

Brackeen v. Haaland and ICWA

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Brackeen v. Haaland and ICWA

Concerns about ICWA:

1 – Reduces legal protections for “Indian children”

2 – makes it extremely difficult to find them permanent foster or adoptive homes

3 – Creates jurisdictional conflicts

Brackeen v. Haaland and ICWA

Reduces legal protections for “Indian children”

- “Active efforts”

 - Requires states to return abused children to abusive homes

 - Even requires private parties to assist abusive spouses in regaining custody

- “Beyond a reasonable doubt” + expert witness for TPR

 - Higher standard of evidence than is required in criminal law

 - In effect, tribal governments get to choose the expert witnesses

- Gives tribal govts power to override parental choices

 - Troxel v. Granville* (2000): Parents have fundamental right to make choices about care, custody, and control of children.

 - Mississippi Choctaw v. Holyfield* (1989): ICWA gives tribes rights over children “on a par with” the parents’ rights.

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ICWA makes it extremely difficult to find Indian children permanent foster or adoptive homes

- **Race-based “placement preferences” (25 USC 1915)**
 - (1) *Member of the extended family (as defined by the tribe)*
 - (2) *Other members of child’s tribe*
 - (3) *Other Indian families*
 - (4) *(for foster care): an institution approved by “an Indian tribe”*
- ***Holyfield*: Congress intended for Indian children to remain within the “Indian community.”**

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Jurisdictional conflicts:

- **ICWA purports to give tribal courts jurisdiction over cases based on child's "eligibility" for membership**
- **Without regard to personal jurisdiction (which is a due process requirement)**
- **Tribal courts even assert power over children who are not eligible for membership.**

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What's involved in *Brackeen* case:

- Navajo mom & Cherokee dad volunteer child for adoption by Brackeens.
- Tribal lawyers decide to deem child Navajo, demand child be sent to N.M. instead.
- Brackeens want to adopt child's sibling; hearing next month in Texas.
- Cliffords lost custody of Indian child but grandmother wants Cliffords to have custody in the event of her death.

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Lower courts:

District court declared ICWA unconstitutional:

1) Race-based

(meaning it doesn't fit within *Mancari* precedent)

2) Commandeering

(meaning it forces states to implement federal policy against their will)

Both *executive* and *judicial* commandeering

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Fifth Circuit:

300+ pages of opinions

Majority declared it not race based

But it does violate anti-commandeering

But only executive, not judicial commandeering

And the “any Indian family” placement preference fails even rational-basis scrutiny.

Because it isn’t tribe-specific

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In the Supreme Court

1) Is ICWA race-based?

- *Mancari* says “tribal Indians”—but ICWA applies to children who are only “eligible” for membership
- But do Brackeens/Cliffords have standing to raise this issue?

2) Does Congress have power to adopt ICWA at all?

- “Commerce” and “plenary” power

3) Does Texas have standing as a state to complain about ICWA?

- Does “active efforts” apply “even-handedly”?

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In the Supreme Court

- 1) Alito: Could Congress force a state legislature to pass a statute relating to Indians?
- 2) Barrett: Is Congress's "plenary" power still within constitutional boundaries?
- 3) Attorney Kneeder: ICWA doesn't *override* the "best interests" test, it's a nationwide presumption *about* best interests.
- 4) Attorney Gershengorn: The "other Indian families" requirement is disposable.

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**In the Supreme Court
Predictions?**

...I don't predict.

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What if ICWA gets struck down?

- 1) Best interests in all cases**
- 2) No race-based placement mandates**
- 3) No tribal court jurisdiction without personal jurisdiction**
(Or where child isn't even eligible for membership – J.P. case)
- 4) “Active efforts” should be excused in cases of aggravated circumstances**
- 5) Stronger civil rights protections for parents**
(Including overruling *Santa Clara Pueblo v. Martinez*)

...More to come in *Discourse* magazine