THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES IN DEFENSE OF THE INDIAN CHILD WELFARE ACT

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Abstract

The Indian Child Welfare Act (ICWA) is a law that was passed to address the removal crisis of American Indians from their community to non-Indian families. The removal crisis is a result of centuries of detrimental federal government policies such as assimilation laws and boarding schools and campaigns to "adopt out" Indian children. ICWA has been challenged over the years in court but has prevailed. Although child removal has decreased slightly since its adoption, the data on removal are still shocking and must be addressed. The most recent development in the fight over ICWA is *Brackeen v. Bernhardt* where a non-Indian adoptive couple is suing over ICWA's constitutionality under the equal protection clause and Tenth Amendment. Because of the confusion between the lower courts, the case is likely to be decided by the Supreme Court.

Meanwhile, the United Nations Declaration on the rights of Indigenous People (UNDRIP) is an international instrument that was adopted by the UN General Assembly in 2007. UNDRIP proclaims a comprehensive list of collective and human rights held by indigenous peoples and individuals. UNDRIP is watershed legislation, the first to legally recognize indigenous people's rights on the international stage. The Declaration's Articles include the right of indigenous people and their children to not be subject to removal from their culture or be subject to forced assimilation into others. The Articles are remedial in nature; they highlight the government's obligation to pass and enforce legislation such as ICWA to mitigate a legacy of removal created by federal government policies.

I argue that the Supreme Court should use UNDRIP to find in favor of the Defendants and ICWA's constitutionality. I will explain how, although an international document, UNDRIP is especially authoritative in the *Brackeen* case where American Indigenous peoples' rights hang in the balance. I will show how the substance of UNDRIP can assist the Court in its constitutional analysis. And lastly, I will provide two examples of how a domestic court and foreign court have already begun to utilize UNDRIP in similar cases, demonstrating UNDRIP's relevance and suitability to the *Brackeen* litigation.

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I. Introduction

This Note proposes a role for the United Declaration on the Rights of Indigenous Peoples[1] ("the Declaration") in the most recent attack on the Indian Child Welfare Act (ICWA) in *Brackeen v. Bernhardt*.[2] ICWA is a federal law passed in 1978.[3] It gives tribal governments exclusive jurisdiction over the placement of children facing removal proceedings who

[1] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, (Sept. 13, 2007 [hereinafter Declaration].
[2] 942 F. 3d 287 (5th Circ. 2019).
[3] Indian Child Welfare Act (ICWA) of 1978, 25 U.S.C. §§ 1901–63.

live or are domiciled on a reservation.[4] The Supreme Court ("the Court") should consider and rely on the Declaration when evaluating ICWA.

Although an international instrument, the Declaration is authoritative regarding a domestic statute enacted to benefit American Indians. As Philip Frickey, one of the nation's most distinguished experts on federal Indian law and policy, has explained, international law is the mechanism through which federal Indian law was developed.[5] The Declaration provides a "domestic interpretive backdrop" to statutes like ICWA.[6] President Walter Echo-Hawk suggests that the Justices should carry Felix Cohen's book on federal Indian law in one hand and the Declaration when deciding on indigenous peoples issues.[7]

The Declaration's purpose and substantive Articles are highly relevant to the ICWA analysis. First, the Declaration's spirit contextualizes ICWA's remedial purpose with the shared legacy of forcible child removal suffered globally by Indigenous People.[8] Second, the articles are relevant to the constitutional challenges over ICWA. Article 8 highlights Congress's unique obligation to Indian tribes to remedy past policies including assimilation and boarding schools, through protecting indigenous children from removal out of their communities. And Article 7 articulates the individual rights of Indian children to not be arbitrarily removed protected by ICWA.

Beyond the substantive articles' relevance in *Brackeen*, this paper also discusses the Declaration's growing authority among domestic and foreign courts in comparable cases. The District Court of New Mexico referenced the Declaration as authority when adjudicating a tribe's aboriginal title claim in *Pueblo of Jemez v. United States*.[9] The Belize Supreme Court directly cited the Declaration as authority in *Cal et al v. Attorney General* when finding for Mayan land rights against a state challenge.[10] As an international instrument affirming the customary rights of Indigenous Peoples in different spaces, the Declaration can aid the Court in upholding ICWA to protect American Indian's rights.

II. The Legacy of Forcible Child Removal and the Enactment of ICWA

The 1978 Indian Child Welfare Act (ICWA) was enacted in response to a national Indian child removal crisis.[11] Studies at the time

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4 *Id.*

5 Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996).

6 *Id.* at 37.

7 *See* WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2013).

8 KRAKOFF ET AL., *infra* note 15, at 539.

9 Pueblo of Jemez v. United States, 483 F. Supp. 3d 1024, 1103 (D.N.M. 2020).

10 Supreme Court of Belize Oct. 18, 2003, *Aurelio Cal et al. v. Attorney General of Belize* (Claim no. 171 of 2007), 63 ¶ ¶ 16, 17.

11 *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS., https://www.nicwa.org/

revealed that 25–35 percent of all Indian children were being removed from their parents, extended families and communities by state child welfare and private adoption agencies.[12] Of those children removed, 85 percent were placed outside their families and communities despite the availability of able and willing relatives.[13] ICWA was passed "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[14]

ICWA expands tribal jurisdiction outside Indian country and changes informs how state courts adjudicate Indian child removal cases.[15] ICWA enforces many safeguards, but relevant to this Note, ICWA requires for any party seeking to effect foster care placement of, or termination of parental rights to, an Indian child, to demonstrate to the satisfaction of the court that active efforts had been made to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[16] It also enforces a placement preference, absence a show of good cause, for (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.[17] These provisions are triggered during state custody proceedings over an Indian child who is a tribal member or eligible member of a federally recognized tribe.[18]

ICWA's scope is broad. In *Mississippi Band of Choctaw Indians* the Supreme Court heard a case which involved the adoption of twin babies born to parents who were both members of the Mississippi Band of Choctaw Indians Tribe.[19] The parents drove 200 miles off the Reservation to give birth to the twins.[20] A few weeks later, the mother executed a consent-to-adoption form before the Chancery Court.[21] The chancellor issued a final Decree of Adoption to the Holyfields, a non-Indian couple, later that month without reference to ICWA or the children's' tribal background.[22] Two months after, the Choctaw Tribe moved to vacate the adoption decree on the ground that ICWA granted the tribe, not the state, exclusive jurisdiction over the adoption proceedings of the twins.[23] ICWA grants exclusive jurisdiction to tribal courts only over matters involving Indian children who reside or are domiciled on the Reservation.[24] The Chancery denied the motion finding that because the twins' mother

about-icwa (last visited Nov. 20, 2021).

12 *Id.*

13 *Id.*

14 25 USC § 1902.

15 Sarah Krakoff et al., American Indian Law: Cases and Commentary, 504 (4th ed. 2020).

16 25 U.S.C.A. § 1912(d)

17 25 U.S.C.A. § 1915(a)

18 *Id.*

19 Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33–38 (1989).

20 *Id.* 38–39.

21 *Id.*

22 *Id.* at 39.

23 *Id.*

24 *Id.*

purposefully gave birth to the children outside the reservation the children never "resided" on the Reservation, and therefore ICWA was not controlling.[25]

The case made its way to the U.S. Supreme Court, which reversed the decision in favor of the Tribe.[26] It interpreted the ICWA provisions broadly, and noted that "domicile" does not necessarily mean "residence"—domicile can be established by physical presence in a place coupled with an intent to remain there.[27] And, as is the case with most minors, their domicile in determined by their parents.[28] Because the twins' mother was at all times domiciled on the Choctaw Reservation, the twins were domiciled though association, despite having not physically been brought there.[29] Thus, ICWA was controlling and the Choctaw Tribe had exclusive jurisdiction over the twins' removal proceeding.[30]

ICWA's scope was then severely limited in the high-profile case, *Adoptive Couple v. Baby Girl*.[31] The case involved a child whose father was a member of the Cherokee Nation and whose mother was not.[32] The Birth Mother and Biological Father were engaged and became pregnant.[33] The relationship deteriorated and the Biological Father relinquished his parental rights over text to the Birth Mother, who decided to put Baby Girl up for adoption.[34] The Birth Mother knew that the Biological Father had Cherokee heritage, so her attorney contacted the Cherokee Nation to determine whether he was an enrolled member.[35] But because the inquiry letter misspelled the Biological Father's name and misstated his birthday, the Cherokee Nation was not able to verify Biological's Father's membership in the Tribe.[36]

The Birth Mother then selected a non-Indian adoptive couple through a private adoption agency to adopt her unborn child.[37] The couple supported the Birth Mother during her pregnancy and participated in the birth.[38] The morning after the delivery, the Birth Mother relinquished her parental rights and consented to adoption.[39] The adoptive couple successfully adopted Baby Girl and returned to South Carolina.[40] About four months after the adoption, the Adoptive Couple served the Biolog-

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25 *Id.*
26 *Id.* at 41.
27 *Id.* at 48.
28 *Id.*
29 *Id.* 48–49.
30 *Id.* at 53.
31 Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).
32 *Id.* at 643.
33 *Id.*
34 *Id.*
35 *Id.* at 643 .
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.*

ical Father with papers requesting his to consent to the adoption.[41] The Biological Father signed the papers, but believed to have been signing over parental rights to the Biological Mother.[42] Once he realized he had signed adoption papers, he immediately tried to get the papers back- but was prevented from doing so by the process server.[43] The father contested the termination process in South Carolina Family Court which found that the Adoptive Couple had not carried its heightened burden in proving that Baby Girl would suffer "serious emotional or physical damage" if Biological Father retained custody.[44] The South Carolina Family Court then awarded custody of Baby Girl to her Biological Father.[45]

The Adoptive Couple sued and argued their constitutional rights were violated because ICWA required the placement of Baby Girl with her Biological Father.[46] Under ICWA, as a tribal member, Biological Father should have preferred custody over a non-Indian adoptive couple,[47] and the Cherokee Nation exclusive jurisdiction over the placement of its member's child.[48] The South Caroline Supreme Court agreed and upheld the placement of Baby Girl with her Biological Father.[49]

The Supreme Court reversed and remanded the case.[50] It never reached the equal protection challenge because it held that the three ICWA provisions: Sections 1912(d), 1912(f), and 1915(a), were inapplicable in a case where a tribal parent never had *initial* custody of the child.[51] The Court left ICWA intact but vulnerable. The *Brackeen* litigation is now the latest development in the battle over ICWA since *Adoptive Couple*.

III. The Brackeen litigation and threats to ICWA.

The *Brackeen* case poses the greatest threat to ICWA to date. The specific issue in the case is whether a non-Indian couple who had fostered an Indian child could adopt him after the Navajo Nation identified an eligible Indian adoptive family in New Mexico.[52] The child, referred to as A.L.M., was placed with the Brackeen's when he was ten months old.[53] His parents were enrolled members of the Navajo and Cherokee tribes.[54] The state of Texas terminated the parents' rights over A.L.M. six months

41 *Id.*
42 *Id.* at 643–644.
43 *Id.*
44 *Id.* at 646.
45 *Id.* at 637.
46 *Id.* at 2570 n.3.
47 Marcia Zug, *Icwa's Irony*, 45 Am. Indian L. Rev. 1, 27 (2021).
48 Kathryn Fort, *Observing Change: The Indian Child Welfare Act and State Courts*, 46 N.Y. St. Bar Assc. Family L. Rev. 8, 2 (2014).
49 *Adoptive Couple*, 570 U.S. 637 at 639.
50 *Id.*
51 *Id.*
52 Zug, *supra* note 47, at 31.
53 Brackeen v. Zinke, 338 F. Supp. 3d 514, 525 (N.D. Tex. 2018).
54 *Id.*

later and the Brackeens began the adoption process with the parents' approval.[55] Meanwhile, the Navajo Nation had already found a potential adoptive placement with a tribal family in New Mexico.[56] Under § 1915(a) of ICWA, the Indian couple would have preferred placement and custody over the non-Indian adoptive couple, the Brackeens.[57]

The Brackeens argued that there was "good cause" for A.L.M to remain in their home under an exception to ICWA.[58] Under the final rule, "good cause" must be proved by the non-Indian adoptive couple by clear and convincing evidence.[59] The Brackeens failed to meet the standard.[60] The Brackeens successfully petitioned to adopt A.L.M., but under ICWA and the recent 2016 Bureau of Indian Affairs (BIA) Final Rule, the Brackeens' adoption of A.L.M would be subject to collateral attack for two years.[61] Although they planned to continue fostering children, they were now cautious about fostering Indian children in the future.[62] They sued in Texas District Court, over the constitutionality of ICWA.[63] The Brackeens argue that ICWA and the placement preferences interfered with their ability to home additional children and that the legal regime harms Texas's interests by limiting the supply of available, qualified homes necessary to foster all children, Indian and non-Indian alike.[64]

Two other adoptive couples joined the litigation. The Librettis had begun the adoption process of Baby O, who was put up for adoption by their non-Indian mother.[65] Baby O's father was a descendent of the Ysleta del sur Pueblo Tribe, but was not a member himself.[66] The Pueblo Tribe had intervened in the custody proceedings and attempted to place Baby O with an Indian adoptive couple.[67] The Librettis also joined the Brackeen litigation after petitioning for adoption of Baby O because they felt that ICWA would prevent them from fostering Indian children in the future.[68] The Cliffords were the foster parents of Child P.[69] Child P was not a registered member of a tribe, but her biological grandmother was a White Earth Ojibwe tribal member.[70] Consistent with the placement

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55 *Id.*
56 *Id.*
57 *Id.* at 526.
58 *Id.*
59 "The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." 25 CFR § 23.132(b)
60 *Brackeen* 338 F. Supp. 3d at 526.
61 *Id.*
62 *Id.*
63 Brackeen v. Zinke, 338 F. Supp. 3d 514, 519 (N.D. Tex. 2018).
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.* at 526–27.
69 *Id.* at 527.
70 *Id.*

preferences, Child P was removed from the Clifford's home and placed with her grandmother, who had previously lost her license to provide foster care.[71]

In their motion for summary judgement, the plaintiffs alleged multiple constitutional violations. They contended that ICWA violates the Equal Protection and Due Process Clause of the Fifth Amendment, the Tenth Amendment, and Indian Commerce Clause.[72] The argued that ICWA "usurps" state authority over child custody and welfare proceedings and commandeers state governments with enforcing a federal program in violation of the 10th Amendment.[73]

There defendants in this case include the Cherokee, Navajo, and Oneida Nations, the Secretary of the United State Department of Interior and Director of Bureau of Indian Affairs.[74] They argue that ICWA's classification of Indian and non-Indian is political and not in violation of the equal protection clause under *Morton v. Mancari*.[75] The Supreme Court in *Mancari* determined that Indian-status-based statutes are political and not racial, and that such laws are subject to only rational basis review.[76]

The Texas District Court disagreed and granted summary judgement for the plaintiffs.[77] The Court invalidated eighteen sections of ICWA because they created a "harmful disparity" between Indian and non-Indian adoption and foster care cases and were distinguishable from the Indian-based hiring preferences in *Mancari*.[78] It determined that ICWA's classifications were racial because they apply to children who are not only members of federally recognized tribes but also those that are *eligible* for membership.[79] It applied strict scrutiny,[80] and found that ICWA was not "narrowly tailored to advance a compelling government interest."[81] It found the classification overinclusive because it establishes standards unrelated to specific tribal interests and applies them to *potential* Indian children beyond its constitutional scope.[82]

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71 *Id.*
72 *Id.* at 530.
73 *Id.*
74 *Id.* at 519–20.
75 *Id.* at 531.
76 *Id.*
77 *Id.* at 536–41.
78 The district court found that "[t]he specific classification at issue in this case mirrors the impermissible racial classification in *Rice* and is legally and factually distinguishable from the political classification in Mancari." Brackeen, 338 F. Supp. 3d at 533. The court concluded that sections 1901–3, 1911–23 and 1951–52 of ICWA were unconstitutional." *Id.* at 541–42.
79 *Id.* at 534–45.
80 *Id.* at 535.
81 *Id.*
82 *Id.*

The District Court also ruled that ICWA violated the Tenth Amendment[83] because it requires the state to enforce placement preferences in all adoptive proceedings under state law.[84] And further, that ICWA commands the state courts to enforce a tribal court's order of preferences once established.[85] Because ICWA requires states to enforce comprehensive federal standards that create causes of actions, the District Court held that ICWA violates the Tenth Amendment.[86]

The Defendants appealed. The appellate court reversed, finding that the District Court erred in its ruling and that ICWA was indeed constitutional.[87] It first determined that ICWA was based on political and not racial status[88] and was rationally related to Congress's unique obligation toward Indians.[89] And second, that because ICWA *preempts* conflicting state laws, it does not violate the Tenth Amendment anti-commandeering doctrine.[90] A few months later, the Fifth Circuit granted rehearing en banc.[91]

The panel reversed in part and affirmed in part by a fractured set of opinions. On the merits, it found that ICWA was within Congress's Article 1 authority and that ICWA's classifications were political, not racial.[92] However, it invalidated the active efforts, expert witness, and record keeping provisions under the anti-commandeering doctrine[93] and the adoptive placement provisions for Indians over non-Indians because they violated the equal protection clause.[94] The Supreme Court will likely grant certiorari given the lack of consensus between the courts and the need for uniformity. The decision will have major repercussions for ICWA and could invalidate a law that was passed to address the crisis of indigenous child removal that is on-going today.

The data shows that child removal rates have improved since ICWA's enactment but are still quite high.[95] An Indian child is four times as more likely to be removed from their family and placed in foster care as compared to children of white families.[96] This is in large part due to

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[83] *Id.* at 540.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Brackeen v. Bernhardt, 937 F.3d 406, 416 (5th Cir. 2019).
[88] *Id.* at 426.
[89] *Id.* at 429–30.
[90] *Id.* at 430.
[91] Brackeen v. Bernhardt, 942 F.3d 287 (5th Cir. 2019).
[92] Brackeen v. Haaland, 994 F.3d 249, 267–69 (5th Cir. 2021) (en banc); CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK § 13:3 (2021 ed. 2021).
[93] *Id.*
[94] *Id.*
[95] Kristen Carpenter, Edyael Casaperalta, and Danielle Lazore-Thompson, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples in the United States: A Call to Action for Inspired Advocacy in Indian Country*, UNIV. OF COLO. L. REV. 90 (Mar. 6, 2020).
[96] *About ICWA, supra* note 11.

non-compliance by the states.[97] For example, in 2008, 56 percent of Indian and Alaskan children placed in non-Native homes.[98]

The federal government has made efforts to strengthen ICWA's enforcement through rulemaking. In 2016, the Bureau of Indian Affairs published final rules promulgated in 25 CFR § 23.132.[99] The rules broadened the definitions of "Indian child" and "extended family" to increase ICWA's jurisdiction.[100] They also shifted the burden of showing "good cause" for the adoption on the non-Indian parties and prohibit courts from comparing the financial situations of Indian and non-Indian families when deciding on placement.[101] But these rules are now threatened by the *Brackeen* litigation.

IV. The Supreme Court Justices should rely on the Declaration to aid them in their constitutional interpretation of ICWA.

The Declaration may be a creature of international law; but is highly relevant in domestic matters concerning American Indian rights.[102] Federal Indian law sprung from international law and treaty-making principles.[103] As Philip Frickey explained in his article *Domesticating Federal Indian Law*, the "interpretation . . . of congressional power [and] its limits as well, should be informed by international law, including the evolving component [of] the rights of indigenous peoples."[104] The United States originally justified its federal plenary power over tribes through International Law and treaty-making.[105] The U.S Supreme Court based its original finding that Indians constituted domestic dependent nations on international law.[106] The Supreme Court justified Congress's plenary authority to both make and abrogate treaties with the tribes under the law of nations.[107] In light of this background, Professor Frickey explained how international law concerning Indigenous Peoples' rights should not be dismissed as external norms decided by a far-away court.[108] Rather, the international instruments on human rights are linked to the United States Constitution and thus "provide a domestic interpretive backdrop for[. . .]constitutional interpretation" of statutes such as ICWA.[109]

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[97] *Id.*
[98] R.M. Kreider, *Interracial Adoptive Families and Their Children: 2008 in Adoption Facebook V*, National Council for Adoption 109 (2011).
[99] 25 CFR § 23.132.
[100] Katie L. Gojevic, *Benefit or Burden?: Brackeen v. Zinke and the Constitutionality of the Indian Child Welfare Act*, 68 Buff. L. Rev. 247, 265 (2020).
[101] *Id.*
[102] *See generally* Native American Rights Fund, Tribal Implementation Toolkit (2021) [hereinafter Toolkit].
[103] Krakoff et al., *supra* note 15, at 538.
[104] Frickey, *supra* note 5, at 37.
[105] *Id.* at 55–56.
[106] *Id.* at 37, 75–80.
[107] *Id.* at 57–58.
[108] *Id.*
[109] *Id.* at 37.

The Declaration was "the culmination of many years of organizing by indigenous peoples and built on previous efforts [. . .]to write indigenous peoples into international legal instruments."[110] The Declaration captures the shared struggles of indigenous groups globally.[111] Through the Declaration, international law now "serves as a basis for Indigenous Peoples' claims against states and even influences indigenous groups' internal processes of revitalization."[112] The Declaration, with its remedial sprit, articulates the shared experiences inflicted on indigenous group and their corresponding rights. It is the pièce de résistance of the indigenous human rights movement.

Courts too can benefit by utilizing the Declaration in cases adjudicating Indigenous Peoples' rights. Use of the Declaration by the U.S. courts could ensure consistent application of Indian law throughout the country.[113] Uniformity is key because, as is the case in ICWA, state-resistance and inconsistent application of the law have contributed to on-going Indian child removal throughout the country.[114] Additionally, the Declaration is an instrument that can advance and protect the well-being of indigenous children by setting minimum standards for their treatment within the child welfare system.[115]

The Declaration's global consensus on the minimum standard of Indigenous Peoples' rights is important to the interpretation of ICWA in two ways.[116] First, the Declaration connects ICWA's remedial purpose with the legacy of forcible child removal shared by Indigenous Peoples globally.[117] Indian child removal is not an isolated incident suffered only in North American, but a crisis that is affecting indigenous people worldwide which requires remedial legislation such as ICWA. Second, the articles can aid the court in its constitutional analysis of ICWA. Article 8 explains Congress's unique obligation to Indian tribes to ensure their survival against the equal protection challenge. And Article 7 articulates the individual rights of Indian children and the collective right of the tribe against forcible removal under the anti-commandeering challenge.

A. *The Declaration's remedial spirit contextualizes ICWA's purpose by highlighting a shared legacy of forcible indigenous child removal.*

The Declaration contextualizes ICWA's greater purpose by articulating the shared experience of indigenous child removal. As Jon Beidelschies explains in his work *The Impacts of the United Nations Declaration on the Rights of Indigenous Peoples on Wisconsin Tribes*,

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110 KRAKOFF ET AL., *supra* note 15, at 541.
111 *Id.* at 538–39.
112 *Id.*
113 Carpenter et al., *supra* note 95, at 90.
114 *Id.*
115 *Id.*
116 *Id.*
117 KRAKOFF ET AL., *supra* note 15, at 539.

"General normative instruments, such as the [. . .] Declaration, have traditionally played a fundamental role in articulating norms and justifications that provide a shared reference and source of validation for indigenous organizations."[118] There is a resonance of forcible child removal shared among Indigenous Peoples[119] as a result of harmful assimilation policies, boarding schools, and religious adoption services.[120] The Indigenous Peoples' right to family is a right that has been historically denied[121] and must continue to be protected by statutes such as ICWA.

Throughout the nineteenth and twentieth centuries in the United States, federal policies attempted to extinguish tribes and assimilate them by targeting their children.[122] Boarding school programs intended to eradicate "Indianness" by removing children from their community to residential schools.[123] In the schools, the children were forced to learn English and Christianity.[124] They were subjected to hard labor and punishments for "infractions" such as speaking their native language.[125] This policy has continued today through campaigns to "adopt out" indigenous children.[126] When ICWA was passed, one out of three indigenous children were being removed from their homes and communities.[127] Today, indigenous children are over-represented in the child welfare system, subject to acute poverty, and face other socio-economic challenges.[128] As a result, Indian families are four times more likely to have their children removed than their white counterparts today.[129]

The Stolen Generation in Australia demonstrates the resonance of child removal among different indigenous groups. Indigenous Peoples in Canada, New Zealand and the Australia were all subject to assimilation policies and the forcible removal of their children to boarding schools.[130] But in Australia specifically, the phrase "Stolen Generation" refers to the

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[118] Jon Beidelschies, *The Impact of the United Nations Declaration on the Rights of Indigenous Peoples on Wisconsin Tribes*, 26 Wis. Int'l L.J. 479, 480 (2008).
[119] Frickey, *supra* note 5, at 55–56.
[120] *About ICWA*, *supra* note 11.
[121] G.A. Res 61/295, *supra* note 1, at 2
[122] Toolkit, *supra* note 102, at 33.
[123] *Id.* at 34.
[124] Mannes Marc, Factors and Events Leading to the Passage of the Indian Child Welfare Act, in A History of Child Welfare, (Eve. P. Smith & Lisa A. Merkel-Holguín eds., 1st ed. 1996); Matthew L.M. Fletcher and Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 85 Ne. L. rev. 885, 942 (2016).
[125] *Id.*
[126] Toolkit, *supra* note 102, at 34.
[127] *Id.*
[128] Randall Akee, *How Does Measuring Poverty Affect American Indian Children?*, Brookings Institute: Up Front (Mar. 12, 2019), https://www.brookings.edu/blog/up-front/2019/03/12/how-does-measuring-poverty-and-welfare-affect-american-indian-children.
[129] *About ICWA, supra* note 11.
[130] *See* Jon Reyhner & Navin Kumar Singh, *Cultural Genocide in Australia, Canada, New Zealand, and the United States: The Destruction and Transformation of Indigenous Cultures*, 4 Indigenous Policy J. 1, 10 (2010).

"countless number of Aboriginal and Torres Strait Islander children who were forcibly removed from their families under government policy and direction between 1910 to 1970."[131] During the active years of the policies, between one in ten and one in three Indigenous children were removed from their families and communities.[132] The Aboriginal Protection Act allowed the removal of Aboriginal people with mixed descent from their native homes.[133] The "Board for Protection of the Aborigines" implemented this removal and assimilation.[134] Many children were placed in "Training Homes" where they were forbidden to speak their traditional language or participate in cultural traditions.[135] They were often subject to abuse and neglect.[136]

As is the case for American Indians, the legacy of child removal is still felt today among Australian Aboriginal populations. Research from the Western Australia Department of Communities and Department of Health indicate that between 2012 and 2017, the number of children removed and placed in foster care rose from 46.6 percent to 56.6 percent.[137] The number of infants under the age of one that were removed rose from 24.8 percent to 29.1 percent between 2013 and 2016.[138] A study by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) on the Rights of Indigenous Children found that Aboriginal and Torres Strait Islander children were 9.7 times more likely to be removed from their parents than non-indigenous children in Australia.[139] Babies are removed for questionable reasons such as the young age or mental health of the mother.[140] Similar to America's ICWA, the New Zealand Child Welfare Act was amended to improve the situation of native children, such as the Māori.[141] The amendments incorporate "international children's rights instruments" and establish "basic minimum standards for every child aimed at reducing disparity in care and increasing a child's connection to his or her cultural identity."[142]

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[131] Michael O'Loughlin, *The Stolen Generation*, AUSTRALIAN MUSEUM (June 22, 2020) https://australian.museum/learn/first-nations/stolen-generation.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] Human Rights Council, Rights of the indigenous child under the United Nations Declaration on the Rights of Indigenous Peoples– Study of the Expert Mechanism on the Rights of Indigenous Peoples, ¶ 37–40, U.N. Doc. A /HRC /48 /74 (Aug. 9, 2021) [hereinafter EMRIP] https://www.undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F48%2F74&Language=E&DeviceType=Desktop&LangRequested=False.
[140] *Id.*
[141] *Id.*
[142] *Id.*

The similarities between the forcible child removal in Australia and the United States highlights the importance of remedial statutes like ICWA. The Declaration, through its substantive Articles that recognize and remedy past and ongoing injustices, can remind the Court of the scale of the indigenous child removal crisis and highlight the need for statutes like ICWA.

B. *Articles 7 and 8 can aid the Court in its constitutional challenge analysis.*

The Declaration's substantive articles can aid the Court in its constitutional analysis of ICWA. Specifically, Article 8 supports ICWA's placement preference provisions by highlighting the federal government's unique obligation to tribes to ensure their continued survival. Article 7 affirms the individual rights of indigenous children and the collective rights of the tribe against forcible child removal.

1. Article 8 highlights Congress's unique obligation towards tribes to ensure their survival through preventing arbitrary removal of their member's children.

The Fifth Circuit was evenly divided on whether ICWA's adoptive placement preferences for "other Indian families," and "Indian foster homes" violated the equal protection clause.[143] Because it did not decide on the issue, the lower court's decision, which had invalidated the provisions, was affirmed.[144] The lower court invalidated two ICWA provisions: the placement preferences for "other Indian families" in § 1915(a)3(a) and foster care and pre-adoptive preferences for Indian foster homes under § 1915(b)(iii).[145]

Because the Fifth Circuit affirmed that "Indian child" is a political, not racial, classification, the preferences should be reviewed under rational basis.[146] This holding aligns with the ruling in, *Morton v. Mancari*, which found that statutes based on Indian status are valid when the special treatment is "rationally tied to Congress's unique obligations towards Indians."[147] Thus, proof of a law or policy that illustrates the federal

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[143] Pet. App. 51, 211a, 298a.

[144] *Id.*

[145] Brackeen v. Zinke, 338 F. Supp. 3d 514, 530–36 (N.D. Tex. 2018).

[146] Brackeen v. Haaland, 994 F.3d 249, 340 (5th Cir. 2021) ("Plaintiffs also separately contend that ICWA's lowest-tiered adoptive placement preference for 'other Indian families' constitutes a racial classification . . . . We disagree for reasons similar to our holding regarding ICWA's Indian child designation. Like the hiring preference in Mancari, this adoption placement preference—like all of ICWA's placement preferences 'applies only to members of federally recognized tribes.' . . . Because on its face the provision is limited to 'members of federally recognized tribes, the preference is political rather than racial in nature.' Accordingly, it, too, is subject only to rational basis review.") (internal citations omitted).

[147] Morton v. Mancari, 417 U.S. 535, 555 (1974).

government's unique obligations to the tribe in regards to child removal should support ICWA's constitutionality.[148]

The federal government indeed has a unique obligation to ensure Indian survival.[149] Therefore, the federal government has an ongoing obligation to protect Indian children from removal to non-Indian families. This obligation is necessary to redress the Federal Indian law and policies that "focused on American Indian children from the very beginning of American history" which included destructive assimilation and boarding school policies.[150]

The Declaration affirms the federal government's duty to ensure tribal survival vis-a-vis vital links to their children. Article 8 provides, "Indigenous Peoples . . . shall not be subjected to forced assimilation or destruction of culture . . . *States shall provide effective mechanisms for prevention of and redress* for (a) any action which has the aim or effect *of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities*."[151] The Declaration commands the states to act in the best interest of the tribes and the indigenous children facing removal. It highlights the federal government's obligation to pass statutes like ICWA and protect indigenous children from being deprived of their cultural values and ethnic identities that would be lost once removed to a non-Indian family.

2. Article 7 affirms individual rights of indigenous children to not be subject to forcible removal.

Indian children have the right to remain with their families and communities unless certain conditions are met under ICWA.[152] The Texas District Court invalidated the active efforts, qualified expert witness, and placement preferences provisions under ICWA.[153] The Fifth Circuit affirmed this decision because the provisions "demand action by" and "impose duties on" state agencies, in violation of the anti-commandeering principle.[154]

The anti-commandeering principle prevents Congress from directly regulating states[155] by requiring them to enforce a federal regulatory program.[156] Congress can only regulate individuals.[157] For example, in *New*

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[148] KRAKOFF ET AL., *supra* note 15 at 524.
[149] *Id.*
[150] Matthew Fletcher and Kathryn Fort, *Intimate Choice and Autonomy: Adoptive Couple v. Baby Girl*, *in* CRITICAL RACE JUDGMENTS (Bennett Capers, Devon Carbado, Robin A. Lenhart, & Angela Onwuachi-Willig, eds.) (forthcoming 2022).
[151] Decl., *supra* note 1, art. 8 (emphasis added).
[152] Pet. For Cert., 23. https://www.supremecourt.gov/DocketPDF/21/21–380/191451/20210903173358008_ICWA%20Cert.%20Petition%20-%20TO%20FILE.pdf.
[153] Brackeen v. Haaland, 994 F.3d 249, 268 (5th Cir. 2021) (en banc).
[154] *Id.* at 404–409, 415.
[155] New York v. United States, 505 U.S. 144, 161–66, 195 (1992).
[156] *Id.* at 165.
[157] *Id.*

York v. United States, the Supreme Court held that the "take title" provision of the Low-Level Radioactive Waste Policy Act violated the Tenth Amendment.[158] The Act required the states to choose between regulating radioactive waste pursuant to congressional instructions or to "take title" to low level radioactive waste within their border.[159] The Court determined that the choice was illusory, and that the Act commandeered states to carry out a federal program.[160]

Congress may, however, promulgate laws governing state court proceedings that implicate *individual* interests under the Supremacy Clause.[161] The petitioners in *Brackeen* argue that this principle "comes from the Supremacy Clause's command that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.' U.S. Const. art. VI, cl. 2."[162] The Supreme Court has repeatedly recognized that federal law may provide "substantive principles" for adjudicating individual interests in state courts.[163]

The provisions of ICWA provide these "substantive principles" to protect the rights of individual indigenous children. According to Kathryn Fort, ICWA protects individual interests because it "puts up deliberate roadblocks for state courts to ensure due process for the parents, the tribes, and the children."[164] The active-efforts,[165] mandatory tribal notice,[166] and placement preference provisions,[167] all slow down the usually rushed state court removal process of Indian children to ensure that they can stay with their tribe; which is usually in the best interests of the children.[168] The active efforts requirement is illustrative, it prohibits states courts from removing Indian children unless the party seeking removal satisfies to the court that active efforts to avoid the outcome have been made.[169]

By giving courts substantive principles to reduce arbitrary removal of indigenous children from their tribes, ICWA protects the rights of a vulnerable population. According to an EMRIP study, indigenous children face multiple barriers to realizing their rights including: marginalization, racism and structural discrimination, inadequate housing, poor health and education outcomes, vulnerability to suicide, increased interactions with State care and justice systems, violence, forced displacement, the impact of extractive industries, militarization of their territories and

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158 *New York*, 505 U.S. at 175-176.
159 *Id.*
160 *Id.*
161 Pet. for Cert., *supra* note 152, at 22.
162 Pet. For Cert., *supra* note 152, at 20–21.
163 Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985).
164 Fort, *supra* note 48, at 2.
165 ICWA § 1912(d).
166 *Id.* § 1912(a).
167 *Id.* § 1915.
168 Fort, *supra* note 48, at 2.
169 ICWA § 1912(d).

lack of registration and recognition.[170] Remaining within their tribe is in the child's best interest because removal severs indigenous children's ties to their culture and traditional territories.[171] These connections are "central to [their] ability to reach their potential and exercise the full panoply of their rights, including cultural rights and the right to health."[172] Removal threatens indigenous children's rights to their traditional lands, belonging to an indigenous community; practicing their spiritual and religious traditions; and learning their languages and culture.[173] Removal also impacts the tribes' collective right to raise their members and pass down their culture and traditions to younger generations.[174]

The Declaration clearly articulates the individual right of indigenous peoples against arbitrary removal of their children.[175] The Declaration's preamble recognizes in particular, "the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child."[176] Article 7 explains, "Indigenous Peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group."[177] Indeed, there can be no greater threat to "essential tribal relations" and no greater infringement on the right of a tribe to govern itself than removing tribal control over the custody of its children.[178]

As Chief Hoskin of the Cherokee Nation said at a recent workshop implementing the Declaration, "the most important resources for tribes are our members." [179] And that even as tribes improve their situation through healthcare or language revival, these achievements would be in vain if the members were not able to pass down their traditions to their children.[180] ICWA, by protecting the collective tribal right to raising their member's children, can mitigate "losing what it means to be Cherokee."[181]

The Declaration parallels ICWA's emphasis on children-rights in different contexts too. Three Articles articulate the children's rights in different spaces. Article 21 asks States to pay particular attention to vulnerable groups, including children, and to continue to improve their economic and social conditions.[182] Article 17 commands States to protect

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[170] EMRIP, *supra* note 139 at ¶ 14..
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] Decl. Preamble, Art. 7.
[176] Decl. Preamble. (emphasis added).
[177] Decl. Art. 7. (emphasis added).
[178] Wakefield v. Little Light, 276 Md. 333, 350 (1975).
[179] Chief Hoskin, Opening Address at Cherokee Reservation Declaration Implementation Workshop (Nov. 8, 2021).
[180] *Id.*
[181] *Id.*
[182] Decl. Art. 21.

indigenous children from economic exploitation and any work that could interfere "with the child's education" or harm "the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability . . . "[183] Article 14 guarantees indigenous people, especially children, an education without discrimination—in their own culture and language if possible.[184] Lastly, Article 22 articulates the individual rights of children to not be subject to violence or discrimination.[185] ICWA, by preventing removal of indigenous children from their community and culture, can help protect these rights of the indigenous child. ICWA protects the general welfare of Indian children, specifically their right to fair treatment throughout the child welfare system.[186]

The Declaration's Articles protect the best interests of Indigenous children by articulating their individual rights impacted by removal. The Declaration adopts a broad rights-based approach to successfully protect children from physical, mental, socio-economic, moral, and spiritual harm. In addition, there are "cross-cutting rights [of children] throughout the Declaration" that ICWA supports.[187] For example, the right to traditional land and territories in Articles 25 through 28, is an individual right of the child threatened by removal.[188] Additionally, the rights to health in Article 24 and cultural rights in Articles 11, 13, 31, and 34 are impaired by removal.[189] Under these Articles, an indigenous child has a right remain within his or her community and learn traditional knowledge and medicine.[190] The Declaration articulates for the Court the individual rights that removal threatens and directly supports the need for ICWA's provisions to ensure due process.

C. *The Declaration is especially authoritative in Indigenous Peoples' rights cases and is increasingly referenced by foreign and domestic courts.*

According to the Colorado Conference Report on the Declaration, "[f]ederal courts, including the U.S. Supreme Court, have often cited nonbinding resolutions of the United Nations and other international institutions, as well as nonbinding foreign sources, as persuasive authority in appropriate cases."[191] In cases involving juvenile death penalty and same-sex marriage, the Supreme Court referenced international law and practices in its opinions.[192] The internationally recognized rights contained in the Declaration are similarly authoritative.

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[183] Decl. Art. 17.
[184] Decl. Art. 14.
[185] Decl. Art. 22.
[186] Carpenter et al., *supra* note 95 at 90.
[187] EMRIP, *supra* note 139 at ¶ 14.
[188] *Id.*
[189] Decl. Art. 11, 13, 24, 31, 34.
[190] *Id.*
[191] Carpenter et al., *supra* note 95, at 71.
[192] Carpenter et al., *supra* note 95, at 72; *see also* Hurtst Hannu et al., International

Increasingly, courts have referenced the Declaration in comparable cases on indigenous issue. A United States District Court in *Pueblo of Jemez v. United States* recently cited the Declaration as authority when adjudicating the Jemez Pueblo's claim of aboriginal title.[193] In *Jemez* the Pueblo of Jemez, a federally recognized Indian tribe, sued the United State under federal common law, claiming they had aboriginal title and exclusive right to use, occupy and possess lands set aside for a National Preserve.[194] The New Mexico District Court analyzed the claim but ultimately concluded that the Tribe did not enjoy aboriginal title to Valle San Antonio, a sub-area of the Valles Caldera National Preserve, because the tribe's use of Valle San Antonio was not exclusive.[195] Other tribes also used Valle San Antonio for various purposes.[196]

The District Court did, however, recognize the relevance and importance of the Declaration in its opinion. In a footnote, it referenced the Declaration as authority requiring courts to consider aboriginal claims brought by Tribes, "Both international law and common-law countries' law recognize aboriginal title. See, e.g., UN Declaration on the Rights of Indigenous Peoples."[197] It referenced the substance of the Articles in the Declaration as support for heightened due process protections when government action infringes on the rights of Indigenous Peoples, "International law also rejects the non-justiciability of aboriginal title extinguishment; for example, The United Nations Declaration on the Rights of Indigenous Peoples provides significant protection for indigenous peoples' right to the lands and resources they have traditionally owned and prevents the taking of such lands without due process and compensation . . . "[198] The District Court's reference to the Declaration demonstrates its authority in the U.S. Courts and shows how the Declaration can play an important role in *Brackeen.*

HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE, 570 (6th ed. 2018). In *Lawrence v. Texas*, the Court cited the practice of many countries in favor of protecting the right of homosexual adults to engage in intimate, consensual conduct. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003); *see also Roper v. Simmons*, 543 U.S. 551, 576 (2005) (Scalia, J., dissenting) (holding the juvenile death penalty unconstitutional after looking to the views of foreign courts and legislatures.

193 *Pueblo of Jemez v. United States*, 483 F. Supp. 3d 1024, 1063 N.67 (D.N.M. 2020) (citing the Declaration as authority for undergoing an analysis of the Pueblo of Jemez Tribe's aboriginal title claim and admonishing the lower court for ducking the question when it is customary in international law to do so, arguing that "[i]nternational law also rejects the nonjusticibility of aboriginal title extinguishment; for example, The United Nations Declaration on the Rights of Indigenous Peoples provides significant protection for Indigenous Peoples' right to the lands and resources they have traditionally owned and prevents the taking of such lands without due process and compensation").

194 *Pueblo of Jemez*, 430 F. Supp. 3d at 953, *amended on reconsideration*, 483 F. Supp. 3d at 1024.

195 *Pueblo of Jemez*, 483 F.Supp.3d at 1112–1121.

196 *Id.* at 1121.

197 *Id.* at 1094 n.54.

198 *Id.* at 1103 n.67.

In *Cal et al. v. Attorney General*, the Declaration was instrumental to the Belize Supreme Court's decision affirming the land rights held by Maya of Toledo.[199] The court upheld the Mayans' land rights in Belize based on their longstanding use and occupation.[200] These rights protected the land against state intrusion and oil exploration.[201] In its decision, the court cited the Declaration's Article recognizing indigenous title to ancestral lands as an authoritative source of internationally accepted law.[202] The Belize Supreme Court cautioned other courts against ignoring the Declaration's authority in future cases, "importantly in this regard is the recent Declaration on the Rights of Indigenous Peoples . . . Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member states, but where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them."[203] The Supreme Court would be wise to follow Belize's advice and rely in part on the Declaration to uphold ICWA.

V. Conclusion

The Declaration is an international instrument that affirms the rights of American Indians to benefit from domestic statutes like ICWA. The Declaration is relevant to the ICWA litigation and should be utilized by the deciding Court. The Declaration is especially authoritative in *Brackeen* because it considers a remedial statute enacted to benefit American Indians considering the shared crisis of child removal. The Declaration highlights the resonance of forcible child removal among different indigenous groups globally. Additionally, it affirms the government's unique obligation to protect tribal survival vis-à-vis retaining ties with their children and affirms the individual rights of indigenous children against arbitrary removal. The Justices should utilize the Declaration to fully comprehend the indigenous rights at stake.[204] Anything less would do a great injustice to current day American Indians and their predecessors whose rights are now recognizes internationally, but are still under threat at home.

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[199] Supreme Court of Belize Oct. 18, 2003, *Aurelio Cal et al. v. Attorney General of Belize* (Claim no. 171 of 2007), 63 ¶ 131.
[200] Supreme Court of Belize Oct. 18, 2007, *Aurelio Cal et al.*, 27 ¶ 44-45.
[201] *Id.* at 65-67 ¶ 136.
[202] Supreme Court of Belize Oct. 18, 2007, *Aurelio Cal et al.*, 63 ¶ 131.
[203] Supreme Court of Belize Oct. 18, 2007, *Aurelio Cal et al.*, 63 ¶ 131.
[204] *See* Walter R. Echo-Hawk, *supra* note 7.