April 03, 2023

FEATURE

Brackeen and the "Domestic Supply of Infants"

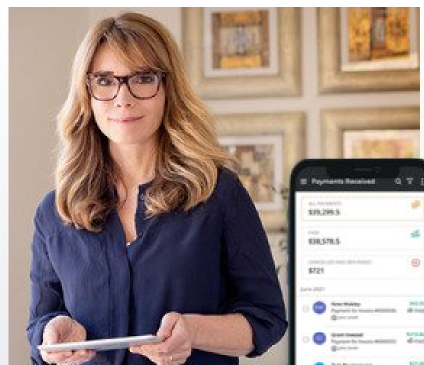
Marcia Zug

Share:

Introduction

In November 2022, the Supreme Court heard oral arguments in *Brackeen v. Haaland*.[1] The case concerns the constitutionality of the Indian Child Welfare Act (ICWA), a statute enacted in 1978 to help keep Indian children connected to their families and culture.[2] Most Indian child and family advocates consider ICWA a success.[3] The Act is routinely referred to as one of the most important pieces of Indian legislation ever passed[4] and is commonly described as the "gold standard" in child welfare.[5] The Act restricts the unjustified removal of native children from their families and helps to ensure that when removals do occur, significant attempts will be made to place Indian children with relatives (native or non-native), with their tribe, or in other Indian homes before considering non-Indian placements.[6]

Thryv's on the clock—even when you're not
Meet the all-in-one software app that gives you time back in your day.
SEE HOW



thryv

Preferring Indian placements over non-Indian ones has long been controversial.[7] Come spring, this provision, and possibly the entire ICWA, may be found unconstitutional. Such a ruling would contradict longstanding federal Indian law jurisprudence but closely aligns with the Court's recent adoption-related discussions in *Dobbs v. Jackson Women's Health Organization*[8] and *Fulton v. City of Philadelphia*.[9] Consequently, this article does not focus on the constitutional arguments being brought against ICWA. Instead, using *Dobbs* and *Fulton*, this article shows that a majority of justices of the current Court have expressed strong support for policies that increase the supply of

adoptable children as well as an inclination to aid adoptive families the legal system deems deserving and desirable.[10] It then argues that because *Brackeen* gives the Court the opportunity to do both, there is every reason to believe that it will.

I. Brackeen and the Challenge to ICWA

Brackeen concerns the potential adoption of Indian children by non-native couples.[11] Pursuant to ICWA, such placements should only occur after attempts to place a child with relatives or other Indian families fail.[12] The *Brackeen* case involves six non-Indian potential adoptive parents who wished to adopt Indian children and the biological mother of one of the children.[13] The trial court proceedings also included the states of Texas, Indiana, and Louisiana as plaintiffs as well as the Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians as intervening defendants.[14]

The titular case, *Brackeen v. Haaland*, arose when the Brackeens, a white, evangelical Christian couple, challenged the constitutionality of ICWA and specifically the Act's placement preferences.[15] The Brackeens had been fostering a Navajo child whom they wished to adopt. However, the child had a great aunt, Alvetta James, an enrolled member of the Navajo tribe, who was also "ready and willing to adopt" the child.[16] Under ICWA, as well as general family law principles preferring relative placements, James was entitled to preference and the child should have been placed in her care.[17] Nevertheless, instead of acquiescing to the child's placement with a member of his family and tribe, the Brackeens challenged the constitutionality of the Act. Then, when "Ms. James learned that the appeals process could take years to complete," she withdrew her adoption petition out of concern"that the delay would ultimately make [her great-nephew's] transition harder."[18] This enabled the Brackeens to adopt the boy, but not before filing suit in federal court challenging ICWA. The Brackeens—together with the state of Texas—claimed in their October 2017 complaint that the law is unconstitutional because its placement preferences impermissibly discriminate on the basis of race, exceed Congress's power over Indian affairs, and impermissibly commandeer state governments and courts.[19]

The constitutional argument raised by the Brackeens is not new.[20] The Supreme Court has repeatedly confirmed that "Indian" is a political, not racial, designation[21] and that Congress has the power and the responsibility to enact legislation protecting Indian tribes and their citizens.[22] Thus, based on judicial precedent, the Brackeens' challenge should have been rejected. This is not what occurred. Ignoring long-standing precedent, the Texas district court found the Act's placement

preferences unconstitutional.[23] On appeal, the Fifth Circuit reversed this holding, but the Fifth Circuit, *en banc*, reheard the case and, in a very fractured opinion, reversed in part the lower court's finding that the Act was racially discriminatory while upholding other parts of the district court's opinion.[24] Finally, in February 2022, the Supreme Court granted certiorari to resolve the uncertainty created by the *Brackeen* litigation and determine the fate of ICWA.[25]

II. Dobbs and the Adoption Fantasy

Long-established precedent holds that ICWA's preference categories are constitutional.[26] However, in *Dobbs*, the Court rejected more than 40 years of case law when it overturned the constitutional right to abortion.[27] Consequently, although predicting Supreme Court decisions has always been difficult, judicial precedent may now be significantly less informative than in the past. In analyzing how the Court is likely to rule in *Brackeen*, it may be more helpful to consider the adoption policies promoted by the Court's recent adoption-related decisions rather than the Court's traditional Indian law jurisprudence.[28] In fact, while primarily an abortion case, *Dobbs* itself may provide a strong indication of how *Brackeen* will be decided.

The *Dobbs* Court's interest in adoption first appeared during oral arguments when Justice Amy Coney Barrett commented that since people could easily arrange for the adoption of their babies, "pregnancy and parenthood" were no longer part of the "same burden."[29] This idea then became an important part of the majority's opinion. Justice Alito acknowledged that outlawing abortion would force women to remain pregnant, but he defended this decision by arguing it would not force them to parent.[30] According to Alito, unhappily pregnant women could simply put their unwanted children up for adoption and, due to the low "domestic supply of infants," they would be readily adopted.[31] Alito wrote, "[A] woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home."[32] Adoption, not abortion, was the Court's solution to unwanted pregnancy.[33] In addition, the Court suggested that the reverse was also true—unwanted pregnancies could be a solution to current adoption shortages.[34]

In *Dobbs*, Justice Alito noted the many "suitable home[s]" available for unwanted children.[35] And yet, one year earlier, in *Fulton v. City of Philadelphia*,[36] the Court held that foster care agencies could exclude potential adopters based on the organizations' religious beliefs that some homes were not "suitable." The specific issue in *Fulton* was whether Philadelphia could cancel its contract with a Roman Catholic foster care agency that refused to work with same-sex couples as foster parents.[37] The Court held it could not.[38] According to the Court, Philadelphia violated the Free

Exercise Clause of the First Amendment by refusing to contract with Catholic Social Services (CSS) once it learned that the organization would not certify same-sex couples for foster care.[39] It concluded that since the city could exempt child placement agencies from its contractual nondiscrimination requirements on a discretionary basis, the requirements were not neutral or generally applicable and, thus, must be analyzed under strict scrutiny.[40] Then, applying this heightened standard of review, the Court held the city could not deny CSS an exemption on religious grounds and that CSS had the right to make foster child placements based on its religious beliefs regarding marriage and sexuality.[41]

Given the discretion afforded under the Philadelphia contractual provision, it is possible the *Fulton* decision will be read narrowly, and the greater rights and protections afforded to certain religiously defined suitable foster and adoptive families will be limited to locales with foster care nondiscrimination requirements similar to Philadelphia's. However, that outcome seems unlikely. Although the *Fulton* Court did not overturn *Employment Division v. Smith*,[42] the case holding that neutral and generally applicable laws are ordinarily not subject to strict scrutiny, it gave few assurances it wouldn't do so in the future. In fact, it gave significant indications it was simply waiting for a more opportune fact pattern.[43] If that is the case, then *Fulton* is just the beginning and the privileging of certain types of foster and adoptive parents may soon become even more widely permissible.[44]

III. Brackeen and Adoption

At its core, *Brackeen* is an adoption case. It is about who can adopt and which kids get adopted. These were important issues in both *Dobbs* and *Fulton*. In fact, they were so important, they arguably blinded the Court to the negative repercussions of the adoption policies they were promoting. In *Dobbs*, adoption was presented as the solution to unwanted parenthood even though there is little support for this supposition.[45] Most adoption experts predict only a small percentage of women with unintended pregnancies will ultimately choose adoption. Instead, the majority will be raised by their birth families.[46] In a *Washington Post* article, University of California San Francisco sociologist Gretchen Sisson, whose work focuses on abortion and adoption, predicted: "What we're going to see, I think, is many more people parenting children that they did not intend to have."[47] Consequently, the Court was overly optimistic about the likely increase in adoptable newborns as a result of its decision while simultaneously naïve about the case's likely effect on removal and foster care rates. Parenting unplanned children may increase the risk of abuse and neglect.[48] Therefore, while *Dobbs* may lead to a small increase in the number

of newborn adoptions, it may also lead to an increase in the number of children entering foster care due to abuse and neglect.[49]

Like the *Dobbs* Court, the *Fulton* Court also ignored many of the child welfare repercussions of its decision. *Fulton* permits state-contracted foster and adoption agencies to define what is meant by "suitable homes" according to their religious beliefs.[50] However, in parts of the country, faith-based organizations are the only foster and adoption options. As a result, a significant number of prospective adoptive and foster parents, those who don't meet those organizations' requirements, now are effectively barred from receiving children.[51] This change should have little effect on the placement of healthy newborns, but it may drastically reduce the likelihood that less-sought-after children receive the opportunity to live in a safe and loving home.[52]

Most Indian child advocates believe overturning ICWA would be extremely harmful for Indian children and families.[53] However, the Court's recent adoption cases indicate it will not be particularly receptive to such concerns. Instead, *Dobbs* and *Fulton* suggest that some justices on the *Brackeen* Court may be primarily focused on the fact that ICWA makes adoptions more difficult, particularly for the types of families the law typically deems the most desirable, i.e. straight, married couples.[54]

IV. Adoption Regulations

For 50 years, reliable birth control and access to safe abortions dramatically reduced the number of unplanned pregnancies.[55] This in turn decreased the number of American children available for adoption.[56] In response to this diminished supply, especially the number of white newborns, prospective adoptive parents began to reconsider the stigmas that previously made children of color "unadoptable." Many became willing to adopt Latino, Asian, or American Indian children and, to a lesser extent, African American infants as well.[57] When there still weren't enough children to satisfy America's adoption demand, prospective adopters turned to international adoption. By the early 2000s, nearly 25,000 foreign children were adopted by American families every year.[58] However, in the early 2010s, legitimate fears of commodification, corruption, exploitation, and child laundering brought these adoptions to a near standstill. Since then, there have been attempts to revitalize international adoptions, but these have largely failed.[59]

The most well-known effort to increase international adoptions was the proposed Children in Families First Act (CHIFF),[60] which sought to eliminate the Hague Convention's preference for in-

country care solutions in return for U.S. aid.[61] CHIFF was aimed at increasing the number of foreign children available for adoption by American families. CHIFF failed to pass,[62] but the idea of increasing adoptions by removing children from poorer families and placing them with more privileged families did not disappear and has been greatly helped by the Supreme Court's recent adoption decisions.[63]

The case of immigrant child adoptions is illustrative. For years, immigrant children have been separated from their undocumented parents and adopted by American families.[64] In 2018, this practice garnered national attention when hundreds of immigrant children were removed from their families and placed in American homes.[65] The organization in charge of many of these placements, Bethany Christian Services, was a religiously affiliated adoption agency similar to the agency at issue in *Fulton*.[66] Such agencies have been accused of promoting adoptions through coercive and discriminatory tactics.[67] In an article for *The Guardian*, journalist Jill Filipovic described such agencies as essentially engaging in "baby-stealing . . . justified by the arrogant assumption that American Christian families provide better homes for children than, say, a poor Ethiopian mother ever could."[68] Both *Dobbs* and *Fulton* similarly express tacit, if not explicit, support for such tactics by encouraging unintended childbearing and adoption discrimination, respectively.[69] Now, *Brackeen* offers the Court another opportunity to further this adoption policy.

Today, Indian children continue to be removed from their families at much higher rates than non-native children.[70] However, these removal and adoption efforts are often thwarted by ICWA.[71] Notably, in 2015, the state of South Dakota was sued for removing hundreds of Indian children from their families and placing them in non-Indian homes.[72] Indian people comprise less than 9 percent of the state's population, yet Indian children made up 52 percent of the children in state foster care.[73] This means they were 11 times more likely to be placed in foster care than white children.[74] The 2015 class action lawsuit brought by the ACLU revealed that these foster care disparities were not accidental.[75] South Dakota Indian child removal hearings typically lasted fewer than five minutes (some as little as 60 seconds) and the state had a success rate of 100%.[76] These were blatant violations of ICWA, and the district court agreed, ordering the state to cease such actions.[77] Whether the *Brackeen* Court would consider this outcome—one that prevents hundreds of potential adoptions—as desirable is less clear.[78] *Dobbs* and *Fulton* suggest it would not.

Conclusion

ICWA makes the removal and adoption of Indian children by non-Indian families difficult. It reduces the number of children available for adoption and prevents "suitable" families from adopting them. This was the Act's intent. Nevertheless, this goal appears to conflict with the Court's current adoption policies. Both *Dobbs* and *Fulton* helped increase the number of children available for adoption by certain types of families. During oral arguments in *Brackeen*, Justice Kavanaugh expressed skepticism for the constitutionality of the Act by asking if Congress could "say that, you know, Catholic parents should get a preference[?]"[79] However, as this essay has argued, such parents frequently do get preference. Consequently, it is reasonable to expect that when faced with another opportunity to expand the number of adoptive placements for the "right" kind of families, the *Brackeen* Court will choose to do so.[80] How the Court will effectuate this adoption preference remains uncertain. In the worst-case scenario, the Court may find the entire Act unconstitutional, but, even if that doesn't occur, given the Court's current pro-adoption policies, it seems almost certain it will eliminate some, if not all, of the placement preferences. ICWA was intended to reduce the adoption of Indian children by non-Indian potential parents. It has been successful in this goal and, ultimately, that may be why it (was/is) doomed.

Endnotes

1. . *See* Transcript of Oral Argument, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Nov. 9, 2022).

2. . Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as 25 U.S.C. §§ 1901–63).

3. . *See* 149 Cong. Rec. 28327 (2003) (statement of Rep. Young). On the 25th anniversary of ICWA's enactment, Representative Don Young of Alaska spoke before the House of Representatives and described the Act as "the most important Indian law the Congress has enacted." *Id.* at 28328. *See also* Tara Hubbard & Fred Urbina, *ICWA—The Gold Standard: Golden Nuggets of Evidence from Arizona*, Ariz. Att'y, July/Aug. 2022, at 32, 38 (noting "[t]he data from the Pascua Yaqui Tribe and Pima County ICWA Courts show the success of ICWA and support the nickname ICWA has earned as the 'gold standard'").

4. . Indian advocates routinely describe ICWA as one of the most important pieces of Indian legislation ever enacted. *See, e.g.*, Kathryn E. Fort & Peter S. Vicaire, *The Invisible Families: Child Welfare and American Indian Active Duty Servicemembers and Veterans*, Fed. Law., Apr. 2015, at 1

(describing ICWA as "one of the most important pieces of federal legislation for American Indian families"); Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska's Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, 19 Alaska L. Rev. 57, 59 (2002) (calling ICWA "one of the most important and far-reaching pieces of legislation protecting Indian tribes"); Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 Ariz. St. L.J. 253, 284 (2010) (referring to ICWA as "perhaps the most important legislation enacted during this [self-determination] era").

5. . *See, e.g.*, Bethany R. Berger, *Savage Equalities*, 94 Wash. L. Rev. 583, 630 (2019) (noting "[t]he leading child welfare organizations in America have opined that ICWA's procedural protections are the 'gold standard' for adoption and child welfare cases, serving the interests of children as well as biological and adoptive families") (citing Brief for Casey Family Programs at 2–3, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399)). *See also* Brackeen v. Haaland, 994 F.3d 249, 270 (5th Cir. 2021) (en banc) (Dennis, J., opinion) (noting many states "view ICWA as the 'gold standard' for child welfare practices and a 'critical tool' in managing their relationships with the Indian tribes within their borders"), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022).

6. . 25 U.S.C. § 1915.

7. . *See, e.g.*, Lucy Dempsey, *Equity over Equality: Equal Protection and the Indian Child Welfare Act*, 77 Wash. & Lee L. Rev. Online 411, 466 (2021); Kathleena Kruck, Note, *The Indian Child Welfare Act's Waning Power After* Adoptive Couple v. Baby Girl, 109 Nw. U. L. Rev. 445, 453 (2015) ("[The placement preference] is one of the most controversial sections of the ICWA because it necessarily requires the consideration of race when placing children in adoptive homes."); Timothy Sandefur, *The Unconstitutionality of the Indian Child Welfare Act*, 26 Tex. Rev. L. & Pol. 55, 60–61 (2021) (arguing, "[g]iven the drastic shortage of Native adoptive homes, and the extraordinary need for such options, these 'preferences' prevent 'Indian children' from obtaining the adoptive homes they often need").

8. . 142 S. Ct. 2228 (2022).

9. . 141 S. Ct. 1868 (2021).

10. . *See infra* Part II. *See also* Adoptive Couple v. Baby Girl, 570 U.S. 637, 644 (2013) (engaging in a tortured reading of the ICWA that enabled the adoptive couple to retain custody of an Indian child).

11. . Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *aff'd in part, rev'd in part sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022).

12. . 25 U.S.C. § 1915(a).

13. . *Brackeen*, 338 F. Supp. 3d at 519, 525–27.

14. . *Id.* at 519–20.

15. . Complaint ¶¶ 235–46, *Brackeen*, 338 F. Supp. 3d 514 (No. 4:17-cv-00868), https://turtletalk.files.wordpress.com/2017/10/show_multidocs.pdf; Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, Vox (Feb. 20, 2020, 7:30 AM EST), https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care.

16. . Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 Yale L. & Pol'y Rev. 292, 295 (2020); *see* Jan Hoffman, *Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes*, N.Y. Times (June 5, 2019), https://www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html [https://perma.cc/CV6R-558L].

17. . *See generally* Marcia Zug, *ICWA's Irony*, 45 Am. Indian L. Rev. 1, 1 (2021) (arguing that ICWA entails general child welfare best practices such as prioritizing kinship care placements).

18. . Gale & McClure, *supra* note 16, at 295–96 (footnotes omitted).

19. . Complaint, *supra* note 15.

20. . *See, e.g.*, Gale & McClure, *supra* note 16, at 312 (noting "[t]he classic attack on ICWA is that it creates a racial classification, violating the Equal Protection Clause of the U.S. Constitution"); *see*

also id. & n.132 (quoting Complaint at 2, A.D. *ex rel.* Carter v. Washburn, No. 2:15-cv-01259-DKD, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017), *vacated as moot sub. nom.* Carter v. Tahsuda, 743 F. App'x 823 (9th Cir. 2018), alleging that "[c]hildren with Indian ancestry . . . are still living in the era of *Plessy v. Ferguson*[, 163 U.S. 537 (1896)]").

21. . *See* Morton v. Mancari, 417 U.S. 535, 554 (1974); *see also* Gale & McClure, *supra* note 16, at 312 ("The problem with the [theory that ICWA discriminates based on race] is that it flies in the face of fundamental federal Indian law doctrine. Indian tribes are quasi-sovereign entities, with tribal membership functioning as a political status.").

22. . The special government-to-government relationship between native nations and the U.S. government gives Congress the authority to pass legislation exempting or preferencing tribes and their members. In *Morton*, which involved an equal protection challenge to the Bureau of Indian Affairs' hiring preference for tribal citizens, the Supreme Court specifically rejected the claim that such legislative preferences were unconstitutional racial discrimination and held that, when Indian affairs legislation is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555; *see also* Rice v. Cayetano, 528 U.S. 495, 519 (2000) ("Of course . . . Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs.").

23. . Brackeen v. Zinke, 338 F. Supp. 3d 514, 530–36 (N.D. Tex. 2018), *aff'd in part, rev'd in part sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022), and *cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), and *cert. granted*, 142 S. Ct. 1205 (2022).

24. . *Brackeen*, 994 F.3d at 268–69 (per curiam) ("An en banc majority . . . holds that ICWA's 'Indian child' classification does not violate equal protection. The district court's ruling to the contrary . . . is therefore reversed. The en banc court is equally divided, however, as to whether Plaintiffs prevail on their equal protection challenge to ICWA's adoptive placement preference for 'other Indian families,' and its foster care placement preference for a licensed 'Indian foster home.'") (internal citations and footnotes omitted).

25. . Given the well-settled law regarding the constitutionality of Indian affairs legislation and that the Supreme Court has previously decided cases interpreting ICWA, the Court could easily have

denied cert. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013). The fact the Court chose to hear the case suggests it may have been the policy issues that were of particular interest to the Court.

26. . *See supra* notes 21 and 22.

27. . Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

28. . *Cf.* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (rejecting long-standing precedent regarding state criminal jurisdiction over crimes allegedly committed by non-Indians against tribal members in Indian country); *id.* at 2521 (Gorsuch, J., dissenting).

29. . Transcript of Oral Argument at 57, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

30. . *Dobbs*, 142 S. Ct. at 2259 n.46.

31. . *Id.* Alito quoted a 2008 report by the Centers for Disease Control and Prevention on why so many "suitable home[s]" are available: "'the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted [has] become virtually nonexistent.'" *Id.* (citation omitted). In other words: Demand for infants is high and supply is low.

32. . *Id.* at 2259. It should be noted that not all children are in equally high demand. The greatest demand is for healthy white infants. The demand for Black infants and disabled infants is significantly lower. *See* Erwin A. Blackstone et. al., *Market Segmentation in Child Adoption*, 28 Int'l Rev. L. & Econ. 220, 225 (2008) (noting "healthy white babies are in excess demand while excess supply exists for older, minority or disabled children").

33. . Gretchen Sisson, *Alito Touted Adoption as a Silver Lining for Women Denied Abortions*, Wash. Post (July 6, 2022), https://www.washingtonpost.com/made-by-history/2022/07/06/alito-touted-adoption-an-option-women-denied-abortions/.

34. . *See Dobbs*, 142 S. Ct. at 2259 n.46 (quoting 2008 CDC report noting the supply of infants available for adoption was "virtually nonexistent") (citation omitted). It is estimated that more than one million American families are seeking to adopt. Sydney Trent, *Women Denied Abortion Rarely*

Choose Adoption. That's Unlikely to Change., WASH. POST (July 18, 2022), https://www.washingtonpost.com/dc-md-va/2022/07/18/adoption-abortion-roe-dobbs/.

35. . *Dobbs*, 142 S. Ct. at 2259 n.46; *see also* Sisson, *supra* note 33.

36. . Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

37. . *Id.* at 1874.

38. . *Id.* at 1882.

39. . *Id.*

40. . *Id.* at 1878–79.

41. . *Id.* at 1875, 1881–82.

42. . Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

43. . The *Fulton* majority noted the concurrence "chides the Court for seeking to 'sidestep the question'" of whether to overrule *Smith*. *Fulton*, 141 S. Ct. at 1881. According to the Court, it simply wasn't the right time or case to revisit *Smith* because the outcome in *Fulton* was the same regardless of *Smith*. *See id.* ("Because the City's actions are . . . examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here."). The implication, therefore, is it is simply waiting for a better case.

44. . *See* Dahlia Lithwick, *The Horrifying Implications of Alito's Most Alarming Footnote*, SLATE (May 10, 2022), https://slate.com/news-and-politics/2022/05/the-alarming-implications-of-alitos-domestic-supply-of-infants-footnote.html (noting that "some of the same groups clamoring for more 'domestic' babies to be adopted by deserving families have sought to make it impossible for same-sex parents, or even non-Christian parents, to adopt them").

45. . *See* Trent, *supra* note 34.

46. . *Id.* Comparisons with the pre-*Roe* rate of adoptions are misguided. Such modest adoption predictions make sense given that in the pre-*Roe* era, the inability to obtain an abortion was not

the primary reason children were placed for adoption. Rather, it was the fact that large numbers of unintentionally pregnant women were denied the opportunity to parent. The period between World War II and the *Roe v. Wade* decision, often described as the "Baby Scoop Era," was a period of coercive and secretive adoptions in which as many as three to four million women had their newborns adopted. These birth mothers were typically young, unmarried, white women who were sent away to maternity homes, and then forced to give birth in secret and subsequently surrender their infants for adoption. Pema Levy, *When Abortion Was Illegal, Adoption Was a Cruel Industry. Are We Returning to Those Days?*, MOTHER JONES (July 5, 2022), https://www.motherjones.com/politics/2022/07/when-abortion-was-illegal-adoption-was-a-cruel-industry-are-we-returning-to-those-days/.

47. . Trent, *supra* note 34.

48. . *Id*. In commenting on this myopia regarding the adoption solution to abortion bans, Gabrielle Glaser, author of AMERICAN BABY: A MOTHER, A CHILD, AND THE SHADOW HISTORY OF ADOPTION (2021), described this likely outcome, noting, "I don't think any legislators in those states who are anti-abortion are actually thinking, 'Oh, great, these single women are gonna raise more children.' No, their hope is that those children will be placed for adoption. But is that the reality? I doubt it.'" Levy, *supra* note 46.

49. . *See* Trent, *supra* note 34 (noting that "[a]doption advocates have expressed concern that one result of decreasing access to abortion will be a spike in the number of children who wind up in foster care").

50. . *See supra* Part II.

51. . Faith-based foster-care and adoption agencies provide services to thousands of children every year. The CEO of the National Council for Adoption has said that "'[i]f [faith-based agencies] would disappear overnight the whole system would collapse on itself." Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 310 (2013). As an example, in Arkansas, 40% of all foster parents are sourced through The CALL, a faith-based organization. William G. McGrath, Fulton v. City of Philadelphia, *and the Rights of Faith-Based Adoption and Foster Care Agencies*, 10 ARK. J. SOC. CHANGE & PUB. SERV. 73, 81 (2020). *See also* Chris Stewart & Gene Schaerr, *Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act*, 46 J. LEGIS. 134, 190 (2020) (arguing for

legislation that would help reduce "the number of places where a religious adoption provider holds something like a natural monopoly because of the financial disincentives for competition now in place"). *See generally* Jeremy Kohomban, Opinion, *A New Supreme Court Ruling Will Devastate LGBTQ Foster Families*, Politico (June 26, 2021), https://www.politico.com/news/magazine/2021/06/26/supreme-court-lgbtq-foster-families-fulton-philadelphia-496391.

52. . Same-sex couples and single parents have long been those most likely to adopt harder-to-place children such as older children and those with disabilities. *See* Mary O'Hara, *The LGBT Couples Adopting "Hard to Place" Children*, Guardian (Mar. 4, 2015, 08:50 EST), https://www.theguardian.com/social-care-network/2015/mar/04/the-lgbt-couples-adopting-hard-to-place-children; Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 Harv. L. Rev. 835, 907 (2000) (explaining that adoption agencies favor married couples and "allow[] single-parent adoptions only in the case of hard-to-place children who are otherwise unlikely to be adopted at all").

53. . *See, e.g.*, Brief of 497 Indian Tribes & 62 Tribal & Indian Orgs. as Amici Curiae in Support of Fed. & Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 19, 2022); Brief of Casey Family Programs & 26 Other Child Welfare & Adoption Orgs. as Amici Curiae in Support of Fed. & Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 19, 2022); Brief of Nat'l Ass'n of Counsel for Children & 30 Other Children's Rights Orgs. as Amici Curiae in Support of Fed. & Tribal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378 & 21-380 (U.S. Aug. 18, 2022).

54. . For examples of state laws giving adoption placement preference to married couples, see, e.g., Ariz. Rev. Stat. Ann. § 8-103(C)(1) (factors to consider for adoptive home placements include "[t]he marital status and the length and stability of the marital relationship of the prospective adoptive parents"); Utah Code Ann. § 78B-6-117(3) (West) ("A child may not be adopted by an individual who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state unless the individual is a relative of the child or a recognized placement under the Indian Child Welfare Act.") (citation omitted); *see also* Marie-Amélie George, *Expanding LGBT*, 73 Fla. L. Rev. 243, 305 (2021) (noting "[a]doption officials often express a preference for couples, and state laws may require them to place children with couples over single parents"); Ruth Colker, *The Freedom to* Choose *to Marry*, 30 Colum. J. Gender & L. 383, 418 (2016) (suggesting that in *Obergefell*, the Court "recognized the 'harm' and 'humiliation' to the children of unmarried parents"); *cf.*

Adoptive Couple v. Baby Girl, 570 U.S. 637, 653–54 (2013) (worrying about the possibility that any other interpretation of the ICWA provision at issue in the case "would surely dissuade some [potential adoptive parents] from seeking to adopt Indian children. And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption.").

55. . *See* Joerg Dreweke, *New Clarity for the U.S. Abortion Debate: A Steep Drop in Unintended Pregnancy Is Driving Recent Abortion Declines*, 19 Guttmacher Pol'y Rev. 16, 19 (2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1901916.pdf (concluding that "more and better contraceptive use" contributed to a decline in unintended pregnancies and abortions from 2008 to 2011); *see also* Naomi Cahn & June Carbone, *Family Classes: Rethinking Contraceptive Choice*, 20 U. Fla. J.L. & Pub. Pol'y 361, 368 (2009) (noting the "advent of the birth control pill and abortion produced dramatic declines in the overall number of unintended births"). *See generally* George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. Econ. 277, 279, 289–90, 291–96 (1996).

56. . Anjanette Hamilton, Comment, *Privatizing International Humanitarian Treaty Implementation: A Critical Analysis of State Department Regulations Implementing the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 58 Admin. L. Rev. 1053, 1054 n.2 (2006) (noting the reduced number of U.S. children available for adoption "can be attributed [in part] to a decline in unwanted pregnancies brought on by the increased use of abortion and birth control").

57. . The exception was African American children. These children remain harder to place for adoption. *See* Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 Fla. L. Rev. 295, 322 (2015) ("In this blatantly racially segmented market, however, the children that suffer are those of African American descent; Latino, Asian, and American Indian children are generally classified with the vanishingly small supply of white infants. A recent empirical analysis of applications to adopt available infants, for example, found that parents are seven times less likely to seek African American infants, but there were no differences between rates of application for White and Hispanic babies.") (footnotes omitted); Barbara Fedders, *Race and Market Values in Domestic Infant Adoption*, 88 N.C. L. Rev. 1687, 1697–98 (2010) ("[A]pproximately eighteen percent [of adoption agencies] charge higher fees for the adoption of white infants than black infants. One adoption expert estimates that up to one-half of

all agencies employ race-based pricing.") (footnotes omitted); *see also* Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. Third World L.J. 61, 66–69 (2006) (discussing "Race-based Baby Valuing"); Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 Yale J.L. & Feminism 99, 116 n.108 (2013) ("Perversely, this market reality may insulate mothers of African-American or bi-racial/African American infants from potentially coercive tactics used to ensure relinquishment.").

58. . David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective*, 41 Cumb. L. Rev. 1, 49 (2011) ("Intercountry adoptions to the United States roughly tripled, rising from 7,377 adoptions in 1993 to a peak of 22,990 adoptions in 2004.").

59. . *See* Pamela Laufer-Ukeles, *Collaborative Family-Making: From Acquisition to Interconnection*, 64 Vill. L. Rev. 223, 225 (2019) ("Explicit references to markets and revelations of transfers of money have led to shutdowns and bans in [intercountry child adoptions], and the process of legally rooting out financial incentives has undermined the functioning of [intercountry child adoptions] in fundamental ways."); *see generally* Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century*, 52 Int'l Soc. Work 575, 578 (2009) (discussing adoption moratoriums).

60. . Children in Families First Act of 2014 [hereinafter 2014 CHIFF], S. 2475, 113th Cong. (2014); *see also* Children in Families First Act of 2014, H.R. 4143, 113th Cong. (2014).

61. . As Professor DeLeith Gossett described it, CHIFF served "the interests of privileged families from wealthy nations at the expense of the poorest." DeLeith Duke Gossett, *Take Off the [Color] Blinders: How Ignoring the Hague Convention's Subsidiarity Principle Furthers Structural Racism Against Black American Children*, 55 Santa Clara L. Rev. 261, 305 (2015).

62. . *Id.* at 304 (noting, "Despite the bipartisan effort, the bill was not passed.").

63. . *Dobbs* is expected to have the greatest impact on poor women and women of color and *Fulton* will compound these vulnerabilities. *See* Youyou Zhou & Li Zhou, *Who Overturning* Roe *Hurts Most, Explained in 7 Charts*, Vox (July 1, 2022), https://www.vox.com/2022/7/1/23180626/roe-dobbs-charts-impact-abortion-women-rights ("'It's going to fall on the women who are poor,' she said last year when the Court was hearing oral arguments in the *Dobbs* case. 'It's going to fall on the women who already have children and cannot leave; it's going to fall on women who are

working three jobs; it's going to fall on young, young girls who have been molested and may not know they are pregnant until deep into the pregnancy.'" ((quoting Senator Elizabeth Warren)).

64. . *See, e.g.*, Garance Burke & Martha Mendoza, *Separated from Parents, Some Migrant Children Are Adopted by Americans*, Christian Sci. Monitor (Oct. 9, 2018), https://www.csmonitor.com/USA/2018/1009/Separated-from-parents-some-migrant-children-are-adopted-by-Americans (discussing such removals and subsequent adoptions).

65. . *See* Dana Chicklas, *Protests as Children Separated from Families at Border Now in Bethany Christian Services' Foster Care*, Fox 17 (June 20, 2018), https://www.fox17online.com/2018/06/20/protests-as-children-separated-from-families-at-border-now-in-bethany-christian-services-foster-care (quoting the Bethany Christian Services director of refugee and foster care of programs stating that the organization was placing children with American families "because we believe that these children will be separated . . . and we believe children should be in family. If the government's going to choose to do that, then children need to be protected and cared for."). *See also* Dan MacGuill, *Christian Non-profit Faces Scrutiny over Government Foster Care Contract for Separated Children*, Snopes (updated July 11, 2018), https://www.snopes.com/news/2018/06/26/bethany-christian-services-family-separation-betsy-devos/ (confirming that Bethany Christian Services had been placing border-separated children with American foster families).

66. . Jill Filipovic, Opinion, *Adoption of Separated Migrant Kids Shows "Pro-Life" Groups' Disrespect for Maternity*, Guardian (Oct. 30, 2019), https://www.theguardian.com/commentisfree/2019/oct/30/adoption-separated-migrant-children-pro-lifers-deep-disrespect-for-maternity.

67. . *Id.*

68. . *Id.*

69. . *Id.*

70. . *See, e.g.*, Matthew L.M. Fletcher & Randall F. Khalil, *Preemption, Commandeering, and the Indian Child Welfare Act*, 2022 Wis. L. Rev. 1199, 1206–07 (2022) ("[T]he disproportionate removal of Indian children from their homes remains a serious problem and continues to justify the need

for ICWA. 'According to 2018 data, American Indian/Alaska Native children didn't even account for 1% of the population, yet they made up 2.4% of children in foster care.'").

71. . Tellingly, the success of ICWA is often used in attacks against the Act. For example, the litigation director for the Goldwater Institute (the most prominent anti-ICWA organization) contended that, "[s]o long as ICWA stands, countless children will be left in abusive homes and prevented from or delayed in becoming part of a permanent loving homes [sic]." Clint Bolick, *The Wrongs We Are Doing Native American Children*, Newsweek (Nov. 2, 2015, 3:48 PM EST), https://www.newsweek.com/wrongs-we-are-doing-native-american-children-389771. Many states have recognized the success of ICWA in preventing unwarranted removals of native children and have enacted state ICWAs to add further protections. *See Comprehensive State ICWA Laws*, Turtle Talk, https://turtletalk.blog/icwa/comprehensive-state-icwa-laws/ (last visited Jan. 9, 2022).

72. . South Dakota also contracts with religiously affiliated foster and adoptive organizations that can make placements that conform to the agency's definition of desirable homes and families. Mark Joseph Stern, *South Dakota Allows State-Funded Adoption Agencies to Turn Away Same-Sex Couples*, Slate (Mar. 13, 2017), https://slate.com/human-interest/2017/03/south-dakota-allows-state-funded-adoption-agencies-to-turn-away-same-sex-couples.html.

73. . Stephen Pevar, *In South Dakota, Officials Defied a Federal Judge and Took Indian Kids Away from Their Parents in Rigged Proceedings*, ACLU (Feb. 22, 2017), https://www.aclu.org/news/racial-justice/south-dakota-officials-defied-federal-judge-and-took.

74. . *Id.*

75. . Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749 (D.S.D. 2015), *on reconsideration in part sub nom.* Oglala Sioux Tribe v. Hunnik, No. CV 13-5020-JLV, 2016 WL 697117 (D.S.D. Feb. 19, 2016), and *vacated sub nom.* Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018).

76. . *See* Pevar, *supra* note 73.

77. . *Oglala Sioux Tribe*, 100 F. Supp. 3d at 768. The decision was then vacated and remanded by the Eighth Circuit Court of Appeals, which held the district court should have abstained and allowed the ICWA claims to be raised in state court. *See* Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 613 (8th Cir. 2018). However, the appellate court did not disturb the district court's conclusion

that ICWA had been violated. Moreover, since the ACLU's lawsuit, the South Dakota Supreme Court has issued at least one decision, *In re C.H.*, sharply rebuking the lower court for violating the ICWA. Specifically, in *In re C.H.* the state supreme court rejected the lower court's conclusion that active efforts, as required under the Act, had been made to reunite the child with the mother. Instead, the court found "*no efforts* were made to reunite C.H. with Mother" and found the lower court decision was "clearly erroneous." People in Int. of C.H., 962 N.W.2d 632, 639–40 (S.D. 2021). *See also* People in Int. of T.P. & A.P., 974 N.W.2d 731, 2022 WL 2062726 (S.D. 2022) (reversing a termination of parental rights decision for failure to comply with the ICWA).

78. . Certainly, there are some groups that believe that preferring Indian placements means children are more likely to be harmed. Angela Aleiss, *In Baby Veronica Case, Some Evangelicals Side with Adoptive Parents*, Religion News Serv. (Sept. 12, 2013), https://religionnews.com/2013/09/12/baby-veronica-case-evangelicals-side-adoptive-parents/ (highlighting organizations created based on a belief that ICWA harms children); *see also* George F. Will, Opinion, *The Brutal Racial Politics of the Indian Child Welfare Act*, Wash. Post (Jan. 5, 2022), https://www.washingtonpost.com/opinions/2022/01/05/brutal-indian-child-welfare-act/ (highlighting cases in which the ICWA preferences potentially led to the child's abuse or death).

79. . Transcript of Oral Argument at 152, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Nov. 9, 2022).

80. . Such sympathy was also readily apparent in the Court's last ICWA case, *Adoptive Couple v. Baby Girl*. For example, in Maureen Johnson's article *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, she writes, "By this author's count, the majority opinion hammered-home the 'dead-beat dad' versus loving adoptive couple theme eleven times." 49 Ind. L. Rev. 397, 439 (2016).

ENTITY:

SECTION OF FAMILY LAW

TOPIC:

FAMILY

The material in all ABA publications is copyrighted and may be reprinted by permission only. Request reprint permission here.

Authors

Marcia Zug

Marcia Zug is the Miles and Ann Loadholt Professor of Family Law at the University of South Carolina School of Law. She thanks Professors Lisa Grumet, Solangel Maldonado, and Ned Snow for their valuable assistance with this piece.