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Emily Hudson

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EMILY HUDSON*

I. INTRODUCTION

The Indian Child Welfare Act (ICWA) was passed in 1978 as a response to the disproportionate removal of Indian children from their homes compared to non-Indian children.[1] It was found that this was disproportionality in part because judges and child welfare workers did not understand Indian culture–which led to prejudicial attitudes and the higher rates of removal.[2] Congress enacted the ICWA through its plenary power over Indian tribes.[3]

The constitutionality of the ICWA is currently being decided by the Fifth Circuit Court of Appeals.[4] In a remarkable decision, the District Court for the Northern District of Texas, Fort Worth Division, found the act to be unconstitutional for violating Equal Protection, anti-Commandeering, and the non-delegation doctrine.[5] Despite the recent developments related to the ICWA, the act's constitutionality has been questioned since its enactment.[6]

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* Licensed Ohio Attorney; Ohio Northern University, J.D.

1. *Indian Child Welfare Act (ICWA),* CHILD WELFARE INFORMATION GATEWAY, https://www.childwelfare.gov/topics/systemwide/diverse-populations/americanindian/icwa/ (last accessed May 1, 2020).

2. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 291 (1991).

3. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984).

4. *See* Brackeen v. Bernhardt, 942 F.3d 287 (5th Cir. 2019) [hereinafter *Bernhardt II*].

5. Brackeen v. Zinke, 338 F.Supp. 3d 514, 546 (N.D. Tex. 2018).

6. *Id*. at 519.

This comment analyzes several constitutional arguments made against the ICWA. First the relationship between congressional power over tribes and tribal sovereignty will be described, as this foundational information is necessary to understanding the constitutional arguments that may be made against the act.[7] Next, this comment will discuss the act itself, with a focus on the history and relevant sections of the act.[8] This comment will then move into a discussion and analysis of some of the constitutional arguments that may be made against the act.[9] The discussion will then move into recent developments related to the act–including discussion of *Brackeen v. Bernhardt* (formerly *Zinke*).[10] Lastly, potential consequences if the act is found to be unconstitutional will be discussed.[11]

II. RELATIONSHIP BETWEEN CONGRESSIONAL POWER OVER TRIBES AND TRIBAL SOVEREIGNTY

Indian law is complex and something many individuals do not fully understand. As the Court correctly stated in *United States v. Kagama*,[12] "[t]he relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character."[13] Brigham Young University Law professor, Michalyn Steele, said it best when describing Indian law: "[t]he story of federal Indian law is a study in the art of using the shards of adverse precedent to cobble together enduring arguments and principles from what remains."[14] Part of this complexity comes from interrelation between Congressional power over tribes and tribal sovereignty.[15]

Congress is able to enact broad legislation over Indians because of their plenary power and trust doctrine.[16] Further, while some of this legislation contains what would be considered "racial classifications," when it comes to Indians, tribal membership is considered a political classification because of the quasi-Sovereign status of Indians.[17] In order to fully analyze the

7. *See infra* Part II.
8. *See infra* Part III.
9. *See infra* Part IV.
10. *See infra* Part V.
11. *See infra* Part VI.
12. 118 U.S. 375 (1886).
13. *Id.* at 381.
14. Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 679 (2016).
15. *See id.* at 679.
16. *Id*. at 680.
17. Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167/ .

constitutionality of the Indian Child Welfare Act an understanding of tribal sovereignty, congressional power over the tribes, and the historical context of the Act are necessary.[18]

a. Tribal Sovereignty

Tribes are not private associations, as they exercise political sovereignty over the individuals and property present on the reservations.[19] Native American Tribes are considered quasi-sovereign.[20] They are not states of the Union, but separate, dependent nations within the United States.[21] However, tribal members are still United States citizens and subject to the federal government.[22]

Cherokee Nation v. Georgia is the initial case defining tribal sovereignty.[23] In determining if the Cherokee Nation was a "foreign nation" under the constitution, Chief Justice Marshall determined that while not foreign sovereigns, tribes were "domestic dependent nations."[24] Defined in this fashion, the tribes retained some of their original sovereignty and essentially had the character of a state, in that they could manage their own affairs and were self-governing.[25]

The Court has also found that part of Indian tribal sovereignty stems from "aboriginal authority" that existed prior to the Constitution.[26] Thus, some jurisdiction of the tribe is not granted from the federal government but is an "inherent power[s] of a limited sovereignty which has never been extinguished."[27] However, despite retaining some sovereignty, tribes are still under the authority of the federal government.[28]

b. Federal Power Over Indians

Not only is Congress's power over Indian tribes unique in our government, it is extremely vast.[29] Just a few of Congress's powers over Indians include the ability to increase or decrease tribal authority and abolish

18. *See infra* Part II.
19. Newton, *supra* note 3, at 197.
20. Steele, *supra* note 14, at 679.
21. Cherokee Nation v. Georgia, 30 U.S. 1, 17-18 (1831).
22. Newton, *supra* note 3, at 197.
23. *Cherokee Nation,* 30 U.S. at 1.
24. *Id.* at 17.
25. *Id.* at 16.
26. Steele, *supra* note 14, at 678; US v. Wheeler, 435 U.S. 313, 323-24 (1978); Talton v. Mayes, 163 U.S. 376, 382-83 (1896).
27. *Wheeler*, 435 U.S. at 322 (quoting Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)).
28. *See* Steele, *supra* note 14, at 680-81.
29. Litman & Fletcher, *supra* note 17.

both tribes and reservations.[30] While the Constitution does not explicitly grant Congress a "general power" over Indian affairs, it has been found that Congress does in fact have plenary power that it may use to regulate Indian affairs.[31] The Indian Commerce Clause and the trust doctrine have been used to both find and justify utilization of this plenary power.[32]

i. Indian Commerce Clause and the Basis of Federal Power

The Indian Commerce Clause has been used as one source granting Congress power over Indian tribes.[33] Article one, Section 8 of the United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[34] This section has been interpreted as giving Congress 'plenary power' over Indian tribes.[35] This 'plenary power' gives Congress the same amount of control over the Indian tribes as States have over their citizens.[36]

The Supreme Court has relied on this clause as supporting the federal government's power over tribes.[37] Specifically, the Court has stated that "the Indian Commerce Clause makes 'Indian relations . . . the exclusive province of federal law.'"[38] Further, this power has been found to be vast—giving the federal government exclusive and essentially unchecked authority over Indian tribes.[39] Due to this plenary power, Congress has the ability to limit, modify, or eliminate tribal powers.[40] The federal government may take Indian tribal land without just compensation.[41] Additionally, Congress may terminate tribal status.[42]

ii. Trust Doctrine

There have been a number of Supreme Court decisions during the late 1800s and early 1900s that recognized Congress's plenary power.[43]

30. *Id.*
31. Newton, *supra* note 3, at 196.
32. United States v. Lara, 541 U.S. 193, 200 (2004).
33. Newton, *supra* note 3, at 230-31.
34. U.S. CONST. art. 1. § 8.
35. Newton, *supra* note 3, at 230.
36. *Federal Indian Law for Alaska Tribes,* UAF, https://www.uaf.edu/tribal/112/unit_1/usconstitutionandcongress%20.php (last visited 5/1/2020).
37. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1014 (2015).
38. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 60 (1996) (quoting Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985)).
39. *See* Cotton Petroleum Corp. v. New York, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); Ablavsky, *supra* note 37.
40. *Federal Indian Law for Alaska Tribes*, *supra* note 36.
41. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290-91 (1955).
42. *Federal Indian Law for Alaska Tribes*, *supra* note 36.
43. Litman & Fletcher, *supra* note 17.

However, many of these decisions were made based on the belief that Indians were not able to efficiently govern themselves.[44] The Court's decisions gave Congress greater power over Indian affairs.[45] The Court based its rationale on the notion that Indians were "weak and helpless," and therefore the federal government needed to have a broad domain over them for their own protection.[46] This is what has been called the "trust relationship" between the United States government and Indian tribes.[47]

As Chief Justice Marshall characterized in *Cherokee Nation,* this relationship is similar to "that of a ward to his guardian."[48] This "trust relationship" was recognized in *Worcester v. Georgia*,[49] where Chief Justice Marshall stated that "[t]he Indian nations had always been considered as distinct, independent political communities. . . . [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence– its right to self-government, by associating with a stronger, and taking its protection."[50] Further, in *Worchester*, Marshall related this duty of protection back to treaties that the Cherokee Nation had signed and that they "acknowledge[d] themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected."[51]

Historically, Congress used this doctrine to justify federal actions.[52] There is no doubt the trust doctrine stems from prejudicial ideology.[53] Despite this congressional power's racist beginnings, it has allowed Congress to protect Indians from both "new and old forms of discrimination, imperialism, and white supremacy."[54] Notably, this trust relationship does not possess a constitutional basis.[55]

III. THE INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act was adopted pursuant to Congress's plenary power and duties under the trust doctrine.[56] The following sections

44. *Id.*
45. *Id*.
46. *Id.*
47. Newton, *supra* note 3, at 232-33.
48. *Cherokee Nation*, 30 U.S. at 17.
49. 31 U.S. 515 (1832).
50. *Id.* at 559-61.
51. *Id.* at 552.
52. Newton, *supra* note 3, at 219.
53. *Id.* at 218.
54. Litman & Fletcher, *supra* note 17.
55. Newton, *supra* note 3, at 232-33.
56. *Worcester*, 31 U.S. at 519; Litman & Fletcher, *supra* note 17.

describe the reasons for the enactment and important parts of the act and the Final Rule relevant to this paper.[57]

a. Reasons for ICWA Enactment

Congress passed the ICWA in 1978 after it became apparent that Indian children were removed from their homes at a disproportionately higher rate than non-Indian children.[58] Prior to its enactment, Congress conducted a study in the mid-1970s which found that state child welfare and private adoption agencies removed 25-35 percent of all Indian children.[59] The study also found that in one state Indian children were adopted eight times more frequently than white children.[60] In another state it was found that Indian children were 13 times more likely to be placed in foster care than their non-Indian counterparts.[61] Additionally, Congress found that children who were removed were placed in non-Indian homes at an exceedingly high percentage.[62] Even when relatives were willing and fit to care for the children, 85 percent of these children were placed outside of both their families and community.[63]

Congress also found that while there were many causes for removal, non-Tribal public and private agencies and State child-protective agencies played a large role in the alarming rates of separation.[64] Furthermore, these agencies and courts did not recognize tribal and social relations and different cultural and social standards when they removed children.[65] Judges and state social workers lacked an understanding and basic knowledge of Indian culture and child-rearing, deficiencies which resulted in prejudiced attitudes and removal of the children.[66] For instance, the extended Indian family, which could include hundreds of relatives, was often directly involved in raising a child.[67] These family members were counted as close, responsible family members.[68] Many social workers, however, found these family dynamics abnormal, and

57. See *infra* pp. 6-12.

58. *Indian Child Welfare Act (ICWA), supra* note 1.

59. *Setting the Record Straight: The Indian Child Welfare Act*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION (Sept. 2015), https://www.nicwa.org/wp-content/uploads/2017/04/Setting-the-Record-Straight-ICWA-Fact-Sheet.pdf; PEVAR, *supra* note 2, at 291.

60. *Id.*

61. *Id.*

62. BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 5 (2016) [hereinafter THE GUIDELINES].

63. *Setting the Record Straight*, *supra* note 59.

64. THE GUIDELINES, *supra* note 62, at 5.

65. *Id.*

66. PEVAR, *supra* note 2, at 291.

67. H. Rep. No. 95-1386, at 10 (1978).

68. *Id.*

they felt that leaving the children with individuals outside the nuclear family was neglect.[69]

As noted in the House Report, Congress intended the ICWA "to address the Federal, State, and private agency policies and practices that resulted in the 'wholesale separation of Indian children from their families.'"[70] Congress worked with American Indian and Alaska native officials, child welfare experts, and families impacted through the unnecessary removal of children from their homes, in order to pass the ICWA in 1978.[71] The act sets the standards for the removal and out-of-home placement of Indian children, while allowing tribes to be more interactive in the cases.[72]

b. The Provisions of the Act[73]

The Indian Child Welfare Act is an extensive act which places many duties and responsibilities on states in order to protect tribal children.[74] After the act's passage in 1978, new guidelines followed in 1979 to provide guidance to the states on how to follow and interpret the act relating to Indian child custody proceedings.[75] In December 2016, the Bureau of Indian Affairs (BIA) updated these guidelines.[76] While these guidelines are legally non-binding, in 2016 the BIA also implemented regulations regarding implementation of the ICWA in both state courts and public and private agencies.[77] These regulations, meanwhile, are legally binding.[78]

The goal of the ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ."[79] It lays the foundation, framework, and requirements for the adoption of and child custody proceedings involving Indian children.[80] Overall, it "establishes: (1) placement preferences in adoptions of Indian children; (2) good cause to depart from those placement preferences; (3) standards and

69. *Id.*

70. THE GUIDELINES, *supra* note 62, at 5 (quoting Rep. No. 95-1386, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7531).

71. *Setting the Record Straight*, *supra* note 59.

72. *Child Welfare Act (ICWA), supra* note 1. Child custody proceedings covered by the act includes foster-care placement, a termination of parental rights (TPR), a preadoptive placement, or an adoptive placement. 25 U.S.C. § 1903(1); 25 C.F.R. § 23.2.

73. As the act is very extensive, I will only highlight the main portions relevant to understanding the act or relevant to Constitutional challenges discussed in this paper.

74. THE GUIDELINES, *supra* note 62, at 7.

75. *Id.* at 5 (Guidelines for State Courts); Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

76. *About ICWA*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, https://www.nicwa.org/about-icwa/ (last visited May 1, 2020).

77. *Id.*

78. *Id.*

79. 25 U.S.C. § 1902 (2020).

80. *Id.*

responsibilities for state courts and their agents; and (4) consequences flowing from noncompliance with the statutory requirements."[81] The Act provides guidance through every possible scenario related to child custody proceedings–both voluntary and involuntary.[82]

The act is applicable during custody proceedings involving an Indian child.[83] "Custody proceedings" under the ICWA include when there is a child in need of care, termination of parental rights, adoption, guardianship/conservatorship, or a status offense case if any part of the case results in removal.[84] Additionally the ICWA only applies when the child is an Indian child.[85] An "Indian child" is as an unmarried individual under the age of eighteen who is either a citizen of a federally recognized tribe or is the biological child of a tribal member and eligible for tribal citizenship.[86]

The tribal community receives preference over non-Native individuals when it comes to placement of the child in child custody proceedings.[87] When an Indian child is subject to adoptive proceedings, foster care, or pre-adoptive placements, the ICWA gives preference to the child's extended family, members of the child's tribe, and then other Indian families, over non-native families.[88] Importantly, the child's tribe may establish a different order of preferences.[89] In these cases, the state follows the tribe's preferential order "so long as the placement is the least restrictive setting appropriate to the particular needs of the child . . . ."[90]

Additionally, the ICWA creates a dual jurisdictional system that prioritizes tribal interests.[91] While the child lives or is domiciled on the reservation, the state court has no jurisdiction related to the child's custody; rather, the tribal courts have exclusive jurisdiction in this situation.[92] When the child lives off the reservation, state and tribal courts share concurrent jurisdiction, with the tribe having priority.[93] In this scenario, the state is

81. *Zinke*, 338 F.Supp. 3d at 521.

82. *Id.* at 521, 524.

83. THE GUIDELINES, *supra* note 62, at 4.

84. 25 C.F.R. § 23.103(a); U.S. DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, 2016, 78-79.

85. 23 C.F.R. § 23.103.

86. *Id.* §§ 23.103, 23.2; Alicia Summers, et al., *The Importance of Measuring Case Outcomes in Indian Child Welfare Cases¸* AMERICAN BAR ASSOCIATION (Jan. 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/January-2017/understanding-the-2016-indian-child-welfare-act-regulations/.

87. 25 U.S.C. § 1915(c).

88. *Zinke*, 338 F.Supp. 3d at 521.

89. 25 U.S.C. § 1915(c).

90. *Id.*

91. PEVAR, *supra* note 2, at 293. It is also important to note that the ICWA treats emergency placements as separate proceedings – that is in situations where there is an "imminent physical damage or harm to the child" not all of the ICWA provisions apply. 25 C.F.R. §§ 23.104, 113.

92. 25 C.F.R.§ 23.2.

93. PEVAR, *supra* note 2, at 293.

required to transfer the case to the tribal court at the tribe's or parents' request.[94] Because many Indians live off the reservation, the cases may start in the State court and then be transferred to the tribal court.[95]

The states are also required to follow record-keeping rules to show their compliance with the statute.[96] A final custody order may be overturned in the absence of ICWA compliance.[97] This possible consequence essentially places a higher burden on states when it comes to Indian children.[98] Given the various procedural steps, rules, and record-keeping requirements, that must be taken, child custody cases involving Indian children are much more involved than typical child custody cases.[99]

c. The Final Rule

Due to inconsistent application of the ICWA among states, the BIA revised the guidelines on the ICWA and implemented regulations for the ICWA for the first time ever.[100] The BIA updated both the regulations (Final Rule) and Guidelines in 2016.[101] The revised guidelines help clarify the ICWA for state courts and private and public agencies.[102]

Part of the new regulations require child agencies to collect data related to their ICWA cases in order to better track the case outcomes and help to ensure these agencies follow the guidelines.[103] From the Act's inception until the passage of the new regulations, there was no requirement to ensure that states were complying with the act's protections.[104]

Among the inconsistencies corrected was the method which state courts use to determine "good cause."[105] States must follow the placement preferences, unless there is a determination that the there is good cause to depart from those preferences.[106] Prior to the enactment of the regulations, states "differ[ed] as to what constitute[d] 'good cause' for departing from ICWA's placement preferences . . . ."[107] Because of these inconsistencies, the Final Rule requires that the party urging that ICWA preferences not be

94. *Id.*
95. *Id.* at 293-94.
96. 25 U.S.C. § 1915(e).
97. *Id.* § 1914.
98. *Id.*
99. *Id.* § 1915.
100. THE GUIDELINES, *supra* note 62, at 6.
101. *Id.*; Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,779 (2016) (codified at 25 C.F.R. pt. 23).
102. Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,779.
103. Summers, et al., *supra* note 86.
104. *Id.*
105. *See Zinke*, 338 F.Supp. 3d at 521; 25 C.F.R. § 23.107(a).
106. 25 C.F.R.§ 23.129(c) (2016).
107. 81 Fed. Reg. at 38,783.

followed bears the burden of proving by clear and convincing evidence the existence of good cause for not following the preferred placement.[108]

By requiring state courts' inquiries to be on the record and by instructing "parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child," the state court now has more responsibility to determine if the child is in fact an Indian child.[109] Additionally, courts keep records and send them to the BIA when they make a final adoption decree or an order in an Indian child placement.[110]

The Final rule also states that only the Indian tribe to which the child belongs can determine if the child is actually a member or eligible to be a member of that tribe.[111] The court may not determine this itself.[112] Despite the well-meaning intent of passing both the Act and promulgating the Final Rule, both have recently been subject to Constitutional attacks.[113] As such, the following section will discuss some potential constitutional arguments that may be made against either.[114]

IV. CONSTITUTIONAL ARGUMENTS

While the ICWA was passed with good intent, it has faced resistance from its inception.[115] As demonstrated by *Brackeen*, discussed later in this article, there are several constitutional arguments that can be made against the act.[116] The below selections discuss equal protection, commerce clause, and non-delegation arguments.[117] These are just a few of the potential arguments.

a. Equal Protection

As Justice Black stated in *Korematsu v. United States*: "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."[118] As racial classifications are subject to strict scrutiny, if the act

108. 25 C.F.R. § 23.132(b).
109. *Zinke*, 338 F.Supp 3d at 524; 25 C.F.R. §23.107(a), (b).
110. *Zinke*, 338 F.Supp 3d at 524; 25 C.F.R. §23.140.
111. 25 C.F.R. §23.108(a).
112. *Id*. § (b).
113. *Zinke*, 338 F.Supp. 3d at 520.
114. *See infra* Section IV.
115. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 ("By some accounts the Act has been the victim of entrenched state court hostility ever since its enactment more than two decades ago.").
116. *Zinke*, 338 F.Supp. 3d at 520.
117. See *infra* Section IV.a-c.
118. Korematsu v. United States, 323 U.S. 214, 216 (1944).

does classify on the basis of race, it would be subject to strict scrutiny review.[119] Based on precedent, any constitutional challenge brought under equal protection would likely face an uphill battle. Historically, the Court has been clear that "classifications based on Indian tribal membership are not impermissible racial classification[s]" but are instead political classifications.[120] Additionally, equal protection challenges have continuously been rejected under this approach.[121]

Without considering the quasi-sovereignty that tribes have and precedent surrounding these issues, a challenge of the ICWA seems like a very straight forward equal protection analysis using heightened scrutiny.[122] The tribes certainly meet the conditions the United States Supreme Court has used in justifying heightened scrutiny.[123] "The Court has observed that a suspect class is one subject to a 'history of purposeful unequal treatment.'"[124]

Historically Indians have dealt with persecution and discrimination, leading to them being one of the most disadvantaged groups in today's society.[125] Indians were the victims of colonization and practically suffered a genocide at the hands of the colonizers.[126] Further, from then and into the twentieth century, Indians have endured "torture, terror, sexual abuse, massacres, systematic military occupations, removals of Indigenous peoples from their ancestral territories, and removals of Indigenous children to military-like boarding schools."[127] Up until 1957, Indians living on reservations could not vote in some state elections.[128] Even today they make up less than one percent of the United States population, many live separately on reservations, tribes tend to be poor, and many Indians speak their tribal

119. *Id.*

120. Adoptive Couple v. Baby Girl, 570 U.S. 637, 690 (2013) (Sotomayor, J., dissenting) (citing United States v. Antelope, 430 U.S. 641, 645-47 (1977); Morton v. Mancari, 417 U.S. 535, 553-54 (1974)).

121. *See e.g.*, *Antelope*, 430 U.S. at 647-49; Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 501-02 (1979); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 85-90 (1977); *see also* Brief for the Indian Law Scholars as Amicus Curiae, 14, *Bernhardt II*, 942 F.3d 287 (2019) [Hereinafter Brief for the Indian Law Scholars].

122. Newton, *supra* note 3, at 246.

123. *Id.*

124. *Id.*

125. PEVAR, *supra* note 2, at 2.

126. ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 8-9 (2014). The UN Convention on the Prevention and Punishment of the Crime of Genocide, which the United States has ratified, is not retroactive, but what occurred during the colonialism era against the Indians could be classified as genocide under it. *Id.* at 126. In the convention, any one of five acts is considered genocide if 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group': killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [or] forcibly transferring children of the group to another group. *Id.* at 8.

127. *Id.* at 9.

128. Newton, *supra* note 3, at 246.

language and maintain significant portions of their tribal culture.[129] Not only do they have a past of purposeful, unequal treatment from a majority group, but they are also a "discrete and insular minorit[y]."[130] This history would lend credence to classifying American Indians as a suspect class.[131] However, tribes are quasi-sovereign and tribal membership has been found to be a political classification, which complicates matters.[132] Political classifications, unlike racial classifications, are only subject to rational basis review.[133]

Despite the potential difficulties an equal protection challenge faces, it is still an argument worth examining. Some argue that the act only applies to children of Native American descent and as such impermissibly discriminates on the basis of race.[134] However, there have been many previous decisions where the Supreme Court has found that laws which give preferences to Indians are not based on racial distinctions, but are political and based on tribal quasi-sovereignty.[135] Essentially, the question is this: is the distinction in the act racial or based on tribal citizenship?[136] In determining whether the classification is racial or political, a brief discussion and application of *Morton v. Mancari* and *Rice* v. *Cayetano*[137] is important–as each case has been used to both defend and question the constitutionality of the act.[138]

i. Comparing Mancari and Rice

It is likely that in an equal protection decision on the ICWA either *Mancari* or *Rice* would be applied as a standard.[139] Each case addresses claims against statutes that involve classifications of "native" individuals, each argument asserting the classification is racial.[140] The following sections explain the two cases and the reasoning the United States Supreme Court used in finding that there was or was not a racial classification.[141]

129. *Id.* at 245.
130. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); *see also* Newton, *supra* note 8, at 246.
131. Newton, *supra* note 3, at 246.
132. *Mancari*, 417 U.S. at 535 n.4.
133. *Id.* at 535, 555.
134. Litman & Fletcher, *supra* note 17.
135. *Id.*
136. Elizabeth Jensen, *Assessing an NPR Report On The Indian Child Welfare Act: A Complex Story Needed More Context,* NPR (Jan. 23, 2019).
137. 528 U.S. 495 (1999).
138. *Mancari*, 417 U.S. at 553-54; *Rice*, 528 U.S. at 522.
139. *See Mancari*, 417 U.S. at 553-54; *Rice*, 528 U.S. at 522.
140. *Mancari*, 417 U.S. at 547; *Rice*, 528 U.S. at 522.
141. *See infra* Section IV.a-b.

a. Morton v. Mancari

Morton v. Mancari involved the Indian Reorganization Act of 1934 which gave preferences to Indians for employment within the Bureau of Indian Affairs (BIA).[142] Under the Act, an individual had to have one-fourth or more Indian blood and be a member of a federally-recognized tribe to qualify as an Indian.[143] The Act was challenged under the basis that it violated the Due Process clause of the Fifth Amendment as racial discrimination.[144]

The Court in *Mancari* found that hiring preferences to Indians were not racial but were political.[145] The Court noted that because the statute required "Indians" be members of a federally recognized tribe, it actually excluded many individuals who would be considered racially Indian because they were not members of a federally recognized tribe.[146] Further, the preference was not given to Indians as a "discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."[147]

The Court looked to both the "unique legal status of Indian tribes" and Congress's plenary power and its connection with the trust doctrine to reach this conclusion.[148] Specifically, the Court found that the hiring preferences were not "racial discrimination" but that they were "employment [criteria] reasonably designed to further the cause of Indian self-government . . . ."[149]

Besides finding the classification in *Mancari* to be political, the Court identified a sort of rational basis review as the appropriate standard for judicial review in such cases.[150] *Mancari* precedent only requires that Congress's treatment be reasonably related to its "unique obligations" to tribes and their members.[151] The *Mancari* test applies to federal classifications which further Congress's obligation to tribes.[152] It states when "the special treatment can be tied rationally" to furthering congressional goals "such legislative judgements will not be disturbed."[153]

142. *Mancari*, 417 U.S. at 537.
143. *Id.* at 553 n.24.
144. *Id.* at 537.
145. *Id.* at 553-54.
146. *Id.* at 553 n.24.
147. *Mancari*, 417 U.S. at 554.
148. *Id.* at 551.
149. *Id.* at 553-54.
150. *Id.* at 555 ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgements will not be disturbed.").
151. *Id.*; Brief for the Indian Law Scholars at 19.
152. *Mancari*, 417 U.S. at 555.
153. *Id.*; *see also* Brief for the Indian Law Scholars at 13.

b. Rice v. Cayetano

Rice v. Cayetano involved a Hawaiian statute that restricted voter eligibility to "Hawaiians" and "native Hawaiians" in a state election voting for trustees of the Office of Hawaiian Affairs.[154] "Native Hawaiians" were defined by statute as "descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778."[155] The statute defined "Hawaiians" as "those persons who are descendants of people inhabiting the Hawaiian Islands in 1778."[156]

The United States Supreme Court found that the statute's prohibition of non-Hawaiians right to vote violated the Fifteenth Amendment.[157] Further, the Court found that the restriction was a racial classification and used ancestry as a proxy for race.[158] Additionally, the Court found that in the statute, Hawaii had "used ancestry as a racial definition and for a racial purpose," further noting that "ancestral tracing . . . employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name."[159] The Court found that the Act contained a racial classification because of the ancestral classification.[160]

ii. Political or racial: Application of Rice or Mancari?

Some might apply *Rice* to strengthen the equal protection argument and claim that the definition of Indian child is a racial one.[161] At first blush it seems *Rice* could apply, and the ICWA's definition of Indian child would be unconstitutional.[162] In its definition the act defines an Indian child as both one who has tribal membership or who is eligible for membership and the biological child of a tribal member.[163] The part of the definition that requires tribal membership is likely allowable under equal protection, as it follows *Mancari*.[164] But the issue arises in the second definition of Indian child. The "biological child" of a member of an Indian tribe is directly tied to an individual's being a descendant of a member, and this classification is related to ancestry.[165] This conclusion seems to be the exact thing the Court pointed

154. *Rice*, 528 U.S. at 499.
155. *Id.* at 499 (citing HAW. REV. STAT. § 10-2).
156. *Id.*
157. *Id.*
158. *Id.* at 514.
159. *Rice*, 528 U.S. at 515, 517.
160. *Id.* at 524.
161. *Id.* at 514-15.
162. *See id.* at 524.
163. 25 C.F.R. § 23.2.
164. *Id.*; *Mancari*, 417 U.S. at 554.
165. 25 C.F.R. § 23.2.

out in *Rice* – ancestry and ancestral tracing should not be used as a racial proxy.[166]

Despite the similarities in statutory language, *Rice* is unlikely to apply.[167] This is again because of the quasi-sovereign status of Indians and Congress' duty under the trust doctrine.[168] The *Rice* Court recognized that certain members of Indian tribes are given preferential treatment, as in *Mancari.*[169] Hawaii actually used *Mancari* to support its claim that the exclusion of non-Hawaiians from voting was allowed so the state could protect the interests of native Hawaiians.[170] In response, the Court first pointed out that native Hawaiians do not have the same status that Indian tribes do.[171] Stating further, that Congress has authority over Indian tribes to preserve that tribal status–this authority does not exist in regards to Native Hawaiians.[172] The Court hints that power has to do with tribes being recognized as quasi-sovereign (or being a political classification), as Congress has the ability to apply to the Indian tribes, but it is unclear whether this ability carries over to Native Hawaiians.[173] Further, the Court notes that the key aspect of Indian legislation is the special treatment of Indian classification as *citizens* of the tribe.[174] This fact distinguishes the case from *Mancari*.[175]

In *Mancari,* while there was a racial aspect in the preference (the individual had to have one-fourth or more Indian blood), they also had to be members of a Federally-recognized tribe.[176] Instead of being a blanket preference to an entire racial group of Indians, the Act was only for members of a federally recognized tribe—and thus political.[177]

Initially distinguishing between the two cases seems to be a difficult task. However, one main difference between the cases and directly related to the appropriate classification of Indians, is who *determines* who is Native American.[178] In *Rice*, it was the state of Hawaii that was making that determination.[179] Hawaii defined who belonged to the "native Hawaiian"

166. *Rice*, 528 U.S. at 514-15.
167. *See id.* at 518.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Rice*, 528 U.S. at 518.
172. *Id.*
173. *Id.*
174. *Id.* at 519; *Mancari*, 417 U.S. at 552.
175. *Rice*, 528 U.S. at 519.
176. *Id.*
177. *Id.* at 519-20.
178. Patrick Runge, *Brackeen v. Zinke, the Case Challenging ICWA's Constitutionality, Explained*, RUNGE LAW OFFICE, LLC (Apr. 5, 2019), https://patrickrunge.wordpress.com/2019/04/05/bra ckeen-v-zinke-the-case-challenging-icwas-constitutionality-explained/.
179. *Rice*, 528 U.S. at 508-09.

group and who belonged to the "Hawaiian" group.[180] Native Hawaiians and Hawaiians were not defined as a separate group that defined membership themselves—as in *Mancari*.[181] In *Mancari*, the tribes determined their membership according to their own tribal rules.[182] The hiring preferences, then, were based on those tribal determinations.[183] Tribes using their own rules to determine employment is a concept which fits with tribal status being a political classification rather than a racial one.[184] As sovereigns, the tribes determine their own membership using qualifications such as "blood quantum" or something else seemingly race-based.[185] Because of tribal sovereignty they can make this decision.[186] The most important element of sovereignty is "the power to make decisions for yourself as a group and be governed by them—then determine who is a member of that group."[187]

The state government cannot determine who qualifies as an Indian and thus who can and cannot participate.[188] In *Rice*, that happened.[189] The Hawaiian legislature was deciding who could and could not vote—based on whether the voter was "Hawaiian" or not.[190] The scenario in *Rice* was unlike *Mancari* and the ICWA, where the tribe's decision on membership (i.e. citizenship of the tribe) is a "political decision made by a sovereign nation to its own citizenship."[191] The definition in the act would likely be found to be political under this view.[192]

However, *Mancari* can be interpreted and applied in another way.[193] How *Mancari* is interpreted may be crucial. It is possible to distinguish *Mancari* and make the argument that the Indian classification in the ICWA is racial.[194] *Mancari* could be construed to mean the law (1) only provided special treatment to Indians living on or near a reservation and (2) relied on actual tribal membership, even though the ICWA's membership eligibility does not.[195] In *Mancari*, the Court found that tribal membership was not a racial classification because only individuals who belonged to a nationally recognized tribe could benefit from such a membership—those whose tribes

180. *Id.* at 510.
181. *Id.* at 522.
182. *Mancari*, 417 U.S. at 554.
183. *Id.*
184. *See Antelope*, 430 U.S. at 646.
185. Runge, *supra* note 178.
186. *Id.*
187. *Id.*
188. *See* 25 U.S.C. § 1903(3) (2021) (defining who qualifies as an "Indian").
189. *Rice*, 528 U.S. at 499.
190. *Id.*
191. Runge, *supra* note 178.
192. *Id.*
193. *See Bernhardt I*, 937 F.3d 406, 427 (5th Cir. 2019) [hereinafter *Bernhardt I*].
194. Runge, *supra* note 178.
195. *Bernhardt I*, 937 F.3d at 427.

no longer existed or had been removed from their tribe were not affected.[196] The ICWA broadly defines an Indian child as "any unmarried person who is under [the] age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe."[197] This allows children who are not current members of the tribe to fall under the protection of the ICWA and thus seems to be broader than the statute at issue in *Mancari.*[198]

There is some scholarly support in coming to this conclusion using *Mancari*.[199] The view is that the Court was not saying that being "Indian" could not be a racial classification, it was not a racial classification under the specific facts of the *Mancari* case.[200] As noted by David Williams, instead

> [T]he Court carefully distinguished between two usages of the term - racial and political. *Mancari*, for example, opposed a "'racial' group consisting of 'Indians'" to a category that includes only "members of 'federally recognized' tribes" and excludes "many individuals who are racially to be classified as 'Indians.'" It is therefore possible, in the Court's mind, to think of Indians in a racial light and so use the category with a racial meaning. Apparently, however, the racial usage is confined to the general category "Indian," meaning all Indians; one cannot use the category "enrolled members of the Navajo Nation" in a racial sense. As long as the government confines itself to "legislation singling out *tribal* Indians," it is on safe ground.[201]

This suggests the possibility of equal protection issues when the term "Indians" is too broadly defined, or, in the case of the ICWA, when an Indian child who is not a current member of a tribe, but eligible to be a member.[202] As the child is not a current member of the tribe, it could be interpreted that it's a "broad" category of defining Indians.[203]

Further, the Court itself has suggested that there might be equal protection issues specifically related to this fact and the ICWA.[204] In *Adoptive Couple v. Baby Girl*,[205] the Supreme Court's most recent case

196. *Mancari*, 417 U.S. at 553, 553 n.24.
197. 25 U.S.C. § 1903(4) (2021).
198. *Bernhardt I*, 937 F.3d at 427.
199. *See generally* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991).
200. *Id.* at 793-94.
201. *Id.*
202. *Baby Girl*, 570 U.S. at 656.
203. *Bernhardt I*, 937 F.3d at 427.
204. *Baby Girl*, 570 U.S. at 656.
205. *Id.* at 637.

specifically concerning the ICWA, without going into a full discussion the Court stated that under certain factual conditions there could be equal protection issues with the application of ICWA.[206] Specifically the Court noted:

> The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor — even a remote one — was an Indian. As the State Supreme Court read §§1912(d) and (f), a biological Indian father could abandon his child in utero and refuse any support for the birth mother — perhaps contributing to the mother's decision to put the child up for adoption — and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns . . . .[207]

This signaled that the Court had equal protection concerns about the ICWA.[208] It suggests the Court had concerns when a child is simply eligible for membership and not actually a tribal member.[209] However, instead of addressing the issue, the Court avoided the constitutional question and used a textual interpretation of the statute to resolve the legal issue in the case.[210]

There may be concerns with the "biological child of a tribal member" portion of the definition of an Indian child.[211] As noted above, this inclusion might be what saves the eligible child definition. If a child is eligible for tribe membership, the child must also be the biological child of a tribe member.[212] This definition is similar to the interpretation in *Mancari* to determine who qualified as an Indian under the statute.[213] In *Mancari*, the Indian parent had to be both one-fourth Indian and a member of a federally recognized tribe.[214] Here, if not a current member of a tribe, to be an "Indian child" the child must be eligible for tribal membership and biologically related member of a

206. *Id.* at 653-54, 656.
207. *Id.* at 655-56.
208. *Id.* at 656.
209. *Baby Girl*, 570 U.S. at 646 n.1.
210. *Id.* at 646, 646 n.4.
211. Gregory D. Smith, *ICWA Adoptions An Indian Child Welfare Act Primer*, 5 ACCORD LEGAL J. FOR PRAC. 81, 96-97 (2016).
212. 25 U.S.C. § 1903(5) (2021).
213. *Mancari*, 417 U.S. at 536.
214. *Id.* at 553 n.24.

federally recognized tribe.[215] Both statutes require a blood connection to the tribes.[216] In *Mancari*, the requisite blood connection was a blood-quantum requirement and in the ICWA it is a direct descendant requirement.[217] However, despite these quasi-race classifications, as demonstrated in *Mancari*, the requirement of membership in a federally recognized tribe makes the status of an "Indian child" political.[218] Meanwhile, the ICWA requires the biological parent of the eligible child be a member of the tribe, meaning there is still a political consideration because of the membership requirement.[219]

In the end, while there may be equal protection concerns related to the ICWA, it is unlikely to be found unconstitutional under that claim.[220] Generally, among academia, there appears to be a consensus that the "Indian" classification is not based on race but is political because of the quasi-sovereign status of Indians.[221] Further, *Rice* is likely to be found inapplicable in relation to the ICWA because the statute in *Rice* was a state statute that defined the group and prohibited others from voting based on the classification.[222] Here, the classification defines itself. While the statute is applicable to Indian children and those Indian children are eligible for tribal membership, the tribes themselves define who qualifies for membership.[223]

If a court were to find that the definition of an Indian child under the ICWA was a political classification rather than a racial classification, a court would likely use *Mancari* as its justification.[224] As such, the *Mancari* standard should apply to the ICWA. This requires courts to determine if "the special treatment can be tied rationally to" furthering congressional goals.[225] It is possible to find that Congress's findings regarding "Indian children" and their disproportionate removal from their homes due to discriminatory practices, are in fact "sufficiently widespread to create existential threats to some tribes."[226] To combat this concern, Congress passed the ICWA to protect "Indian families based on their status as members of sovereign Indian

215. *See* 25 U.S.C. § 1903(5).
216. *Id.*; *Mancari*, 417 U.S. at 554 n.24.
217. *Mancari*, 417 U.S. at 553 n.24.
218. *Id.* at 553 n.24.
219. 25 U.S.C. § 1903(5).
220. *See Baby Girl*, 570 U.S. at 656.
221. Caroline M. Turner, *Implementing and Defending the Indian Child Welfare Act Through Revisited State Requirements*, 49 COLUM. J. L. SOC. PROBS. 517-18 (2016).
222. *Rice*, 528 U.S. at 499.
223. 25 U.S.C. § 1903(5).
224. *Mancari*, 417 U.S. at 554.
225. *Id.* at 553 n.24; *see also* Brief for the Indian Law Scholars at 14.
226. *Id.* at 16.

nations . . . ."[227] Here, the passage of the ICWA would meet the rational basis review set in *Mancari*.[228]

b. Commerce Clause

Another constitutional argument that may be made is that Congress exceeded its commerce power when it enacted the ICWA.[229] Potentially, the Congressional power over the tribes has been defined too broadly.[230] While this argument is one that is likely to fail, it is interesting and worth mentioning. Based purely on a textual reading of the Constitution, the ICWA could be found unconstitutional.[231] This is an argument made in Justice Thomas' concurrence in *Adoptive Couple v. Baby Girl*, wherein Justice Thomas pointed out that nowhere in the Constitution is Congress granted the "power to override state custody law" anytime there is an Indian involved.[232]

Additionally, Justice Thomas noted that nowhere in the text or the original understanding of the Commerce Clause is there support for Congressional plenary power over Indian affairs.[233] The Indian Commerce Clause grants Congress the power "[t]o regulate *commerce* with foreign nations, and among the several states and with Indian tribes."[234] He focused on the word "commerce," noting that when the Constitution was ratified commerce meant "selling, buying, and bartering, as well as transporting for these purposes."[235] This did not include noneconomic "activity such as adoption of children."[236] The scholarly view is that the Framers only intended for the federal government to have power over commerce, i.e. trade, with the Indians, and that this has been too broadly defined.[237]

If the Indian Commerce Clause is read as straight forwardly as Justice Thomas suggests, then Congress would have no plenary power and only be able to regulate commercial interactions with tribes.[238] Precedent aside, if his interpretation is followed the act would be unconstitutional, as there is a strong argument that "commerce" did not mean to apply to the "adoption of children."[239]

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227. *Id.* at 16-17.
228. *Mancari*, 417 U.S. 555.
229. Newton, *supra* note 3, at 237.
230. *Id.*
231. *See Baby Girl*, 570 U.S. at 666 (Thomas, J., concurring).
232. *Id.* at 658.
233. *Id.* at 658.
234. U.S. CONST. art. I, § 8 (emphasis added).
235. *Baby Girl*, 570 U.S. at 659.
236. *Id.* at 659.
237. Newton, *supra* note 3, at 237-38.
238. *Baby Girl*, 570 U.S. at 660.
239. *Id.* at 659.

However, there is evidence that when the Constitution was drafted, unlike Justice Thomas argued, commerce with Indian tribes did not *solely* mean "trade with Indians."[240] The Indian Commerce Clause had a broader meaning than Justice Thomas asserted.[241] "Commerce" was only used occasionally in publications dealing with Indian affairs; but "trade" and "intercourse" appeared more frequently.[242] The use of the term "intercourse" was a legal term of art that was used to describe the relations between the Indians and settlers.[243] Additionally, where "commerce" was used in the Constitution, a similar meaning was found; for example, the reference to the "exchange of religious ideas among tribes."[244] This historical evidence indicates that "commerce" was not just used to describe economic exchanges, and "trade" meant more than economic activity when used in reference to Indians.[245] While the term "trade" referred to "buying, selling, trading, exchanging, and gifting items," this vocabulary was present in the contexts of diplomacy and politics, rather than commercial transactions.[246] The historical usage of the term "trade" supports the claim that "commerce" with Indians was very diverse, and had several meanings, not strictly Justice Thomas' textual interpretation.[247]

The fact is, that even if Justice Thomas was correct on the meaning of the text and the original intent, the ICWA would not be found unconstitutional based on the argument that commerce with tribes went beyond simply "trading"—to do so would risk ending Congress' plenary power and thus strike down most legislation related to Indian tribes.[248] Congress's plenary power has long been found to come in part from the Indian Commerce Clause and it has continually "been recognized and rarely questioned."[249] While Congress's plenary power over the tribes is not absolute, the Court has time after time found that Congress has plenary power over Indian affairs, and that power comes in part from the Indian commerce clause.[250]

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240. Ablavsky, *supra* note 37, at 1028.
241. *Id.*
242. *Id.*
243. *Id.* at 1028-29.
244. *Id.*
245. Ablavsky, *supra* note 37, at 1029.
246. *Id.*
247. *Id.* at 1028.
248. *Id.* at 1032.
249. Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act of United States v. Lara*, 35 ENVTL. L. 471, 484 n.64 (2005). *See also Lara*, 541 U.S. at 201.
250. *See, e.g., Wheeler*, 435 U.S. at 319 ("[T]he undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."). *But see, e.g.,* United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.").

Throughout the history of Indian law, there has been judicial deference to Congress regarding Indian policies.[251] Therefore, while Congress's power has been so broadly defined that essentially Congress can regulate any Indian action,[252] the Indian Commerce Clause has been interpreted this way throughout history.[253] The Court has recognized Congress's plenary power over Indian tribes by stating, "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."[254] If the Court were to find that the Indian Commerce Clause is being interpreted too broadly, Indian legislation would be upended.[255] It is essentially settled law that the Indian Commerce Clause is where Congress gets most of its plenary power over Indian tribes.[256] It is for this reason that it is unlikely that the Court would follow Justice Thomas's reasoning.[257] If the ICWA were to be found unconstitutional, it will not be for utilizing Justice Thomas's argument.

c. Non-Delegation Doctrine

A non-delegation claim is another argument that could be made against the ICWA and the Final Rule.[258] In fact, in *Brackeen*, that is one of the State's arguments.[259] The vesting clause of the United States Constitution states that "[a]ll legislative Powers . . . shall be vested in a Congress of the United States . . . ."[260] The State in *Brackeen* argued that section 1915(c) of the ICWA and section 23.130(b) of the Final Rule violated the non-delegation doctrine.[261] Section 1915(c) allows the tribes to reorder the placement preference in adoption cases.[262] Further, the Final Rule states that a tribe's preference will take priority over the specific order listed in the ICWA.[263] Arguably, the ICWA grants tribes the authority to reorder "congressionally enacted adoption" preferences and then force the tribe's preference on the states in an impermissible delegation of congressional power.[264]

251. Newton, *supra* note 3, at 240.
252. *Id.* at 242.
253. See *Lara*, 541 U.S. at 200.
254. *Seminole Tribe of Florida*, 517 U.S. at 62.
255. Ablavsky, *supra* note 37, at 1032.
256. *Lara*, 541 U.S. at 200.
257. Ablavsky, *supra* note 37, at 1032.
258. *See Zinke*, 338 F. Supp. 3d at 536.
259. *Id.*
260. U.S. CONST. art. I, § 1.
261. *Bernhardt I*, 937 F.3d at 435.
262. 25 U.S.C. § 1915(c) (2021).
263. 25 C.F.R. § 23.130(b) (2020).
264. *Zinke*, 388 F. Supp. 3d at 536.

This is an interesting argument. Congress allows for discretion in the execution of the law, but cannot delegate power to create laws.[265] Congress may also grant agencies the power to execute legislation and interpret ambiguities of that legislation.[266] Only when Congress has established an "intelligible principle" that agencies base their decisions, is a delegation of regulatory power proper.[267] The question here is whether, in granting the tribes the ability to reorder the adoption placement preferences, has Congress delegated the ability to create law to the tribes.

Specifically, section 1915(c) states that "if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement *shall* follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child . . . ."[268] The Final Rule states that "[i]f the Indian child's Tribe has established by resolution a different order of preference than that specified in [the] ICWA, the Tribe's placement preferences apply."[269] The language of the ICWA and Final Rule are clear where the tribe establishes a different order of preference than that ordered by a court or agency, the court or agency follows the tribe order—despite its difference from the statutory requirement.[270]

Further, when there is a permissible delegation of Congressional power, the delegation must be to a coordinate branch of government, meaning a federal entity.[271] What are Indian tribes? Are Indian tribes a coordinate branch of government? Even if the delegation of power itself is allowable, the fact that Indian tribes are not part of the federal government prevents the tribes from exercising power over state courts and agencies because these entities are non-Indians on non-tribal lands.[272]

However, the delegation of power by Congress may be considered permissible because Indian tribes are not viewed as private entities, but as quasi-sovereign.[273] When Congress incorporates another sovereign's laws into federal law, Congress' actions do not violate the non-delegation doctrine.[274]

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265. Loving v. United States, 517 U.S. 748, 758 (1996).

266. City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

267. Whitman v. Am. Trucking Ass'n. Inc., 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

268. 25 U.S.C. § 1915(c) (2021) (emphasis added).

269. 25 C.F.R § 23.130(b) (2020).

270. 25 U.S.C. § 1915(c); 25 C.F.R. § 23.130(b).

271. Mistretta v. United States, 488 U.S. 361, 371-72 (1989).

272. *Bernhardt I*, 937 F.3d at 435.

273. *Id.*

274. *Id.* at 436; *see also* United States v. Mazurie, 419 U.S. 544, 557 (1975) (quoting United States v. Curtiss-Wright Export Corp, 299 U.S. 304, 319-22 (1936)) ("It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this

United States v. Mazurie[275] somewhat addresses this issue. In *Mazurie*, the Wind River Tribe was able to control the introduction of alcohol within the reservation on the privately owned land of non-Indians.[276] The United States Supreme Court found the federal law that allowed this regulation did not violate the non-delegation doctrine due to the Tribal sovereignty and a tribe's inherent power to regulate what goes on within the reservation.[277] *Mazurie* can be read to say that because of tribal sovereignty, despite not being a federal entity, tribes given legislative authority are able to pass resolutions when the resolutions pertain to the tribe.[278]

However, *Mazurie* used a narrower interpretation.[279] In *Mazurie*, the Tribe was regulating what occurred within the reservation, on tribal lands.[280] The tribe was not creating laws effecting non-Indians and state courts, outside of the reservation.[281] The *Brackeen* Circuit court found this fact unpersuasive, stating that "[i]t is well established that tribes have 'sovereignty over both their members and their territory.'"[282] The argument that remains is that tribes must be able to have the power to regulate all Indian children, whether they are on the reservation or not, in order to effectively exercise authority related to tribal membership and domestic relations among the tribal members.[283]

Further, tribes have the authority and inherent power over domestic relations, like child custody and tribal membership.[284] Therefore, through section 1915(a), Indian tribes determine the appropriate placement for the Indian children within the tribal community, and they exercise their "inherent power to determine tribal membership [and] regulate domestic relations among members" and children eligible for tribal membership.[285] This fact relates back to *Mazurie* and tribes being quasi-sovereign because this "legislation" concerns regulating the tribe.[286] Because of Indian tribes' quasi-

portion of its own authority "to regulate Commerce . . . with the Indian tribes."); United States v. Sharpnack, 355 U.S. 286, 292-94 (1958) (holding that a staute that prospectively incorporated state criminal laws "in force at the time of" the alleged crime was a "deliberate continuing adoption by Congress" of state law as binding federal law in "federal enclaves" within state boundaries.); Gibbons v. Ogden, 22 U.S. 1, 207 (1824) ("Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject.").

275. *Mazurie*, 419 U.S. at 556-57.
276. *Id.* at 547-48.
277. *Id.* at 556-57.
278. *See Bernhardt I*, 937 F.3d at 436-37.
279. *Mazurie*, 419 U.S. at 556-57.
280. *Id.* at 547.
281. *Id.* at 547-48.
282. *Bernhardt I*, 937 F.3d at 436 (quoting *Mazurie*, 419 U.S. at 557).
283. *Id.* at 436-37.
284. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 170 (1982) (Stevens, J., dissenting); Montana v. United States, 450 U.S. 544, 564 (1981) (citing *Wheeler*, 435 U.S. at 326).
285. *Montana*, 450 U.S. at 564.
286. *Mazurie*, 419 U.S. at 556-57.

sovereignty, the likelihood of the non-delegation doctrine applying is small.[287]

V. RECENT DEVELOPMENTS

Recently, there have been cases before the Supreme Court, or will likely be before the Supreme Court related to these issues and are discussed below.[288]

A. Adoptive Couple v. Baby Girl

The United States Supreme Court ruled against tribal interests in *Adoptive Couple v. Baby Girl,* when it overturned a South Carolina Supreme Court's application of the ICWA.[289] *Baby Girl* involved a putative father who sought custody of his biological daughter, who was 3/256 Cherokee.[290] The child's father was a member of the Cherokee Nation and her mother was non-Indian.[291] After both separating from the father, and the father's affirmation that he intended to relinquish his parental rights, the mother put the child up for adoption.[292] Despite being served, and signing, adoption papers, the father contested the adoption in South Carolina court.[293] The child had been living with a non-Indian family in South Carolina for a year.[294]

The South Carolina court granted custody to the father, finding that the ICWA applied to the case because the child was an Indian child and the father was a "parent" as defined by the ICWA.[295] The South Carolina Supreme Court found two provisions of the act prevented biological father's rights from being terminated.[296]

When the United States Supreme Court reviewed the case, the majority opinion avoided directly addressing any Constitutional arguments and reversed the South Carolina Supreme Court's holding in a 5-4 decision.[297] The Supreme Court did not decide whether the biological father was a parent as defined by the statute because the Court found that neither section 1912(f) or 1912(d) applied to the case, regardless of the child's parentage.[298] Solely

287. *Id.* at 556.
288. *See infra* Parts V.a-b.
289. *Baby Girl*, 570 U.S. at 655-56.
290. *Id.* at 641.
291. *Id.* at 643.
292. *Id.* at 643-44.
293. *Id.* at 644.
294. *Baby Girl*, 570 U.S. at 644-45.
295. *Id.* at 645-46.
296. *Id.* at 646. The first provision focused on keeping Indian families intact, while the second provision stated that parental rights could not be terminated if the termination of those rights would cause "serious emotional or physical damage to the child." 25 U.S.C. § 1912(d), (f) (2021).
297. *Baby Girl*, 570 U.S. at 641-42.
298. 25 U.S.C. § 1912(d), (f).

using the text of the statute, the Court determined that because the father never had "continued custody" of the child, there was no "breakup of the Indian family" section that could be applied.[299] The Court further held that the ICWA was inapplicable to cases such as this, where "the parent abandoned the Indian child before birth and never had custody of the child."[300]

Despite not directly addressing constitutional arguments, the Court made several comments in dicta about potential concerns.[301] First, Justice Alito pointed out how little Cherokee blood the child had, and that for this reason alone the ICWA applied, resulting in the child being taken away from the only parents she ever knew.[302] Further, he stated, "[i]t is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have no right to object to her adoption under South Carolina law."[303]

Justice Alito's continued focus on how "Cherokee" the child was, indicates that he saw this classification as racial and unreasonably tied to the child's ancestry.[304] He stated that based on South Carolina Supreme Court's reading of the act, the state court's interpretation "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian."[305] This statement, and the use of the term ancestor, which hints at *Rice*, a case which used ancestry as a racial proxy.[306] Lastly, Justice Alito pointed out that under certain factual situations, there could be equal protection concerns with the ICWA.[307] Alito's argument shows that, while in this particular case the Court did not address equal protection issues with the ICWA, there was no indication that equal protection issues do not exist.[308]

Despite these veiled constitutional arguments, the Court intentionally narrowed the application of the sections at issue in an effort to avoid constitutional issues in the future.[309] For instance, in order to explain his view further, Justice Breyer wrote a concurrence stating, "We should decide here no more than is necessary."[310] Breyer noted it was necessary to limit the holding to the specific facts of the case.[311]

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299. *Baby Girl*, 570 U.S. at 641.
300. *Id.*
301. *Id.* at 646, 655.
302. *Id.* at 646.
303. *Id.*
304. *Baby Girl*, 570 U.S. at 690 (Sotomayor, J., dissenting).
305. *Id.* at 655.
306. *See Rice*, 528 U.S. at 514.
307. *Baby Girl*, 570 U.S. at 656.
308. *Id.*
309. *Id.* at 667 (Breyer, J., concurring).
310. *Id.*
311. *Id.*

This case suggests that while the Court may think there are equal protection or other constitutional issues with the statute, it will likely do what it can to avoid addressing those issues.[312] However, it might be forced to address certain constitutional issues in *Brackeen v. Bernhardt.*[313]

B. Brackeen v. Bernhardt/Zinke

Brackeen v. Bernhardt (formerly *Zinke*), is a case out of the Fifth Circuit.[314] Many Indian nations, such as the Cherokee Nation, the Morongo Band of Mission Indians, the Oneida Nation, and the Quinault Nation have participated in in this case.[315] The suit was brought by Texas, Louisiana, and Indiana and non-Native families seeking to adopt Indian children.[316] The plaintiffs argue that specific provisions of the ICWA and regulations are unconstitutional.[317] Specifically, they argue "the ICWA and the Final Rule violate: (1) the equal protection requirements of the Fifth Amendment; (2) the Due Process Clause of the Fifth Amendment; (3) the Tenth Amendment; and (4) the proper scope of the Indian Commerce-Clause. Plaintiffs also argue that: (1) the Final Rule violates the Administrative Procedure Act; and (2) the ICWA violates Article I of the Constitution."[318]

Relating to the Equal Protection claim, the plaintiffs assert that sections 1915(a)-(b), section 1913(d), and section 1914, of the ICWA, along with sections 23.129-132, of the Final Rule violate equal protection under the Fifth Amendment.[319] They claim the ICWA is unconstitutional as the child's "race" is taken into account, and as such the act violates both state and federal law because it "implement[s] a system that mandates racial and ethnic preferences."[320] The main disagreement is over whether sections 1915(a)-(b) rely on racial classifications and are subject to strict scrutiny, or if the classifications are political, and subject to rational basis review.[321]

Additionally, they claim states are being forced to modify their child welfare programs in order to comply with the federal act.[322] The plaintiffs assert that sections 1901-23 and sections 1951-52 are unconstitutional under Article One and the Tenth Amendment because they "violate the Commerce

312. *Baby Girl*, 570 U.S. at 667 (Breyer, J., concurring).
313. 937 F.3d at 416 (*Bernhardt I*).
314. *Id.* at 406.
315. *Zinke*, 338 F. Supp.3d at 520.
316. Litman & Fletcher, *supra* note 17.
317. *Zinke*, 338 F. Supp.3d at 519-20.
318. *Id.* at 530.
319. *Id.* at 530-31; Section 1915(a) and (b) are the preferences and criteria for adoptive placements and foster or preadoptive placements. 25 U.S.C. § 1915(a)- (b).
320. *Zinke*, 338 F. Supp.3d at 520.
321. *Id.* at 531.
322. *Id.* at 520.

Clause, intrude into state domestic relations, and violate the anti-commandeering principle."[323] The state plaintiffs alone seek the invalidation of section 1915(c) and Final Rule section 23.130(b) because of a violation of the non-delegation doctrine.[324]

The case has turned into a "frontal attack" on federal law governing and Congress's authority over Indian affairs.[325] Essentially, the plaintiffs are seeking to limit the federal government's power over Indians arguing that Congress can only regulate commerce with tribes, per the Constitution.[326]

i. District Court

The fate of the ICWA has been up in the air since the case was first filed. Initially, the court struck down the act.[327] In a shocking decision, the district court granted summary judgement in favor of the plaintiffs, determining that section 1903(4) defining an "Indian Child" was a race-based classification that could not survive strict scrutiny, the ICWA and Final rule violated the non-delegation doctrine, and that the ICWA violated the anti-commandeering doctrine.[328]

The District Court began its analysis by focusing on the equal protection argument and relying on *Rice v. Cayetano*.[329] The District Court analogized the *Rice* case and "ancestry as a proxy" in its finding that the classification in the ICWA was a racial classification.[330] Additionally, the court distinguished *Mancari* by noting that the preference in that case "only applied to members of federally recognized tribes, which 'operates to exclude many individuals who are racially classified as 'Indians.''"[331] The court focused on the definition of Indian child and found that it was too broad—it "defines an Indian child as one who is a member 'of an Indian tribe' as well as those children simply *eligible* for membership who have a biological Indian parent."[332] The court found this to be ancestral tracing, as an Indian child would be a child who was "related to a tribal ancestor by blood."[333]

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323. *Id.* (These sections cover statutes related to the congressional findings, congressional declaration of policy, definitions, and then all of the sections related to child custody proceedings. Sections 1951 and 1952 are the specific statutes related to the recordkeeping, information availability, and timetables related to the act.)

324. *Id.* at 520. (Section 1915(c) regards placement of Indian Children which allows the tribe to establish a different order of placement than what is required in section (a) and (b) of the section and the state is generally required to follow it.)

325. Litman & Fletcher, *supra* note 17.

326. *Id.*

327. *Zinke*, 338 F. Supp.3d at 546.

328. *Bernhardt I*, 937 F.3d at 420.

329. *Zinke*, 338 F. Supp.3d at 531-32.

330. *Id.* at 534.

331. *Id.* at 533.

332. *Id.* (emphasis in original).

333. *Id.*

The court stated that this was the exact situation *Mancari* warned of when the Court noted that a "blanket exemption for Indians" would raise issues.[334] Additionally, it found that because the act's definition of Indian children "defer[red] to tribal membership eligibility standards based on ancestry, rather than actual tribal affiliation, the ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race and therefore 'must be analyzed by a reviewing court under strict scrutiny.'"[335]

The court then subjected the act to a strict scrutiny review and found that the government did not show there was a compelling governmental interest that the racial classification serves.[336] The court also found the act was not narrowly tailored.[337] Thus, it did not survive strict scrutiny and the plaintiffs had a valid equal protection claim.[338]

The district court went on to address the Article I non-delegation claim.[339] The Vesting Clause provides that "[a]ll legislative Powers . . . shall be vested in a Congress of the United States."[340] The plaintiffs argued that section 1915(c) of the ICWA was an impermissible delegation of congressional power to the Indian tribes because it allows the tribes to "reorder congressionally enacted adoption placement preferences by tribal decree and then apply their preferred order to the states."[341] Further, the plaintiffs argued that section 23.130(b) of the regulations also violates the non-delegation doctrine.[342]

The district court found that these were, in fact, violations of the non-delegation doctrine.[343] Noting that while there are permissible delegation of congressional power which involve the ability to execute laws, this was an instance of congressional delegation to create law, which is impermissible.[344] Here, the court found that instead of granting the tribes a power to interpret an ambiguity within the act, Congress had granted them the power to change its legislative preferences that had been enacted in the ICWA.[345] Further, these changes were binding on the state courts.[346] Additionally, even if the delegation had been permissible, the court found that it was beyond

334. *Zinke*, 338 F. Supp. 3d at 533.
335. *Id.* at 533-34.
336. *Id.* at 534.
337. *Id.* at 535.
338. *Id.* at 536.
339. *Zinke*, 338 F. Supp.3d at 536.
340. U.S. CONST. art. I. § 1, cl. 1.
341. *Zinke*, 338 F. Supp.3d at 536.
342. *Id.*
343. *Id.* at 537.
344. *Id.* at 536.
345. *Id.* at 537.
346. *Zinke*, 338 F. Supp.3d at 537.

Congress' power because tribes are not government entities.[347] The court equates tribes to private entities, noting they are "'not part of the federal Government at all,' which 'would necessarily mean that [they] cannot exercise. . . governmental power.'"[348]

After finding a violation of the non-delegation doctrine, the court moved on to the anti-commandeering doctrine.[349] Essentially, the anti-commandeering doctrine says that Congress cannot order states to do something—i.e. Congress is allowed to regulate individuals, not States.[350] The plaintiffs claimed the ICWA and Final Rule violate the Tenth Amendment through commandeering.[351] The defendants argued that Congress had the power to enact the ICWA through the Indian Commerce Clause and that its "authority over Indian children was never reserved to the States."[352] Again, this goes back to federal power over Indians. However, the district court found that the ICWA directly commanded that state courts and agencies adopt and apply a federal standard in a state cause of action (child custody causes of action).[353]

The courts final judgment resulted in ICWA sections 1901-23, 1951-52, and Final Rule sections 23.106-22, 23.124-32, and 23.140-41 being declared unconstitutional.[354] The defendants subsequently appealed.[355] The case was subsequently appealed.

ii. Circuit Court

After the district court ruling was appealed, the Fifth Circuit Court of Appeals heard the case.[356] Initially, the Circuit Court upheld the act.[357] However, on January 22 the case was reheard *en banc* before the entire judicial panel of the Fifth Circuit.[358] There has yet to be a ruling in the rehearing. The below will discuss the holding prior to the *en banc* panel.

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347. *Id.* at 536.

348. *Id.* at 537-38 (quoting Dept. of Trans. v. Ass'n of Am. R.R.'s, 135 S. Ct. 1225, 1253 (2015) (Thomas, J. concurring)).

349. *Id.* at 538. While I did not address the anti-Commandeering argument in my analysis of potential constitutional arguments, I will very briefly address the court's finding here.

350. Murphy v. NCAA, 138 S. Ct. 1461, 1475-76 (2018).

351. *Zinke*, 338 F. Supp.3d at 538.

352. *Id.* at 538.

353. *Id.* at 541.

354. *Id.* at 546.

355. *Bernhardt I*, 937 F.3d at 416.

356. *Id.* at 406.

357. *Id.* at 416.

358. Acee Agoyo, *'An Indian is an Indian is an Indian': Tribes defend sovereignty amid attack on Indian Child Welfare Act*, INDIANZ.COM (Jan. 23, 2020), https://www.indianz.com/News/2020/01/23/tribes-defend-indian-child-welfare-act.asp.

First, the circuit court found that the definition of Indian child was not race-based.[359] The court noted that Congress has had plenary power over tribes since "the beginning" and that this power has always been political.[360] Further, the court found that the United States Supreme Court has been clear in finding that classifications involving Indians and Indian tribes have always been political and not race-based.[361] The court focused on *Morton v. Mancari* in particular.[362] Using *Mancari*, the court reasserted the fact that Indians are quasi-sovereign, and that when there are laws that classify them, or give preference to them, they are political.[363] In *Mancari,* the Supreme Court found that hiring preferences of Indians by the BIA was not racial, but was "employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It was directed to participation by the governed in the governing agency."[364] Additionally, the circuit court stressed that in *Marcari*, the Court recognized how important the relationship was between Congress's plenary power over the tribe and the "unique legal status of Indian tribes."[365]

Further, the circuit court disagreed with the district court's reasoning in distinguishing *Mancari*, and found that *Mancari* does in fact control.[366] The court first noted that geographical location of Indians does not matter, as Congress has power to regulate Indians both on and off the reservations.[367] The court went on to find that the district court was wrong in its conclusion that the ICWA definition of Indian child was based on race, with ancestry as a proxy.[368] The court noted that under some tribal membership laws, children with non-native blood can in fact be eligible for membership.[369] Where a child's parent became a tribal member despite lack of "Indian blood," the child would fall under ICWA's membership even though they are not "racially Indian."[370] Further, the court stated there are many children who are "racially Indian," such as those in non-federally recognized tribes, that would be excluded from ICWA's definition of Indian child.[371] Thus the circuit court

359. *Bernhardt I*, 937 F.3d at 426.
360. *Id.*
361. *Id.*; *See e.g.*, Lone Wolf v. Hitchcook, 187 U.S. 553, 565 (1903); and *see e.g.*, *Antelope*, 430 U.S. at 645; *See e.g.*, *Mancari*, 417 U.S. 535, 552.
362. *Bernhardt I*, 937 F.3d at 427-28.
363. *Id.* at 427.
364. *Id.* (quoting *Mancari*, 417 U.S. at 553-54).
365. *Id.* at 426-27.
366. *Id.* at 427.
367. *Bernhardt I*, 937 F.3d at 427.
368. *Id.* at 428.
369. *Id*.
370. *Id.*
371. *Id.*

found the ICWA's definition of Indian child was political and not racial.[372] Finding that the classification was political, the court used a rational basis review and found that the act's definition of Indian child did not violate equal protection.[373]

The court found the act does not violate the anti-commandeering doctrine.[374] Unlike the district court, the circuit court looked to the Supremacy Clause in finding that enforcement of the ICWA and Final Rule by state courts was not an anti-commandeering issue.[375] The court found that under the Supremacy Clause, there was a difference in state *courts* applying federal law, and making state legislatures and executives enforce federal law.[376] In this case, it was state courts applying the federal law, not legislatures, and thus the anti-commandeering principle did not apply.[377] The court further found that the ICWA did not commandeer state agencies as the provisions applied to both state agencies and private parties alike.[378]

Finally, the Court found that section 1915(c), which allows the Indian tribes the ability to change placement preferences, does not violate the non-delegation doctrine.[379] The court focused on the sovereignty of the tribes in reaching this conclusion.[380] First stating, "[t]he Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the non-delegation doctrine,"[381] the court found *Mazurie* instructive.[382] Using *Mazurie*, the court found that because of tribal sovereignty, tribes have authority of tribal membership and regulation of domestic relations of its members, including Indian children.[383] As such, the

372. *Bernhardt I*, 937 F.3d at 428-29. The court also distinguishes *Rice* for several reasons here, including (1) that *Rice* involved voter eligibility in a statewide election – something that application of *Mancari* would not permit, (2) the ICWA definition of Indian child did not single out children solely based on their ancestry, and (3) that unlike the statute in *Rice,* the ICWA was enacted by Congress to protect Indian children and tribes.

373. *Id.* at 430.

374. *Id.* As noted above, while I did not discuss the anti-commandeering doctrine in my analysis I will briefly summarize the Circuit court's holding.

375. "*Judges* in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2 (emphasis added).

376. *Id.* at 431.

377. *Id.* Judge Owen did dissent in relation to the commandeering argument. *Id.* at 442. The district court's finding that the ICWA violated the anti-commandeering doctrine and Judge Owen's dissent suggest that this particular issue will have varied opinions in the *en hanc* ruling. *Id.* at 443.

378. *Bernhardt I*, 937 F.3d at 432-33 ("Because both state agencies and private parties who engage in state child custody proceedings may fall under these provisions, 1912(a) and (d) 'evenhandedly regulate[] an activity in which both States and private actors engage.'").

379. *Id.* at 437.

380. *Id.* at 437.

381. *Id.* at 436.

382. *Id.*

383. *Bernhardt I*, 937 F.3d at 436.

court held that section 1915(c) is not a violation of the non-delegation clause but simply "an incorporation of inherent tribal authority of Congress."[384]

iii. Circuit Court Rehearing

After the ruling, the states and non-Indian parties requested a rehearing. The 5th Circuit ordered the case to be reheard *en banc*.[385] The case was reheard before a panel of 16 judges on January 22.[386] The Navajo Nation was included in this oral argument.[387]

It is unclear how the court will rule this time. While the Fifth Circuit includes Indian nations located in Louisiana, Texas, and Mississippi, it has not always ruled favorably for the Indian tribes.[388] Additionally, in the oral arguments, many questions related blood quantum[389] were asked, which seems to suggest the court will really focus on the equal protection issue. Another interesting point is that prior to the most recent case, the Fifth Circuit found that the state's interests were more important than tribal sovereignty.[390]

Once the circuit court issues a ruling, it is expected that the case will be appealed to the United States Supreme Court.[391] The last time the Court heard an ICWA case was in *Adoptive Couple v. Baby girl*, where the Court ruled against tribal interests.[392] As noted above, in that case the Court "allowed a non-Indian couple to adopt a Cherokee Nation girl over the objections of her biological father, who is a citizen of the tribe."[393] In *Baby Girl*, five of the justices who ruled against the tribal interests still serve on the Court.[394] Three Justices are no longer on the Court—Justice Kennedy, who joined the majority, and Justices Scalia and Ginsburg, who were on the dissent.[395] It is uncertain how the new makeup of the Court would affect the constitutionality of the ICWA.

VI. CONSEQUENCES IF DEEMED UNCONSTITUTIONAL

Strictly related to Indian children and child protective services, if the act is repealed there is a chance that, as in the past, Indian children will be removed at an alarming rate.[396] Currently, the problem of separation of

384. *Id.* at 437.
385. *Bernhardt II*, 942 F.3d at 287.
386. Agoyo, *supra* note 358.
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. Agoyo, *supra* note 358.
392. *Id.*
393. *Id.*
394. *Id.*
395. *Id.*
396. *See About ICWA*, *supra* note 76.

Indian children does persist today.[397] For instance, a 2015 report found that these children are three times more likely to be removed from their home by state child protective services than children of non-Native descent.[398] Additionally, when native children are adopted, over half are not placed with their families or communities.[399] Also, the number of Native American children that are currently in foster care is over twice the proportion of the general public.[400] Many attribute these numbers to non-compliance with the act—which the Final Rule was promulgated to address.[401]

Logically, it flows that if the act is repealed, these numbers will increase as there is no check on the State governments regarding Indian children. The fact is, prior to the passage of the act, when these children were removed it was not as a last resort but was the first step taken.[402] As in the past, social workers may not "exhaust[e] all familial and tribal opportunities for placement."[403] This would result in even higher numbers of Indian children being removed from their families and placed with non-Indian families.

Additionally, if the act struck down because Congress exceeded its power under the Indian Commerce Clause, the entire power of Congress over Native Americans is at risk.[404] It would not be just the ICWA that would be affected, but other laws in Indian affairs.[405] The Indian Commerce Clause is where Congress gets its authority to enact Indian legislation.[406] Further, if this act were to be found unconstitutional under a violation of equal protection, almost everything in Indian law would be subject to the same outcome.[407]

Essentially, decades of protection from discrimination, imperialism, and white supremacy would be at risk of remerging if the act were to be repealed.[408] The tribal ability for self-regulation is at risk, along with the ability to punish those who victimize Indians.[409] Tribal sovereignty may be no more.[410]

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397. *Id.*

398. *See Setting the Record Straight* , *supra* note 59.

399. Specifically, a report noted that 56% were not placed with either family or community. *See id.*

400. Alicia Summers & Steve Wood, *Measuring Compliance with the Indian Child Welfare Act: An Assessment Toolkit*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES 4 (2013), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/webteam/pdf/idc1-025753.pdf.

401. *Setting the Record Straight* , *supra* note 59.

402. Summers & Woods, *supra* note 400, at 26.

403. Cheryl Fairbanks, *New ICWA Court aims to keep Native families together,* NEW MEXICO CENTER ON LAW & POVERTY, (Oct. 24, 2019), http://nmpovertylaw.org/2019/10/new-icwa-court-aims-to-keep-native-families-together/.

404. *See* Litman & Fletcher, *supra* note 17.

405. Runge, *supra* note 178.

406. Ablavsky, *supra* note 37, at 1014.

407. Runge, *supra* note 178.

408. Litman & Fletcher, *supra* note 17.

409. *Id.*

410. Runge, *supra* note 178.

VII. CONCLUSION

Based purely on precedent and the deference given to Congress in relation to power over the tribes, the act is likely constitutional based on the three potential claims that have been discussed.[411] However, if the issue is brought before the Supreme Court, there is a chance it could be struck down based on equal protection—if the Court does not avoid the constitutional question. The district court's finding that the act was unconstitutional as a violation of equal protection was unexpected. Based on comments made in dicta, the Supreme Court seems to have noticed there is the potential for an equal protection claim.[412]

It is unlikely the act would be found unconstitutional under the Commerce Clause. The Supreme Court has long held that Congress gets its plenary power from the clause.[413] However, the Court's treatment of Indian law could be described as "whimsical" and as such "the Court could conceivable abolish plenary power, [although] to do so would be a dramatic departure from centuries-old jurisprudence."[414]

The non-delegation argument is an interesting one as well. This argument seems to have the most potential of the two above mentioned. That is because *Mazurie* can easily be read to only apply to Indian's legislating on the reservation.[415] It would be a very straight-forward interpretation.

In the end, all eyes are anxiously awaiting the decision from the Fifth Circuit and then the potential petition for certiorari that is expected to come after the decision. If this case gets to the United States Supreme Court, the decision could have an impact not just on the constitutionality of the ICWA, but potentially all Indian legislation past and future.

411. *See supra*, Part IV.a-c.
412. *Baby Girl*, 570 U.S. at 646, 655.
413. Tweedy, *supra* note 249, at 472.
414. *Id.* at 482, n.69.
415. *See Bernhardt I*, 937 F.3d at 436.