




4-19-2021

Equity over Equality: Equal Protection and the Indian Child Welfare Act

Lucy Dempsey

Washington and Lee University School of Law, dempsey.l21@law.wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr-online>

 Part of the [Family Law Commons](#), [Fourteenth Amendment Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), [Juvenile Law Commons](#), [Law and Race Commons](#), and the [Legislation Commons](#)

Recommended Citation

Lucy Dempsey, *Equity over Equality: Equal Protection and the Indian Child Welfare Act*, 77 WASH. & LEE L. REV. ONLINE 411 (2021), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol77/iss2/7>

This Note is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review Online by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Equity over Equality: Equal Protection and the Indian Child Welfare Act

Lucy Dempsey*

Abstract

In 2018, a Texas District Court shocked the nation by declaring the Indian Child Welfare Act (ICWA) unconstitutional pursuant to the Equal Protection Clause of the U.S. Constitution. The decision was overturned by the Fifth Circuit but may well be appealed to the U.S. Supreme Court. The ICWA provides a framework for the removal and placement of Indian children into foster and adoptive homes in such a way that attempts to reflect the unique values of Indian culture and supports the autonomy of the tribe. In doing so, the law treats Indian children differently than it would White children. But does this divergent treatment constitute impermissible racial discrimination? Should the ICWA's protections be applied to children merely eligible for tribal membership? What level of scrutiny should courts use when analyzing the ICWA's constitutionality? This Note will provide insight into these questions which the U.S. Supreme Court has not yet addressed.

* J.D. Candidate May 2021, Washington and Lee University School of Law. My deepest gratitude to Professor Joan Shaughnessy for her superb edits, patient conversations, and knack for asking questions that forced me to rethink everything. Special thanks also to Professor Sheryl Buske for introducing me to this topic and teaching me so much. Thank you to the *Washington and Lee Law Review* for their thoughtful guidance and to my family for their endless encouragement. Finally, thank you to Chandler—in this, as in all things, I am eternally grateful for your love and support.

This Note provides a background of the ICWA and examines the current constitutional controversy in the Fifth Circuit by placing the ICWA in the larger statutory context of federal Indian jurisprudence. This Note analyzes the fundamental question raised in Indian law equal protection cases—whether the term “Indian” should be interpreted as a racial or political classification. An examination of precedent confirms the unique status of Indians as non-racial, semi-autonomous actors who often receive uncommon treatment. With this context in mind, this Note explores past equal protection challenges to the ICWA and lays out the current case. This Note recommends that the Supreme Court uphold the Fifth Circuit’s finding of constitutionality on the equal protection claim and provides two possible analytical paths to reach that conclusion. The first ascribes to the common argument that “Indian” should be viewed as a political classification, subject to reduced scrutiny. The second, however, questions the assumption that the application of strict scrutiny is fatal to the ICWA, instead proposing an alternative path forward drawing from Supreme Court reasoning in affirmative action cases. This Note concludes that future challenges to the ICWA should be struck down as the ICWA passes all levels of constitutional scrutiny.

Table of Contents

I.	Introduction	413
II.	Background of the ICWA.....	416
	A. Legislative History	416
	B. Provisions of the ICWA.....	421
	C. Constitutional Concerns of the ICWA.....	425
III.	Equal Protection and Federal Indian Law	427
	A. The Doctrine of Equal Protection	427
	B. Equal Protection and Federal Indian Law	431
IV.	Equal Protection and the ICWA	439
V.	The Current Setting	445
	A. <i>Brackeen I</i> —The District Court Case.....	445
	B. <i>Brackeen II</i> —Fifth Circuit Opinion.....	448
	C. Analyzing the Correct Approach to Equal Protection in the ICWA.....	453
	D. An Alternative Path Forward.....	461

IV. Conclusion.....	468
---------------------	-----

I. Introduction

Since its origin, the Indian Child Welfare Act¹ (ICWA) has faced numerous constitutional challenges for its bold policy of treating Indian² children differently than non-Indian children in child custody proceedings.³ Underlying and justifying this differentiated treatment is a deep-seated history of discrimination faced by Indian families from welfare agencies and state court systems.⁴ Described by some lawmakers as a “cultural genocide,”⁵ by the 1970s “a minimum of 25 percent of all Indian children [were] either in foster homes, adoptive homes, and/or boarding schools” instead of living with their parents.⁶ The United States Congress responded by drafting the ICWA, a complex federal statutory framework for the removal and placement of Indian children into foster and adoptive homes that attempted to “reflect the unique values of Indian culture” and “[provided] for assistance to Indian tribes.”⁷ The ICWA’s framework immediately sparked accusations of equal protection

1. 25 U.S.C. §§ 1901–1963.

2. This Note will use the term “Indian” rather than “Native American” or “Alaskan Native” in order to be consistent with the statutory language of the ICWA. The Bureau of Indian Affairs (“BIA”) also uses the political term “Indian” in its current recognition of 573 Indian tribes. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200, 1200 (Feb. 1, 2019) [hereinafter *Indian Entities*]. As this Note argues, the term “Indian” is political, not racial, and thus it is especially crucial to use the designated term for the political category.

3. *See* Addie Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. ST. L. REV. 727, 727 (describing the ICWA as “under fire” as challengers argue that it “interferes with adoptions and violates the Constitution by doing so”).

4. *See Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs*, 93d Cong., 2d Sess. 1, 2 (1974) [hereinafter *1974 Hearings*] (“It appears that for decades Indian parents and their children have been at the mercy of arbitrary or abusive action of local, State, Federal, and private agency officials.”) (statement of Sen. James Abourezk).

5. *Id.* at 2.

6. *Id.* at 1.

7. 25 U.S.C. § 1902.

violations. Even today, the ICWA, with its underlying purpose of acknowledging important differences between Indian and non-Indian children,⁸ challenges courts to address the fundamental question of whether to prioritize equity of semi-autonomous Indian tribes and their children over legal equality.

In perhaps the most significant challenge to date, a Texas federal district court struck down the ICWA as unconstitutional in 2018.⁹ The reaction nationwide was one of outrage.¹⁰ The case was appealed and a three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed, affirming the ICWA's constitutionality under the Equal Protection Clause.¹¹ Shortly after the decision came out, however, the Fifth Circuit voted to rehear the case en banc.¹² Oral arguments in January 2020 garnered national attention in both the Indian and legal community for the potential implications not only on the ICWA, but on the constitutionality of all federal Indian law.¹³ Ultimately, the Fifth Circuit produced a deeply divided opinion, with a slim majority affirming the constitutionality of certain ICWA provisions under the Equal Protection Clause, but remaining equally divided on the constitutionality of others.¹⁴

8. See H.R. REP. NO. 95-1386, at 8 (1978), *reprinted in* 1978 U.S.C.A.N. 7530, 7530 [hereinafter House Report] (“[ICWA’s purpose is] to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal [and placement] of Indian children . . . which will reflect the unique values of Indian culture . . .”).

9. *Brackeen v. Zinke*, 338 F. Supp. 3d 514 543–44 (N.D. Tex. 2018).

10. See, e.g., *Official Statement: Joint Statement on Indian Child Welfare Case Brackeen v. Zinke Ruling*, NAT’L CONG. INDIAN AM. (Oct. 8, 2018), <https://perma.cc/QYB4-8K9J> (“This egregious decision ignores the direct federal government-to-government relationship and decades upon decades of precedent that have upheld tribal sovereignty and the rights of Indian children and families.”).

11. *Brackeen v. Bernhardt*, 937 F.3d 406, 425–30 (5th Cir. 2019).

12. *Brackeen v. Bernhardt*, 942 F.3d 287, 289 (5th Cir. 2019).

13. See Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020), <https://perma.cc/Z2XG-N56U> (“In *Brackeen*, Texas has mounted nothing less than a frontal attack on the entire corpus of federal law that governs Indian affairs today.”).

14. *Brackeen v. Haaland*, No. 18-11479, 2021 U.S. App. LEXIS 9957, at *7–8 (5th Cir. Apr. 6, 2021) (“The district court’s ruling that provisions of ICWA and the Final Rule are unconstitutional because they incorporate the

This convoluted ruling will likely be appealed to the Supreme Court.¹⁵ This Note will endeavor to address whether the ICWA is constitutional under the Equal Protection Clause.¹⁶

This Note will proceed as follows: Part II will bring into focus the historical and political landscape behind the implementation of the ICWA in the late 1970s. Part III will provide a broad survey of equal protection jurisprudence relating to federal Indian laws throughout history, illustrating the unique status of quasi-sovereign Indian tribes in an equal protection context. Next, Part IV will narrow the focus to equal protection as applied to the ICWA in particular and the various challenges the statute faces. The most recent constitutional challenge will be analyzed in detail in Part V with a close examination of the recent Fifth Circuit opinion.¹⁷ This Note will argue that the Fifth Circuit correctly approached the equal protection issue, acknowledging the unique status of Indian tribes and adhering to supporting precedent in federal Indian law. This Note will conclude that, whether under strict scrutiny or rational basis review, courts should uphold the constitutionality of the ICWA. The Fifth Circuit's reasoning provides a model which the United States Supreme Court should follow, solidifying the constitutionality of this crucial statute under the Equal Protection Clause.

"Indian child" classification is therefore reversed, but its ruling that § 1915(a)(3) and (b)(iii) violate equal protection is affirmed without a precedential opinion."). The en banc majority also found the ICWA to be unconstitutional under the anticommandeering doctrine but this is beyond the scope of this Note. *Id.* at *8–9.

15. See Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, VOX (Feb. 20, 2020, 7:30AM), <https://perma.cc/9U34-484F> ("Native advocates say it's likely that whatever the ruling [of the Fifth Circuit], the decision will be appealed to the Supreme Court.").

16. U.S. CONST. amend. XIV, § 1.

17. *Brackeen v. Haaland*, No. 18-11479, 2021 U.S. App. LEXIS 9957 (5th Cir. Apr. 6, 2021).

II. Background of the ICWA

A. Legislative History

The United States Congress enacted the ICWA in 1978 as an attempt to “establish standards for the placement of Indian children in foster or adoptive homes [and] to prevent the breakup of Indian families.”¹⁸ Congress lamented how, for years, “an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.”¹⁹ State social services agencies and courts placed many of these children in non-Indian foster and adoptive homes.²⁰ Other children were removed from their homes and sent to federal boarding institutions, which contributed acutely to the “destruction of Indian family and community life.”²¹ The children were often isolated from their families and taught by instructors who possessed “very little understanding and appreciation of the children’s native languages and traditions.”²² In 1971, the Bureau of Indian Affairs (BIA) reported over 34,500 children living in its federal boarding school and dormitory facilities.²³ In

18. 25 U.S.C. § 1901; see House Report, *supra* note 8, at 8 (stating the purpose of the ICWA’s federal standards to be “protect[ing] the best interests of Indian children” and promoting “the stability and security of Indian tribes and families”).

19. *Id.* § 1901(4); see House Report, *supra* note 8, at 9, 11; Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32–33 (1989) (characterizing the ICWA as stemming from rising national concern over “the consequences to [Indian children, families, and tribes] of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster case placement, usually in non-Indian homes”).

20. 25 U.S.C. § 1901(4).

21. House Report, *supra* note 8, at 9; see Ann Piccard, *Death by Boarding School: The Last Acceptable Racism and the United States’ Genocide of Native Americans*, 49 GONZ. L. REV. 137, 141 (2013) (describing the use of Indian boarding schools as “an act of genocide under international law” which was designed “not to educate those children but, instead, to instill in them the whites’ belief that everything ‘Indian’ was bad, inferior, and evil”).

22. B.J. JONES ET AL., *THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN* 2 (A.B.A. 2d ed., 2008).

23. See House Report, *supra* note 8, at 9 (representing that over 17 percent of the school-aged Indian population on federal reservations lived in

the 1950s, the government partnered with both state and private agencies to create the Indian Adoption Project, which adopted out Indian children primarily to non-Indian families to further the “Indian extraction” policy.²⁴

Congress realized that these intrusive practices by non-Indian actors had fomented the separation of hundreds of Indian families and ultimately contributed to the loss of future tribal members.²⁵ An Association of American Indian Affairs survey in 1974 indicated that “approximately 25–35% of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions.”²⁶ Congress was particularly troubled by the reasons given for the majority of these removals. Non-Indian social workers based 99 percent of the removals on vague categories of “neglect” or “social deprivation” rather than any charges of physical abuse.²⁷ Non-Indian social workers and judges often found fault with commonplace Indian child-rearing behavior.²⁸ Social workers

institutions, with tribes such as the Navajo Reservation seeing 90 percent of their K-12 children shipped off to boarding schools).

24. See ELLEN SLAUGHTER, UNIV. OF DENVER RSCH. INST., *INDIAN CHILD WELFARE: A REVIEW OF THE LITERATURE* 61 (1976), <https://perma.cc/7XN8-6LGR> (PDF) (explaining the then-prevailing “Indian extraction” policy as seeking to reduce reservation populations, reduce boarding school costs, and satisfy a “large demand for Indian children on the part of Anglo parents”).

25. See House Report, *supra* note 8, at 9 (“The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”); 1974 Hearings, *supra* note 4, at 2 (stating that the welfare agency’s “stealing” of children “strike[s] at the heart of Indian communities”) (statement of Sen. James Abourezk).

26. *Id.* at 9. The report shared disturbing details about “[t]he disparity in placement rates for Indians and non-Indians” throughout the country. *Id.* For example, the report stated, South Dakota had seen 40 percent of all adoptions over the past decade involve Indian children, although Indians made up “only 7% of the juvenile population.” *Id.* In Wisconsin, the chance that an Indian child would be separated from their parents was nearly 1,600 percent greater than for a non-Indian child. *Id.*

27. See *id.* at 10 (explaining how many cases were argued merely on allegations of emotional damages inflicted on the child from living with their parents).

28. See *id.* (“Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider[ed] leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.”); JONES, *supra* note 22, at 3 (arguing that

regularly made decisions Congress considered “wholly inappropriate” in the context of Indian cultural values and social norms.²⁹

In addition to the removals themselves, Congress also began to question the methodology with which states placed children in adoptive or foster homes. Discriminatory standards, based on “middle-class values,” disqualified most Indian families from fostering or adopting Indian children.³⁰ As a result, by 1969, a survey of sixteen states showed that approximately 85 percent of Indian children in foster homes were living with non-Indian families.³¹ Congress believed that many of the states actively failed to “recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”³² The commonly accepted standard for child welfare litigation is

non-Indian social workers remained ignorant of the traditional Indian ways of child-rearing such as leaving children with grandparents for extended periods of time); Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 603–04 (2002) (“[S]tate child welfare officials were insensitive to traditional Indian approaches to child rearing, in particular the widespread practice of involving members of a child’s extended family in significant caregiving.”).

29. See House Report, *supra* note 8, at 10 (asserting social workers’ conclusions regarding Indian children’s emotional risk and Indian parents’ caregiving abilities to be blinded by bias and a lack of respect for systemic cultural differences).

30. See *id.* at 11 (“Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle class values.”); Atwood, *supra* note 28, at 604–05 (“Applying majoritarian middle-class values, state workers often construed [Indian child-rearing] practice[s] as neglect or even abandonment. In addition, high rates of alcoholism and poverty were relied on as justifications for removing Indian children from their communities.”).

31. House Report, *supra* note 8, at 9; see Allison Krause Elder, “Indian” as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act, 13 NW. J. L. & SOC. POL’Y 417, 418 n.10 (2018) (explaining that the phenomenon of Indian children ending up in non-Indian homes can also be attributed to the Indian Adoption Project of the 1950s, as well as a well-known campaign “Kill the Indian, Save the Child” (citing Lila J. George, *Why the Need for the Indian Child Welfare Act?*, 5 J. MULTICULTURAL SOC. WORK 165 (1997))); FRANK POMMERSHEIM, *BROKEN LANDSCAPE* 243 (2009) (citing one of the leading educators and spokesmen for federal boarding schools, William Pratt, as espousing the primary goal “to kill the Indian and save the man”).

32. 25 U.S.C. § 1901(5).

the “best interest of the child” standard (BICS).³³ The BICS prioritizes, above all, providing the child with the opportunity to psychologically bond with at least one adult “who is perceived by that child as his or her psychological parent.”³⁴ Some believe that the ICWA, by considering not only the individual child’s interest but also that of the greater tribe,³⁵ creates an inherent tension between tribal and individual welfare, making it incompatible with the BICS.³⁶

Others reject this notion, arguing that the ICWA instead merges the two interests and, in doing so, exemplifies “the gold standard” of child welfare by creating provisions which “maintain a safe environment for the child while preserving as many of a child’s connections as possible.”³⁷ The ICWA embodies

33. See JONES, *supra* note 22, at 12 (noting that this theory was popularized by Goldstein, Freud, and Solnit in their well-known book *Beyond the Best Interest of the Child*); Julia Halloran McLaughlin, *The Fundamental Truth about Best Interests*, 54 ST. LOUIS U.L.J. 113, 160 (2009) (“The [BICS] is a creature of common law, existing from time immemorial and has become the bedrock of our state custody statutory law. . . . At its core the [standard] is designed to identify and reinforce the child’s fundamental right to a loving and nurturing parent-like relationship.”).

34. JONES, *supra* note 22, at 12; see Brief for Casey Family Programs et al. as Amici Curiae Supporting Appellants at 5, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479) [hereinafter *Casey Brief*] (“Child welfare’s core principle is that children are best served by preserving and strengthening their birth family relationships.”).

35. House Report, *supra* note 8, at 8 (“The purpose of [the ICWA] is to protect the best interests of Indian children *and* to promote the stability and security of Indian tribes and families” (emphasis added)).

36. See Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 12–13 (2017) (arguing that the ICWA’s placement preferences override individual consideration of a child’s personal best interests, “except in the rarest of circumstances”); Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. DET. L. REV. 451, 453 (1989) (“For the Indian children who may become involved in protracted controversies about their adoptive placement the ICWA goal of promoting their best interests may be undermined by the ICWA’s other goal of ensuring insuring tribal survival.”); Jones, *supra* note 22, at 12 (noting that the ICWA’s holistic, tribal goals have been perceived as straying from the “best interest of the child” theory).

37. *Casey Brief*, *supra* note 34, at 4–5 (explaining that the central interest in child welfare—maintaining family integrity—includes an interest in preserving “the mesh of ties that surround a child, from the closest ties

the “realization that Native Americans have unique practices and traditions regarding child-rearing that are not susceptible to judgment using a non-Indian barometer.”³⁸ These traditions revolve around semi-autonomous tribal communities and therefore necessitate tribal considerations to be folded into an Indian child’s BICS analysis.³⁹ Similarly, the ICWA’s goal of protecting the stability and security of Indian tribes is inextricably linked with the protection of Indian children.⁴⁰ Congress drafted the ICWA to promote the unique best interests of Indian children *and* tribes by addressing tribal considerations in child welfare proceedings and eliminating “subjective values” imposed by judges and state welfare officials which previously controlled the evaluation of Indian children’s best interests.⁴¹ To do so, Congress provided an objective, yet individualized, framework to assist decision-makers in properly evaluating the best interests of Indian children by taking tribal interests into

(birth parents, siblings), to extended family, to the child’s broader community”). The placement provisions prioritize keeping children within the child’s birth family first, then placement with extended family (even without tribal connection), and finally members of the child’s broader community, including the child’s tribe. 25 U.S.C. § 1915(a), (b). The role of tribal placements forms “a context-specific application of the universal best practice of preserving as many of a child’s connections to the community as possible.” Case Brief, *supra* note 34, at 5.

38. JONES, *supra* note 22, at 12.

39. Case Brief, *supra* note 34, at 6 (“Thus, ICWA’s interest in preserving a child’s ties to a tribe . . . is best understood as implementing the universal best practice of prioritizing placements that will maintain as many of a child’s networks, and as much stability and sense of identity, as possible.”); Tanya A. Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 244 (2013) (“The best interests of Native American children are inherently tied to the concept of belonging.”).

40. See 25 U.S.C. § 1901 (“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children”); Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 602 (1994) (“With the disappearance of the younger generation, Native American tribes would lose the conduit of their cultures.”).

41. See House Report, *supra* note 8, at 15 (“Moreover, judges too may find it difficult, in utilizing vague standards like ‘the best interests of the child’, to avoid decisions resting on subjective values.”).

account while remaining loyal to the fundamental facets of the BICS.⁴²

B. Provisions of the ICWA

This carefully drafted decision-making framework includes both procedural and substantive provisions all designed “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”⁴³ To protect these interests the ICWA sets out three primary objectives: (1) eliminating the removal of Indian children due to cultural bias and ignorance; (2) placing validly-removed Indian children in foster or adoptive homes that reflect their unique culture and background; and (3) increasing tribal court adjudication of child custody proceedings.⁴⁴ In keeping with these objectives, the statute is “jurisdictionally stringent in *favor* of tribal court jurisdiction, creates minimum *federal* standards for the removal of Indian children from their homes by the *state*, and establishes strict placement preferences that must be followed by state courts.”⁴⁵

The ICWA applies to all state court child custody proceedings involving an Indian child.⁴⁶ Child custody proceedings are defined by the statute to encompass: (1) foster care placements; (2) termination of parental rights; (3)

42. Casey Brief, *supra* note 34, at 16–17 (explaining how the statute “mandates structured placement preferences while permitting customized consideration of each child’s needs” by including a departure from placement preferences upon a showing of “good cause” (citing 25 U.S.C. § 1915(a), (b))).

43. 25 U.S.C. § 1902.

44. *Id.* § 1901; JONES, *supra* note 22, at 4–5.

45. POMMERSHEIM, *supra* note 31, at 243 (interpreting the statute to aim to accomplish these three primary objectives).

46. Under the ICWA, “Indian child” is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4). This definition gives tribes ultimate power to define who is an “Indian child” based on their own membership criteria. *See* Elder, *supra* note 31, at 422 (“Rather than impose their own understanding of Indian identify, Congress chose to defer to tribal standards for membership eligibility. Key to the ICWA, this definitional power reflects Indian tribes’ status as sovereign nations, as well as the importance of children to tribal sovereignty.”).

pre-adoptive placement; and (4) adoptive placement.⁴⁷ In any of these proceedings involving one or more Indian children, ICWA imposes minimum federal procedural requirements that are unique to Indian cases.

First, the ICWA grants tribal courts jurisdiction over Indian child custody proceedings. Exclusive jurisdiction is given to tribal courts when the child in question is a resident or domiciliary of the reservation.⁴⁸ If the child is not a resident or domiciliary of a reservation, a state court “in the absence of good cause to the contrary shall transfer such proceeding to the jurisdiction of the tribe.”⁴⁹ This concurrent jurisdiction for the tribe can be obtained upon the petition of either of the child’s parents, the child’s Indian custodian,⁵⁰ or the Indian child’s tribe.⁵¹ Furthermore, the Indian child’s tribe(s) has the right to intervene “at any point in the proceeding.”⁵² In general, the ICWA favors a transfer of jurisdiction to tribal courts of a child custody proceeding, barring any unusual findings made by the state court judge.⁵³ Tribal courts may decline to take individual cases.⁵⁴ In order to facilitate an intervention or transfer, notice is also a crucial requirement under the ICWA.⁵⁵ In any involuntary child custody proceeding where a party knows or has reason to believe that the child involved is an Indian child, there is “an affirmative obligation on the part of all parties, and

47. 25 U.S.C. § 1903(1).

48. *Id.* § 1911(a).

49. *Id.* § 1911(b).

50. *See id.* § 1903(6) (“Indian custodian” means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.”).

51. *Id.* § 1911(b).

52. *Id.*

53. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989) (determining that the jurisdictional transfer provisions of the ICWA create “presumptive” tribal court jurisdiction).

54. *See JONES*, *supra* note 22, at 6 (describing how many tribes consciously decline transfers due to a lack of resources to provide for their children and a hope that the state and county agencies can provide better).

55. *See* 25 U.S.C. § 1912(a) (“[T]he party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.”).

their attorneys, to report such to the court so that notice may be given to the Indian child's tribe."⁵⁶ Notice must also be given to the child's parents and, if applicable, to an Indian custodian.⁵⁷ Finally, various other procedural standards appear in the ICWA that apply only to Indian children. These include the necessity of expert testimony,⁵⁸ the provision of rehabilitative services,⁵⁹ and enhanced burdens of proof.⁶⁰ To sustain a termination of parental rights, the court must find beyond a reasonable doubt that certain requirements are shown.⁶¹ To involuntarily place an Indian child in foster care, the court must find "clear and convincing evidence" that allowing the child to remain in their parent's custody "is likely to result in serious emotional or physical damage."⁶²

56. JONES, *supra* note 22, at 5. Heated judicial debate exists amongst state courts on carving out an exception to the definition of "Indian child," and thus avoiding triggering the ICWA, for otherwise qualified Indian children who have not lived with an Indian family or live with an Indian family with few or no ties to an Indian tribe. *Id.*; *see, e.g., In re Baby Boy L.*, 103 P.3d 1099, 1108 (Okla. 2004) (overturning precedent from a prior 1992 decision, *In re S.C.*, which had adopted the "Existing Indian Family Exception," and noting that the Oklahoma legislature expressly rejected the exception).

57. 25 U.S.C. § 1912(a).

58. *Id.* § 1912(f) (requiring expert testimony of a qualified expert witness that the child remaining in their current home is "likely to result in serious emotional or physical damage").

59. *Id.* § 1912(d) ("[A]ctive efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. . ."). In cases involving non-Indian children, merely "reasonable efforts" are required to preserve and reunify families after children have been taken into state custody. *See, e.g.,* 42 U.S.C. § 671(a)(15); ALASKA STAT. § 47.10.086 (2019); IOWA CODE § 232.102(5)(b) (2019); MINN. STAT. § 260.012(a) (2019).

60. 25 U.S.C. § 1912(e).

61. *Id.* § 1912(f). In contrast, in cases involving non-Indian children, a termination of parental rights case necessitates only a "clear and convincing evidence" burden of proof. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (concluding that this standard "strikes a fair balance between the rights of the natural parents and the State's legitimate concerns").

62. 25 U.S.C. § 1912(e). In cases involving non-Indian children, states use lower burdens of proof for involuntary foster care placements including "reasonable grounds" or "probable cause." *See Sandefur, supra* note 36, at 42 (arguing that ICWA's higher evidentiary standard fails to strike a balance between parental rights and children's safety by making it harder for state officers to gather sufficient evidence to remove a child).

The ICWA also contains substantive provisions creating placement preferences designed to promote the placement of removed Indian children into homes that reflect their unique culture and background.⁶³ There are placement preferences for both foster care⁶⁴ and adoptive⁶⁵ placements, and both allow flexibility for tribes to exercise their discretion, so long as the placement is the “least restrictive setting appropriate to the particular needs of the child.”⁶⁶ This flexibility exemplifies the purpose of the ICWA by giving Indian tribes autonomy and deference in evaluating an Indian child’s best interests.⁶⁷ These preferences create a hierarchy which state courts must ascribe to when placing Indian children.⁶⁸ Altogether, the ICWA’s provisions take into account innate differences between Indian and non-Indian children using higher burdens of proof, unique placement preferences, and flexibility for tribal intervention. In singling out Indian children for differentiated treatment in these ways, however, the statute has drawn constitutional scrutiny from critics.

63. See *Holyfield*, 490 U.S. at 36 (proclaiming the “most important substantive requirements imposed upon state courts” to be the placement preferences in § 1915).

64. See 25 U.S.C. § 1915(b)

In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with (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.

65. See *id.* § 1915(a) (“In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”).

66. *Id.* § 1915(c).

67. See *Elder*, *supra* note 31, at 423 (“The ICWA essentially presumes that it is in the Indian children’s best interest to be with family in their tribe, or with other tribal members, unless the tribe itself determines otherwise.”).

68. See POMMERSHEIM, *supra* note 31, at 244 (explaining that the placement preferences “are designed to facilitate placement with Indian families and institutions” and are “socially and culturally defined and subject to tribal revision” only).

C. Constitutional Concerns of the ICWA

Perhaps the most controversial facet of the ICWA is the provision stipulating the persons to whom the act can be applied. The act applies to any “Indian child,” defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”⁶⁹ There is little debate over the constitutionality of applying the ICWA to children who are registered members of a federally recognized⁷⁰ Indian tribe in clause (a). Clause (b) of this definition, however, raises constitutional questions under the Equal Protection Clause⁷¹ as to whether the inclusion of children “eligible for membership in an Indian tribe” constitutes an illegitimate racial classification.⁷² Eligibility for membership varies by tribe, with each tribe possessing complete autonomy in choosing the factors to assess.⁷³ Race can play a large role in

69. 25 U.S.C. § 1903(4).

70. The term “Indian tribe” is defined in the ICWA in § 1903(8) as:

[A]ny Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Bureau of Indian Affairs] because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act.

Thus, unrecognized tribes which are not eligible for federal funding or services cannot assert the ICWA. *See id.* (excluding all but those “recognized” tribes); *see also* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1,200, 1,200 (Feb. 1, 2019) (containing the most recent official list of 573 tribal entities recognized by and eligible for funding and services from the Bureau of Indian Affairs). This Note will use the term “tribe” as it is used under the ICWA itself in reference only to federally recognized Indian tribes.

71. U.S. CONST. amend. XIV, § 1.

72. *See infra* Parts IV–V.

73. *See Tribal Enrollment Process*, U.S. DEPT OF INTERIOR, <https://perma.cc/Y2YG-UZ2S>.

Tribal enrollment criteria are set forth in tribal constitutions, articles of incorporation or ordinances. The criterion varies from tribe to tribe, so uniform membership requirements do not exist.

Two common requirements for membership are lineal descendency from someone named on the tribe’s base roll or relationship to a tribal member who descended from someone named on the base roll.

eligibility, but, depending on the tribe, is not necessarily determinative.⁷⁴

The Supreme Court recently weighed in on a case involving a child with a non-custodial biological Indian father, but avoided overtly addressing any of the ICWA's potential equal protection concerns.⁷⁵ In its second-ever interpretation of the statute,⁷⁶ the Court in *Adoptive Couple v. Baby Girl* decided against applying the ICWA's protections to non-custodial Indian fathers.⁷⁷ Although the decision hinged on whether the ICWA should apply to non-custodial Indian fathers,⁷⁸ the 5–4 majority opinion repeatedly emphasized its reluctance to apply the statute where a child was only “3/256 Cherokee.”⁷⁹ However, the case involved no dispute over the child's status as an “Indian child.”⁸⁰ The

(A “base roll” is the original list of members as designated in a tribal constitution or other document specifying enrollment criteria.) Other conditions such as tribal blood quantum, tribal residency, or continued contact with the tribe are common.

74. See Russell Thornton, *Tribal Membership Requirements and the Demography of “Old” and “New” Native Americans in* CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH 103, 107 (1996) (using BIA tribal enrollment data to demonstrate that “many [tribes] have no minimum blood quantum requirement” requiring instead “only a documented tribal lineage”). Thornton's research shows that by the mid-twentieth century 98 out of 302 federally recognized Indian tribes had no blood quantum requirement—primarily those without a reservation base. *Id.*

75. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655–56 (2013) (hinting at potential equal protection concerns raised by the ICWA “put[ting] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian”).

76. See *infra* Part IV (explicating *Miss. Band of Choctaw Indians v. Holyfield*, the Supreme Court's first case interpreting the ICWA).

77. *Adoptive Couple*, 570 U.S. at 654 (rejecting the argument that ICWA provision § 1912(d) barred termination of biological father's parental rights in the instant case).

78. See *id.* at 643 (stating that the Father was a member of the Cherokee Nation).

79. *Id.* at 646 (“It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law.”). The majority provided no explanation or rationale for the use of this specific number. *Id.*

80. *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 635 (2012) (“[I]n January 2010 the Cherokee Nation first identified Father as a registered member and determined that Baby Girl was an “Indian Child,” as defined under the [ICWA].”). As a baby who had not been formally enrolled, it can be assumed that Baby Girl was classified as an “Indian child” under § 1903(4)(b) due to (1)

dissent called out the majority's rhetoric for hinting at "lurking constitutional problems [which] are, by [the majority's] own account, irrelevant to its statutory analysis, and accordingly need not detain [this opinion] any longer."⁸¹ This case reinvigorated the debate over the constitutionality of the ICWA but provided no concrete answers.⁸² Thus, with little guidance from the Supreme Court on equal protection as applied to the ICWA specifically, it is instructive to contextualize the ICWA within the Court's broader jurisprudence on equal protection and federal Indian law in general.

III. *Equal Protection and Federal Indian Law*

A. *The Doctrine of Equal Protection*

The guarantee of equal protection only appears explicitly in the Fourteenth Amendment, which prohibits states from making or enforcing any law which "den[ies] to any person within its jurisdiction the equal protection of the laws."⁸³ The Fifth Amendment's Due Process Clause enumerates individuals' rights under federal law, but makes no specific

her eligibility for tribal membership under Cherokee law and (2) her father's enrolled status as a member of the tribe.

81. See *Adoptive Couple*, 570 U.S. at 690–91 (Sotomayor, J., dissenting) (chastising the majority for needlessly referencing the child's 3/256th Cherokee ancestry and "do[ing] no more than creat[ing] a lingering mood of disapprobation of the criteria for membership adopted by the Cherokee nation").

82. See, e.g., Christopher Deluzio, *Tribes and Race: The Court's Missed Opportunity in Adoptive Couple v. Baby Girl*, 34 PACE L. REV. 509, 558 (2014) (criticizing the Court for using "the ICWA's statutory text as a useful life raft to avoid the choppy waters of ICWA's fundamental equal protection flaws" and "perpetuat[ing] the legal fiction necessary to justify rational basis review of Indian classifications"); Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 336 (2015) [hereinafter *Name of the Child*] (characterizing the Court's "ominous" references to equal protection concerns as "deliberately vague" and "built upon air"); Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 588–92 (2014) (stating that "the majority—despite its brief allusion to equal protection—would itself apply no meaningful constitutional scrutiny to the ICWA" and that, the Court would not "seek to extend [its 'colorblind' approach to affirmative action] to the family law domain").

83. U.S. CONST. amend. XIV, § 1.

mention of equal protection.⁸⁴ The Supreme Court's jurisprudence, however, treats the equal protection analysis of federal laws under the Fifth Amendment the same as that of state laws under the explicit Fourteenth Amendment.⁸⁵ As a result, in the context of Indian law, where most equal protection concerns are raised by federal laws which affect or single out Indians,⁸⁶ a law's constitutionality is analyzed as if the Fifth Amendment itself explicitly included an equal protection requirement for federal laws.

The equal protection analysis begins with the question of upon what basis a law has drawn a distinction to treat a certain class of people differently.⁸⁷ Depending on the nature of the basis for that decision, the court applies different standards of review and grants varying amounts of deference to the law.⁸⁸ If the decision is based on a non-suspect classification, such as politics or age, the law is usually constitutional as long as there exists a rational basis—a legitimate government purpose fulfilled by rationally related means—for the distinction.⁸⁹ Classifications based on race, however, are more suspect, and are evaluated under strict scrutiny and granted less deference.⁹⁰ Under strict scrutiny, the government must assert a compelling

84. U.S. CONST. amend. V, § 1 (“[N]or be deprived of life, liberty, or property, without due process of law . . .”).

85. See *Boiling v. Sharpe*, 347 U.S. 497, 499 (1954) (acknowledging that the concepts of due process and equal protection are not mutually exclusive); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (emphasizing that any “untenable distinction between state and federal racial classifications” in equal protection cases “lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right”).

86. Since the country's founding, Congress has singled out Indians in federal law. See, e.g., U.S. CONST. art. I, § 8 (“Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

87. See Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1583–84 (2017) (describing the first step of the equal protection analysis).

88. See *id.* (discussing the different standards of review).

89. See *id.* (explaining the varying levels of deference afforded classifications).

90. See *Boiling*, 347 U.S. at 499 (“Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”).

purpose and prove that it used necessary means to achieve that purpose.⁹¹

More often than not, once the court chooses to apply strict scrutiny in an equal protection case, the government loses and the classification is declared unconstitutional.⁹² However, there are a few notable cases where the government prevailed despite the application of strict scrutiny.⁹³ In *Grutter v. Bollinger*,⁹⁴ a prospective student challenged the University of Michigan Law School's admissions policy as unconstitutionally racially discriminatory.⁹⁵ The student alleged that her application was rejected because Michigan gave certain minority groups, including Native Americans, preferential treatment over White applicants.⁹⁶ The Supreme Court applied strict scrutiny but pushed back on the concept that strict scrutiny is "strict in theory, fatal in fact."⁹⁷ Instead, the Court saw the standard of review as "designed to provide a framework for carefully

91. See Leslie, *supra* note 87, at 1584 (describing the government's burden under strict scrutiny (citing *Adarand*, 515 U.S. at 227)).

92. See Roy G. Jr. Spece & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 312 (2015) (summing up the authors' formulation of strict scrutiny, which interprets precedent case law as implicitly requiring the government to meet the burden of proof of six elements in order to prevail under strict scrutiny).

93. See generally, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

94. 539 U.S. 306 (2003). In *Grutter*'s companion case, *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court held Michigan's undergrad admission policy to be unconstitutional.

95. See *Grutter*, 539 U.S. at 315–18 (explaining that, besides Law School Admission Test scores, the policy purported to take a "holistic" approach and consider soft variables including diversity—racial and otherwise—to fulfill the school's commitment to achieving a level of diversity with the "potential to enrich everyone's education").

96. See *id.* at 317 ("Petition alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment . . . [in that] the Law School use[d] race as a 'predominant' factor, giving applicants who belong[ed] to certain minority groups [preference over white applicants].").

97. See *id.* at 326–27 (emphasizing that "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it"). The Court acknowledged the constitutionality of race-based actions when they became "necessary to further a compelling governmental interest" as long as "the narrow-tailoring requirement is also satisfied." *Id.*

examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”⁹⁸ With those principles in mind, the Court examined the policy and found a compelling governmental interest at stake, justifying the school’s use of race-based action.⁹⁹ A central pillar of this finding relied on the Court’s respect for educational institutions which “occupy a special niche in our constitutional tradition.”¹⁰⁰ Additionally, the Court gave weight to the expert studies and reports which demonstrated “the educational benefits that flow from student body diversity.”¹⁰¹

The Court also found that the means chosen were specifically and narrowly tailored to accomplish this purpose, satisfying the second prong of strict scrutiny.¹⁰² The holistic process was necessary because there was no alternative way to advance the goal of gaining a diverse student body.¹⁰³ Further, the school did not use impermissible tools like quotas, but only considered race as a “plus” or one factor in each applicant’s file.¹⁰⁴ The Court, satisfied with the school’s showing of previous failed attempts to increase diversity through race-neutral alternatives, stressed that narrow tailoring “does not require exhaustion of every conceivable race-neutral alternative.”¹⁰⁵ Finally, the race-conscious admissions policy did not unduly harm individuals who were not members of the favored racial group.¹⁰⁶

98. *Id.* at 331–32.

99. *See id.* at 328 (holding that the law school has a compelling interest in attaining a diverse student body).

100. *Id.* at 329.

101. *Id.* at 330.

102. *See id.* at 333–34 (noting that the narrowly tailored inquiry “must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education”).

103. *See id.* at 333 (“The Law School has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”).

104. *See id.* at 334 (emphasizing that “[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system”).

105. *See id.* at 339–40 (describing failed alternatives).

106. *See id.* at 341 (“[I]n the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s

B. Equal Protection and Federal Indian Law

The varying standards of review used in equal protection inquiries, determined by whether a classification is race-based, distills many federal Indian law equal protection claims down to one question: whether the term “Indian” should be interpreted as a racial or political classification. Whether or not the terms “Indian” or “Indian tribes” are considered “racial” determines the standard of review and, often, the ultimate outcome of an equal protection challenge.¹⁰⁷ In considering this question, it is useful to examine past equal protection challenges to federal Indian legislation.¹⁰⁸ One of the seminal moments in Indian equal protection jurisprudence was the *Morton v. Mancari*¹⁰⁹ decision in 1974.¹¹⁰ In *Mancari*, the Supreme Court unanimously upheld a state statute, which defined “Indian” in part based on blood, after determining the law to be rationally

race-conscious admissions program does not unduly harm nonminority applicants.”).

107. See, e.g., Sandefur, *supra* note 36, at 60 (“Whether [ICWA’s differing treatment of Indian children from non-Indian children] is constitutional or not depends on whether it is regarded as race-based or as based on the nature of tribes as political units.”). Alternatively, some scholars argue that even under a racial classification, all federal Indian law should be reviewed with rational basis scrutiny. See, e.g., Carole Goldberg-Ambrose, *Not Strictly Racial: A Response to Indians as Peoples*, 39 UCLA L. REV. 169, 173–74 (1991) (arguing for the abandonment of strict scrutiny in all Indian equal protection cases because of the unique obligation of the federal government to protect Indian culture under Article I of the United States Constitution).

108. See Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1167 (2010) [hereinafter *Reconciling*] (“Although questions regarding the congruence of Indian law and equal protection may seem more pressing now, they have existed since the framing of the Fourteenth Amendment and have reappeared at key moments in its history.”).

109. 417 U.S. 535 (1974).

110. See *Reconciling*, *supra* note 108, at 1171 (arguing that the Supreme Court sought to use *Mancari* to reconcile equal protection doctrine with federal Indian policy and that subsequent decisions, while maintaining the doctrinal reconciliation, have “failed to develop its normative justification, leaving the doctrine vulnerable to challenge and backlash”).

related to the tribes' unique political status and thus not a racial classification.¹¹¹

Mancari involved a provision of the Indian Reorganization Act of 1934 which gave preference in hiring to Indian employees in the BIA.¹¹² To be eligible for preference, the individual “must be one-fourth or more degree Indian blood and be a member of a Federally recognized tribe.”¹¹³ In order to determine the standard of review, the Court analyzed whether or not the preference constituted “invidious racial discrimination” under the Due Process Clause of the Fifth Amendment.¹¹⁴ The Court focused on the “unique legal status of Indian tribes under federal law” and “the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes.”¹¹⁵ The existence of this “special relationship” created an “assumption of a ‘guardian-ward’ status” between Congress and the political bodies of Indian tribes.¹¹⁶ In light of this relationship, the Court found that “[l]iterally every piece of legislation dealing with Indian tribes” singles out constituencies of tribal Indians.¹¹⁷ The Court decided that this differential treatment, derived from a unique historical relationship and “explicitly designed to help only Indians,” did not constitute racial discrimination.¹¹⁸ The

111. See *Mancari*, 417 U.S. at 554 (“The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”); *Reconciling*, *supra* note 108, at 1186 (“Therefore, *Mancari* held, different treatment of Indian people by the federal government is not subject to the strict scrutiny reserved for racial classifications, but instead will be upheld if it ‘can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.” (citing *Mancari*, 417 U.S. at 555)).

112. See *Mancari*, 417 U.S. at 537 (describing non-Indian appellees challenging the provision “such qualified Indians shall hereafter have preference to appointment to vacancies in any such positions” as violative of the Fifth Amendment).

113. *Id.* at 553.

114. *Id.* at 551.

115. *Id.* at 551–52 (basing Congress’ plenary power in the Constitution’s explicit Commerce Clause and the history of treaties being used by Congress to “deal with” tribes).

116. *Id.*

117. *Id.* at 552.

118. See *id.* (noting that if such laws were invidious racial discrimination, then “an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized”).

Court's opinion contextualized the Indian Reorganization Act as part of a legislative history imbued with the aim of increasing Indian self-governance through participation in BIA operations.¹¹⁹ The preference, the opinion stated, formed part of a larger goal to give "Indians a greater control of their own destinies" and correct for past injustice and "[t]he overly paternalistic approach of prior years."¹²⁰

The Court concluded that the preference did not constitute racial discrimination nor could even be considered a "racial" preference.¹²¹ The Court emphasized that the preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities," making the classification political, not racial, in nature.¹²² Thus, the Court applied rational basis and found that the special treatment could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."¹²³ The Court also looked favorably upon the fact that the preference applied narrowly to employment in the BIA¹²⁴ and was "directly related to a legitimate, nonracially based goal."¹²⁵ In upholding the preference, the *Mancari* Court also relied upon extensive

119. *See id.* at 541–44 (finding the purpose of the Indian Reorganization Act to be "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically").

120. *Id.* at 553.

121. *See id.* at 553–54 (characterizing the preference instead as an employment criterion working to "further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups").

122. *Id.* at 554.

123. *See id.* at 555. ("Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.")

124. *See id.* at 554 (clarifying that the preference does not cover other government agencies or activities and does not serve as "a blanket exemption for Indians from all civil service examinations").

125. *See id.* (noting that such a legitimate goal is "the principal characteristic that generally is absent from proscribed forms of racial discrimination").

precedent which affirmed legislation that “singles out Indians for particular and special treatment.”¹²⁶

In the wake of the *Mancari* decision, federal circuit courts across the country have recognized “Indian tribes” as a political classification.¹²⁷ The United States Supreme Court itself reaffirmed the wide scope of *Mancari*’s principles in all Indians affairs with two cases decided in the late 1970s. The first, *Fisher v. District Court*,¹²⁸ involved a pre-ICWA adoption proceeding arising on a reservation and involving only Indian parties.¹²⁹ There, the Court concluded that state court jurisdiction over the adoption would interfere with the Northern Cheyenne Tribe’s powers of self-government, conferred upon the tribe by federal statute.¹³⁰ Thus, pursuant to the tribal constitution, the parties

126. *Id.* at 555 (citing *Bd. of Cty. Comm’rs v. Seber*, 318 U.S. 705 (1943) (federally granted tax immunity); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164 (1973) (same); *Simmons v. Seelatsee*, 384 U.S. 209 (1966) (statutory definition of tribal membership, with resulting interest in trust estate); *Williams v. Lee*, 358 U.S. 217 (1959) (tribal courts and their jurisdiction over reservation affairs)).

127. *See, e.g.*, *Means v. Navajo Nation*, 432 F.3d 924, 933–35 (9th Cir. 2005) (relying heavily on *Mancari* to determine that the statute in question “subjects [defendant] to Navajo criminal jurisdiction not because of his race but because of his political status as an enrolled member of a different Indian tribe”); *Equal Emp. Opportunity Comm’n v. Peabody W. Coal Co.*, 773 F.3d 977, 982 (9th Cir. 2014) (“[W]here differential treatment serves to fulfill the federal government’s special trust obligation to the tribes as quasi-sovereign political entities, tribal preferences are permissibly based on political classifications.” (internal citations omitted)); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1212 (5th Cir. 1991) (using *Mancari*’s reasoning to uphold a statute allowing for possession of peyote on the basis that members of the Indian church who used the peyote are “limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry”); *United States v. Garrett*, 122 Fed. App’x 628, 632 (4th Cir. 2005) (acknowledging that preferences given to Indian tribes are not racial but political in nature and asserting that *Mancari* is on point precedent for any cases “dealing with Native American preferences”); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (rejecting the notion that “distinctions based on Indian or tribal status can never be racial classifications” but acknowledging that “the recognition of Indian tribes remains a political, rather than racial determination”).

128. 424 U.S. 382 (1976).

129. *Id.* at 383.

130. *See id.* at 387–89 (determining that no congressional intent existed to confer jurisdiction upon state courts over adoptions by Indians on a reservation).

were required to use tribal court.¹³¹ The Court dismissed the notion that denying the parties access to state courts constituted impermissible racial discrimination on the grounds that “[t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi—sovereign status of the Northern Cheyenne Tribe under federal law.”¹³²

The opinion stated that the disparate treatment was justified, even if it denied an Indian plaintiff a forum to which a non-Indian plaintiff had access, because “it [was] intended to benefit the class of which [the Indian] is a member by furthering the congressional policy of Indian self-government.”¹³³ The term “class,” used in the context of quasi-sovereignty and self-government, equates the term “Indian” with the status of being a “tribal member” in a political sense, as opposed to a purely racial classification.¹³⁴

A year later in *United States v. Antelope*,¹³⁵ the Court assessed whether federal criminal statutes violated the Fifth Amendment by “subjecting individuals to federal prosecution by virtue of their status as Indians.”¹³⁶ The Court, citing *Mancari* extensively, found the “Indian” classification to be political and went so far as to state that any “federal regulation of Indian affairs is not based upon impermissible classifications.”¹³⁷ The Court grounded this broad statement in the undeniable history of Indian tribes operating as semi-sovereign communities with their own political institutions.¹³⁸ Again, the Court underscored

131. *See id.* at 389 (“[T]he jurisdiction of the Tribal Court is exclusive.”).

132. *Id.* at 390.

133. *Id.* at 390–91 (citing *Morton v. Mancari*, 417 U.S. 535, 551–55 (1974)).

134. *See* *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 673 n.20 (1979) (reiterating that treaties can confer enforceable special benefits on Indian tribes and that the “particular semisovereign and constitutionally recognized status of Indians” justifies special treatment subject to rational basis scrutiny).

135. 430 U.S. 641 (1977).

136. *Id.* at 642.

137. *See id.* at 646 (emphasizing that the determination of “Indian” as a political classification in the statute in *Mancari* applied more broadly to any type of federal regulation of Indian affairs).

138. *See id.* (“Federal regulation of Indian tribes, therefore is governance of once-sovereign political communities; it is not to be viewed as legislation of a ‘racial group consisting of Indians . . .’” (internal quotation marks omitted) (quoting *Morton v. Mancari*, 417 U.S. 535, 553 (1974))).

the non-racial character of the term “Indian” by highlighting that the federal criminal statutes applied to the respondents not because of their race, but because of their tribal enrollment.¹³⁹ *Antelope* continued to distinctly separate the concept of “Indian” as a race from that of tribal affiliation, which, although often including people of the Indian race, the Court viewed as non-racial and political in nature.¹⁴⁰

In another 1976 case, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*,¹⁴¹ the Supreme Court rejected an equal protection challenge to a claim of tribal immunity from Montana tax statutes.¹⁴² There, the Court doubled down on its willingness to single out constituencies of tribal Indians “for particular or special treatment.”¹⁴³ The Court reaffirmed statutory preferences involving Indians to be neither invidious nor racial in character and applied a rational basis test to determine merely if the statute rationally fulfilled “Congress’ unique obligation toward the Indians.”¹⁴⁴

Further reinforcing the unique status of Indians as non-racial, the Supreme Court explicitly limited *Mancari* to members of federally recognized Indian tribes. In another seminal case, *Rice v. Cayetano*,¹⁴⁵ the Court struck down a statute limiting voting rights to those of “native Hawaiian” descent.¹⁴⁶ The State of Hawaii barred a Hawaiian citizen from voting for the trustees of the Office of Hawaiian Affairs (OHA) on the grounds that his ancestry did not qualify him under the

139. See *Antelope*, 430 U.S. at 646–47 (“We therefore conclude that the federal criminal statutes enforced here are based neither in whole nor in part upon impermissible racial classifications.”).

140. See *id.* at 645 (“The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications.”).

141. 425 U.S. 463 (1976).

142. See *id.* at 479–80 (“We need not dwell at length on this constitutional argument, for assuming that the State has standing to raise it on behalf of its non-Indian citizens and taxpayers, we think it is foreclosed by our recent decision in *Morton v. Mancari*.” (citing *Morton v. Mancari*, 417 U.S. 535, 555 (1974))).

143. *Moe*, 425 U.S. at 480 (citing *Morton*, 417 U.S. at 554–55).

144. *Id.* (citing *Morton*, 417 U.S. at 555).

145. 528 U.S. 495 (2000).

146. See *id.* at 522 (“A State may not deny or abridge the right to vote on account of race, and this law does so.”).

statute as a “Hawaiian” or “native Hawaiian.”¹⁴⁷ The citizen argued the statute was unconstitutional under the Fifteenth Amendment, which guarantees U.S. citizens the right to vote regardless of race.¹⁴⁸ The Court rejected Hawaii’s arguments that the classification was not racial and held the state’s “denial of petitioner’s right to vote to be a clear violation of the Fifteenth Amendment.”¹⁴⁹

In *Rice*, the Court examined the history of the Fifteenth Amendment and its ongoing purpose to “reaffirm the equality of the races.”¹⁵⁰ In the years since the Civil War, the Court developed the precedent of using the Fifteenth Amendment to invalidate statutes which do not mention “race,” but instead use the term “ancestry” to “effect a transparent racial exclusion.”¹⁵¹ The Court stated that ancestry was being used in the *Rice* statute as a proxy for race.¹⁵² In response, the state attempted to analogize native Hawaiians to members of Indian tribes enjoying employment preferences in *Mancari*.¹⁵³ The Court noted, but did not definitively address, a fundamental dissimilarity between native Hawaiians and organized Indian tribes.¹⁵⁴ The Court showed deep skepticism that native Hawaiians, as the result of a few federal laws regarding land, had achieved “a status like that of Indians in organized tribes” giving Congress “broad authority to preserve that status.”¹⁵⁵

147. *See id.* at 510 (quoting the statute’s definition of “Hawaiian” as a descendent of the aboriginal people in Hawaii in 1778 and “native Hawaiian” as a descendent of “not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778”).

148. U.S. CONST. amend. XV, § 1.

149. *Rice v. Cayetano*, 528 U.S. 495, 499 (2000).

150. *Id.* at 512.

151. *See id.* at 513–14 (citing *Guinn v. United States*, 238 U.S. 347 (1915); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944)).

152. *See id.* at 514 (“Ancestry can be a proxy for race. It is that proxy here.”).

153. *See id.* at 518 (explaining how the state uses *Mancari*, and its theory of quasi-sovereign authority in the BIA, to defend its decision “to restrict voting for the OHA trustees, who are charged so directly with protecting the interests of native Hawaiians”).

154. *See id.* at 518–19 (“It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. . . . We can stay far off that difficult terrain, however.”).

155. *Id.* at 518.

Regardless, even if native Hawaiians and Indians hypothetically *could* be legally analogized, the Court stated, Congress still could not constitutionally authorize a state to create a voting scheme that “limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.”¹⁵⁶ The Court took pains to differentiate the right to vote for public officials from other scenarios where Congress may constitutionally enact preferential legislation dedicated to Indian tribes’ needs.¹⁵⁷

By recognizing the status of the OHA as a state agency, the Court also tacitly acknowledged the difference between native Hawaiians and Indians.¹⁵⁸ The Court emphasized that Indian tribes’ uniquely political and quasi-sovereign status gives a governing agency such as the BIA the constitutional ability to apply preferential hiring treatment.¹⁵⁹ In contrast, the *Rice* Court noted that an agency such as the OHA does not govern a quasi-sovereign group.¹⁶⁰ The Court distinguished *Mancari*, emphasizing that “[a]lthough the classification [there] had a racial component,” the preference in *Mancari* was not directed towards a “racial group consisting of Indians but rather only to members of federally recognized tribes,” making it political,

156. *Id.* at 520.

157. *See id.* at 519 (enumerating several constitutional examples of Congress granting a certain constituency of tribal Indian unique treatment). Specifically, the Court stated that voting in *tribal* elections can be restricted only because the elections are an “internal affair of a quasi-sovereign.” *Id.* at 520. The OHA elections, in contrast, “are the affair of the State of Hawaii.” *Id.*

158. *See id.* at 521 (“Although it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State.”).

159. *See id.* at 519–20 (“The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.” (quoting *Morton v. Mancari*, 417 U.S. 535, 554 (1974))).

160. *See id.* at 522 (“Nonetheless, the elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies.”). Other courts have underscored *Rice*’s distinction between the rights of individuals being subject to equal protection concerns, while the legal relationship between political entities, namely Indian tribes, allows for differing treatment. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (stating that “at its core, *Rice* concerned the rights of individuals, not the legal relationship between political entities”).

rather than racial, in nature.¹⁶¹ Without federal recognition or quasi-sovereignty, the native Hawaiian classification fell firmly in the racial category and the Court refused to uphold the statute.¹⁶²

These cases form a clear narrative of the Supreme Court's approach to challenges to federal Indian laws. The Court's decisions evince the unique status of Indians as non-racial, semi-autonomous actors who often receive uncommon and exceptional levels of deference.

IV. *Equal Protection and the ICWA*

This Note will now examine constitutional challenges to the ICWA, keeping in mind the greater framework of Indian law equal protection jurisprudence. ICWA equal protection claims center around whether the statute's definition of "Indian child" should be viewed as an impermissible racial classification.¹⁶³ Critics of the ICWA attempt to portray the classification as racial in nature,¹⁶⁴ while supporters argue that a racial interpretation of the term "Indian" is inconsistent with the ICWA's original purpose in protecting tribal sovereignty.¹⁶⁵

161. See *Rice*, 528 U.S. at 519–20 (internal quotations omitted) (citing *Morton v. Mancari*, 417 U.S. 535, 533 (1974)).

162. See *id.* at 522 ("To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result.").

163. See *Elder*, *supra* note 31, at 420 (describing a recent equal protection challenge to ICWA as "depending heavily on a reading of the Act as race-based legislation, with the goal of achieving strict scrutiny review and crippling the ICWA").

164. See, e.g., Christopher Deluzio, *Tribes and Race: The Court's Missed Opportunity in Adoptive Couple v. Baby Girl*, 34 PACE L. REV. 509, 510 (2014) (arguing the ICWA often acts as "a naked racial preference for those with Indian blood"); Sandefur, *supra* note 36, at 62–63 ("Eligibility for tribal membership universally depends on biological ancestry. It follows syllogistically that ICWA applies to a racial group consisting of Indians.").

165. See, e.g., Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA*, 42 MITCHELL HAMLINE L. REV. 801, 810 (2017) ("[C]lassifying American Indians as a 'race'—as opposed to classifying them as citizens of Tribal Nations that enjoy a sovereign-to-sovereign relationship with

Other than through a vague allusion to equal protection concerns in *Baby Girl*,¹⁶⁶ the Supreme Court has addressed the constitutionality of the ICWA only once—in *Mississippi Band of Choctaw Indians v. Holyfield*.¹⁶⁷ Neither of these decisions offers definite conclusions on whether “Indian” is racial or political, but the Court’s discussion provides assistance in interpreting the ICWA.¹⁶⁸ *Holyfield* focused on a claim challenging whether two Indian twins¹⁶⁹ were “domiciled” on a reservation for purposes of the ICWA,¹⁷⁰ but the case “reveals a larger debate about whether the ICWA is intended to protect tribes, Indian families, or both.”¹⁷¹ The majority opinion weighed the rights of Indian tribes heavily in assessing whether the children were domiciled on the reservation and thus under the exclusive jurisdiction of tribal court.¹⁷² After considering the ICWA’s legislative history, the Court emphasized that the statute’s purpose in protecting tribal interests corresponded with that of

the federal government—finds no support in the Fourteenth Amendment, and as a result, [ICWA using ‘Indian’ as a criterion] in no way violate[s] equal protection principles.”); Elder, *supra* note 31, at 437 (proposing the classification of “Indian” as political due to the deference to the tribes’ definition of “Indian” and “the important tribal interest at stake in maintaining sovereignty, based on legislative history and the historical context of Indian identity in the United States”).

166. See *supra* notes 75–82 and accompanying text.

167. 490 U.S. 30 (1989).

168. See Elder, *supra* note 31, at 429 (suggesting that the Court’s two interpretations of the ICWA in each case mirror the racial-political dichotomy and “highlight the difficulty of treating Indian legislation under traditional equal protection doctrine”).

169. The twins were both “Indian children” within the meaning of the ICWA because, at birth, they were both eligible for tribal membership and their parents were both enrolled members of the Mississippi Band of Choctaw Indians. 25 U.S.C. § 1903(4)(b).

170. See *id.* § 1911(a) (“An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides *or is domiciled* within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law.” (emphasis added)).

171. Elder, *supra* note 31, at 431.

172. *Holyfield*, 490 U.S. at 44–45 (“It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities.”).

protecting the best interests of Indian children and families.¹⁷³ The Court concluded that the unique relationship of Indian children with their tribe necessitated that the tribal interest be represented in custody proceedings.¹⁷⁴ The dissent, in contrast, minimized the tribal interests at play and focused primarily on the rights of the parents.¹⁷⁵ The dissent characterized the purpose of the statute as solely to prevent unjustified removal of Indian children from their parents, downplaying tribal sovereignty as only having sway over “the domestic relations of tribe members.”¹⁷⁶ Thus in this situation, where the Indian child’s parents consented to an adoption and wished to use state court, the dissent concluded that tribal jurisdiction should not be granted.¹⁷⁷

Prior to 2015, practically no ICWA cases were filed in federal court and the vast majority of challenges to the statute developed in state courts.¹⁷⁸ Recently, however, the landscape

173. See *id.* at 49 (“Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large number of Indian children adopted by non-Indians.”). Scholars have suggested that the Court’s acknowledgement of such a deep tribal interest supports a more political understanding of the term “Indian.” See, e.g., Elder, *supra* note 31, at 431 (“[Tribal] emphasis is consistent with a broader view of the ICWA as part of a larger body of Indian regulations designed to protect the unique political status of tribes.”).

174. See *Holyfield*, 490 U.S. at 52 (“This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States.” (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1982))).

175. See *id.* at 57 (Stevens, J., dissenting) (“The Act gives Indian tribes certain rights, not to restrict the rights of parents of Indian children, but to complement and help effect them.”). The dissent emphasizes “the Act also reflects a recognition that allowing the tribe to defeat the parents’ deliberate choice of jurisdiction would be conducive neither to the best interests of the child nor to the stability and security of Indian tribes and families.” *Id.* at 60.

176. *Id.* at 58.

177. Scholars view this minimization of the role of the tribe to effectively remove the ICWA from the context of other Indian regulations designed to ensure self-government. See Elder, *supra* note 31, at 431 (noting that in this sense, the term “Indian” becomes “more of a racial classification, and the Act a remedial legislation targeted towards protecting parents with Indian heritage”).

178. See Kathryn Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 2 AM. INDIAN L.J. 32, 41 (2018)

has been changing.¹⁷⁹ After the *Baby Girl* decision, the Goldwater Institute¹⁸⁰ filed a class action lawsuit in the District Court of Arizona.¹⁸¹ The Complaint claimed that many of the ICWA's key provisions were unconstitutional under the Fifth Amendment and portrayed the statute as racially discriminatory.¹⁸² The plaintiffs juxtaposed the ICWA with what they termed "race-neutral" child custody laws and used the phrase "ancestry" repeatedly to suggest the racial nature of the classification.¹⁸³ The Complaint was later dismissed for lack of standing,¹⁸⁴ and vacated as moot by the Ninth Circuit with no discussion of the merits.¹⁸⁵ The National Council for Adoption brought a similar claim in federal court in Virginia in 2015,

(suggesting recent challenges to the ICWA in federal court "represent a shift in litigation strategy" as federal courts rarely hear child welfare cases). For a discussion of state courts' approaches to constitutional challenges to the ICWA, see *infra* notes 192–199 and accompanying text.

179. See Fort & Smith, *supra* note 178, at 41 (commenting that the recent set of federal ICWA cases have been brought by "a coalition of anti-Indian law groups" and have become "problematic" as the constitutional arguments proposed at the federal level are "leaking into state ICWA cases").

180. The Goldwater Institute is a conservative and libertarian think tank in Arizona founded in 1988 by Senator Barry Goldwater. *About the Goldwater Institute*, GOLDWATER INST., <https://perma.cc/3REB-Q8SX>.

181. See Civil Rights Class Action Complaint for Declaratory and Injunctive Relief, *Washburn*, No. 2:15-cv-01259 (D. Ariz. July 6, 2015) [hereinafter Complaint].

182. See *id.* at 21 ("The [ICWA provisions in question] create[] a separate set of procedures for children with Indian ancestry and all other children based solely on the child's race."). The first paragraphs of the Complaint include multiple allusions and citations to famous civil rights cases. *Id.* at 2. ("Children with Indian ancestry, however, are still living in the era of *Plessy v. Ferguson* . . .").

183. See *id.* at 21–23. For a complete analysis of the Goldwater Institute's litigation approach and racial characterization of the ICWA, see Elder, *supra* note 31, at 434–37 (discussing the Complaint and how the plaintiffs are likely trying to build on Justice Alito's understanding the ICWA in the *Baby Girl* case).

184. See *A.D. v. Washburn*, No. 2:15-cv-01259, 2017 U.S. Dist. LEXIS 38060 at *33 (D. Ariz. Mar. 16, 2017) (dismissing the Complaint for lack of standing).

185. See *Carter v. Tahsuda*, 743 Fed. App'x 823, 825 (9th Cir. 2018) (vacating the district court's judgment dismissing for lack of standing and remanding with instructions to the district court to dismiss the action as moot), *cert. denied*, *Carter v. Sweeney*, 139 S. Ct. 3637 (2019).

which was also eventually dismissed.¹⁸⁶ In 2017, the Goldwater Institute joined in an attempt to appeal a state court case in California¹⁸⁷ to first the California Supreme Court and then, when that failed,¹⁸⁸ to the United States Supreme Court. The Goldwater Institute urged the Supreme Court to address the constitutionality of what the petition called “ICWA’s Separate-and-Substandard Legal Scheme.”¹⁸⁹ Citing the Court’s use of the term “ancestor” in *Baby Girl*, the petition emphasized the potential unconstitutionality of the ICWA being “triggered *solely* by the DNA in [children’s] blood.”¹⁹⁰ The Court denied certiorari.¹⁹¹

Due to the ICWA’s structure as a federal law, which state administrative and judicial bodies must follow and enforce, the majority of ICWA case law exists as state court decisions.¹⁹² Though the statute’s constitutionality has faced numerous state trial court challenges, very few have been successful at an

186. See *Nat’l Council for Adoption v. Jewell*, 156 F. Supp. 3d 727 (E.D. Va. 2015) (dismissing as moot). Another case, filed in Minnesota in 2015, challenged a state ICWA law. See *Doe v. Piper*, No. 15-2639, 2017 U.S. Dist. LEXIS 124308, at *14 (D. Minn. Aug. 4, 2017) (granting summary judgment to Defendants and dismissing the action as moot).

187. Petition for Writ of Certiorari, *Renteria v. Superior Court*, No. 17-789 (Nov. 27, 2017) [hereinafter *Petition*]. The case was originally brought in federal court but was later transferred to state court due to lack of jurisdiction. See *Renteria v. Shingle Springs Band of Miwok Indians*, No. 2:16-cv-1685-MCE-AC, 2016 U.S. Dist. LEXIS 119394, at *3 (E.D. Cal. Sept. 2, 2016) (dismissing constitutionality claim for lack of jurisdiction).

188. See *Renteria v. Superior Court*, No. S243352, 2017 Cal. LEXIS 6801, at *1 (Cal. Aug. 30, 2017) (denying certiorari).

189. See *Petition*, *supra* note 187, at 19 (“Assuming ICWA does apply as a statutory matter, the constitutional problems created by treating children differently on the basis of race are of pressing concern—and must be addressed by this Court.”).

190. *Petition*, *supra* note 187, at 23 (citing *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 690 (2013)).

191. See *Renteria v. Superior Court*, 138 S. Ct. 986 (2018) (denying certiorari).

192. See *Fort & Smith*, *supra* note 178, at 33 (describing how state court decisions often have influence beyond the state in which they are decided because state courts often look to “sister jurisdictions” when applying the statute due to it being a federal law applied across all states).

appellate level.¹⁹³ Several state supreme courts have affirmed the constitutionality of the ICWA's classifications under the Equal Protection Clause, including Maine,¹⁹⁴ South Dakota,¹⁹⁵ and North Dakota.¹⁹⁶

California appellate courts disagree on the issue, with the Second Appellate District upholding constitutional challenges to the ICWA as applied to “children whose biological parents do not have a significant social, cultural or political relationship with an Indian [tribe].”¹⁹⁷ That court again, seven years later,

193. See, e.g., *S.S. v. Stephanie H.*, 388 P.3d 569, 576 (Ariz. Ct. App. 2017) (rejecting the constitutional challenge), *cert denied sub nom.*, 138 S. Ct. 380; *In re N.B.*, 199 P.3d 16, 22–23 (Colo. App. 2007) (same); *In re Armell*, 550 N.E.2d 1060, 1067–68 (Ill. App. Ct. 1990) (same); *In re Application of Angus*, 655 P.2d 208, 213 (Or. Ct. App. 1982) (emphasizing that the United States Supreme Court has “consistently rejected claims that laws that treat Indians as a distinct class violate equal protection”); *In re Miller*, 451 N.W.2d 576, 579 (Mich. Ct. App. 1990) (following the Oregon Court of Appeals’ reasoning in *Angus* and holding that the ICWA does not deny equal protection to non-Indians); *In re Adoption of Child of Indian Heritage*, 529 A.2d 1009, 1010 (N.J. Super. Ct. App. Div. 1987) (noting that the ICWA has been held constitutional), *aff’d*, 543 A.2d 925 (N.J. 1988); *In re Guardianship of L.*, 291 N.W.2d 278, 281 (S.D. 1980) (rejecting the equal protection challenge); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 326 (N.Y. App. Div. 2005) (stating that the ICWA’s differential treatment of Indians is based not on race but on political status and the quasi-sovereign nature of the tribe).

194. See *In re Marcus S.*, 638 A.2d 1158, 1159 (Me. 1994) (finding the ICWA to be constitutional and taking pains to note the special status of Indians “stemming from the historical relationship between the United States and a sovereign indigenous people”).

195. See *In re Guardianship of L.*, 291 N.W.2d at 281 (stating that the ICWA’s preferences are based solely upon the political status of the parents and children and the quasi-sovereign nature of the tribe and does not constitute “invidious racial discrimination”).

196. See *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003) (finding the ICWA to be constitutional after applying the rational basis standard due to the “political” nature of the classifications made in the statute).

197. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 526 (Cal. Ct. App. 1996). The court in *In re Bridget R.* explained that the ICWA should not be applied to children who live in families without social, cultural, or political relationships to a federally recognized Indian tribe. *Id.* at 527. If such relationships did not exist, the court stated, the only remaining basis for applying the ICWA becomes, “the child’s genetic heritage—in other words, race.” *Id.* Other California appellate districts disagree with this “existing Indian family exception” to the ICWA. See, e.g., *In re Vincent M.*, 59 Cal. Rptr. 3d 321, 335 (Cal. Ct. App. 2007) (“There is no equal protection violation in the application of the ICWA’s provisions to Indian children, even where those children are not part of an existing Indian family.”). The heated discussion regarding the existing Indian family exception is beyond the scope of this Note.

upheld a constitutional challenge to the ICWA as applied to a child with “no association with the Tribe other than genetics, i.e., his one-quarter ‘Minnesota Chippewa blood’ from an enrolled bloodline of the Tribe.”¹⁹⁸ However, commentators and scholars have criticized this line of decisions as imposing superficial requirements that Indians “prove” their Indianness in order to be deemed somehow worthy of the ICWA’s protections.¹⁹⁹

V. *The Current Setting*

A. Brackeen I—*The District Court Case*

The issue of equal protection under the ICWA took center stage in a decision by the United States District Court for the Northern District of Texas in the fall of 2018. *Brackeen v. Zinke*,²⁰⁰ written by Judge Reed O’Connor, applied strict scrutiny to the statute based on a determination that the term “Indian” in Section 1904 was a race-based classification.²⁰¹

The plaintiffs in *Brackeen I* included the states of Texas, Louisiana, and Indiana, along with several non-Indian individuals attempting to adopt Indian children (collectively, “Plaintiffs”).²⁰² The Plaintiffs contested the constitutionality of the ICWA under the equal protection requirement of the Fifth

198. See *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 730 (Cal. Ct. App. 2001) (affirming *Bridget R.*, and emphasizing that an application of ICWA triggered by an Indian child’s genetic heritage, “without substantial social, cultural or political affiliations between the child’s family and a tribal community, is an application based solely . . . upon race and is subject to strict scrutiny” (citing *In re Bridget R.*, 49 Cal. Rptr. at 528)).

199. See *Name of the Child*, *supra* note 82, at 333–36 (characterizing *In re Bridget R.* as inconsistent with state and federal jurisprudence); Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1388 (2002) (arguing that to insist that Indian people demonstrate a certain level of affiliation with their tribes imposes “non-Indian understandings of Indianness and of organizational belonging onto the realities of tribal members” and is a consequence of the continued racialization of tribal membership).

200. 338 F. Supp. 3d 514 (N.D. Tex. 2018) [hereinafter *Brackeen I*].

201. See *id.* at 534 (“Because the ICWA relies on racial classification, it must survive strict scrutiny.”).

202. See *id.* at 519 (identifying plaintiffs).

Amendment.²⁰³ The defendants included several federal agencies and four intervening Indian tribes—the Cherokee Nation, the Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians (“Defendants”).²⁰⁴ The Defendants argued that the ICWA did not violate the equal protection requirement because the statute “distinguish[ed] children based on political categories” instead of racial.²⁰⁵

The district court ultimately found “Indian” to be a racial classification based on its interpretation of Supreme Court precedent “focused on American Indians and other native peoples.”²⁰⁶ The court relied primarily on *Rice* and *Mancari* to unpack the differences between classifications based on race versus those based on tribal membership.²⁰⁷ The Plaintiffs contended that *Rice* controlled on the grounds that the ICWA, like the statute in *Rice*, allegedly utilized ancestry as a proxy for a racial classification.²⁰⁸ The Defendants countered that *Mancari* and Indian case law suggested that the classification of Indians is “based on political characteristics.”²⁰⁹ The court agreed with Plaintiffs that the classification in the ICWA “mirrors the impermissible racial classification in *Rice*”²¹⁰ due primarily to the inclusion in the definition of any child who “is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”²¹¹ The court saw this

203. *See id.* at 530 (enumerating Plaintiffs’ claims). Plaintiffs also moved for summary judgment on several other claims beyond the scope of this Note. They claimed that:

[T]he ICWA and the Final Rule violate: (1) the equal protection requirements of the Fifth Amendment; (2) the Due Process Clause of the Fifth Amendment; (3) the Tenth Amendment; and (4) the proper scope of the Indian Commerce Clause. Plaintiffs also argue that: (1) the Final Rule violates the Administrative Procedure Act (the “APA”); and (2) the ICWA violates Article I of the Constitution.

Id. Only the Fifth Amendment equal protection claim will be analyzed in this Note.

204. *See id.* at 519 (identifying defendants).

205. *Id.* at 531.

206. *Id.*

207. *See supra* Part III (explicating *Rice* and *Mancari* in detail).

208. *See Brackeen I*, 338 F. Supp. 3d 514, 531 (N.D. Tex. 2018) (explaining the parties’ arguments).

209. *Id.*

210. *Id.* at 533.

211. 25 U.S.C. § 1903(4).

eligibility expansion as equivalent to an ancestral requirement analogous to the *Rice* statute restricting voting only to “native Hawaiians and those with Hawaiian ancestry.”²¹² The court interpreted *Rice* as mandating that such ancestral classifications are unconstitutional as they can be used as a “proxy for race.”²¹³

Simultaneously, the court found the ICWA’s classification to be “legally and factually distinguishable from the political classification in *Mancari*.”²¹⁴ The court stated that the preference in *Mancari* only applied to “members of federally recognized tribes,” as opposed to those merely eligible for membership.²¹⁵ The court stated that, by expanding the standard to children eligible for tribal membership, the ICWA had created a “blanket exemption for Indians”²¹⁶ which the statute in *Mancari* avoided by limiting its jurisdiction to “members of quasi-sovereign tribal entities.”²¹⁷ The court emphasized how *Mancari*’s decision was “uniquely tailored to that particular set of facts.”²¹⁸ The court also narrowed the *Mancari* decision by pointing out that the preference there afforded “special treatment only to Indians living on or near reservations.”²¹⁹ The court concluded that *Mancari* did not “announce that all arguably racial preferences involving

212. *Brackeen I*, 338 F. Supp. 3d at 533 (“[The ICWA’s definition of “Indian child”] means one is an Indian child if the child is related to a tribal ancestor by blood.”).

213. *Id.* at 534. (noting how the Supreme Court in *Rice* stated that “racial discrimination is that which singles out ‘identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.” (quoting *Rice v. Cayetano*, 528 U.S. 495, 515 (2000))).

214. *Id.* at 533.

215. *Id.* (emphasizing that the narrow *Mancari* definition excludes many individuals who are racially classified as “Indians” but are not part of a federally recognized tribe).

216. *Id.* (explaining how *Mancari* noted that a “blanket exemption for Indians” in a statute would “raise the difficult issue of racial preferences”).

217. *Id.* at 532.

218. *See id.* (stating that “the Indian preference statute [at issue in *Mancari*] is a specific provision applying to a very specific situation” (citing *Morton v. Mancari*, 417 U.S. 535, 550 (1974))).

219. *Id.*

Indians are actually political preferences” but ruled narrowly in a distinguishable situation.²²⁰

After determining the classification to be racial, the court applied strict scrutiny and analyzed whether the ICWA was “narrowly tailored to further a compelling government interest.”²²¹ The court concluded that the Defendants failed to offer a compelling governmental interest for the statute.²²² Next, the court evaluated whether the ICWA was narrowly tailored.²²³ The court found the ICWA to be broader than necessary because it “[1] establishes standards that are unrelated to specific tribal interests²²⁴ and [2] applies those standards to *potential* Indian children.”²²⁵ The court stated that the ICWA’s preferences burden more children than necessary to accomplish “the [government’s] goal of ensuring children remain with their tribes.”²²⁶ On the basis of these conclusions, the court granted summary judgment to the Plaintiffs on their equal protection claim.²²⁷

B. Brackeen II—*Fifth Circuit Opinion*

The United States Court of Appeals for the Fifth Circuit heard the case on appeal in the summer of 2019. In *Brackeen v.*

220. *Id.* at 533.

221. *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

222. *See id.* at 534 (discussing how the Defendants did not “prove—or attempt to prove—why the ICWA survives strict scrutiny”).

223. *Id.* at 535 (evaluating if the statute is over or underinclusive by asking if it “covers too many—or too few—people to achieve its stated purpose”).

224. *Id.* (explaining that the preferences are unrelated to specific tribal interests because they prioritize a child’s placement with any Indian, regardless of whether that child is eligible for membership in that person’s tribe).

225. *Id.* (explaining that applying the preferences to many children who will never become members of any Indian tribe does not maintain the Indian child’s relationship with his or her tribe).

226. *Id.* at 536 (noting that the classification applies to “potential Indian children, including those who will never be members of their ancestral tribe, those who will ultimately be placed with non-tribal family members, and those who will be adopted by members of other tribes”).

227. *See id.* (“This blanket classification . . . fails to survive strict scrutiny review. For these reasons, the Court finds that Plaintiffs’ motion for summary judgment on their Equal Protection Claim is GRANTED.”).

Bernhardt,²²⁸ a three-judge panel for the Fifth Circuit reversed the district court decision, finding the ICWA to be constitutional under the Equal Protection Clause.²²⁹ The panel concluded that the ICWA's use of the term "Indian child" serves as a political classification that is "rationally related to the fulfillment of Congress's unique obligation toward Indians."²³⁰ In November 2019, the Fifth Circuit vacated the panel's opinion and issued an order for a rehearing en banc.²³¹ The court heard oral arguments in January 2020 and issued a divided, lengthy opinion on April 6, 2021.²³² The en banc majority affirmed the panel's finding of the "Indian child" designation to be constitutional on similar grounds.²³³

The en banc majority began by ascertaining whether "Indian child" was a race-based or political classification in order to determine what level of scrutiny to apply.²³⁴ The court acknowledged the political, plenary power Congress has exercised over tribal relations throughout history.²³⁵ The court noted that legislation often gives special treatment to some

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

229. *See id.* ("[W]e REVERSE the district court's grant of summary judgment for Plaintiffs and RENDER judgment in favor of Defendants on all claims."). It should be noted that, much like in the district court, Plaintiffs brought several other claims that are beyond the scope of this Note. All claims, including the equal protection one, were rejected by the Fifth Circuit. *Id.*

230. *Id.*

231. *See generally* *Brackeen v. Bernhardt*, 942 F.3d 287 (5th Cir. 2019).

232. *Brackeen v. Haaland*, No. 18-11479, 2021 U.S. App. LEXIS 9957, at *7 (5th Cir. Apr. 6, 2021) [hereinafter *Brackeen II*]. The court addressed several issues including standing, equal protection, anticommandeering, the non-delegation doctrine, and Administrative Procedure Act violations. *Id.* at *7–10. Only the equal protection discussion falls within the scope of this Note.

233. *Id.* at 221 (holding the "Indian child" designation to "not offend equal protection principles because [it is] based on a political classification and [is] rationally related to the fulfillment of Congress's unique obligation toward Indians").

234. *See id.* at *156–57 (laying out a level of scrutiny analysis revolving around the key question of what kind of classification terms such as "Indian child," "Indian family," and "Indian foster home" are in the ICWA).

235. *See id.* at *166–67 (classifying the historical, formal relationship between the U.S. government and American Indian tribes as "political, rather than race-based" (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (Nell Jessup Newton ed., 2012))).

subset of tribal Indians without singling out Indians as a race.²³⁶ The court echoed the *Mancari* opinion, underscoring that, “[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”²³⁷

The court unpacked *Mancari* and found the case controlling due to the special legal status of Indian tribes under federal law.²³⁸ In analogizing the two cases, the court disagreed with the district court’s narrow construction of *Mancari*.²³⁹ First, the court challenged the idea that *Mancari*’s “blessing of special treatment for Indians” is limited to laws directed at Indian self-government.²⁴⁰ Moreover, the court found the ICWA directly furthered tribal self-government due to the essential role children play in the continued existence of tribes.²⁴¹ Second, with regard to the ICWA covering children merely *eligible* for tribal membership, the court explained that “[t]hrough the district court made much of the fact that a child’s tribal eligibility generally turns on having a blood relationship with a tribal ancestor, this does not equate to a proxy for race”²⁴² The court reviewed the history of tribal recognition and its politicization over time.²⁴³ In this context, the court concluded,

236. *See id.* at *157 (“The Supreme Court’s decisions ‘leave no doubt that federal legislation with respect to Indian tribes . . . is not based upon impermissible racial classification.’” (quoting *United States v. Antelope*, 430 U.S. 641, 645 (1977))).

237. *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 552 (1974)).

238. *See id.* at *158 (emphasizing *Mancari*’s focus on the unique plenary power of Congress to legislate on behalf of federally recognized Indian tribes).

239. *See supra* notes 215–219 and accompanying text (narrowing the applicability of *Mancari* because the *Mancari* statute applied (1) “only to Indians living on or near reservations” and (2) relied on “actual tribal membership”).

240. *See Brackeen II*, 2021 U.S. App. LEXIS 9957, at *161 (“*Mancari*—and its progeny—confirm that classifications relating to Indians need not be specifically directed at Indian self-government to be considered political classifications . . .”).

241. *See id.* at *162–64 (considering Congressional findings on the importance of retention of Indian children to long-term tribal survival).

242. *Id.* at *166.

243. *Id.* at *167 (“Though inevitably tied in part to ancestry, tribal recognition and tribal sovereignty center on a group’s status as a continuation of a historical political entity.”).

the ICWA is simply applied “on the basis of a child’s connection to a political entity based on whatever criteria that political entity may prescribe.”²⁴⁴ Additionally, the court added, including children eligible for membership, “embraces Indian children who possess a potential but not-yet-formalized affiliation with a current political entity—a federally recognized tribe.”²⁴⁵

The Fifth Circuit also examined the district court’s analysis of *Rice* and rejected the district court’s conclusion that the ICWA presented a similar “impermissible racial classification.”²⁴⁶ To parse out the crucial differences in *Rice* and *Mancari*, the court first examined the Supreme Court’s reasons for determining the Hawaiian voting statute’s definition to be a racially based classification.²⁴⁷ The court noted that the *Rice* majority focused on the fact that native Hawaiians do not enjoy a protected status akin to that of members of federally recognized tribes.²⁴⁸ This overarching discrepancy between the groups, combined with the statute’s classification of citizens based solely on their ancestry,

244. See *id.* at *168–69 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978)). It is worth noting that the Fifth Circuit panel opinion highlighted the consistency of using a political classification with its decision in *Peyote Way Church of God Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991). See *Brackeen v. Bernhardt*, 937 F.3d 406, 428 (5th Cir. 2019). In both *Peyote Way* and *Mancari*, a court refused to find a law directed at a subgroup of Indians to be a race-based classification necessitating strict scrutiny. *Peyote Way*, 922 F.2d at 1212; *Mancari*, 417 U.S. at 550. *Mancari* upheld a hiring preference statute that applied only to individuals who were a member of a federal recognized tribe and had “one-fourth or more degree Indian blood.” *Mancari*, 417 U.S. at 553 n.24. Similarly, in *Peyote Way*, the Fifth Circuit used *Mancari* to uphold a statute allowing for possession of peyote on the basis that members of the Indian church who used the peyote are “limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry” *Peyote Way*, 922 F.2d at 1212. The panel concluded that the ICWA’s classification similarly turns, “at least in part, on whether the child is eligible for membership in a federally recognized tribe.” *Brackeen*, 937 F.3d at 428.

245. *Brackeen II*, No. 18-11479, 2021 U.S. App. LEXIS 9957, at *171 (5th Cir. Apr. 6, 2021) (citing *Mancari*, 417 U.S. at 553 n.24).

246. *Id.* at *169 (quoting *Brackeen I*, 338 F. Supp. 3d 514, 533 (N.D. Tex. 2018)).

247. See *id.* at *169–70 (examining the Supreme Court’s determination that the statute classified citizens “solely because of their ancestry”).

248. See *id.* at *171 (citing *Rice v. Cayetano*, 528 U.S. 495, 522 (2000)) (examining the majority opinion’s rationale).

led the Supreme Court to conclude that the legislature's purpose was to use the term "ancestry" as a proxy for race.²⁴⁹

With the Supreme Court's analysis in mind, the Fifth Circuit distinguished *Rice* from *Brackeen I* for several reasons. First, the court noted that, unlike *Rice*'s facts, the ICWA's classification of "Indian child" would not exclude whole classes of a state's citizens from decision-making in state affairs.²⁵⁰ Additionally, unlike the *Rice* statute, the ICWA's classification does not single out children solely because of their ancestry.²⁵¹ Perhaps most importantly, the *Rice* opinion was acutely aware that native Hawaiians do not enjoy the same unique protections as Indians under federal law.²⁵² The voter eligibility law in *Rice* lacked the context of Congress' lengthy history of federal regulation with Indian tribes, making it clearly distinguishable from the ICWA.²⁵³ The Fifth Circuit determined that because *Rice* was distinguishable and *Mancari* controlling, the ICWA's definition of "Indian child" was "a political classification subject to rational basis review."²⁵⁴

After determining the standard of review, the court easily concluded that the special treatment of Indian children under the ICWA can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, due to the statute's stated purpose of protecting Indian children while promoting the

249. *See id.* at *170 (noting that, in reaching this conclusion, "the *Rice* Court expressly reaffirmed *Mancari*'s central holding that, because classifications based on Indian tribal membership are 'not directed towards a "racial" group consisting of "Indians,"' but instead apply 'only to members of "federally recognized" tribes,' they are 'political rather than racial in nature'" (citing *Rice*, 528 U.S. at 519–20)).

250. *See id.* (explaining how *Rice* involved voter eligibility in a state-wide election for a state agency and thus did not even violate equal protection but only the Fifteenth Amendment).

251. *See id.* at *172 ("But unlike the ancestral requirement in *Rice*, ICWA's eligibility standard simply recognizes that some Indian children have an imperfect or inchoate tribal membership.") (quoting *Rice*, 528 U.S. at 515).

252. *See id.* at *171 (emphasizing how tribal members are "constituents of quasi-sovereign political communities").

253. *See id.* at *171–72 (underscoring that, in drafting the ICWA, Congress was recognizing "the realities of tribal membership and classifying based on a child's status as a member or potential member of a quasi-sovereign political entity, regardless of his or her ethnicity").

254. *Id.* at *172.

stability and security of the Indian tribes.²⁵⁵ The en banc majority also dismissed arguments that the ICWA impermissibly intrudes into state proceedings.²⁵⁶ Based on its finding of a political classification warranting rational basis review, the Fifth Circuit did not consider the viability of the district court's strict scrutiny analysis.²⁵⁷

C. *Analyzing the Correct Approach to Equal Protection in the ICWA*

This section of the Note will evaluate whether the district court or the Fifth Circuit correctly determined the appropriate standard of review by which to evaluate the ICWA. This decision hinges on which court correctly identified the nature of the classification of the term “Indian child.” Many scholars side with the Fifth Circuit’s conclusion on the grounds that the term “Indian” is a political, rather than racial category.²⁵⁸ On the other hand, critics of the ICWA agree with the district court’s conclusion that the classification is racial and apply strict scrutiny.²⁵⁹ As detailed below, the Fifth Circuit’s approach is the best approach. The term “Indian” as a political classification is supported by the historical and social context of the ICWA, the

255. See *id.* at *174–75 (reiterating the circumstances giving rise to the ICWA and determining “Indian child” to be a political classification which passes rational basis review and does not violate equal protection).

256. See *id.* at *175–77 (arguing that any such intrusion would have “no bearing on whether that law is rationally linked to protecting Indian tribes[.]” and to hold otherwise would be to incorrectly apply a strict scrutiny standard to the statute). As to the other judges’ concerns about over- and under-inclusiveness of the ICWA, the majority reiterated that “[r]ational basis review tolerates overinclusive classifications, underinclusive ones, and other imperfect means-ends fits.” *Id.* at *180 (citations omitted).

257. See *id.* (omitting any discussion of whether the statute would pass strict scrutiny).

258. See, e.g., Elder, *supra* note 31, at 419 (arguing that the term “Indian” should be interpreted as a political classification due to the historical context of Indians in the United States and a manifest congressional intent to protect tribes as political units through the ICWA); see also *supra* Part III.B (explicating precedent for “Indian” as a political classification).

259. See Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?*, 23 TEX. REV. L. & POL. 425, 430–31 (2019) (applauding the *Brackeen I* decision and contending that the ICWA indeed “falls on the racial, rather than the political, side of the [Rice/Mancari] division”).

ICWA's place within a larger body of federal Indian regulation, and the application of Supreme Court precedent in non-ICWA Indian law equal protection cases. Thus, correct application of precedent shows rational basis to be the proper standard of review for the ICWA.

Both *Brackeen* opinions focus their discussion on the correct application of *Mancari* and *Rice*.²⁶⁰ *Brackeen I* distinguished *Mancari* based on the ICWA's inclusion of children (1) merely *eligible* for tribal membership and (2) living off Indian reservations.²⁶¹ *Brackeen II* disagreed with this narrow construction of *Mancari* and challenged both of these points in turn.²⁶² As for geographic limitations, the Fifth Circuit correctly determined that extensive precedent supports the precept that federal laws can apply to Indians no matter their physical location.²⁶³ Such power is derived from the U.S. Constitution's Commerce Clause, which grants Congress the authority "to regulate commerce with foreign nations, and among the several States, and with Indian tribes."²⁶⁴ As such, *Mancari*'s holding does not depend on the individuals at issue being physically on a reservation.²⁶⁵

The tougher question for the courts, and the question at the heart of the constitutional issue, is whether the ICWA's definition of "Indian child" can constitutionally be extended to children who are not enrolled tribal members yet are eligible for membership and have a tribal citizen for a biological parent. The

260. See *supra* notes 109–126 and accompanying text (explicating *Mancari* opinion in detail); *supra* notes 145–162 and accompanying text (explicating *Rice* opinion in detail).

261. See *supra* notes 214–220 and accompanying text (explicating *Brackeen I* opinion).

262. See *supra* notes 237–**Error! Bookmark not defined.** and accompanying text (explicating the *Brackeen II* opinion's analysis of the application of *Mancari* to the case at bar).

263. See, e.g., *United States v. McGowan*, 302 U.S. 535, 539 (1938) ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." (citing *United States v. Ramsey*, 271 U.S. 467, 471 (1926))); *Perrin v. United States*, 232 U.S. 478, 482 (1914) (acknowledging Congress' power to regulate Indians "whether on or off a reservation and whether within or without the limits of a state").

264. U.S. CONST. art. I § 8, cl. 3.

265. *Brackeen II*, No. 18-11479, 2021 U.S. App. LEXIS 9957, at *165–66 (5th Cir. Apr. 6, 2021) (noting that not even the preference in *Mancari* required that the Indians benefiting live on or near a reservation).

district court emphasized that *Mancari*'s statute applied a preference only to current members of federally recognized tribes.²⁶⁶ In contrast, the district court saw the ICWA's expansive definition, including children merely eligible for tribal membership, as an ancestrally or race-based classification, different than *Mancari*'s political classification which depended on individuals actually being enrolled members.²⁶⁷ However, the tribal eligibility requirement is not a racial classification, based purely on ancestry or blood.

The statute in *Mancari* required not only tribal membership, but also that an individual be at least one-quarter "Indian blood."²⁶⁸ This blood quantum provision differs from the ICWA, which depends solely on the tribe's individual criteria for membership and does not explicitly impose any blood quantum requirement.²⁶⁹ Therefore, the case for racial discrimination "is even weaker regarding the ICWA, since the legislation itself is silent on bloodlines."²⁷⁰ If the Supreme Court went so far as to designate the *Mancari* statute, with an explicit blood quantum provision, a non-racial classification, then "the ICWA certainly is an expression of 'Congress' unique obligation toward the Indians' as tribes, rather than race-based legislation."²⁷¹

266. See *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 533 (N.D. Tex. 2018) (maintaining that the narrow *Mancari* definition excludes many individuals who are racially classified as "Indians" but are not part of a federally recognized tribe).

267. See *id.* at 533–34 ("By deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the ICWA's jurisdictional definition of "Indian children" uses ancestry as a proxy for race and therefore [receives strict scrutiny].").

268. See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) (explaining that to be eligible for preference "an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe").

269. 25 U.S.C. § 1903(4).

270. See *Elder*, *supra* note 31, at 428 (differentiating requiring the individual to be the "biological child of a member of an Indian tribe" and requiring certain bloodlines, due to the fact that the parent is merely required to be a tribe member, not to meet a specified blood quantum).

271. *Elder*, *supra* note 31, at 429 (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

The concept of using blood quantum is not new in the context of federal Indian legislation.²⁷² However, since the early 1970s, Congress has gone to great lengths to define “Indian” as a citizen of a tribe as opposed to a percentage of a blood quantum.²⁷³ Along with the Indian Land Consolidation Act,²⁷⁴ the Indian Child Protection and Family Violence Protection Act,²⁷⁵ the Indian Employment, Training and Related Services Act,²⁷⁶ and the Indian Health Care Improvement Act,²⁷⁷ the ICWA is another example of the paradigm of a new era—one where Congress recognizes the term “Indian” as a “political designation of citizenship,” as defined by each tribe, instead of a racial identity.²⁷⁸

Undoubtedly, Congress’s approach since the 1970s reinforces and protects a more accurate reflection of what tribes themselves view as the nature of their membership eligibility requirements.²⁷⁹ Like the United States, tribes often extend citizenship to the children of citizen parents, passing the parents’ “willful political relationship” with the tribe on to the

272. See Fain & Nagle, *supra* note 165, at 803 (revealing that, during the Termination Era of 1870–1950, the government enforced policies requiring a minimum blood quantum before federal law would recognize an individual as a citizen of a Tribal Nation).

273. See *id.* at 850 (providing the example of the Indian Self-Determination and Education Assistance Act of 1975 which “completed the shift away from using a minimum blood quantum” by defining “Indian” as “a person who is a member of an Indian tribe”).

274. 25 U.S.C. § 2201 (passed in 1983).

275. *Id.* §§ 3201–02 (passed in 1990).

276. *Id.* § 3401 (passed in 1992).

277. *Id.* § 1601(5) (passed in 1976).

278. Fain & Nagle, *supra* note 165, at 851–53; see John Robert Renner, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power over Indian Affairs*, 17 AM. INDIAN L. REV. 129, 141 (1992) (“[B]y the late 1960s the policy again shifted—with the beginning of the present period. The new emphasis was and remains on tribal self-determination.”).

279. Brief for the United Keetoowah Band of Cherokee Indians in Oklahoma as Amicus Curiae Supporting Defendant at 14, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) [hereinafter Brief for Cherokee Indians in Oklahoma] (“Citizenship in a Tribal Nation, however, is not contingent on “ancestry,” but rather hinges on an individual’s contemporary political relationship with a sovereign nation.”).

next generation.²⁸⁰ In the present litigation, the Indian tribes argue that this concept of citizenship is central to determining that the ICWA's classification of "Indian child" turns on whether a child has a political affiliation to a certain tribe.²⁸¹ Tribes have long held themselves out as separate sovereign bodies with exclusive requirements for membership.²⁸² Race can play a role in eligibility, but is not necessarily determinative depending on the tribe.²⁸³ The ICWA requires both that a child (1) be eligible for tribal membership, as defined by individual tribes' laws, *and* (2) have at least one biological parent who is a member of a tribe.²⁸⁴ Factor two, the political affiliation of a biological parent to a tribe, is also relevant to whether the ICWA applies to a child.²⁸⁵ Thus, race or ancestry is simply one factor of the child's tribal membership eligibility, which in turn is one factor of the child's eligibility to be classified as an "Indian child" under the ICWA. Using race as a factor within a factor does not make the entire classification race-based, especially within the highly political context of Indian federal tribe citizenship.²⁸⁶

By muddling the concepts of citizenship and ancestry, *Brackeen I* misunderstood tribal eligibility standards. Applying "ancestry" terminology also ignores entire tribes, and existing

280. See *id.* at 15 (stating that "just as citizenship in the United States is not tethered to some identifiable 'ancestor' who once lived in the United States" neither is Tribal Nation citizenship based in ancestry but is a consequence of a "willful political relationship").

281. See Brief of Appellants Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians at 29, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) [hereinafter Brief of Tribal Nations] (stating the statute's emphasis is on the child either being a *citizen* of a federally recognized tribe or having a parent who is a *citizen*, thus making the ICWA "triggered by *political affiliation*: enrolled membership (or eligibility for it) in a sovereign nation—not race— . . .").

282. See Thornton, *supra* note 74, at 106 (explaining that Indian tribes "won the right to determine their own membership" in the early twentieth century and now hold complete autonomy over setting tribal membership standards in their own tribal constitutions).

283. See *id.* at 107 (using BIA tribal enrollment data to illustrate that many tribes in fact have no minimum blood quantum requirement).

284. 25 U.S.C. § 1903(4).

285. *Id.*

286. The Supreme Court showed its willingness to allow race to be a factor of a factor in the affirmative action case *Fisher v. University of Texas*, 136 S. Ct. 2198, 2206–07 (2016).

constituencies within certain tribes, who have no “Indian ancestry” whatsoever.²⁸⁷ Several tribes have signed treaties incorporating non-rationally Indian groups into “the body politic of a Tribal Nation” and, in doing so, recognized citizenship rights stemming from marriage, adoption, and previously enslaved groups.²⁸⁸ With this context in mind, attributing a racial or ancestral definition to tribal citizenship requirements necessitates a disregard for U.S.-Indian history, federal statutes and treaties, and the very nature of tribal eligibility criteria.

Additionally, the *Mancari* decision underscored the political nature of the term “Indian” within the context of the relationship of Indian tribes with Congress and the ongoing desire to promote Indian self-governance.²⁸⁹ It cannot be disputed that children are quite literally the future of Indian tribes and their removal from the community directly undermines any semblance of tribal autonomy.²⁹⁰ The ICWA, as a congressional response to the destruction of Indian tribes, embodies the type of legislation necessitated by such a “guardian-ward” relationship.²⁹¹ Further, the ICWA directly promotes tribal autonomy and self-governance by granting

287. See Brief for Cherokee Indians in Oklahoma, *supra* note 279, at 15–16, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (explaining how after the Civil War the United States and the historical Cherokee Nation signed a treaty to free all slaves in their Nation and that “all freedmen . . . and their descendants, shall have all the rights of native Cherokees . . .” (quoting Treaty With The Cherokee, 1866, U.S.-Cherokee Nation of Indians, art. 9, July 19, 1866, 14 Stat. 799)). The U.S. District Court for the District of Columbia recently confirmed that, “the 1886 treaty alone . . . guarantees for qualifying freedmen the right to citizenship.” *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 123 (D.D.C. 2017).

288. See Brief for Cherokee Indians in Oklahoma, *supra* note 279, at 16–19 (discussing such practices in the Cherokee Nation, Choctaw Nation, Chickasaw Nation, Muscogee (Creek) Nation, and Seminole Nation).

289. See *supra* notes 115–123 and accompanying text (explicating the Court’s reasoning).

290. See, e.g., *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th CONG. 1, 156 (1977) (Statement of Hon. Calvin Isaacs) (noting that “[r]emoval is generally accomplished without notice to or consultation with responsible tribal authorities”).

291. 123 CONG. REC. 9980 (1977) (Statement of Sen. Abourezk) (“It is the responsibility of the Congress to take whatever action is within its power to see to it that American Indian communities and their families are not destroyed.”).

tribes intervention rights in state court proceedings,²⁹² creating placement preferences for Indian children,²⁹³ and, in some cases, allowing exclusive tribal court jurisdiction.²⁹⁴ Thus, *Brackeen II* correctly determined the district court’s interpretation of *Mancari* to be far too narrow.²⁹⁵ Instead, including children who are eligible for tribal membership due to their parents’ tribal affiliations should be seen not as a proxy for race, but rather as a standard which “embraces Indian children who possess a potential but not-yet-formalized affiliation with a [tribe.]”²⁹⁶

Brackeen I also relied heavily on “precedent developed by the Supreme Court’s review of statutes focused on American Indians and other native peoples.”²⁹⁷ Already, this statement encompasses far too broad a scope, as the history of federally recognized Indian tribes is unique in equal protection jurisprudence from any other population.²⁹⁸ The district court claimed that the ICWA, by including in the definition of “Indian child” children merely eligible for tribal membership, “mirrors

292. See 25 U.S.C. § 1911I (enumerating tribal courts’ unprecedented intervention abilities in state court child custody proceedings).

293. See *id.* § 1915 (describing the deference given to tribes in Indian placement preferences for removed children and how tribes can even edit a child’s preference order via a resolution).

294. See *id.* § 1911(a) (explaining that tribal courts shall have exclusive jurisdiction over certain child custody proceedings involving “an Indian child who resides or is domiciled within the reservation of such tribe”).

295. It warrants mention that the district court, when limiting the application of *Mancari*, heavily emphasized a line from the opinion stating that the BIA statute “is a specific provision applying to a very specific situation.” *Brackeen I*, 338 F. Supp. 3d 514, 532 (N.D. Tex. 2018) (citing *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). However, this quotation is taken out of context and appeared in *Mancari* during a statutory interpretation discussion merely to address whether the BIA statute had been implicitly repealed by the 1972 Equal Employment Opportunities Act. See *Morton*, 417 U.S. at 550–51 (discussing that “[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one”). It has little bearing on the application of the *Mancari* precedent on the political versus racial classification question.

296. *Brackeen II*, No. 18-11479, 2021 U.S. App. LEXIS 9957, at *171 (5th Cir. Apr. 6, 2021) (emphasizing that minors and infants often do not have the capacity to initiate the formal procedure to join a tribe).

297. *Brackeen I*, 338 F. Supp. 3d at 531 (citing *Rice v. Cayetano*, 528 U.S. 495 (2000)) (emphasis added).

298. See *supra* Parts II–III.

the impermissible racial classification in *Rice*.”²⁹⁹ However, the two classifications are distinguishable for several reasons. As the Fifth Circuit noted, unlike *Rice*’s statute, the ICWA classification does not exclude whole classes of a state’s citizens from participating in state affairs.³⁰⁰ In contrast, the ICWA exists to assist judges and state courts in making child custody decisions for children who were either members of, or were eligible for membership *and* had a parent who was a member of, a semi-sovereign body.³⁰¹ Unlike elections, which clearly implicate state courts, Indian child custody matters have more complex interests at stake, including that of the child, the parents, the state, the tribe, and the United States.³⁰² Even before the ICWA, the Supreme Court upheld the exclusion of state judicial systems in Indian child custody proceedings³⁰³ within the context of a long historical tradition of Indian tribes being given semi-sovereign status and enjoying self-autonomy in the United States.³⁰⁴ Excluding non-native Hawaiians from voting in a state election outside of the context of Indian

299. *Brackeen I*, 338 F. Supp. 3d at 531.

300. *Brackeen II*, No. 18-11479, 2021 U.S. App. LEXIS 9957, at *170 (5th Cir. Apr. 6, 2021) (explaining that *Rice* involved the sensitive topic of voter eligibility in a state-wide election for a state agency).

301. *See supra* Part II.B (explaining how the ICWA accounts for the unique nature of semi-sovereign Indian tribes and creates tribal intervention rules).

302. *Brackeen II*, 2021 U.S. App. LEXIS 9957, at *178–79 (noting that while the elections in *Rice* were clearly state affairs, a state court adoption proceeding involving an Indian child was “simultaneously affairs of states, tribes, and Congress” (citing 25 U.S.C. § 1901(3))).

303. *See, e.g.*, *Fisher v. Dist. Court*, 424 U.S. 382, 387 (1976) (“State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the [tribe] and exercised through the Tribal Court.”).

304. *See, e.g.*, U.S. CONST. art. I, § 8 (stating that “Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” and thus determining Indian tribes to be separate from the states and foreign nations); Indian Reorganization Act of 1934, 25 U.S.C. § 5123 *et seq.* (allowing Indians to set up formal tribal councils and courts and encouraging tribal autonomy); *see also* Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 670 (2016) (exploring the legal paradox between the Supreme Court’s simultaneous acknowledgement of the plenary power of Congress over Indian affairs and the endurance of a “critical core of inherent tribal sovereignty”).

jurisprudence is another matter entirely and clearly distinguishable.³⁰⁵

The *Rice* opinion itself emphasized that native Hawaiians do not have a protected status akin to that of Indian tribes.³⁰⁶ *Brackeen II* found that the law in *Rice* lacked the contextual history of Congress's lengthy engagement with regulating Indian tribes.³⁰⁷ Precedent suggests that the principles of self-autonomy and the assumption of a "guardian-ward" status only apply in the context of federally recognized Indian tribes, not all native peoples.³⁰⁸ Thus, the *Rice* court's holding that the exclusion of native Hawaiians was unconstitutional cannot serve as a roadmap by which to judge the constitutionality of the ICWA as it relates to federally recognized Indian tribes and their members.

D. *An Alternative Path Forward*

Even if a court determined that the term "Indian" in the ICWA was indeed a suspect racial classification, the statute is still constitutional under strict scrutiny. Strict scrutiny requires race-based classifications to have a compelling governmental purpose and use necessary and narrowly tailored means to achieve this purpose.³⁰⁹ For the ICWA, like many federal Indian laws, the compelling purpose stems from the government's interest in fulfilling unique responsibilities to federally

305. See *Brackeen II*, 2021 U.S. App. LEXIS 9957, at *179 ("The Rice Court's caution against fencing off a class of citizens from participation in state affairs thus does not apply to ICWA[.]").

306. See *Rice v. Cayetano*, 528 U.S. 495, 518 (2000) (stating that no such comparable status to Indian tribes exists for native Hawaiians); see also *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (rejecting an equal protection challenge brought by native Hawaiians, who were excluded from the U.S. Department of the Interior's regulatory tribal acknowledgement process and simultaneously concluding that the recognition of Indian tribes was political).

307. See *Brackeen II*, 2021 U.S. App. LEXIS 9957, at *178 (describing the historical discrepancy between native Hawaiians and federally recognized Indian tribes).

308. See Part III (surveying cases which emphasize and affirm the deep notions of sovereignty and self-autonomy that federally recognized Indian tribes have been granted throughout history by federal courts).

309. See *supra* notes 90–91 and accompanying text (discussing strict scrutiny review).

recognized tribes.³¹⁰ This interest is based on the “general trust relationship between the United States and the Indian people”³¹¹ which creates obligations to Indian tribes, holding the government responsible “for the protection and preservation of Indian tribes.”³¹² The ICWA’s two intertwined purposes of protecting the best interests of Indian children and promoting the stability and security of Indian tribes both fall within this overarching trust relationship.³¹³ Granting tribes more autonomy over Indian child custody proceedings and stopping unwarranted removals of Indian children from Indian homes are vital instruments to protect and stabilize the future of Indian tribes, thereby fulfilling the government’s guardian role.³¹⁴ A governmental interest in better protecting Indian children and tribes remains compelling today, as recent studies show that the proportion of Indian children in foster care is still more than twice as high as the proportion of the general population.³¹⁵

Further, the Supreme Court has held that the government may use race-based classifications to respond to the “unhappy

310. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (noting that along with Congress’s power to “regulate Commerce . . . with the Indian Tribes” comes an obligation of trust to protect the rights and interests of federally recognized tribes and to promote their self-determination); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 473 (5th Cir. 2014) (finding “an obligation to protect the interests of federally recognized tribes” to be compelling under strict scrutiny); *United States v. Wilgus*, 638 F.3d 1274, 1284–87 (10th Cir. 2011) (“[T]he interest found compelling arises from the federal government’s obligations, springing from history and from the text of the Constitution, to federally-recognized Indian tribes.”); *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (“[T]he Government has met its evidentiary burden of proving that it has a compelling governmental interest in fulfilling its treaty obligations with federally recognized Indian tribes.”).

311. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (noting that this principle dominates federal Indian law and creates a fiduciary relationship).

312. 25 U.S.C. § 1901(2).

313. See *id.* § 1901; House Report, *supra* note 8, at 8; see also *infra* notes 37–42 and accompanying text (positing that the ICWA’s purposes are interconnected and symbiotic).

314. See *id.* (“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . .”).

315. Alicia Summers & Steve Wood, *Measuring Compliance with the Indian Child Welfare Act: An Assessment Toolkit*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, 4 (Feb. 28, 2014), <https://perma.cc/PJH8-CV8N> (PDF) (stating additionally that many states, such as Minnesota, have “[Indian foster] care rates more than 10 times the general population rate”).

persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country.”³¹⁶ The ICWA is an overt and decisive response to racial discrimination and systematic bias against Indian families.³¹⁷ The insensitivity of state courts and the social welfare systems toward the unique tribal Indian way of life continues today and leads to the detrimental treatment of Indian children in child custody proceedings.³¹⁸

In *Grutter*, a case where the Court upheld a statute under strict scrutiny,³¹⁹ the Court emphasized its deference to “[t]he Law School’s educational judgment that . . . diversity is essential to its educational mission” in finding the admissions policy’s purpose to be compelling.³²⁰ The Court described educational institutions as “occupy[ing] a special niche in our constitutional tradition.”³²¹ If the history of Indian law jurisprudence teaches us anything, it is clear that federally recognized Indian tribes also occupy a unique “niche” in the United States’ constitutional tradition.³²² In the context of semi-sovereign Indian tribes, courts have shown extreme

316. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (dispelling the notion that strict scrutiny is “strict in theory, but fatal in fact” in all circumstances); see *Grutter v. Bollinger*, 539 U.S. 306, 326–327 (2003) (“Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.”).

317. See 1974 Hearings, *supra* note 4, at 213–14 (identifying Euro-American cultural bias as the leading cause of distress to Indian families and culture, due to a legal system that was depleting tribal populations deliberately because of “profound prejudice and discrimination” (quoting statements of Evelyn Blanchard, a BIA social worker)); see also *supra* Part II.A (explaining how Congress drafted the ICWA as a direct response to the staggering number of child removals due to racist treatment of Indian children and families in state child welfare systems).

318. See *About ICWA*, NAT’L INDIAN CHILD WELFARE ASS’N (2020) (“[R]ecent research on systemic bias in the child welfare system yielded shocking results. Native families are four times more likely to have their children removed and placed in foster care than their White counterparts.”).

319. See *supra* notes 94–106 and accompanying text (explicating *Grutter* in detail).

320. *Grutter*, 539 U.S. at 328.

321. *Id.* at 329.

322. See *supra* Part III.B (explicating the Court’s deferential approach to treatment of Indian tribes as different from non-Indians and focus on cultivating a unique guardian-ward relationship between the federal government and such tribes).

deference to tribes and their ability to exercise self-autonomy.³²³ Each of the ICWA's provisions directly furthers one or both of the statute's compelling interests. The ICWA promotes tribal autonomy and self-governance by granting tribal courts both notice and intervention rights in certain state court proceedings.³²⁴ Similarly, provisions such as the placement preferences in § 1915 serve the larger compelling purpose of protecting Indian children by attempting to preserve as many of the child's connections as possible within an individualized framework that allows for customized consideration of each child's needs.³²⁵

The drafters of the ICWA were careful to use necessary and narrowly tailored means to achieve these compelling purposes, crafting a statute with similar properties as the admissions policy in *Grutter*. *Brackeen I* claimed that the ICWA's definition of "Indian child" was overinclusive because it encompassed all "children simply *eligible* for membership who have a biological Indian parent."³²⁶ But this misstates the text of the statute, which applies only to children eligible for membership with a biological parent who is a "member of an Indian tribe."³²⁷ The legislative history shows that Congress originally considered, but ultimately rejected, a broader definition of "Indian child."³²⁸ An earlier draft of the ICWA did not define "Indian child" specifically, but instead defined "Indian" as "any person who is a member of *or who is eligible for membership in a federally recognized Indian tribe*."³²⁹ The final draft changed this

323. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 541 (1974) (finding the BIA statute's purpose to be "to give Indians a greater participation in their own self-government"); Indian Reorganization Act of 1934, 25 U.S.C. § 5123 *et seq.* (proclaiming an "overriding purpose" to foster "a greater degree of self-government, both politically and economically," among Indian tribes).

324. See 25 U.S.C. § 1911 (enumerating tribal court intervention abilities).

325. See *supra* notes 33–42 and accompanying text (describing how the ICWA's placement preferences aim to serve the BICS in a unique tribal context).

326. *Brackeen I*, 338 F. Supp. 3d 514, 532 (N.D. Tex. 2018).

327. 25 U.S.C. § 1903(4).

328. See *Nielson v. Ketchum*, 640 F.3d 1117, 1123–24 (10th Cir. 2011) (holding that the ICWA did not cover a child of Indian descent who was eligible for membership but whose parents were not tribal members because "the final draft of the statute" limited membership to those children, otherwise eligible, who had a parent who was a member of a tribe).

329. *Id.* at 1124 (citing 123 Cong. Rec. S37223 (1977) (emphasis added)).

language so as not to include children granted automatic, temporary membership under certain tribal laws.³³⁰ Congress “did not intend the ICWA to authorize this sort of gamesmanship,”³³¹ and the drafters excluded this expansive definition of membership, carefully tailoring the law. The eligibility language represents a conscious effort by the drafters to simultaneously ensure that the ICWA is not underinclusive, as it seeks to protect tribal members and their young children who have not yet become formally enrolled members.³³²

In addition to narrowly tailored language, the ICWA, like *Grutter*, uses race merely as one factor in determining whether a child is an “Indian child” under the ICWA.³³³ The ICWA requires both that a child be eligible for tribal membership, as defined by individual tribes’ laws, *and* have at least one biological parent who is a member of a tribe.³³⁴ Membership eligibility requirements amongst tribes vary greatly, and race or ancestry is not the only factor at play.³³⁵ Further, the political affiliation of a biological parent to a federally recognized tribe is also relevant to whether the ICWA applies to a child.³³⁶ Similarly, in *Grutter*, the Court viewed the holistic nature of the admissions policy favorably, with race being a mere “plus” factor, instead of a definitive attribute.³³⁷

330. See, e.g., *Nielson*, 640 F.3d at 1123–24 (explaining that the Cherokee Nation Citizenship Act “purports to make newborns who are directly descended from Dawes enrollees temporary citizens for 240 days following their birth” even if the child’s parents are not members).

331. *Id.* (“[T]he Citizenship Act’s broad definition of citizenship—even if it was full citizenship as opposed to temporary—violates Congress’ intent.”).

332. House Report, *supra* note 8, at 17 (recognizing that extending protection to minors who are not yet enrolled tribal members is crucial to the ICWA’s interests and that Congress must “act to protect the valuable rights of a minor Indian who is eligible [for membership in a tribe]”).

333. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (“Universities can, however, consider race or ethnicity more flexibly as a ‘plus’ factor in the context of individualized consideration of each and every applicant.”).

334. 25 U.S.C. § 1903(4).

335. See *supra* notes 279–283 and accompanying text (explaining the variety of tribal eligibility standards).

336. 25 U.S.C. § 1903(4).

337. *Grutter*, 539 U.S. at 334–336 (describing how the admissions policy is constitutional due to its use of race merely as one factor for determining law school admission).

Additionally, a court should find that all race-neutral alternatives were considered before the formation of the ICWA. In *Grutter*, the law school argued that the “holistic application” process was necessary because there was no alternative way to attract a diverse student body.³³⁸ Similarly, here, the legislative history clearly shows that the desperate plight of Indian children and their families gave the government little alternative than to create federal standards unique to Indian child custody proceedings.³³⁹ The standards and values used by state social workers for non-Indian families were not applicable to the Indian way of life, and caused unwarranted removal at an unprecedented rate.³⁴⁰ Current practices were deemed “wholly inappropriate” by Congress in the context of Indian cultural values and social norms.³⁴¹ A carefully tailored statute, applicable only to tribal Indians and their offspring, was necessary to take into account the burgeoning “realization that Native Americans have unique practices and traditions regarding child-rearing that are not susceptible to judgment using a non-Indian barometer.”³⁴²

Similarly, the enactment of the controversial placement preferences in § 1915 was absolutely essential in the drafting of the ICWA given the evidence presented to Congress. Removed children were often deprived of their identities as Indians, yet

338. *See id.* at 333 (“The Law School has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”). The Court was satisfied with the school’s record of previous failed attempts to increase diversity through race-neutral alternatives. *See id.* at 339–40 (describing failed alternatives).

339. *See supra* notes 32–42 and accompanying text (describing the breakdown of the BICS in the context of Indian children and the need for a more directed approach, better able take into account cultural differences and tribal concerns).

340. *See Atwood, supra* note 28, at 603–04 (explaining how state welfare officials were insensitive to “traditional Indian approaches to child rearing” and based the majority of removals on vague categories of “neglect” rather than any concrete charges); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) (“Congress perceived the States and their courts as partly responsible for the problem it intended to correct.”).

341. *See House Report, supra* note 8, at 10 (asserting that social workers’ conclusions regarding Indian children’s emotional risk and Indian parents’ caregiving abilities were often blinded by bias and a lack of respect for deep cultural differences).

342. *JONES, supra* note 22, at 12.

never fully accepted into their new communities.³⁴³ The preference for placement with Indian families, even those outside the child's tribe, serves to actively subscribe to the BICS in the unique context of Indian children.³⁴⁴ Similarly, the preference for placement "with other Indian families" is not overbroad, but instead a recognition that many tribes have deep historical connections, allowing placement of a child with members of a connected tribe to further both the ICWA's goals by maintaining the child's relationship with their own tribe.³⁴⁵ Finally, the statute adheres closely to its best interest purpose by including the flexibility to allow a judge to override the preferences in the face of "good cause" for each individual situation.³⁴⁶ This flexibility, embedded in a framework of carefully calibrated provisions which weigh tribal, state, federal, and individual interests, narrowly tailors the ICWA's provisions to further its compelling governmental interests.

343. See, e.g., 1974 Hearings, *supra* note 4, at 46 ("[Indian children raised in non-Indian communities] were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess.") (statement of Dr. Joseph Westermeyer, psychiatrist). Though cared for "by devoted and well-intentioned foster or adoptive parents" adolescent Indians often suffered from "ethnic confusion and a pervasive sense of abandonment." *Id.* at 63 (statement of Dr. Carl Mindell and Dr. Alan Gurwitt).

344. See 25 U.S.C. § 1902 (asserting that keeping children within the tribe is not the sole interest of the ICWA, as the statute also explicitly seeks to promote the best interests of the children). Careful to not let tribal allegiance override common knowledge about best interests of children, Congress recognized that placing Indian children with relatives, regardless of their tribal connection, can frequently be in their best interest and listed "placement with a member of the child's extended family" as the primary placement preference. *Id.* § 1915(a); see U.S. DEP'T HEALTH & HUM. SERVS., PLACEMENT OF CHILDREN WITH RELATIVES 1 (2018), <https://perma.cc/8SV5-HH94> (PDF) (finding that placement with relatives is often in the best interest of children).

345. See Indian Entities, *supra* note 2, at 1200 (showing that many tribes today have historical relationships and are often descended from larger historical bands).

346. 25 U.S.C. § 1915(a) ("In any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (emphasis added)).

IV. Conclusion

In conclusion, whether or not the classification of “Indian child” is seen as a racial or political classification, the ICWA should pass all levels of constitutional scrutiny. The Fifth Circuit en banc majority correctly determined the ICWA’s definition of “Indian child” to be a political classification which passes rational basis review. This reading is supported by the historical and social context of federal Indian regulation, the statutory interpretation of the ICWA itself, and the correct application of Supreme Court precedent. However, even if the statute is held to strict scrutiny review, the clearly compelling purpose and careful tailoring of the statute, as well as the inadequacy of race-neutral alternatives, demonstrate the unquestionable constitutionality of the ICWA. Therefore, the ICWA is constitutional under the Equal Protection Clause of the United States Constitution and should be upheld in future courts as a crucial protection guaranteeing fair treatment for Indian children.