HAALAND V. BRACKEEN: THE INDIAN CHILD WELFARE ACT, STATES' RIGHTS, AND THE SURVIVAL OF AMERICA'S FIRST PEOPLES AND NATIONS

ANDREW B. REID[†]

ABSTRACT

At the end of its 2023 term, the United States Supreme Court issued a long-awaited decision on the Indian Child Welfare Act, *Haaland v. Brackeen.* The Court was presented with the direct conflict between three well-established bodies of constitutional law: (1) the right of individuals against racial discrimination, (2) the rights reserved by the states under Tenth Amendment federalism, and (3) federal supremacy over the states in matters concerning Native peoples and nations. These conflicts risk the survival of Native families, communities, and culture as well as the collective rights of Native peoples to their survival as inherently sovereign nations under federal (colonial) Indian law. The Court was presented with arguments over 500 years in the making regarding not only the "theft" of Native children, but also requesting a revisitation and reaffirmation of the fundamental colonial relationship between the United States, the states, and Native nations and peoples on the 200th anniversary of the Court's Marshall Trilogy. The Marshall Trilogy concocted what is known as federal Indian law and limited the reach of the states into Native affairs and resources. This Article examines the Court's majority and dissenting opinions, the parties' arguments, and the dispute's fascinating and tragic backstory. The Article concludes with a discussion of the significant underlying issues not raised, and arguments not made, which bear upon the human rights and future survival of the original peoples and nations who have found themselves within the claimed territory and colonial rule of the United States.

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† Andrew Reid, J.D., L.L.M.; Reid has practiced and taught Federal Indian Law, and International and Human Rights Law of Indigenous Peoples for over forty-five years. He is counsel for numerous Native nations and Indigenous peoples in the United States, Canada, the Caribbean, and other parts of the world. He is an alumnus (L.L.M.) and adjunct professor at the University of Denver Sturm College of Law.

INTRODUCTION

Towards the end of its 2022–2023 Session, the United States Supreme Court issued a long-awaited decision on the constitutionality of the Indian Child Welfare Act (ICWA or the Act)[1] in *Haaland v. Brackeen* (*Brackeen*)[2] All major decisions of the Court have a backstory. *Brackeen*'s backstory begins some 200 years ago during the early development of federalism, an era characterized by state's attempts to extend their authority to Native territories and people, and the federal government's declaration of its exclusive "plenary" authority over them.[3]

The ICWA's backstory reaches further back, some 530 years, to the initial discovery and settlement of the Americas by the imperial powers and people of Europe.[4] The Act's history continues to impact the present day political, legal, and cultural relationship between the United States and the peoples and nations that then inhabited and continue to inhabit territory now claimed by the United States. The ICWA backstory is one of slow physical, economic, cultural, and spiritual genocide, colonial domination and rule, institutionalized slavery, theft of children, and forced assimilation. It is one of stolen ancestral territories, lands, and resources that caused the destruction of pre-existing sovereign, independent Native nations. It is also a story of restorative justice and how Americans, as a peoples and nation, confront their own history and their moral and legal obligations to do right by the most vulnerable members of the original inhabitants of Khéya Wíta (Lakota for "Turtle Island," or North America prior to colonization).[5]

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1. Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901, 1902, and throughout other sections of Title 25 of the U.S. Code).

2. 599 U.S. 255 (2023).

3. *See* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 199 (1984); McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020). *See generally* W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy in Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533 (2023); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1 (2003).

4. *See U.S. History Primary Source Timeline*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/colonial-settlement-1600-1763/ (last visited on Jan. 15, 2024).

5. Hassan Kanu, *U.S. Confronts "Cultural Genocide" in Native American Boarding School Probe*, REUTERS (May 18, 2022, 11:11 AM), https://www.reuters.com/legal/government/us-

I. NATIVE CHILDREN AS INSTRUMENTS OF ETHNOCIDE AND GENOCIDE

The ICWA was enacted by Congress in 1978 "to promote the stability of Indian[6] tribes and families" in response to "an alarmingly high percentage of Indian" children being removed by non-tribal public and private agencies and placed in non-Indian foster homes, adoptive homes, and institutions.[7] Surveys leading up to the Act's enactment indicated that some 25%–35% of all Native children were separated from their families and placed in foster homes, adoptive homes, or institutions—a rate of up to nineteen times greater than that of non-Native children.[8] The surveys found that 75%–93% of the placements were with non-Native families;[9] the result of state "fail[ure] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[10] As discussed later in more detail, the

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confronts-cultural-genocide-native-american-boarding-school-probe-2022-05-18/ (discussing examples of Americans confronting past harm caused to Native Americans); Amanda Robinson, *Turtle Island*, THE CANADIAN ENCYCLOPEDIA (Michelle Filice, ed., last edited Nov. 6, 2018), https://www.thecanadianencyclopedia.ca/en/article/turtle-island (discussing the origin of Turtle Island); *North America in Lakota*, THE DECOLONIAL ATLAS (Dec. 3, 2014), https://decolonialatlas.wordpress.com/2014/12/03/north-america-in-lakota/.

6. The term "Indian," of course, is an exonymic racial and ethnic branding of First Peoples by European imperialists and colonialists which denies the sovereign status of the Indigenous peoples of Abya Yala ("the Americas" in the Guna Indigenous language) and demeans them as lesser human beings. Fábia Prates, *What do Abya Yala and Pindorama Mean?*, CONTEMPORARY AND AMÉRICA LATINA (Apr. 13, 2023) https://amlatina.contemporaryand.com/editorial/what-do-abya-yala-and-pindorama-mean/#:~:text=The%20various%20peoples%20who%20inhabited,their%20land%2C%20was%20baptized%20America. It is used throughout this article in its imperial, colonial sense. Similarly, the terms "American Indians" and "Native Americans" are colonial expressions meant to define the Indigenous peoples of Mikinoc Waajew or Khéya Wíta ("North America"/"Turtle Island" in the Indigenous Anishinaabemowin and Lakóta languages, respectively) as "Americans," racial or ethnic minorities within the authority of the colonial State, rather than as peoples possessed of independent national sovereignty or of the collective human right to self-determination equal to all other "peoples" of the world. *The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?*, NAT'L MUSEUM OF THE AMERICAN INDIAN: SMITHSONIAN INST., https://americanindian.si.edu/nk360/informational/impact-words-tips#:~:text=American%20Indian%2C%20Indian%2C%20Native%20American,group%20which%20term%20they%20prefer (last visited Jan. 15, 2024) (explaining the preferred terminology when addressing indigenous peoples). At the time of colonization, western Native peoples described themselves not by their race but were instead "tribocentric," exclusively described by their tribal affiliation or Native nationality. *Native American and Indigenous Peoples FAQs*, UCLA (Apr. 14, 2020) https://equity.ucla.edu/know/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs/. Native sign language for example, the principal means of intertribal communications, did not contain a sign for the racial concept "Indian." W.P. CLARK, THE INDIAN SIGN LANGUAGE 223 (reprt. 1982) (1885).

7. 25 U.S.C. §§ 1901(4), 1902.

8. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d. Cong., 2d. Sess. 70 (1974) [hereinafter *1974 Hearings*]; William Byler, *The Destruction of American Indian Families*, *in* THE DESTRUCTION OF AMERICAN INDIAN FAMILIES, 1 (Steven Unger ed., 1977); Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1288–90 (1980); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).

9. *1974 Hearings*, *supra* note 8, at 17; Barsh, *supra* note 8, at 1287 n.3, 1290 n.16.

10. 25 U.S.C. § 1901(5). Canada engaged in a similar practice, referred to as the "Sixties Scoop," between 1951 and 1984 when an estimated 20,000 First Nations, Métis, and Inuit children were taken by child welfare authorities and placed for adoption in mostly non-Indigenous households. Meera Baswan & Sena Yenilmez, *The Sixties Scoop*, THE INDIGENOUS FOUNDATION (last visited Jan. 15, 2024) https://www.theindigenousfoundation.org/articles/the-sixties-scoop. As in the United

institutionalized and non-institutionalized theft of Native children has been a major tool used to promote slavery, colonialism, forced assimilation, and Christian conversion for over 430 years.[11]

> A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.
>
> Brigadier General Richard Henry Pratt, 1892[12]

The United States, through its state and federal institutions, had long been engaged in using other methods to take Native children and risk the future survival of Native communities. At the urging of several Christian denominations, the United States formally adopted an Indian Boarding School Policy, beginning with the Indian Civilization Act Fund of 1819.[13] The express intention behind this policy was to destroy and replace the Native culture and identity of Native people with a Euro-American one.[14] As the founder of the first off-reservation boarding school, Brigadier General Richard Henry Pratt, (in)famously remarked that the goal of the policy was to "[k]ill the Indian in him, and save the man."[15] From 1858 to 1871,

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States, this practice in Canada was supported by a series of government policies. *See* Shandel Valiquette, Sixties Scoop, Historical Trauma, and Changing the Current Landscape about Indigenous People, (Nov. 2019) (unpublished master's degree research paper, University of Windsor) (on file with the University of Windsor). For some, like Lil'Wat First Nation's member Loni Edmonds, the institutionalized taking of Indigenous children is not a thing of the past. In 2007, social services removed all six of Ms. Edmonds's children from her care. Joseph Jones, *BC Authorities Snatch Three-Day-Old Indigenous Baby*, VANCOUVER MEDIA CO-OP (July 27, 2010) https://vancouver.media-coop.ca/fr/story/bc-authorities-snatch-three-day-old-indigenous-baby/4303. She herself had been removed as a child from her own mother's care by Canadian authorities, as was her mother from that of her grandmother. Loni Edmonds and Children v. Canada, Petition 879-07, Admissibility Report No. 89/13, ¶¶ 8–9 (Inter-American Commission on Human Rights (IACmHR) November 4, 2013). In 2013, six years after the children were taken from their mother, the Inter-American Commission on Human Rights ruled the allegations in her petition stated violations by Canada of the human rights of Ms. Edmonds and her children "to equality before the law," "to protection of honor, personal reputation, and private and family life," "to a family and to protection thereof," "to protection for mothers and children," "to residence and movement," "to inviolability of the home," "to the preservation of health and well-being," "to the benefits of culture," "to a fair trial," to petition, and to due process of law. *Id.* at ¶ 72.

11. *See, e.g.*, ELIAS CASTILLO, A CROSS OF THORNS: THE ENSLAVEMENT OF CALIFORNIA'S INDIANS BY THE SPANISH MISSIONS (2017); THE MISSIONS OF CALIFORNIA: A LEGACY OF GENOCIDE 3 (Rupert Costo & Jeannette Henry Costo, eds., 1987) [hereinafter COSTO & COSTO]; STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND 45–46 (2008). *See generally* GEORGE E. TINKER, MISSIONARY CONQUEST: THE GOSPEL AND NATIVE AMERICAN CULTURAL GENOCIDE (1993).

12. Proceedings of the National Conference of Charities and Correction, 19th Annual Session, June 23–22, 1892 (Isabel C. Barrows, ed., 1892), at 46.

13. Hope MacDonald LoneTree, *Healing from the Trauma of Federal Residential Indian Boarding Schools*, THE ADMIN. FOR CHILDREN AND FAMILIES (Nov. 24, 2021), https://www.acf.hhs.gov/blog/2021/11/healing-trauma-federal-residential-indian-boarding-schools#:~:text=The%20Indian%20Civilization%20Act%20of%201819%20was%20enacted%20for%20the,emotional%20suffering%2C%20physical%20illness%2C%20immediate.

14. Andrea H. Frye, *Brief Historical Background: Savin' "Them" from "Themselves*," 2021 ADVANCED FAM. L. 47-III (2021).

15. Captain R.H. Pratt, Proceedings of the National Conference of Charities and Correction: The Advantages of Mingling Indians with Whites, 46 (1892).

in many treaties between the United States and the Native nations, the United States included provisions making attendance at on-reservation schools, established and run by the government, compulsory for Native children with the goal of "civilizing" them through a Euro-American and Christian education.[16] In 1891, a compulsory attendance law enabled federal officers to forcibly take Native children as young as four-years-old from their homes and send them off for assimilation in boarding schools largely operated by Christian missionaries, Christian churches, and military personnel with federal funding.[17] From 1891 until the 1970s, the United States forcibly reeducated, indoctrinated, and Christianized hundreds of thousands of Native children in 367 boarding schools, as much as 83% of Native school-age children.[18]

Sexual, physical, psychological, and emotional abuse of Native children in boarding schools was rampant.[19] Thousands of Native children perished and were buried at these schools, often in unmarked graves, never making it back home to their people.[20] Those that did eventually make it

16. *See generally* Robert Laurence, *Indian Education: Federal Compulsory School Attendance Law Applicable to American Indians: The Treaty-Making Period: 1857-1871*, 5 AM. INDIAN L. REV. 393 (1977).

17. Ursula Running Bear, Zaneta M. Thayer, Calvin D. Croy, Carol E. Kaufman, Spero M. Manson, *The Impact of Individual and Parental American Indian Boarding School Attendance on Chronic Physical Health of Northern Plains Tribes*, NIH: NAT'L LIBR. OF MED., https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6241300/#R5 (last visited Jan. 15, 2024).

18. SECRETARY OF THE INTERIOR, 60TH ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, at 66–67 (1891) (on file with the University of Wisconsin Library); *Healing Voices, Volume 1: A Primer on American Indian and Alaska Native Boarding Schools in the U.S.*, THE NAT'L NATIVE AM. BOARDING SCH. HEALING COAL. (2d. ed. 2020), https://boardingschoolhealing.org/wp-content/uploads/2021/09/NABS-Newsletter-2020-7-1-spreads.pdf; Kathie Marie Bowker, The Boarding School Legacy: Ten Contemporary Lakota Women Tell Their Stories, (Nov. 2007) (unpublished D.Ed. dissertation, Montana State University) (on file with Mont. State University); *Beyond the Mandate: Continuing the Conversation: Report of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission*, THE MAINE WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM'N (June 14, 2015), https://d3n8a8pro7vhmx.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468974047/TRC-Report-Expanded_July2015.pdf?1468974047. Both Canada and Australia also engaged in widespread forced removal of Indigenous children to Christian boarding schools far from their communities and homes. *Canada's Residential Schools: The Legacy, The Final Report of the Truth and Reconciliation Commission of Canada, Volume 5*, TRUTH AND RECONCILIATION COMM'N (2015), https://publications.gc.ca/collections/collection_2015/trc/IR4-9-5-2015-eng.pdf; *Australian Human Rights Commission (AHRC), Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, COMMONWEALTH OF AUSTRALIA (1997), https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf.

19. Dana Hedgpeth, *'12 Years of Hell': Indian Boarding School Survivors Share Their Stories*, WASH. POST (Aug. 7, 2023), https://www.washingtonpost.com/history/2023/08/07/indian-boarding-school-survivors-abuse-trauma/; BRYAN NEWLAND, U.S. DEP'T. OF INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 56 (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf; *Let All That is Indian Within You Die!*, NATIVE AM. RIGHTS FUND LEGAL REV., Summer/Fall 2013, at 1–2, https://narf.org/nill/documents/nlr/nlr38-2.pdf [hereinafter NARF Summer/Fall 2013]; *Trigger Points*, NATIVE AM. RIGHTS FUND (2019), https://www.narf.org/nill/documents/trigger-points.pdf; Andrea Smith, *Soul Wound: The Legacy of Native American Schools*, INDIAN COUNTRY 2023, Oct. 9, 2015, https://laratracehentz.wordpress.com/2015/10/09/soul-wound-the-legacy-of-native-american-schools/; *see, e.g.*, Bernie v. Catholic Diocese of Sioux Falls, 821 N.W.2d 232 (S.D. 2012).

20. NEWLAND, *supra* note 19, at 85–86; *see also Sacred Responsibility: Searching for the Missing Children and Unmarked Burials*, INDEP. SPECIAL INTERLOCUTOR 9–11 (June 2023), https://osi-

back had lost their language, culture, and identities, and were scarred for life.[21] Boarding school survivors are aptly known as the "stolen generations."[22] Professor David Wallace described this era as "Education for Extinction."[23] These "graduates" of Indian boarding schools became unwitting agents of colonial dominance and destruction of Native spirituality, culture, language, economies, communities, peoples, and nations.[24] The colonial policy of forced assimilation has been labeled frequently as cultural genocide or ethnocide.[25]

By the end of the 1990s, sexual abuse became entrenched in Native communities—the sexual assault rate among Native Americans was three-and-a-half times higher than any other ethnic group in the United States.[26] The rates of mental illness, alcoholism, and drug abuse

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bis.ca/wp-content/uploads/2023/06/OSI_InterimReport_June-2023_WEB.pdf (showing thousands of graves, including mass graves, of Native children identified at Canadian residential schools).

21. *See, e.g.*, SANDY WHITE HAWK, "A CHILD OF THE INDIAN RACE": A STORY OF RETURN (2022); TRACE A. DEMEYER, ONE SMALL SACRIFICE: A MEMOIR: LOST CHILDREN OF THE INDIAN ADOPTION PROJECTS 215–16 (2012); Alastair Lee Bitsói, *Native Mental Health Providers Seek to Heal Boarding School Scars With Informed and Appropriate Treatment*, HIGH COUNTRY NEWS (Aug. 14, 2023), https://www.hcn.org/issues/55.9/native-mental-health-providers-seek-to-heal-boarding-school-scars-with-informed-and-appropriate-treatment.

22. *See, e.g.*, the Truth and Healing Commission on Indian Boarding School Policies in the US Act, Oversight Hearing of "Volume 1 of the Dep't of the Interior's Fed. Indian Boarding Sch. Initiative Investigative Rep." & Legis. Hearing to receive testimony on S. 2907, 117th Cong. (2021–2022) (statement of Dr. Denise K. Lajimodiere, member, Turtle Mountain Band of Chippewa, Belcourt, N.D). *See generally*, AHRC, *supra* note 18 (The Indigenous peoples of Australia also refer to their children taken from then and sent off to government boarding schools as "the stolen generations."). These "survivors" also sustained lifelong scars. *See*, Bitsói, *supra* note 21.

23. *See generally* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928 (1995).

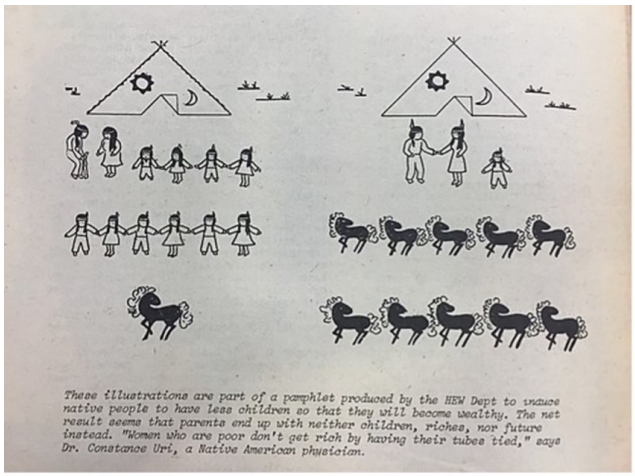
24. *See* ADAMS, *supra* note 23, at 276–83; JOHN WILLINSKY, LEARNING TO DIVIDE THE WORLD: EDUCATION AT EMPIRE'S END 24 (1998) (Cultural and identity extinction through the theft and re-education of Native children has been central to colonial rule since the time of Columbus. Professor John Willinsky described this as "intellectually staged" conquest alongside imperialism's other exploits.); THE LAWS OF BURGOS 1512–1513: ROYAL ORDINANCES FOR THE GOOD GOVERNMENT AND TREATMENT OF THE INDIANS XVII (Lesley Bird Simpson, trans., John Howell ed., 1960) (1512) (The very first laws promulgated by the Native peoples of Abla Yala, the Leyes of Burgos of 1512 (Laws of Burgos), commanded that the sons of the chiefs of the Taino peoples be taken and given to the Catholic priests to be forcibly converted and educated in the Catholic religion before being returned back to their tribes as a means of converting from within the Taino peoples to Christianity and the rule of the Universal Church.).

25. NARF Summer/Fall 2013, *supra* note 19, at 1–3; Stefanie Kunze, *US Federal Off-Reservation Boarding Schools and Ethnocide's Benevolent Perpetrator*, GENOCIDE STUD. INT'L, Fall 2020, at 134, 135–38; Ronan Campbell, *Until All That I Am Is Lost: Education as Ethnocide*, CONTEMP. REV. OF GENOCIDE & POL. VIOLENCE (Nov. 15, 2018), https://crgreview.com/until-all-that-i-am-is-lost-education-as-ethnocide/; *see* A. DIRK MOSES, GENOCIDE AND SETTLER SOCIETY: FRONTIER VIOLENCE AND STOLEN INDIGENOUS CHILDREN IN AUSTRALIAN HISTORY 16–17 (2004); Zachary Fargher, *The Unspoken Genocide: Canada's Residential Schools and Australia's Stolen Generation*, 4 TE TAI HARURU: J. OF MAORI AND INDIGENOUS ISSUES 54, 56, 73–74 (2013).

26. Andrea Smith, *The Legacy of Native American Schools*, AMNESTY INT'L USA (Oct. 9, 2025). *See generally*, U.S. DEP'T OF JUST., NCJ 203097, *American Indians and Crime*, 5 (2004), https://www.justice.gov/sites/default/files/otj/docs/american_indians_and_crime.pdf; *see also* Lynn Rosenthal, *The Tribal Law and Order Act of 2010: A Step Forward for Native Women*, THE WHITE HOUSE (July 29, 2010, 5:13 PM), https://obamawhitehouse.archives.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women#:~:text=According%20to%20a%20Department%20of,be%20raped%20in%20their%20lifetimes.

chronically exceed that of any other ethnic group.[27] The suicide rate is over two-and-a-half times higher than the national average and the second leading cause of death for Native youth.[28]

In 1969, an investigation into the education of Native children by the Senate's Special Subcommittee on Indian Education indicated that Indian education was "400 years of failure" and "a national tragedy."[29] In response, Congress passed, among other legislation, the Indian Education Act of 1972, the Indian Self-Determination and Education Assistance Act of 1975, and the Tribally Controlled Schools Act of 1988 to replace the existing assimilationist off-reservation boarding school policy with one that promoted and financed local education services respectful of Native cultures and practices.[30]



This pamphlet, urging Native women to have fewer children, was created by the United States Department of Health, Education, and Welfare.[31]

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27. Indian Education: A National Tragedy—A National Challenge, Report of the Comm. on Labor and Public Welfare, Special Subcomm. on Indian Educ., S. Doc. No. 91-501, at 17–19 (1969) [hereinafter Committee Report]; *Behavorial Health*, INDIAN HEALTH SERV. (Mar. 2023), https://www.ihs.gov/newsroom/factsheets/behavioralhealth/.

28. Sally C. Curtin, Holly Hedegaard, *Suicide Rates for Females and Males by Race and Ethnicity: United States, 1999 and 2017*, NAT'L CTR. FOR HEALTH STATISTIC 1, 3–4, June 2019, https://www.cdc.gov/nchs/data/hestat/suicide/rates_1999_2017.pdf; Committee Report, *supra* note 27, at 17–19.

29. Committee Report, *supra* note 27, at 3, 8–10 ("The goal, from the beginning of attempts at formal education of the American Indian, has been not so much to educate him as to change him.").

30. Indian Education Act of 1972, Pub. L. 92-318, 86 Stat. 334 (1972); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, 88 Stat. 2213 (1975); Tribally Controlled Schools Act of 1988, Pub. L. 100-297, 102 Stat. 385 (codified as amended at 25 U.S.C. § 2501 *et seq.* (1988)); JOEL SPRING, THE AMERICAN SCHOOL 1642–1993, at 358–60 (3d ed. 1994); ARI GLOGOWER, THE INDIAN EDUCATION ACT OF 1972, at 2, 7 (2005); H.R. REP. NO. 1386, at 8–9 (1978) (During the hearings on the ICWA, these Indian boarding schools were acknowledged as "contribut[ing] to the destruction of Indian family and community life" along with the non-Native adoptions of Native children.).

31. @lakotalaw, TWITTER (May 15, 2022, 10:00 AM), https://twitter.com/lakotalaw/status/1525868769633083393.

In the 1960s and 1970s, the United States Indian Health Service (IHS) and collaborating physicians sustained a widespread practice of performing sterilization procedures on Native women, often without their consent or by misleading women into believing that the sterilization procedure was reversible.[32] Native girls as young as eleven-years-old were sterilized.[33] Outrage of the Native communities eventually led to a United States General Accountability Office (GAO) investigation that confirmed the widespread practice.[34] Sterilization procedures were performed on an estimated 25%–40% of Native women in some communities, which, if accurate would be the sterilization of some 70,000 Native women and girls during this period.[35] The sterilizations were subsidized by federal dollars under the Family Planning Services and Population Research Act of 1970.[36] From 1970 until 1980, partially due to sterilization practices, the Native birth rate fell from 3.7 to 1.8 births per Native mother.[37] Marie Sanchez, Northern Cheyenne Chief Tribal Judge, equated the mass sterilization of Native women to a "modern form" of genocide.[38]

The second half of the 20th century was marked by increased Native resistance and activism in response to the gross abuses of forced assimilation and ethnocide.[39] This was in no small part due to the unintended

32. Thomas W. Volscho, *Sterilization Racism and Pan-Ethnic Disparities of the Past Decade: The Continued Encroachment on Reproductive Rights*, 25 WICAZO SA REV 17, 17 (2010); D. Marie Ralstin-Lewis, *The Continuing Struggle Against Genocide: Indigenous Women's Reproductive Rights*, 20 WICAZO SA REV 71, 71–72 (2005). Forced or coerced sterilizations of Native women were also widespread in Canada. *See* STANDING SENATE COMMITTEE ON HUMAN RIGHTS, THE SCARS THAT WE CARRY: FORCED AND COERCED STERILIZATION OF PERSONS IN CANADA – PART II, at 10–11 (2022). The practice even included Native residential school children. KEVIN D. ANNETT, HIDDEN FROM HISTORY: THE CANADIAN HOLOCAUST, THE UNTOLD STORY OF THE GENOCIDE OF ABORIGINAL PEOPLES BY CHURCH AND STATE IN CANADA 14 (2001) (The Sexual Sterilization Act of British Columbia allowed a school principal to permit the sterilization of any native person under his charge. As their legal guardian, the principal could thus have any native child sterilized. Frequently, these sterilizations occurred to whole groups of native children when they reached puberty in institutions like the Provincial training School in Red Deer, Alberta, and the Ponoka Mental Hospital.).

33. Courtney Lewis, *Frybread Wars: Biopolitics and the Consequences of Selective United States Healthcare Practices for American Indians*, 21 FOOD, CULTURE & SOC'Y 427–48 n.17 (2018).

34. U.S. GOV'T ACCOUNTABILITY OFF. HRD-77-3, LETTER OF THE U.S. COMPTROLLER GENERAL TO U.S. SENATOR JAMES G. ABOUREZK 18 (1976).

35. Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24 AM. INDIAN Q. 400, 410 (2000); Ralstin-Lewis, *supra* note 32, at 71; *see* BRIANNA THEOBALD, REPRODUCTION ON THE RESERVATION: PREGNANCY, CHILDBIRTH, AND COLONIALISM IN THE LONG TWENTIETH CENTURY 9 (2019).

36. Pub. L. 91-572, 84 Stat. 1504 (1970); Brianna Theobald, *A 1970 Law Led to the Mass Sterilization of Native American Women. That History Still Matters*, TIME (Nov. 27, 2019, 11:00 AM), https://time.com/5737080/native-american-sterilization-history/.

37. Lawerence, *supra* note 35, at 402.

38. Theobald, *supra* note 36.

39. STAN STEINER, THE NEW INDIANS 26–27 (1968) (discussing the emergence of new Native ideas in America and how contemporary Natives are demanding equality); WARD CHURCHILL, STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIALISM 103 (2002) (exploring the ecocidal and genocidal consequences of resource exploitation in the Native-populated lands); WINONA LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 187, 190 (1999) (discussing Native resistance to environmental and cultural degradation). *See generally* NOAH CHOMSKY, NEW WORLD OF INDIGENOUS RESISTANCE (Lewis Meyer & Benjamin Maldonado Alvarado ed., 2010) (denouncing the crimes committed against Natives and reflecting on decades of struggle, resistance, and hope).

consequences of the Indian boarding schools which created a pan-Indian consciousness, militancy, and solidarity movement by bringing together Native youth from across the country and training them in the tools of colonial domination and oppression.[40] Changes in U.S. colonial policies on Native education and the preservation of Native identities and communities emerged in the wake of this resistance—most notably, by halting the loss of Native children through adoption by non-Natives.

II. ATTACKING THE ICWA: THE *BRACKEEN* LITIGATION

The ICWA was promulgated by Congress in response to persistent demands by the Native community to stem, at least in part, the continued institutionalized and systemic extermination, forced assimilation, ethnocide and slow genocide of Native peoples.[41] The ICWA prioritizes tribal jurisdiction over the adoption of children enrolled or eligible to be enrolled with the tribe; establishes strict procedural limitations on the states, non-tribal public and private placement, and adoption agencies; and mandates preferred placement be with the extended family, tribal members, or other Indian families over non-Indian families.[42]

The *Brackeen* case arose from three separate child custody proceedings governed by the ICWA.[43] In the first, the child, A.L.M., was born to an enrolled Navajo mother and enrolled Cherokee father.[44] His mother left A.L.M. with his paternal grandmother in Texas.[45] Ten months later, Texas Protective Services removed A.L.M. from his grandmother and placed him in foster care with a white, evangelical Christian couple, Chad and Jennifer Brackeen.[46] After the parental rights of A.L.M.'s biological parents were terminated, the Brackeens filed a petition to adopt A.L.M.[47] The family

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40. HAZEL W. HERTZBERG, THE SEARCH FOR AN AMERICAN INDIAN IDENTITY, MODERN PAN-INDIAN MOVEMENTS 15 (1971) (2d ed.1972); Sally J. McBeth, *Indian Boarding Schools and Ethnic Identity: An Example from the Southern Plains Tribes of Oklahoma*, 28 PLAINS ANTHROPOLOGIST 119, 120, 126–27 (1983); Abigail M. Gibson, *The Last Indian War: Reassessing the Legacy of American Indian Boarding Schools and the Emergence of Pan-Indian Identity*, 10 GLOB. TIDES 1, 11 (2016).

41. *1974 Hearings*, *supra* note 8; *see* LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION 77–78 (2012); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, *in* FACING THE FUTURE, THE INDIAN CHILD WELFARE ACT 50, 51–56 (Matthew L.M. Fletcher, Wenona T. Single, & Kathryn E. Fort ed., 2009); Maylinn Smith, *Where Have All the Children Gone? When Will They Ever Learn?*, *in* FACING THE FUTURE, THE INDIAN CHILD WELFARE ACT 245–46 (Matthew L.M. Fletcher, Wenona T. Single, & Kathryn E. Fort ed., 2009); Drew Pollom, *Killing the Policy to Save the Child: Comparing the Historical Removal of Indigenous Children in Australia to the United States and How the Countries Can Learn from Each Other*, 4 AM. INDIAN L.J. 252, 266 (2016); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33–35 (1989); 25 U.S.C. § 1901(3) (The breakup of Native families through the adoption of Native children by non-Native parents was threatening "the continued existence and integrity of Indian tribes.").

42. 25 U.S.C. §§ 1911–12, 15.

43. Haaland v. Brackeen, 599 U.S. 255, 268 (2023).

44. *Id.*

45. Brackeen v. Zinke, 338 F. Supp. 3d 514, 525 (N.D. Tex. 2018) [hereinafter *Brackeen Dist. Ct.*].

46. *Id.*; Emily McFarlan Miller, *Religion Plays a Role in Native American Adoption Case Before Supreme Court*, RELIGION NEWS SERV. (Nov. 9, 2022), https://religionnews.com/2022/11/09/religion-plays-a-role-in-native-american-adoption-case-before-supreme-court/.

47. *Brackeen Dist. Ct.*, 338 F. Supp. 3d at 525.

court denied their petition finding that they had failed to show good cause to depart from the ICWA's Indian family preference requirements.[48] After initiating an appeal, the Brackeens were able to reach a settlement and finalize their adoption of A.L.M., then sought to adopt A.L.M.'s biological sister over the opposition of the Navajo Nation.[49] The second proceeding, which originated in Nevada, concerned Nick and Heather Libretti, a non-Indian couple who sought to adopt Baby O, an enrolled member of the Ysleta del Sur Pueblo Tribe in Texas, with the biological parents' permission.[50] The Tribe intervened under the ICWA but ultimately withdrew its challenge and the Librettis finalized their adoption of Baby O.[51] In the third proceeding, the parental rights to Child P. were terminated, and she was placed with non-Indian foster parents Jason and Danielle Clifford in Minnesota.[52] Following the placement, Child P. was enrolled as a member of the White Earth Band of the Ojibwe Tribe, and the Tribe intervened seeking ICWA compliance.[53] The family court ultimately denied the Clifford's motion to adopt Child P.[54]

These three sets of non-Indian adoptive parents (hereinafter Individual Plaintiffs or Individual Petitioners) then brought the *Brackeen* challenge in federal court against the United States agencies and officials (collectively, the United States) charged with setting federal guidelines regarding the ICWA.[55] The Individual Plaintiffs were initially joined by the States of Texas, Louisiana, and Indiana (hereinafter the States), with only Texas remaining when the case reached the Supreme Court.[56] The Cherokee Nation and several other Native nations (hereinafter the Native Nations) were permitted by the court to intervene as defendants.[57] Only the Navajo Nation was permitted to intervene on the appeal.[58]

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48. *Id.* at 525–26.

49. *Id.*; *Brackeen*, 599 U.S. at 268–69.

50. Second Amended Complaint and Prayer for Declaratory and Injunctive Relief at 2–3, 7, 39, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 35; *Brackeen*, 599 U.S. at 270.

51. Second Amended Complaint and Prayer for Declaratory and Injunctive Relief, *supra* note 50, at 39; *Brackeen*, 599 U.S. at 270; *see also* Rebecca Nagle, *The Story of Baby O—and the Case That Could Gut Native Sovereignty*, THE NATION (Nov. 9, 2022), https://www.thenation.com/article/society/icwa-supreme-court-libretti-custody-case/.

52. Second Amended Complaint and Prayer for Declaratory and Injunctive Relief, *supra* note 50, at 7, 41.

53. *Id.* at 42; *Brackeen*, 599 U.S. at 270.

54. Second Amended Complaint and Prayer for Declaratory and Injunctive Relief, *supra* note 50, at 42; *Brackeen*, 599 U.S. at 270.

55. Second Amended Complaint and Prayer for Declaratory and Injunctive Relief, *supra* note 50, at 1, 4.

56. *Id.* at 1, 7–9; *Brackeen*, 599 U.S. at 271.

57. Motion of Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians to Intervene as Defendants at 1, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 41; Order at 1, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 45.

58. Order at 1, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 139 (denying the Navajo Nation's motion to intervene); Order at 1–2, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 202 (granting the Navajo Nation's motion to intervene in the appeal).

The plaintiffs asserted four constitutional challenges to the ICWA.[59] They argued that Congress exceeded its Article I authority in adopting the Act;[60] that the ICWA violates the Tenth Amendment's reservation of family matters (such as foster care and adoption) to the states; and that the ICWA improperly "commandeers" state implementation of federal law.[61] The plaintiffs also argued that the Act is racially discriminatory against non-Indian adoptive parents and therefore violates the Fifth Amendment's equal protection guarantee.[62]

The United States and the Native Nations responded to the petitioner's challenge to Congressional authority by arguing that Congress possessed plenary power over Indians pursuant to the Constitution's Indian Commerce Clause and the President's treaty power, the "preconstitutional powers necessarily inherent in any Federal Government," and its "assumption of a trust obligation toward Indian tribes."[63] On the Tenth Amendment states' rights challenge, the United States responded that the Amendment does not reserve to the states any authority over Indian affairs nor exclusive authority over domestic relations matters that would prevent the United States from fulfilling its "unique obligation toward the Indians."[64] The defendants argued that the ICWA does not "command" any state action but merely provides legal standards in child-custody proceedings relating to that obligation.[65] The defendants further responded to the

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59. *Brackeen*, 599 U.S. at 271 n.1, 291–92. The Petitioners raised other claims in their federal complaint which are not considered here, particularly a non-delegation claim and one under the Federal Administrative Procedures Act, because they were not at the heart of the Supreme Court's opinion. Second Amended Complaint and Prayer for Declaratory and Injunctive Relief, *supra* note 50, at 57, 76, 82.

60. Second Amended Complaint and Prayer for Declaratory and Injunctive Relief, *supra* note 50, at 63−66; Brief in Opposition to Defendants' Motion to Dismiss and In Support of Individual Plaintiffs' Motion for Summary Judgment at 66–68, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 80; State Plaintiffs' Response in Opposition to Defendants' Motions to Dismiss and Memorandum in Support of Motion for Summary Judgment at 49–52, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 74; *Brackeen*, 599 U.S. at 272–80.

61. Second Amended Complaint and Prayer for Declaratory and Injunctive Relief, *supra* note 50, at 66–67; Brief in Opposition to Defendants' Motion to Dismiss and In Support of Individual Plaintiffs' Motion for Summary Judgment, *supra* note 60, at 68–70; State Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss and Memorandum in Support of Motion for Summary Judgment, *supra* note 60, at 37–41; *Brackeen*, 599 U.S. at 271, 278.

62. Second Amended Complaint and Prayer for Declaratory and Injunctive Relief, *supra* note 50, at 74; Brief in Opposition to Defendants' Motion to Dismiss and In Support of Individual Plaintiffs' Motion for Summary Judgment, *supra* note 50, at 44, 49; State Plaintiffs' Response in Opposition to Defendants' Motions to Dismiss and Memorandum in Support of Motion for Summary Judgment, *supra* note 60, at 53, 57; *Brackeen*, 599 U.S. at 271–72.

63. Memorandum in Opposition to State Plaintiffs' Motion for Summary Judgment at 10, 25, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 121; Memorandum in Support of Defendants' Opposition to Individual Plaintiffs' Motion for Summary Judgment at 35–36, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 123; Intervenor-Defendants' Brief in Support of Their Response in Opposition to the Plaintiffs' Motions for Summary Judgment at 21–22, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 118.

64. Memorandum in Opposition to State Plaintiffs' Motion for Summary Judgment, *supra* note 63.

65. *Id*. at 37; Memorandum in Support of Defendants' Opposition to Individual Plaintiffs' Motion for Summary Judgment, *supra* note 63, at 40–41; Intervenor-Defendants' Brief in Support of Their Response in Opposition to the Plaintiffs' Motions for Summary Judgment, *supra* note 63, at 29–31, Brackeen v. Zinke, 338 F. Supp. 3d 514 (No. 4:17-cv-868-O), ECF No. 188.

Fifth Amendment equal protection challenge by noting that the tribal membership, which pulls a child within the requirements of the Act, is not based on an impermissible racial classification but on citizenship due to "the unique status of Indians as 'a separate people' with their own political institutions."[66]

Following argument on the motions, the district court held that the ICWA requires an impermissible racial classification rather than a political one in that the Act defines an Indian child not only as one who is a member of an Indian tribe but as having a "biological Indian parent."[67] The court construed this to be an "ancestry proxy for race" and therefore a racial classification subject to strict scrutiny review.[68] The court then found that the ICWA failed to survive strict scrutiny because its extension of priority to "potential Indian children" was not sufficiently narrow and thereby treats "all Indian tribes as an undifferentiated mass."[69] On the commandeering claim, the court ruled that by regulating "states—not individuals" Congress violated the Tenth Amendment and that its plenary power did not exempt it from the Amendment.[70] The court granted summary judgment in favor of the non-Indian adoptive parents.[71]

The United States and Native Nations appealed the decision to the Fifth Circuit Court of Appeals.[72] The initial appellate panel, per Judge James L. Dennis, ruled, among other issues, that the ICWA's definition of "Indian child" was a political classification subject to rational basis review, rather than a racial one subject to strict scrutiny, and did not violate equal protection.[73] The Court also concluded that the Act preempted conflicting state law and did not violate the Tenth Amendment's anticommandeering doctrine.[74] The Court reasoned that under the Supremacy Clause state courts are required to enforce federal law and therefore the anticommandeering doctrine does not apply where the ICWA evenhandedly regulated both states and private actors in an activity, and where the only action required of the states was administrative.[75]

On motion, the Court of Appeals granted en banc review.[76] It issued a very mixed and complex decision with Circuit Court Judges James L.

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66. Memorandum in Opposition to State Plaintiffs' Motion for Summary Judgment, *supra* note 63, at 10–12; Memorandum in Support of Defendants' Opposition to Individual Plaintiffs' Motion for Summary Judgment, *supra* note 63, at 13−14; Intervenor-Defendants' Brief in Support of Their Response in Opposition to the Plaintiffs' Motions for Summary Judgment, *supra* note 63, at 14.

67. *Brackeen Dist. Ct.*, 338 F. Supp. 3d at 533–34, 536.

68. *Id.* at 534.

69. *Id.* at 535 (quoting U.S. v. Bryant, 579 U.S. 140, 160 (2016) (Thomas, J., concurring)).

70. *Id.* at 540–41, 546.

71. *Id.* at 536, 538, 541–42, 546.

72. Notice of Appeal at 1, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 18-11479); Notice of Appeal at 1, Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-00868-O) ECF No. 190.

73. Brackeen v. Bernhardt, 937 F.3d 406, 428–30 (5th Cir. 2019).

74. *Id.* at 430–35.

75. *Id.* at 431.

76. Brackeen v. Haaland, 994 F.3d 249, 267 (5th Cir. 2021).

Dennis and Stuart Kyle Duncan delivering different parts of the majority opinion. Among other issues,[77] the Court of Appeals agreed that Congress possessed the exclusive plenary and trust authority to enact the ICWA under Article I of the Constitution.[78] However, while agreeing that the ICWA's "Indian child" definition does not violate equal protection, it split evenly on whether the Act's placement preference provisions do.[79] A majority of the Circuit Court also held that the ICWA's "active efforts" requirements unconstitutionally commandeers state actors, but again split evenly on other provisions, including whether the Act commandeers state courts.[80] The majority further held that certain other challenged ICWA provisions validly preempt state law and thus do not commandeer the states.[81] The Circuit Court sitting en banc vacated the panel's decision and affirmed in part and reversed in part the District Court's decision.[82] All parties then sought and obtained certiorari before the Supreme Court of the United States to clarify the Fifth Circuit's unusually complicated and mixed decision.[83]

III. THE LONG GAME, OR ORCHESTRATING A CASE FOR THE SUPREME COURT

There is a notable backstory on why and how *Brackeen* reached the Supreme Court. The modern conservative/libertarian movement (the conservative movement), largely white and Christian, is well-known for playing the long game to achieve its goals.[84] Lacking consistent majorities in national elections, one part of that strategy is focused on gaining control of state legislatures through political gerrymandering of the electoral

77. *Id.* at 267, 290–97, 361, 368–70 (discussing standing); *Id.* at 269, 346–52, 361, 419–24 (discussing delegation of power); *id.* at 269, 352–61, 424–31 (discussing the Administrative Procedures Act).

78. *Id.* at 267, 299–316.

79. *Id.* at 268–69, 332–45, 361, 370–72, 392–401.

80. *Id.* at 268.

81. *Id.* at 268, 316–32, 401–19.

82. *Id.* at 269.

83. Petition for a Writ of Certiorari at 1, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (No. 21-376); Petition for a Writ of Cert. at 1, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (No. 21-380); Petition for a Writ of Cert. at 1, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (No. 21-378); *Docket for No. 21-380*, UNITED STATES SUPREME COURT, https://www.supremecourt.gov/docket/docketfiles/html/public/21-380.html.

84. DONALD COHEN, DISMANTLING DEMOCRACY: THE FORTY-YEAR ATTACK ON GOVERNMENT, . . . AND THE LONG GAME FOR THE COMMON GOOD 12–13, 35, 41–60 (2018); MITCH MCCONNELL, THE LONG GAME 2, 5, 258 (2016); Grace Panetta & Brent D. Griffiths, *Republicans' Next Big Play is to 'Scare the Hell Out of Washington' By Rewriting the Constitution. And They're Willing to Play the Long Game to Win*, BUS. INSIDER AFRICA (July 31, 2022, 11:58 AM), https://africa.businessinsider.com/politics/republicans-next-big-play-is-to-scare-the-hell-out-of-washington-by-rewriting-the/dfe74ew; *see also*, New Guard Staff, *Join the Long Game to Save America*, YOUNG AMS. FOUND. (July 19, 2023), https://yaf.org/news/join-the-long-game-to-save-america/; Lewis F. Powell, Jr., Attack on the American Free Enterprise System, Memorandum from the Wash. and Lee Univ. Sch. of L. Scholarly Commons (Aug. 23, 1971) (on file with author) (discussing the libertarian goals of the movement, including the Lockean primacy of property, the right to free enterprise and development, and the accumulation of wealth, which attracts financial support from corporations and the extremely wealthy).

process to restrict or even nullify the popular vote.[85] Another part of their strategy focused on the courts, most importantly the U.S. Supreme Court, aims to enable conservative judicial activism.[86] With former President Trump's appointment of Amy Coney Barrett to the Court, the conservative movement was able to obtain an ideological six-member supermajority.[87]

Perhaps the most prominent example of the conservative movement's success can be seen in the Court's recent ruling in *Dobbs v. Jackson Women's Health Organization*,[88] completing the movement's 50-year effort to take ideological control of the Court, reverse *Roe v. Wade*,[89] and send the abortion legalization decision to the states.[90] In the following session, the conservative movement's decades-long strategy dominated the Court's decisions: including the Court's decisions to all but eliminate affirmative action in *Students for Fair Admissions, Inc. v. Harvard*;[91] expand religious rights of Christians while limiting LGBTQ+ protections in *303 Creative LLC v. Elenis*;[92] expand private property rights while restricting the application of the Clean Water Act in *Sackett v. Environmental Protection Agency*;[93] abrogate Native nation sovereignty in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*;[94] and limit the trust obligations of the United States to Native nations in *Arizona v. Navajo Nation*.[95] In a close 5–4 decision in *Allen v. Milligan*,[96] Chief Justice John Roberts somewhat unexpectedly pulled back from previous affirmations of conservative state gerrymandering and joined the "liberal" justices affirming one of the remaining parts of the Voting Rights Act as constitutional.[97] After decades of activism successfully orchestrating the

85. *See* German Lopez, *A Shift in Gerrymandering*, N.Y. TIMES (Oct. 16, 2023), https://www.nytimes.com/2023/10/16/briefing/republicans-gerrymandering.html.

86. ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA xix (2020).

87. *See generally* MICHAEL WALDMAN, THE SUPERMAJORITY: HOW THE SUPREME COURT DIVIDED AMERICA 5, 98–104 (2023).

88. 142 S. Ct. 2228 (2022).

89. 410 U.S. 113 (1973).

90. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2228 (2022); David S. Cohen, Greer Donley, & Rachel Rebouché, *Rethinking Strategy After Dobbs*, 75 STAN. L. REV. ONLINE 1, 1, 6 (2022); Leah Savas, *Pro-Lifers Played the Long Game*, WORLD (June 30, 2022), https://wng.org/articles/pro-lifers-played-the-long-game-1656563935.

91. 600 U.S. 181 (2023); *id.* at 230–31; *see* Rahem D. Hamid & Vivi E. Lu, *Emboldened by Conservative Court, Ed Blum Seeks to Close Out 'Long Game' Against Affirmative Action*, HARV. CRIMSON (Oct. 28, 2022), https://www.thecrimson.com/article/2022/10/28/sffa-arguments-change/; Kimberly Strawbridge Robinson, *Clarence Thomas Wins Long Game Against Affirmative Action*, BLOOMBERG L. (June 29, 2023, 10:03 AM), https://news.bloomberglaw.com/us-law-week/clarence-thomas-wins-long-game-against-affirmative-action.

92. 600 U.S. 570 (2023); *id.* at 578–80, 602–03; *see* Dylan Scott, *Texans Discuss SCOTUS Decision Regarding Same–Sex Couples*, SPECTRUM NEWS (July 1, 2023, 7:50 AM), https://spectrumlocalnews.com/tx/austin/news/2023/07/01/texans-discuss-scotus-decision-regarding-same-sex-couples.

93. 598 U.S. 651 (2023).

94. 599 U.S. 382, 385 (2023).

95. 599 U.S. 555 (2023).

96. 599 U.S. 1 (2023).

97. *See id.* at 96 (noting the four Justices that joined Chief Justice Roberts's majority opinion in part or in all and the three Justices that joined in part or in all of Justice Thomas's dissenting

placement of conservative, libertarian, Christians on the Court, these matters were heard by a majority of justices more favorable to the conservative position.[98]

Brackeen exemplifies the conservative long game to increase states' rights and limit federal authority, the libertarian and white long game to end the perceived "race" preferential status of Native peoples and nations, and the evangelical Christian long game to preserve their religiously and socially privileged status.[99] The Goldwater Institute, which describes itself as "the nation's preeminent liberty organization,"[100] is a leader of the long game challenge to the ICWA. The Institute contends that the state and federal law protecting Native communities and families, and the heritage of Native children, "denies equal protection for children of Native American ancestry" and subjects them "to a separate, less-protective set of laws because of their race."[101] The Institute declares it "is fighting [the ICWA] in courts nationwide" and lists thirteen ICWA actions in which it has been involved, including *Brackeen* and a federal class-action initiated in 2015 by the Institute's Clint Bolick, now an Arizona Supreme Court Justice.[102] In *Brackeen*, the Institute and another libertarian organization, the Cato Institute, submitted amicus briefs asserting their race-discrimination and equal protection arguments to the Fifth Circuit Court of Appeals, and again to the Supreme Court in *Brackeen*.[103]

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opinion); *see also* Ed Pilkington, *Turning Point or the Long Game: What's Behind John Roberts's Surprise Supreme Court Voting Rights Ruling?*, THE GUARDIAN (June 10, 2023), https://www.theguardian.com/us-news/2023/jun/10/john-roberts-us-supreme-court-voting-rights-decision; Linda Greenhouse, *John Roberts's Long Game*, THE ATL. (Sept. 20, 2022), https://www.theatlantic.com/magazine/archive/2022/10/john-roberts-supreme-court-voting-rights-act/671239/.

98. *See* WALDMAN, *supra* note 87, at 5–6.

99. Margaret Talbot, *Amy Coney Barrett's Long Game*, THE NEW YORKER (Feb. 7, 2022), https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game (this defense of conservative Christian privilege is also reflected in that community's key participation in bringing *303 Creative* and the *Dobbs* matters to the Court and influence in the President's nominees to the Court).

100. *Our Story*, GOLDWATER INST., https://www.goldwaterinstitute.org/about/ (last visited Jan. 22, 2024); *see* Alleen Brown, *How a Right-Wing Attack on Protections for Native American Children Could Upend Indian Law*, THE INTERCEPT (June 17, 2019, 12:10 PM), https://theintercept.com/2019/06/17/indian-child-welfare-act-goldwater-institute-legal-battle/.

101. *Ensuring Equal Protection for Native American Children*, GOLDWATER INST., https://www.goldwaterinstitute.org/indian-child-welfare-act/ (last visited Jan. 22, 2024). This argument, of course, ignores the history and special status of Native nations as pre-existing and separate sovereigns by treating Native "Americans" as an ethnic American minority in an effort to defeat the special protections afforded Native nations as separate sovereigns. *See* discussion *infra* note 108.

102. GOLDWATER INST., *supra* note 101. *See generally* Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 TEX. REV. L. & POL. 55 (2021); Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1 (2017); Clint Bolick, *The Wrongs We Are Doing Native American Children*, NEWSWEEK (Nov. 2, 2015, 3:49 PM), https://www.newsweek.com/wrongs-we-are-doing-native-american-children-389771. More recently the Supreme Court denied certiorari in the Institute's own broad discrimination-against-non-Natives challenge to the ICWA. Carter v. Sweeney, 139 S. Ct. 2637 (mem.) (2019).

103. *See* Brief for Goldwater Institute, Cato Institute, and Texas Public Policy Foundation in Support of Plaintiffs–Appellees on Rehearing En Banc at 1, 4, 5, 9, 13, 21, Brackeen v. Bernhardt, 994 F.3d 249 (5th Cir. 2021) (No. 18-11479); Brief for Goldwater Institute, Cato Institute, Texas Public Policy Foundation, and Families Affected by ICWA in Support of Brackeen, et al. and State of Texas at 3, 9, 11, 26–29, Haaland v. Brackeen, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, & 21-380).

The *Brackeen* Individual Plaintiffs were represented in the litigation and appeal pro bono by Matthew McGill and others from the law firm of Gibson, Dunn & Crutcher (Gibson Dunn).[104] In 2013, Lori Alvino McGill, Matthew McGill's wife, represented the birth mother in *Adoptive Couple v. Baby Girl*,[105] a previous ICWA case that received Supreme Court attention.[106] Gibson Dunn submitted an amicus in the matter on behalf of child advocacy organizations.[107] In 2015, the McGills represented the National Council for Adoption in a previous class-action challenge to the constitutionality of the ICWA.[108] The National Council for Adoption submitted an amicus brief in *Brackeen* asserting race discrimination against non-Natives.[109] The McGill couple and Gibson Dunn represent a larger constituency—the private adoption industry, which has become a powerful voice lobbying against the ICWA.[110] The adoption industry works closely with the Christian adoption movement, which sees adoption as a means to live out their faith.[111] For example, the Christian adoption agency affiliated with the *Adoptive Couple* case views transracial adoption as a means of fulfilling the biblical commandment to "make disciples of all nations."[112] Given the history of enslavement, forced conversion, and the thefts of Native children by some Christian denominations, many Native people

104. *See* Vivia Chen, *Gibson Dunn Pro Bono Case Draws Ire of Some Native Americans*, BLOOMBERG L. (Nov. 23, 2021, 1:20 PM), https://news.bloomberglaw.com/business-and-practice/gibson-dunn-pro-bono-case-draws-ire-of-some-native-americans.

105. 570 U.S. 637 (2013).

106. *See* Tony Mauro, *New Challenge to Native American Adoption Rules; Husband-Wife Team From Quinn Emanuel, Gibson Dunn File Suit Pro Bono in Follow-Up to Landmark High-Court Case*, NAT'L L.J. ONLINE (May 27, 2015), https://plus.lexis.com/api/document?collection=legalnews&id=urn:contentItem:5G37-9RX1-JBM3-R49D-00000-00&context=1530671; *see also* Brief of Amica Curiae Birth Mother in Support of Petitioners and Baby Girl, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399); Laura Briggs, *Why Feminists Should Care About the Baby Veronica Case*, INDIAN COUNTRY TODAY, (Sept. 16, 2013), https://ictnews.org/archive/why-feminists-should-care-about-the-baby-veronica-case.

107. Brief of Child Advocacy Organizations as Amici Curiae in Support of Baby Girl Supporting Reversal, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399).

108. *See* Nat'l Council for Adoption v. Jewell, No. 1:15-cv-00675, 2015 WL 13158702 (E.D. Va. July. 30, 2015); Nat'l Council for Adoption v. Jewell, No. 16-1110, 2017 WL 9440666, at *1 (4th Cir. Jan. 30, 2017); Mauro, *supra* note 106.

109. Brief for Academy of Adoption and Assisted Reproduction Attorneys and National Council for Adoption as Amici Curiae in Support of Individual and State Petitioners at 17, 20–22, 25–26, *Brackeen*, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, & 21-380).

110. Mary Annette Pember, *The New War on the ICWA*, THE PUBLIC EYE, Fall 2019, at 3, 22–23, https://politicalresearch.org/sites/default/files/2020-08/ThePublicEye_2019_Fall_nobleeds.pdf; Mauro, *supra* note 106; Suzette Brewer, *War of Words: ICWA Faces Multiple Assaults From Adoption Industry*, INDIAN COUNTRY TODAY (July 8, 2015).

111. *See, e.g.*, Kathryn Joyce, *The Adoption Crunch, the Christian Right, and the Challenge to Indian Sovereignty*, POL. RSCH. ASSOCS. (Feb. 23, 2014), https://politicalresearch.org/2014/02/23/adoption-crunch-christian-right-and-challenge-indian-sovereignty.

112. Pember, *supra* note 110, at 23; Brown, *supra* note 100; Joyce, *supra* note 111; *Adoption Fulfills the Great Commission*, NIGHTLIGHT CHRISTIAN ADOPTIONS, https://nightlight.org/statement-faith/#:~:text=Nightlight%20was%20founded%20in%201959,born%20of%20the%20Virgin%20Mary (last visited Jan. 22, 2024).

remain skeptical of the motives and best-interest-of-the-child declarations of adoption organization and agencies.[113]

Gibson Dunn has also spent decades in litigation against the Indian Gaming Regulatory Act (IGRA).[114] In 1998, Gibson Dunn attorney and former U.S. Solicitor General Ted Olson successfully challenged a state proposition which gave tribes the right to run certain gambling operations.[115] In January 2022, Gibson Dunn, per both Olson and McGill, brought an action for a non-Native gaming company in *Maverick Gaming, LLC v. United States*[116] challenging Indian gaming compacts entered between twenty-nine tribes and the state of Washington under the IGRA.[117] There, Gibson Dunn made identical equal protection and states' rights (commandeering) constitutional arguments that they made against the ICWA in *Brackeen*, but the focus was on Native nations and sovereignty rather than on Native children.[118] Somewhat ironically, the matter was dismissed for failure to join indispensable parties, the Native nations themselves, who had not waived their sovereign immunity from suit.[119] As reported by Bloomberg Law's Vivia Chen:

> "McGill's effort is part of a large, well-orchestrated attempt to undermine tribal sovereignty and tribal nationhood." Kimberly Cluff, legal director of the California Tribal Families Coalition, told me, "It is the biggest and most strategic attack on tribes this century." Defeating tribal sovereignty would lead to the eradication of tribal rights over valuable resources like oil and gaming operations, she explained, noting Gibson Dunn's clients in the energy and gambling sectors, "They're attacking the ICWA because it's low-hanging fruit."[120]

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113. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 655 (2002); *Indian Self-Determination Begins at Home*, *Indian Child Welfare Program: Hearing Before the United States Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. 70, 171 (Aug. 4, 1974) (statement of Bobby George, Dir. of the Navajo Office of Resource Sec. Select Comm. on Indian Affairs).

114. *See generally* Hotel Emps. & Rest. Emps. Intern. Union v. Davis, 981 P.2d 990 (Cal. 1999); Maverick Gaming v. U.S., 2022 U.S. Dist. LEXIS 177916 (W.D. Wash. 2022).

115. *Hotel Emps. & Rest. Emps. Intern. Union*, 981 P.2d at 1018.

116. 2022 U.S. Dist. LEXIS 177916 (W.D. Wash. 2022).

117. *Id.* at *1.

118. *Id.*; *see also* KG Urban Enterprises, LLC v. Patrick, No. 11-12070-NMG, 2014 WL 108307, *1 (D. Mass. Jan. 9, 2014) (regarding a similar equal protection challenge to IGRA). Paul Clement, United States Solicitor General under George Buse, counsel for the child per the guardian ad litem in *Adoptive Couple*, and the "patron saint of conservative causes at the Supreme Court," also represented a non-Native gaming client in Massachusetts making the argument that the state Indian gaming law was an illegal racial set-aside. Briggs, *supra* note 106.

119. *Maverick Gaming*, 2022 U.S. Dist. LEXIS 177916 at *10–12.

120. Vivia Chen, *Why Gibson Dunn's 'Best Interest of the Child' Has a Dark Side*, BLOOMBERG LAW (Nov. 11, 2022, 4:00 AM), https://news.bloomberglaw.com/business-and-practice/why-gibson-dunns-best-interest-of-the-child-has-a-dark-side. Investigative reporter Rebecca Nagle described the effort to undermine the ICWA as "the first in a series of dominoes. This lawsuit is about way more than the children. The case has become a Trojan horse." Nancy Marie Spears, *Will Supreme Court Hear Challenge to Bedrock Law on Native American Families*, THE IMPRINT (Jan. 25, 2022, 11:51 PM), https://imprintnews.org/icwa/supreme-court-hear-challenge-law-native-american-families/62175; *see also* Chuck Tanner, *"Take These Tribes Down" The Anti-Indian Movement Comes to*

Gibson Dunn represented Chevron oil company in its attack on the multi-billion dollar toxic tort judgment obtained by some 30,000 Indigenous Ecuadorians for the gross contamination of their environment.[121] It also represented oil pipeline company Dakota Access, LLC in the controversial Standing Rock litigation between Dakota Access and Native nations over a pipeline.[122] As Native historian and journalist Nick Estes summarized: "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."[123]

The interests at play in *Brackeen*—the Christian adoptive movement, the gaming industry, and the oil industry—share in the goal of eliminating Native sovereignty and exclusive federal authority over Native affairs, and thereby extending state jurisdiction and states' rights over Native territory, resources, and people. This goal harkens back 200 years to the Marshall Trilogy, *Johnson v. M'Intosh*,[124] *Cherokee Nation v. Georgia*,[125] and *Worcester v. Georgia*,[126] the initial cases placing Native nations between private and states' rights and federal authority.[127] In *M'Intosh*, the Supreme Court was presented with the question of whether a private party obtaining a land title directly from a Native nation violated the exclusive authority of the United States.[128] As here, it appears the matter was orchestrated to get a decision from the Court on the issue.[129] Chief Justice Marshall rejected the privately acquired title by judicially establishing the United States' exclusive colonial ownership (fee title) of Native lands under a concocted "doctrine of discovery" that applied only (sui generis) to

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Washington State, IREHR (Apr. 26, 2013), https://www.irehr.org/2013/04/26/take-these-tribes-down/ (at a 2013 meeting over a plan to export coal to China, "[s]peakers echoed a recurring strategic theme: anti-Indian activists should mine federal laws and court cases for anti-tribal language that can be used to seek termination in the courts and 'educate' local and state officials." Among the cases that speakers suggested might work was the forthcoming verdict in *Adoptive Couple v. Baby Girl*).

121. *See, e.g.*, In re Application of Chevron Corp., 749 F. Supp. 2d 135, 136 (S.D.N.Y. 2010); Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 383–84 (S.D.N.Y. 2014).

122. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 540 F. Supp. 3d 45, 45 (D.D.C. 2021). Gibson Dunn also represents Justice Clarence Thomas's longtime billionaire friend, Harlan Crow, in the Senate Judiciary Committee's Supreme Court ethics hearings arising out of Justice Thomas's potential conflicts of interests. Joe Patrice, *Harlan Crow's Lawyers Double Down on Genius Strategy to Invite Contempt Charges*, ABOVE THE LAW (June 7, 2023, 12:46 PM), https://abovethelaw.com/2023/06/harlan-crow-gibson-dunn-clarence-thomas-double-down.

123. *See* Nick Estes, *Why is the US Right Suddenly Interested in Native American Adoption Law?*, THE GUARDIAN (Aug. 23, 2021), https://www.theguardian.com/commentisfree/2021/aug/23/why-is-the-right-suddenly-interested-in-native-american-adoption-law; *see also* Sarah Rose Harper and Jesse Phelps, *Texas, Big Oil Lawyers Target Native Children in a Bid to End Tribal Sovereignty*, LAKOTA PEOPLE'S L. PROJECT (Sept. 17, 2021), https://lakotalaw.org/news/2021-09-17/icwa-sovereignty; Brittany Habbart, *Who's Really Behind* Brackeen v. Haaland*?: The Conspiracy That a Law Firm and Big Oil Are Duplicitously Undermining Tribal Sovereignty Through Native Children*, L.J. FOR SOC. JUST., Mar. 21, 2022; Tanner, *supra* note 120.

124. 21 U.S. 543 (1823).

125. 30 U.S. 1 (1831).

126. 31 U.S. 515 (1832).

127. *M'Intosh*, 21 U.S. at 571–72; *Cherokee Nation*, 30 U.S. 15; *Worcester*, 31 U.S. at 536.

128. *M'Intosh*, 21 U.S. at 571–72.

129. *See* LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 8, 35–36, 45–64 (2005).

Indian nations.[130] Chief Justice Marshall left Native nations and peoples with a severely diminished "Indian title," a mere usufructuary right (the right of occupation and use subject to the whim of the colonial fee owner) to their territories, lands, and resources.[131] This decision placed pre-invasion sovereign Native nations and peoples within the territory and subject to the rule of the United States.[132] It formally established the colonial relationship and domination (plenary power) of the United States over Native nations and peoples as a matter of United States domestic law.

In *Cherokee Nation*, the Cherokee Nation challenged Georgia's attempt to "annihilate" the Cherokee Nation as a sovereign entity and seize its lands through state legislation.[133] Speaking for the majority in a divided Court, Chief Justice Marshall held that the Cherokee Nation was not a "foreign state" and lacked standing to sue, but that it was a sovereign entity separate from the state of Georgia and thus subject to the (colonial) "protection" of the federal government.[134] Thereafter, the Cherokee Nation was indirectly able to get the Georgia legislation before the Court in *Worcester* by challenging the state's exercise of criminal jurisdiction over an individual within the Cherokee Nation's territory.[135] Chief Justice Marshall, again opining for the Court's majority, ruled that the Cherokee Nation as a "nation" was a "sovereign," "distinct, independent political communi[ty]"[136] under the "protection of the United States,"[137] and that its territory was "completely separated from that of the states."[138] He concluded that the laws of Georgia therefore can have no force over the Cherokee Nation, its territory, or its people, and that "[t]he whole intercourse between the United States and this [N]ation" is "vested in the government of the United States."[139] The decision in *Worcester* extended the exclusive colonial relationship between the United States and Native nations to the "management of Indian affairs,"[140] thereby preempting state intrusion into such matters.

All three Marshall decisions relied on the "unique" and exclusive colonial relationship between the United States and Native nations to preempt private rights and the expansion of state power. To reach its decision in *Brackeen*, the Court harkens back to that same centuries old relationship to restrict private and states' rights and preserve its exclusive

130. *M'Intosh*, 21 U.S. at 574, 576–77, 588, 591.
131. *Id.* at 574, 588, 603.
132. *See id.*
133. Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831).
134. *Id.* at 17.
135. Worcester v. Georgia, 31 U.S. 515, 536 (1832).
136. *Id.* at 559–60, 561.
137. *Id.* at 536, 552.
138. *Id.* at 557.
139. *Id.* at 561.
140. *Id.* at 558.

domination over the affairs of Native nations and peoples through its supreme "plenary power."[141]

IV. PUNTING ON "REVERSE RACISM"

In a largely unexpected ruling, the *Brackeen* Court held that neither the petitioning white adoptive parents nor the State of Texas possessed standing to challenge the ICWA's Indian-protective preference provisions as racially discriminatory[142] and put that issue off to another day.[143] The Court also ruled that Texas lacked standing to challenge an ICWA provision allowing tribes to alter adoption priority as an improper delegation of Congressional authority.[144] After dismissing all adoptive parents as parties, there was no longer any ICWA case before the Court. Yet, the Court still took up the State's contention that the Act usurps the traditional authority of states over family matters in violation of the Tenth Amendment's reservation of state powers.[145] Relying upon the federal relationship between the United States and Native nations and peoples, and upon the supremacy of federal law over the states, the Court's seven-justice majority[146] rejected the State's Tenth Amendment challenge to the Act.[147]

It is significant that Justice Barrett, writing for the majority, cautiously kept short of declaring the ICWA constitutional: "If there are arguments that the ICWA exceeds Congress's authority as our precedent stands today, petitioners do not make them. We therefore decline to disturb the Fifth Circuit's conclusion that the ICWA is consistent with Article I."[148] One of the arguments the Court in *Brackeen* punted is the "reverse racism" against whites[149] equal protection challenge to the ICWA that was

141. *See Brackeen*, 599 U.S. 255, 272–73, 315–18 (2023).
142. *See id.* at 292–96.
143. *See id.* at 333 (Kavanaugh, J., concurring).
144. *See id.* at 296.
145. *See id.* at 276.
146. *Id.* at 262. Opinion by Justice Barrett, joined by Chief Justice Roberts, Justice Sotomayor, Justice Kagan, Justice Gorsuch, and Justice Jackson. Justice Gorsuch filed a concurring opinion in which Justice Sotomayor and Jackson joined. Justice Thomas and Alito filed dissenting opinions.
147. *See id.* at 280–92.
148. *Id.* at 280.
149. The idea of reverse racism, which has been central to the challenges to both affirmative action and the ICWA, is seen by many as a myth promoted by those who are the beneficiaries of historic and systemic racism of Native peoples and other people of color. *See* Philip L. Fetzer, *'Reverse Discrimination': The Political Use of Language*, 12 NAT'L BLACK L.J. 212, 216, 227–28 (1993); Vann R. Newkirk II, *The Myth of Reverse Racism*, THE ATLANTIC (Aug. 5, 2017), https://www.theatlantic.com/education/archive/2017/08/myth-of-reverse-racism/535689/; Stephen L. Carter, *'Reverse Discrimination' Is a Concept With a Long, Ugly History*, THE WASH. POST (Nov. 6, 2022 12:14 AM), https://www.washingtonpost.com/business/reverse-discrimination-is-a-conceptwith-a-long-ugly-history/2022/11/05/91e0637e-5d0a-11ed-bc40-b5a130f95ee7_story.html. One commentator noted that the concept of "reverse racism" itself contains within it an assumption of white superiority as the cause of the discrimination. *See* Joyce A Hughes, *"Reverse Discrimination" and Higher Education Faculty*, 3 MICH. J. OF RACE & L. 395, 404–05 (1998). The concept further conflates instances of individual racism or racial prejudice against white people with historic and systemic or structural racism collectively experienced by people of color which remedial laws on affirmative action, voting, and the adoption of Native children were designed to address. *See* ALI RATTANSI, RACISM: A VERY SHORT INTRODUCTION 102–09 (2020); Erica Chayes Wida, *What Does 'Reverse Racism' Mean and Is It*

at the core of the conservative movement's participation in the case.[150] Justice Kavanaugh took the trouble of highlighting just that in his concurring opinion implying that he might rule differently on the constitutionality of the Act were that issue properly before him.[151] Only about two weeks later, for example, in *Students for Fair Admissions*, Justice Barrett joined Justice Kavanaugh and other conservative justices in a 7–3 decision, completing the conservative long game that started with *Regents of the University of California v. Bakke*,[152] in a final rejection of any form of affirmative action to remedy the legacies of past gross systemic racial (and gender) discrimination.[153] As Chief Justice Roberts summed up: "Eliminating racial discrimination means eliminating all of it."[154] Chief Justice Roberts also emphasized that race-focused remedial legislation does not provide the compelling governmental interest required to meet the first prong for any exception to the prohibition against racial discrimination under strict scrutiny review:[155] "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest."[156] During the same term, in *Allen*, Justices Barrett and Kavanaugh were viewed during argument as "subscrib[ing] to the reverse discrimination myth" as applied to voting rights.[157]

On the very same day the Court handed down its *Brackeen* decision, Justices Barrett and Kavanaugh joined the majority in *Lac du Flambeau Band of Lake Superior Chippewa Indians*, an 8–1 decision affirming further abrogation of the residual sovereignty of Native nations by a general Act of Congress that does not specifically refer to Native nations in its

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Actually Real? Experts Weigh In, TODAY (June 26, 2020, 12:20 PM), https://www.today.com/tmrw/what-reverse-racism-experts-weigh-term-t184580.

150. *See, e.g.*, Brief Amici Curiae Goldwater Institute, Cato Institute, Texas Public Policy Foundation, and Families Affected by ICWA in Support of Brackeen, et al. and State of Texas, *Brackeen*, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, & 21-380); Brief for Academy of Adoption and Assisted Reproduction Attorneys and National Council for Adoption as Amici Curiae in Support of Individual and State Petitioners, *Brackeen*, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, & 21-380).

151. *See Brackeen*, 599 U.S. at 333–34 (Kavanaugh, J., concurring).

152. 438 U.S. 265 (1978).

153. *See* Students for Fair Admissions v. Harvard, 600 U.S. 181, 229–31 (2023); *Bakke*, 438 U.S. at 269–71; Michael Avery and Mark Brodin, *The Federalist Society Just Won Its 40-Year War on Affirmative Action*, TRUTHOUT, July 8, 2023, https://truthout.org/articles/the-federalist-society-just-won-its-40-year-war-on-affirmative-action/.

154. Students for Fair Admissions, Inc. v. Harvard Coll., 600 U.S. 181, 206 (2023).

155. *See id.* at 306–08.

156. *Id.* at 226 (alteration in original) (quoting Shaw v. Hunt, 517 U.S. 899, 909–10 (1996)).

157. *See* Hassan Kanu, *Justice Jackson's History Lesson Exposes 'Reverse Racism' Concerns*, REUTERS (Oct. 17, 2022, 5:40 PM), https://www.reuters.com/legal/government/justice-jacksons-history-lesson-exposes-reverse-racism-concerns-2022-10-17/. Justice Barrett sided with Justice Thomas's dissent arguing for a "race-neutral" benchmark which was rejected by the Court's majority. Allen v. Milligan, 599 U.S. 1, 26, 50–54 (2023). Professor Kathryn Stanchi's examination of the Court's treatment of racism and white supremacy found warped definitions of the terms deeply embedded in the Court's opinions. She found that those appearing before the Court "also face a Court that embraces definitions of these terms that embolden claims of white innocence and encourage white fragility" and one that wholly fails to "take responsibility for its role in perpetuating racism." Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 B.C. L. REV. 1251, 1320 (2021).

coverage.[158] The decision, as Justice Gorsuch emphasized in his dissent, can be viewed as a substantive dilution of the "demanding standard" of an "unmistakably clear" statement of Congressional intent to abrogate a Native nation's sovereign immunity.[159] It affirms another broad exercise of colonial plenary power by the United States over Native nations and a lack of respect and deference to the their sovereignty that may forebode the Court's conservative majority position when next confronted with the issue Justice Kavanaugh highlighted in *Brackeen*, a choice between race neutralism (reverse racism) and the sovereign political status of Native nations under federal colonial rule.

Justice Barrett, an evangelical Christian, is also the adoptive mother of two black children from Haiti which would appear to make her personally sympathetic to trans-race, white adoptive parents.[160] She and Justice Kavanaugh, along with Justices Roberts, Thomas, Alito, and Gorsuch are known to be conservative Catholics.[161] As discussed elsewhere in this Article, the Catholic Church and many other Christian denominations have an over 500-year-long history of troubling interactions with Indigenous people and nations generally, and with Native children in particular.[162] The matter of any law providing remedial special benefits or preferences to "Indian" people or nations for past racial abuses, including slavery, colonial rule, ethnocide, and genocide, is sure to appear before the Court in the near future. Justices Barrett and Kavanaugh might well join their conservative companions on the Court to find such laws, including the ICWA, unconstitutional, and strike what some fear to be a potential deathblow to Native sovereignty and survival under federal Indian law.

V. BACK TO THE FUTURE, STATES' RIGHTS VS. FEDERAL PREEMPTION

The Court's *Brackeen* decision has been widely lauded as a "massive victory for Native children, Native families and the future of Native

158. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 385 (2023).

159. *See id.* at 387; *see also id.* at 402–18 (Gorsuch, J., dissenting).

160. Susan Silverman, *Critics of Amy Coney Barrett and Her Adopted Children Are Wrong. So Are Her Defenders*, NBC NEWS (Oct. 27, 2020, 7:05 AM), https://www.nbcnews.com/think/opinion/critics-amy-coney-barrett-her-adopted-children-are-wrong-so-ncna1244564; *see, e.g.*, Samuel L. Perry, *Conservative Christians and Support for Transracial Adoption as an Alternative to Abortion*, 95 SOC. SCI. QUARTERLY 380, 384–85 (2014); Chrissy Stroop, *Are Evangelical Adoption Agencies Stealing Children?*, DAME MAG. (Oct. 1, 2018), https://www.damemagazine.com/2018/10/01/are-evangelical-adoption-agencies-stealing-children/; Kathryn Joyce, *The Trouble With the Christian Adoption Movement*, THE NEW REPUBLIC (January 11, 2016), https://newrepublic.com/article/127311/trouble-christian-adoption-movement.

161. Marci A. Hamilton & Leslie C. Griffin, *How Did Six Conservative Catholics Become Supreme Court Justices Together?*, VERDICT (May 3, 2023), https://verdict.justia.com/2023/05/03/how-did-six-conservative-catholics-become-supreme-court-justices-together. The Federalist Society's Leonard Leo, popularly known as the Justice-Maker who personally campaigned for Justices Barrett, Kavanaugh, and Gorsuch, is also a conservative Catholic who holds or has held many positions in Church organizations.

162. *See supra* notes 24, 113 and accompanying text; *see also infra* notes 277–81, 282, 285 and accompanying text.

peoples."[163] However, *Brackeen* was in its essence not a decision on the adoption of Native children or on Native sovereignty, but rather a throwback to the original exclusive federal colonial domination over Indians that gave rise to the creation of federal Indian law 200 years ago. The United States' federal status as the colonial ruler of the original peoples and Nations found within its claimed territory provided the rationale for assuming federal plenary authority over the "savage" and "uncivilized" Native nations and peoples and their affairs, to the exclusion of both private parties[164] and the states.[165] It was the exercise of that exclusive plenary authority by Congress over Indian affairs in passing the ICWA, coupled with the supremacy of federal law over conflicting state law, that formed the Court's decision in *Brackeen*.[166]

Understandably, the decision was a great disappointment for state and individual rights advocates and many libertarians, conservatives, religious entities, and natural resource development corporations. These groups saw *Brackeen* as a golden opportunity to obtain the long-sought termination of the "special" political and legal status and residual sovereignty of Native peoples and nations.[167] Commentary from one prominent libertarian conservative states' rights advocate, the Federalist Society, roundly condemned the rationale of the majority's decision authored by former Society member Justice Barrett and the rationale of the concurring opinion by Society member Justice Gorsuch.[168] Justices Barrett and Gorsuch were joined in the opinion by Society members Chief Justice Roberts and Justice Kavanaugh,[169] and by the liberal wing of the Court, Justices Sotomayor, Kagan, and Jackson.[170] Federalist Society members Justices Thomas and Alito dissented from the majority's decision.[171]

On appeal to the Fifth Circuit, the United States and the Native Nations reasserted their argument that Congress was "explicitly and

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163. *In a Major Win for Native Families, Supreme Court Upholds the Constitutionality of the ICWA*, NATIVE AM. RTS. FUND (June 15, 2023), https://narf.org/protect-icwa-statement/; *Protect ICWA Campaign Initial Statement on Brackeen Supreme Court Decision*, NAT'L CONGRESS OF AM. INDIANS (June 15, 2023), https://www.ncai.org/news/articles/2023/06/15/protect-icwa-campaign-initial-statement-on-brackeen-supreme-court-decision ("We are overcome with joy"); Joseph Biden, *Statement from President Joe Biden on Supreme Court Decision in Haaland v. Brackeen*, THE WHITE HOUSE (June 15, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/15/statement-from-president-joe-biden-on-supreme-court-decision-in-haaland-v-brackeen/.

164. Johnson v. M'Intosh, 21 U.S. 543, 573–77 (1823).

165. Cherokee Nation v. Georgia, 30 U.S. 1, 1 (1831); Worcester v. Georgia, 31 U.S. 515, 594–96 (1832).

166. *Brackeen*, 599 U.S. 255, 272–75, 286–87 (2023).

167. *See supra* Part IV.

168. Robert C. Natelson, *The Supreme Court's Confused Decision in Haaland v. Brackeen*, THE FEDERALIST SOC'Y (June 21, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-supreme-court-s-confused-decision-in-haaland-v-brackeen.

169. *The Conservative Club That Came to Dominate the Supreme Court*, THE HARVARD GAZETTE (Mar. 4, 2021), https://news.harvard.edu/gazette/story/2021/03/in-audiobook-takeover-noah-feldman-lidia-jean-kott-explore-how-federalist-society-captured-supreme-court/.

170. *Brackeen*, 599 U.S. at 262.

171. *Id.* at 372 (Thomas, J., dissenting); *id.* at 1683 (Alito, J., dissenting).

implicitly" granted exclusive plenary power over Indian affairs, including over domestic Indian relations matters.[172] Describing the relationship between the federal government and Native nations as a "trust relationship,"[173] the United States' argument relied on its treaty obligation to "protect Indians from numerous threats"[174] and purported plenary power under the Constitution to fulfill that obligation[175] and protect "domestic dependent sovereigns."[176] The Native Nations defendants refocused their argument away from Congress's plenary authority to focus on the use of its plenary power in the fulfillment of the United States' "trust duty" to protect Indian Tribes and families from threats to their survival.[177] This placed the colonial exercise of plenary power in a more favorable light. As seen in the amicus briefs, Native nations and peoples may more easily stomach colonial obligations to them than the assertion of colonial plenary power and domination over them.[178] The twenty-nine-page amicus brief of *497 Indian Tribes and 62 Tribal and Indian Organizations*, for example, never once mentions Congressional plenary authority in arguing that the enactment of the ICWA was an appropriate exercise of federal trust responsibility.[179] However, this shift does not negate the fact that both plenary power and trust responsibility are manifestations of the continuing colonial relationship between the United States and Native nations and peoples.

Despite the respondents' shift in focus to the trust obligations of the United States, the *Brackeen* majority mentioned this "trust relationship" only once, almost in passing, as "inform[ing]" the exercise of Congress's plenary power over Indian people.[180] The majority, per Justice Barrett, instead immediately turned to Congress's superseding "plenary and exclusive" power over Indian affairs to find Congressional authority for the promulgation of the ICWA.[181] Under the Plenary Power Doctrine, the United States exercises complete and absolute power over Indian nations and peoples.[182] Justice Barrett identified four sources for such authority: (1) the Constitution's Indian Commerce Clause, which authorizes

172. *Id.* at 274 (majority opinion).

173. *Id.*

174. Brief for the Federal Parties at 7, *Brackeen*, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, & 21-380).

175. *Id.* at 10–23, 27–28 (including "individuals composing those tribes.") (quoting U.S. v. Holliday, 70 U.S. 407, 417 (1865)).

176. *Id.* at 27.

177. Brief for Tribal Defendants at i, 1–3, 6, 11, 24–33, 37–39, 68, *Brackeen*, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, & 21-380).

178. *See, e.g.*, Brief of 497 Indian Tribes and 62 Tribal and Indian Organizations as Amici Curiae in Support of Federal and Tribal Defendants at 2–3, *Brackeen*, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, & 21-380).

179. *Id.* at 4, 13–14 (discussing Congress's broad and exclusive authority over Indian matters in relation to states, but not its plenary nature).

180. *Brackeen*, 599 U.S. 255, 274–75 (2023).

181. *Id.* at 272–73.

182. United States v. Wheeler, 435 U.S. 313, 319 (1978) (The United States possesses an "all-encompassing federal power" over Indian tribes "in all matters.").

Congress to "regulate Commerce . . . with the Indian Tribes;"[183] (2) the President's treaty-making power under the Constitution's Treaty Clause,[184] which Justice Barrett admits does not authorize Congress to act legislatively; (3) the Constitution's "structure" ("implicit[]" "preconstitutional powers" "necessary concomitants of nationality"); and (4) "the trust relationship between the United States and Indian people."[185] The majority then proceeded to cite over 100 years of Court precedence declaring plenary power's existence with little examination of the validity or strength of the constitutional or other sources for such declarations.[186] Ultimately, the Court was forced to concede that the "precedent is unwieldy, because it rarely ties a challenged statute to a specific source of constitutional authority."[187] The Court's rationale is largely circular. It finds the plenary power exists and is constitutional simply because that is what the Court has always declared.

It is evident that none of the cited sources provided clear support for Congress's authority—or that of the United States—over the affairs of preexisting independent, sovereign, nations and their peoples. The Court has acknowledged that, as sovereign and independent nations that preexisted the establishment of the United States and its Constitution, Native nations and their peoples do not fall within the Constitution.[188] Perhaps the earliest source, and the one most frequently relied upon by the Court to support the existence of exclusive federal plenary power, is the reference to "Indian Tribes" in the Commerce Clause.[189] The Commerce Clause provides in full that: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."[190] In *Cotton Petroleum Corp. v. New Mexico*,[191] the Court noted that it has historically declined to treat the meaning of the Interstate Commerce Clause ("commerce among the several States") as interchangeable with the Indian Commerce Clause ("commerce with Indian Tribes").[192] In the former, states retain some authority over trade while in the latter the Court extends near total authority to the federal government over all "affairs" of Native nations and peoples, not just trade.[193]

While the power to regulate all affairs of Native nations and peoples may be incidental to a colonial or "trust" relationship, there appears to be

183. U.S. CONST. art. I, § 8, cl. 3.
184. *Id.* at art. II, § 2, cl. 2.
185. *Brackeen*, 599 U.S. at 274–75.
186. *Id.* at 272–76.
187. *Id.* at 275–76.
188. Talton v. Maves, 163 U.S. 376, 384 (1896); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).
189. Cherokee Nation v. Georgia, 30 U.S. 1, 18–19 (1831); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).
190. U.S. CONST. art. I, § 8, cl. 3.
191. 490 U.S. 163 (1989).
192. *Id.* at 192; U.S. CONST. art. I, § 8, cl. 3.
193. *Cotton Petroleum Corp.*, 490 U.S. at 192–93; *see also White Mountain Apache Tribe*, 448 U.S. at 142.

little support for expansion of the term "commerce" to include all of Native "affairs." Article IX of the Articles of Confederation, which preceded the Constitution, for example, provided for Congress to "have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any states."[194] The draft language of the Constitution initially empowered Congress "to regulate affairs with Indians," but this language was dropped when Indian Tribes were incorporated into the general interstate and international commerce provision.[195] The new nation's concern was not the internal affairs of Indian tribes, but interactions between Indians and (1) non-Indians as seen in *M'Intosh*,[196] (2) states as occurred in *Cherokee Nation*,[197] and (3) other European colonial powers.[198] Contemporaneous with the drafting of the Constitution and its Commerce Clause, Congress passed the Trade and Intercourse Act of 1790 which forbade anyone from engaging in trade with the Indian tribes without the approval of the United States.[199] It barred the purchase of any land from any Indian unless by public treaty under the authority of the United States.[200] The focus was on trade with Indians, not their non-commercial affairs.[201] It is considered a "practical and contemporaneous construction" of the Indian Commerce Clause.[202] The Act was renewed by Congress every two years until Congress enacted a permanent Trade and Intercourse Act in 1802.[203] None of these acts authorized federal interference with tribal affairs other than commerce and jurisdiction over Indians who committed *off-reservation* crimes.[204]

In *Worcester*, Chief Justice Marshall, interpreting a provision in the Treaty of Hopewell, between the United States and the Cherokee Nation, stated expansively that Congress "shall have the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs*, as they think proper."[205] The Treaty was signed in 1785, shortly prior to the drafting of the Constitution. Chief Justice Marshall interpreted the clause

194. ARTICLES OF CONFEDERATION of 1777, art. IX, para. 4.

195. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 321, 493 (Max Farrand ed., Yale University Press 1911); Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413, 444–46 (2021); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1022 (2015); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER U. L. REV. 201, 237–41 (2007).

196. Johnson v. M'Intosh, 21 U.S. 543, 573, 590 (1823); *see also, e.g.*, Seneca Nation of Indians v. Christy, 162 U.S. 283, 284–87 (1896).

197. Cherokee Nation v. Georgia, 30 U.S. 1, 1–3 (1831); *see also* Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 667–68 (1974).

198. *M'Intosh*, 21 U.S. at 573.

199. Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790).

200. *Id.*

201. *Brackeen*, 599 U.S. 255, 344–45 (2023) (Thomas, J., dissenting).

202. FELIX S. COHEN, NELL JESSUP NEWTON, & ROBERT T. ANDERSON, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 37 (2005).

203. Karl Oakes, Annotation, *Construction and Application of Non-Intercourse Act, Codified at 25 U.S.C.A. § 177, and Predecessor Enactments Barring Conveyances of Tribal Land to Non-Indians Unless Made or Ratified by Congress*, 73 A.L.R. Fed. 2d § 2 (2013).

204. *See generally* Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.

205. Worcester v. Georgia, 31 U.S. 515, 553 (1832) (emphasis added).

within the context of the relationship between the United States and Native nations as one of peace and protection:

> To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade . . . The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true, as respects the management of all their affairs. The most important of these, are the cession of their lands . . . . It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade.[206]

Thus, a proper interpretation of the term "commerce" as it appears in the Indian Commerce Clause would be matters or affairs involving trade with Indians rather than all, particularly non-commercial, affairs. Recently, in *Sackett*, the Court had another occasion to construe the meaning and scope of the term "commerce" within the Commerce Clause,[207] and rejected a broad interpretation in favor of one that required an actual connection with commerce.[208] In a concurring opinion Justice Thomas, joined by Justice Gorsuch, notes that the power to regulate commerce is a limited one which "comprehends the control *for that purpose*."[209] Justice Thomas decries "deeper problems with the Court's Commerce Clause jurisprudence" that "has significantly departed from the original meaning of the Constitution. . . . [T]he term 'commerce' [was] consistently used to mean trade or exchange—not all economically gainful activity that has some attenuated connection to trade or exchange."[210] Mere "effects" or remote connections with commerce were not within its scope.[211] In *United States v. Kagama*,[212] for example, the Court rejected "a very strained construction" of the Indian Commerce Clause that would include "a system of criminal laws . . . without any reference to their relation to any kind of commerce."[213]

Justice Thomas follows the same line of reasoning in his dissent in *Brackeen*: "First, the Indian Commerce Clause is about commerce, not

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206. *Id.* at 553–54.
207. *See* Sackett v. EPA, 143 S. Ct. 1322, 1345–46, 1348–49, 1358 (2023) (Thomas, J., concurring) (further discussing the meaning and scope of "commerce").
208. *Id.* at 1344.
209. *Id.* at 1346.
210. *Id.* at 1358 (second alteration in original) (quoting Gonzales v. Raich, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting)).
211. *Id.* at 1348 (Thomas, J., concurring).
212. 118 U.S. 375 (1886).
213. *Id.* at 378–79.

children."[214] At the time the Constitution was ratified, "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes."[215] Justice Thomas noted that "[E]ven under our most expansive Commerce Clause precedents, the Clause permits Congress to regulate only 'economic activity' like producing materials that will be sold or exchanged as a matter of commerce."[216] He concludes that due in particular to the drafters' decision not to include an "Indian affairs" power "there is no basis to stretch the Commerce Clause beyond its normal limits."[217] There is then no basis to extend the scope of commerce and Congressional power under the Indian Commerce Clause to the adoption of Native children and the ICWA.

Justice Barrett, in *Brackeen*, describes the relationship between the United States and the Native nations as one in which "the Federal Government has charged itself with 'moral obligations of the highest responsibility and trust' toward Indian tribes."[218] It is not comparable to a private trust relationship nor necessarily a fiduciary one, but is a general moral obligation assumed by the colonial power in response to the purported incompetent and dependent condition of Indian tribes and people.[219] The relationship was described by Chief Justice Marshall in *Cherokee Nation* as similar to a "guardianship":

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[220]

Justice Barrett cited no constitutional source to explain this federal responsibility.[221] Justice Thomas in his concurring opinion in *Arizona*,

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214. *Brackeen*, 599 U.S. 255, 335 (2023).

215. *Id.* at 351–52 (Thomas, J., dissenting); Sackett v. Environmental Protection Agency, 143 S. Ct. 1322, 1358 (2023).

216. *Brackeen*, 599 U.S. at 351 (Thomas, J., dissenting).

217. *Id.* at 354–55.

218. *Brackeen*, 599 U.S. at 1628; *see* United States v. Jicarilla Apache Nation, 564 U.S. 162, 176 (2011).

219. *Jicarilla*, 564 U.S. at 173, 174 ("Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law."); Arizona v. Navajo Nation, 599 U.S. 555, 565–67 (2023).

220. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); *see also Brackeen*, 599 U.S. at 357–58 (Thomas, J., dissenting).

221. *See Brackeen*, 599 U.S. at 360 (Thomas, J., dissenting).

found the Constitution's complete silence on any such generic trust relationship "troubling."[222]

It is understandable why Native nations and their counsel appear to have refashioned their arguments from one relying on the colonial federal domination implicit in the plenary power doctrine to one based on the colonial powers' moral trust obligations to protect the nations and peoples under its rule.[223] However, reliance on the trust relationship implicitly accepts not only colonial dominance and rule, but also a 200-year-old fundamentally racist status of incompetence and dependency under domestic law. In the Marshall Trilogy, beginning with *M'Intosh*, Chief Justice Marshall, writing on behalf of a unanimous Court, found "some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them."[224] That "character" is described by him as one of uncivilized heathens (non-Christian) and fierce savages.[225] In *Cherokee Nation*, Chief Justice Marshall described Indian Tribes as uncivilized "domestic dependent nations" in a "state of pupilage" by their guardian, the United States.[226] In *Worcester*, Indians are referred to a "barbarous" nations, "savages," needing civilizing and conversion to Christianity.[227] In other words, the trust relationship arises out of a need for Indian "wards" to be protected by their colonial guardian from their own conferred incompetency.[228]

The flip side of the trust relationship is that it provides little guarantee that the federal guardian will always act in the best interest of Indian tribes and people when exercising its plenary authority over them.[229] In *United States v. Jicarilla Apache Nation*,[230] Justice Alito pointed out that "the Government 'has a real and direct interest' in the guardianship it exercises over the Indian tribes; 'the interest is one which is vested in it as a sovereign.' This is especially so because the government has often structured the trust relationship to pursue its own policy goals."[231] While formally acting as the "guardian" or trustee, the United States may assert its own sovereign interest.[232] The relationship, by definition, can deprive Indian

222. *Arizona*, 599 U.S. at 572–73 (Thomas, J., concurring).
223. *See Brackeen*, 599 U.S. at 272, 291–96; *id.* at 314–19 (Gorsuch, J., concurring).
224. Johnson v. M'Intosh, 21 U.S. 543, 589 (1823).
225. *Id.* at 573, 577, 590.
226. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). The Cherokees were at the time far from "uncivilized" under Euro-American standards or in need of pupilage by the United States. *See* Mary Young, *The Cherokee Nation: Mirror of the Republic*, 33 AM. Q. 502, 502–05 (1981). They were Christian, plantation owners, and slave owners with their own alphabet and a government and judiciary modeled after that of the United States. *See id.* Ironically, the United States referred to them as one of the Five *Civilized* Tribes when they were removed to Oklahoma after this decision. *See id.*
227. Worcester v. Georgia, 31 U.S. 515, 545–46 (1832).
228. Tiger v. Western Inv. Co., 221 U.S. 286, 313–14 (1911).
229. United States v. Jicarilla Apache Nation, 564 U.S. 162, 175 (2011); Arizona v. Navajo Nation, 599 U.S. 555, 572–73 (2016) (Thomas, J., concurring).
230. 564 U.S. 162 (2011).
231. *Id.*
232. *Id.* at 176.

wards of standing and actually facilitate abuse by the guardian exercising plenary control over their lives and property.[233]

Under domestic trust law, the ward's legal personality is largely denied in favor of the guardian.[234] Further, the concoction of a relationship of tutelage by the colonial power deprived all Indian nations and peoples of their international personality as well.[235] By imposing as a matter of domestic law a trust relationship upon Indian nations and peoples, the United States assumed authority to act in the stead of its purportedly incompetent Indian wards over their residual lands, resources, and other assets.[236] The trust relationship is effectively a means by which the colonial power maintains its continuing dominance and control over Native nations and their people, lands, natural resources, and other assets.[237] Indian nations and people are the only race, ethnicity, peoples, and nations categorically subject to trust domination and deprivation of their independent legal persona and rights by the United States.[238] The trust doctrine is rooted in both racism and colonial domination.

Justice Barrett further indicates that the trust relationship "informs" the federal government's exercise of its plenary power.[239] In other words, the government's assumption of Indian trust responsibility is itself an exercise of the plenary authority of the United States.[240] As such, the assumption and exercise of trust responsibility is subject to the plenary will of Congress: "The Federal Government owes judicially enforceable duties to a tribe 'only to the extent it expressly accepts those responsibilities.'"[241] A

233. Heckman v. United States, 224 U.S. 413, 445–46 (1912); United States v. Sandoval, 231 U.S. 28, 48 (1913). The nonbeneficial abuse of this "trust" relationship was exposed in the *Cobell* litigation which resulted in a $3.4 billion settlement for just part of the losses suffered by the Indigenous "wards" of the United States in the mismanagement of their property interests. *See* Cobell v. Salazar, 573 F.3d 808, 810 (D.D.C. 2009); Class Action Settlement Agreement at 6, Cobell v. Salazar, 573 F.3d 808 (D.D.C. 2009) (No. 1:96CV01285-JR).

234. White Mountain Apache Tribe v. Bracker, 537 U.S. 465, 474 n. 3 (2003) (domestic trust law provides "[a]ll of the necessary elements of a common law trust, there is no need to look elsewhere for the source of a trust relationship. We have recognized a general trust relationship since 1831.").

235. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 54 (1831). The United States Congress sealed the deprivation of an international persona of indigenous nations with the Act of 1871 which declared that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power whom the United States may contract by treaty" and ended the practice of treaty-making between the United States and Indigenous Nations. Indian Appropriations Act, 41st Congress, Sess. III, Ch. 119–20 (March 3, 1871) (codified as amended in 25 U.S.C. Sec. 71); *see also* United States v. Lara, 541 U.S. 193, 202–03 (2004).

236. United States v. Sioux Nation of Indians, 448 U.S. 371, 409 n.26 (1980); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 356 (1962).

237. Nadeau v. Union Pac. R.R. Co., 253 U.S. 442, 445–46 (1920) (affirming the United States' power over indigenous lands); *see also* Secretary, U.S. Dep't of the Interior, *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries*, Order No. 3335 (Aug. 20, 2014).

238. The Supreme Court created a whole body of colonial law—federal Indian law—that applies solely to Indian nations and peoples. *See* Johnson v. M'Intosh, 21 U.S. 543, 591 (1823) ("[t]he resort to some new and different rule"); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coghlin, 599 U.S. 382, 410–12 (2023) (Gorsuch, J., dissenting).

239. *Brackeen*, 599 U.S. 255, 274 (2023).

240. United States v. Jicarilla Apache Nation, 564 U.S. 162, 175 (2011).

241. Arizona v. Navajo Nation, 599 U.S. 555, 563–64 (2023) (quoting *Jicarilla*, 564 U.S. at 177).

more conservative, libertarian, or assimilationist Congress in the exercise of its plenary authority could, at any time, simply repeal the ICWA and eliminate special "protections" of Indian tribes as it did during the Termination period of the 1950s and 1960s.[242] It is not the trust relationship but the federal government's exercise of its exclusive plenary authority over Indian affairs coupled with the Supremacy Clause[243] that preempts and defeats state interference with Indian policies.

The Constitution's Treaty Clause was also mentioned by Justice Barrett as a potential source of authority for the ICWA.[244] While discarded because it does not authorize the Congressional legislative action necessary to enforce the Act,[245] treaties of protection with Indian tribes have been suggested as sources supporting the plenary authority of the United States, as well as its trust responsibility to Indian tribes. In *Arizona*, the Court rejected general trust obligations of the United States under a treaty with the Navajo Nation.[246] It held that obligations flowing from a treaty must be express and specific.[247]

In *Worcester*, Chief Justice Marshall construed the scope of authority pursuant to treaties of protection and opined that such treaties be construed in context:

> The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector. . . . This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.[248]
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> . . . .
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> [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self-government and

242. H. Con. Res. 108, 67 Stat. B132 Aug. 1, 1953; Clayton R. Koppes, *From New Deal to Termination: Liberalism and Indian Policy, 1933–1953*, 46 PAC. HIST. REV. 543, 545–46 (1977); Steven C. Schulte, *Removing the Yoke of Government: E.Y. Berry and the Origins of Indian Termination Policy*, 14 S.D. HIST. SOC'Y 48, 49–50 (1984); *Arizona*, 599 U.S. at 588. The Court issued a haunting reminder of Congressional power over Native nations in the otherwise laudable affirmation of the survival of Native sovereignty in McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020).

243. *Brackeen*, 599 U.S. at 286–88; U.S. CONST. art. VI, cl. 2.

244. *Brackeen*, 599 U.S. at 274; *see also* United States v. Lara, 541 U.S. 193, 201 (2004).

245. *Brackeen*, 599 U.S. at 274.

246. *Arizona*, 599 U.S. at 568.

247. *Id.*

248. Worcester v. Georgia, 31 U.S. 515, 555 (1832).

> sovereign and independent authority are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.[249]

"The Indians perceived in this protection, only what was beneficial to themselves—an engagement to punish aggressions on them."[250] Chief Justice Marshall cites to Emer de Vattel, a founder of modern international law, to describe the law of treaties as it existed at that time. Vattel opines that a nation that enters into a treaty of protection "does not at all derogate from her sovereignty."[251] Instead, when the stronger nation fails its obligation to protect the weaker nation "it loses all the rights it had acquired by the convention," and the weaker nation "re-enters into the possession of all its rights, and recovers its independence, or its liberty."[252] "[I]f the more powerful nation should assume a greater authority over the weaker one than the treaty of protection or submission allows, the latter may consider the treaty as broken . . . ."[253] Thus, a treaty of protection cannot be construed as granting the stronger nation plenary power over a weaker one and cannot be viewed as a source for such power.

VI. *BRACKEEN* UNDER COLONIALISM

The remaining potential source for Congress's plenary power identified by Justice Barrett was described as implicit "preconstitutional powers necessarily inherent in any Federal Government, . . . concomitants of nationality" when "Indian affairs were more an aspect of military or foreign policy than a subject of domestic or municipal law."[254] This describes the elephant in the room—the existence of a colonial relationship between a dominant nation and the weaker nations that are found within its claimed borders. The source of plenary power exercised over the original nations and peoples is that of an imperial power and colonial ruler.

The source of "trust responsibility" can be also found within a colonial analysis. As Chief Justice Marshall remarked in *M'Intosh*: "When the conquest is complete, and the conquered inhabitants can be . . . safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power."[255] Or as Vattel put it: "Conquest (says an excellent man) ever leaves behind it an immense debt, the discharge of which is absolutely necessary to acquit the

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249. *Id.* at 520.
250. *Id.* at 552.
251. EMER DE VATTEL, THE LAW OF NATIONS 207 (Bella Kapossy & Richard Whatmore, eds., 2008) (1758) [hereinafter VATTEL].
252. *Id.* at 208.
253. *Id.* at 209.
254. *Brackeen*, 599 U.S. 255, 274 (2023) (quoting United States v. Lara, 541 U.S. 193, 201 (2004)); *see also* United States v. Kagama, 118 U.S. 375, 384–85 (1886).
255. Johnson v. M'Intosh, 21 U.S. 543, 589–90.

conqueror in the eye of humanity."[256] Later, such humanitarian principles became the basis of the modern international law of occupation which also recognizes a trust obligation.[257]

Through the Marshall Trilogy, the Court created and contextualized federal Indian law within the invasion and occupation of the territories of preexisting, fully sovereign and independent Native nations and peoples.[258] Chief Justice Marshall described the taking of those territories under the so-called Doctrine of Discovery by the imperial nations of Europe, the arrival of settlers from Europe, and the establishment of "colonies" on Native lands.[259] He elaborates on the imposition of a paternal relationship by the United States upon Native nations and peoples as "ward[s]," as "domestic, dependent, nations," whereby the United States as guardian claims and exercises plenary authority over all Indian nations and peoples.[260] He also acknowledges that Native nations have engaged in wars against the invading imperial powers, resisted assimilation, and retained to the extent they could, their separate territories, lands, culture, governance, laws, and spirituality.[261]

What the Marshall Trilogy describes and formally establishes under domestic law is a classic imperial or "colonial" relationship. "Colonialism" has been defined as "the act of power and domination of one nation, by acquiring or maintaining full or partial control over another sovereign nation."[262] Fundamentally, it is a form of domination.[263] As the late Professor Patrick Wolfe opined in his seminal essay, *Settler Colonialism and the Elimination of the Native*, colonialism is not an "event," it is a structure.[264] He articulates an influential theory of the "logic of elimination," which constitutes settler colonialism as an ongoing structure of power that systematically erases indigenous peoples from the land (through genocide, assimilation, and other means), and replaces them with settlers from around the world.[265] In other words, the policies, programs, and acts of a colonial state, like the United States, and its institutions regarding

256. VATTEL, *supra* note 251, at 600.

257. *See, e.g.*, The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex, Regulations concerning the Laws and Customs of War on Land, art. 43, Oct. 1907, 187 CTS 227.

258. *M'Intosh*, 21 U.S. at 573–77; Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831); Worcester v. Georgia, 31 U.S. 515, 543–47, 552–53, 561 (1832).

259. *M'Intosh*, 21 U.S. at 573.

260. *Cherokee Nation*, 30 U.S. at 17.

261. *Id.* at 9; *M'Intosh*, 21 U.S. at 546; *Worcester*, 31 U.S. at 545.

262. *Colonialism*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/colonialism (last visited Jan. 24, 2024); *see also* Annie Stilz, On Colonialism and Self-Determination (Feb. 15, 2013) (unpublished paper) (on file with Princeton University); Ronald J. Horvath, *A Definition of Colonialism*, 13 CURRENT ANTHROPOLOGY 45, 46 (1972) ("the control by individuals or groups over the territory and/or behavior of other individual or groups").

263. Horvath, *supra* note 262, at 46.

264. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. OF GENOCIDE RSCH., 387, 388 (2006); *see also* J. Kēhaulani Kauanui, "*A Structure, Not an Event": Settler Colonialism and Enduring Indigeneity*, LATERAL: J. CULTURAL STUD. ASS'N, Spring 2016 (noting the continuing nature of the colonization of indigenous peoples).

265. Wolfe, *supra* note 264, at 388.

colonized peoples, are structurally and institutionally infused with continuing colonial domination and racial/ethnic discrimination. It is not just history, but a continuing, currently existing, oppressive relationship.[266] That is readily seen within the context of the "federal Indian law" of the United States[267] discussed above, which Professor Emeritus Peter P. d'Errico refers to as federal "anti-Indian" law.[268] Where colonialism and colonial domination are focused, as here, on a particular race or ethnicity, it is also a form or manifestation of racism.[269]

The systemic and institutionalized elimination of the Native under settler colonialism, and the resulting destruction of Native families, communities, peoples, and nations has been and is being accomplished through many different means. Since the very beginning of the colonial invasion of Americas by the imperial nations of Europe, a primary method of elimination has been the destruction of Native identity through forced assimilation.[270] General Pratt's infamous Indian boarding school slogan: "kill the Indian, save the man."[271]

Native children have always been at the heart of this.[272] When Columbus and the Spanish first arrived in the Bagua (Caribbean in Taíno) in 1492, he took Natives captive, forced them to learn Spanish and act as interpreters, and took them back to Europe as examples of potential slaves in the Indies. He established a slave trade resulting in the transport of an estimated 2.5 million Native slaves from the New World to Europe.[273] It was reported that Columbus gifted Taíno women to his crewmen and sold young Taíno into sexual slavery.[274] He took ten Native captives with him back to Spain on his return from his first voyage to be trained as

266. *See* Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOCIO. OF RACE AND ETHNICITY 54, 57 (2015); Matthew Wildcat, *Fearing Social and Cultural Death: Genocide and Elimination in Settler Colonial Canada—An Indigenous Perspective*, 17 J. GENOCIDE RSCH 391, 406 (2015); *see also G.A. Res. 48/7*, Preamble ¶ 1, 2 (Oct. 8, 2021).

267. *See* NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 2–4, 11, 32–33, 71 (2020).

268. PETER P. D'ERRICO, FEDERAL ANTI-INDIAN LAW, THE LEGAL ENTRAPMENT OF INDIGENOUS PEOPLES xxii, 34–36 (2022).

269. U.N. Int'l Convention on the Elimination of All Forms of Racial Discrimination, U.N. DOC. Preamble ¶ 1, 2 (Vol. 660), at 212 (Dec. 21, 1995) (signed by the United States in 1966 and ratified by Congress in 1994) [hereinafter ICERD]; U.N. Convention On the Elimination Of all Forms of Racial Discrimination, 68th Sess., Decision 1(68), U.N. DOC. (8 March 2006) [hereinafter UNCERD].

270. *See supra* Part II.

271. *See* Pratt, *supra* note 15.

272. Christina Firpo & Margaret Jacobs, *Taking Children, Ruling Colonies: Child Removal and Colonial Subjugation in Australia, Canada, French Indochina, and the United States, 1870-1950s*, 29 J. OF WORLD HIST. 529, 530–31 (2018).

273. ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA 5 (2016).

274. Aura Bogado, *Here's The Real Story of Columbus that People Prefer to Ignore*, GRIST (Oct. 12, 2015), https://grist.org/politics/heres-the-real-story-of-columbus-that-people-prefer-to-ignore/; *see* Chief Petro Guanikeyu Torres, *The Historical Roots of a Nation*, HARTFORD WEB PUBL'G, http://www.hartford-hwp.com/Taino/docs/Tnation.html (last visited Jan. 24, 2024).

interpreters.[275] One of them, a native boy named Guaikan from the island of Guanahani, later became Columbus's adopted son, christened Diego Colon.[276]

Spain promulgated the very first laws regarding the Native peoples of Abla Yala, the Leyes of Burgos of 1512 (Laws of Burgos). Under the Laws of Burgos, the sons of the Taíno chiefs were taken and given to the Catholic priests to be forcibly converted and educated in the Catholic religion before being returned their tribes. By converting the chiefs' sons before returning them, the Spanish began converting the Taíno peoples to Christianity and the rule of the Universal Church from within their own communities.

> Also, we order and command that now and in the future all the sons of chiefs of the said Island, of the age of thirteen or under, shall be given to the friars of the Order of St. Francis who may reside on the said Island, as the King my Lord has commanded in one of his decrees, so that the said friars may teach them to read and write, and all the other things of our Holy Catholic Faith; and they shall keep them for four years and then return them to the persons who have them in encomienda, so that these sons of chiefs may teach the said Indians, for the Indians will accept it more readily from them; and if the said chiefs should have two sons they shall give one to the said friars, and the other we command shall be the one who is to be taught by the person who has him in encomienda.[277]

The theft and enslavement of Native children and other Native people by the Spanish and the Catholic Church continued for the next 350 years.[278] Even after Spain abolished slavery, a large Indian slave trade flourished in Spain and North America through the 17th century, and into the 18th and 19th centuries through indentured peonage.[279] Known as "Genizaros," there were anywhere from 50,000 to 70,000 slaves.[280] The term described Christian captives who were forcibly abducted as children.[281] Hundreds of Genizaro slaves were purchased from the Spanish by Mormons who believed Native peoples were fallen Lamanites of the Book of

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275. Christine Adams, *24—Columbus's Interpreters: Some Ran Away, Some Stayed, Many Died*, LOOKING FOR INTERPRETER ZERO (Mar. 11, 2023), https://interpreter-zero.org/early-interpreter-interpreter-zero/24-columbuss-interpreters-some-ran-some-stayed-many-died/.

276. Torres, *supra* note 274, at 2–5; José Barreiro, *From the Shadows of History: Taino at the Vatican*, AM. INDIAN, Fall 2013, at 1–6.

277. THE LAWS OF BURGOS OF 1512–1513: ROYAL ORDINANCES FOR THE GOOD GOVERNMENT AND TREATMENT OF THE INDIANS 26–27 (Lesley Byrd Simpson, trans., 1960).

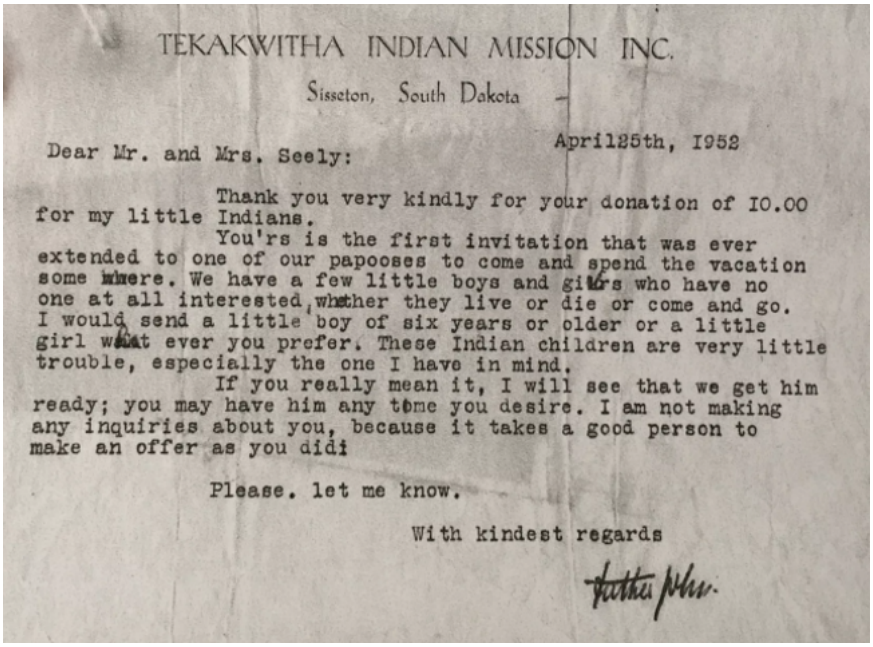
278. RESÉNDEZ, *supra* note 273, at 4; GUY NIXON, SLAVERY IN THE WEST: THE UNTOLD STORY OF THE SLAVERY OF NATIVE AMERICANS IN THE WEST 6 (2012); BILL PIATT & MOISES GONZALES, SLAVERY IN THE SOUTHWEST: GENÍZARO IDENTITY, DIGNITY AND THE LAW 32 (2019); CASTILLO, *supra* note 11, at 5; COSTO & COSTO, *supra* note 11, at 3.

279. PIATT & GONZALES, *supra* note 278, at 20–33.

280. *Id.* at 31.

281. *Id.* at 23.

Mormon that should be brought back to the Mormon Church.[282] In addition to the Spanish, the Dutch, English, French, Americans, and others also traded native slaves.[283] In 1838, the Supreme Court upheld the slave status of a Native woman, Marguerite, because she was the child of a Native slave.[284]



TEKAKWITHA INDIAN MISSION INC.

Sisseton, South Dakota

April25th, I952

Dear Mr. and Mrs. Seely:

Thank you very kindly for your donation of IO.OO for my little Indians.

You'rs is the first invitation that was ever extended to one of our papooses to come and spend the vacation some where. We have a few little boys and girls who have no one at all interested, whether they live or die or come and go. I would send a little boy of six years or older or a little girl what ever you prefer. These Indian children are very little trouble, especially the one I have in mind.

If you really mean it, I will see that we get him ready; you may have him any time you desire. I am not making any inquiries about you, because it takes a good person to make an offer as you didi

Please. let me know.

With kindest regards

Father John.

"Part of the record of a single Lakota child, Dennis Isaac Seely, kidnapped from his parents, sent to a Catholic mission run by a sexual predator, and sold to white 'parents' to use as cheap labor."[285]

In 1890, a young girl, one of the few survivors of the Wounded Knee Massacre, who had been recovered from under her mother's body, was purchased by Brigadier General Leonard Colby as a trophy of war.[286] She became known as Zintkála Nuni, Lost Bird of Wounded Knee.[287] The previously described assimilationist theft of Native children during the 19th and 20th centuries for boarding schools and non-Native adoption were manifestations of colonialism and racism.[288] So too was the erasure of

282. Michael Kay Bennion, Captivity, Adoption, Marriage and Identity: Native American Children in Mormon Homes, 1847–1900, at 1–3 (Aug. 1, 2012) (M.A. thesis, University of Nevada, Las Vegas) (on file with the University Libraries, University of Nevada, Las Vegas).

283. *See generally* BARBARA J. OLEXER, THE ENSLAVEMENT OF THE AMERICAN INDIAN IN COLONIAL TIMES 4–25 (2d prtg. 2005) (1982).

284. Choteau v. Marguerite, 37 U.S. 507, 507, 509–10 (1838).

285. Beebugmom, *527 Years*, RAGE. CREATION – JOY (Nov. 5, 2018), https://ragecreation-joy.wordpress.com/2018/11/05/527-years/.

286. RENÉE SANSOM FLOOD, LOST BIRD OF WOUNDED KNEE: SPIRIT OF THE LAKOTA 76–79 (1995).

287. *Id.* at 76–77.

288. *See supra* text accompanying notes 14–25.

future generations of Native children through the sterilization of Native women.[289]

The use of children as weapons of war and colonial occupation continues. In November 2022, several United Nations experts issued a letter to China expressing their concerns over China's large-scale campaign to assimilate Tibetan children.[290] During its invasion of Ukraine, Russia took hundreds of thousands of children from Ukraine and placed them in Russian homes and schools.[291] On March 17, 2023, the International Criminal Court issued arrest warrants for Russian President Vladimir Putin and his Commissioner for Children's Rights for the war crime of unlawful deportation of children from occupied Ukraine.[292]

Native nations and people understand that they are subject to colonial domination by the United States and that the theft of their children was and continues to be a manifestation of colonialism and forced assimilation.[293] Native nations understand that the ICWA is in part a barrier to such forced assimilation.[294] They comprehend that doctrines of federal Indian law, including the doctrines of "discovery," plenary power, and trust, are expressions of colonial domination and racism.[295] Colonialism is fundamentally an international law and human rights issue. Yet, none of the submissions to the Supreme Court in *Brackeen*, including the amicus briefs, analyze and argue the issues raised by the ICWA from a colonial or anti-colonial, human rights, or international law perspective.[296] The arguments touch on nation-to-nation relationships, the protection of Native

289. *See supra* text accompanying notes 31–38.

290. Fernand de Varennes, Special Rapporteur on minority issues, Alexandra Xanthaki, Special Rapporteur in the field of cultural rights, Farida Shaheed, Special Rapporteur on the right to education, & Nazila Ghanea, Special Rapporteur on freedom of religion or belief, Joint Letter of Allegation addressed to the State Councilor and Minister for Foreign Affairs, U.N. Doc. CHN 6/2022, at 1–7 (Nov. 11, 2022); Press Release, Special Proc., *China: UN Experts Alarmed by Separation of 1 Million Tibetan Children from Families and Forced Assimilation at Residential Schools*, U.N. Press Release (Feb. 6, 2023).

291. Lidia Kelly, *Moscow Says 700,000 Children From Ukraine Conflict Zones Now in Russia*, REUTERS (July 3, 2023, 2:29 PM), https://www.reuters.com/world/europe/moscow-says-700000-children-ukraine-conflict-zones-now-russia-2023-07-03/#:~:text=%22In%20recent%20years%2C%2070 0%2C000%20children,neighbour%20Ukraine%20in%20February%202022.; Sarah El Deeb, Anastasiia Shvets, & Elizaveta Tilna, *How Moscow Grabs Ukrainian Kids and Makes Them Russians*, AP (Mar. 17, 2023, 2:45 PM), https://apnews.com/article/ukrainian-children-russia-7493cb22c9086c6293c1ac7986d85ef6.

292. Press Release, Int'l Crim. Ct., *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

293. *See, e.g.*, Janine Jackson, *'A Crucial Part of Colonization Is Taking Our Children*,*'* FAIR (Dec. 13, 2022), https://fair.org/home/a-crucial-part-of-colonization-is-taking-our-children/.

294. Brief of 497 Indian Tribes & 62 Tribal & Indian Organizations as Amici Curiae in Support of Federal & Tribal Defendants at 4–13, *Brackeen*, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, & 21-380).

295. PETER P. D'ERRICO, FEDERAL ANTI-INDIAN LAW: THE LEGAL ENTRAPMENT OF INDIGENOUS PEOPLES xxi–xxiii (2022); WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 15–22 (2010).

296. *See generally* Briefs of Amici Curiae and Parties, *Brackeen*, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, & 21-380).

nations and sovereignty, treaty obligations, the survival of Native peoples and their culture, and the transnational adoption of children. These issues would be better treated and served under principles of international law rather than through a colonial power's own domestic law.

There is a great and tragic irony in colonized and oppressed peoples having to rely on the domination doctrines of a colonial power for protection for fear of offending its high court by exposing and challenging that colonial and racist relationship.[297] The United States is a colonial empire that exercises the plenary power of colonial rule over almost 600 Native nations and peoples.[298] Colonialism "*in all its forms and manifestations*" has been condemned by the United Nations for over seventy years.[299] In 1952, for example, in regard to colonized peoples, and citing the United Nations' Charter provision for the "equal rights . . . of peoples," the United Nations General Assembly acknowledged that "the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights."[300] On December 14, 1960, the General Assembly published UNGA Resolution 1514, reaffirming "the equal rights of . . . nations large and small," and acknowledging that "all peoples have an ***inalienable*** right to complete freedom, the exercise of their sovereignty and the integrity of their national territory." The General Assembly further recognized "that the peoples of the world ardently desire the end of colonialism in all its manifestations," and proclaimed "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations."[301] The United Nations General Assembly declared that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations."[302] On December 10, 2020, the United Nations General Assembly resolved its *Fourth International Declade for the Eradication of Colonialism*, reaffirming "its determination to continue to take all steps to necessary to bring about the complete and speedy

297. The author prepared an international law, human rights, and treaty rights amicus argument supporting ICWA as a partial barrier to colonial domination and assimilation on behalf of sever Native traditional bodies in Brackeen. However, counsel for a major Native group amicus requested that it not be submitted out of concern that it may offend one of the conservative justices on the Court and lessen their chance of success. On the 200th anniversary of the Court's formalization of the colonial relationship through creation of federal Indian law, it is time to attain a new relationship that satisfies international law and human rights standards.

298. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554–58 (Jan. 29, 2021).

299. G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, at 67 (Dec. 14, 1960) (emphasis added); *see also* G.A. Res. 1541 (XV), annex, Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called For Under Article 73 e of the Charter, at 29–30 (Dec. 15, 1960); G.A. Res. 1654 (XVI), at 65, ¶ 1 (Nov. 27, 1961).

300. G.A. Res. 637 (VII) (A), The Right of Peoples and Nations to Self-Determination, at 26 (Dec. 16, 1952).

301. G.A. Res. 1514, *supra* note 299, at 66–67 (emphasis added); *see also* U.N. Charter at 2, art. 1, ¶ 2.

302. G.A. Res. 1514, *supra* note 299, ¶ 1.

eradication of colonialism."[303] The ICWA can be construed as a step in that direction and a partial fulfillment of the United States' decolonization obligations.

In 1965, the United Nations General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which the United States signed and ratified.[304] The Convention expressly acknowledged that "the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that [UNGA Resolution 1514] . . . has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end."[305] It affirmed the "necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations," and declared that "there is no justification for racial discrimination, in theory or in practice, anywhere."[306] The "State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms"[307] and to "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law."[308] Tasked with enforcing the ICERD, in 1997 the United Nations Committee on the Elimination of Racial Discrimination (UNCERD) issued General Recommendation XXIII affirming that "discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination."[309]

On March 3, 2006, the UNCERD issued a decision affirming that the domestic law of the United States regarding Indigenous land rights "'did not comply with contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests,' as stressed by the Inter-American Commission on Human Rights in the case *Mary and Carrie Dann v. United States* (Case 11.140, 27 December 2002)."[310] In so ruling, the UNCERD recognized that the surviving and continuing colonial relationship between the colonial states and Indigenous peoples and nations is a racist and unlawfully discriminatory one.[311] The collective right of a peoples to be free from racial or ethnic

303. G.A. Res. 75/123, at 2 (Dec. 10, 2020).
304. ICERD, *supra* note 269 (signed by the United States in 1966 and ratified in 1994).
305. *Id.* at 2.
306. *Id.* at 2.
307. *Id.* at art. 2, ¶ 1.
308. *Id.* at art. 5.
309. Rep. of the Comm. on the Elimination of Racial Discrimination, annex V, ¶ 1, U.N. Doc. A/52/18 (1997).
310. UNCERD, *supra* note 269, ¶ 6 (quoting Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 72/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 ¶ 139 (2003), http://cidh.org/annualrep/2002eng/USA.11140.htm).
311. *See* Mabo v. Queensland (1989) 166 CLR 186 (Austl. Dec. 8, 1988), https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1988/69.html?context=1;query=mabo%20v.%20quee

discrimination is recognized under international law as *jus cogens* rules, preemptory norms, to which no derogation by any state is permitted and of which no treaty or law is required to establish.[312]

In 2007, the United Nations General Assembly issued the Declaration on the Rights of Indigenous Peoples (UNDRIP).[313] The UNDRIP does not establish or state any new rights for indigenous peoples, but instead declares the existing rights of peoples to apply equally to indigenous peoples, "in accordance with the [United Nations] Charter."[314] Borrowing from the Charter, it declares that, "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity."[315] From the ICERD, the UNDRIP notes that "all *doctrines*, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and social unjust."[316]

Notably, the UNDRIP expressly acknowledges Indigenous peoples as victims of "colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."[317] It declares that, "Indigenous peoples have the right to the **full enjoyment**, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law,"[318] including—as "minimum standards"[319]—the rights to "recognition, observance and enforcement of treaties," to indigenous governance and customary law, to dignity, to indigenous culture and spirituality, to not to be

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nsland;mask_path=au/cases/cth/HCA (applying the ICERD and ruling that the denial of the recognition of customary indigenous land rights was racially discriminatory and a violation of the ICERD) (cited in Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 72/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 ¶ 58 n.16 (2003), http://cidh.org/annualrep/2002eng/USA.11140.htm); *see also* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 592–93 (2009).

312. *See* U.N. Charter at art. 1, ¶ 2; ICERD, *supra* note 269, at art. 1, ¶ 1; *see also* Convention on the Prevention and Punishment of the Crime of Genocide, arts. I–II, *opened for signature* Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277; G.A. Res. 1514, *supra* note 299, at 66, ¶ 2; G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, arts. 1–3 (Sep. 13, 2007) [hereinafter UNDRIP]; Vienna Convention on the Law of Treaties, art. 64, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, 294, ¶¶ 3, 5 (Feb. 25, 2019) (separate opinion by Robinson, J.); Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 55, 59 (Oct. 15); Zhang v. Zemin [2010] NSWCA 255, ¶¶ 120, 123.

313. UNDRIP, *supra* note 312.

314. *Id.* at annex at 1.

315. *Id.* at annex at 1, art. 2; U.N. Charter at 2, art. 1, ¶ 2.

316. UNDRIP, *supra* note 312, annex at 2 (emphasis added); ICERD, *supra* note 269, at 2.

317. UNDRIP, *supra* note 312, annex at 2, art. 7, ¶ 2, arts. 8, 10, 14 (emphasis added).

318. *Id.* at annex art. 1 (emphasis added).

319. *Id.* at annex art. 43.

subject to forced assimilation or destruction of their culture, to life and health, and to effective remedies to protect their rights.[320]

The Organization of American States (OAS) human rights instruments also define and secure the rights of Indigenous nations and peoples of the Americas. The OAS Charter of 1948, signed and ratified by the United States,[321] affirms "international law" as the standard of state conduct, including "the faithful fulfillment [by member states] of obligations derived from treaties and other sources of international law."[322] It endorses "social justice" and proclaims the "fundamental rights of the individual without distinction as to race, nationality, creed, or sex."[323] The 1948 American Declaration of the Rights and Duties of Man (American Declaration), primarily controlled by the OAS Charter, secures among other rights the rights to life, liberty, security, equality, religion and spiritual development, property, heath, education, culture, a juridical personality, and governance.[324]

Colonialism, and racism, in *any* "form or manifestation," by their very definitions violate the fundamental, inalienable rights to life (i.e., genocide, ethnocide, right to collective existence),[325] liberty (i.e., freedom from alien domination or rule),[326] security (i.e., freedom from territorial invasion, theft of lands and resources, alien rule),[327] dignity (i.e.,

320. *See id.* at arts. 26.1, 32.1 (property and resources), art. 37, pmbl. (treaties), arts. 4, 18, 20.1, 32.2, 33, 34, 35 (governance), art. 27 (customary law), arts. 10, 19, 32.2 (free, prior, and informed consent), arts. 6, 9, 33 (nationality), art. 15 (dignity), arts. 11, 12, 13, 16, 24.1, 25, 31, 34 (culture and spirituality), art. 8.1 (freedom from forced assimilation and culturecide), art. 7 (life), arts. 24, 29 (health), arts. 8.2, 11.2, 15.2, 20.2, 26.3, 28, 31.2, 38, 40 (effective remedies).

321. Signed on April 30, 1948, and ratified by the U.S. President on June 15, 1951. ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN TREATIES SIGNATORIES AND RATIFICATIONS (1948), https://www.oas.org/en/sla/dil/inter_american_treaties_signatories_member_states_USA.asp.

322. International Conference of American States, *Charter of the Organization of American States*, arts. 3(a), 3(b) (Apr. 30, 1948) [hereinafter *OAS Charter*].

323. *Id.* at arts. 3(j), 3(l).

324. Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man*, pmbl. (religion/spirituality and culture), art. 1 (life), art. 2 (equality), art. 3 (religion/spirituality), art. 11 (health), art. 12 (education), art. 13 (culture), art. 17 (juridical personality), art. 19 (nationality), art. 20 (governance), art. 23 (property) (May 2, 1948).

325. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948) [hereinafter UDHR]; G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, art. 6.1 (Dec. 16, 1966) [hereinafter ICCPR].

326. UDHR, *supra* note 325, at art. 3; G.A. Res. 1514, *supra* note 299, at pmbl. ("complete freedom"); ICCPR, *supra* note 325, at pmbl., art. 9.1.

327. UDHR, *supra* note 325, at art. 3; ICERD, *supra* note 269, at art. 5(b); ICCPR, *supra* note 325, at pmbl. (the "inalienable rights of all members of the human family" "derive from the inherent dignity of the human person"), art. 9.1.

denial of sovereignty and nationality, culturecide),[328] and equality[329] of nations and peoples.[330]

Colonialism is itself a violation of peoples to be free of subjection to alien subjugation, domination, or exploitation,[331] and of racial or ethnic discrimination in any form or manifestation.[332] From these fundamental rights the collective rights of indigenous peoples and nations to a juridical personality;[333] an indigenous nationality;[334] territory;[335] free, prior and informed consent as to all matters that affect them; customary governance and laws;[336] natural resources;[337] culture and religion;[338] an indigenous education;[339] economic security;[340] health (clean environment);[341] effective remedy for acts violating fundamental rights;[342] and more are derived.

As declared in the Vienna Declaration and recalled in the American Declaration on the Rights of Indigenous Peoples, human rights do not stand alone but are universal, inseparable, and interdependent under international law.[343] For example, the "legacies of colonialism" have been recently recognized by the United Nations Human Rights Council as having negative impacts on the enjoyment of human rights.[344]

VII. *BRACKEEN* AND THE COLLECTIVE HUMAN RIGHTS OF NATIVE NATIONS AND PEOPLES

The theft of Native children through non-Native adoption is an act of forced assimilation and ethnocide (also referred to as "cultural genocide"). Many Native nations and people view the theft of their children as

328. UDHR, *supra* note 325, at arts. 5–6; ACARD, pmbl. (affirm same in UDHR, the American Declaration, American Convention, and the ICERD); ICERD, *supra* note 269, at pmbl.; ICCPR, *supra* note 325, at arts. 7–10; G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social, and Cultural Rights, pmbl. (Dec. 16, 1966) [hereinafter *ICESCR*].

329. UDHR, *supra* note 325, at arts. 1–2, 7; ICERD, *supra* note 269, at pmbl., art. 5(a); ICCPR, *supra* note 325, at arts. 3, 14.1, 26.

330. U.N. Charter at pmbl., art. 1.2; G.A. Res. 1514, *supra* note 299, at pmbl.

331. G.A. Res. 1514, *supra* note 299, at art. 1; ICERD, *supra* note 269, at pmbl.

332. ICERD, *supra* note 269, at pmbl, arts. 1–7.

333. ICCPR, *supra* note 325, at art. 16.

334. UDHR, *supra* note 325, at art. 15, 21; ICERD, *supra* note 269, at art. 5(d)(iii).

335. UDHR, *supra* note 325, at art. 17; ICERD, *supra* note 269, at art. 5(d)(v).

336. UDHR, *supra* note 325, at art. 21; ICERD, *supra* note 269, at art. 5(c); ICCPR, *supra* note 325, at art. 25.

337. G.A. Res. 1514, *supra* note 299, at pmbl; *see also U.N. G.A. Res. 1803, Permanent Sovereignty Over Natural Resources*, art. 8 (Dec. 14, 1962).

338. UDHR, *supra* note 325, at art. 27; ICERD, *supra* note 269, at art. 5(e)(vi); ICCPR, *supra* note 325, at art. 18.

339. UDHR, *supra* note 325, at art. 26; ICERD, *supra* note 269, at art. 5(e)(v).

340. G.A. Res. 1514, *supra* note 299, at pmbl.

341. UDHR, *supra* note 325, at art. 25; ICERD, *supra* note 269, at arts. 5(a) and (e)(iv).

342. UDHR, *supra* note 325, at arts. 8, 10; ICERD, *supra* note 269, at art. 6; ICCPR, *supra* note 325, at art. 2(3).

343. Vienna Declaration, Art. 5; Organization of American States, *American Declaration of the Rights of Indigenous Peoples*, pmbl. para. 11 (June 15, 2016).

344. *See generally* U.N. Human Rights Council Res. 48/7, Negative Impact of the Legacies of Colonialism on the Enjoyment of Human Rights (Oct. 8, 2021).

genocide.[345] Under current international law, genocide is defined by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.[346] Article 2 of the Convention defines genocide as an act committed with the intent to destroy, in whole or part, a national, ethnical, racial, or religious group through killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group.[347] Article 3 extends culpability for genocide to conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.[348] Article 4 applies culpability to all persons, including rulers, public officials, or private individuals.[349] It is beyond question that the United States committed all of these genocidal acts against Indigenous peoples and continues to do so—although more covertly—through enduring, systemic, institutionalized, and insidious colonial rule and slow, involuntary, assimilation and attrition.

The originator of the modern doctrine, Raphael Lemkin, like Professor Wolfe, regarded colonization itself as "intrinsically genocidal."[350] He saw colonization as a two-stage process: the destruction of an Indigenous peoples' way of life followed by the colonizer's imposition of their way of life on Indigenous peoples.[351] Deliberate cleansing of Indigenous peoples from an area for colonial settlement or exploitation has been stated as an imperial or colonial form of genocide.[352] Although still contested among genocide and international law scholars, it has been urged by

345. *See, e.g.*, Stephanie Woodard, *Standing Rock Sioux Move to Rescue Children, Accuse South Dakota of Genocide*, INDIAN COUNTRY TODAY (Oct. 3, 2013), https://www.tulalipnews.com/wp/2013/10/05/standing-rock-sioux-move-to-rescue-children-accuse-south-dakota-of-genocide/; Zac Russell, *SCOTUS Considers Genocide*, THE REVIEW (May 5, 2022), https://virginiapolitics.org/online/scotus-considers-genocide.

346. U.N. G.A., Treaty Series, vol. 78, p. 277 (Dec. 8, 1948); *see also* Rome Statute of the International Criminal Court, U.N. G.A., Treaty Series, vol. 2187, no. 38544, art. 6 (July 17, 1998). Genocide is also a violation of current federal law. 18 U.S.C. § 1091.

347. U.N. Office on Genocide Prevention and the Responsibility to Protect (UNGRP), Convention on the Prevention and Punishment of the Crime of Genocide, art. 2 (Dec. 9, 1948).

348. *Id*. at art. 3.

349. *Id.* at art. 4.

350. JOHN FORGE, DESIGNED TO KILL: THE CASE AGAINST WEAPONS RESEARCH 77 (2012); MOSES, *supra* note 25, at 27.

351. FORGE, *supra* note 350, at 77; MOSES, *supra* note 25, at 27.

352. David Maybury-Lewis, *Genocide Against Indigenous Peoples*, *in* ANNIHILATING DIFFERENCE: THE ANTHROPOLOGY OF GENOCIDE 43, 45 (Alexander Laban Hinton ed., 2002); *see also Cultural Homogenization, Ethnic Cleansing, and Genocide*, *in* INTERNATIONAL STUDIES ENCYCLOPEDIA (Robert A. Denemark & Reneé Marlin-Bennett eds., 2017); Ajdin Dautović, *Potato, Potatoe: An Analysis of the Term 'Ethnic Cleansing' and 'Genocide', and its Application in the Bosnian War and Genocide*, ACADEMIA (Dec. 9, 2015), http://www.academia.edu/23681092/Potato_Potatoe_An_Analysis_of_the_term_Ethnic_Cleansing_and_Genocide_and_its_application_in_the_Bosnian_War_and_Genocide.

Lemkin and others that the destruction of culture may also be another form of genocide.[353]

The cultural rights of Indigenous peoples are also protected elsewhere under international law. Article 8 of the UNDRIP, for example, also provides that "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."[354] Paragraph 2 of Article 8 requires states to

> [P]rovide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identites; . . . (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration[.][355]

The ICWA is clearly an effective mechanism that works to accomplish this state obligation.[356]

There are specific international laws that protect the human rights of children, importantly the United Nations Convention on the Rights of the Child.[357] Paragraph 2 of Article 3 requires states:

> [T]o ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.[358]

Article 4 provides in part: "With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."[359] Paragraph 1 of Article 7 provides that "[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and [sic] as far as possible, the right to know and be cared for by his or her parents."[360] Article 8 requires states "to respect the right of the child to

353. A. Dirk Moses, *Raphael Lemkin, Culture, and the Concept of Genocide*, *in* THE OXFORD HANDBOOK OF GENOCIDE STUDIES 19, 20, 29, 34 (Donald Bloxham & A. Dirk Moses eds., 2012); Barry Sautman, *"Cultural Genocide" and Tibet*, 38 TEX. INT'L L.J. 173, 180–84 (2003); Roxanne Dunbar-Ortiz, *U.S. Settler-Colonialism and Genocide Policies Against Native Americans*, BREWMINATE (May 19, 2016), https://brewminate.com/u-s-settler-colonialism-and-genocide-policies-against-native-americans/.

354. UNDRIP, *supra* note 312, art 8, para. 1.

355. *Id.* at para. 2.

356. For further discussion of this provision, see generally, Sandra Pruim, *Ethnocide and Indigenous Peoples: Article 8 of the Declaration on the Rights of Indigenous Peoples*, 35 ADELAIDE L. REV. 269 (2014).

357. G.A. Res. 44/25, Convention on the Rights of the Child, art. 8 (Nov. 20, 1989) (signed by the United States on Feb. 16, 1995, but not yet ratified).

358. *Id.* at art. 3, para. 2.

359. *Id.* at art. 4.

360. *Id.* at art. 7, para. 1.

preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."[361] The preservation of a child's Native identity, the child's national (tribal) affiliation, and the child's inclusion in his or her family are central purposes of the ICWA.[362] Article 9 requires states to ensure that a child not be separated from his or her parents against their will, except when necessary for the best interests of the child.[363] The ICWA is particularly relevant to Article 30, which provides:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.[364]

In 2013, the Inter-American Commission on Human Rights rendered its admissibility decision in the Loni Edmonds case involving Canadian social service taking an Indigenous woman's six children from her largely because of her poverty.[365] Her petition alleged that the colonial government had violated certain right guaranteed to her and her children under the American Declaration on the Rights and Duties of Man, including equality before the law (Article II); the right to protection of honor, personal reputation, and private and family life (Article V); to a family and to protection thereof (Article VI); to protection for mothers and children (Article VII); to residence and movement (Article VIII); to inviolability of the home (Article IX); to the preservation of health and well-being (Article XI); to the benefits of culture (article XIII); to a fair trial (Article XVIII); to nationality (Article XIX); of petition (Article XXIV); to due process of law (Article XXVI); as well as the scope of the rights of man (Article XXVIII) and duties toward children and parents (Article XXX).[366] The petition also asserted violations of Article 3(2), 4, 7, and 17 of the United Nations Convention on the Rights of the Child.[367] Upon review of the facts alleged by the parties, the Commission ruled that the Ms. Edmonds and her children had stated human rights violations of the right to: equality before the law, protection of honor, personal reputation, private and family life, a family and protection thereof, protection for mothers and children, a residence and movement, inviolability of the home, the preservation of

361. *Id.* at art. 8.
362. 25 U.S.C.S. §§ 1901–02.
363. Convention on the Rights of the Child, *supra* note 357, at art. 9, para. 1.
364. *Id.* at art. 30.
365. Loni Edmonds and Children v. Canada, Petition 879-07, Inter-Am. Comm'n H.R., Admissibility Report No. 89/13, ¶¶ 3, 60 (2013).
366. *Id.*
367. *Id.*

health and wellbeing, the benefits of culture, a fair trial, to the right of petition, and the right to due process of law.[368]

The United States, like Canada, is also a signatory and ratifying state to the American Declaration of the Rights and Duties of Man and is bound by its provisions.[369] The Edmonds decision demonstrates that each of the rights the Commission ruled had been violated by Canada under the facts before it is implicated in the ICWA. Thus, dispensing with the colonial doctrines of federal Indian law allows for the application of international human rights law to provide support for the Act as a partial enforcement of the human rights obligations of the United States. Eliminating the colonial relationship as required by international law also strengthens the independence and sovereignty of Native nations over their own affairs. It provides greater separation between it and states whereby adoptions would be treated as intercountry adoptions with the special procedures and protections necessary in such situations under domestic and international law.[370]

CONCLUSION

> **Solomon's Wisdom and Prosperity**
> 16 Then came there two women . . . unto the king [Solomon],
> and stood before him [both claiming to be the mother of a child].
> . . . .
> 24 And the king said, Bring me a sword.
> And they brought a sword before the king.
> 25 And the king said, Divide the living child in two,
> and give half to the one, and half to the other.
> 26 Then spake the woman whose the living child was unto the king,
> for her bowels yearned upon her son, and she said,
> O my lord, give her the living child, and in no wise slay it.
> But the other said, Let it be neither mine nor thine, but divide it.
> 27 Then the king answered and said,
> Give her the living child, and in no wise slay it: she is the mother thereof.
> 28 And all Israel heard of the judgment which the king had judged;
> and they feared the king:
> for they saw that the wisdom of God was in him, to do judgment.
>
> 1 Kings 3:16-28 (King James Version)[371]

In December 2005, the United Nations General Assembly adopted a resolution establishing Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian

368. *Id.* at ¶ 69.
369. Smith v. United States, Petition 8-03, Inter-Am. Comm'n H.R., Admissibility Report No. 56/06, ¶¶ 32-35 (2006).
370. *See* 42 U.S.C. § 14932(b).
371. 1 *Kings* 3:16–28 (King James).

Law.[372] The Basic Principles and Guidelines sets forth a structure and a process for providing remedies to victims of ethnic cleansing and genocide as well as other gross human rights violations. Although directed at immediate victims,[373] it does provide for collective remedies and, to the extent that the violations are continuing through generations,[374] it may arguably apply to the slow genocide of Indigenous peoples. Historic and continuing victimization and transgenerational harm are defining and identifying characteristic of victims of colonialism, ethnocide, and genocide.[375] Regardless, the Basic Principles and Guidelines provides instruction on restorative justice and reparations that could be utilized. Section IX sets forth the scope and requirements for reparations.[376] It requires "proportional[ity]" to the gravity of the violations and harm suffered, the establishment of programmes for reparation, restitution whenever possible (including the right of return and the return of property wrongfully taken), and compensation for physical or mental harm and "moral damage," among other action.[377] It requires "full and public disclosure of the truth," an official declaration restoring the dignity, the reputation, and the rights of the victims and of persons closely connected with the victims, a "[p]ublic apology, including acknowledgement of the facts and acceptance of responsibility," commemorations and tributes to the victims, and inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.[378] The nature and scope of appropriate reparations should be determined by the victims and not by the violator of rights.[379]

These Guidelines direct what should be the appropriate reparative response of the United States as a colonial power that has engaged in hundreds of years of slow, cultural, genocide. The Guidelines support the ICWA as a step in stopping the harms caused to Native children, mothers, families, peoples, and nations by the institutionalized thefts of Native children. Reparations further require aggressive Government policies and programmes to facilitate the reunion of stolen Native children with their families and communities. It requires mental health support for the generational trauma caused by adoptions and separations. Support should also be provided to build effective foster care and adoption programmes within

372. *See* G.A. Res. 60/147 (Dec. 16, 2005) [hereinafter *Basic Principles*].

373. *Id.* at sec. V, para. 8.

374. *See id.*

375. *See* RONALD NIEZEN, THE ORIGINS OF INDIGENISM 23 (2003); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3–4 (2004); Ronald Niezen, *Templates and Exclusions: Victim Centrism in Canada's Truth and Reconciliation Commission on Indian Residential Schools*, 22 J. OF THE ROYAL ANTHROPOLOGICAL INST. 920, 926 (2016); *see also supra* note 117.

376. *Basic Principles*, *supra* note 372, at sec. IX.

377. *See id.* at sec. IX, paras. 15–16, 19–20.

378. *Id.* at sec. IX, para. 22. For a more in-depth discussion see REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Federico Lenzerini ed., 2008).

379. *See* Lenzerini, *supra* note 378, at 15; see *also* Sam Grey, *Just and Unjust Reallocations of Historical Burdens: Notes on a Normative Theory of Reparations Politics*, 12 LES ALTELIERS DE L'ÉTHIQUE 60, 61, 60, 74–75, 78 (2017).

Native communities, including financial support for the Native institutions and the parents and families in the programs. Full respect should be given to the sovereignty and laws of Native nations freed from colonial domination. The ICWA is important, but merely a half measure. Decolonization and embracing Native customary law, human rights, and the international law of nations provides a way forward in the best interests of the child, and of its people and nation.