NOTE

MOVING FORWARD FROM *BRACKEEN* AND SOLUTIONS FOR THE GREATER EFFICACY OF THE INDIAN CHILD WELFARE ACT

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INTRODUCTION

The Indian Child Welfare Act (ICWA) of 1978, enacted to protect American Native children from being removed from their tribes, was recently upheld in 2023 by the U.S. Supreme Court in *Haaland v. Brackeen* in the face of considerable challenge. Through analyzing the upholding of ICWA and its ramifications, this Note seeks to examine how greater solutions can be postulated to keep Native children with Native families within the reaffirmed boundaries of the plenary power. Both continual and novel challenges since ICWA's enactment in 1978 will be discussed. Ultimately, this Note will analyze what specific duty of care and involvement is owed to tribes after decades of policies sought the assimilation and the mass removal of Native children from their homes. These policies may necessitate greater federal support with social services aimed at decreasing the amount of dependency proceedings involving Native children, which remain disproportionately high. ICWA and its progeny will be defined at the onset of this Note and later used to examine what duty the federal government owes to tribes and what role the federal government should have in mitigating the consequences of a centuries-long genocide against tribes. Historical context for why ICWA was enacted will be provided thereafter. Though the *Brackeen* decision dealt with the legal challenges raised by the petitioners such as federal authority, infringement on state sovereignty, and racial discrimination, the decision does not address the questions and concerns raised by the application of ICWA in dependency proceedings. Currently, the most pressing concern is the unfortunately still high rate of removal of Native children from their families and the exacerbating weight of child welfare systems to manage its own demands.

While this Note will address some of the questions unanswered by the *Brackeen* decision, the focus of this Note is to discuss the causes and solutions to the complicated factual scenarios that dependency proceedings raise. ICWA is not a panacea, but a tool for Indigenous nations to exercise sovereignty, through being able to keep the children of their nations

in their nation. After a discussion of the current enforcement of ICWA, solutions will be laid out that aim to reduce the disproportionate placement of Native children in the foster system and ensure that ICWA is effectively enforced as intended. The lens of sovereignty will frame the arguments for the greater efficacy of ICWA because promoting tribal sovereignty is at the heart of each of these proposed solutions. Maintenance of ICWA remains essential to mitigate the ongoing disproportionate removal of Native children from their homes, but greater measures can be taken by the U.S. government to ease ICWA dependency proceedings. With more uniform enforcement of ICWA throughout the nation, as well as enforcement of ICWA that is cognizant of its history and the ongoing cultural practices and sovereignty of tribes, fewer Native children will be harmed by the foster care system.

I
THE INDIAN CHILD WELFARE ACT OF 1978 (ICWA) AND ITS PROGENY

The Indian Child Welfare Act (ICWA) was codified into federal law at 25 United States Code §§ 1901-1963[1] in 1978 and seeks to keep Indian children with Indian families by balancing the "best interests of Indian children" with tribal governance and sovereignty.[2] ICWA allows for tribal governments to exercise exclusive jurisdiction over dependency proceedings[3] and adoptions[4] when an Indian child resides in the tribe's reservation or when a tribe requests transfer of the proceeding to its own tribal court. The tribe also has the right to intervene in the dependency proceeding at any point,[5] and notice must be given to both the parent or custodian and the Indian child's tribe.[6] Any Indian parent or custodian "may withdraw consent to a foster care placement . . . at any time," for any reason, "and the child shall be returned" to said Indian guardian.[7] ICWA essentially makes it more difficult for an involuntary removal

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1 25 U.S.C. §§ 1901–1963.

2 *Id.* §§ 1901–1902; *see also* Haaland v. Brackeen, 143 S. Ct. 1609, 1623–1625 (2023).

3 25 U.S.C. § 1911(a)–(b).

4 *See id.* § 1911(a) (establishing that "[a]n Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child").

5 *Id.* § 1911(c).

6 *Id.* § 1912(a).

7 *Id.* § 1913(b)–(c).

to occur[8] by requiring that "active efforts" be demonstrated to avoid the removal of the Indian child.[9] The hierarchy of the child's foster placement preferences is as follows:

> (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[10]

Under ICWA, an "Indian child" is defined as a person under eighteen who is "(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."[11]

The application of ICWA varies with how dependency, adoption, and family laws compare for non-Native children entering the system across jurisdictions.[12] Through recognizing the unique trust relationship between Indian tribes and the federal government, the sources of Congressional authority to enact ICWA derived from Congress's power to regulate commerce with Indian tribes and through Congress's "plenary power over Indian affairs."[13] This special relationship between tribes and the federal government is characterized as a responsibility of Congress for the "protection and preservation of Indian tribes and their resources."[14] Through the observation of an alarmingly high rate of Indian children being removed from their families, as well as an alarmingly high rate of said children being placed into non-Indian foster homes or institutions, Congress acknowledged a failure to recognize the need for tribal jurisdiction over custody proceedings and the accompanying "tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[15]

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8 Haaland v. Brackeen, 143 S. Ct. 1609, 1646 (2023) (Gorsuch, J., concurring).

9 25 U.S.C. § 1912(d).

10 *Id.* § 1915(a)–(b).

11 *Id.* § 1903(4).

12 *See* Anu Joshi, *Protecting the Indian Child Welfare Act at the State Level*, ACLU (June 15, 2023), https://www.aclu.org/news/racial-justice/protecting-indian-child-welfare-act-icwa-state-level-brackeen-v-haaland [https://perma.cc/9K2F-5CK4] (discussing variations in state applications of ICWA).

13 *Id.* § 1901(1).

14 *Id.* § 1901(2).

15 *Id.* § 1901(5).

Title IV-E of the Adoption Assistance and Child Welfare Act of 1980, an amendment to the Social Security Act, was one of the first major child dependency statutes enacted by Congress post-ICWA.[16] Title IV-E provides federal funding to foster care, adoption, and kinship guardianship assistance conditioned on compliance with a Title IV-E plan approved by the U.S. Department of Health and Human Services (HHS) that seeks to ensure child safety and well-being.[17] A Title IV-E Agency operates on a state level,[18] as well as for tribal agencies seeking federal funding.[19] As a federal program, Title IV-E serves all fifty states,[20] along with twenty-one federally recognized tribes.[21] These Title IV-E agencies must create a written case plan for every child in care to determine appropriate placement.[22] The Family First Prevention Services Act,[23] enacted in February of 2018, is another major amendment to Title IV-E of the Social Security Act and provides reimbursement of 50% to tribal and state agencies for funding for mental health, parent skill-building, and substance abuse treatment programs.[24]

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16 Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272 § 101(a)(1), 94 Stat. 500; *see* EMILIE STOLTZFUS, CONG. RSCH. SERV., IF11843, CHILD WELFARE PROGRAMS: A TIMELINE (2021), https://crsreports.congress.gov/product/pdf/IF/IF11843/2 [https://perma.cc/462U-HK83].

17 EMILIE STOLTZFUS, CONG. RSCH. SERV., R42794, CHILD WELFARE: STATE PLAN REQUIREMENTS UNDER THE TITLE IV-E CARE, ADOPTION ASSISTANCE, AND KINSHIP GUARDIANSHIP ASSISTANCE PROGRAM 1 (2014), https://crsreports.congress.gov/product/pdf/R/R42794/10 [https://perma.cc/29N4-TYWK].

18 42 U.S.C. § 671(a)(3) (stating "that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them.").

19 42 U.S.C. § 679c(c)(1)(B).

20 Children's Bureau, *Title IV-E Foster Care Eligibility Reviews Fact Sheet*, U.S. DEP'T OF HEALTH & HUM. SERVS. (stating that "Title IV-E foster care funds are awarded to the 50 States") https://acf.gov/cb/fact-sheet/title-iv-e-foster-care-eligibility-reviews-fact-sheet#:~:text=Title%20IV-E%20foster%20care%20funds%20are%20awarded%20to%20the,state%20title%20IV-E%20agencies [https://perma.cc/K2QT-VXB8].

21 Children's Bureau, *Tribes with Approved Title IV-E Plans*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Oct. 29, 2024), https://www.acf.hhs.gov/cb/grant-funding/tribes-approved-title-iv-e-plans [https://perma.cc/5SYF-C95Q].

22 42 U.S.C § 671(a)(16); 42 U.S.C. § 675(1)(A)–(B).

23 Bipartisan Budget Act of 2018, Pub. L. 115-123, 132 Stat. 64; *see* Children's Bureau, *Title IV-E Prevention Program*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Jan. 17, 2025), https://www.acf.hhs.gov/cb/title-iv-e-prevention-program [https://perma.cc/4JRX-SHLP].

24 MEGHAN BISHOP ET AL., FAMILY-BASED FACILITIES FOR TREATING SUBSTANCE USE DISORDERS: A TITLE IV-E FUNDING AND PLANNING BRIEF 22 (2024), https://www.casey.org/media/24.02-Family-Centered-Substance-Abuse-Treatment-Funding-and-Planning-Brief-1.pdf [https://perma.cc/DP6F-LDZJ].

ICWA is often hailed as a "gold standard" for child welfare proceedings as it prioritizes upholding familial ties.[25] When a court is informed that the child in a dependency proceeding may be considered an Indian child under ICWA, Title IV-E agencies must comply with ICWA's standards rather than state law. In particular, the "active efforts"[26] requirement of ICWA, intended to prevent separating Indian children from their families, poses a more substantial burden than the "reasonable efforts"[27] requirement under Title IV-E, intended to prevent removal of non-Native children from their homes.

Another difference is that under ICWA's placement preferences, placing the child with other tribe members or Indian families, even if they are not related, is prioritized,[28] whereas under Title IV-E, agencies must consider preference for relatives over non-relative caregivers.[29] In addition, if a case reaches a removal to foster care placement stage or a termination of parental rights stage in an ICWA proceeding, the testimony of a qualified expert witness is mandatory in support of evidence beyond a reasonable doubt for the termination of parental rights and in support of clear and convincing evidence for foster care placement.[30] In 2016, the Bureau of Indian Affairs published guidelines for implementing ICWA, which clarified that a qualified expert witness may be designated by the Indian child's tribe, but cannot also be the active social worker on the Indian child's case.[31] The qualified expert witness must be qualified to testify on "whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe."[32] As for non-ICWA proceedings,

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25 Shea Backus, *Indian Child Welfare Act: Upheld by U.S. Supreme Court and Enacted into State Law*, 32 NEV. LAW. 21, 22 (Feb. 2024) (discussing the operation and purposes of ICWA).

26 25 U.S.C. § 1912(d) (stating that "any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall 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 proved unsuccessful.").

27 42 U.S.C § 671(a)(15)(A)-(B).

28 25 U.S.C. § 1915(a)–(b).

29 42 U.S.C. § 671(a)(19).

30 25 U.S.C. § 1912(e)–(f).

31 25 C.F.R. § 23.122.

32 *Id.* § 23.122(a).

a qualified expert witness is not federally mandated,[33] as the evidentiary standard for termination of parental rights is clear and convincing evidence,[34] rather than ICWA's beyond a reasonable doubt requirement, and the evidentiary standard for foster care placement varies among state laws.[35] All of these differences between ICWA with federal and state child welfare laws highlight the arduous efforts needed to separate Native children from their families and the distinction of persistent cultural preservation efforts throughout this process.

II
Historical Context of ICWA

Understanding the historical context that gave rise to the enactment of ICWA is imperative before assessing any constitutional merits. In assimilation efforts by the federal government, policies were geared toward the destruction of tribal identity and the mass removal of Native children from their families.[36] To achieve such nefarious goals, Native children were targeted because "the warm reciprocal affection existing between parents and children" was "among the strongest characteristics of the Indian nature," causing officials to seek its elimination by dissolving Native families.[37] During the 1970s, too, a significant number of Native children were removed from their families and communities through the Native American Adoption Project, a program financed by the Children's Bureau.[38] This initiative facilitated the adoption of Native children by non-Native families, often without regard for tribal sovereignty,

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33 *See* 42 U.S.C. § 671(a)(14)–(15) (not requiring states to have qualified expert witnesses in permanency hearings).

34 Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (establishing that the Due Process Clause of the Fourteenth Amendment requires a state to support its allegations under the clear and convincing evidentiary standard before severing parental rights).

35 *Compare* N.Y. Fam. Ct. Act § 1046(b)–(c) (McKinney 2021) (foster care placement may be ordered at dispositional hearings which consider determinations of child abuse or neglect from fact-finding hearings under the standard of a preponderance of evidence), *with* Cal. Welf. & Inst. Code §§ 358, 360 (evidentiary standards for removal determinations at dispositional hearings depend on whether the child will remain in parental custody (preponderance of evidence applies) or if the child may be removed (clear and convincing evidence standard applies)).

36 Haaland v. Brackeen, 143 S. Ct. 1609, 1641–44 (2023) (Gorsuch, J., concurring).

37 *Id.* at 1642. (quoting Off. of Indian Affs., Annual Report of the Commissioner of Indian Affairs to the Secretary of Interior, for the Year 1904, pt. I, at 392 (1904)).

38 Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32–33 (1989).

cultural preservation, or the long-term impact on the children and their tribes.[39]

Assimilationist policies were the driving force behind boarding schools. A quote from the former head of the Carlisle boarding school, Captain Richard Henry Pratt, encompasses the vision behind these boarding schools: "[A]ll the Indian there is in the race should be dead. Kill the Indian in him, and save the man."[40] Many families resisted sending their children to these boarding schools, so the federal government resorted to economic coercion methods like depriving rations, and when this tactic failed, they turned to child abduction.[41] In these boarding schools, Native children were given a new English name, had their hair forcibly cut, had their traditional clothes confiscated, and were prohibited from speaking their native language.[42] Religious groups like the Church of Jesus Christ of Latter-day Saints and Christian boarding schools sought to erase tribal spiritual traditions and convert Native children to Christianity.[43] The result of all these efforts was an estimated 90% of adoptions of Native children going to non-Native couples,[44] as well as approximately 75-80% of Native families residing in reservations losing at least one child through the foster care system, prior to the passage of ICWA.[45]

These tactics notably contributed to the direct degradation of tribal sovereignty in allowing tribes to have jurisdiction over the welfare of their children. When children were removed, there was no custody hearing and thus no due process that allowed for tribal jurisdictional intervention, and as a result,

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39 *Miss Band of Choctaw Indians*, 490 U.S. at 32–33.

40 *Haaland*, 143 S. Ct. at 1642 (Gorsuch, J., concurring) (quoting R. H, Pratt, *The Advantages of Mingling Indians with Whites*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 46 (Isabel C. Barrows ed. 1892)) (alteration in original).

41 *Id.* at 1642–43 (citing BRYAN NEWLAND, DEP'T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 36 (2022) [hereinafter "BIA Report"].

42 *Id.* at 1643 (citing BIA Report, *supra* note 41, at 53) (citing JON REYHNER & JEANNE EDER, AMERICAN INDIAN EDUCATION 178 (2004)) (citing OFF. OF INDIAN AFFS., ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF INTERIOR, FOR THE YEAR 1886, at 199 (1886)).

43 Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 10–11, 22 n.94 (1998).

44 *Haaland*, 143 S. Ct. at 1645 (Gorsuch, J., concurring) (citing W. BYLER, THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 2 (S. Unger ed. 1977) [hereinafter AAIA Report].

45 *ICWA History and Purpose*, MONT. DEP'T OF PUB. HEALTH & HUM. SERVS., https://dphhs.mt.gov/CFSD/icwa/icwahistory [https://perma.cc/SU2JUY9V] (last visited June 29, 2025).

parents were often tricked into signing forms that they believed were authorizing only brief removal of their children.[46] What they believed should have been a brief removal of their children was in actuality, total termination of their own parental rights and a surrender of full custody of their children.[47] Non-Native social workers, who disregarded Native cultural and social practices, often ordered family separations to penalize Native parents for impoverished living conditions.[48] Once these children were separated, they underwent "severe distress" and were more likely to experience emotional, physical, or even sexual abuse in these non-Native placement homes than white children.[49] In 1974, Congress began to have hearings where tribal leaders testified about these abominable experiences, and eventually, ICWA was passed in 1978.[50]

III
ICWA Decision and its Implications

A small group of people including "corporate lawyers, private adoption attorneys, and right-wing organizations" have brought varying challenges to ICWA over the years.[51] Such attacks on ICWA have been seen by tribes as erosions of their sovereignty.[52] These challenges amounted to the Supreme Court decision *Haaland v. Brackeen*. The Supreme Court, with only two justices dissenting, Justice Thomas and Justice Alito, upheld the constitutionality of ICWA.[53] The petitioners were white evangelical couples who sought to adopt Indian children

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46 *Haaland*, 143 S. Ct. at 1645 (Gorsuch, J., concurring) (citing AAIA Report, *supra* note 44, at 1).

47 *Id.*

48 *Id.*

49 *Id.* at 1645–46.

50 *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affs. of the Comm. On Interior & Insular Affs.*, 93rd Cong. (1974).

51 B.A. Parker, *The Implications of the Case Against ICWA*, NPR: Code Switch (May 2023) https://www.npr.org/transcripts/1175041677 [https://perma.cc/4DS4-2U2M] (podcast discussing ICWA with Cherokee journalist Rebecca Nagle).

52 *See e.g.*, Tehassi Hill, Draft Letter from the Chairman, *in Oneida Business Committee Meeting*, Oneida Bus. Comm., 142 (May 24, 2022) https://oneida-nsn.gov/wp-content/uploads/2022/05/2022-05-25-BC-Open-pkt-for-members-only.pdf [https://perma.cc/LSC5-2TSP].

53 *Haaland*, 143 S. Ct. at 1623; *Id.* at 1662 (Thomas, J., dissenting); *Id.* at 1683 (Alito, J., dissenting).

but could not, due to ICWA challenges.[54] The petitioners in the case made challenges against ICWA under the federal government's plenary power, the anti-commandeering doctrine, and most concerningly, the Equal Protection Clause.[55] ICWA was challenged for potentially violating the anti-commandeering doctrine of the Tenth Amendment, but such claims lacked standing because ICWA applied to both private parties and non-private parties, like the government.[56] ICWA was also upheld because the federal government possesses exclusive plenary power in its dealings with Indian affairs, which derives from the Indian Commerce Clause.[57] Plenary power was held to be "well established and broad" but "not unbounded" in its legislative history.[58] In addition, ICWA was upheld because the petitioners in *Brackeen* presented arguments that were not only legally tenuous,[59] but lacked standing.[60]

As established by the *Morton v. Mancari* decision, because "Indian" is a political classification and not a racial classification, Indians can receive distinct treatment that may otherwise be deemed disparate in violation of the Equal Protection Clause.[61] Given that the *Brackeen* opinion only cursorily addressed the question of Indian as a racial classification, for the argument lacked merits, this ability of tribes to determine who is a member of their tribe or an Indian child for the purposes of ICWA was not fleshed out and may experience challenges in the future.[62]

While there are difficulties with diagnosing the source of right-wing attacks on ICWA, several theories have been presented. On a small scale, motives may be as simple as non-Native foster parents wanting very greatly to adopt children

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54 Jan Hoffman, *Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html [https://perma.cc/E2JC-F98Q].

55 *Haaland*, 143 S. Ct. at 1627, 1631, 1638.

56 *Id.* at 163; *see generally* Jessie Shaw, *Commandeering the Indian Child Welfare Act: Native American Rights Exception to Tenth Amendment Challenges*, 42 CARDOZO L. R. 2007 (2021).

57 *Haaland*, 143 S. Ct. at 1627–28.

58 *Id.* at 1628; *see also* Hoffman, *supra* note 54.

59 *See, e.g.*, James G. Dwyer, *The Real Wrongs of ICWA*, 69 VILL. L. REV. 1, 4 (2024) (discussing how Indian children who do not live in Indian country do not deserve ICWA application; petitioner cited to this argument to support that the child's best interests are not the preservation of Indian heritage).

60 *Haaland*, 143 S. Ct. at 1638.

61 Morton v. Mancari, 417 U.S. 535, 551–53, 553 n.24 (1974).

62 *Haaland*, 143 S. Ct. at 1648 (quoting *id.*)

that belong to tribes. While it is unknown if the petitioners in *Brackeen* were attempting this tactic, often, people try to foster to adopt (fost-adopt) to increase their chances of adoption.[63] When such a scheme is utilized to adopt Native children, foster parents are shocked at the mountain of complications ICWA will impose that makes termination of parental rights a seemingly unattainable goal at times.

On a larger scale, these right-wing attacks come from a broader desire to attack tribal sovereignty, with overturning ICWA being the attempted vehicle. Those seeking to diminish tribal sovereignty do not like the so-called "preferential treatment" afforded in ICWA, gaming policies, hiring policies, or treaties.[64] ICWA was the vehicle in that right-wing attacks sought to eliminate this "preferential treatment" by overturning the *Morton v. Mancari* decision.[65] Overturning *Mancari* would have devastating effects on tribal sovereignty, as tribes would no longer be the deciders of their own members' citizenship. Justice Gorsuch notes in *Brackeen* that these attacks may also stem from corporate or material interests in tribal land, oil, or casinos.[66]

Nonetheless, the upholding of ICWA in its entirety is a significant victory for Native children, parents, and tribes. In support of amicus briefs arguing to uphold ICWA, signatures outpoured from "497 Tribal Nations, 62 Native organizations, 23 states and DC, 87 congresspeople, [and] 27 child welfare and adoption organizations."[67]

IV
Current Enforcement of ICWA and its Efficacy

ICWA's efficacy for the purpose of this Note's analysis refers to the ability of ICWA's enforcement to produce the intended effect of the 1978 statute. The intended effects of ICWA are manifold and consider the following dimensions: (1) the upholding of tribal sovereignty; (2) state courts and agencies complying

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63 Maggie Wong Cockayne, *Foster to Adopt: Pipeline to Failure and the Need for Concurrent Planning Reform*, 60 Santa Clara L. Rev. 151, 151, 164 (2020).

64 Laura Briggs, Haaland v. Brackeen *and* Mancari*: On History, Taking Children, and the Right-Wing Assault on Indigenous Sovereignty*, 56 Conn. L. Rev. 1121, 1129–30 (2024).

65 *Id.* at 1121, 1129.

66 *Id.* at 1130.

67 *Indian Child Welfare Act (ICWA)* (Haaland v. Brackeen), Native Am. Rts. Fund (2023) https://narf.org/cases/brackeen-v-bernhardt/ [https://perma.cc/S566-QHZB].

with ICWA requirements; (3) prioritizing the preservation of keeping Native children with Native families; and (4) engaging in active efforts consistent with prevailing tribal cultural and social standards.[68] Evidence on the effectiveness of ICWA enforcement is generally "positive" with regards to placement and reunification.[69] However, many available studies on the impact of ICWA on Native children and families are outdated, and thus understanding the current-day impact of ICWA requires more comprehensive research.[70] Further refuting ICWA opponents, the mental-health and well-being benefits of ICWA's placement preferences are supported by extensive kinship care literature and psychological development studies.[71] Such benefits are tangible as children approach adulthood with better "education, employment, housing, [and] juvenile delinquency" outcomes.[72]

Since 1978, ICWA has been making resounding progress in decreasing the removal of Native children from their homes, yet Native children remain overrepresented[73] in child welfare systems nationwide at a rate ranging from 1.3 to 3.3 times their proportion of the general population.[74] Additionally, Native children are reunified with their families at rates lower than almost any other racial group.[75] For Native children who were

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68 *See generally* Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, U.S. DEP'T OF THE INTERIOR (Dec. 2016) https://www.bia.gov/sites/default/files/dup/assets/bia/ois/pdf/idc2-056831.pdf [https://perma.cc/9FWF-SHZD].

69 Annie M. Francis et al., *Implementation and Effectiveness of the Indian Child Welfare Act: A Systematic Review*, 146 CHILD. & YOUTH SERVS. REV. 106799, at 12–13 (Mar. 2023), https://doi.org/10.1016/j.childyouth.2022.106799 [https://perma.cc/FS3K-WAPZ].

70 *Id.* at 15.

71 *Understanding ICWA Placements Using Kinship Care Research*, NAT'L INDIAN CHILD WELFARE ASS'N 2 (2019) https://www.myflfamilies.com/sites/default/files/2023-05/2019-Understanding-ICWA-Placements-Using-Kinship-Care-Reasearch-Final.pdf [https://perma.cc/ED9N-Q745].

72 *Id.*

73 *Disproportionality in Child Welfare: Fact Sheet*, NAT'L INDIAN CHILD WELFARE ASS'N (2021) https://old.nicwa.org/wp-content/uploads/2021/12/NICWA_11_2021-Disproportionality-Fact-Sheet.pdf [https://perma.cc/EFJ6-XTBF].

74 *Data Sheds Light on Systemic Barriers*, CASEY FAMILY PROGRAMS (2020) https://www.casey.org/hope2022/ [https://perma.cc/L66U-Q6R7].

75 Catherine A. LaBrenz et al., *Racial/Ethnic Disproportionality in Reunification Across U.S. Child Welfare Systems*, 114 CHILD ABUSE & NEGLECT 104894, at 5 (April 2021) https://doi.org/10.1016/j.chiabu.2020.104894 [https://perma.cc/CD4B-G8ZQ].

removed from their families or tribal communities, approximately 56% were placed in non-Native homes.[76] Such statistics not only emphasize the need for the continuance of ICWA but allude to internalized issues within child welfare systems as well as larger systemic issues that contribute to situations where appropriate childcare is unable to be provided for Native children. While there may not be policies in place as explicit about genocidal goals as the Boarding Schools[77] or the assimilation policies of the 1950s to 70s,[78] the failures of states to effectively enforce ICWA and ensure that its intention to keep Native children with Native families is preserved is operatively genocidal toward Indigenous cultural identities and their passage through generations. These failures are also operatively degrading toward respecting the sovereignty of tribes over their own children.

A. Biases Against Indian Families Remain Pervasive

One pervasive problem within child welfare systems is systemic bias, in which child welfare workers, potentially involving a wide range of people,[79] including social workers, attorneys, judges, Court Appointed Special Advocates (CASAs), or police officers, are more likely to hold either implicit biases or overt racial biases against Native families that result in overly paternalistic efforts. These overly paternalistic efforts are then more likely to generate reports of abuse or neglect and are more likely to cause removal of Native children from their homes or tribes.[80] Implicit bias here refers to unconscious beliefs or attitudes about the traits associated with various groups of people.[81] The informality and emotionally charged nature of

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76 *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, NAT'L INDIAN CHILD WELFARE ASS'N (Sep. 2015) https://www.nicwa.org/wp-content/uploads/2025/02/Setting-the-Record-Straight-2018.pdf [https://perma.cc/6RVQ-NH5E].

77 *See supra* notes 36-39.

78 *See supra* notes 40-45.

79 *Child Welfare Law Career Guide*, NAT'S ASS'N OF COUNSEL FOR CHILDREN 6, https://naccchildlaw.org/wp-content/uploads/2024/04/NACC-Child-Welfare-Law-Career-Guide_Final.pdf [https://perma.cc/2DGG-83WQ] (discussing parties involved in child welfare cases) (last visited May 25, 2025).

80 *See supra* note 73, at 3–4.

81 *Id.*

child welfare proceedings tends to invite bias.[82] In practice, these biases may be responsible for how when abuse has been reported, Native children are twice as likely to be investigated, twice as likely to have such abuse allegations sustained, and four times more likely to be placed in foster care than white children.[83] Such biases may give rise to child protective services investigations where purported poverty, which does not pose a risk of harm to the child, is conflated with neglect.[84] These neglect removals may result from impoverished conditions, including "inadequate housing" or "failure to provide adequate nutrition."[85] In fact, in 2019, 63% of the Native children removed from their families were removed because of alleged neglect.[86] Alcohol use accounts for 15% of ICWA cases and other substance use accounts for 41%, bearing that the percentages add up to more than 100% due to there being multiple reasons that a Native child may enter the child welfare system.[87] Leading into the next section, these statistics suggest that many cases of child removal in Native communities may be rooted in systemic issues like poverty and substance use, raising questions about whether interventions are addressing the root causes or merely disproportionately penalizing families for conditions often beyond their control.

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82 Kathryn Fort, *The Road to* Brackeen*: Defending ICWA 2013–2023*, 72 AM. U. L. REV. 1673, 1697 (2023) (citing Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J. OF L. & FEMINISM 339, 380 (1999) ("Where decision making occurs without these formal constraints, however, it is even more susceptible to being swayed by prejudices, stereotypes, and snap judgments based on innuendo and rumor.").

83 Robert B. Hill, *An Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels*, CASEY-CTR. FOR THE STUDY OF SOC. POL'Y ALL. FOR RACIAL EQUITY IN CHILD WELFARE, RACE MATTERS CONSORTIUM WESTAT 10 (2007), https://www.issuelab.org/resources/8256/8256.pdf [https://perma.cc/44ZZ-287R].

84 Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 536 (2019); *see* Larissa MacFarquhar, *When Should a Child Be Taken From His Parents*, NEW YORKER 36 (Aug. 7, 2017), https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents [https://perma.cc/4EXM-DB2A]. ("You may be shocked by the living conditions you encounter, but you're not allowed to remove children solely because of poverty—if, for instance, there's no food in the kitchen because the parent's food stamps have run out—only for 'imminent risk' due to abuse or neglect. But it's often difficult to draw a line between poverty and neglect.").

85 *The Child Welfare System Fact Sheet*, CHILDREN'S RTS. 1, 2 (Jan. 2023) https://www.childrensrights.org/wp-content/uploads/2023/01/CR-The-Child-Welfare-System-2023-Fact-Sheet.pdf [https://perma.cc/VS6W-WVMH].

86 *See Disproportionality in Child Welfare: Fact Sheet*, *supra* note 73, at 4.

87 *Id.*

V
Solutions for Greater Efficacy of ICWA in Preventing the Removal of Native children

Involvement in the child welfare system can cause substantial detriment to a child's well-being, development, and health.[88] A disturbing statistic that encapsulates the harm of entering into the child welfare system is that **50%** of the homeless population spent time in foster care, and about **1 out of every 4** youth in foster care will become homeless within 4 years of aging out of foster care.[89] The problem is not ICWA itself, nor the constitutional grounds ICWA stands on, despite what was postulated by the petitioners in *Brackeen*.[90] Overrepresentation of Native children in the child welfare system is a vestigial consequence of the same anti-Indigenous policies that led to the enactment of ICWA: colonialism and an ongoing "'assimilationist agenda' [that has continued] to the present day."[91]

Under the legal principle of the federal trust responsibility, the United States must meet the highest moral obligations to ensure the protection of Indian tribes.[92] Indian child welfare is rationally related to Congress' unique obligations to Indians,[93] especially given the federal government's active role in the implementation of boarding schools and the mass removal of Native children from their families.[94] Therefore, within the scope of the plenary power,[95] more reforms and aid should be provided to protect the welfare of Indian children.

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88 *Understanding ICWA Placements Using Kindship Care Research*, *supra* note 71, at 3–4; *see generally* Katherine Kortenkamp & Jennifer Ehrle, *The Well-Being of Children Involved with the Child Welfare System: A National Overview*, Urb. Institute, (Jan. 2002) https://www.urban.org/sites/default/files/publication/59916/310413-The-Well-Being-of-Children-Involved-with-the-Child-Welfare-System.PDF [https://perma.cc/CTB7-6RT2].

89 *Housing and Homelessness*, Nat'l Foster Youth Institute (2024) https://nfyi.org/issues/homelessness/[https://perma.cc/SR2U-C88E].

90 *Supra* note 56.

91 Robert Odawi Porter, *American Indians and the New Termination Era*, 16 Cornell J. L. & Pub. Pol'y 473, 474 (2007).

92 United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011); *see* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885, 933 n.270 (2017).

93 *See* Morton v. Mancari, 417 U. S. 535, 555 (1973).

94 *See supra* Part II.

95 *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1627 (2023); see also Santa Clara Pueblo v. Martinez, 436 U. S. 49, 58 (1978); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903), United States v. Lara, 541 U.S. 193, 200 (2004); South Dakota v. Yankton Sioux Tribe, 522 U. S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs . . . ."); Washington v. Confederated Bands &

The power to provide federal aid to tribes to promote the maintenance of Indian families and Indian child welfare is also derived from 25 U.S.C. § 1931, which is about providing grants for, on, or near reservation programs.[96] If the Secretary of the Interior makes more proactive efforts to work with the federally recognized tribes, more services can be provided internally for these tribes. Given the historical involvement of religious organizations in the mass removal of Native children and the degradation of Indigenous identities,[97] funding efforts directed toward non-Native organizations should be exclusively secular.

ICWA scholar Kathryn E. Fort argues that a combination of anti-poverty legislation, funding for mental health programs, and funding for substance abuse rehabilitation programs would provide powerful solutions to the factual scenarios that give rise to ICWA dependency proceedings.[98] A perfectly uniform application of ICWA nationwide is not pragmatic—states have varying tribal populations and tribes are not a monolith. Tribes do not choose to exercise jurisdiction or determine the tribal membership status of Indian children in the same ways. Some of these solutions are applicable to state courts and could improve the child welfare system for non-Indian children as well. To preface these proposals, while in ideal circumstances children would not have to enter the child welfare system, the system still serves an important purpose when a child is in danger in their own home, particularly in instances of physical abuse, sexual abuse, or extreme neglect. Through proposing these solutions to lower the flooding of children into this system, there can be greater assurance that the children who do enter the system are there because of necessity and that the court determines the appropriate plan for the child. Ultimately, by conducting unique assessments on the efficacy of ICWA in preserving Indian families, the goal is to prevent Indian children from entering the system and to ensure that, when they do, the process is as smooth as possible and ICWA can be maintained.

Tribes of Yakima Indian Nation, 439 U.S. 463, 470 (1979) (Congress exercises "plenary and exclusive power over Indian affairs."); Winton v. Amos, 255 U.S. 373, 391 (1921) ("It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations . . . .").

96 25 U.S.C. § 1931.

97 *See generally* Briggs, *supra* note 64.

98 Fort, *supra* note 82, at 1697.

A. Increased Funding to Enforce ICWA is Needed

Under 25 U.S.C. §§ 1931 and 1932, the Secretary of the Interior has authority to make grants to Indian tribes or affiliated organizations, as well as off-reservation[99] efforts to assist child services programs and the "implementation of child welfare codes."[100] The code includes a non-exhaustive list of programs the grants could fund, such as educational programs for families, court trainings, afterschool programs, legal representation costs, or counseling programs.[101] In 2023, an annual grant award of nearly $2 million was provided for ten organizations in seven states by the Bureau of Indian Affairs under § 202, with each organization receiving around $200,000.[102] Providing this funding was certainly a step in the right direction, but significantly more funding is needed for substantial increases in the efficacy of ICWA. The proposal for increased ICWA-related funding is the first posited solution because of its top-down effect. Other solutions are speculative if the funding to make them come to fruition is unavailable.

Aside from receiving grants through the authority of ICWA itself, another pathway for tribes to receive additional funding is through Title IV-E.[103] To receive Title IV-E funding, tribes must comply with the same requirements as state agencies and direct funds toward child welfare assistance.[104] Only 20 of the 574 federally recognized tribes have Title IV-E plans.[105] The lack of widespread tribal participation may be due to the administrative capacity needs, such as needing an existing tribal court and child welfare program in place.[106] Tribes may also be hesitant to have funding conditioned on federal oversight, deeming it an infringement on sovereignty, and might prefer to utilize their own tribal child welfare systems, in accordance with their

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99 25 U.S.C § 1932.

100 *Id.* § 1931(a).

101 *Id.*

102 *Indian Child Welfare Act Grants Awarded for Off-Reservation Programs*, INDIANZ.COM (Nov. 30, 2023) https://indianz.com/News/2023/11/30/indian-child-welfare-act-grants-awarded-for-off-reservation-programs/ [https://perma.cc/NN2H-Z85J].

103 Kathy Deserly & Joe Walker, *Pathways to Tribal Title IV*-E, CAPACITY BLDG. CTR. FOR TRIBES 2 (Oct. 2017) https://tribalinformationexchange.org/files/products/Pathways_to_Tribal_IV-E.pdf [https://perma.cc/5JL3-LT2C].

104 *Id.* at 7–9.

105 *Tribes with Approved Title IV-E Plans*, *supra* note 21.

106 *See* Deserly & Walker, *supra* note 103, at 4.

cultural practices, without being directed by the U.S. government as to how they should be operating them.

For tribes hesitant about sovereignty concerns in relation to funding or for those who do not possess the necessary infrastructure,[107] another funding solution is requiring courts to match foster care reimbursements to a tribe when its tribal child welfare system is not able to equally provide and tribal jurisdiction is at stake.[108] This funding scheme would promote tribal sovereignty by ensuring that monetary benefits from the foster care system do not unduly influence a transfer question or lead to forum shopping. Additionally, with the aid of federal funding from the initiatives by the Secretary of the Interior, programs can be designed to ensure that basic needs, like food, clothing, or shelter, are adequately accessible and affordable to prevent neglect charges from arising.

When dealing with the government, funding increase requests for ICWA are not a simple request. There are certainly constitutional grounds to increase funding, but a driving factor is the political will of the governmental administration in charge. Whether political will for more ICWA funding can be driven as a partisan effort is challenging to predict. Attacks on ICWA have right-wing origins, but the 7-2 *Brackeen* opinion by Justice Barrett indicates that protecting Native children is a cause that may transcend partisan boundaries.[109]

B. More ICWA Courts and Attorneys are Needed

Given that tribes have discretion to exercise jurisdiction over an ICWA case and transfer it from a state court to a tribal court,[110] ICWA cases may remain in state court systems. Within state court systems, there is some variation in how and where

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107 25 U.S.C. §§ 1903(11), 1931.

108 Jessica Lussenhop, *The Supreme Court Upheld the Indian Child Welfare Act. The Long Struggle to Implement the Law Continues*, PROPUBLICA (June 21, 2023, at 11:00 a.m. ET), https://www.propublica.org/article/scotus-icwa-decision-questions-native-american-families [https://perma.cc/DD56-D6N5].

109 *Compare* Briggs, *supra* note 64 (discussing the right-wing origins on attacks against ICWA) *with* Grant Christensen, *Predicting Supreme Court Behavior in Indian Law Cases*, 26 MICH. J. RACE & L. 65 (2020) (discussing how assumptions and data indicating that liberal Justices are more pro-Indian are weak and how such beliefs vary considerably between Justices).

110 25 U.S.C. § 1911(b); *see* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

dependency cases are handled.[111] Some states have a centralized administrative system for child welfare cases, while others administer such cases on a county level.[112] The nine states that administer child welfare services on a county level are: California, New York, Minnesota, Colorado, North Carolina, North Dakota, Ohio, Virginia, and Pennsylvania.[113] Nevada and Wisconsin follow a hybrid county and state administration.[114] Arguably, county administration allows for more specialized services, but whether such administration is needed on a more micro-level is typically a question of demand and state funding. Twenty-four "ICWA courts" exist across ten states and handle dependency cases falling under ICWA that are not transferred to tribal court jurisdiction.[115] These ICWA courts are an excellent solution to ensure that ICWA is enforced as intended. Depending on ICWA case volume per state or county, more ICWA courts should be established to ensure that the specialized knowledge of "'gold standard' attorneys, judges, social workers and tribal representatives" leads to greater ICWA efficacy.[116] Specialized ICWA courts may also help reduce racial biases by preventing legal officials from blurring the requirements of ICWA with state-level child welfare requirements by comparison.[117]

Within these children's courts, there should be mandated minor's counsel provided. Minor's counsel is not automatically guaranteed in every state, and such appointment may be discretionary as there is no federally recognized constitutional

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111 Child Welfare Information Gateway, *State vs. County administration of Child Welfare Services*, CHILD. BUREAU (Mar. 2018), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/services.pdf?VersionId=sCIFPdVWvKGX_HymH2hK53tlMda3d101 [https://perma.cc/T384-XHHE].

112 *Id.*

113 *Id.*

114 *Id.*

115 *ICWA Courts*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, https://www.ncjfcj.org/child-welfare-and-juvenile-law/icwa-courts/#section-map [https://perma.cc/5AFE-BDZM] (last visited July 2, 2025); *see, e.g.*, *Brimming with Compassion*, DAILY J. (Oct. 2022), https://dailyjournal.com/judicial_profile/10204 [https://perma.cc/77FA-SMGS] (discussing Los Angeles County Superior Court Commissioner Hon. Gabriela H. Shapiro, who presides over ICWA Court team); *see* ADREA KORTHASE, SOPHIA I. GATOWSKI, MARK ERICKSON, INDIAN CHILD WELFARE ACT (ICWA) COURTS: A TOOL FOR IMPROVING OUTCOMES FOR AMERICAN INDIAN CHILDREN AND FAMILIES, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES 1, 4 (April 2021), https://www.ncjfcj.org/wp-content/uploads/2021/04/NCJFCJ_ICWA_Tool_UMD_Final.pdf [https://perma.cc/DDX7-A7GH].

116 *ICWA Courts*, *supra* note 115.

117 *Id.*

right guaranteeing representation.[118] For involuntary proceedings, ICWA provides for indigent Indian parents or custodians to receive court-appointed counsel, but appointment of counsel for children is discretionary and determined on a finding that appointment is in the child's best interest.[119] While the path to making this right constitutionally enshrined may be challenging, the right to counsel for children in state dependency court proceedings could be added as an amendment to the existing United States Code or codified into state laws. "[A]ll but about a dozen states" mandate some form of legal representation for children in dependency proceedings, and these costs can be partially covered by Title IV-E funding.[120] These amendments could be added under the argument that because Indian families are disproportionately overrepresented in child welfare cases, a higher duty of care exists to ensure that the rest of ICWA is able to be fully operational.

Another condition of this proposal for mandated minor's counsel under ICWA is that, when appointed, who minor's counsel is can very across states. Minor's counsel could be a Court Appointed Special Advocate (CASA), a guardian at litem (GAL), or a children's attorney.[121] Therefore, amendment proposals should require, at a minimum, a children's *attorney* who advocates for the stated interests of the child client. Contrastingly, some appointed minor's counsel like GALs or CASAs follow a best-interest model, which is where the counsel advocates for the best interests of the child, even if those best interests go against the child's wishes.[122] Overly paternalistic "unfettered discretion" can cause best-interest model counsel to substitute their own judgment, which may be entrenched in biases or even deviate from ICWA's placement preferences.[123] For this reasoning, 'traditional' client-directed lawyers, who zealously advocate for the child's stated interests, are advocated for by the American Bar Association and other national children's law

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118 *Child Welfare Law Career Guide*, *supra* note 79, at 6.

119 25 U.S.C. § 1912(b).

120 Amy Harfeld, *Twenty Years of Progress in Advocating for a Child's Right to Counsel*, AM. BAR ASSOC., https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/twenty-years-of-progress-in-advocating-for-a-childs-right-to-counsel/ [https://perma.cc/SZV9-T2X9].

121 *See* 42 U.S.C. §§ 5106(1)(a), 5106a.

122 Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 U.N.H. L. REV. 97, 111–14 (2013).

123 *See id.* at 114 (quoting DONALD N. DUQUETTE & ANN M. HARALAMBIE, CHILD WELFARE LAW AND PRACTICE 447 (2d ed. 2010)).

experts like the Administration of Children, Youth and Families and the U.S. Department of Health and Human Services.[124] Thus, with ICWA application, designating that mandated child attorneys follow a client-directed model is imperative to ensure that the voices of children are legally advocated for and that children's agency is respected. By implementing these solutions for legal systems and parties enforcing ICWA, there is more opportunity for the "gold standard" to be adhered to with due process for all parties involved.

C. Upholding Tribal Sovereignty in ICWA Proceedings

Hopefully, further challenges to ICWA are not successful, and the tribal membership status remains at the discretion of tribes, not federal courts. In deciphering whether a case is or is not an ICWA case, courts are to make active efforts to provide notice.[125] Notice can look like asking all involved parties, including children, parents, and extended relatives, if the child possesses, or has any relatives who may possess, Indigenous ancestry.[126] Ensuring that active efforts are complied with for notice is the pillar for upholding tribal sovereignty because it is the source for tribal court transfers and the catalyst for ICWA requirements to go into effect.

Furthermore, the determination of Indian children for ICWA purposes raises tribal sovereignty concerns. Indian is a "political rather than racial" classification,[127] and tribes remain "independent political communities, retaining their original natural rights."[128] The Indian Reorganization Act (IRA) defines "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction,"[129] yet under ICWA, the definition of an Indian Child includes both children with tribal membership or who have parents with tribal membership, as well as children who are "eligible for

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124 MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, AND DEPENDENCY PROCS.,101A § 1(E), Commentary (A.B.A. 2011), https://www.improvechildrep.org/Portals/0/PDF/Model%20Act%20Representing%20Children%202011%20w-Resolution.pdf [https://perma.cc/4X5R-2D5D].

125 25 U.S.C. § 1912(a).

126 *Id.*; *see* National Indian Law Library, *Topic 4. Notice*, NATIVE AM. RTS FUND https://www.narf.org/nill/documents/icwa/faq/notice.html [https://perma.cc/4TMQ-MB9R].

127 Morton v. Mancari, 417 U.S. 535, 553, 553 n.24 (1974).

128 Worcester v. Georgia, 31 U.S. 515, 559 (1832).

129 25 U.S.C. § 5129.

membership in an Indian tribe."[130] The broader definition of Indian in ICWA can lead to a delayed permanency plan[131] due to investigations of Indian ancestry if notice is reported to the presiding Judge. However, such a delay is imperative to ensure that, if a case is, in fact, an ICWA case, the proper sovereign tribal jurisdiction can be exercised. A delayed placement is better than an inappropriate placement or having to shuffle between multiple households. Ensuring that notice is provided as frequently as possible can prevent cases from becoming ICWA cases late in proceedings and reinforce tribal sovereignty over Indian children.

Even if the active efforts requirement for notice is met, the next challenge is affirming that once the tribes are parties to the proceeding, respect for the sovereign wishes of the tribes is actually provided.[132] State courts justify the denial of tribal court transfers and non-compliance with ICWA under subjective conceptions of good cause or the best interests of the child.[133] These determinations should be avoided, as they severely undermine tribal sovereignty because the court is assuming that it is a better judge of what is in the best interest for the child than the child's own tribe.[134]

Undermining tribal sovereignty is a direct consequence of letting unresolved, anti-Native racial biases enter the child welfare system. To combat this issue, previously referred to in this Note as pervasive,[135] ICWA should be either federally amended or codified into state law to require stringent bias trainings for all legal actors involved, including judges, counsel, and social workers. For social workers, a curriculum content evaluation guide has been developed by the National Child Welfare Workforce Institute, providing comprehensive information about tribal history, sovereignty, and common racial stereotypes and misconceptions.[136] If such training programs covering anti-bias

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130 25 U.S.C. § 1903(4).

131 *What Impacts Placement Stability?*, CASEY FAM. PROGRAMS (May 12, 2023), https://www.casey.org/placement-stability-impacts/ [https://perma.cc/4SRH-CB9D].

132 Michael E. Connelly, *Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1978: Are the States Respecting Indian Sovereignty?*, 23 N.M. L. REV. 479, 481 (1993) (discussing how ICWA enhanced sovereignty by strengthening tribal voices during child custody proceedings).

133 *Id.* at 487.

134 *Id.*

135 *Supra* Part IV.A.

136 *See generally American Indian/Alaska Natives: Curriculum Content Evaluation Guide*, NAT'L CHILD WELFARE WORKFORCE INSTITUTE (2022) https://ncwwi.org/

topics were specifically developed for different parties to ICWA proceedings, parties would hopefully be more empathetic and cognizant of the importance of complying with ICWA. For parties involved in ICWA cases, periodic training on the history and necessity of ICWA should be mandated.[137] Training aimed at combatting racial biases should be completed before parties can work on ICWA cases.

D. ICWA Should be Codified into State Law for all States and Territories

So far, only seventeen states have codified laws similar to ICWA in an effort to protect Native children.[138] With the potential of future ICWA challenges or tribal sovereignty attacks again, there have been calls for more states to codify the Indian Child Welfare Act into state policy.[139] Along with having state safeguards, ICWA should be codified into state law in all states to promote uniformity in accordance with the Supremacy Clause.[140] Through uniform state codification of ICWA, federal legal challenges like sovereign immunity for the federal government or the withholding of federal funds like Title IV-E funding for ICWA non-compliance would not be as concerning.

Issues in compliance with ICWA at the state level have been exemplified in South Dakota, where ICWA's intents were sidestepped by state courts.[141] In the case *Oglala Sioux Tribe v. Van Hunnik*, several tribes joined in a class action against a South Dakota state judge and accompanying state agencies, alleging ICWA non-compliance for having extremely rushed hearings, often lasting less than five minutes, where the state would

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wp-content/uploads/2022/05/AIAN-Curriculum-Evaluation-Guide.pdf [https://perma.cc/JZZ2-B6F8].

137 *See* Andrew J. Wistrich & Jeffery J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, *in* ENHANCING JUSTICE87, 106-08 (Sarah E. Redfield, ed. 2017) (discussing how trainings can help combat implicit bias in judicial decision making).

138 Backus, *supra* note 25, at 22.

139 *Id.*

140 B. J. Jones, *The Indian Child Welfare Act: In Search of A Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 397 (1997) (stating that "[t]his diffidence on the part of the federal courts has created an 'anomaly in federalism'—a federal civil rights statute which is largely unenforceable in a federal forum and whose very application and effect varies from state to state.")

141 Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749, 768 (D.S.D. 2015) (referring to the actions in South Dakota as "[c]ontrary to the clear intent of ICWA").

always prevail, and for failing to provide parents with representation or meaningful time to file appeals.[142] Such practices led to an overrepresentation of Native children in the child welfare system, with Native children comprising 52% of the children in South Dakota's foster system.[143] The overrepresentation was also explained by racial bias such as how South Dakota's Native children had an eleven times higher likelihood of foster care placement than white children.[144] The court held that both ICWA and due process requirements were not complied with.[145] Through all states adopting ICWA codes, non-compliance as exhibited by South Dakota state courts can be prevented. State codification of ICWA would ensure uniformity in protecting the rights of Native children and families regardless of where they are geographically bound.

Following the *Brackeen* decision, the American Civil Liberties Union (ACLU) has urged states to adopt ICWA into their state laws, tailor these laws to the specific jurisdictional needs of relevant Tribal nations, and even go beyond the federal protections afforded by ICWA if necessary.[146] The ACLU also urges states to assess the efficacy of ICWA laws and for states to work with Tribal leaders throughout this process.[147] Involving tribal leaders in this process will both promote the sovereign interests of tribes and mitigate litigation issues later down the road.

E. Preventative Measures in the Form of Mental Health Services and Universal Basic Income

Prevention is an often-overlooked concern when addressing the issues in the foster care system and the enforcement of ICWA. Instances where child welfare investigations are conducted for neglect, rather than abuse, are more receptive to mitigation and prevention services.[148] As previously discussed,

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142 *Id.* at 753, 757.

143 Stephen Pevar, *In South Dakota, Officials Defied a Federal Judge and Took Indian Kids Away from Their Parents in Rigged Proceedings*, ACLU: NEWS & COMMENT. (Feb. 22, 2017), https://www.aclu.org/news/racial-justice/south-dakota-officials-defied-federal-judge-and-took [https://perma.cc/B9YU-PJYW].

144 *Id.*

145 *Oglala Sioux Tribe*, 100 F. Supp. 3d. at 765–72.

146 Crystal Pardue, *Looking Beyond* Haaland v. Brackeen, ACLU: NEWS & COMMENT. (July 11, 2023), https://www.aclu.org/news/racial-justice/looking-beyond-haaland-v-brackeen [https://perma.cc/7MXZ-4LZW].

147 *Id.*

148 Brief of Casey Family Programs and Twenty-Six Other Child Welfare and Adoption Organizations As Amici Curiae in Support of Federal and Tribal

under ideal circumstances, Native children would never have to enter the child welfare system ever in their lives. Tackling some of the root causes of what is bringing Native children into the system disproportionately is an imperative step. Poverty, mental health, and substance abuse should be targeted specifically because child welfare investigations for these reasons can be prevented when adequate measures are taken.

Noting that neglect charges can often directly tie into poverty and biased assumptions against low-income parents, measures should be taken to ensure that financial barriers are alleviated. One effective approach to prevention is the implementation of Universal Basic Income (UBI) programs that provide enough assistance to cover childcare expenses. An example of UBI as a preventative measure is a program piloted in Sacramento, California that grants $725 monthly for Black and Indigenous families with children aged five and under, and who are making 200% less than the federal poverty line, which is less than $62,400 for a family of four.[149] The county spokesperson involved with this program stated that its goal is to prevent children from ever coming into contact with the child welfare system.[150] A report on the UBI program found that 75% of the participants were confident in meeting their financial goals because of it.[151] If more localities developed similar UBI programs for Indian families, neglect charges based merely on impoverished conditions could decrease. These payments serve as a method to soothe the swelling foster care system and prevent children from entering the system during highly critical stages of their development. Given that the equal protection questions to ICWA remain open following the *Brackeen* decision, such UBI policies could become a source of legal and political scrutiny. Such policies should be defended by maintaining that they lie within the scope of the plenary power and that Indian is a political classification, not a racial one.[152]

Another preventative measure is ensuring that therapy and mental health services, including substance abuse programs,

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Defendant at 16, Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 3648364, at *16.

149 Kristin Lam, *Sacramento County Guaranteed Income Program to Begin Accepting Applications*, CAP RADIO (Sep. 23, 2024) https://www.capradio.org/articles/2024/09/23/sacramento-county-guaranteed-income-program-to-begin-accepting-applications/ [https://perma.cc/9QUK-E38Q].

150 *Id.*

151 *Id.*

152 Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

are readily available. Funding for such programs was previously discussed, but the importance of these programs as preventative measures should be underscored, especially when boarding school survivor trauma remains and trickles through generations. Increasing accessibility to these support programs is legally derived from the active efforts requirement of ICWA, which necessitates making maximum efforts to ensure that tribal socio-cultural conditions are maintained and the removal of children is prevented.[153]

Firstly, efforts should be made to ensure that mental health services are accessible for parents to prevent impairments to caregiving capacities and for children to prevent severe behavioral issues that give rise to investigations. However, a significant caveat of these mental health programs is that they should be provided with a high level of cultural competence for Indigenous families. Optimally, community mental health workers are Indigenous themselves and can better facilitate rapport and familiarized care.[154] Regardless, if non-Indigenous providers work with tribes, such care should be sensitive to existing tribal practices and the lasting effects of colonialism, such as historical trauma and loss, when providing care.[155] According to the National Center on Substance Abuse and Child Welfare, a residential treatment program where adolescents were treated with Dialectical Behavioral Therapy that incorporated cultural and spiritual traditions of tribal members had a 96% success rate in seeing recovery or improvement for these children.[156] By investing in such culturally competent mental health programs, the intent of ICWA to recognize the prevailing "cultural and social standards" in Indigenous families and communities will be realized.[157]

Another solution is to make substance abuse recovery programs more accessible and affordable for parents whose children are involved in proceedings. Parents, as part of their court-assigned case plan, may have to pay for these drug

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153 *Child Welfare Act: Active Efforts Support Tool Guidance Document*, NAT'L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE at 4 (2024) https://ncsacw.acf.hhs.gov/whats-new/ICWA-active-efforts-series/ [https://perma.cc/6A8D-HC46].

154 Victoria M. O'Keefe, Mary F. Cwik, Emily E. Haroz, & Allison Barlow, *Increasing Culturally Responsive Care and Mental Health Equity With Indigenous Community Mental Health Workers*, O'Keefe, 18 PSYCHOLOGICAL SERVICES 84, 84 (2021).

155 *Id.* at 85.

156 *See supra* note 153 at 9.

157 25 U.S.C. § 1901(5).

rehabilitation programs or experience difficulties with taking time off work.[158] Ensuring that such programs are kept free for participants means parents can get the help they need without the financial barriers stopping them from eventually reuniting with their child. Research has found that when "family-based treatment programs" are accessible for parents involved in dependency proceedings, they are more likely to complete the program and have greater capacity to care for their children.[159] In these family-based treatment programs, parents may stay in facilities for one to two weeks before their children join them and, after stabilization efforts are successful, families move to transitional housing.[160] Increased allocations of funding from the Family First Prevent Services Act of 2018 amendment to Title IV-E could make these family-based treatment programs more available for struggling parents.[161] Through greater accessibility to such effective substance abuse programs, Native children entering the foster system can be reduced.

F. More Reporting is Needed on Indian Child Welfare

Lastly, to tailor solutions for greater efficacy of ICWA, more in-depth reporting is needed on this topic.[162] Obtaining this solution is imperative because it is a source of state variation in ICWA application and it is the foundation of the argument that the overrepresentation of Native children in the child welfare system is a vital issue deserving of a heightened lens of attention.[163] Already, the Bureau of Indian Affairs generates reports about ICWA, and tribes or tribal organizations who

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158 Children's Bureau *Parental Substance Use and the Child Welfare System*, DEP'T OF HEALTH & HUM. SERVS. 5 (Oct. 2014), https://projectlifeline.us/wp-content/uploads/2020/09/Child-Welfare-System.pdf [https://perma.cc/9L5F-FD92] (discussing barriers to parents completing substance abuse programs for reunification such as inadequate funding and lack of insurance coverage for such services).

159 MEGHAN BISHOP ET AL., *supra* note 24, at 4.; *see generally* C.E. Grella, Barbara Needell, Yifei Shi, & Yih-Ing Hser, *Do Drug Treatment Services Predict Reunification Outcomes of Mothers and Their Children in Child Welfare?* 36 J. OF SUBSTANCE ABUSE TREATMENT 278, (2009).

160 MEGHAN BISHOP ET AL., *supra* note 24, at 6–7.

161 *Id.* at 22; Bipartisan Budget Act of 2018, Pub. L. 115-123, 132 Stat. 64.

162 John Kelly, *ICWA Added to Federal Data Collection. Will It Last?*, IMPRINT: YOUTH & FAM. NEWS (Dec. 5, 2024) https://imprintnews.org/youth-services-insider/icwa-added-federal-data-collection-will-it-last/256693 [https://perma.cc/H2RQ-E8TL].

163 Adoption and Foster Care Analysis and Reporting System ICWA Revisions, 89 Fed. Reg. 96569, 96571 (proposed Dec. 5, 2024) (to be codified at 45 CFR pts. 1355.41-1355.47).

receive ICWA grants must make quarterly and annual reports.[164] The Administration for Children and Families (ACF) is the federal agency that collects child welfare data generally[165] and oversees tribal child welfare programs.[166] Quarterly and Annual Reports on ICWA are published by the ACF, which helps determine ICWA based grants for tribes.[167] The 'Adoption and Foster Care Analysis and Reporting System should expand its data-collecting methods to include tribal affiliations of parties involved in ICWA cases, as well as the stability of placements for parents, legal guardians, and foster caretakers to determine if placement is actually following the hierarchy[168] of placements under ICWA.[169] Implementing more stringent data collection on ICWA and how Native children who are both in the system and age out of the system are affected is essential to craft effective solutions to decrease the overrepresentation of Native children in the child welfare system. One thing that makes collecting this data difficult is which children are counted as Indian. As part of the notice requirements for ICWA, a child's case may be initially classified as an ICWA case where a child claims to have an Indian relative, even if the relative is a distant one with Indian ancestry.[170] If later in the case, the tribe in question does not consider the child a member of their tribe, then it presents difficulties with counting the child for data reporting purposes as an "Indian child."[171] Noting what stage in the dependency proceeding the child is in while collecting these statistics would provide useful information on which children actually see an ICWA case to completion. Fortunately, on December 5, 2024, the former Biden Administration successfully added heightened ICWA data collection requests for Title IV-E agencies to

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164 25 C.F.R. § 23.47.

165 *ACF Data Strategy*, ADMIN. FOR CHILD. AND FAMS., https://www.acf.hhs.gov/ai-data-research/acf-data-strategy [https://perma.cc/RN8Z-GAET] (last accessed July 3, 2025).

166 *ACF Tribal & Native American Affairs*, ADMIN. FOR CHILD. AND FAMS., https://www.acf.hhs.gov/tribal-affairs [https://perma.cc/U8DZ-HAHC] (last accessed July 3, 2025).

167 *See, e.g.*, EMILY JUNE ADAMS, INDIAN CHILD WELFARE (ICW) QUARTERLY AND ANNUAL REPORT, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF INDIAN SERVS., DIVISION OF HUM. SERVS. (2023).

168 25 U.S.C. § 1915(a)–(b).

169 Annie M. Francis et al., *Examining Foster Care Outcomes for American Indian Children in the Context of the Indian Child Welfare Act*, 28 CHILD MALTREATMENT 527, 536 (2023).

170 *See* National Indian Law Library, *supra* note 126.

171 *See* 25 U.S.C. § 1903(4).

the Federal Data Collection, which addressed these concerns raised and sought to ensure states are in compliance with ICWA's provisions.[172] Adding ICWA to Adoption and Foster Care Analysis and Reporting System (AFCARS) had been advocated for since the Obama administration and was later scrapped by the Trump administration.[173] AFCARS provides data for policy-making and strategic development to prevent children from entering the foster system.[174] These newly adopted revisions request data elements on the procedural protections afforded by ICWA, such as "requests for transfers to Tribal court, termination/modification of parental rights, and foster care, pre-adoptive and adoptive placement preferences."[175] The Federal Register Rule emphasizes that comprehensive data collecting is necessary to provide "culturally responsive care" and to understand how children for whom ICWA applies are affected by ICWA's protections and the nature of the assistance they receive.[176] With strong, evidential AFCARS data indicating a need for increased budgeting for programs that "honor ICWA's intent," Congress can be more persuaded to meet this need.[177] Taking into consideration the past opposition to these additional ICWA data collection elements from the Trump administration, there is a potential that this rule is frozen, and in effect not enforced, or challenged during the Trump administration's second term.[178] Given the *Brackeen* decision's reaffirmance of ICWA,[179] there may not be the same opposition, but such a course of action is difficult to definitively predict. Thus, with the potential of attacks on this promising federal rule, support for comprehensive ICWA data collection should continue.

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172 Adoption and Foster Care Analysis and Reporting System ICWA Revisions, 89 Fed. Reg. 96569, 96571 (proposed Dec. 5, 2024) (to be codified at 45 CFR pts. 1355.41–1355.47); *see* Kelly, *supra* note 162.

173 *See supra* note162.

174 Children's Bureau, *Adoption and Foster Care Analysis and Reporting System (AFCARS)*, U.S. DEP'T OF HEALTH & HUM. SERVS. (June 30, 2024) https://www.acf.hhs.gov/cb/data-research/adoption-fostercare [https://perma.cc/536M-8UT4].

175 Adoption and Foster Care Analysis and Reporting System ICWA Revisions, 89 Fed. Reg. 96569, 96574 (proposed Dec. 5, 2024) (to be codified at 45 CFR pts. 1355.41–1355.47).

176 *Id.* at 96571.

177 *Id.*

178 *See supra* note 162 (discussing the Trump administration's 2020 AFCARS rule that decreased ICWA data collection in response to the Obama administration's proposal to increase ICWA data collection requirements, which the Trump administration previously froze in January, 2017).

179 *Supra* note 57.

Conclusion

In optimal circumstances, the situation would be two-fold: as few children as possible ever have to enter the child welfare system, but when Native children *are* brought into the child welfare system, states invoke ICWA both swiftly and compliantly. While future challenges may arise again, such as Equal Protection Clause challenges or broader attacks on tribal sovereignty, for optimal circumstances to be obtained, the *Brackeen* decision needs to remain the standing precedent. Further, the root causes of what may bring Native children into the child welfare system in the first place need to be ameliorated. Throughout these processes, the central notion of upholding tribal sovereignty should be maintained, with tribes running or coordinating family services. Entering the child welfare system is, within itself, an incredibly traumatic experience for Native children, and with greater mitigatory efforts, the number of children entering this system can decrease. On October 25, 2024, former President Biden issued a formal apology for the government's role in facilitating the "horribly wrong" Indian boarding schools,[180] a long overdue admission. Yet, words alone are not enough. Enforcing the golden standard, ICWA, with the greatest efficacy possible, is what the government needs to do to create meaningful change.

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180 Remarks by President Biden on the Biden—Harris Administration's Record of Delivering for Tribal Communities, Including Keeping His Promise to Make this Historic Visit to Indian Country, The White House (Oct. 25, 2024) https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/10/25/remarks-by-president-biden-on-the-biden-harris-administrations-record-of-delivering-for-tribal-communities-including-keeping-his-promise-to-make-this-historic-visit-to-indian-country-lavee/ [https://perma.cc/LN6H-SG77].