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Why is the US right suddenly interested in Native American adoption law?

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George Armstrong Custer of the Seventh Cavalry was infamous during the nineteenth-century Indian wars for riding into the enemy camp, holding Native women, children and elders hostage at gunpoint, and forcing the surrender of the tribe. He systematically attacked and captured civilians to crush Indigenous resistance, which is partly how he defeated the Cheyenne at the Battle of Washita River in 1868. Cheyenne, Lakota and Arapaho warriors later killed Custer as he fled after trying the same hostage-taking ploy at the Battle of Greasy Grass in 1876.

Attacking noncombatants, especially children, to enable the conquest of land by destroying the family, and therefore Indigenous nations, wasn't unique to Custer or the US military.

There's a reason why "forcibly transferring children" from one group to another is an international legal definition of genocide. Taking children has been one strategy for terrorizing Native families for centuries, from the mass removal of Native children from their communities into boarding schools to their widespread adoption and fostering out to mostly white families. It's what led to the passage of the Indian Child Welfare Act (ICWA) of 1978, touchstone legislation that aimed to reverse more than a century of state-sponsored family separation.

Yet the spirit of Custer still haunts the fate of Native children even today. The fight has shifted from battlefield to courtroom.

In the new season of the This Land podcast premiering this Monday, Cherokee journalist Rebecca Nagle shows how corporate lawyers and rightwing thinktanks like the Cato Institute have teamed up with non-Native families to not only dismantle the ICWA but the entire legal structure protecting Native rights. And so far, they've made small but important victories.

Last April, an appeals court upheld parts of a federal district court decision, in a case called Brackeen v Haaland, that found parts of ICWA "unconstitutional". The non-Indian plaintiffs contend that federal protections to keep Native children with Native families constitute illegal racial discrimination, and that ICWA's federal standards "commandeer" state courts and agencies for a federal agenda. Put plainly, the mostly white families wanting to foster and adopt Native children are claiming *reverse racism* and arguing that federal overreach is trampling *states' rights* – two codewords frequently associated with dismantling anti-racist policies.

According to this upside-down logic, ICWA – monumental legislation consciously designed to undo genocidal, racist policy – is racist because it prevents mostly non-Indians from adopting

Native children. The thinking is as old as the "civilizing" mission of colonialism – saving brown children from brown parents.

Native child welfare in practice, however, is quite different, and, as Nagle shows in story after heartbreaking story, it very often works against the interests of Native children and families and in favor of families like the plaintiffs in Brackeen.

Court records show that two of the three non-Indian families in Brackeen have successfully fostered or adopted Native children despite ICWA protections and with tribes agreeing to the adoption. But they still claim discrimination.

A mountain of evidence suggests that Native families, particularly poor ones, are the real victims.

In two studies from 1969 to 1974, the Association on American Indian Affairs found that 25-35% of all Native children had been separated from the families and placed in foster homes or adoptive homes or institutions. Ninety percent were placed in non-Indian homes.

ICWA aimed to reverse this trend. Today, Native children are four times more likely to be removed from their families than white children are from theirs. And according to a 2020 study, in many states Native family separation has surpassed rates prior to ICWA. This is mostly due to states ignoring or flouting ICWA requirements.

A common cause for removal is "neglect", a form of abuse and a highly skewed claim especially when the Native families most targeted are poor. Failure to pay rent, for example, can result in eviction and homelessness and the placement of a child in state foster care system because of unstable living conditions. Some state statutes may provide up to several thousands of dollars a child per month to foster parents, depending on the number of children in their care and a child's special needs.

Why doesn't that money go towards keeping families together by providing homes instead of tearing them apart?

And there's the dark side of foster care.

Much like the boarding school system which preceded it, foster care is rife with stories of sexual and physical abuse, neglect and forced assimilation into dominant, white culture. To say nothing of the lifelong trauma of being torn from one's family and nation during the formative years of childhood.

So why are corporate law firms like Gibson Dunn – which has represented Walmart, Amazon, Chevron and Shell and is a former employer of the far-right Arkansas senator Tom Cotton – showing up at custody battles to square off with poor Native families and tribes? Are they really interested in the welfare of Native children?

It's foolish to think Custer had the best interests of Native children in mind when he captured them at gunpoint to slaughter and imprison their parents or that the Indian boarding school system, which disappeared thousands of children and raped, tortured, and traumatized countless more, was about "education".

Powerful conservative forces want to bring Brackeen v Haaland to the supreme court not just to overturn the ICWA but to gut Native tribes' federal protections and rights. Like their

counterparts the anti-critical race crusaders, anti-ICWA advocates use the language of "equality" to target Native nations. The collective tyranny of the tribe, the thinking goes, violates the rights of the individual.

It's the libertarian spin on the genocidal logic of Richard Henry Pratt's nineteenth century maxim to justify child removal: "Kill the Indian, save the man." The "Indian" is the tribal consciousness; the collective rights of a nation and its sovereignty must be weakened or destroyed to gain access to its lands and resources.

Without the tribe, there is no Indian. When there is no Indian, there's no one to claim the land.

White congressmen from western states used the same reasoning to terminate tribes in the 1950s, making the argument that the collective rights of tribes shouldn't trump individual rights of US citizens. The results were catastrophic. The legal abolition of dozens of tribes led to the privatization of their lands for the benefit of white settlers and businesses.

Indigenous people are trying to drag the people of this land into the twentieth-first century by advocating for the protection of healthy water and land, the very elements necessary for all life, a true universal aspiration for a future on a livable planet that benefits everyone. And Native journalists like Rebecca Nagle reveal how nefarious corporate interests are trying to undermine that project by attacking the most precious among us – our children.