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Indian child welfare legal challenge is about ending tribal sovereignty

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This story is like a scary movie. In "Fatal Attraction" Glen Close's character won't give up her murderous quest. She comes back again and again. The legal challenges to the Indian Child Welfare Act follow a similar plot line.

The scene in the 1970's for American Indian and Alaska Native children was disturbing, some 25 to 35 percent of the population were removed from their homes by state welfare and private adoption agencies. This was slow motion genocide by literally removing the future from the home.

The Indian Child Welfare Act was enacted as to reverse this narrative and to recognize that tribes, as sovereign nations, have control over the welfare of their own children.

Attacks on the law, enacted in 1978, have inexplicably risen in the past seven years and attracted the support of a seemingly disparate array of high power ultra conservative players and organizations.

Today's challenges to the child welfare protocols aren't only about adoption because if the Indian Child Welfare Act is found to be unconstitutional that would undermine tribal governments. So much is at stake: The authority of tribal courts, economic nationhood, including casinos, and the control of tribal land, potentially an opening for fossil fuels and other extractive industry development.

"Eliminating ICWA is part of an ultra-conservative agenda to return Indian Country to the Termination Era, abrogate tribal treaties, and made tribes and tribal citizens fully subjects to state law," said former tribal prosecutor J. Eric Reed.

The latest Indian Child Welfare Act challenge is again before the 5th U.S. Circuit Court of Appeals. The court made the unusual decision to vacate its August 9 decision in Brakeen v. Bernhardt finding child welfare law is not race-based but a valid, constitutional statute; then the court announced it would rehear the case En Banc.

The use of En Banc, in which all judges of a particular court hear a case, is a relatively uncommon legal procedure usually reserved for the purposes of maintaining uniformity of the court's decisions or to show that the proceeding involves a question of exceptional importance.

In its original decision finding ICWA to, indeed, be constitutional, one of the three judges, Priscilla R. Owen wrote her dissenting opinion in an August 16 modification. Owen wrote that in requiring states to maintain records relating to placement of Indian children as part of

compliance with Indian Child Welfare Act violates the constitution's 10th Amendment anti-commandeering doctrine. According to the 10th Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people."

Owens wrote: "The defendants in the present case contend that the Indian Commerce Clause empowers Congress to direct the States as it has done in the ICWA. They are mistaken. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."

This opinion underscores the rise of Federalist philosophies in conservative politics supporting states rights over federal authority, questioning the constitutionality of requiring state governments to carry out federal policies.

The 5th U.S. Circuit Court of Appeals long considered the most politically conservative court in the country, has grown more so after five appointments to its ranks by President Trump. A total of 17 judges occupy the court.

According to federal court watchers, President Trump is engaged in a quiet revolution to populate federal courts with judges who align with his brand of politically conservative politics. Although his 157 judicial appointments place him roughly even with both Barack Obama and George W. Bush during the same point in their tenures, his focus on federal appeals courts sets him apart from his predecessors according to the New York Times. If all of his current nominees are confirmed, they will account for 1.4 of the country's federal appeals court judges.

National Public Radio's Carrie Johnson described Trump's appointment of James Ho to the Fifth Circuit Court as exemplifying the Trump era. A first time judge, Ho's first Fifth Circuit opinion has been described by legal scholars as political commentary rather than legal opinion. In Zimmerman v. City of Austin, involving limiting campaign contributions in Austin, Texas, he wrote in his dissenting opinion, "If you don't like big money in politics, then you should oppose big government in our lives,"

Vanita Gupta, president and chief operating officer of the Leadership Conference on Civil and Human Rights issued a statement about Trump's court nominees: "The majority of his nominees have long records of hostility to civil and human rights, and too many are unqualified. Leader McConnell and Senate Republicans are transforming our federal courts because their agenda is failing in Congress and the court of public opinion."

She notes that appointments to the federal judiciary are lifetime positions.

History of Brakeen v. Bernhardt before the Fifth Circuit

On October 4, 2018, U.S. District Judge Reed O'Connor of the Northern District of Texas ruled that the Indian Child Welfare Act is unconstitutional because it's race-based.

The ruling was based on Chad and Jennifer Brackeen, non-Natives, experience in trying to adopt a Native child, an enrolled citizen of the Navajo and Cherokee Nations whom they had fostered for a year-and-a-half. In 2017, the Brackeens filed a lawsuit in Texas seeking to adopt the two-year-old boy, identified in the lawsuit as A.L.M. Although a Navajo family was available to take the boy in January 2018 the Brackeens won their case in a Texas district court, and successfully finalized their adoption. But their lawsuit, *Brackeen v. Bernhardt,* proceeded anyway, joined by

several other plaintiffs, including the states of Texas, Louisiana, and Indiana, and eventually landed before Judge O'Connor.

Most media coverage of O'Connor's ruling, such as a story by National Public Radio, tended to gloss over the law's political and legal context and the far-reaching implications of its reversal.

Many failed to mention that conflicts concerning the child welfare system that can often be traced back to the failure of state and county authorities to notify a tribe when an enrolled child enters child protective services. And most neglected to explain that tribal identity is based not on racial identifiers, or whether a child "looks Indian," but on their political and citizenship connections to a sovereign nation. And that gets at issues that go far beyond the ability of non-Natives to adopt Native American children.

The designation that the children of enrolled tribal citizens are automatically enrolled citizens as well "is foundational to federal Indian law," noted a statement released by the Native American Journalists Association. In March 2019, the Fifth Circuit Court of Appeals in New Orleans heard oral arguments in the *Brackeen* case and issued its now vacated decision in August finding that the child welfare law is not race based, unconstitutional nor does it counter the 10th amendment. If the court finds during rehearing that ICWA is unconstitutional on any front, it opens the door to overturning tribal sovereignty.

And without sovereignty, treaties between the U.S. government and tribes could be subject to debate.

Reversing the Indian Child Welfare Act would mean that "the hundreds and thousands of federal statutes benefiting Indians would be open for reconsideration," said Michigan State University law professor Matthew Fletcher, a member of the Grand Traverse Band of Ottawa and Chippewa Indians and editor of Turtle Talk, the leading blog on American Indian law and policy. "Federal services for Indians and statutes such as the Indian Self Determination Act, Indian Gaming Regulatory Act and others could be challenged."

And that might be the point. Tribal leaders, legal scholars and child welfare advocates speculate that attacks on the law are seldom rooted in genuine concern for American Indian children, but are merely the latest strategy for right-wing groups to advance agendas rooted in racism, greed and the othering of poor people.

Since 2013, challenges to the law have gained new urgency and support from wealthy right-wing interest groups. *Brackeen v. Bernhardt* was itself bankrolled by an unlikely alliance of right-wing political, legal, economic and religious groups that outwardly appear to have little connection to Indian Country or its children. They include right-wing think tanks, representatives of the private adoption industry, the evangelical adoption movement, anti-treaty rights organizations and conservative fossil fuel industrialists.

Although the final goals of these seemingly disparate groups may differ, their shared strategy of commodifying Native American children reveals a colonial mindset that not only depicts Native American people as incapable of managing their own affairs, but also frames their children and resources as free for the taking.

According to J. Eric Reed, former tribal prosecutor and a member of the Choctaw Nation, the current legal fight is part of a strategy that feeds into ending the federal government's trust relationship with tribes as well as challenging federal authority over states' rights.

"*Brackeen v. Zinke*," said Reed, "is a right-wing foot in the door to rewrite the Constitution."

Although the decision to rehear Brankeen v. Bernhardt appears to be based on Owen's dissenting opinion that ICWA violates the Constitution's anti commandeering doctrine, it will mean all plaintiff's complaints in the original case will be up for reconsideration.

The law's opponents are emboldened by each small favorable court decision in their favor. For instance, since 2013, with an infamous lawsuit known as "Baby Veronica" that reached the Supreme Court, challenges to ICWA have increased. In the Baby Veronica case—formally called *Adoptive Couple v. Baby Girl*—powerful interests in the adoption industry and evangelical churches joined with high-profile attorneys to challenge ICWA's authority regarding the adoption of an infant citizen of the Cherokee Nation named Veronica. Eventually the non-Native couple seeking to adopt Veronica, Matt and Melanie Capobianco, prevailed.

Although the court found that ICWA was, indeed, constitutional, it found in favor of the Capobianco's because the child's Native father had not maintained custody since her birth. Not long after the Supreme Court ruled in the Capobiancos' favor, Veronica's non-Native biological mother, Christina Maldonado, signed onto a lawsuit against the U.S. government claiming that ICWA was unconstitutional. (She later dismissed the suit voluntarily)

"ICWA opponents want another crack at the Supreme Court," said Nicole Adams of the Colville Confederated Tribes and advisor at the Partnership for Native Children.

"Redefining ICWA as race-based furthers their final agenda of dismantling Indian law as a whole," she said.

The Roots of the child welfare act

Most people in the U.S. have never heard of the Indian Child Welfare Act, enacted in 1978 to stop the near wholesale removal of Native American children from their birth families to non-Native foster and adoption placements. Today, under that law, tribes typically try to place children who come into tribal or state care with a family member, a member of their tribe or, failing that, a family from another tribe.

"Typically, the mainstream press picks up a story regarding ICWA only when a non-Indian family has somehow been injured," said Terry Cross, founding director and current advisor for the National Indian Child Welfare Association

But the law stems from generations of abusive policies that tore Native American families apart. Beginning in the late 19th Century, the federal government forced or coerced the separation of thousands of Native children from their families, sending them to federal or religious boarding schools often many hours away from their homelands.

Created as part of President Ulysses S. Grant's Peace Policy of 1869, the boarding school era was framed as a bloodless, more humane answer to the country's "Indian Problem." The schools' explicit mission was to destroy Native cultures, languages, and spirituality, and prepare the children for assimilation into American society. Modeled on education tactics used on Native

prisoners at Fort Mason in the 1870s by Captain Richard H. Pratt, the boarding schools followed a punitive philosophy of rigid order and Pratt's motto: "Kill the Indian, and save the man."

Today, Native American and Alaska Natives remain overrepresented in foster care at a rate 2.7 times greater than their proportion in the general population.

It's these dynamics that ICWA was created to address: helping ensure that tribes, as sovereign nations, have jurisdiction over their own children. Since the act's establishment, several prominent child advocacy organizations have declared it the gold standard for child welfare policies and practices for American Indian children.

Despite the law, tribes often decide not to transfer eligible children to tribal jurisdiction for a number of reasons: that the child may have close tribal and family connections in a non-Indian placement, or the tribe may lack the resources to intervene in cases located far from the reservation. Notably, in the Brackeen, the tribs ruled in favor of the non-Native family's adoptions. These scenarios, however, seldom receive media coverage.

There is little data regarding states' compliance with Indian Child Welfare Act, but a 2015 study by Casey Family Programs suggests that many government child protection agencies fail to follow the law. The lack of federal oversight for enforcing ICWA adds to gaps in compliance.

"For years, under ICWA, tribes have been making determinations in child welfare cases based on the best interest of the child," noted law professor Matthew Fletcher. "Suggesting that tribes don't routinely make child welfare decisions based on the best interest of the child is just ignorant."

The legal battle over ICWA will likely continue for several years, and Fletcher and others believe that future challenges are inevitable.

Termination of tribal sovereignty

From the mid-1940s through 1970, the federal government employed a series of assimilationist policies designed to privatize American Indian lands, destroy tribal cultures, and reverse the tribes' and government's "trust relationship," which protects tribal treaty rights, lands, assets, and resources.The assault on this trust responsibility and Indian rights became known as the Termination Era.

But the 2018 ruling *Brackeen v. Bernhardt*, Judge O'Connor seemed to endorse the anti-tribal government view that it's a race-based statue.

"If you're a right-wing interest group and can figure out a way to get the case heard in Judge O'Connor's court, you can expect a sympathetic ear," Fletcher said.

The leading figures in the newest anti-Indian Child Welfare Act drama include the right-wing think tank the Goldwater Institute; the National Council for Adoption, representing the private adoption industry; and an evangelical Christian adoption movement that sees adoption as a means to live out their faith.

Ancillary supporters include the Koch brothers; the DeVos family; the Mercer Family (who are among Trump's largest donors); the Cato Institute; the American Legislative Exchange Council (ALEC); the anti-treaty group Citizens Equal Rights Alliance which advocates for the termination of U.S. and tribal treaty agreements; the Southern Baptist Convention, and others.

"It's like this weird triad of strange and powerful bedfellows," said Adams. Some of the players may have unwittingly signed on to this war and don't necessary share the duplicitousness of others. But their combined opposition to ICWA represents titanic influence, power, and money in service of an anti-tribal sovereignty agenda.

One of the richest anti-ICWA funders is the Goldwater Institute. Since 2015, the libertarian non-profit has underwritten several legal challenges to ICWA. Attorneys at the Goldwater Institute filed an amicus brief in *Brackeen v. Bernhardt*, reiterating its past claims that ICWA is race-based and unconstitutional. And Timothy Sandefur, the Institute's vice president for litigation, compared ICWA to discrimination suffered under Jim Crow laws, telling *The Nation* in 2017 that ICWA subjects Native children to an unfair set of rules based on race.

The Institute, along with the Cato Institute and the Texas Public Policy Foundation filed an amicus curiae brief supporting the current Fifth Circuit's decision to hold En Banc hearings on ICWA.

The Institute describes Indian communities as environments "where poverty, crime, abuse and suicide are rampant," and cites data showing that American Indian children have the highest rate of foster care of any ethnic group as an argument against ICWA. In essence, this blames American Indians for the outcomes of generations of federal assimilationist policies and recommends more of the same as a solution.

And yet, as Fletcher noted, "The Goldwater Institute has no history of expressing interest in either Indian or family law." Although the Goldwater Institute has created an organization called Equal Protection for Native Children and frequently works with other ICWA opponents such as the Cato Institute, it has no history of working to improve the economic, educational, or health circumstances of Native children. Indeed, according to the organization's income tax filing from 2016, its primary areas of research include constitutional law, education reform, and healthcare policy.

Among the Goldwater Institute's major donors are the Koch brothers, well-known opponents to federal power and spending. Through their various advocacy organizations, the Koch brothers fund and support groups such as ALEC, which, like the Goldwater Institute, has called for a constitutional convention that would focus on elevating states' rights and reducing federal oversight and regulation.

The other ally against the child welfare law the National Council for Adoption, and the adoption movement it represents. Matthew McGill, the lead plaintiffs' attorney in *Brackeen v. Bernhardt,* is part of a husband-and-wife legal team with a long history of challenging the Indian Child Welfare Act.

McGill's wife, Lori Alvino McGill, also a lawyer, represented the adoptive parents and the non-Indian biological mother in the Baby Veronica case ,accompanying them on a media tour, including an appearance on the Today Show that helped make their challenge to ICWA a national story.

The couple represent a larger constituency in the private adoption industry, which has become a powerful lobby against ICWA. Private adoptions are a lucrative business, with attorney fees routinely running between $10,000 and $40,000. But as obstacles to international adoptions have

grown, there is a greater interest in domestic adoptions in the U.S.—including adoptions from Indian Country.

Many clients of private adoption attorneys like the McGills are members of a Christian adoption movement that encourages evangelicals to see adoption as a means to live out their faith help the needy, and evangelize children. The statement of faith for Nightlight Christian Adoptions — the agency affiliated with the Baby Veronica case — holds that adoption fulfills the Bible's mandate to make disciples of all nations.

Practicing Christians are more than twice as likely to adopt than the general population, according to a 2013 study by the Barna Group. The study also found that most adoptive parents are White, while the children they adopt are overwhelmingly non-White.

For many Native Americans, these demographics bear a troubling resemblance to historical interactions between White Christians and Native peoples—whether the Catholic Church's 15th Century documents granting European Christian explorers permission to use any means necessary to subdue and convert indigenous peoples, or the more recent abuses of the boarding school era.

"There is nothing original about some of the evangelical Christian adoption movements to focus on Native children and take it upon themselves to decide what's best for Native families," said the Partnership for Native Children's Nicole Adams.

Sandy White Hawk, program manager with the Indian Child Welfare Act Law Center in Minneapolis, and a team of researchers, found that adult American Indians who were adopted to non-Indian parents experienced high rates of sexual, physical, and emotional abuse in their adoptive families. Adoptees also experience traits common to trauma survivors such as anxiety, intrusive imagery or nightmares, depression, withdrawal/isolation, guilt, and unresolved grief. The National Indian Child Welfare Association also cites studies indicating that Indian children placed in non-Indian adoptive homes suffer a far greater risk than the general American Indian population of psychological damage and have a higher tendency to abuse drugs and alcohol.

"I believe some of the motivation for evangelical Christians to adopt American Indian children comes from a savior complex," said White Hawk. "Minority populations are often portrayed as unable to care adequately for their children; some of the adoptive parents may believe they are offering homes for unwanted, neglected children."

But too often, then as now, this impulse may spring from a failure to understand American Indian culture or extended family structure, wherein aunts or uncles might raise a child instead of her biological parent. As child welfare workers labeled that tradition as neglect, generations of Indian children were removed from their homes.

"Instead of saving Native families, these policies robbed them of the nurturing traditional values where the whole community embraced the child," said Nicole Adams. "Who are these people to think they can take away ICWA, one of the few good things Native people have to protect our families?"

What's next?

“Right now we know one judge from the panel (Owen) was concerned about one or two sections of the statute, but not its entirety. It may be the En Banc court will re-open the whole panoply of constitutional challenges; We just don’t know yet,” said Matthew Fletcher.

Amicus briefs are due December 16 and January 14, 2020. Oral arguments and case hearing are scheduled in New Orleans for the week of January 20, 2020.