Protecting Tribal Nations by Developing a 21st Century Workforce

Brakeen v. Haaland
Oral Argument Recap

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BRACKEEN V. HAALAND

- How it may change the Indian Child Welfare Act and
- How it may change the legal landscape of all of Indian Country

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LEGAL PRINCIPLES OF FEDERAL INDIAN LAW

- **"Federal Indian law" is the body of United States law – treaties, statutes, executive orders, administrative decisions, and court cases – that define and exemplify:**
  - **the unique legal and political status of the 574 federally recognized American Indian and Alaska Native tribes; the relationship of tribes with the federal government; and**
  - **the role of tribes and states in our federalism.**

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LEGAL PRINCIPLES OF FEDERAL INDIAN LAW

- **Federal Indian law has three fundamental legal principles:**
  - 1. American Indian and Alaska Native tribes that are recognized by the federal government are independent sovereign governments, separate from the states and from the federal government. They PRE-DATE the United States!
  - 2. Unless Congress provides otherwise, the sovereignty of federally recognized American Indian and Alaska Native tribes generally extends over their federally recognized geographic territory (e.g., reservations, allotments, trust and restricted Indian lands, and other Indian country), including over the activities and conduct of tribal members and non-tribal members within that territory.
  - 3. The sovereignty of federally recognized American Indian and Alaska Native tribes is inherent and exists unless and until Congress takes it away.

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LEGAL PRINCIPLES OF FEDERAL INDIAN LAW (cont)

- **These three fundamental principles of federal Indian law have been recognized since the formation of the United States of America. The principles are acknowledged in many acts of Congress and many decisions of the United States Supreme Court.**
- Now let's look at the Brackeen case and how it might affect the lay of the land in Indian law.

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Supreme Court Case is a Consolidation of 4 cases:

- 1) Brackeen v. Haaland (21-380);
- 2) Texas v. Haaland (21-378);
- 3) Cherokee Nation v. Brackeen (21-377);
- 4) Haaland v. Brackeen (21-376)

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Facts of the Case

- A Texas couple wishing to adopt an Indian child, and the State of Texas, filed suit against the United States and several of its agencies and officers in federal district court claiming that the Indian Child Welfare Act (ICWA) was unconstitutional.
- They were joined by additional individual plaintiffs and the States of Louisiana and Indiana.
- Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (collectively the Four Tribes) intervened as defendants, and Navajo Nation intervened at the appellate stage.
- Louisiana and Indiana are no longer parties to the Supreme Court case.

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Procedural History

- The District Court held that much of the Indian Child Welfare Act (ICWA) was unconstitutional.
- The Fifth Circuit issued a split decision.
- Sitting en banc (17 Judge panel), the Fifth Circuit **reversed** much of the District Court decision. However, the Fifth Circuit did **affirm** the District Court on some of its holdings:
  - 1. Specific sections of ICWA violated the Fifth Amendment's equal protection guarantee and the Tenth Amendment's anti-commandeering principle.

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Prcedural History (continued)

- 2. Specifically, the Fifth Circuit, by an equally divided court, affirmed the district court's holding that ICWA's preference for placing Indian children with "other Indian families" (ICWA's third adoptive preference, after family placement and placement with the child's tribe) and the foster care preference for licensed Indian foster homes violated equal protection.
- 3. The Fifth Circuit also concluded that the Tenth Amendment's anti-commandeering principle was violated by ICWA's "active efforts," "qualified expert witness," and record keeping requirements.
- An equally divided court affirmed the district court's holdings that placement preferences and notice requirements would violate the anti-commandeering principle if applied to State agencies.

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Procedural History (continued)

- 4. Finally, the Fifth Circuit also held that certain provisions of the ICWA Final Rule, specifically those related to the provisions that the Court had found to be unconstitutional, violated the Administrative Procedure Act.
- The United States, the Four Tribes, Texas, and the non-Indian individuals each filed petitions for review at the U.S. Supreme Court (4 Separate Petitions for Review)
  - **The United States and the Four Tribes** sought review of the Fifth Circuit's finding of unconstitutionality based on Equal Protection and anti-commandeering and the corresponding findings of APA violations, and assert that the individual plaintiffs lack standing.
  - **The individual plaintiffs** focus their petition more narrowly on equal protection and anti-commandeering claims.

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Procedural History (continued)

- **Texas asserts** that Congress acted beyond its Indian Commerce Clause power in enacting ICWA and that ICWA creates a race-based child custody system in violation of the Equal Protection clause.
- Texas also claims that ICWA violates the anti-commandeering principle and that its implementing regulations violate the non-delegation doctrine by allowing individual tribes to alter the placement preferences enacted by Congress.

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Parts of Indian Child Welfare Act Being Challenged

- Congress enacted the Indian Child Welfare Act as a response to a long and tragic history of separating Native American children from their families.
- The ICWA law establishes minimum standards for the removal of Native American children from their families and establishes a **placement preference** that when Native American children are taken from their homes, they be placed with extended family members or with other Native families, even if the families are not relatives.
- Opponents of the law say **it exceeds Congress' power, violates states' rights, and imposes unconstitutional race-based classifications.**

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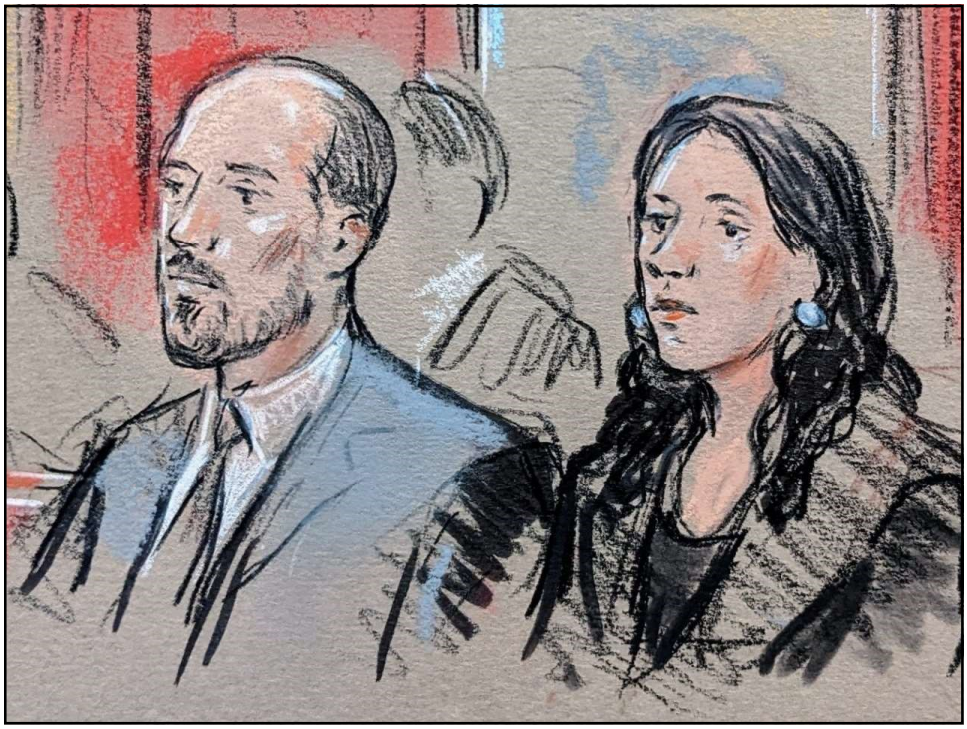

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Supreme Court Oral Argument(cont)

- Lawyer Matthew McGill represented the seven individual **plaintiffs** who are challenging ICWA, including three non-Native couples who tried to foster or adopt children with Native American ancestry.
- He told the justices that ICWA "flouts the promise of equal justice under the law" by treating Native American children differently.
- McGill insisted that ICWA falls outside Congress' power to regulate Native American affairs, arguing that Congress does not have the "power to regulate Indians everywhere, wherever they might be in the jurisdiction of the United States."

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Supreme Court Justices Divided

- **Justice Amy Coney Barrett** countered that the Supreme Court has described Congress' power to regulate Indian affairs as "plenary" – that is, absolute. "Are you asking us," she queried, "to overrule all of those precedents?"
- **Justice Neil Gorsuch**, arguably the court's strongest champion of Native American sovereignty, observed that the Supreme Court has never struck down laws based on the exercise of Congress' plenary power to regulate Indian affairs. Gorsuch also pushed back against McGill's suggestion that family law is a state, rather than federal, matter. The federal government has long been involved in family law for Native Americans, he noted. Indeed, Gorsuch posited, it might be "a little anachronistic" to contend that states have a special interest in applying their family laws to Native Americans when, for many decades, "they didn't do anything at all."

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Supreme Court Justices Divided (cont)

- **Justice Elena Kagan** also viewed Congress' power over Native American affairs as very broad. "Plenary," she told Texas Solicitor General Judd Stone, means "unqualified."
- **Justice Samuel Alito** worried aloud that Congress' plenary power could be unlimited under the interpretation advanced by the federal government and a group of Native Americans tribes that are defending the law.
- **Edwin Kneedler, the Deputy Solicitor General who argued on behalf of the federal government,** reassured Alito that Congress does not have unlimited power to regulate Native American affairs. Instead, he stressed, Congress' exercise of its power must be rationally related to Congress' unique obligations to Native Americans.

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Supreme Court Justices Divided (cont)

- **Gorsuch** also expressed concern that, if the Supreme Court were to strike down ICWA on the ground that it exceeded Congress' power, other laws intended to benefit Native Americans – on topics ranging from health care and the environment to religious liberties – would also be in jeopardy.
- Several justices raised the question whether ICWA violates the Constitution's guarantee of equal protection, which generally prohibits the government from discriminating based on race, gender, or ethnicity.
- **Gorsuch** did not see a constitutional problem. The Constitution, he emphasized, describes the tribes as separate sovereigns, so that the distinctions that ICWA draws are political, rather than racial. And the Supreme Court's 1974 decision in ***Morton v. Mancari***, he continued, made clear that this is a political classification.

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Supreme Court Justices Divided (cont)

- **Kagan** agreed. She told McGill that the Supreme Court has "a long history of cases where we've understood legislation relating to the tribes as political." By contrast, she continued, "you have one case," involving "a very different situation" in which the "classification did not relate to a tribe."
- For **Justice Brett Kavanaugh**, however, it was a harder question. He described ICWA as "difficult" because the court has to find the "fine line" between two competing principles: respect for tribal self-government, recognizing the long history of oppression of Native Americans; and, on the other hand, the general principle that people should not be treated differently based on their race or ancestry. Where, Kavanaugh asked Stone, do we draw the line?

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Supreme Court Justices Divided (cont)

- Some justices focused specifically on McGill's contention that ICWA displaces the "best interests of the child" standard that state family courts would normally apply.
- **Sotomayor** noted that the federal government has superseded state family law in other arenas – for example, with the Hague Convention on the Civil Aspects of International Child Abduction, which applies to cases brought in U.S. court seeking the return of a child who was abducted to the United States. The Hague Convention, Sotomayor observed, doesn't apply the "best interests of the child" standard, instead requiring courts to return children to their home country so that courts there can resolve any custody disputes.

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Supreme Court Justices Divided (cont)

- Other justices were troubled by what they referred to as ICWA's **"third preference"** – the preference that if a Native American child cannot be placed with either members of her extended family (the first preference) or members of the same tribe (the second preference), she be placed with members of another tribe.
- **Chief Justice John Roberts** offered a hypothetical involving a Native American baby without any extended family members available to take care of her, and a non-Native couple willing to adopt her. Does the priority of having Native American adoptive parents, Roberts asked, trump the best interests of the child?

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Supreme Court Justices Divided (cont)

- Kneedler emphasized that Congress enacted ICWA precisely because of the long history of separating Native American children from their families. Congress was "concerned about the free-floating application of the 'best interests of the child' standard," and determined that it was in the best interests of Native American children to remain, when possible, with non-family members who are Native American rather than go to non-Native families.
- But **Kavanaugh and Barrett** appeared unconvinced. Kavanaugh suggested that the "third preference" was not based on a political classification precisely because a Native American child could be placed with a family from a different tribe.

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Supreme Court Justices Divided (cont)

- **Barrett** echoed this idea. This "third preference," she suggested, treats the different Native American tribes as fungible [interchangeable].
- Both **Kneedler and Ian Gershengorn, who represented the tribes,** assured the justices that the third preference rarely comes into play. And in any event, they said, tribes have common interests – including a political relationship with the federal government – and common spiritual practices.
- **Gershengorn** also suggested that the justices' concerns about the third preference were unfounded. Although the justices may have been worrying about a scenario in which a child from a tribe in one part of the country, such as Maine, is sent to live with a family belonging to a tribe in a completely different part of the country, such as Oklahoma, Gershengorn explained, "that case has never happened that we have been able to find." Indeed, he added, it is common for members of one tribe to live on another tribe's land.

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Supreme Court Justices Divided (cont)

Ian Gershengorn argues for the Native American tribes. (William Hennessy)

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Supreme Court Justices Divided (cont)

- **Barrett** also raised questions about whether some provisions of ICWA violate the 10th Amendment's "anti-commandeering doctrine," which prohibits the federal government from requiring states and state officials to adopt or enforce federal law. Barrett was skeptical that an ICWA provision requiring states to maintain records regarding the placement of Native American children "commandeers" the states, but she was more concerned about ICWA's requirement that states make "active efforts" to avoid break-up of the Native American family.
- But **Gorsuch** downplayed the "active efforts" provision, noting that it applies both to the states and to private placements of children – and is therefore not an effort to coopt state machinery.

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Supreme Court Justices Divided (cont)

- **Justice Ketanji Brown Jackson** also did not view ICWA as creating any anti-commandeering problems. If Congress believes that legislation like ICWA is necessary "to avoid the extinction of tribes," she observed, it would be odd to say that ICWA is invalid because of the "relatively new" anti-commandeering doctrine – which has not previously been applied to Native American affairs.
- Two justices raised questions about standing – the legal right to bring the lawsuit in the first place. Gorsuch was doubtful that the individual plaintiffs had a right to challenge ICWA's provisions as an equal protection violation. The individual plaintiffs, he noted, have sued federal officials, but they can't tell state family-court judges what to do – and therefore the lawsuit cannot provide any relief for them. "I would think that might be the end of it," he told McGill.

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Supreme Court Justices Divided (cont)

- **Justice Clarence Thomas** asked Stone how the state had a right to sue. You are representing parents and potential parents, Thomas said, who can represent themselves.
- **Stone** countered that ICWA does regulate Texas directly. If it doesn't comply with ICWA, he told the justices, Texas could lose millions of dollars in federal funding for Social Security. Texas is also harmed by the equal protection violation that ICWA creates, Stone continued, because it costs the state money to determine whether a child is a Native American and therefore covered by ICWA.

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Supreme Court Justices Divided (cont)

Texas Solicitor General Judd Stone argues for Texas. (William Hennessy)

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Supreme Court Justices Divided (cont)

- With relatively little interest in the standing question, it seemed likely that the justices will consider the merits of the claims at the heart of the case.
- How they will rule on those claims remains to be seen, but the oral argument suggested a result that, although not what the federal government and the tribes might want, also might not be the catastrophic result that they have feared.

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Why Is This Case Important To Tribes?

- **REMEMBER THOSE treaties, statutes, executive orders, administrative decisions, and court cases – that define and exemplify:**
  - **the unique legal and political status of the 574 federally recognized American Indian and Alaska Native tribes;**
  - **the relationship of tribes with the federal government; and**
  - **the role of tribes and states in our federalism?**

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Why Is This Case Important To Tribes?

- If the U.S. Supreme Court continues to question whether the hundreds of statutes enacted specifically for Native Americans and/or Indian Tribes, and considers them to be **IMPERMISSIBLY RACE-BASED STATUTES, the entire body of what we are now calling "Federal Indian Law" could be overturned, INCLUDING TITLE 25 OF THE U.S. CODE.**
- **That may include treaties (although treaties are part of international law), and WILL include statutes, executive orders, administrative decisions, and court cases.**
- **All of Indian Country criminal jurisdiction will be kaput!**

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Why Is This Case Important To Tribes?

- BUT THIS HAS NOT HAPPENED YET!
- Implications for Tribal Sovereignty
  - The U.S. Constitution only mentions ONE group of people by name: "Indians Not taxed" and "Indian Tribes."
  - If the Supreme Court rules that ICWA (and other statutes relating to Indians and Tribes), they will then be saying that THE U S CONSTITUTION IS UNCONSTITUTIONAL, which is absurd.
  - So long as Congress' actions are rationally related to their fulfillment of the trust responsibility and Congress' duty of protection of Indian Tribes, the statute is VALID. EASY ANALYSIS.
  - Congress has always been granted extensive deference in Indian affairs, usually to the detriment of Indian Tribes.
  - This case is bringing a FACIAL CHALLENGE to a federal statute. The test for constitutionality is there cannot be ANY application of the statute that IS constitutional. So the Plaintiffs CANNOT pick out small pieces of the statute and assert they are unconstitutional WITHOUT PROVING THE ENTIRE STATUTE IS UNCONSTITUTIONAL. So long as there are possible applications of the statute that ARE constitutional, the Court should not be striking down ANY PART, or even the whole statute.

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Why Is This Case Important To Tribes?

- Implications for Native Family Preservation
  - Custody of the 3 children at issue in the case was given to these non-Indian families, as opposed to their biological families EVEN FOLLOWING ICWA.
    - The Texas Courts have no Indian judges, Indian social workers and few Native foster care families.
    - There was very little discussion in the oral argument of THE BEST INTERESTS OF THE CHILDREN
    - The best interest of these children would have been to stay with their extended family.
    - Adoption at its core is a vestige of colonialism

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EPILOGUE

- There is a fourth child from the same Indian family that the Brackeens are trying to adopt EVEN THOUGH THEY HAVE NEVER EVEN HAD CUSTODY OF THIS CHILD.
- This information came from me, Turtle Talk, SCOTUSBLOG, the National Indian Child Welfare Association and the Native American Rights Fund websites.

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