The Intercept_

How A Right-Wing Attack On Protections For Native American Children Could Upend Indian Law

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A LAW KEY to preventing state welfare agencies from separating Indigenous children from their families is at risk of being overturned thanks to the yearslong effort of a network of libertarian and right-wing organizations.

In the 1970s, between a quarter and a third of Indigenous children across the United States had been removed from their homes. Social services often cited neglect or deprivation, euphemisms for poverty, as grounds for placing children in the custody of non-Native families and institutions, offering birth parents little opportunity for redress. Congress passed the Indian Child Welfare Act in 1978 in order to reform a system designed to destroy Indigenous people.

Last October, a U.S. district judge in Texas declared the law unconstitutional under the Fifth Amendment's equal protection clause, arguing that it creates a separate set of practices for a so-called racial group. The federal government and four tribes appealed the decision, which is currently pending before the U.S. 5th Circuit Court of Appeals. If the ruling is upheld and the case makes its way to the Supreme Court, it could not only upend protections for the nation's most vulnerable children but also undermine a foundational concept of Indian law: that to be Indian is political, not racial.

The campaign against the Indian Child Welfare Act fits into a wider right-wing effort to legally challenge civil rights era gains that have remained instrumental in shielding marginalized communities from America's foundational systems of discrimination and genocide.

Leading the charge against the law is the Goldwater Institute, which brands itself as a "free-market public policy research and litigation organization" that supports limited government and private property rights. The institute has participated in 12 cases challenging ICWA in the last five years. The Texas decision is its biggest victory yet. The Cato Institute and the Project on Fair Representation, founded by the strategist responsible for two major Supreme Court cases challenging affirmative action and the Voting Rights Act, also filed briefs in the Texas case.

Tribal leaders, child advocates, and attorneys specializing in Indian law worry that if the Texas ruling is upheld, it could open the door to constitutional challenges of a range of federal laws based on Native American tribes' political relationship with the U.S. government, including the Major Crimes Act, which establishes the federal government's law enforcement role on reservations; the Indian Gaming Regulatory Act, which governs casinos on tribal land; federal policies that allow tribes to regulate the oil and gas industry; and programs that offer housing and health care to Native American communities.

Timothy Sandefur, Goldwater's vice president for litigation, claims that the Texas decision is "a major step forward for the rights of Indian children in this country and their parents." But 31 child welfare organizations disagree, writing in an amicus brief that ICWA "both embodies and has served as a model for the child welfare policies that are best practices generally."

Shannon Smith, executive director of the ICWA Law Center in Minnesota, rejects Goldwater's assertion that taking down ICWA would be good for children. "This is very misguided, and the potential impacts to Indian children and their connection to families and tribes could be devastating."

"Kill the Indian, Save the Man"

The U.S. government's efforts to "kill the Indian, save the man" via removal of Native children from their communities dates to the opening of the Carlisle Indian Industrial School in 1879. Hundreds of thousands of children were placed in institutions where they were typically not allowed to speak their language or practice their culture. Later, the Indian Adoption Project placed hundreds of Native children in the custody of white families between 1958 and 1967.

In a remarkable series of Senate hearings in 1974, family after family described children who were disappeared by the state with no notice or court hearing, welfare agents repeatedly requesting that mothers give up their newborns, and kids making plans to hide if child services showed up to take them away.

The Indian Child Welfare Act, passed four years later, set a high bar for the removal of Indigenous children from their parents, requiring "active" efforts to avoid the breakup of an American Indian family. That might mean a social worker driving a parent struggling with chemical dependency to treatment rather than simply mandating they go or handing them a brochure. Before a parent's rights can be terminated, ICWA requires evidence "beyond a reasonable doubt" that continued custody would result in serious physical or emotional damage. And when a removal does occur, child welfare agencies must first attempt to place the child with a family member, then with a member of their tribe, then with a member of another tribe.

The law has been important for curbing the flow of children out of Indigenous communities, but it fell short of eliminating the problem. A 2011 NPR series found that, despite the availability of licensed Native foster parents, 90 percent of Indigenous kids in foster care in South Dakota were still placed in group homes or with non-Native families. In Minnesota, Native kids are 17 times more likely than non-Native kids to be removed from their parents.

In recent years, as advocates for Indigenous families were fighting to strengthen ICWA, a concerted effort to undermine the law emerged in the form of non-Native couples attempting to adopt Native children.

The lead plaintiffs in the Texas case are Jennifer and Chad Brackeen, a white couple who sought to adopt a Navajo baby they had fostered for a year. After the tribe's attempt to place him with an adoptive Navajo family fell through, the Brackeens were able to keep the child. But their lawsuit argued that a provision of ICWA allowing tribes to contest an adoption for up to two years threatened the integrity of their family.

What happened in the wake of the Texas ruling demonstrates what losing ICWA can mean for Native families. The adopted child's biological mother had another baby that she planned to put up for adoption. The baby girl's great aunt, Alvetta James, sought to adopt her, making the case that she would maintain connections to her culture and family in James's care, according to a New York Times profile. But the Brackeens asserted that they were the best family for the sibling, and in May, a family court judge agreed, citing the ruling that found ICWA unconstitutional and giving them primary custody of the baby girl.

The Definition of "Indian"

ICWA applies to children who have a parent who is a tribal member and who are eligible for membership, even if they have not yet applied. According to U.S. District Judge Reed O'Connor, who presided over the Texas case, the fact that a baby who has not yet been enrolled in a tribe could be called "Indian" means the designation is racial, not political.

"Babies don't get born and run down to the citizenship office and file a petition," said Matthew Fletcher, director of the Indigenous Law and Policy Center at Michigan State University. When his own child was born, he and his partner took a year to register him as a tribal member, in part because he was eligible for more than one tribal nation. "To say that somehow this kid hasn't been enrolled yet and therefore doesn't have a political relationship is really quite disingenuous."

The political relationship Native Americans maintain with the U.S. government dates back to treaty commitments the government made between 1778 and 1868 in exchange for the millions of acres of land that constitute the United States. The treaties form the basis of what's known as the "trust relationship" between Native nations and the United States. ICWA is part of a body of law meant to fulfill the U.S. government's trust responsibility.

The reason the distinction between racial and political matters is that under the Fifth Amendment's due process clause, laws that differentiate on the basis of race are subject to a higher level of scrutiny in the courts and must be narrowly tailored to fulfill an important government interest.

Over the years, various parties have attempted to raise equal protection challenges to Indian laws. Despite numerous legal attacks, O'Connor is the first judge to declare ICWA unconstitutional. "Basically, the judge is saying that any federal statute with the word Indian in it should be subject to strict scrutiny," Fletcher said.

The Goldwater Institute, the Cato Institute, the Texas Public Policy Foundation, and the Academy of Adoption and Assisted Reproduction Attorneys claimed in an appellate brief that

concerns about the Brackeen decision's potential to undermine Indian law more widely are "radically overblown." But even as the ICWA ruling is being appealed, at least one attorney has already signaled willingness to use it to challenge the Major Crimes Act — a foundational law that gives the federal government jurisdiction over certain crimes committed by Indian people on Indian land, such as murder, rape, and burglary.

Derrick Jim, a Navajo man from Arizona, was sentenced to life in prison for raping a woman at a party at her house. Because he's legally an Indian and the assault took place in the Navajo Nation, he was tried in federal court. Had he been tried in New Mexico's state system, his sentence might have been lighter. In an appeal filed at the end of April, his lawyer asked the judge to preserve Jim's right to bring his case to the Supreme Court and challenge the constitutionality of the Major Crimes Act should the Texas ICWA ruling be upheld.

According to Fletcher, loss of the Major Crimes Act could throw the legal system into disarray and allow more violent crimes on tribal land to be committed with impunity. "The majority of tribes don't have the capacity to exercise criminal jurisdiction," he explained.

Fletcher pointed out that the same arguments advanced in the Texas decision have been used by private casinos attempting to overturn laws that allow Indian gaming. He expressed concern that, if upheld, the Brackeen decision could also be used to argue against Environmental Protection Agency policies that grant some tribes the right to enforce the oil and gas industry's compliance with environmental regulations.

Meanwhile, the Trump administration has repeatedly signaled other ways a redefinition of "Indian" as racial could be used to take away welfare benefits that fulfill the U.S. government's treaty responsibilities to Native people. In a 2017 signing statement for an appropriations bill, Trump listed Native American Housing Block Grants among programs he described as allocating benefits "on the basis of race, ethnicity, and gender." He said he planned to treat those programs as subject to equal protection requirements — suggesting that Native housing benefits for communities where affordable housing is notoriously rare and rundown might be unconstitutional.

In 2018, the administration attempted to use the same argument to deny Native people access to Medicaid. After several states passed laws requiring Medicaid recipients to fulfill work requirements, the federal Centers for Medicare and Medicaid Services denied requests for exemptions for Native Americans, many of whom live on isolated reservations where jobs are difficult to find. The administration cited constitutional concerns that the exemption would be a racial preference.

"The United States has a legal responsibility to provide health care to Native Americans," Mary Smith, who headed Indian Health Service under Barack Obama, told Politico. "It's the largest prepaid health system in the world — they've paid through land and massacres — and now you're going to take away health care and add a work requirement?"

Eventually, the administration backed down and allowed the exemptions, but many experts in Indian law see clear warning signs that the Trump administration has benefits to Native people in its crosshairs.

Behind the Legal Attacks

Sandefur, the Goldwater Institute lawyer, insists that concern for children drives his interest in ICWA. “I know that there’s a lot of skepticism on the left toward our motives about this,” he told The Intercept, “that this is all some sort of secret Koch brothers conspiracy to destroy Indian tribes and all this bullshit.” In fiscal year 2016, the Charles Koch Foundation donated $100,000 to Goldwater. The Mercer Family Foundation, backed by the billionaires that propelled Trump to power, donated $1.1 million between 2014 and 2016. Goldwater has also accepted more than $1 million from the murky right-wing fund Donors Trust, through which billionaires like the Kochs and Mercers funnel money to an array of causes.

“The reason we’re interested in this is that these children are our fellow Americans who deserve the same constitutional rights as every other American,” Sandefur continued, proceeding to quote Martin Luther King’s “Letter from a Birmingham Jail.” Sandefur has a habit of co-opting the words of black historical figures to justify right-wing agendas. He is also the author of “Frederick Douglass: Self-Made Man,” a biography published by the Cato Institute that paints the abolitionist critic of white supremacy as a “radical individualist.”

While Sandefur couches his claims in the language of civil rights, Goldwater and the other right-wing groups fighting ICWA have a track record of challenging policies meant to address systemic discrimination in the United States.

The Project on Fair Representation, which has also received funding from Donors Trust, is directed by Edward Blum, the strategist behind Abigail Fisher’s case challenging affirmative action before the Supreme Court as well as Shelby v. Holder, which gutted the Voting Rights Act by eliminating rules that required federal oversight of districts with a history of voter discrimination. Another amicus filer, the Pacific Legal Foundation, is in the midst of a lawsuit challenging New York Mayor Bill De Blasio’s effort to enroll more black and Latino students in the city’s most prestigious high schools.

The adoption industry, meanwhile, has a clear financial stake in undermining ICWA. A high demand for adoptable children, driven in part by an Evangelical Christian movement that frames adoption as a social cause, has coincided with increased restrictions from foreign countries and fewer U.S. children put up for adoption. The Academy of Adoption and Assisted Reproduction Attorneys, whose members are paid to represent adoptive parents in court, has filed amicus briefs in at least four separate legal cases attacking ICWA.

The relative material wealth of people living outside of Native communities is the subtext of the arguments for more adoptions to non-Native families.

Chad Brackeen, an evangelical Christian whose property includes a pool, greenhouse, and zip line, reportedly told the family court judge that he imagined the baby girl “not as an infant living in a room with a great-aunt but maybe as an adolescent in smaller, confined homes.” He added, “I’m a little bit concerned with the limited financial resources possibly to care for this child, should an emergency come up.”

Sandefur dismissed statistics showing that Native children continue to be disproportionately removed from their families. “Do you assume that these kids shouldn’t have been removed?” he asked The Intercept. “Native Americans are also overrepresented in terms of the poverty statistics, crime statistics, and drug and alcohol statistics, so it’s natural to assume that children growing up in such circumstances are going to be taken into state custody more often.”

It was Darcy Olsen, Goldwater's former CEO, who initially set the organization's sights on ICWA. Olsen has fostered and adopted multiple children, and since she left Goldwater, her vision has expanded far beyond Indian Country. Through her nonprofit Generation Justice, she is pushing for state-level laws that would limit kinship preferences in all adoptions and more quickly terminate parental rights, particularly for parents coping with addiction.

Echoes of the Past

Reflecting on the rhetoric used by ICWA opponents like Sandefur, Nicole Adams, a spokesperson for Partnership for Native Children, pointed to the institutions that pushed for the use of boarding schools and adoption for decades before ICWA's passage. "They were led by very well-intentioned Christian coalitions purporting that Indian children needed to be saved, and they were just the ones to do it. If you look at the rhetoric being put out by some of ICWA's most staunch opponents, it is eerily and frighteningly similar."

Smith said there's plenty of room to build a system that better supports Native children. "If we're really going to talk about child welfare, we need to talk about the welfare of moms," she said, and assuring they have access to safe and affordable housing and health care — the kinds of services that could be undermined with the Texas ICWA decision as precedent.

Adams is hopeful that it won't get to that point. "This decision is only the first step in a long process," Adams said. "Indian country will be fighting together to ensure that doesn't happen."