practices, and were separated from other members of their own tribe. Children who resisted or ran away were punished. The conditions in the schools generally involved sexual, physical, and emotional abuse; disease; malnourishment; overcrowding; and no health care. Tribes were charged with the cost of the schools. Children at the boarding schools were required to work on the grounds to subsidize the costs. Some children were "outed" to live with white families to work on household and farm chores. Boarding schools continued into the 1970s, although a transition away from boarding schools had been occurring.

At the same time, there was an increased demand for Indian children by adoptive couples. In the 1960s and 1970s, approximately one quarter to one third of all Indian children were removed from their families and communities without justification and without due process. An estimated 90 percent or more of non-relative adoptions were by non-Indian couples. Compared to white children, Indian children experienced a higher rate of physical, sexual, and emotional abuse in their foster and adoptive homes. The result was long-lasting health and emotional damage.

In 1978, Congress responded to this crisis by enacting ICWA. Justice Gorsuch stated, "the law's operation is simple. It installs substantive and procedural guardrails against the unjustified termination of parental rights and removal of Indian children from tribal life." Gorsuch Concur 10. Still, " ' many [S]tates have struggled with 'effective implementation'…. Others resist ICWA outright, as the present litigation by Texas attests." Gorsuch Concur 12.