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A Right-Wing Think Tank is Trying To Bring Down the Indian Child Welfare Act. Why?

Native Americans say the law protects their children. The Goldwater Institute claims it does the opposite.

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On the wall above his desk, attorney Timothy Sandefur keeps a copy of The Liberator, a 186-year-old abolitionist newspaper that features an etching of a slave auction on its masthead. Sandefur is the vice president for litigation at the Phoenix-based Goldwater Institute, a nonprofit right-wing think tank with a donor roster that includes the Mercer family (Donald Trump's biggest campaign contributors) and Donors Trust, a dark-money funnel for the Koch brothers, the DeVos family, and others. Goldwater is largely known for its efforts to limit regulation, promote tax cuts, expand school choice, and advance private-property rights.
Recently, the Goldwater Institute has stepped into an entirely different legal arena: an effort to dismantle a landmark law called the Indian Child Welfare Act. ICWA requires that before private and public agencies place Native American children in foster care or with an adoptive family, they try to keep nuclear families together or, if that fails, to place children with their extended family, their tribe, or a member of another tribe. It was passed in 1978 after government programs removed a large number of American Indian children from their families. But Goldwater and Sandefur argue that, rather than protecting Indian children, ICWA subjects them to an unfair set of rules that don't apply to other kids—a type of discrimination that Sandefur likens to Jim Crow.

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ICWA "is obviously racial discrimination," Sandefur said when I visited his office in March. Picking up a biography of the abolitionist Frederick Douglass, he added: "I've been writing a lot about my great hero Frederick Douglass. I think his answer is that we all have a right to be treated equally by the law."

Cloaking its efforts in the language of civil rights, Goldwater has launched a coordinated attack against ICWA alongside evangelical and anti-Indian-sovereignty groups, adoption advocates, and conservative organizations like the Cato Institute. Since 2015, Goldwater has litigated four state or federal cases against ICWA, and filed several briefs in support of other cases. Goldwater's stated goal is to have the US Supreme Court strike down ICWA as unconstitutional. The implications go far beyond child welfare: Many tribal members fear that if Goldwater is successful, it could undermine the legal scaffolding of Native American self-determination.

Gary Williams, a member of Arizona's Gila River Indian Community, was driving across the Arizona desert, listening to the radio, when he first heard about one of the Goldwater Institute's ICWA lawsuits. Williams immediately pulled over to the slim edge of the highway to listen carefully. His heart raced.

Williams is a living example of what could happen to American Indian children without what he calls "the safety net" of ICWA. His mother, a member of the Gila River Indian Community, died before he turned 1, and before ICWA was law. Williams and his three older siblings were placed in Arizona's foster-care system. Over the next 15 years, he was separated from his siblings and sexually and physically abused. In all, he lived in seven different foster homes and one large institution.

For most of his childhood, Williams didn't know that his mother was Native American; all he knew was that he didn't look like other kids. By the time he learned about his heritage, most of his extended family had died.

"I feel cheated," Williams said recently. "I would have loved to grow up on my reservation. I would much rather be able to hug my grandparents than talk to a mound of dirt—but the state took that right away from me." Williams can't get that time back, but he has tried to reconnect with his tribe; he now works as one of Gila River's gaming commissioners.

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Williams's story of being separated from his family and tribe is common in Indian country. From the mid-1800s into the 1970s, tens of thousands of Native American children were taken from their homes, sometimes forcibly, and sent to government-run boarding schools, often hundreds of miles away. Intended to "kill the Indian…save the man," the schools prohibited students from speaking Native languages or practicing tribal ceremonies. In 1958, the Bureau of Indian Affairs funded the Indian Adoption Project to find homes for the "forgotten child" who was "left unloved and uncared for on the reservation, without a home or parents he can call his own," in the words of the project's director. In fact, many of these children were being cared for by grandparents or aunts, traditional kinship roles in many Native communities.

By the 1970s, these federal adoption and schooling programs had created what one congressional committee called a crisis of "massive proportions." An estimated 25 to 35 percent of all Indian children were no longer living with their families but instead had been adopted or were living in

institutions or foster homes, the vast majority of which were non-Indian. “The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today,” the committee wrote in a 1978 report.

To Native Americans, removing so many children amounted to cultural genocide. “It causes us to lose our connection to our families and our traditions,” said Wenona Singel, a citizen of the Little Traverse Bay Bands of Odawa Indians and a visiting professor at the University of Arizona James E. Rogers College of Law. Her grandparents and great-grandparents were sent to boarding schools, while her mother Loretta and her aunt Sherry were adopted into a white family; so was her sister later. Native communities “were not just dispossessed of their land,” Singel said. “They were dispossessed of their children.”

In response, Congress passed ICWA in 1978. The law was intended to “promote the stability and security of Indian tribes and families” by limiting the state’s ability to remove Native children without good cause. It requires states to make “active efforts” to keep children with their parents. If this fails, a state must first attempt to place the child with a member of her extended family; second, with another tribal member; and finally, with an unrelated Native American family. In ICWA cases, tribes or parents can request to transfer the case out of the state court system and into tribal court.

Eighteen national child-advocacy organizations, including the Children’s Defense Fund and the Casey Family Foundation, have called ICWA the “gold standard” in the field of child welfare. Studies have found that when Native youth are connected to their culture and feel pride about it, they’re more likely to have better grades and to attend college. Conversely, growing up separated from one’s cultural group can have deleterious effects, including an increased risk of depression, substance abuse, and suicide.

“For Indian kids, it’s especially important to be connected to their culture, which is not only our food and traditional practices but also our shared history of resilience despite the catastrophic attempts by the federal government at genocide,” said Sarah Kastelic, executive director of the National Indian Child Welfare Association. “Despite what Goldwater would say, ICWA is not an outdated solution to a problem long ago solved—it’s still a law that’s very much needed.”

In fact, nearly four decades after the passage of the law, some social workers and judges throughout the country continue to ignore it. Although there is no national compliance data, a 2011 investigation by National Public Radio found that 32 states were in violation of the act. Today, due to ongoing noncompliance, more than half of adopted American Indian and Alaska Native children are placed outside their families and communities, according to the National Indian Child Welfare Association. South Dakota is an egregious example: Since 2010, more than 1,000 Native American children in one South Dakota county have been taken from their families and placed disproportionately in non-Indian homes, according to a lawsuit filed by the American Civil Liberties Union. The child-custody hearings held after these removals typically lasted fewer than five minutes, according to the ACLU, and “the state won 100 percent of the time.”

The Goldwater Institute's attention was directed to ICWA by its chief executive and president, Darcy Olsen, after she learned about the law while receiving training to become a foster parent. (She has adopted three of her former foster children, none of them Native.) In 2014, Olsen wrote a letter to Phoenix foster-care agencies, offering pro bono legal services to foster parents who were being blocked from fostering or adopting an Indian child due to ICWA.

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The timing wasn't coincidental. The year before, the Supreme Court had ruled on an ICWA case for the first time in 24 years, signaling to Goldwater a new interest in the law. Adoptive Couple v. Baby Girl concerned a man, a Cherokee tribal member, who tried to use ICWA to block his child's mother, a non-Indian, from allowing a white family to adopt their daughter. In a majority opinion written by Justice Samuel Alito, the court ruled that because the biological father had given up custody before birth and the child had never been in his legal custody, ICWA didn't apply.

Significantly, the ruling implicitly raised the question of what makes someone Native American. "The case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee," Alito wrote in the first line of his majority opinion. He went on to conclude: "The Act would put certain vulnerable children at great disadvantage solely because an ancestor—even a remote one—was an Indian."

Currently, tribes decide membership eligibility in a variety of ways. Some rule that you're a member if one of your parents is; others allow a more distant family connection. It's possible to be racially Native American and not a citizen of any federally recognized tribe. As a result, tribes and courts consider tribal membership a political designation having nothing to do with race.

But Alito's emphasis on Baby Girl's distant connection to her tribe is mirrored by Goldwater's allegation that it is unfair to subject Indian children to a different set of rules, especially if their tribal connection is remote. Goldwater alleges that the law hurts kids by delaying their placement in stable homes, and by sending them back to live with potentially abusive parents.

The Goldwater Institute's most significant case against ICWA, A.D. v. Washburn, argues that the law amounts to unconstitutional racial discrimination against Native children. (Laws that discriminate on the basis of race are subject to "strict scrutiny," which requires the government to prove a compelling interest.) Named for a baby girl who is an enrolled member of the Gila River Indian Community, A.D. v. Washburn is a class-action lawsuit involving more than 1,300 Native American kids in the Arizona foster-care system. "The only basis for forcing these kids to be sent to tribal courts is because they're racially connected," Sandefur told me. "It's like saying that children of Japanese descent need to be adjudicated by the court of Japan."

Jacqueline Pata, executive director of the National Congress of American Indians, argues that this is a colossal misunderstanding of tribal treaty rights. "We were tribal citizens before we were American citizens, and while we recognize each other's government structures, these rights to determine what's best for our people are inherent to us," she said, adding, "Goldwater's

suggestion that the law is somehow impermissibly unfair to Indian children ignores the reason why ICWA was passed and is still critical today: Indian children aren't treated fairly by the justice system."

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Simmering close to the surface of Goldwater's argument is the tacit accusation that children growing up on reservations are likely to be disadvantaged. "Native American death rates are rising and they have the lowest life expectancy rates, thanks in no small part to the way government policies have made reservations into economic wastelands," Sandefur wrote on his blog last September.

Tribes dispute this characterization. It "perpetuates an unfounded, racist, historical stereotype that Indian reservations and homes are unfit," said Stephen Lewis, the governor of the Gila River Indian Community and a board member of the Native American Rights Fund. "Like communities all across America, there are reservations that experience poverty and negative social conditions. But that in no way means that we cannot care for our own children." Lewis believes that the groups allied against ICWA, which include attorneys representing for-profit adoption agencies, have a darker agenda. "The adoption industry [is] looking to monetize our children. It's almost like our children have a bounty on their heads," he said.

Goldwater has yet to be validated in court. In January, the Supreme Court declined to hear R.P. v. LA County, a case in which Goldwater had filed a supporting brief alleging that ICWA had harmed a child by not allowing her to stay with a California foster family rather than be sent to Utah to live with her sister and other relatives. And late in March, an Arizona federal judge dismissed A.D. v. Washburn, saying that Goldwater had failed to show how the law caused real harm to its plaintiffs.

Even so, these cases aren't going away. Goldwater characterizes the Arizona judge's ruling as nothing more than procedural and plans to take the case to the Ninth US Circuit Court of Appeals. The organization is powerfully connected: Its former vice president for litigation now serves on the Arizona Supreme Court, and Charles Cooper, whose firm partnered with Goldwater in the class-action case, is a close friend of US Attorney General Jeff Sessions.

If A.D. v. Washburn were to make it all the way to the US Supreme Court, and if ICWA were to be ruled unconstitutional, experts say the decision could lead to a deeper gutting of federal Indian law. "Accepting Goldwater's premise that tribal citizenship is nothing but a race-based determination undercuts all of federal Indian law," said Kathryn Fort, an ICWA expert and director of the Indian Law Clinic at Michigan State University's law school. "It's a fundamental, purposeful misunderstanding of how we talk about tribes and tribal people and how courts and Congress treat American Indian people."

A ruling in Goldwater's favor, according to Fort and other legal experts, could undermine the authority of tribal courts, shutter tribal casinos, and open up reservations to privatization,

something that could benefit oil and gas developers like the Koch brothers. While Goldwater denies that its ultimate goal is to undercut tribal sovereignty, some of the institute's allies embrace the charge. "Maybe we should get serious about the 14th Amendment and equality and do away with federal Indian policy and say, 'You're an American like everybody else is an American,'" said Darrel Smith, who serves on the board of directors of the Citizens for Equal Rights Foundation, a national organization that has long fought to diminish the power of tribes. Smith's group has filed an amicus brief in A.D. v. Washburn.

At Goldwater's offices in Phoenix, Sandefur insisted that his case is about nothing more than the welfare of Indian children. "It was a white Congress in Washington, DC, that passed a law saying, 'The best interest of all Indians is as follows.' Isn't that why we have the problems we have?" When asked if Goldwater is working with any Native American members of Congress to reform ICWA or improve the circumstances of Native children, Sandefur said no—he hadn't heard anything about that.