reason

Supreme Court's Sidestep Leaves Native Kids Without Answers

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On June 15, the Supreme Court refused to address some of the toughest questions about the Indian Child Welfare Act (ICWA), including the scope of Congress' power with regard to tribes and whether the Act's racial classifications violate the Equal Protection Clause. The Court may have saved itself from having to make yet another controversial decision this term, but its temporary punt ensures the case will be back before the justices in the future.

The ICWA governs foster and adoption proceedings for Indian children. It was enacted in response to a sad and shameful history, starting in the 1950s, of Native children being ripped from their homes and placed in boarding schools that sought to eradicate all traces of their culture. Later, after those schools were closed, states changed tactics and forcibly took the kids under the pretense of abuse and placed them in white households. The ICWA was passed to make sure that American Indian children would no longer be unjustifiably taken from their families.

But the ICWA is no panacea. While intended to keep Native families together, critics argue it subjects American Indian children to a lower level of protection than is enjoyed by non-Native kids.

For example, it requires parties seeking to take Native children out of unsafe environments to try harder to keep the family together than in cases involving non-Native children. This can result in kids being kept in abusive homes.

It also creates a racial hierarchy in terms of placement preferences. Normally, courts consider the "best interests of the child." But under the ICWA, courts must prioritize placing the child with Native families from *any* tribe before placing them with non-Native families. This is true even if the child has already been living with a non-Native family and even if one or both biological parents support placement in that home.

Thus, the ICWA can result in tribes seeking to take children out of their longtime homes against the biological parents' wishes and attempting to place them with a tribe to which the child has zero connection. This entire scheme applies based on the child's DNA, representing a highly collectivist way of thinking about children.

Whatever one's take on the ICWA, the stories are objectively heartbreaking for all involved. In 2016, 6-year-old Lexi made front page news when Los Angeles social workers took her, crying,

from a non-Native family that had fostered her for four years and placed her with distant relatives in another state. Because Lexi is 1.56 percent Native American, a tribe had been able to petition for her transfer.

The plaintiffs in the recent Supreme Court case, *Haaland v. Brackeen*, have similar stories. The Brackeens fostered a child since he was 10 months old and, after a year, sought to adopt him. His biological parents and grandmother supported the adoption, but the Navajo and Cherokee nations did not and tried to send him to nonrelative tribal members in another state. After the Brackeens sued, the Navajo Nation backed down, but now the couple seeks to adopt his biological sister. Once again, the tribe opposes this and is seeking to enforce the ICWA to halt the adoption.

The Brackeens say that the ICWA is unconstitutional. They argue that Congress, which can only act pursuant to enumerated powers in the Constitution, doesn't have the authority to prescribe standards for custody proceedings—which are usually governed by state law. In response, the government relies on the Indian Commerce Clause, which empowers Congress to "regulate Commerce" with "Indian tribes."

In a 7–2 decision, the Supreme Court sided with the government, reasoning that a long line of cases establishes that the Indian Commerce Clause grants Congress broad and plenary power over American Indian affairs. One of the most interesting facets of the case was the debate between Justice Neil Gorsuch, who wrote a concurring opinion, and Justice Clarence Thomas, who wrote a dissent. Both employed an originalist analysis of the Indian Commerce Clause but came out on different sides. While Gorsuch interpreted Congress' power broadly, Thomas noted that the Framers specifically rejected an "Indian affairs" clause and instead limited Congress' powers to "commerce" with American Indian tribes, which by its own terms must be limited to trade.

Gorsuch's interpretation won out for now, but the Court left open future challenges. Justice Amy Coney Barrett noted that to the extent the Court's earlier cases are inconsistent with the original meaning of the Constitution, the parties failed to press that argument with enough clarity or detail.

The state of Texas, which joined the Brackeens in the lawsuit, also argued that the ICWA impermissibly "commandeers" state officials into enforcing Federal law in violation of the 10th Amendment. For instance, it requires state officials to make "active efforts" to keep Native families together. But the Court rejected that argument too, reasoning that the ICWA's mandates apply to *any* party that seeks removal, including private parties, and thus cannot be said to co-opt state officials.

The parties also made an equal protection argument. The ICWA, they said, puts non-Native families at a disadvantage in foster and adoption proceedings. Though the Court has long signaled that the ICWA raises serious equal protection concerns, it sidestepped the issue, ruling that the parties had not sued the proper party to make this argument. It further declined to rule on the parties' argument that some of the ICWA's provisions impermissibly delegate Congress' power to tribes.

It's a lot of work to accept a case, read the parties' briefing, and hear oral arguments just to ignore the most pressing issues plaguing the ICWA. So why do it?

Perhaps it was just too much controversy for one term. The ICWA is a notoriously fraught issue, with each side accusing the other of leaving Native American children in the lurch. With cases like *Students for Fair Admissions v. Harvard* (concerning racial preferences in higher education) and *Department of Education v. Brown* (about President Joe Biden's student loan forgiveness program) looming, and with increasing attacks on the Court's legitimacy, perhaps the Court didn't want to decide yet another polarizing issue.

Whatever the reason, by ignoring the most pressing issues, the Court has made sure the case will come up again in another term.

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