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THE BEST INTERESTS OF THE CHILD BEYOND *HAALAND V.*
BRACKEEN

*Bailey Ruhm**

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*J.D. Candidate, University of Alabama School of Law 2025. I would like to extend a thank you to CASA of New Hampshire for first exposing me to the Indian Child Welfare Act and sparking my interest in this important piece of legislation. I am also grateful to all of the teachers and professors I have had over the years who not only fostered my love for writing and exploration, but also encouraged me to continue to pursue my passion for the field of child advocacy through higher education. And finally, I would like to extend my deepest appreciation to my family for supporting me in my every pursuit, and my classmates at Alabama Law, for taking the time and attention to support my writing and get this project across the finish line.

I. INTRODUCTION

Congress enacted the Indian Child Welfare Act (ICWA) in 1978, in recognition of the widespread practice of abuse in the child welfare system that occurred through the removal of Native American children from their Tribal families and communities.¹ Congress enacted ICWA with the goal of keeping more Native American children with their Tribes, which would allow them to maintain their traditions and culture despite any engagement with child protective services (CPS).² The Act recognized that Native American communities have a genuine interest in the preservation of their Tribes and that protecting Tribal children plays a key role in this goal.³

Since its enactment, families and individuals have challenged ICWA in various ways, most recently in the form of constitutional challenges which appeared before the Supreme Court in 2023 in the case of *Haaland v. Brackeen*.⁴ In this case, the Court upheld ICWA against these constitutional challenges.⁵ The decision upholding ICWA in *Haaland* came as a surprise to many and was seen as a victory for Tribes, who were rightfully concerned that any blow to the law would upend the basic principles which have allowed them to govern these cases and outcomes since ICWA's inception. While the recognition of the importance of this Act is understandable, and the celebrations on behalf of the Tribes are valid, lingering concerns remain around the impact of ICWA on the well-being of Tribal children and the long-term psychological effects that ICWA's practical application and enforcement bring in cases like these.

This note will begin by exploring the background and history of the Indian Child Welfare Act. Next, it will discuss the facts and decision in *Haaland v. Brackeen*, as well as the Dissent's concern around the "best interests" and well-being of the child. The note will then explore how other cases on ICWA have dealt with or been impacted by these issues. Finally, this note will explore the interplay between

1. While the Indian Child Welfare Act uses the language of "Indian," "Indian Children," and "Indian Tribes," this article will, where possible, instead use the language of "Native American" or "Tribal" generally to better reflect the appropriate terminology. This is with the understanding that "Tribal" is very broad and many Native people instead prefer to be called by their specific tribal name; however, due to the general applicability of this Act to all recognized Tribes, the generalized term of "Tribe" or "Tribal" is necessary here. See *Teaching & Learning About Native Americans*, NAT'L MUSEUM AM. INDIAN, <https://americanindian.si.edu/nk360/faq/did-you-know#:~:text=In%20the%20United%20States%2C%20Native,preferred%20by%20many%20Native%20people> (last visited Oct. 31, 2023).

2. H.R. REP. NO. 95-1386, at 2 (1978).

3. *Id.*

4. *Haaland v. Brackeen*, 599 U.S. 255 (2023).

5. *Id.* at 297.

ICWA and “best interest of the child” more generally, including an analysis of the “best interests” standard, the potential psychological harm on the children as a result of the Act, and any safeguards that could protect against some of these harms.

II. BACKGROUND OF ICWA

The Indian Child Welfare Act (ICWA) originated from Congress’s recognition of the widespread and tragic practice involving the separation of Native American children from their families and Tribes through child welfare involvement. This practice led to disproportionately high rates of foster care placement or adoption, most resulting in placements in non-Tribal homes.⁶ In many states, Native American children were placed in alternate care⁷ at rates ten to twenty times higher than placement rates for non-Native children, and adoption rates for Native American children also significantly exceeded those for non-Native children.⁸ Despite the overarching goal of reunification present in America’s child welfare systems, many of the Native American children who were removed from their homes and Tribes before the passing of ICWA were never reunified with their families or returned to their communities.⁹

The Indian Child Welfare Act of 1978 was seen not only as an acknowledgment of this troublesome history, but more importantly, a solution. The first section of ICWA states Congress’s finding that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”¹⁰ The purpose of the Act was not only to “protect the best interests of Indian children,” but also to ensure “the stability and security of Indian tribes and families.”¹¹

Under ICWA, a Native American child is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member

6. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–33 (1989).

7. “Alternate care” refers to any out of home placement not with parental caregivers, including formal or informal placement with known family members or friends, foster placement, residential homes, or adoptive placements. See Kirsten Sandberg, *Alternative Care and Children’s Rights*, in *INT’L HUM. RTS. CHILD.* 187, 187–213 (Ursula Kilkelly & Ton Liefaard eds., 2019).

8. MARGARET C. PLANTZ ET AL., U.S. DEP’T INTERIOR, CONT. NO. 105-82-1602, *INDIAN CHILD WELFARE: A STATUS REPORT* 20 (1988).

9. *Id.*

10. 25 U.S.C. § 1901(4).

11. *See id.* § 1902.

of an Indian tribe.”¹² The “Tribe” is defined as “(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.”¹³ ICWA outlined that in any foster placement or pre-adoptive placement of Native American children, preference should be given to a member of the child’s extended family; a home licensed, approved, or specified by the child’s Tribe; a Native American foster home licensed or approved by another authorized licensing authority; or an institution for children approved by the Native American Tribe or Native American organization that has programs suitable to meet the Native American child’s needs.¹⁴ ICWA also outlined that, if the child’s Native American Tribe establishes a different order of preference by resolution, that order was to be followed “so long as the placement is the least restrictive setting appropriate to the particular needs of the child . . . [and w]here appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.”¹⁵

III. FACTS OF *HAALAND V. BRACKEEN*

Haaland v. Brackeen arose from three separate child custody proceedings, all of which fell under the Indian Child Welfare Act.¹⁶ The first proceeding involved a child who was placed in the care of the Brackeen foster family when he was 10 months old.¹⁷ Both of the child’s biological parents had Tribal affiliations, which brought the child within ICWA’s definition of a Native American child.¹⁸ After a year in their care, the Brackeens attempted to adopt the child.¹⁹ The child’s biological mother, father, and grandmother all supported the adoption, but the Navajo and Cherokee Nations (whom the child was affiliated with) did not.²⁰ Instead, the Tribes intervened and requested that the child be placed with nonrelative Tribal members rather than with the Brackeens, whom the child had been living with for the previous year.²¹ And because of ICWA’s placement preferences, this requested

12. *See id.* § 1903(4).

13. *See id.* § 1903(5).

14. *See id.* § 1915(b).

15. *See id.* § 1915(c).

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

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 269.

placement by the Tribes outranked the non-Native American home of the Brackeens.²² Ultimately the Brackeens were able to adopt the child, but not without lengthy litigation and only after the Tribal family withdrew from consideration.²³ The Brackeens remained in the suit because, while their original case ended in a successful adoption, they still desired to adopt additional Native American children at the opposition of the Navajo Nation.²⁴ However, due to ICWA's mandates and in light of their first adoption experience and the litigation that ensued, they remained hesitant to pursue further adoptions, so they stayed in the suit as an interested and affected party.²⁵

The second proceeding involved an infant born to a non-Native American biological mother and a biological father who descended from members of a Native American Tribe.²⁶ The biological mother chose a non-Native American family as an adoptive family for her newborn daughter.²⁷ The child was placed in this pre-adoptive home at only three days old.²⁸ After this placement had been arranged and implemented, the Tribe affiliated with the child then exercised their rights under ICWA to intervene, arguing that the child should be removed from the adoptive home and moved to the Tribe's reservation.²⁹ After litigation began, the Tribe withdrew and the adoptive family was able to successfully adopt the child, but the family chose to remain in the litigation because, like the Brackeens, they, too, hoped to foster and adopt additional Native American children in the future.³⁰

The third proceeding involved a child who entered state custody around the age of three.³¹ While the child's maternal grandmother had Tribal affiliations, the biological mother informed the state that the child was not eligible for Tribal membership.³² The relevant Tribe even wrote a letter to court confirming the child's ineligibility for Tribal membership.³³ After two years in foster care, the child was placed in a home with a family who ultimately sought to adopt her.³⁴ At this point, reversing their previous position, the Tribe intervened and asserted their rights under

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 270.

27. *Id.* at 269.

28. *Id.*

29. *Id.* at 270.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

ICWA, claiming that the child was in fact eligible for Tribal membership.³⁵ With this sudden yet critical change in circumstances, the state removed the child from the foster home and moved the child to the home of her maternal grandmother to comply with ICWA's placement requirements.³⁶ The foster family continued to pursue adoption, but the court cited ICWA's placement mandates and thus denied the family's application.³⁷ Like the two families listed above, this family expressed a continued desire to foster or adopt Native American children moving forward which is why they remained a party in this case.³⁸

IV. PROCEDURAL PROCESS

Petitioners – a birth mother, foster and adoptive parents, and the state of Texas – filed suit against the United States, the Department of the Interior and its Secretary, the Bureau of Indian Affairs (BIA) and its Director, and the Department of Health and Human Services (HHS) (together the plaintiffs).³⁹ Various Native American Tribes intervened as defendants as well.⁴⁰

The plaintiffs sought a declaration that the Indian Child Welfare Act was unconstitutional, as well as injunctive relief.⁴¹ They argued that Congress did not have authority to enact ICWA and that several of the requirements in ICWA violated the anticommandeering principle of the Tenth Amendment.⁴² In addition, they argued that ICWA violates Equal Protection by unlawfully using racial classifications, hindering non-Native American families from fostering or adopting Native American children.⁴³ The petitioners also challenged the provision of ICWA that allows Tribes to alter the prioritization order, arguing that it violates the nondelegation doctrine.⁴⁴ The defendants, in response, filed a motion to dismiss.⁴⁵

In 2018, in the case of *Brackeen v. Zinke*, the United States District Court for the Northern District of Texas denied defendants' motion to dismiss, granted in part plaintiffs' motion for summary judgment on their constitutional claims, and denied

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 271.

40. *Id.*

41. *Id.* at 292.

42. *Id.* at 271.

43. *Id.*

44. *Id.*

45. *Id.*

a stay pending appeal.⁴⁶ Defendants appealed.⁴⁷ A 3-judge panel for the United States Court of Appeals for the Fifth Circuit reversed.⁴⁸ On rehearing en banc, the Court of Appeals, affirmed in part and reversed in part, leaving a fractured ruling that held parts of ICWA unconstitutional.⁴⁹ The United States Supreme Court then granted certiorari.⁵⁰

A. Majority Opinion

In the 2023 decision of *Haaland v. Brackeen*, in a 7–2 decision, the Supreme Court upheld ICWA’s constitutionality in its entirety.⁵¹ In doing so, the Court upheld Congress’s power to legislate with respect to the Native American Tribes as “plenary and exclusive,” superseding both state and Tribal authority.⁵² While the Court acknowledged that the Constitution does not explicitly grant Congress power to regulate custody proceedings of Native American children, the Court interpreted the Constitution’s Indian Commerce Clause as broad enough to include such issues.⁵³ The Court also rejected the anti-commandeering claims, reasoning that because two of the challenged provisions apply “evenhandedly” to private actors and government entities, the use of sovereign powers does not violate anti-commandeering principles.⁵⁴ The Court did not reach the equal protection claims, holding that the petitioners lacked standing to assert such claims.⁵⁵ In so finding, the Court explained that while the individual petitioners argued that ICWA’s hierarchy preferences injure them by placing them on uneven footing with Native American families who may seek to foster or adopt a Native American child, the petitioners failed to show that the injury they claim is likely to be redressed by judicial relief.⁵⁶ The Court explained that even if it were to grant an injunction preventing federal parties from enforcing such preferences, such an injunction is not guaranteed to remedy the claimed injury because state courts were not parties to this suit, are not obliged to honor the legal determination, and thus would still be able to apply the preferences.⁵⁷ Likewise, the Court held that Texas had no equal protection rights of its

46. 338 F. Supp. 3d 514, 519 (N.D. Tex. 2018).

47. *Haaland*, 599 U.S. at 271.

48. *Id.*; see *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

49. *Haaland*, 599 U.S. at 271–72.

50. *Id.*

51. *Id.* at 296.

52. *Id.* at 272–76.

53. *Id.*

54. *Id.* at 283–85.

55. *Id.* at 291–96.

56. *Id.* at 292.

57. *Id.*

own since the state itself is not injured by the placement preferences, and Texas could not assert such claims on behalf of its citizens.⁵⁸

Justice Gorsuch, joined by Justice Sotomayor and Justice Jackson, wrote a separate concurrence that largely highlighted the history of treatment of Native American children and families in America, shedding further light on the history of the Act and emphasizing the importance of upholding ICWA generally.⁵⁹ Justice Gorsuch also highlighted research which supports that “[i]t is generally in the best interests of Indian children to be raised in Indian homes.”⁶⁰

B. Dissenting Opinion and Concern Around Child Well-Being

Justice Thomas and Justice Alito wrote separate opinions, both dissenting.⁶¹ Justice Alito’s lengthy and thorough analysis centers around a topic hardly discussed by the majority—the best interests of the children who are at the very center of these laws and decisions.⁶² He critiqued the majority for losing sight of concern over these “most vulnerable” youth, emphasizing that the paramount concern in decisions about child custody, foster care, and adoption has always been, and should continue to be, the “best interests” of the children involved.⁶³ While Justice Alito acknowledged that the Court’s decision did recognize the troubled history of treatment of Native children, he expressed concern that the Court’s decision fails to protect these children’s best interests moving forward.⁶⁴ In Justice Alito’s view, there is no power instilled in Congress which allows them to sacrifice the best interests of children in order to promote interests of the Tribe, or which enables them to force judges to make decisions in ways that fail to serve the best interests of children.⁶⁵

Though Justice Alito dissented from the majority opinion which upheld ICWA, he was not ignorant or oblivious to the history or motivations which lead to ICWA’s enactment.⁶⁶ He expressed sympathy for the real challenges that Native American Tribes face in maintaining membership or preserving their Tribal cultures, and he recognized that the best interests of children may sometimes take into account a genuine desire to support them in maintaining connection with their Native

58. *Id.*

59. *See id.* at 297–333 (Gorsuch, J., concurring).

60. *Id.* at 307 (quoting Brief for Am. Psych. Ass’n et al. as Amici Curiae) (Gorsuch, J., concurring).

61. *See id.* at 334–81 (Thomas, J., dissenting) (Alito, J., dissenting).

62. *See id.* at 372–81 (Alito, J., dissenting).

63. *Id.* at 372.

64. *Id.*

65. *Id.* at 373–74.

66. *Id.* at 381.

American culture.⁶⁷ Even so, he opined that there are other means for promoting these interests that are permissible under the Constitution, and in his view those permissible means do not include permitting Congress to “to displace long-exercised state authority over child custody proceedings to advance those interests at the expense of vulnerable children and their families.”⁶⁸

V. OTHER ICWA CASES IMPLICATING THE BEST INTERESTS OF THE CHILD

While *Haaland v. Brackeen* is one of the most recent and most publicized cases involving debates around the Indian Child Welfare Act, known especially for its constitutional components and challenges raised, disputes over the role and impact of ICWA are generally not new.

In 1982, the Supreme Court of Kansas wrestled with the requirements of ICWA’s placement preferences in the case of *In re Adoption of Baby Boy L.*⁶⁹ In this case, a child was born out of wedlock to a non-Native American mother and a Native American father.⁷⁰ The mother consented to an adoption, but only to the non-Native American adoptive parents that she selected.⁷¹ Despite efforts by the biological father and grandparents to intervene and prevent adoption into a non-Native family, the adoption was granted by the trial court and affirmed by the Supreme Court of Kansas.⁷² In their opinion, the trial court explained that it was in the best interest of the child to grant the adoption to the consented adoptive parents.⁷³ They reasoned that the Act was not intended to interfere with adoptions that are instituted by voluntary consent of the biological mother of a child born out of wedlock, a mother who was never a member of a Native American home or culture and likely never would be.⁷⁴ The rationale for this decision created what would become known as the “existing Indian family doctrine.”⁷⁵

While the case of *In re Baby Boy L.* was not appealed further, it was not the last word in this debate.⁷⁶ In 2009, the Supreme Court of Kansas again addressed the issue of parental choice and non-Native American adoptive placements in the case

67. *Id.*

68. *Id.*

69. *See generally In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982).

70. *Id.* at 172.

71. *Id.* at 173.

72. *Id.*

73. *Id.*

74. *Id.* at 174-75 (creating what would later be called the “existing Indian family doctrine”).

75. *See id.*; *In re A.J.S.*, 204 P.3d 543, 544 (Kan. 2009).

76. *Adoption of Baby Boy L.*, 643 P.2d at 168.

of *In re A.J.S.*⁷⁷ While the specifics of the case were slightly different from *In re Baby Boy L.*, ultimately the core facts remained similar: a child was born out of wedlock to a biological mother with no Tribal affiliations and a biological father who did hold Tribal affiliations.⁷⁸ The mother sought to have the child placed for adoption within her own, non-Native family.⁷⁹ Here, though, the Supreme Court of Kansas took the opportunity to overrule *In re Adoption of Baby Boy L.* and did away with the “existing Indian family doctrine.”⁸⁰ In doing so, they relied on the Supreme Court’s rationale in *Mississippi Band of Choctaw Indians v. Holyfield* (detailed below) that “ICWA grew in part out of concern for preservation of [T]ribal interests in Indian children and that those interests could *not* necessarily be defeated by the desires of parents or concerns over *placement permanency*.”⁸¹ The court expressed the belief that “ICWA’s overall design . . . ensures that all interests—those of both natural parents, the [T]ribe, *the child*, and the prospective adoptive parents—are appropriately considered and safeguarded.”⁸² In light of these findings, the court held that the Tribe must be permitted to intervene in the adoption sought here.⁸³ It is important to note that while adoption had not yet been granted,⁸⁴ the child had been in the custody of the selected adoptive parents until this decision was made. While the case does not specify the outcome after the decision here was rendered, it is likely that the reversal resulted in at least one additional custody change for the child after a lengthy period of stable placement with nurturing caregivers.

The Supreme Court also addressed the application of ICWA in the 1989 case of *Mississippi Band of Choctaw Indians v. Holyfield*.⁸⁵ In *Holyfield*, the Court vacated an adoption decree of twins that occurred a few months after birth and which both parents consented to after the Tribe moved to vacate the adoption decree on the ground that, under ICWA, the Tribal court had exclusive jurisdiction over the case.⁸⁶ In its decision which vacated the adoption decree, the Court held that since the biological parents were Native American, ICWA’s mandates should have been applied to the proceedings.⁸⁷ The Court emphasized that ICWA “*seeks to protect the rights of the Indian child* as an Indian and the rights of the Indian community

77. *A.J.S.*, 204 P.3d at 544.

78. *Id.*

79. *Id.*

80. *Id.* at 549.

81. *Id.* at 548 (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 31 (1989)) (emphasis added).

82. *Id.* at 551 (emphasis added).

83. *Id.*

84. *See id.* at 545.

85. *Miss. Band of Choctaw Indians*, 490 U.S. at 30.

86. *Id.* at 37–38.

87. *Id.* at 53.

and [T]ribe in retaining its children in its society.”⁸⁸ It is important to note that the decision vacating the adoption decree was issued over three years after the adoption had been finalized.⁸⁹ In what appears to be a recognition of the impact of this reversal, or a desire to lessen its guilt, the Court concluded its opinion by noting that “whatever anguish is suffered by the Indian children, their natural parents, and their adoptive parents because of its decision today is a result of their failure to initially follow the provisions of the ICWA.”⁹⁰ The dissent, however, authored by Justice Stevens and joined by Chief Justice Rehnquist and Justice Kennedy, raised the concern that this decision “establishes a rule of law that is virtually certain to ensure that similar anguish will be suffered by other families in the future.”⁹¹ It now seems that Justice Stevens’s dissenting predication was all too accurate.

The Supreme Court once again addressed concerns around the application of ICWA in the 2013 case of *Adoptive Couple v. Baby Girl*.⁹² In this case, the biological mother and father separated while the mother was pregnant, and at that time, the father agreed to relinquish his parental rights.⁹³ The mother did not have any Tribal affiliations, but the father was a member of the Cherokee Nation.⁹⁴ The mother arranged for a private adoption of Baby Girl to a non-Native American family.⁹⁵ Four months after the birth of Baby Girl, the adoptive couple served the biological father with notice of the pending adoption.⁹⁶ While the father had not provided any financial support to the child up until this point, the biological father expressed his opposition to the adoption petition and sought custody in the adoption proceedings.⁹⁷ When the trial occurred, Baby Girl was already two years old and had been living with the adoptive couple for her entire life.⁹⁸ However, due to ICWA, the trial court denied the adoption petition and awarded custody to the biological father, an individual the child had never met.⁹⁹ The Supreme Court of South Carolina affirmed.¹⁰⁰ The Supreme Court, however, reversed, holding that a non-custodial parent *cannot* invoke ICWA to block an adoption that was voluntarily and

88. *Id.* at 37 (quoting H.R. REP. NO. 95-1386, at 23 (1978)) (emphasis added).

89. *See id.* at 38, 53.

90. *Id.* at 65 (Stevens, J., dissenting).

91. *Id.*

92. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013).

93. *Id.* at 643.

94. *Id.*

95. *Id.* at 644.

96. *Id.*

97. *Id.* at 645.

98. *Id.*

99. *Id.* at 637.

100. *Id.* at 637–38.

lawfully initiated by the non-Native American birth mother.¹⁰¹ The Court reasoned that because the father agreed to relinquish rights before the child was born and the child had never been in his custody, ICWA's goals of preventing the unwarranted removal of Native American children and breakup of Native American families did not apply.¹⁰² Under the same rationale, the Court held that ICWA's mandate requiring the state to provide remedial services or rehabilitative support to prevent the "breakup" of Native American families was not applicable when the Native American parent abandons the child before birth and when the child was never in their custody.¹⁰³ The Court also held that ICWA's placement preferences only come into play when other Tribal members or families come forward to adopt a child, and thus the preferences did not apply in this case.¹⁰⁴ Ultimately, this case limited the application of the Indian Child Welfare Act to prevent the protection of parents who have never had custody of a child, and limited the application of the placement preferences and affirmative requirements on the state as well.

VI. INTERPLAY BETWEEN ICWA AND A CHILD'S WELL-BEING

In ICWA's Congressional Declaration of Policy, Congress states that the policy of ICWA is designed "to protect the best interests of Indian children and to promote the stability and security of Indian Tribes and families..."¹⁰⁵ Congress intended to facilitate this goal through "the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture..."¹⁰⁶ However, as the cases involving ICWA have demonstrated, it is not always clear what "protect[ing] the best interests of Indian children"¹⁰⁷ truly means, or whether the methods outlined by ICWA have that intended effect. It also appears that, depending on what is meant by the "best interest of Indian children," this goal proves to be in conflict with the promotion of "stability and security of Indian tribes," at least in some situations.¹⁰⁸

To begin, this note recognizes the problematic and tragic history of the treatment of Native American communities within America. As Justice Gorsuch put it, "[t]he Indian Child Welfare Act did not emerge from a vacuum."¹⁰⁹ Without going into detail regarding the mass removal of Native American children from their

101. *Id.* at 638.

102. *Id.*

103. *Id.* at 638–39.

104. *Id.* at 639.

105. 25 U.S.C. § 1902.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Haaland v. Brackeen*, 599 U.S. 255, 297 (2023).

Tribes, and the dissolution of families and other devastating effects that resulted from these atrocities, it is important to recognize and acknowledge the reality of this troubled history. This note does not delve into that history but will instead focus in on the specific impact that ICWA-motivated child removals have on the children at the center of the debate, as well as the potential implications that may arise from any additional removals as a result of ICWA's placement preferences.

A. Best Interests of the Child

The “best interests of the child” standard, which is repeatedly referenced in ICWA, originally stemmed from the common law’s idea of paternal authority and the belief that it would be in the “best interest of the child” to be raised by a father.¹¹⁰ Much later, the “best interests” standard became the foundation of American adoption, but the standard, as applied in American adoptions, instead sought to “establish an institution to ameliorate the condition of the neglected and dependent child...”¹¹¹ Debates around the proper scope, meaning, and application of the “best interests” standard have been prevalent throughout history.¹¹² One of the primary concerns that critics raise with its use is that, in application, the doctrine rests heavily on a judge’s subjective view of the “best interests” of the child, views which are undeniably influenced by one’s personal observations, biases, and values.¹¹³

In some ways, one may view ICWA as combatting this criticism. The Act specifically outlines the placement preferences to apply to Native American children, all with the stated goal of “best interest” of the Native American child.¹¹⁴ The specifics of this preference hierarchy arguably leave less discretion for the judges when it comes to making these placement decisions. But, while these placement preferences are in place to address the history of and concern around the destruction of Tribal communities, as well as the desire to keep Native American children connected to their Tribes, debate remains around the practical application of these preferences and what “best interests” of the children they work to serve.

Specifically, as seen in the cases outlined above, the demands of ICWA’s placement preferences risk breaking up adoptions or removing children from homes that they have lived in for years. This concern is especially prevalent when the

110. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUDS. 337, 346 (2008) (citing LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 858 (2002)).

111. Stephen G. Post, *Adoption Theologically Considered*, 25 J. RELIGIOUS ETHICS 149, 151 (1997) (citing Fred L. Kuhlmann, *Interstate Succession by and from the Adopted Child*, 28 WASH. U. L. Q. 221, 223 (1943)).

112. See generally Kohm, *supra* note 110.

113. *Id.*

114. See 25 U.S.C. § 1915(b).

preferences outlined in ICWA are not applied to the child's original placement, so it is not until late in a dependency proceeding when a parent with Tribal affiliations and parental rights, or the Tribe itself, decides to assert their ICWA rights, that ICWA's preferences are enforced and implemented.¹¹⁵

Of note, one of the major considerations in a "best interests" determination in dependency proceedings has consistently been permanence for the children. In 1889, in the case of *Richard v. Collins*, the New Jersey court explained that the judges' task is to "fix the future status of the child with some stability and permanence."¹¹⁶ While this case was not one that involved Native American children or the Indian Child Welfare Act, the importance of providing children with permanence remains true in all cases involving the living arrangements and custody of children. Many scholars have detailed the role and significance of permanence, including authors Goldstein, Solnit, and Freud who discussed this concept at length in their book *Before the Best Interests of the Child*, explaining that "[c]ourts have ... recognized that the earlier presumptive preferences could be overturned if applying them would not serve the child's need for continuity of care."¹¹⁷

B. Psychological Impacts on Children in Removal Processes

The social sciences have also heavily researched the importance of permanence for the long-term health and well-being of children, and the importance of these findings cannot be overstated. This is especially true when considering the detrimental psychological effects that stem from the lack of permanence and the experience of multiple moves in a child's youth. One such study found that children who had experienced more placement changes were more likely to develop emotional and behavioral problems than children who had experienced stable placements.¹¹⁸ Specifically, studies found that multiple placement changes result in children who are more likely to experience attachment difficulties, externalizing behavior problems, and internalizing behavior problems.¹¹⁹

Children who experience attachment difficulties and attachment disorders exhibit varying levels of inability to form and maintain relationships and demonstrate emotional depth in the relationships they do form, often resulting in higher levels

115. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 65 (1989); *In re Adoption of Baby Boy L.*, 643 P.2d 168, 172 (Kan. 1982).

116. *Richards v. Collins*, 17 A. 831, 832 (N.J. 1889).

117. JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 189 (1986) (emphasis added).

118. Theodore P. Cross et al., *Why Do Children Experience Multiple Placement Changes in Foster Care? Content Analysis on Reasons for Instability*, 7 J. PUB. CHILD WELFARE 39, 54 (2013).

119. Christian M. Connell et al., *Changes in Placement Among Children in Foster Care: A Longitudinal Study of Child and Case Influences*, 80 SOC. SERV. REV. 398, 399 (2006).

of peer conflict.¹²⁰ These children may also have an increased “likelihood of experiencing physical health morbidities and impaired social, psychological, neurobiological functioning extending” beyond childhood into their adult years.¹²¹

Externalizing behaviors refer to a form of behavior problems commonly manifested in children’s outward behaviors and they reflect that the child is acting negatively in response to the external environment.¹²² Examples of externalizing behavior problems may be seen through aggression, delinquency, and hyperactivity.¹²³ Researchers have also described externalizing behavior more broadly as conduct problems, antisocial behavior, or uncontrollable actions.¹²⁴

In contrast, internalizing behavior problems are directed inwardly toward the children themselves.¹²⁵ Examples of internalizing behavioral problems “include social withdrawal, depression/dysthymia, anxiety, somatization problems, obsessive-compulsive behaviors, and selective mutism.”¹²⁶ Internalizing behaviors can be particularly harmful because, unlike external behaviors which are often more obvious and alarming to others, internalizing behaviors are often more subtle and less likely to be noticed by those in a child’s environment.¹²⁷ Thus, children experiencing internalizing behaviors may be even less likely to receive the support they so desperately need.

The compounding effect of attachment difficulties, externalizing behavior problems, and internalizing behavior problems that children are likely to experience when they are subject to unstable placements and multiple moves is troublesome. These experiences and traumas often have long term effects on the physical and psychological wellbeing of these children, not only throughout childhood, but for the duration of their lives.¹²⁸

120. Gail Hornor, *Attachment Disorders*, 33 J. PEDIATRIC HEALTH CARE 612, 617 (2019).

121. *Id.* at 613.

122. Jianghong Liu, *Childhood Externalizing Behavior: Theory and Implications*, 17 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 93, 93 (2004).

123. *Id.*

124. See Stephen P. Hinshaw, *On the Distinction Between Attentional Deficits/Hyperactivity and Conduct Problems/Aggression in Child Psychopathology*, 101 PSYCH. BULL. 443, 443–45 (1987).

125. Frank M. Gresham & Lee Kern, *Internalizing Behavior Problems in Children and Adolescents*, in HANDBOOK OF RSCH. IN EMOTIONAL AND BEHAV. DISORDERS 262 (Robert B. Rutherford Jr. et al. eds., 2004).

126. *Id.*

127. *Id.*

128. Lois A. Weithorn, *Developmental Neuroscience, Children’s Relationships with Primary Caregivers, and Child Protection Policy Reform*, 63 HASTINGS L.J. 1487, 1529 (2012).

It is important to note that moving itself is not the only aspect of the system that may cause harm to the psychological development of children in the child welfare system. Arguably more impactful are the disruptions and losses of relationships with caregivers that result from these moves and removals that risk causing severe delays and disturbances in physical and psychological development.¹²⁹ Significant disruptions in a child's relationship with a primary caregiver can, in the short-term, cause psychological distress and dysregulation.¹³⁰ And in the long term, these experiences of separation may increase the child's vulnerability to the development of mental health and physical health ailments throughout life.¹³¹

The multiple placement changes and loss of relationships put a child at risk of further negative psychological impacts, many of which are attributable to their experiences of "relational losses, disenfranchised grief, and complex trauma."¹³² Relational losses refer to the loss of personal relationships, which results in shrinking social circles and less social supports, often then leading to a lack of access to resources, poorer health outcomes, and declines in one's ability to socialize.¹³³ The effects of relational losses can understandably be described as a snowball effect. Disenfranchised grief refers to grief experienced by those who experience loss that is not openly acknowledged or adequately supported.¹³⁴ Both relational loss and disenfranchised grief are commonly experienced by children who experience instability in placements and repeated loss of supportive relationships or caregivers through multiple moves in placement homes. The losses these children experience are often not fully recognized or adequately supported for a variety of reasons, some of which are attributable to the young age of the children, but also due to lack of access to social supports or supportive relationships themselves. The children are mourning the loss of the very type of relationships which would support a child in mourning in other situations or more traditional family systems. This experience of complex trauma, which results from exposure to severe stressors within the caregiver system,¹³⁵ such as the loss of relationships, also disrupts or hinders various aspects of a child's development, including the formation of self and the ability to

129. *Id.* at 1529–37.

130. *Id.*

131. *Id.*

132. Vivek Sankaran et al., *A Cure Worse than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1166 (2019).

133. Sarah Stephenson, *Micro Losses: The Effects of Repeated Physical and Relational Losses*, UNIV. UTAH, COLL. SOC. WORK: INTERACTION BLOG (June 6, 2016), <https://socialwork.utah.edu/interaction/posts/2016/all/micro-losses-the-effects-of-repeated-physical-and-relational-losses.php>.

134. Kenneth J. Doka, *Disenfranchised Grief*, 18 BEREAVEMENT CARE 37, 37 (1999).

135. David M. Lawson & Jamie Quinn, *Complex Trauma in Children and Adolescents: Evidence-Based Practice in Clinical Settings*, 69 J. CLINICAL PSYCH. 497, 497 (2013).

form secure attachments.¹³⁶ These disruptions have lasting impacts because safety and stability serve as the foundation for much of a child's healthy physical and mental development.¹³⁷ Not surprisingly, higher numbers of placement changes generally predict a greater rate of outpatient mental health visits.¹³⁸

Studies have also analyzed children's behavioral and biological reactions to disruptions in care, with one study specifically analyzing the levels of cortisol production in children throughout the day.¹³⁹ The study found that young children who were removed from their primary caregivers showed atypical patterns of cortisol production throughout the day, some higher than the average and some lower than the average.¹⁴⁰ The lower levels of cortisol production were associated with externalizing behaviors such as disruptive conduct or substance abuse, while the higher levels of cortisol production were associated with the internalizing behaviors such as depression and anxiety.¹⁴¹ The researchers noted that more research is needed to fully understand the long-term impacts of these disruptions in care on a biological level, but they hypothesized that these removals and the resulting fluctuations in cortisol at a young age will confer risks for various health disorders later in life as well.¹⁴²

C. Psychological Safeguards that Benefit Children

On the flip side, the developmental research in psychological and neurobiological science highlights that the presence of certain features in a child's youth leads to more positive mental, social, emotional, and academic outcomes. While the loss of relationships puts a child at risk of various negative physical and psychological impacts, the presence of stable relationships with consistent and nurturing caregivers contributes to the child's overall well-being.¹⁴³ The establishment and maintenance of these consistent relationships and the strong emotional bonds that come with such relationships can also promote a child's resilience, which can help the child combat many of the other traumas they may experience or have experienced

136. *Complex Trauma*, NAT'L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma> (last visited Oct. 27, 2023).

137. *Id.*

138. Sigrid James et al., *Predictors of Outpatient Mental Health Service Use—The Role of Foster Care Placement Change*, 6 MENTAL HEALTH SERVS. RSCH. 127, 127 (2004).

139. See Mary Dozier & Johanna Bick, *Changing Caregivers: Coping with Early Adversity*, 36 PEDIATRIC ANNALS 205, 206 (2007).

140. *Id.*

141. *Id.*

142. *Id.*

143. Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 FUTURE CHILD. 31, 33 (2004).

as children in the system.¹⁴⁴ Even in the absence of a biological parental caregiver to provide these consistent relationships, consistent and long-term non-parental caregivers can step in to provide the sensitive, responsive caregiving which supports the secure attachments children need to adequately regulate stress hormones.¹⁴⁵

Children can benefit from consistent and nurturing caregivers even when they have been removed from their biological families and placed in foster or adoptive homes, but the age at which this removal occurs has an impact on the child's ability to form and benefit from these new relationships. When younger children (often under the age of one) experience removal from caregivers and subsequent placement in new homes, they tend to be able to trust the new caregivers rather quickly and will seek them out directly when they are distressed.¹⁴⁶ However, for children who enter a new placement beyond one year of age, the process to bond with and trust these new caregivers takes far longer.¹⁴⁷ If the children are not trusting of, or bonded with, these caregivers, the children are often less likely to seek the support or nurturance from the caregivers even when the children could greatly benefit from such nurturance or support.¹⁴⁸

VII. CONCLUSION

The Indian Child Welfare Act is a Congressional attempt to address the widespread and detrimental practice of removing Native American children from their families and destroying Tribal communities. This attempt, through the creation of a thorough and specific Act, gave Tribal parents and Tribes themselves the right to intervene in cases of child removal. It outlined specific placement preferences for these children and gave Tribal families and Tribal affiliated placements preference in cases where children required alternate placements. As with many legislative actions, Congress enacted and implemented ICWA to respond to a historical problem with the best of intentions. But through decades of practice, the various cases that have challenged ICWA have come to highlight that, in its application, the Act is not perfect and has the potential to lead to questionable and oftentimes harmful, unintended results as well. While these issues are not at the center of the constitutional debate around the viability of ICWA, the concerns relating to the best interests of children, who are at the very center of these cases, cannot be disregarded. The

144. *Id.* at 33–34.

145. See Ross A. Thompson, *Bridging Developmental Neuroscience and the Law: Child-Caregiver Relationships*, 63 HASTINGS L.J. 1443, 1453 (2012).

146. Dozier & Bick, *supra* note 139, at 206.

147. *Id.*

148. *Id.* (citing K. Chase Stovall-McClough & Mary Dozier, *Forming Attachments in Foster Care: Infant Attachment Behaviors During the First 2 Months of Placement*, 16 DEV. & PSYCHOPATHOLOGY 253 (2004)).

science around the psychological, emotional, and physical health impacts of removals and subsequent placement changes, as well as the need for permanence in the lives of these children, cannot and should not be ignored.

For many of the children impacted by ICWA, the need for stable, committed, and nurturing caregivers is not found in their biological family but instead in the home in which they are subsequently placed. If ICWA is applied appropriately from the outset of a case, then the children may receive the benefits of a stable, committed, and nurturing home at a young age, while also maintaining ties and connections with their Tribal community. These children may receive the benefits of committed, stable relationships *and* the benefits associated with the maintenance of cultural connections and Tribal affiliations. But, as seen in the cases outlined above, some children impacted by ICWA are placed in non-Tribal homes upon removal or separation from their biological parent or parents. These children have often been placed in these homes at a young age, allowing them the opportunity to develop the stable, committed, and nurturing relationships and bonds that they so desperately need, but in families that do not have Tribal affiliations. For these children, later application of ICWA risks removing them from these homes, severing the bonds they have formed, and subjecting the children to further trauma as well as the host of psychological and physical harms that are connected with such removals, relocations, and disruptions in relationships. When applied from the start, ICWA would not pose these problems; ICWA can be used to facilitate secure and loving placements for children at a young age in Tribal families who can continue to support them for years to come. But when the rules and requirements of ICWA are not implemented until a later phase in the dependency proceeding or brought up for the first time when a stable placement files for adoption, it is hard to say whether the role of ICWA's governance, and the resulting consequences of additional removals, relocations, and severed relationships, is really what was intended by ICWA's goal of "protect[ing] the best interests of Indian children."¹⁴⁹

The implications of ICWA in cases where children have already established permanence in a home that does not align with ICWA's placement preferences should likely be reconsidered or reworked if the goal of this Act truly is to foster and "protect the best interest[] of [the] Indian children."¹⁵⁰ ICWA was largely designed with the well-being and protection of Tribes as the top priority, but the impact on the well-being of Tribal children is a huge component of that mission. The implications of the late application of ICWA on the children deserve larger consideration and weight in the analysis of ICWA's mandates moving forward.

149. 25 U.S.C. § 1902.

150. *Id.*

