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Haaland v. Brackeen and Mancari: On History, Taking Children, and the Right-Wing Assault on Indigenous Sovereignty

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Essay

Haaland v. Brackeen and *Mancari*: On History, Taking Children, and the Right-Wing Assault on Indigenous Sovereignty

LAURA BRIGGS

In June 2023, the Supreme Court upheld the constitutionality of the Indian Child Welfare Act (ICWA) of 1978 in Haaland v. Brackeen*, making it harder for (some) Indigenous families and communities to lose their children. The decision left one key question unanswered, however: whether protections specifically for American Indian households served as an illegitimate "racial" preference. Justice Amy Coney Barrett's opinion for the majority argued that the petitioners lacked standing to raise this issue. Thus, the Court left the door open to continuing challenges by those who have an interest in using ICWA's cute children and clean-cut evangelical Christian parents to try to put an end to this and all related statutes that give so-called "preferential treatment" to American Indians—including in gaming compacts, employment, federal treaties, and essentially all of Indian law.*

This Essay argues for the importance of history broadly and critical adoption studies in particular in understanding the stakes in ICWA. Part I shows that recent scholarship in critical adoption studies elucidates the ways the two sides in these cases narrate adoption as either a sweet and generous act or as belonging to a history of taking Indigenous (and other racially minoritized) children. These are common narrative strategies, but the focus on adoption as charity is misleading. Part II locates Brackeen *in relation to the rising power of the political right, noting that the right has overlapping interests in first, overturning* Morton v. Mancari*, which found that tribal nations are political entities, not racial groups, and hence their members can be accorded different status than the citizens of states, and second, in challenging dominant theories of race and reproduction that constitute a view of the United States as a multiracial democracy. Part III argues that the efforts to tell a neutral story about the history of ICWA—that it was a response to high rates of child separation—obscures the activism by Indigenous peoples that resulted in the passage of the Act, and hence the stakes of the debate itself.*

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INTRODUCTION

In June 2023, the Supreme Court upheld the constitutionality of the Indian Child Welfare Act (ICWA) of 1978 in *Haaland v. Brackeen*, making it harder for (some) Indigenous families and communities to lose their children. The decision left one key question unanswered however: whether protections specifically for American Indian households served as an illegitimate "racial" preference. Supreme Court Justice Amy Coney Barrett's majority opinion held that the petitioners lacked standing to raise this issue. Thus, the Court left the door open to continuing challenges by those who have an interest in using cute Native children and clean-cut evangelical Christian parents to try to put an end to ICWA and all related statutes that give so-called "preferential treatment" to American Indians—including in gaming compacts, employment, federal treaties, and essentially all of Indian law.[1]

This Essay argues for the importance of history broadly and critical adoption studies in particular in understanding the stakes in ICWA. Part I shows that recent scholarship in critical adoption studies elucidates the ways the two sides in these cases narrate adoption as either a sweet and generous act or as belonging to a history of taking Indigenous children. These are common narrative strategies, but the focus on adoption as charity is

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[1] Haaland v. Brackeen, 143 S. Ct. 1609, 1638 (2023). Indeed, the vice president for legal affairs for the Goldwater Institute and the author of amicus briefs for Goldwater and the Cato Institutes, two of the important institutional advocates for overturning ICWA, immediately published an article arguing that the anti-ICWA litigation would continue. *See* Timothy Sandefur, *Why* Haaland v. Brackeen *Is Not the End of the Story*, *in* 2022–2023 CATO SUPREME COURT REV. 169 (2023). *See also* Carole Goldberg, *American Indians and Preferential Treatment*, 49 UCLA L. REV. 943 (2002) (noting that some challenges to Indian law are tied to larger challenges against affirmative action and suggesting ways that Tribes can defend against these attacks).

misleading.[2] Part II locates *Brackeen* in relation to the rising power of the political right. It notes that the right has an interest in first, overturning *Morton v. Mancari*, which held that Tribal nations are political entities, not racial groups, and hence their members can be accorded different status than the citizens of states.[3] The right is also engaged in challenging dominant theories of race and reproduction that constitute a view of the United States as a multiracial democracy. Part III argues that the efforts to tell a neutral story about the history of ICWA—that it was a congressional response to high rates of child separation—obscures the activism by Indigenous peoples that resulted in the passage of the Act, and hence the stakes of the debate itself.

I. CRITICAL ADOPTION STUDIES

The past twenty-five years have seen the emergence of the interdisciplinary field of critical adoption studies. This field has brought together historians, anthropologists, sociologists, and cultural and legal studies scholars to explore what adoption can tell us about kinship, transnational relations, race, indigeneity, and public policy.[4] Scholars have raised questions about how children whose birth parents relinquish or have their parental rights taken away are persistently poorer, younger, and darker-skinned than those who adopt them, locating adoption as shot through with questions of power, money, racism, and exploitation.

Those who sought to overturn ICWA, in contrast, relied on the ways those in the United States have often understood adoption and fostering as particularly generous acts: a way of bringing a small person into an intimate relationship with a household, sometimes strangers, and raising them to adulthood. So, for example, the amicus brief for the Goldwater Institute reads in part, "ICWA's foster care and adoption placement mandates . . . and the power of tribes to invalidate state court decisions in certain circumstances . . . create a powerful disincentive against adults opening their homes and hearts to 'Indian children.'"[5] Or, as Matthew D. McGill said in his oral argument before the Supreme Court on November 9, 2022:

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[2] *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 692 (2013) (Sotomayor, J., dissenting) (discussing the proactive steps that the birth father took to assert his parental rights and contrasting this with the version of the facts enshrined in the majority opinion to note that this was not a charitable decision, but instead a wanted child).

[3] 417 U.S. 535, 554 (1974).

[4] *See, e.g.*, LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION (2012) [hereinafter BRIGGS, SOMEBODY'S CHILDREN]; E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION (1998); ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES (2008); MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD (2014); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

[5] Brief for Goldwater Institute et al. as Amici Curiae Supporting Respondents, at 22–23, *Brackeen*, 143 S. Ct. 1609 (No. 21-376).

> [E]ach year hundreds, if not thousands, of Indian children are placed in non-Indian foster homes, and sometimes there they bond with those families. Yet, when those families try to adopt those children, ICWA rears its head . . . allowing tribes to play the proverbial ICWA trump card at the eleventh hour. . . . Not even [their Indigenous foster child's] deep attachment to the Brackeens after being part of their family for four years is sufficient.[6]

McGill primarily works to represent gaming interests,[7] a point to which we will return, and here he engages in a sentimental move that critical adoption studies has analyzed at length.

Critical adoption studies scholars have reframed the often, frankly romanticized narrative that family courts, foster parents, and strangers use when they speak on behalf of the child's feelings and best interests. Scholars show the ways that adoption and fostering (and not just of Native children) are about state power and professional interests that take someone away from all of their relations, including the people who birthed and sometimes raised them for a portion of their childhood. At best, adoption and foster care are full of loss on all sides, for birth parents, their communities, and children—and for generations to come. As the child who loses their birth parents grows and has their own children, these children will be born without their biological grandparents, aunts and uncles, cousins, and all the others, while the family left behind will have a hole in it. At worst, fostering and adoption are full of coercion and even violence, as police and foster agencies tear a child from the arms of parents or others who want them and fully intended to raise them. As many scholars have noted, impoverished people, Indigenous, Black, and other people of color—often single mothers or queer parents—are the most likely to lose their children.[8]

Adoption can also be a Trojan Horse. It serves as a way of winning approval for laws supporting certain kinds of families, or as a way of punishing communities and individuals for their politics, their rebellions, or even their existence. For example, when large numbers of children became

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[6] Oral Argument at 00:53, *Brackeen*, 143 S. Ct. 1609 (No. 21-376), https://www.oyez.org/cases/2022/21-376. This language of the "ICWA trump card" is hardly proverbial, but is a quotation of Samuel Alito's majority opinion in an earlier ICWA case, Adoptive Couple v. Baby Girl, 570 U.S. 637, 656 (2013) (quoted in Rose Cuison Villazor, Commentary, Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013)*, *in* FEMINIST JUDGEMENTS: REPRODUCTIVE JUSTICE REWRITTEN 265, 269 (Kimberly M. Mutcherson, ed. 2020)).

[7] His law firm describes his practice this way on its website: "Matthew D. McGill is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher and Co-Chair of the firm's Judgment and Arbitral Award Enforcement and Betting and Gaming practice groups." *Matthew D. McGill*, GIBSON DUNN, https://www.gibsondunn.com/lawyer/mcgill-matthew-d/ (last visited Apr. 10, 2024).

[8] LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR 6 (2020) [hereinafter BRIGGS, TAKING CHILDREN]; DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 36–38 (2022); RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 27–28 (2001).

available for adoption from Central America to the United States in the 1980s and '90s, officially it was because the wars in El Salvador, Guatemala, Nicaragua, which spilled over into Honduras, had displaced people, and children had been orphaned or lost.[9] Many, however, pointed out that children were being kidnapped as a tactic of war, particularly but not exclusively by those on the political right.[10] As grieving and terrorized parents began to organize and tell their stories, first to each other and then on a larger public stage, it became clear that disappearing children was an organized political strategy to terrorize those who were part of, or suspected to sympathize with, the political left.[11]

In the United States, as this scholarship notes, separating parents and children was explicitly part of enslavement. Enslaved mothers were said by slavers to have no maternal feelings, while abolitionists and formerly enslaved people told heart-wrenching stories of children losing their mothers, and mothers, children.[12] During Reconstruction, Black children were claimed as laborers by those who said they had apprentice contracts with them.[13] After Reconstruction, Black children were impressed as labor by chain gangs.[14] Throughout the long Civil Rights era, which was often explicitly a children's crusade to desegregate schools or lead marches, white citizens' councils and segregationist public officials first cut welfare payments to single mothers and then took away the hungry children left behind.[15]

Similar patterns have been documented in United States Indian policy. They affected an even larger percentage of children, first through boarding school policy, then, as Native activism and public outcry forced federal and local governments to remedy the widespread hunger, disease, and death that swept boarding schools through the provision of state and federal welfare funds to single mothers on reservations.[16] The involvement of states, particularly in the Western United States, made things much worse. These

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[9] *See* MARGARET E. WARD, MISSING MILA, FINDING FAMILY: AN INTERNATIONAL ADOPTION IN THE SHADOW OF THE SALVADORAN CIVIL WAR 202 (2011) (discussing the influx of adopted children in the United States during the 1980s from Central America).

[10] *Id.* at 199.

[11] RACHEL NOLAN, UNTIL I FIND YOU: DISAPPEARED CHILDREN AND COERCIVE ADOPTIONS IN GUATEMALA 12–13 (2024).

[12] *See e.g.*, FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS: AN AMERICAN SLAVE 3 (Cambridge Univ. Press 2011) (1845) (describing the death of his mother); HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 138 (R.J. Ellis ed., Oxford Univ. Press 2016) (1861) ("I have shed many and bitter tears, to think that when I am gone from my children they cannot remember me with such entire satisfaction as I remembered my mother.").

[13] LAURA F. EDWARDS, GENDERED STRIFE & CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION 42–44, 47–54 (1997); LESLIE A. SCHWALM, A HARD FIGHT FOR WE: WOMEN'S TRANSITION FROM SLAVERY TO FREEDOM IN SOUTH CAROLINA 250–51 (1997).

[14] W.E. BURGHARDT DU BOIS, EFFORTS FOR SOCIAL BETTERMENT AMONG NEGRO AMERICANS 82 (1909).

[15] BRIGGS, TAKING CHILDREN, *supra* note 8, at 33–34; ROBERTS, *supra* note 8, at 36–38.

[16] *See* BRIGGS, SOMEBODY'S CHILDREN, *supra* note 4, at 65–77 (discussing federal policies regarding displacement of Native American children).

states took Native children and placed them in middle-class, usually white, homes in an effort to reduce their welfare budgets.[17] This pattern was intensified in the 1960s and '70s, as a sovereignty movement swept Indian Country—often born, ironically enough, in boarding schools.[18] Building on longstanding political movements dating back to the eighteenth and nineteenth centuries, Indigenous political organizations sought to force the federal government to acknowledge that treaties had never ceded the sovereignty of Tribal nations, and reservations and Tribes were essentially islands of foreign authority within the United States.[19] That is, they insisted that states had no business taking children or even entering reservations without the permission of Tribal authorities, and the federal government only acted through authority granted by treaties.[20]

Drawing in part on critical adoption studies scholarship and extensively on the Department of the Interior's 2022 report on the history of Indian boarding schools, Supreme Court Justice Neil Gorsuch wrote a scathing concurrence in *Brackeen*. The concurrence essentially served as a rebuttal to the think tanks, conservative activists, and legal advocates who have sought to overturn ICWA—and through ICWA, *Morton v. Mancari* and all Indian law—for decades.[21] The mass removal of Indigenous children in the sixties and seventies, he wrote,

> was only the latest iteration of a much older policy of removing Indian children from their families—one intentionally spearheaded by federal officials with the aid of their state counterparts nearly 150 years ago. In all its many forms, the dissolution of the Indian family has had devastating effects on children and parents alike. It has also presented an existential threat to the continued vitality of Tribes—

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[17] *Id.* at 72.

[18] *See generally* BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940 (1998) (discussing the history of Indian boarding schools and the effects that these schools had on Indigenous families); Teresa Evans-Campbell, Karina L. Walters, Cynthia R. Pearson & Christopher D. Campbell, *Indian Boarding School Experience, Substance Use, and Mental Health among Urban Two-Spirit American Indian/Alaska Natives*, 38 AM. J. DRUG & ALCOHOL ABUSE 421, 421 (2012) ("By the 1970s, a number of schools were closed and the mission of the remaining schools shifted away from overt assimilation."); K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL (1994) (providing a historical account of the Chilocco Indian School from the perspective of the Indigenous peoples who attended it); DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928 (1995) (noting that Indian boarding schools were part of a larger effort to forcibly assimilate Indigenous peoples). *See also* MARTHA LOUISE HIPP, SOVEREIGN SCHOOLS: HOW SHOSHONES AND ARAPAHOS CREATED A HIGH SCHOOL ON THE WIND RIVER RESERVATION (2019) (chronicling an early effort for public school sovereignty during the 1960s and '70s).

[19] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.07, 4.01, 5.01 (Nell Jessup Newton ed., 2019).

[20] *Id.* § 5.01.

[21] For instance, the opinion cites JACOBS, *supra* note 4. Mostly, it relies on BRYAN NEWLAND, DEP'T OF THE INTERIOR, OFF. OF INDIAN AFFS., FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 33 (2022).

> something many federal and state officials over the years saw as a feature, not a flaw.

This was a principle that was perhaps most explicitly acknowledged through the passage of the Indian Child Welfare Act, which set different standards for the taking of Indigenous children into foster care or adoptions, giving Tribal nations authority to intervene in all Indian child welfare cases or to actually giving jurisdiction over the cases to Tribal courts. This has frustrated those who seek to reduce the power of the federal government or to extract resources from Indian land or Tribal nations since its passage in 1978.[22]

Gorsuch, in his role as the member of the Court who has defined and defended Indian law during this historical moment, articulated many of critical adoption studies' arguments, and, indeed, what Indigenous activists have argued for decades: that the goal of ICWA is to prevent the gutting of Tribal membership through off-reservation child placement and the dissolution of the land base of Indian Country through the weakening of Tribal nations.[23]

II. A HISTORY OF THE PRESENT: THE RIGHT AND *MORTON V. MANCARI*

The political right has explicitly and ideologically opposed affirmative action for decades, winning major victories in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*[24] in 2023 and a voting rights case, *Shelby County v. Holder*.[25] Its adherents have expressed distress that affirmative action disfavors white people in employment, education, political representation, and the awarding of other goods, like housing and government contracts.[26] Less vociferously, but under the same rationale, conservatives have sought to overturn *Morton v. Mancari*, which, they say, gives preferential treatment to members of American Indian Tribal nations. *Mancari* treats Indigenous peoples as members of political or governmental entities (that is, Tribal nations) that predate the founding of the United States and retain unceded sovereignty, rather than as members of a distinct

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[22] Haaland v. Brackeen, 143 S. Ct. 1609, 1641 (2023) (Gorsuch, J., concurring).

[23] James Abourezk, *The Role of the Federal Government: A Congressional View*, *in* THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 12, 12–13 (Steven Unger ed., 1977).

[24] 143 S. Ct. 2141 (2023).

[25] 570 U.S. 529 (2013).

[26] *See, e.g.*, COLEMAN HUGHES, THE END OF RACE POLITICS: ARGUMENTS FOR A COLORBLIND AMERICA (2024) (arguing that the departure from a colorblind America has led to increased animus between different racial and ethnic groups and that diversity, equity, and inclusion policies harm the people they are meant to help).

"race."[27] As citizens of particular political groups, Indigenous peoples can be given preference in hiring (in, for example, Bureau of Indian Affairs jobs) and the awarding of some government contracts; there are hunting, fishing, and logging rights unique to Tribal peoples, and most importantly, treaties with Indigenous peoples dating back to the founding of the country can be upheld.[28] Treating Indigenous peoples as a racial group would presumptively create a constitutional bar to the enforcement of these treaties or Indian law. The political right's preferred vehicle for challenging *Mancari* has been ICWA litigation, playing on the desire to rescue children—an intrinsically more appealing gesture than trying to, say, take reservation lands or gaming revenue. Trump administration officials inadvertently demonstrated the challenges of upending *Mancari* by administrative means; they ultimately lost their battles to require Native peoples to submit to work requirements for Medicaid and Temporary Assistance for Needy Families (TANF), when those moves were halted by other members of his administration.[29]

For some, the goal of challenging *Mancari* is directly about material interests, just as Gorsuch's concurrence suggested. So, as we have seen, the lawyer who argued the *Brackeen* case before the Supreme Court, is primarily a gaming attorney.[30] In 2018, Matthew McGill won a Supreme Court case that gave states the right to sponsor sports betting, overturning a federal ban that had prohibited that activity by states while allowing it for Indian Tribes.[31] It's a non-trivial industry, worth an estimated $150 billion a year, including illegal sports betting; it had become what the *New York Times* called an "economic lifeline" for federally recognized Indian Tribes.[32] Similarly, Paul Clement, McGill's co-counsel on the sports betting case, argued a previous Supreme Court ICWA case, *Adoptive Couple v. Baby Girl*.[33] Clement represented a Massachusetts group that was trying to win a gaming contract to open what is now the MGM Casino in Springfield, Massachusetts and KG Urban Enterprises in a lawsuit against

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[27] Andrew I. Huff & Robert T. Coulter, *Defending* Morton v. Mancari *and the Constitutionality of Legislation Supporting Indians and Tribes*, INDIAN L. RSCH. CTR. (Nov. 19, 2018), https://indianlaw.org/story/defending-mancari-our-most-urgent-task; Goldberg, *supra* note 1, at 949–50; Dan Diamond, *Trump Challenges Native Americans' Historical Standing*, POLITICO (Apr. 22, 2018, 7:07 AM), https://www.politico.com/story/2018/04/22/trump-native-americans-historical-standing-492794.

[28] Goldberg, *supra* note 1, at 946, 950, 984.

[29] Will Chavez, *Trump Administration Wants Tribal People to Work for Medicaid Benefits*, CHEROKEE PHOENIX (May 24, 2018), https://www.cherokeephoenix.org/news/trump-administration-wants-tribal-people-to-work-for-medicaid-benefits/article_fd111ed4-1678-55d6-8e90-fef7c4f5cbf4.html; Diamond, *supra* note 27.

[30] *2020 Washington D.C. Trailblazers: Matthew D. McGill; Gibson, Dunn & Crutcher*, 4 NAT'L L.J. 132 (2020).

[31] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1468–70, 1484–85 (2018).

[32] David W. Chen, Mark Walker & Kenneth P. Vogel, *How Sports Betting Upended the Economies of Native American Tribes*, N.Y. TIMES (Feb. 10, 2023), https://www.nytimes.com/2023/02/10/sports/sports-betting-native-american-tribes.html; Mark Joseph Stern, *Chris Christie's Big Gamble*, SLATE (Dec. 4, 2017, 6:04 PM), https://slate.com/news-and-politics/2017/12/the-supreme-court-is-skeptical-of-the-ban-on-sports-betting.html.

[33] 570 U.S. 637 (2013).

Massachusetts's set-aside in Southeastern Massachusetts for the Mashpee Wampanoag.[34] Non-Indigenous betting operations like MGM are subject to competition from Indian gaming. Indeed, the Trump administration attempted to, and briefly did, revoke the reservation status of the Mashpee Wampanoag over issues related to competition with non-Indian casinos.[35] Gaming and casino lawyers aggressively representing their clients' interests would like to see an end to the legal existence of Tribal nations and their sovereign status in order to close down Indian casinos and replace them with non-Indian betting operations.[36] ICWA is a compelling vehicle to do that because claiming one is acting in the best interest of Indigenous children is a better narrative than "we want to take their gaming revenue."

Likewise, as the Gorsuch concurrence in *Brackeen* noted, those seeking Indigenous peoples' water, land, and mineral rights have their eyes on both short-term and long-term goals. ICWA applies only to those children who are eligible for Tribal enrollment, most of whom have to meet stiff requirements involving a significant Native blood quantum (although those who seek to overturn ICWA usually look for Cherokee cases, because the Cherokee Nation has no blood quantum membership requirement).[37] Indigenous children placed in white homes generally do not seek Tribal enrollment, and if they do, they have a hard time winning it; likewise, their descendants are rarely members of Tribal nations.[38] At a time when the numbers of Native people are growing, the strategy of separating children from Tribal nations means a smaller population base—less political power and fewer people willing to fight for nations' control of resources. The ultimate goal may well be to return to the policies of the Termination Era of the 1950s, when Congress passed laws to end the legal existence of Tribal nations and their control over land, water, and minerals.[39] It is a story with roots in the eighteenth century, where any wealth and resources that

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[34] George Brennan, *Casino Lawsuit Remains Certain*, STANDARD-TIMES (Apr. 12, 2013, 7:49 AM), https://www.southcoasttoday.com/story/news/local/spectator/2013/04/12/casino-lawsuit-remains-certain/48959302007/; Matthew L.M. Fletcher, *Federal Court Affirms Mass. Gaming Law Granting Preference to Tribes*, TURTLE TALK (Feb. 17, 2012), https://turtletalk.blog/2012/02/17/federal-court-affirms-mass-gaming-law-granting-preference-to-tribes/.

[35] Rory Taylor, *Trump Administration Revokes Reservation Status for Mashpee Wampanoag Tribe amid Coronavirus Crisis*, VOX (Apr. 2, 2020, 10:30 AM), https://www.vox.com/identities/2020/4/2/21204113/mashpee-wampanoag-tribe-trump-reservation-native-land.

[36] Andrew Cohen, *Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington*, THE ATLANTIC (Apr. 12, 2013), https://www.theatlantic.com/national/archive/2013/04/indian-affairs-adoption-and-race-the-baby-veronica-case-comes-to-washington/274758/.

[37] *Frequently Asked Questions*, CHEROKEE NATION (Aug. 10, 2023), https://www.cherokee.org/about-the-nation/frequently-asked-questions/common-questions/?page=2&pageSize=7.

[38] Ashley L. Landers, Sharon M. Danes, Amy A. Morgan, Shamora Merritt & Sandy White Hawk, *My Relatives Are Waiting: Barriers to Tribal Enrollment of Fostered/Adopted American Indians*, 83 J. MARRIAGE & FAM. 1373, 1396–97 (2021).

[39] James E. Officer, *Termination as Federal Policy: An Overview*, *in* INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 114, 114–28 (Kenneth R. Philp ed., 1995) (discussing the Termination Era of the 1950s).

Indigenous people were able to command were seen as illegitimate or vulnerable to those who want to grab or extract them.[40]

The political right, in particular, has embraced fostering and adoption. Adoption is, for example, important to the politics of abortion; the movement that calls itself Right to Life has embraced adoption as an alternative to abortion, although there is little evidence that people denied an abortion turn to adoption.[41] Supreme Court Justice Samuel Alito's majority opinion in *Dobbs v. Jackson Women's Health Organization* relied on adoption as part of the explanation for why a lack of constitutional protections for abortion did not represent an infringement of women's rights—people could simply carry the pregnancy to term and then not raise the child.[42] As many commentators suggested, this passage was particularly alarming, as he argued that adoption was easy because "the domestic supply of infants" was small, which sounded simultaneously consumerist and nativist. [43]

The far right's investment in abortion politics is a means to make white babies available for adoption. Critics' concerns that this was more than a small part of the broader conservative campaign to criminalize abortion intensified after Republican Congresswoman Mary Miller told a crowd in Illinois, "President Trump, on behalf of all the MAGA patriots in America, I want to thank you for the historic victory for white life in the Supreme Court yesterday."[44] Miller's remarks credited Trump for his three Supreme Court appointments after Senate Republicans denied President Obama the opportunity to appoint Merrick Garland.[45] Congresswoman Miller subsequently said that she meant "right to life," not "white life," although

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[40] NED BLACKHAWK, THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY 176–206 (2023) (discussing the exploitation of Indigenous peoples by white settlers in the post-revolutionary period).

[41] DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION 208–09 (2020); Malinda L. Seymore, *Adoption as Substitute for Abortion?*, 95 U. COLO. L. REV. (forthcoming 2024) (manuscript at *5–9), https://papers.ssrn.com/abstract=4408877.

[42] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259 n.46 (2022).

[43] *Id.* The quote is originally from a Centers for Disease Control and Prevention publication, but the fact that the words are not original with Alito does not make his use of them less concerning. *See* Dahlia Lithwick, *The Horrifying Implications of Alito's Most Alarming Footnote*, SLATE (May 10, 2022, 4:27 PM), https://slate.com/news-and-politics/2022/05/the-alarming-implications-of-alitos-domestic-supply-of-infants-footnote.html (noting the "chilling" implications of Justice Alito's use of the phrase "domestic supply of infants" in *Dobbs*); Chelsea Steiner, *Let's Unpack the Chilling Phrase "Domestic Supply of Infants" in the Supreme Court's Draft to Overturn* Roe v. Wade, MARY SUE (May 7, 2022, 3:28 PM), https://www.themarysue.com/domestic-supply-of-infants-supreme-court-roe-v-wade/ (discussing the "insidious" implications of referring to the lack of adoptable children as a supply and demand problem).

[44] Jennifer Hassan, *GOP Lawmaker Calls* Roe *Ruling 'Victory for White Life' as Trump Rally Cheers*, WASH. POST (June 26, 2022, 9:51 AM), https://www.washingtonpost.com/nation/2022/06/26/mary-miller-white-life-trump-rally/. "MAGA" is an acronym for candidate Trump's "Make America Great Again," slogan, and as his supporters have sought to take over the Republican Party and remake its policy positions, MAGA has become the name of his faction.

[45] *Id.*; Carl Hulse, *The Shifting Standards of Mitch McConnell*, N.Y. TIMES (May 29, 2019), https://www.nytimes.com/2019/05/29/us/politics/mitch-mcconnell-supreme-court-trump.html.

the audience cheered her "white life" line.[46] Some critics suspected that the invocation and withdrawal of this language of whiteness was not an accident at all, but a dog whistle to white Christian nationalists,[47] because the "MAGA movement" campaigned, and governed, through some of the most explicitly racist rhetoric and policies that we have seen in United States public life since the eugenics of the 1930s.[48] White nationalist discourse focuses on abortion as a concern about what these groups have called the problem of the Great Replacement or white genocide: the fear that United States-born Christian white people will be—are being—replaced by immigrants, Jewish, Muslim, Black, Indigenous, Asian, and Latinx people, and that white people's use of abortion exacerbates this problem.[49]

Reproduction, not just adoption, is broadly important to the far right. It has become increasingly central in recent years as a result of the distribution of the writings of David Lane, associated with a neo-Nazi terror group, The Order, which murdered a Jewish radio talk show host in 1987.[50] Lane gave us the "fourteen words," a reference to a slogan that has served as a touchstone for white nationalists transnationally: "We must secure the existence of our people and a future for White children."[51] Lane and his followers are conspicuously violent, calling for the mass murder of Black, Latinx, and Jewish people.[52] They have been associated, for example, with the plot in Tennessee to murder Barack Obama and eighty-eight Black school children.[53] The number "88" is also important to them, associated

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[46] Hassan, *supra* note 44.

[47] This invocation and withdrawal of language catering to the far right was a feature of President Trump's courting of that bloc. For example, Trump and his campaign floated the idea that Obama and later Kamala Harris were not eligible to hold office because they were not natural-born citizens. When confronted by journalists with documents that demonstrated that this was a belief without basis in fact or constitutional law, Trump would withdraw the statement, only to proffer it again at a later time. Will Steakin & Terrance Smith, *Trump Floats False, Racist Birther Theory About Kamala Harris*, ABC NEWS (Aug. 14, 2020, 5:08 PM), https://abcnews.go.com/Politics/trump-floats-false-racist-birther-theory-kamala-harris/story?id=72372616.

[48] German Lopez, *Donald Trump's Long History of Racism, from the 1970s to 2020*, VOX (Aug. 13, 2020, 7:00 PM), https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history; Nicholas Kristof, Opinion, *Is Donald Trump a Racist?*, N.Y. TIMES (July 23, 2016), https://www.nytimes.com/2016/07/24/opinion/sunday/is-donald-trump-a-racist.html.

[49] Yotam Ophir, Meredith L. Pruden, Dror Walter, Ayse D. Lokmanoglu, Catherine Tebaldi & Rui Wang, *Weaponizing Reproductive Rights: A Mixed-Method Analysis of White Nationalists' Discussion of Abortions Online*, 26 INFO., COMMC'N & SOC'Y 2186 (2023); Dustin Jones, *What Is the 'Great Replacement' and How Is It Tied to the Buffalo Shooting Suspect?*, NPR (May 16, 2022, 12:35 AM), https://www.npr.org/2022/05/16/1099034094/what-is-the-great-replacement-theory (attributing the term "The Great Replacement" to "Renaud Camus, a French writer who wrote 'Le Grand Remplacement' in 2011").

[50] *David Lane*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/individual/david-lane (last visited Apr. 10, 2024).

[51] *Id.*

[52] *Id.*

[53] Heidi Beirich, *Skinheads Arrested in Plot to Kill Obama,* S. POVERTY L. CTR. (Oct. 27, 2008), https://www.splcenter.org/hatewatch/2008/10/27/skinheads-arrested-plot-kill-obama.

with the phrase "Heil Hitler" and "H," the eighth letter of the English alphabet.[54]

Lane and the Great Replacement Theory are associated with mass violence. These incidents include the 2022 shootings targeting African Americans in a grocery store in Buffalo,[55] the Tree of Life synagogue shooting in Pittsburgh in 2018,[56] and the eco-fascist shooting in 2019 in a Walmart in El Paso that killed twenty-three Mexican Americans and Mexican nationals,[57] and at least six other mass casualty events since Donald Trump assumed the presidency in 2017.[58] These were not conceived as one-off events but were perpetrated with the goal of starting a race war that would eliminate Black and Brown people from the United States and preserve its ecological, cultural, and other resources for the white "race."[59] These are not, moreover, marginal theories; they have been featured on Tucker Carlson's Fox News show (now canceled) and advocated by Republican elected leaders like Lauren Boebert, Matt Gaetz, Paul Gosar, and Marjorie Taylor Greene.[60]

The parts of the conservative coalitions advocating for an end to ICWA do not subscribe to "Great Replacement"-style conspiracies, but to different theories of reproduction. The Goldwater Institute, the American Enterprise Institute, the Cato Institute, and the Heritage Foundation are conservative think tanks of diverse stripes—libertarian, states' rights, neoliberal, and neoconservative—and have been engaged in litigation against ICWA across dozens of cases and for more than a decade.[61] In articles, the Goldwater Institute and others are startlingly eugenicist, describing the child in *Adoptive Couple v. Baby Girl* as 3/256 Cherokee.[62] As historian of eugenics

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[54] *David Lane*, *supra* note 50.

[55] Khaleda Rahman, *'Great Replacement Theory' Has Inspired 4 Mass Shootings in Recent Years*, NEWSWEEK (May 16, 2022, 4:47 PM), https://www.newsweek.com/great-replacement-theory-inspired-terror-attacks-recent-years-1706953; Jones, *supra* note 49.

[56] Rahman, *supra* note 55.

[57] *Id.*

[58] Weiyi Cai, Troy Griggs, Jason Kao, Juliette Love & Joe Ward, *White Extremist Ideology Drives Many Deadly Shootings*, N.Y. TIMES (Aug. 4, 2019), https://www.nytimes.com/interactive/2019/08/04/us/white-extremist-active-shooter.html.

[59] Rahman, *supra* note 55; Cai et al., *supra* note 58.

[60] Will Ragland, *A List of MAGA Republicans Who Took the 'Great Replacement' Theory Mainstream*, CTR. FOR AM. PROGRESS ACTION (May 18, 2022), https://www.americanprogressaction.org/article/a-list-of-maga-republicans-who-took-the-great-replacement-theory-mainstream/.

[61] Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, VOX (Feb. 20, 2020, 7:30 AM), https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care.

[62] The language is from Justice Alito's decision in *Adoptive Couple v. Baby Girl*, and is repeated often in the Goldwater Institute's work. Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013). *See, e.g.*, Clint Bolick, Opinion, *The Wrongs We Are Doing Native American Children*, NEWSWEEK (Apr. 29, 2016, 1:16 AM), https://www.newsweek.com/wrongs-we-are-doing-native-american-children-389771 (detailing a proposed class action filed by the Goldwater Institute challenging the constitutionality of ICWA); Rebecca Clarren, *A Right-Wing Think Tank is Trying to Bring Down the Indian Child Welfare Act. Why?*, THE NATION (Apr. 6, 2017), https://www.thenation.com/article/archive/a-right-wing-think-

Alexandra Stern has noted, this fractional language of racial heritage echoes the kind of crude, reductionist biology that characterized eugenics, and is being again brought into United States American consciousness by the alt-right.[63] The Goldwater Institute did not spontaneously use this language; with the passage of the Indian Reorganization Act of 1934, at the peak of the eugenics era, many Tribal nations enacted constitutions using boilerplate language from the United States government that specified blood quantum as a requirement for citizenship.[64] The Cherokee Nation does not use it to determine Tribal enrollment, however, so its invocation relies on a comfort level with a very old-school language of race, used to characterize African Americans in the era of enslavement and its aftermath, Indigenous people, and others in the era of eugenics.[65]

Adoption is nested awkwardly in the history of eugenics, the science and public policy of seeking to limit the reproduction of some groups—people with disabilities, poor whites, and people of color—while encouraging the reproduction of the best or "fittest" people.[66] I say awkwardly because adoption separates biological reproduction from social reproduction—it preserves non-white bodies even as it often separates children from their people, their histories, and their ancestors. Yet while it is a complex relationship, there is a reason why the Rome Statute of the International Criminal Court identifies forcibly transferring the children of one group to another as an element of the crime of genocide,[67] because reproducing a way of life is also a part of how a group of people is composed and has a future. As Celeste Ng theorizes in her novel, *Our Missing Hearts*, fostering and adoption are tools that can enforce and even instantiate racial hierarchies, intensifying the ways a group is rendered powerless and outside the body politic.[68] If you do not have the power to raise your own children—if the state or religious groups can reach down to the intimate relationships

tank-is-trying-to-bring-down-the-indian-child-welfare-act-why/ ("Alito's emphasis on Baby Girl's distant connection to her tribe is mirrored by Goldwater's allegation that it is unfair to subject Indian children to a different set of rules, especially if their tribal connection is remote. Goldwater alleges that the law hurts kids by delaying their placement in stable homes, and by sending them back to live with potentially abusive parents.").

[63] ALEXANDRA MINNA STERN, PROUD BOYS AND THE WHITE ETHNOSTATE: HOW THE ALT-RIGHT IS WARPING THE AMERICAN IMAGINATION 3 (2019) (observing that "the rehabilitation of American eugenicists is a pastime of the alt-right").

[64] Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended 25 U.S.C. §§ 5101–5129); KIM TALLBEAR, NATIVE AMERICAN DNA: TRIBAL BELONGING AND THE FALSE PROMISE OF GENETIC SCIENCE 32–34 (2013) (noting the eugenics movement's impact on blood quantum in the late nineteenth and early twentieth centuries); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006) (chronicling the rise of blood quantum up to, and through, the passage of the Indian Reorganization Act).

[65] *Frequently Asked Questions*, *supra* note 37; TALLBEAR, *supra* note 64, at 32–34.

[66] DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 299–300 (1985).

[67] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, art. 6(e), U.N. Doc. A/CONF.183/9 (July 17, 1998).

[68] CELESTE NG, OUR MISSING HEARTS (2022).

between parent and child and relatives and the next generation without good cause and due process—you do not have any meaningful rights.

There is, however, an underlying theory of reproduction that holds together this group of Christian nationalists, neoliberals, anti-federalists, and simple capitalists who were pushing the *Brackeen* case. It is a theory of the United States that does not understand the country as a multiracial democracy, but as a white country. That theory should not be understood as a claim about whether those who seek to overturn ICWA or politicians associated with the MAGA movement are more or less racist than others, but rather a specific theory about who constitute the "real" citizens of the country.

Before Trump's election in 2016, there was explicit racial anxiety around reproduction distributed to different degrees across Democrats and Republicans, liberals and conservatives. This racial anxiety focused on Black women as bad mothers, hyper-fertile Latina women, and white girls with illegitimate children, among others, and it undergirded conservatizing politics across political parties, including welfare reform and opposition to immigration.[69] In 1994, Newt Gingrich's Contract with America inserted marriage and work-readiness classes into federal welfare grants.[70] Many advocates for impoverished women and children saw it as condescending and infuriating,[71] but welfare reform legislation at least imagined a future in which welfare mothers with illegitimate children, whether Black, white, Indigenous, or Latinx, could be redeemed through "work readiness" and marriage and made into a productive part of the nation. This idea was rooted in a vision of the United States as a multiracial democracy—arguably deeply racist, based on an understanding of impoverished and racially minoritized people as different and inferior—but nevertheless part of the nation. [72]

We are in a different narrative about reproduction now, and *Brackeen* is exemplary of it. Conservative reproductive politics are increasingly white nationalist. Where before, white nationalists were a fringe minority, they are moving into the center of American life via an increasingly radicalized Republican Party.[73] They are dreaming of a white United States.[74] When the

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[69] *See* LAURA BRIGGS, HOW ALL POLITICS BECAME REPRODUCTIVE POLITICS: FROM WELFARE REFORM TO FORECLOSURE TO TRUMP 50–53 (2017) [hereinafter BRIGGS, POLITICS] (exploring the connection between reproduction, race, and politics).

[70] *Id.* at 49–55; Laura Briggs, *Somebody's Children*, 11 J.L. & FAM. STUD. 373, 373–74 (2009).

[71] Edward J. Rymsza, Note, *The Contract with America: The Crystallization of the GOP's Racial Agenda*, 1 N.Y.C. L. REV. 481, 483–92 (1996).

[72] I have made this argument in more detail elsewhere. *See* BRIGGS, POLITICS, *supra* note 69.

[73] STERN, *supra* note 63, at 5–6.

[74] *Id.* For more about the burgeoning scholarship on the white nationalist right, see, for example, TIM ALBERTA, THE KINGDOM, THE POWER, AND THE GLORY: AMERICAN EVANGELICALS IN AN AGE OF EXTREMISM (2023); KATHLEEN BELEW, BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA (2018); Nicholas De Genova, *"Everything is Permitted": Trump, White Supremacy, and Fascism*, AM. ANTHROPOLOGIST, https://www.americananthropologist.org/online-content/everything-is-permitted-trump-white-supremacy-fascism (last visited Apr. 10, 2024); JEFF SHARLET, THE UNDERTOW: SCENES FROM A SLOW CIVIL WAR (2023).

Goldwater Institute or Justice Alito says that a child eligible for enrollment in the Cherokee Nation is only 3/256 American Indian,[75] they imply: she is *almost* white, close enough that her Indigeneity makes no difference. This child can be white. The old "Black or Indigenous women as bad mothers" trope was different. It may have been racist, but it at least gestured toward an assimilationist multiracial democracy, however ambivalent that gesture may have been. When the Christian Alliance for Indian Child Welfare writes in its amicus brief that ICWA children are being denied access to white foster homes and their white kin, they are straightforwardly describing how to make Indigenous children disappear into white communities, just as the Friends of the Indian groups did in the late nineteenth and early twentieth centuries when they first imagined boarding schools. It was, and still is, an implicitly genocidal fantasy.

Similarly, when the Trump administration took the children of asylum-seekers, whom Attorney General Jeff Sessions called "filth," they kept no records of who the children belonged to because they did not imagine reunifying them, and no one apparently even thought through where they would go.[76] As a Trump administration official admitted to Jonathan Blitzer of *The New Yorker*: "The expectation was that the kids would go to the Office of Refugee Resettlement, that the parents would get deported, and that no one would care."[77] The fact that parents and children had friends and relatives in the United States, and that the Women's Refugee Commission, followed by lawyers, journalists, and a wider public, would raise red flags about this treatment of children apparently never crossed their mind.[78] America, their America, was white.

III. THE STATUS OF HISTORY

Those who wish to challenge white nationalism at the Supreme Court, directed against Indian Tribal nations, or in United States politics at large, need to be concerned about the status of history. With "the story of ICWA," Neil Gorsuch wrote in his concurrence, "it pays to start at the beginning."[79]

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[75] Brief for Goldwater Institute, *supra* note 5, at 6–7; Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013).

[76] Jonathan Blitzer, *Will Anyone in the Trump Administration Ever Be Held Accountable for the Zero-Tolerance Policy?*, NEW YORKER (Aug. 22, 2018), https://www.newyorker.com/news/daily-comment/will-anyone-in-the-trump-administration-ever-be-held-accountable-for-the-zero-tolerance-policy; Bryan Schatz, *Jeff Sessions Announces a New Crackdown on Immigrants and "Filth,"* MOTHER JONES (Apr. 11, 2017), https://www.motherjones.com/politics/2017/04/attorney-general-jeff-sessions-immigration/.

[77] Blitzer, *supra* note 76.

[78] There were ultimately many protests against the policy to separate immigrant children from their families. The first was by the Women's Refugee Commission. Daniella Silva, *Advocates Walk Out of Hearing to Protest Plan to Separate Migrant Families*, NBC NEWS (May 8, 2018, 6:50 PM), https://www.nbcnews.com/news/us-news/advocates-walk-out-hearing-protest-plan-separate-migrant-families-n872476.

[79] Haaland v. Brackeen, 143 S. Ct. 1609, 1641 (2023) (Gorsuch, J. concurring).

So, this opinion began in the eighteenth century with treaties between the newly created United States federal government and Tribal nations, and it continued through the 1960s.[80] It showed the systematic brutality of Indian boarding schools and the subsequent history of the period, sometimes called the "Sixties Scoop," when Indigenous infants and young people were taken from their homes, and the role of both in reducing the size and political clout of Tribal nations and causing destructive effects on young people.[81] Then, Gorsuch's account rather suddenly stops. "Eventually, Congress could ignore the problem no longer," the opinion reads.[82] "In 1978, it responded with the Indian Child Welfare Act."[83] There is a decade missing there, from 1968–78, during which time Native nations and the Association on American Indian Affairs (AAIA) built a legal, social, and political movement for ICWA[84]—a story that would strengthen Gorsuch's argument and, ironically, engage another entanglement with the political right.

One of the key questions about ICWA has to do with a fight about history. Gorsuch's account is what historians would call a Whiggish history; institutions set all things right eventually, and progress is reliable and inevitable.[85] It is, indeed, in part, an attachment to this way of thinking about the inevitability of progress, especially racial progress, that animates the conservative history wars in the United States. We see this in the fights in state legislatures and school boards over whether we are teaching school children and even college students a sufficiently optimistic version of how struggles over racial justice work. When a Moms for Liberty group in Tennessee objected to the book *Ruby Bridges Goes to School*, they said that the image of a "large crowd of angry white people who didn't want Black children in a white school" in New Orleans was too harsh, and that the book didn't offer "redemption" at the end.[86] It is this investment in racial redemption that makes it easy to say that ICWA was designed to remedy a problem during and just after the boarding school era, but now things have

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[80] *Id.* at 1641–48.

[81] *Id.* at 1641–42; Meera Baswan & Sena Yenilmez, *The Sixties Scoop*, INDIGENOUS FOUND., https://www.theindigenousfoundation.org/articles/the-sixties-scoop (last visited Apr. 10, 2024).

[82] *Brackeen*, 143 S. Ct. at 1646 (Gorsuch, J. concurring).

[83] *Id.*

[84] *The Indian Child Welfare Act: The Gold Standard of Child Welfare Practice*, BRIEF (Partners for Our Child., Seattle, WA), Feb. 2019, at 1, https://partnersforourchildren.org/wp-content/uploads/2022/04/ICWA-BRIEF-final.pdf.

[85] William Cronon, *Two Cheers for the Whig Interpretation of History*, AM. HIST. ASS'N (Sept. 1, 2012), https://www.historians.org/research-and-publications/perspectives-on-history/september-2012/two-cheers-for-the-whig-interpretation-of-history.

[86] Michele L. Norris, Opinion, *Students Need to Learn About the Haters and the Helpers of Our History*, WASH. POST (July 23, 2021, 6:51 PM), https://www.washingtonpost.com/opinions/2021/07/23/students-need-learn-about-haters-helpers-our-history/.

improved. The fact that, ICWA notwithstanding, Indigenous kids are still significantly overrepresented in the foster care system gets glossed over.[87]

The right-wing assault on history—including the removal of books about racism, gender, and sexuality from libraries and classrooms; the distortion of scholarship on enslavement, Indigenous dispossession, and LGBTQ people; and the firing of teachers and librarians at schools and universities[88]—is insurgent. However, the more mainstream Whiggish version has dominated discussion of ICWA almost since it was passed. For example, Amy Howe writes in *SCOTUSblog*, a resource that seeks to be neutral in laying out the stakes in cases currently before the Supreme Court, "Congress passed ICWA in response to a long and tragic history of separating Native American children from their families."[89] This is a line that has been repeated almost verbatim in countless court cases and law review articles about ICWA,[90] but it is based on a claim about how United States institutions respond to racial injustice that has little historical justification. It obscures the activist history of who called for change and why, which allows opponents to engage in a seemingly dispassionate debate about statistics and history that only relatively small numbers of scholars and very well-read people can dispute.

To meaningfully combat the right's efforts to overturn ICWA, and with it, *Mancari*, would require engaging with an accurate history of how it came to be passed. Gorsuch tells half of the story in his concurrence in *Brackeen*. The rest of it would be still more helpful.

The campaign for ICWA began in 1968 when the grandmothers of the Spirit Lake Tribe, with the help of young lawyers from the AAIA, stood up

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[87] ROBERT B. HILL, AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS, CASEY-CSPP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE 1–2 (2007), https://www.aecf.org/resources/an-analysis-of-racial-ethnic-disproportionality-and-disparity-at-the-nation.

[88] AHA Staff, *Resolution for Consideration at the January 2024 Business Meeting*, AM. HIST. ASS'N (Dec. 1, 2023), https://www.historians.org/research-and-publications/perspectives-on-history/december-2023/resolution-for-consideration-at-the-january-2024-business-meeting.

[89] Amy Howe, *Supreme Court Upholds Indian Child Welfare Act*, SCOTUSBLOG (June 15, 2023, 3:27 PM), https://www.scotusblog.com/2023/06/supreme-court-upholds-indian-child-welfare-act/.

[90] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 39 (1989) (noting that ICWA caused "rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes"); Adoptive Couple v. Baby Girl, 570 U.S. 637, 642 (2013) ("Congress found that 'an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies'") (citing the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963)). For other examples that include this language, see Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 888 (2017); Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 736–37 (2006); Lucia Kello, *"The Past Got Broken Off": Classifying "Indian" in the Indian Child Welfare Act*, 36 J. C.R. & ECON. DEV. 361, 366 (2023); Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. 1755, 1771 (2022).

to welfare workers who had literally torn children from their arms and placed them in white homes.[91] Elsa Greywind, for example, stood in the doorway of her home when a welfare worker came to take her grandchildren and place them in a white foster home for no reason except that they considered her too old to care for them, standing firm even when the police came and took her to jail.[92] Mrs. Fournier, similarly, resisted a state social worker who sought to take a child she was fostering in Spirit Lake and put him in a white adoptive home in Fargo.[93] Together, they and other grandmothers travelled from North Dakota to New York City, where advocates from the AAIA organized a press conference for the Foreign Press Club.[94] Executive director William Byler told reporters:

> The [Spirit] Lake Sioux people and American Indian tribes have been unjustly deprived of their lands and their livelihood . . . and now they are being dispossessed of their children. . . . [N]othing exceeds the cruelty [to children] of being unjustly and unnecessarily removed from their families. . . . Today in this Indian community a welfare worker is looked on as a symbol of fear rather than of hope. . . . [C]ounty welfare workers frequently evaluate the suitability of an Indian child's home on the basis of economic or social standards unrelated to the child's physical or emotional well-being and [] Indian children are removed from the custody of their parents or Indian foster family for placement in non-Indian homes without sufficient cause and without due process of law.[95]

Byler continued that twenty-five percent of children in the Spirit Lake Tribe were in out-of-home placements.[96] Even a ruling by the North Dakota Supreme Court in 1963 that held that Tribal courts had exclusive jurisdiction over child placement was not enough to stop welfare workers from removing children.[97] The event caught the attention of President Lyndon Johnson and Secretary of the Interior Stewart Udall, both of whom were very aware of

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[91] *AAIA and Devils Lake Sioux Protest Child Welfare Abuses*, INDIAN AFFS. (Ass'n on Am. Indian Affs., New York, N.Y.), June–Aug. 1968, *reprinted in Problems that American Indian Families Face in Raising their Children and How these Problems Are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affs. of the Comm. on Interior and Insular Affs.*, 93d Cong. 95 (1974). While called Devils Lake at the time, the Tribe has reverted back to its original name, Spirit Lake, which will be the name used throughout. *See* Press Release, Bureau of Indian Affairs, Department of the Interior, American Indian Tribe Reverts to Ancestral Name Spirit Lake New Name for Devil's Lake (Aug. 20, 1996), https://www.bia.gov/as-ia/opa/online-press-release/american-indian-tribe-reverts-ancestral-name-spirit-lake-new-name.

[92] *AAIA and Devils Lake Sioux Protest Child Welfare Abuses*, *supra* note 91, at 95.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 95–96 (alteration of order added) (internal quotations omitted).

[96] *Id.* at 95.

[97] Marc Mannes, *Factors and Events Leading to the Passage of the Indian Child Welfare Act*, 74 CHILD WELFARE 264, 273–74 (1995).

the international condemnation of racism in the United States in the context of the Cold War.[98]

Advocates and Indigenous people argued to the foreign press and subsequently in local newspapers and through activist organizations that in the '50s and '60s, state governments went onto reservations and removed children, mostly to white homes, as boarding schools began to enroll fewer Native children.[99] To white child welfare officials' way of thinking, leaving children in the care of grandmothers and other kin, sometimes not even biological relatives, while living without running water or electricity was tantamount to child neglect.[100] Putting aside the shame and embarrassment of losing children to the state—which accused them of being bad parents, dirty, and poor—people in Tribal nations began fighting to get their children back. The movement first spread among the Lakota (Sioux) Nations: the Sisseton-Wahpeton Oyate, the Standing Rock Sioux, and the Oglala Sioux. Subsequently, the Mandan, Hidatsa, and Arikara Nation passed resolutions denouncing the manner and the rate at which children were being placed in off-reservation foster homes.[101] In 1972, the publication of a critical book, *Far from the Reservation*, and ongoing activism from the AAIA brought attention from wider groups.[102] The influential Mohawk (Kanien'kehá:ka) newspaper, *Akwesasne Notes*, began reporting on child welfare activism by Native, Inuit, and Métis people in Canada, carrying the message further still.[103] The AAIA litigated more than twenty child welfare cases.[104] With the support of tribal councils and courts, the movement spread across Indian Country, insisting that far too many children had been taken and that it amounted to attempted genocide of Native peoples.

The efforts to interest Congress in these problems proved challenging. After six years of calling for a national investigation of Indian child welfare practices, the AAIA finally got one in 1974. These hearings were really the basis of widespread organizing, providing a forum in which debate over

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[98] *Devils Lake Sioux Resistance*, INDIAN FAM. DEF. (Ass'n on Am. Indian Affs., New York, N.Y.), 1974, at 6; JACOBS, *supra* note 4, at 101–02.

[99] William Byler, *The Destruction of American Indian Families*, *in* THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 1, 6 (Steven Unger ed., 1977).

[100] Mannes, *supra* note 97, at 265–67.

[101] *Id.* at 267.

[102] DAVID FANSHEL, FAR FROM THE RESERVATION: THE TRANSRACIAL ADOPTION OF AMERICAN INDIAN CHILDREN (1972).

[103] *'Far from the Reservation' Title of Study of Indian/White Adoptions*, 4 AKWESASNE NOTES 29 (1972); *Latest in the "Social Genocide" Field: Adoption of Indian Children by White Families*, 4 AKWESASNE NOTES 10 (1972); *Saskatchewan Native People Ask for Control of Adoption and Group Care of Indian, Metis Children*, 4 AKWESASNE NOTES 29 (1972); *Potawatomis Assert Jurisdiction over Children; Win Landmark Decision*, 6 AKWESASNE NOTES 41 (1974); *Prairie Native Groups Try to Keep Children with Their People*, 6 AKWESASNE NOTES 41 (1974).

[104] *See, e.g.*, *Court Actions*, INDIAN FAM. DEF. (Ass'n on Am. Indian Affs., New York, N.Y.), 1974, at 3, 6 (discussing child welfare cases); *Senate Probes Child Welfare Crisis*, INDIAN FAM. DEF. (Ass'n on Am. Indian Affs., New York, N.Y.), 1974, at 1–3 (summarizing litigation efforts).

issues of Indian child welfare carried far beyond local communities.[105] The initial hearings centered the words of distraught mothers, grandmothers, and children (one child, planning to speak about how difficult things were in the foster home, just wept).[106] Betty Jack (Ojibwe) testified about sterilization on the Lac du Flambeau reservation in Wisconsin, telling the story of an unmarried mother who was told by a welfare case worker that she could keep her four children only if she agreed to sterilization.[107] When she received the operation, they took her children anyway.[108] Margaret Townsend (Paiute), testified that when she was arrested for driving under the influence for the first time in her life, the county took her children and placed them in foster care.[109]

At times, outsiders seemed openly skeptical about their testimony. To many, the stories told by Indigenous leaders were hard to believe. For example, when Indigenous leader and social worker Evelyn Blanchard responded to a question about how children could be taken from their homes and placed in boarding schools or foster care without a court order, she remarked "Sometimes there is no authority . . . some children are removed without any authority except the decision of the caseworker."[110] For those accustomed to being the subject of law and rights, the stories were hard to understand. One woman reported going to court to get a child back from the child welfare system. While she was busy with the procedure, a social worker walked up to her other child, took him by the hand, and drove away with him.[111]

Despite the tidy sense that Congress, on hearing of the problem, acted to stop it, no bill was passed in 1974. Nor did ICWA carry the day in 1976, when the AAIA and Senator James Abourezk, the bill's sponsor, reconvened further hearings. What finally got the Senate (though not the House) to act after the third set of hearings in 1977—after still more court cases, newsletters, local advocacy, op-eds, and letters to the editor across the United States—was a shift in strategy. In place of weeping children and distraught mothers and grandmothers, the AAIA offered statistics and a

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[105] *See* Irving Berlin & Evelyn Blanchard, *Long-Term Effects of Out-of-Home Placement of Indian Children*, *in* THE INDIAN CHILD WELFARE ACT THE NEXT TEN YEARS: INDIAN HOMES FOR INDIAN CHILDREN 149, 151–52 (Troy R. Johnson ed., 1990) (noting significant increases in suicide rates, mental health problems, and substance abuse among Indian children who had been through foster care).

[106] *Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affs. of the S. Comm. on Interior and Insular Affs.*, 93rd Cong. 43 (1974) (statement of Anna Townsend).

[107] *Id.* at 167 (statement of Betty Jack).

[108] *Id.*

[109] *Someone Else Is Caring for Our Children – "Abusive Practices,"* 6 AKWESASNE NOTES 40 (1974).

[110] JOSEPH A. MYERS, THEY ARE YOUNG ONCE BUT INDIAN FOREVER: A SUMMARY AND ANALYSIS OF INVESTIGATIVE HEARINGS ON INDIAN CHILD WELFARE, APRIL 1980, 92–93 (1981), *reprinted in* BRIGGS, SOMEBODY'S CHILDREN, *supra* note 4, at 83.

[111] *Senate Probes Child Welfare Crisis*, INDIAN FAM. DEF. (Ass'n on Am. Indian Affs., New York, N.Y.), 1974.

different kind of witness list. Psychologists, Tribal chairmen, academics, and lawyers replaced the messy stories of women and children, informal kinship, lack of indoor plumbing, the absence of due process, or any process at all.[112] Painstaking research was carried out by the AAIA in the late 1960s, involving gathering data not only from the Bureau of Indian Affairs but from each Tribal nation. In the process, the AAIA often learned that state child welfare systems kept no record at all of how many of the children in its custody were enrolled tribal members. Despite the gaps, the AAIA produced the following statistics. Eighty-three percent of all Native children of school age were forcibly sent to boarding schools from the 1870s to the 1930s.[113] After World War II, state governments removed Indigenous children but now turned primarily to foster care and adoption in non-Indian families.[114] By the 1970s, up to thirty-five percent of all Indigenous children were removed.[115] In 1978, Congress, persuaded by men, numbers, tireless lobbying, four years of hearings and hundreds of witnesses, passed ICWA.[116]

CONCLUSION

The next time someone begins to write that the unbearable situation of children lost in Indian Country caused Congress to pass ICWA, perhaps they will pause and think of Elsa Greywind, arrested and dragged to jail for refusing to let a caseworker come and take away her grandchildren, and the hundreds of Indigenous people who lobbied, testified, wrote for newspapers, went on the radio, and demanded children back for decades. It is a story of cadres of volunteer lawyers who went to family courts to get Native children returned to their families, and the surviving copies of the AAIA's *Indian Family Defense* that are available from any good research library but are rarely consulted. It was not a story of institutions working, but of Indigenous people fighting for their children.

These stories matter to our current moment, not just as memory, but because the struggle for ICWA needs to be constantly renewed. ICWA has been much less effective than the confident accounts of its work suggest. From 1984 to 1988, a study still found about one-third of Native children in out-of-home care.[117] There was a resurgence of demands in the 1980s and '90s that Native children be rescued from their families based on terribly flawed claims about the prevalence of alcohol use among pregnant

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[112] *Id.*

[113] ADAMS, *supra* note 18, at 27.

[114] JACOBS, *supra* note 4, at xxxi, xxxv, 6.

[115] *Id.* at 93.

[116] The Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963); H.R. Res. 12533, 124th Cong. Rec. 38101 (1978) (enacted).

[117] MARGARET C. PLANTZ, RUTH HUBBELL, BARBARA J. BARRETT & ANTONIA DOBREC, U.S. DEP'T OF INTERIOR, ED302352, INDIAN CHILD WELFARE: A STATUS REPORT 364 (1988).

Indigenous people.[118] Kids with Down syndrome and other developmental disabilities were incorrectly diagnosed with fetal alcohol spectrum disorders, and mothers went to prison as a result.[119]

The forces arrayed against ICWA now are different. They are conservatives who seek to overturn *Mancari* as a fellow traveler with the body of affirmative action law that they oppose, and with it most Indian law. They are gaming lawyers representing non-Indian casinos and sports betting, and others who represent mining and other extractive industries, that seek to undermine Tribal sovereignty in the very old fight over Indigenous land and resources. They are far-right figures who favor adoption of children they see as nearly white, in their long game of producing a white nation (and hopes of civil war or race war). But whatever their goals, those who seek the continuation of treaties and Indian law, and keeping Indigenous children with their Tribal communities, need a strong sense of the history of struggles that made ICWA into law. Institutions do not automatically correct excesses; racial redemption does not just happen; and the right-wing attacks on history and memory do not serve Indigenous or racially minoritized communities.

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[118] *Compare* MICHAEL DORRIS, THE BROKEN CORD 202 (1989) (making the influential claim that one in three Native children were exposed to alcohol in utero) *with* JANET GOLDEN, MESSAGE IN A BOTTLE: THE MAKING OF FETAL ALCOHOL SYNDROME 64 (2005) (noting that even the highest public health estimates put the number at fifty to one hundred times lower than what Dorris claimed).

[119] H.E. Hoyme, L. Hauck & D.J. Meyer, Accuracy of Diagnosis of Alcohol Related Birth Defects by Non-Medical Professionals in a Native American Population 13 (1994) (presented at the David W. Smith Morphogenesis and Malformations Workshop, Mont Tremblant, Québec, Can.) (on file with author).