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The Supreme Court's Indian Child Welfare Decision Neglected One Big Thing

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Paris Hilton joins congressional lawmakers during a press conference on legislation to establish a bill of rights to protect children placed in congregate care facilities, at the U.S. Capitol on Oct. 20, 2021. Mandel Ngan/Getty Images

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Earlier this month, the Supreme Court issued its much-anticipated decision in *Haaland v. Brackeen*, in which plaintiffs challenged the constitutionality of the Indian Child Welfare Act. Thankfully, in a 7–2 majority decision, the court roundly rejected the plaintiffs' arguments, leaving ICWA and Congress' power to regulate in this area intact. The decision is unquestionably a major victory for tribes, for Native sovereignty, and for countless families nationwide.

In support of the decision, Justice Neil Gorsuch wrote his own concurring opinion, spending pages laying out the horrifying history that precipitated ICWA. As Justice Gorsuch outlined, the United States' approach to Indian relations began with violence and displacement. Once tribes had been forced onto reservations, the boarding-school era began, in which officials systematically separated Indian children from their families and communities and sought to “kill the Indian” in children in order to “save the man.” By the middle of the 20th century, efforts aimed at assimilating (read: destroying) Indian communities shifted from boarding schools to the removal of Indian children from their families and promotion of adoption by private (white) families. The goal, as Gorsuch described it, was to “allow ‘civilized people’ to raise the children.” In other words: to finish off tribal communities by amputating the newest generation. The private-adoption era was marked by the incredibly widespread separation of children from their families, often without justification or due process and under vague and culturally biased allegations of “neglect,” which frequently penalized parents for mere poverty. This widespread intervention in Indian families wrought immense harm on parents, children, and communities.

It is a devastating picture of a shameful period in American history. What Gorsuch's opinion doesn't acknowledge is that for many Black families, families of color, and poor families, the disaster continues today.

The effort to destroy Native families stands out as uniquely genocidal. But it is not wholly different from the approach the United States has used against many families and communities deemed unworthy or undesirable. To the contrary, it's a playbook we've seen over and over again in American history: during the Trump administration when immigrant families were separated at the border; in Texas, where officials threaten families of trans children with investigation and separation. And in the background, while each of these attention-grabbing examples hit the headlines, it continues to roil through Black communities, communities of color, and poor communities in the guise of the “child welfare” system—what many advocates are now more accurately calling the “family regulation” or “family policing” system. In Gorsuch's description of the pre-ICWA Native family separation crisis, parallels to today's family regulation system are undeniable.

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First, government intervention in families continues to be incredibly common—and concentrated in certain communities. In the 1960 and 1970s, it was estimated that “approximately 25–35 per cent of all Indian children [were] separated from their families,” according to an Association on American Indian Affairs report Gorsuch cited. Thankfully, we do not see such staggering removal numbers in today’s family regulation system. In 2020, a little more than 200,000 children—3 of every 1,000 American kids—entered foster care, with more than 400,000 children in foster care at any given time. But looking only at the number of children removed from home into foster care vastly underestimates the number of families impacted by the system. A [2021 study](#) looking at data from the 20 most populous U.S. counties found that roughly 1 in every 3 children will have a CPS investigation during their childhood. Black children are particularly likely to experience an investigation, with rates as high as 62.8 percent. These investigations are themselves traumatic and destabilizing, while often being unnecessary: Of the 4.4 million reports that agencies received in 2019, [more than half](#) were found to be unsubstantiated.

Second, intervention in families continues to frequently lack adequate justification and is often inflected by racism and bias. The vast majority of investigations of families—[around 75 percent](#)—continue to be for “neglect,” not abuse. Neglect remains, as Gorsuch described it, a “vague ground” susceptible to subjective, culturally biased interpretation. And parents continue to be penalized for [poverty](#) and poor housing, despite having little control over these conditions.

Again, the historic parallels are obvious. In his opinion, Gorsuch recounts the story of “one 3-year-old Sioux child,” who “was removed from her family on the State’s ‘belief that an Indian reservation is an unsuitable environment for a child.’” As Gorsuch wrote: “So it was that some Indian families, ‘forced onto reservations at gunpoint,’ were later ‘told that they live in a place unfit for raising their children.’”

This account might sound familiar to parents trying to raise their families in poverty, living in substandard housing and many government-run shelters or public housing units. Over the past few decades, the United States has hollowed out its safety net for families. Strict eligibility requirements put supports like the Supplemental Nutrition Assistance Program

(SNAP) and Temporary Assistance for Needy Families (TANF) out of reach for many families. Those who succeed in jumping through hoops to qualify find that the benefits themselves are so low they often don't come close to meeting families' actual needs. For example, the maximum monthly TANF benefit amount for a family of four in D.C., where I work, is now \$851. The median rent for a one-bedroom apartment is more than \$1,800. Shelters and public and subsidized housing units are often plagued with dangerous and unhealthy conditions. Forced into these conditions by the United States' legal and social structures, many parents are then investigated for neglect and, as Gorsuch put it, "told that they live in a place unfit for raising their children."

Third, although many parents facing separation from their children in today's system now have counsel during court-based hearings, the problem of coerced separations without due process still persists. Throughout the country, government workers pressure parents to relinquish children to neighbors and relatives in "hidden foster care" systems, operating without counsel, without due process, and sometimes with the same obfuscation and untruths Native families faced.

Finally, family separation continues to cause immense harm. Parents targeted for investigation and separated from their children experience feelings of hopelessness, powerlessness, and questions about their worth similar to those Gorsuch described in Native parents. Children experience abuse at unacceptably high rates in foster care, as well as long-term material and emotional harms.

In 1978, Congress understood that enough was enough for Indian families. Its response—ICWA—thankfully survives. But as many advocates praised the Supreme Court's decision this month, they also noted that it is insufficient. Not only does ICWA's effectiveness for Indian families depend on stepping up its enforcement, but its protections also should be extended to all families. Even better, we should move toward a day when ICWA's protections are no longer necessary for any family.

There are concrete legislative changes that would take us toward that future. Congress is currently considering how to fund the Child Abuse Prevention and Treatment Act (CAPTA), one of the major federal structures undergirding today's system. Congress could rethink its approach, sending money that goes to separating families to supporting them instead. States could repeal harmful mandatory reporting laws. Instead of investing in investigating and separating families, we could invest in things like housing, health care, child care, and universal basic income that would allow families to thrive on their own terms.

But first, we need to reckon with our history, and confront how we're repeating it today. ■

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