Kids, Courts, and the Indian Child Welfare Act

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Get ready to hear much more over the coming year about the Indian Child Welfare Act of 1978. In October, in a case called *Brackeen v. Zinke*, Texas federal judge Reed O'Connor ruled much of ICWA unconstitutional. Since then advocates of the law, led by Indian tribes and social welfare organizations, have been sounding the alarm: ICWA, a law representing a step toward making amends for America's historic maltreatment of Native Americans, is under attack. (Appeal is pending.)

Some of the outcry has now been personalized into an attack on the jurist responsible for the ruling. In an unrelated December 2018 case Judge O'Connor, a 2007 George W. Bush appointee, handed down a much-criticized ruling finding the Affordable Care Act unconstitutional, and online critics were soon connecting the two rulings as "activist" products of the same unreasonable hand.

But the constitutional problems with ICWA are real, and it didn't take Judge O'Connor to spot them. While the law was aimed at remedying a genuine problem, in the course of doing so it created new problems, which federal courts including the US Supreme Court have had to wrestle with ever since. In particular, ICWA takes away some rights that parents and children would otherwise enjoy under prevailing principles of family law, and it does so in ways that are hard to square with principles of equal protection.

The injustices that ICWA was meant to correct were real, longstanding, and serious: states were taking children away from Native American parents without adequate justification. True, many Indian communities suffered from high rates of social dysfunction of forms hazardous to kids, so rates of child removal surpassing those of outside communities would not themselves be unexpected. But as hearings at the time showed, states had taken children away from Indian parents without fair process or convincing proof that they were likely otherwise to suffer serious injury. After being separated, children were sent to foster care or residential schools – both systems rife with problems of their own – and often to adoption by non-Native families.

(It's worth noting that the phenomenon in which Child Protective Services agencies can raid families and seize kids for flimsy reasons and without fair process was not and is not limited to that era or to Native families. In a new book, They Took The Kids Last Night, Chicago parents'-rights attorney Diane Redleaf details horrifying episodes of this sort that continue today around the US — the whole US, not Indian country — often touched off by unreliable reports of abuse, compounded by unreliable forensics, and made worse by agencies' presumptions of greater expertise and parents' unawareness of their rights.)

As a libertarian who would like to keep government interference with family life to a minimum, I'm highly sympathetic toward moves that heighten the presumption against breaking up intact families. So on that front, at least if you set aside issues of federalism, ICWA would seem to be a step in the right direction, and the question is whether that same presumption might not be extended more broadly to benefit families in general.

ICWA also transferred power over placement of Indian children – more on the vexed definition of that term later – from state child welfare agencies to tribal governments. That is more controversial, since while the states may have shown themselves flawed in some ways, the tribes may prove flawed in others. Critics such as the Arizona-based Goldwater Institute contend that in practice the tribes often lack both the skill and the political will to carry out needed interventions and placements for kids at risk. As in the wider child welfare system, horror stories are not lacking of death or injury to kids returned to parents' or relatives' care despite danger signs. Defenders of ICWA say tribes have made strides already in allying with professionals to improve their child welfare capabilities, and are likely to do a better job as time goes on.

Where ICWA is at its most controversial is when it strips away family law rights that parents or children would otherwise have had.

Consider the first dispute under the law to reach the U.S. Supreme Court, the 1989 case of *Mississippi Band of Choctaw Indians v. Holyfield*. A mother and father agreed on an off-reservation adoptive placement they saw as promising a better life for their child. But under ICWA, the Court ruled, they couldn't do that without the tribe's permission, because ICWA required that tribes be given first access before an Indian child was placed outside Indian communities. In short, rights of choice that non-Native parents would take for granted would not be honored for them; their offspring was a resource for the tribe to conscript to improve its hopes of continuation as an institution, no matter what Mom and Dad's views of the infant's best interests. Famously, the late Antonin Scalia was to describe Holyfield as the most troubling case he had encountered in his years on the Court, because of the way the interests of the actual family before the court clashed with the plain directives of the law, which as a jurist he felt he had to enforce.

Personal and parental autonomy regularly counts for little in the ICWA scheme. In the Washington state case *In re the Adoption of T.A.W.*, the mother with Indian ancestry wanted the tribe to stay out of it, to no avail. In the Oklahoma case of *M.K.T.*, the father wanted to unenroll from tribal membership, again in vain.

When conflict divides a family, ICWA often results in doling out unequal rights to parents or family members based on lineage. Consider the second case under the law to reach the U.S. Supreme Court, 2013's *Adoptive Couple v. Baby Girl*. A paperwork mix-up had prevented the proper notification of Baby Veronica's unwed dad. But time had elapsed, and ordinarily that would be that: had he not been affiliated with a tribe, he would not have been in a legal position to block her adoption. Under ICWA, it seemed, there were two kinds of parental rights — a robust kind for the parent with a tribal affiliation, and a weaker kind for a parent without.

This is troublesome from an equal protection standpoint, above all because the line dividing whole rights from the skim-milk variety is based primarily on accidents of birth, bloodline, and lineage, grounds ordinarily forbidden under our Constitution. "Is it one drop of blood that triggers all these extraordinary rights?" asked Chief Justice John Roberts in the Adoptive Couple

case. “It happened here because of ICWA… and it happened because of 3/256ths of Cherokee blood.” (The child had an Indian great-great-great-great grandparent on her father’s side)

One effect is to give tribal governments dangerous power over persons who never willingly submitted to their authority, including persons who have never set foot in Indian country. A couple briefly connect at a bar in Boston or Brooklyn or Baltimore one night and a child is born as a result. The father may not have mentioned at the time, indeed may only imperfectly remember, that as a child he was inducted into an affiliation with some faraway tribe toward whose leadership he has long felt indifferent or estranged. But ICWA covers as an “Indian child” any biological child of a tribal member so long as that child is “eligible for membership” in a tribe.

Sorry, Dad – and sorry, total-bystander Brooklyn Mom — but under ICWA that distant tribe now has a lot of power over your future. You are not necessarily free to make an adoption plan with some trusted member of your local community. Instead, you must submit to a distant tribal authority and prepare for the child’s possible “placement … in … homes [that] reflect the unique values of Indian culture.” What about your own cultural background as a non-Native parent, along with that of your relatives who may have been helping care for the child during his first years? Your youngster may have spent his life thus far immersed in that other culture — perhaps Korean-American, or Dominican, or African-American, or Eastern European. But the law cares not. In fact, it encourages as “ICWA-compliant” placement of your child with any Indian tribe around the country, however remote from that of either biological parent’s, in preference to any non-Native placement, however well matched to the circumstances of the child’s life thus far.

In short, ICWA elevates tribal interests over vital parental and family interests, as well as the best interests of actual children. As litigants prepare to take Judge O’Connor’s ruling up for likely review by the Fifth Circuit, it will not be easy to go on dodging these questions forever.

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