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Towards a More Meaningful Future: An Indian Child Welfare Law for South Dakota

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TOWARDS A MORE MEANINGFUL FUTURE: AN INDIAN CHILD WELFARE LAW FOR SOUTH DAKOTA

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Historically, the relationships between American Indian tribes and the states have been predominately antagonistic. In 1978, Congress attempted to remediate some of the effects of this antagonism by passing the Indian Child Welfare Act ("ICWA") to specifically combat the state-sponsored destruction of Indian families and the wholesale removal of Indian children from their homes. ICWA has been largely successful and is considered by many to be the "gold standard" of child welfare laws. However, there is still room for improvement. Recently, states have been receptive to passing their own Indian child welfare laws—and indeed have passed their own—in furtherance of ICWA to help address the Act's shortcomings. These laws were especially salient leading up to, and still after, the Supreme Court's decision in Haaland v. Brackeen*, where the Court upheld Congress's power to enact ICWA. This comment analyzes the history of ICWA and its vital importance to Indian tribes, families, and children. In reinforcing ICWA's significance, some states have passed their own Indian child welfare laws to clarify ambiguities and amplify the provisions of ICWA to provide additional protections to Indian families and children. This comment examines three states that have passed their own Indian child welfare law and provides a pragmatic roadmap for South Dakota—but applicable to all states—that guides it towards enacting an Indian child welfare law of its own. Even after the Court's decision in* Brackeen*, states can and should act to clarify any ambiguities and amplify the provisions of ICWA to further protect Indian tribes, families, and children, and to achieve a more meaningful future for all tribes and states in the country.*

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I. INTRODUCTION

Since the inception of our nation, state and American Indian tribal relations have been recognized as unfriendly and even hostile.[1] While this characterization equally applies to tribal-federal relations, there has been considerable tension between tribes and states that is deep-rooted and enduring.[2] The hostility between tribes and states is so ubiquitous that a prominent Indian law scholar has attributed a name to the current model of tribal-state relations: the "deadliest enemies model."[3] Regardless of this tension, it is in everyone's best interest to work together in the spirit of cooperative federalism,[4] so long as tribal sovereignty is not weakened in the process.[5]

The argument that tribal-state agreements can pose significant dangers to tribal sovereignty is surely at the forefront of the minds of those who look to enter into these agreements to preserve and even expand tribal sovereignty.[6] However, this concern cannot prevent tribes and their allies from manifesting the

1. *See* United States v. Kagama, 118 U.S. 375, 384 (1886) (describing states as Indian tribes' "deadliest enemies").

2. *See id.*; *see generally* Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 252-68 (1991) (examining the "history and contemporary problems that beset tribal-state relations"). Certainly, this persisting tension exists between the tribes and the federal government. Even so, the federal government's current policy of tribal self-determination is an attempt to remediate this long-running friction. *See generally* Michael P. Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy*, 56 TEX. L. REV. 1195, 1195-96 (1978) (asserting that Indian self-determination is an "effort to win for Indian communities the same rights of self-determination enjoyed by other American communities, while preserving a special, constitutionally sanctioned relationship with the federal government").

3. Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 73 (2007) [hereinafter Fletcher, *Deadliest Enemies*].

4. Cooperative federalism involves different governments (e.g., tribal and state) sharing responsibility and authority through cooperation and understanding for the betterment of all governments and citizens involved. *See generally* Philip J. Weiser, *Cooperative Federalism and its Challenges*, 2003 MICH. ST. DCL L. REV. 727, 728-29 (2003) (providing an overview of cooperative federalism while focusing on state and federal cooperative federalism).

5. *See generally State/Tribal Relations*, NATIONAL CONGRESS OF AMERICAN INDIANS, https://perma.cc/Y4CK-2RE9 (last visited Sept. 13, 2023) (noting that "[e]ffective tribal-state relationships are essential to building a better tomorrow for all Americans"). It should be noted that there is a substantial amount of people that do not believe ICWA is in the best interest of everyone, however, and the engineered nature of Haaland v. Brackeen, 143 S. Ct. 1609 (2023), reveals that. *See, e.g.*, Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 4 (2017) (contending that ICWA deprives Indian children of critical legal protections).

6. *See generally* Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529, 530 (2012) [hereinafter Fort, *Waves of Education*] (stating that some folks "argue that [tribal-state] agreements damage tribal sovereignty regardless of the results").

resilience necessary to improve the conditions of Indian people and communities throughout American society.[7] And it seems it has not, as tribal-state agreements are becoming ever-present, even the norm in some respects,[8] with some asserting that these agreements may even enhance tribal sovereignty.[9]

These tribal-state agreements have the potential to develop new political relationships that empower tribal communities.[10] As long as the tribal-federal political relationship is not negatively affected, tribal-state agreements appear constitutionally viable.[11] Because the constitutionality of these agreements is likely not at issue, protecting tribal sovereignty is vital as more states reach agreements with tribes.[12] The fact that states are negotiating with tribes demonstrates the legitimacy of tribes as sovereigns and supports the notion that tribal-state agreements are not de facto diminutions of tribal sovereignty.[13]

Congress has, to some extent, delegated authority to the states in Indian affairs by passing the Indian Child Welfare Act ("ICWA" or the "Act").[14] ICWA structurally requires respect and cooperation between state and tribal judiciaries to achieve the Act's overarching goal, which is to "protect the best interests of Indian children" while also "promot[ing] the stability and security of Indian tribes and families . . . ."[15] The enforcement of ICWA relies heavily on state judges and court personnel.[16] Significantly, in advancing tribal self-determination and tribal sovereignty, ICWA contains a provision that authorizes states and tribes to enter into agreements to effectuate the federal Act.[17]

To date, sixteen states have enacted their own versions of ICWA, in furtherance of the federal scheme, ensuring that their state courts and actors follow the law while also safeguarding tribes as the primary decision-makers in

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7. *See generally infra* Part IV (proposing an ICW law for South Dakota to improve the Indian child welfare system).

8. *See* Noelle N. Wyman, *Native Voting Power: Enhancing Tribal Sovereignty in Federal Elections*, 132 YALE L.J. 861, 892 (2023) (explaining how "the federal government has created a framework for tribal-state cooperation" by enacting the Indian Gaming Regulatory Act—which mandates tribes and states to enter into compacts "to conduct casino-style gaming in Indian Country"); *see also* Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions From States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits" Test*, 54 S.D. L. REV. 419, 444 (2009) (explaining how there are over 200 tribal-state taxation compacts throughout the country).

9. *See* Fort, *Waves of Education*, *supra* note 6 (explaining that some folks "point out the [tribal-state] agreements can enhance tribal sovereignty").

10. *See generally Tribal-State Relations*, CHILD WELFARE INFORMATION GATEWAY at 5 (Aug. 2012), https://perma.cc/JPM6-H9BF (emphasizing that "States and Tribes are most successful in achieving better outcomes for children and families when they establish positive partnerships").

11. *See generally* Fletcher, *Deadliest Enemies*, *supra* note 3, at 86 ("So long as the federal-tribal political relationship is not interrupted or affected in a negative manner, what harm does it do to legitimize tribal-state agreements?").

12. *See infra* Section III.D (noting how states must obtain tribal consent if the state attempts to encroach on issues involving tribal land or citizens on the reservation).

13. *See* Fort, *Waves of Education*, *supra* note 6 ("[T]he very negotiation of [tribal-state] agreements constitutes an acknowledgement of tribal legitimacy.").

14. 25 U.S.C. §§ 1901-1963 (2023).

15. *Id.* § 1902 (2023).

16. B.J. JONES ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 4-5 (2d ed. 2008).

17. *See* 25 U.S.C. § 1919 (2023).

the welfare of their children.[18] These state Indian child welfare ("ICW") laws benefit both tribal and state systems and simultaneously benefit Indian children—the most vital resource "to the continued existence and integrity of Indian tribes. . . ."[19] ICWA is considered by many to be the "gold standard" of child welfare, suggesting that states would be better off adopting their own ICW laws to supplement the federal Act.[20] This gold standard brand also suggests that states would benefit from enacting baseline child welfare protections like those in ICWA that apply not just to Indian children, but to all children.[21] Yet ICWA, like many federal laws, is not perfect and has room for improvement.[22] This comment will focus on providing a pathway for improved tribal-state relations in South Dakota and will conclude by advancing a pragmatic model for a statute fit for South Dakota and the Tribes within it.[23]

In February 2023, the South Dakota House of Representatives failed to move a bill out of committee that created further protections concerning placement preferences for Indian children.[24] Making it out of committee, but ultimately failing on the House floor, were two bills—one that would have defined "active efforts"[25] and another that would have "established a task force

18. These states are California, Colorado, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Washington, Wisconsin, and Wyoming. CAL. FAM. CODE § 8620 (West 2023); COLO. REV. STAT. § 19-1-126 (2023); IOWA CODE § 232B.1 (2023 Supp.); ME. REV. STAT. ANN. tit. 18-C § 9-107 (2023); MICH. COMP. LAWS SERV. § 712B.1 (West 2023); MINN. STAT. §260.751 (2023); H.B. 317, 2023 Leg., Reg. Sess. (MT 2023); NEB. REV. STAT. § 43-1501 (2023); A.B. 444, 2023 Leg., Reg. Sess. (NV 2023); H.B. 135, 2022 Leg., Reg. Sess. (N.M. 2022); H.B. 1536, 68 Leg., Reg. Sess. (N.D. 2023); OKLA. STAT. tit. 10, §§ 40.1 through 40.9 (West 2023); OR. REV. STAT. § 418.609 (2021); WASH. REV. CODE §13.38.010 (West 2023); WIS. STAT. § 48.028 (2023); WYO. STAT. ANN. § 14-6-701 through 14-6-715 (2023). *See Comprehensive State ICWA Laws*, TURTLE TALK, https://perma.cc/KRY6-JD8F; *see also* Anu Joshi, *Protecting the Indian Child Welfare Act at the State Level*, ACLU (June 15, 2023), https://perma.cc/Q673-5K36 (providing the states that passed their own ICW law as of 2023).

19. 25 U.S.C. § 1901 (2023).

20. Janice Beller, *Defending the Gold Standard: American Indian Tribes Fight to Save the Indian Child Welfare Act*, 65-FEB ADVOC 16, 17-18 (2022) (explaining why ICWA is child welfare's gold standard); Tara Hubbard & Fred Urbina, *ICWA—The Gold Standard*, 58 ARIZ. ATT'Y, July-Aug. 2022, at 32, 33 ("The special findings required by ICWA, along with the resulting positive outcomes, has led to ICWA being considered the "gold standard" in child welfare proceedings by many child welfare agencies."). But again, it should not be lightly cast aside that there is a large minority of individuals and organizations that do not believe ICWA to be the gold standard of child welfare laws. *See* Sandefur, *supra* note 5.

21. *See* Kathryn E. Fort, *Observing Change: The Indian Child Welfare Act and State Courts*, N.Y. ST. BAR ASS'N FAM. L. REV. (Oct. 7, 2014), https://perma.cc/QA3D-YTRE [hereinafter Fort, *Observing Change*] (asserting that "ICWA is a best practices statute and all children would be better off if the standards of ICWA applied to them"). Given the many challenges to ICWA over the years, there are obviously numerous parties that do not believe ICWA to be a best practices statute. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 54 (1989); Haaland v. Brackeen, 143 S. Ct. 1609 (2023).

22. *See infra* Part III (providing examples of how certain states remedied certain issues with ICWA by passing their own ICW law).

23. *Infra* Part IV (describing ways to improve tribal-state relationships in South Dakota and proposing an ICW law for South Dakota).

24. H.B. 1229, 2023 Leg., 1st Sess. (S.D. 2023).

25. H.B. 1168, 2023 Leg., 1st Sess. (S.D. 2023).

to address the welfare of Indian children" in the State.[26] Augmenting placement preferences, defining "active efforts," and creating a task force to address Indian child welfare would all be incredibly beneficial to streamlining the federal Act and improving Indian child welfare in South Dakota.[27] Although none of the bills succeeded, this comment is intended to keep the conversation about Indian child welfare at the forefront of South Dakotans' minds, especially after the Supreme Court's decision in *Haaland v. Brackeen*[28] upheld Congress's power to enact ICWA.[29] Even though ICWA has alleviated much of the systemic removal of Indian children from their homes that transpired prior to its passage, out-of-home placement for Native American children still occurs at higher rates than that of non-Native children.[30] Therefore, further action in this realm is still necessary—South Dakota has a real opportunity to further protect South Dakota families, children, and Native American culture.[31]

In providing a roadmap that guides South Dakota towards an ICW statute of its own, this comment begins by summarizing the historical underpinnings and the general composition of ICWA in Part II.[32] Part III provides an overview and analysis of three states that have already passed ICW statutory regimes in furtherance of the federal ICWA.[33] Finally, in Part IV, the comment provides pragmatic recommendations for South Dakota by offering a pathway for improved tribal-state relations that will optimistically lead to the enactment of an ICW law in South Dakota.[34]

II. THE INDIAN CHILD WELFARE ACT

A. A HISTORY OF HARMFUL POLICIES LEADING TO THE PASSAGE OF ICWA

The policies of the United States concerning Indian tribes have been oppressive and assimilationist.[35] Since the latter half of the nineteenth century,

26. S.B. 191, 2023 Leg., 1st Sess. (S.D. 2023). This bill was actually passed by the South Dakota Senate but failed in the House. *Senate Bill 191*, SOUTH DAKOTA LEGISLATURE LEGISLATIVE RESEARCH COUNCIL, https://perma.cc/BP6J-8REZ (last visited Jan. 12, 2024) ("Title: establish the task force to address the welfare of Indian children in South Dakota").

27. *See infra* Part IV (explaining the benefits of a state ICW law in South Dakota).

28. 143 S. Ct. 1609 (2023).

29. *Id*. at 1641.

30. *About ICWA*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, https://perma.cc/5K5Z-96CP (last visited Mar. 17, 2023).

31. *Infra* Part IV (offering a solution to the still-systemic issue of the removal of Indian children from their homes).

32. *Infra* Part II (summarizing ICWA's origins and provisions).

33. *Infra* Part III (surveying certain states with ICW laws).

34. *Infra* Part IV (providing a pathway for the enactment of an ICW law in South Dakota).

35. It is incontrovertible that American Indians have been subjected to a tragic and revolting history of violence, racism, and genocide. *See* Rennard Strickland, *Things Not Spoken: The Burial of Native American History, Law and Culture*, 13 ST. THOMAS L. REV. 11, 12 (2000) ("[T]he near annihilation of the Western hemisphere's Native people during the four centuries following Christopher Columbus' voyages, constitutes the most massive eradication in the history of the world."). It was only until 1970 that the federal government adopted a policy of Indian self-determination, intended to empower Native tribes and communities to dictate their own paths in furtherance of tribal sovereignty. *See generally* Thomas H. Shipps, *Evolution of the Trust Responsibility and the Path to Tribal Self-*

the federal government's stated purpose was to break up Indian families through Anglo-American paternalism—for example, to "kill the Indian and save the man."[36] The boarding schools, allotment, Indian "reorganization," and termination were all federal policies ratified to erase tribal culture and to assimilate Native Americans into the Anglo-American way of life.[37] Thus, it was no revelation to American Indians—but "shocking" to the greater American society—when, in the 1960s and 1970s, congressional findings uncovered that most state child welfare systems relied upon these policies to firmly target Native Americans.[38] In fact, state courts and their actors were systematically removing Indian children from their homes at disproportionate rates compared to those of non-Indians.[39] Often, Native American children were being removed by child welfare entities without any legitimate basis for removal, effectively destroying American Indian homes, communities, cultures, languages, and identities in the process.[40] The state removal of Indian children during this time was an extension of their removal and kidnapping during the boarding school era and early Indian wars, further exacerbating the destruction of Indian families and culture.[41]

The unearthing of these procedures and practices was enough for the Senate Subcommittee on Indian Affairs, in 1974, to hold hearings on the "problems that American Indian families face raising their children and how these problems are affected by Federal action or inaction."[42] After four years and hundreds of pages of legislative testimony recorded from folks in Indian country, Congress confirmed that states were engaging in the "systematic, automatic, and across-the-board removal of Indian children from their families and into non-Indian

Determination, *in* EMERGING ISSUES IN TRIBAL-STATE RELATIONS 1, 4 (Thomson Reuters/Aspatore ed., 2013) Westlaw 2136512 (describing Indian self-determination as an "empowerment of tribal governments" while also "preserving the federal government's special protective relationship to tribes").

36. *"Kill the Indian, Save the Man": Capt. Richard H. Pratt on Education of Native Americans*, HISTORY MATTERS, https://perma.cc/63JK-UDS4 (last visited Mar. 19, 2023).

37. *See* VINE DELORIA JR. AND CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 11-21 (1st ed. 1983). For a more robust exploration of the federal policies intended to breakup Indian families, see Matthew. L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 895-955 (2017) [hereinafter Fletcher & Singel, *Federal-Tribal Trust Relationship*].

38. *See, e.g.*, Fletcher & Singel, *Federal-Tribal Trust Relationship*, *supra* note 37, at 955 (describing congressional findings regarding ICWA).

39. H.R. REP. NO. 95-1386, p.9 (1978). Surveys from 1969 and 1974 indicated that 25%-35% of all Indian children were separated from their families and placed in foster homes, adoptive homes, or institutions at that time. *Id.*

40. *See* Fletcher & Singel, *Federal-Tribal Trust Relationship*, *supra* note 37, at 955 (emphasizing that "[s]tate actors removed Indian children with 'few standards and no systematic review of judgments' by impartial tribunals").

41. *See generally id.* at 952 ("The removal of Indian children by states has much in common with Indian boarding schools and even involved kidnapping akin to the early Indian wars.").

42. *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 1 (1974) (statement of Sen. James Abourezk) [hereinafter *1974 Hearings*].

families and communities."[43] The quantitative information available at that time revealed states were removing between 25%-30% of Indian children from their homes nationwide and placing approximately 90% of those removed into non-Indian homes.[44]

In South Dakota specifically, Congress found that state social workers on the Rosebud Sioux Reservation implemented a policy declaring that "the reservation was, by definition, an unacceptable environment for children and would remove Indian children on that basis alone."[45] Further, after the State would remove Indian children from their families without providing notice, South Dakota circuit courts would then shift the burden on the Indian parent to prove she or he was fit for parenting.[46] Finally, after hearing much testimony during the Congressional hearings, South Dakota Senator Jim Abourezk—the chairman of the Subcommittee on Indian Affairs—remarked:

> [W]elfare workers and social workers who are handling child welfare caseloads use any means available, whether legal or illegal, coercive or cajoling or whatever, to get the children away from mothers that they think are not fit. In many cases they were lied to, they were given documents to sign and they were deceived about the contents of the documents.[47]

Therefore, after probing the on-the-ground realities of state child welfare policies and the effects they had on Native American children and families in South Dakota and other states, Congress passed ICWA in 1978.[48] South Dakota's own Senator Abourezk, who was non-native but grew up on the Rosebud Indian Reservation, sponsored ICWA and shepherded it through Congress.[49] In passing ICWA, Congress meant to thwart the wholesale removal of Native American children by establishing minimum federal standards and procedural safeguards that apply uniformly to all states and tribes across the country.[50]

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43. Mathew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History*, MICH. ST. UNIV. COLL. L. INDIG. L. & POL. CTR. (Occasional Paper) 4 (2009), https://perma.cc/X8FF-W3VU.

44. Indian Child Welfare Program: Hearings before the Subcomm. on Indian Aff. of the S. Comm. on Interior and Insular Aff., 93rd Cong. 3 (1974) (statement of William Byler); *see* Fletcher & Singel, *Federal-Tribal Trust Relationship*, *supra* note 37, at 955.

45. Fletcher & Singel, *Federal-Tribal Trust Relationship*, *supra* note 37, at 955.

46. Indian Child Welfare Program: Hearings before the Subcomm. on Indian Aff. of the S. Comm. on Interior and Insular Aff., 93rd Cong. 67 (1974) (statement of Cheryl DeCoteau); *see* Fletcher & Singel, *Federal-Tribal Trust Relationship*, *supra* note 37, at 955.

47. Fletcher & Singel, *Federal-Tribal Trust Relationship*, *supra* note 37, at 955.

48. 25 U.S.C. §§ 1901-1963 (2023).

49. Sara Taino, *ICWA Author Sen. James Abourezk Dies at 92*, THE IMPRINT (Mar. 1, 2023), https://perma.cc/96T3-SMNV.

50. *See* H.R. REP. NO. 95-1386, at 19 (1978); *see also* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47 (1989) ("We therefore think it beyond dispute that Congress intended a uniform federal law of domicile for the ICWA.").

B. KEY ICWA PROVISIONS

ICWA's principal goals are to "protect the best interests of Indian children" while simultaneously "promot[ing] the stability and security of Indian tribes and families . . . ."[51] ICWA applies only to state court proceedings, and not tribal court.[52] It follows, then, that if the Indian child resides or is domiciled in Indian country, the tribal court has sole jurisdiction and ICWA does not apply.[53] However, for Indian children living off the reservation, state courts must abide by ICWA's mandates once two threshold matters are met.[54] First, the case must meet the definition of a "child custody proceeding."[55] "Child custody proceedings" are defined under ICWA as foster care placements, pre-adoptive placements, adoptive placements, and terminations of parental rights.[56] Specifically excluded from ICWA are divorce custody awards to a parent and juvenile delinquency placements.[57]

The second threshold matter that must be satisfied before ICWA can apply is determining whether the subject of the proceeding is an Indian child.[58] An Indian child is defined under the Act as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[59] However, the Act does not define tribal membership eligibility.[60] Once the court determines that the proceeding is sufficiently defined as one dealing with "child custody" and involves an Indian child, ICWA can and should be applied.[61]

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51. 25 U.S.C. § 1902 (2023).

52. *Id.* § 1911.

53. *See id.* § 1911(a). Importantly, including the words "reside" and "domicile" effectually create a broader application of ICWA. Interview with Frank Pommersheim, Professor Emeritus, Univ. of So. Dak. Knudson Sch. of L. in Vermillion, SD (July 26, 2023). For example, if an Indian child is domiciled on the reservation but moves off the reservation for the summer, the tribal court would have sole jurisdiction under ICWA if any custody proceedings occurred while the child was living off the reservation. *Id.* Conversely, if the Indian child is domiciled off the reservation but goes to the reservation to reside for the summer, the tribal court would again have sole jurisdiction under ICWA if any custody proceedings occurred while the child was residing on the reservation for the summer. *Id.*

54. *See id.* § 1911(b) (explaining that a state court must transfer a case to tribal court).

55. *See id.* § 1903 (defining "child custody proceedings" and "Indian child").

56. *Id.* § 1903(1).

57. *Id.* ("['Child custody proceedings'] shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.").

58. *See id.* § 1903(4).

59. *Id.*

60. *Id.* This is presumably because Congress is acutely aware that tribes have retained inherent sovereignty to determine tribal membership. *See* Montana v. United States, 450 U.S. 544, 564 (1981). This likely explains why ICWA does not include a proviso that sets out the definition of eligibility for tribal membership, because Congress has generally left the power alone for tribes to exercise. *See* United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978) ("[U]nless limited by treaty or statute, a tribe has the power to determine tribe membership.").

61. "Th[is] is true regardless of whether the proceeding is 'involuntary' (one to which the parents do not consent) or 'voluntary' (one to which they do)." Haaland v. Brackeen, 143 S. Ct. 1609, 1623 (2023).

The major thrusts of ICWA largely consist of procedural and jurisdictional safeguards to further its primary objective.[62] Fundamental procedural aspects of ICWA codified to protect Indian parents include: (1) timely notice any time a state court proceeding concerns an Indian child;[63] (2) the prohibition of parental consent to the termination of parental rights outside the presence of a judge;[64] and (3) if indigent, the right to court-appointed counsel for Indian parents.[65] Tribes are also provided procedural protections, most notably their rights to notice and to intervene after a state actor initiates an involuntary proceeding.[66] ICWA also imposes substantive provisions related to these procedural safeguards, including placement preferences,[67] heightened burdens of proof,[68]

62. 25 U.S.C. § 1911(c), § 1912(a), (b), (e), § 1915(a).

63. *Id.* § 1912(a) ("In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.").

64. *Id.* § 1913(a) ("Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and are fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.").

65. *Id.* § 1912(b) ("In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.").

66. *Id.* § 1912(a); § 1911(c) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.").

67. *Id.* § 1915(a) ("In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."); § 1915(b) ("Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with . . . (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.").

68. *Id.* § 1912(e) ("No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."); § 1912(f) ("No termination of parental rights may

and requirements that those affecting termination of parental rights or foster care take "active efforts" to keep Indian families intact.[69]

Jurisdictionally, ICWA imposes exclusive tribal jurisdiction over termination of parental rights or foster care proceedings when the Indian child is domiciled in Indian country.[70] ICWA also provides presumptive tribal jurisdiction for proceedings involving Indian children domiciled off the reservation, directing state courts to transfer the case absent good cause to the contrary upon petition of either parent, Indian custodian, or Indian child's tribe.[71] Prior to ICWA's passage, states did not provide any child—never mind Indian children—anything remotely comparable to the procedural and jurisdictional safeguards ICWA affords.[72] Because of this best-practices framework, ICWA is considered by many to be the "gold standard" of all child welfare laws—implementing a structure of checks, balances, and heightened judicial oversight in order to overcome the history of the state-sponsored breakup of Indian families.[73]

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be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.").

69. *Id.* § 1912(d) ("Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."). Significantly, "active efforts" is left undefined in the federal ICWA. *See* Megan Scanlon, *From Theory to Practice: Incorporating the "Active Efforts" Requirement in Indian Child Welfare Act Proceedings*, 43 ARIZ. ST. L.J. 629, 656 (2011).

70. *Id*. § 1911(a) ("An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.").

71. *Id.* § 1911(b) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe."); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989) (asserting that § 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation").

72. *See 1974 Hearings*, *supra* note 42, at 2 (stating that the result of these ubiquitous state "policies has been unchecked, abusive child-removal practices, the lack of viable, practical rehabilitation and prevention programs for Indian families facing severe problems, and a practice of ignoring the all-important demands of Indian tribes to have a say in how their children and families are dealt with").

73. *See, e.g.*, Beller, *supra* note 20, at 18 ("Together, these protections, in addition to many others built into ICWA, create what has been called the 'gold standard' of child welfare; a structure of checks, balances, resources, and heightened judicial oversight that gives Indian families and tribes every opportunity to prevent the loss of children from tribal communities."). *But see* Sandefur, *supra* note 5, at 22 (asserting that certain sections of ICWA provide "a set of legal disadvantages that make it harder to protect Indian children from abuse, and to find them permanent adoptive homes").

C. THE CONSTITUTIONAL AUTHORITY OF ICWA

Those that oppose ICWA's constitutionality primarily argue that (1) enacting ICWA exceeds Congress's authority; (2) ICWA treads on the states' authority over domestic relations; (3) ICWA violates the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment; and (4) it violates the anti-commandeering principles of the U.S. Constitution's Tenth Amendment.[74] Although ICWA has been generally upheld by the Supreme Court over time,[75] the constitutionality of the Act was questioned even before its inception.[76] For instance, prior to ICWA's enactment, the Department of Justice identified objections to the Act's constitutional legitimacy, questioning specific provisions of the Act that have remained the subject of contentious debate.[77] In fact, multiple constitutional challenges came before the Supreme Court in 2023 in *Haaland v. Brackeen*.[78] Ultimately, after garnering extensive national attention, ICWA survived these major existential threats and was upheld in its entirety.[79]

The Supreme Court in *Brackeen* primarily held that Congressional plenary power in Indian affairs is valid and that passing ICWA was within the sphere of that plenary authority.[80] The Court reasoned that the petitioners failed to make sufficient arguments to overturn its precedent and "decline[d] to disturb the Fifth Circuit's conclusion that ICWA is consistent with Article I."[81] In effect, the Court endorsed the Fifth Circuit's reasoning that:

> Based on the Framers' intent to confer on the federal Government exclusive responsibility for Indian affairs, the centuries-long history of the Government's exercise of this power, and the extensive body of binding Supreme Court decisions affirming and reaffirming this authority, we conclude that ICWA represents the exercise of powers conferred on Congress by the Constitution.[82]

The Supreme Court essentially ratified the language contained in the Act concerning the source of Congress's power to pass ICWA.[83] The Act specifically states that Congress's power to pass ICWA derives from the Indian

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74. *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1626, 1629 (2023).

75. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 642 (2013); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 54 (1989); *Brackeen*, 143 S. Ct. at 1609.

76. Scanlon, *supra* note 69, at 635.

77. *Id.* (questioning whether (1) Congress can impose minimum federal standards, (2) ICWA applies only to Indians formally enrolled in a tribe, (3) the Act applies only to reservations, and (4) ICWA can override state child welfare laws that are considered to be traditional state functions).

78. *Brackeen*, 143 S. Ct. at 1609.

79. *Id.* However, as detailed below, the Supreme Court failed to reach a decision on the equal protection challenge, holding that the respondents lacked standing. *Id.* at 1638-39.

80. *Id.* at 1627-32. But the Supreme Court left open the question of defining the boundaries of Congress's plenary power in Indian affairs. *See id.* at 1629 ("Thus, we reiterate that Congress's authority to legislate with respect to Indians is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders.").

81. *Brackeen*, 143 S. Ct. at 1631.

82. Brackeen v. Haaland 994 F.3d 249, 316 (5th Cir. 2021) (overturned on other grounds) (internal quotations omitted) (cleaned up).

83. *See generally id.* (describing the source of Congress's power to enact ICWA).

Commerce Clause and the federal government's unique responsibility for the protection and preservation of Indian tribes—also called its trust responsibility.[84] And because Indian children are "vital to the continued existence" of Indian tribes, the federal government's trust responsibility vests in it a direct interest in protecting Indian children.[85]

ICWA opponents maintain that ICWA exceeds the metes and bounds of Congress's power because it infringes upon family law—a traditional state function.[86] The majority in *Brackeen*, however, laid this argument to rest by asserting that ICWA itself is within the ambit of Congressional plenary power, which includes Congress's power to preempt state law: "we have not hesitated to find conflicting state family law preempted, notwithstanding the limited application of federal law in the field of domestic relations generally."[87] The Court stated that "the Constitution does not erect a firewall around family law" and held that just because Congress rarely enacts legislation concerning domestic relations does not mean it cannot.[88] Thus, the Court held that ICWA is a valid exercise of Congressional authority.[89]

Opponents of the Act in *Brackeen* further argued that the various provisions of ICWA violate the Equal Protection Clause of the Fourteenth Amendment.[90] However, courts have generally sustained ICWA's constitutionality by applying principles explained in an oft-cited case from 1974, *Morton v. Mancari*.[91] There, the Supreme Court unanimously upheld the constitutionality of hiring preferences for tribal members implemented by the Bureau of Indian Affairs ("BIA") provided under the Indian Reorganization Act of 1934.[92] The Court determined that the preferences at issue were not invidious racial discrimination in violation of the Equal Protection Clause due to the political relationship between federally recognized tribes and the federal government.[93] The Court reasoned that Indian hiring preferences in the BIA along with "every piece of [federal] legislation dealing with Indian tribes and reservations" exist to further

84. 25 U.S.C. § 1901(1) (2023). The Indian Commerce Clause provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.; 25 U.S.C. § 1901(2) (2023); *see Brackeen*, 143 S. Ct. at 1630 (upholding Congress's power under the Indian Commerce Clause as encompassing "not only trade but also "Indian affairs") (internal citations omitted); *see also* Reid Peyton Chambers, *Implementing the Federal Trust Responsibility to Indians after President Nixon's 1970 Message to Congress on Indian Affairs: Reminiscences of Reid Peyton Chambers*, 53 TULSA L. REV. 395, 399-400 (2018) (illustrating the federal government's trust responsibility to Indian tribes).

85. 25 U.S.C. § 1901(3) (2023).

86. *Brackeen*, 143 S. Ct. at 1629.

87. *Id.* at 1630 (quoting Ridgway v. Ridgway, 454 U.S. 46, 54 (1981)) (cleaned up).

88. *Id.* at 1630.

89. *See id.* at 1631 (declaring "[i]f there are arguments that ICWA exceeds Congress's authority as our precedent stands today, petitioners do not make them").

90. *Id.* at 1638.

91. 417 U.S. 535 (1974).

92. *See id.* at 553-55. In 1980, the South Dakota Supreme Court upheld the constitutionality of ICWA in a Tenth Amendment challenge. *In re* Guardianship of D.L.L. 291 N.W.2d 278 (S.D. 1980) (holding that ICWA does not violate the Tenth Amendment due to the plenary power of Congress over Indians).

93. *Mancari,* 417 U.S. at 554.

tribal self-government and advance the political relationships between tribes and the federal government.[94] So long as the federal government's "special treatment" is rationally tied to Congress's unique responsibility toward Native Americans, congressional laws in the sphere of Indian affairs will be upheld.[95] Consequently, *Mancari* dictates that the political status of Indian tribes, parents, and children—as applied to Indian child welfare proceedings—places them in a qualitatively different position than that of non-Indian parents and children.[96]

Notably, the *Brackeen* decision did not reach the merits of the Equal Protection issue because, the Court determined, no party involved had standing to raise it.[97] The effect of *Brackeen*, then, "upheld the long-standing structure of the federal government as the constitutionally empowered sovereign to engage with tribes on 'Indian affairs.'"[98] ICWA proponents argue that because the law was enacted to prevent states and their actors from discriminating against Indian families, ICWA is actually designed to enforce the Fourteenth Amendment's Equal Protection and Due Process Clauses on states because historically, many states were violating these constitutional rights.[99]

Although the Court in *Brackeen* left the Equal Protection issue for another day, at least one ICWA expert nevertheless believes *Brackeen* impliedly sustained the *Mancari* standard:

> It is hard to imagine that the reasoning laid out in the majority opinion [in *Brackeen*] would bend to a new challenge on equal protection grounds by framing the issue as somehow breaking with federal law and imposing a racial classification for tribal children. This decision sends a clear signal that the federal legal standard for tribal children is a political status as members of tribal nations.[100]

As for the anti-commandeering argument, the rule states that the federal government may not compel—i.e., commandeer—state officers or state legislatures to enforce federal law.[101] Because ICWA mandates that states, through their agency actors and courts, ensure due process for parents, children,

94. *Id.* at 552.

95. *Id.* at 555.

96. Christine P. Costantakos, *§ 13:1. Policies and principles underlying the Indian Child Welfare Act*, 4 NEB. PRAC., NEB. JUV. CT. L. & PRAC. § 13:1:D (2022).

97. Haaland v. Brackeen, 143 S. Ct. 1609, 1638 (2023).

98. Nick Martin, *The Supreme Court Upheld ICWA. Now What?*, HIGH COUNTRY NEWS (June 16, 2023), https://perma.cc/7RT5-P7VQ.

99. *See* Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. 1755, 1787 (2022) [hereinafter Fletcher & Singel, *Lawyering ICWA*] (asserting that "[s]tates were intentionally targeting Indian children for removal because of their race, occasionally deeming any children residing on a reservation, by definition, as experiencing neglect. States believed that Indians' extended family parenting was inappropriate, applying a nuclear family standard without regard to Indian child-rearing practices.").

100. Martin, *supra* note 98 (quoting Angelique EagleWoman, Director of the Native American Law and Sovereignty Institute and a Professor of Law at Mitchell Hamline School of Law).

101. *See* New York v. United States, 505 U.S. 144, 161-66 (1992).

and tribes,[102] opponents consider this impermissible commandeering by the federal government that forces states to administer a federal regulatory program.[103] The Supreme Court in *Brackeen* determined, however, that ICWA poses no anti-commandeering violation because the Act does not require anyone to search for alternative placements—it is the tribe or other objecting party that carries the burden, which is within the Tenth Amendment's parameters.[104] And although ICWA does impose requirements upon state courts, the Supreme Court has already held it constitutional for Congress to "require state courts, unlike state executives and legislatures, to enforce federal law."[105] This includes ICWA's mandate on states to record their "efforts made to comply with the placement preferences—and provide the information to the Secretary and to the child's tribe."[106] The Court held these duties to be "'ancillary' to the state court's obligation to conduct child custody proceedings in compliance with ICWA."[107] Finally, the Court stated that because ICWA "applies 'evenhandedly' to state and private actors[,]" it does not "implicate the Tenth Amendment."[108] Therefore, IWCA's imposition on states to ensure due process for Indian parents, children, and tribes is not impermissible commandeering in violation of the Tenth Amendment, and the Act survived every challenge that came before it in *Brackeen*.[109]

III. STATE ICWA LAWS

Historically, state involvement in Indian affairs has been limited due to Congress's plenary authority and the federal government's trust responsibility.[110] Further, state jurisdiction is generally prohibited within Indian country as defined under 18 U.S.C. § 1151.[111] However, for at least the last

102. 25 U.S.C. § 1912 (a), (e), (f), § 1915 (2023). Notably, large swaths of both §§ 1912 and 1915 were struck down as unconstitutional under anti-commandeering principles by the Fifth Circuit in 2021. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam).

103. *See, e.g.*, Sandefur, *supra* note 5, at 34 (arguing that "ICWA commands not only state judges but also state executive officers to participate in the administration of a federal regulatory program—one that overrides the quintessential state-law realm of family law").

104. Haaland v. Brackeen, 143 S. Ct. 1609, 1635 (2023).

105. *Id.*

106. *Id.* at 1638.

107. *Id.*

108. *Id.* at 1633.

109. *Id.* at 1635.

110. By enacting state enabling acts, the states surrendered tribal jurisdiction over tribal lands within their territories. *See e.g.*, S.D. CONST. art. XXII (declaring that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States"). State involvement in matters of tribal jurisdiction has traditionally been well-delineated by federal statutes and federal common law, starting with the principle endorsed in 1831 in *Worcester v. Georgia*: that state laws can "have no force" in Indian country due to tribes' inherent sovereignty. 31 U.S. (6 Pet.) 515, 520 (1832); *see also* Alaska v. Venetie Tribal Government, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."); Williams v. Lee, 358 U.S. 217, 220 (1959) (holding that without an act from Congress, states cannot "infringe on the right of reservation Indians to make their own laws and be ruled by them").

111. Federal law defines Indian country under 18 U.S.C. § 1151 (2022):

half-century, state authority in Indian country has been bolstered in certain situations.[112] With regard to Indian child welfare, there are two primary ways in which states have the legal authority to pass their own ICW law.[113] First, states are permitted to pass laws that further a federal scheme such as ICWA, even though states do not have the inherent authority to classify Indians differently from other citizens under the Equal Protection Clause.[114] Second, section 1919 of ICWA authorizes tribal-state agreements that concern procedural and jurisdictional issues regarding Indian child welfare.[115] In effect, these two pathways allow states to adopt their own ICW laws that involve essential collaboration with the tribes inside their borders.[116] Because ICWA is here to stay, states can adopt their own ICW law that clarifies, improves, and supplements the goals of ICWA.[117]

> Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id.; *see, e.g.*, Bryan v. Itasca Co. Minnesota, 426 U.S. 373, 377-78 (explaining how state jurisdiction in Indian country is generally limited unless specifically conferred by Congress—in this case under PL 280).

112. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980) ("Long ago the [Supreme] Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries[.]" (quoting *Worcester*, 31 U.S. at 520 (1832))); Moe v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) (holding that a state can require Indian retailers on the reservation to add a state tax on cigarettes to the sales price when the sale is made to non-Indians).

113. There is a third, but less comprehensive, pathway for tribes and states to enter into agreements regarding Indian child welfare: tribes contain the sovereign authority to engage in intergovernmental agreements with states, while states contain this authority under their respective intergovernmental agreement statutes—but these agreements are limited in their effect, especially compared to more comprehensive tribal-state agreements or state ICW laws. *See Topic 10. Tribal-State Agreements*, NATIVE AMERICAN RIGHTS FUND, https://perma.cc/JYP6-SUBR (last visited Mar. 12, 2023); *see also Tribal-State Relations*, CHILD WELFARE INFORMATION GATEWAY at 2-3 (Aug. 2012), https://perma.cc/JPM6-H9BF (describing the effect of Title IV-E grants).

114. *See* Washington v. Confederated Bands of Yakima Indian Nation, 439 U.S. 463, 501 (1979) (holding that where a federal scheme exists with regard to state jurisdiction in Indian country, those same states could validly assume criminal jurisdiction over Indians on non-Indian lands without violating equal protection).

115. *See* 25 U.S.C. § 1919 (2023).

116. *See e.g.*, Brief for the States of California et al. as Amici Curiae Supporting Petitioners at 7, Haaland v. Brackeen, (No. 21- 376), 2022 WL 3691303 [hereinafter Brief for the States of California et al.] (describing how ten states have entered into agreements with thirty-seven different tribes under § 1919 to the benefit of Indian tribes, families, and children). Fort, *Waves of Education*, *supra* note 6, at 533-43 (detailing how the judicial and legislative branches in Michigan collaborated with tribes that ultimately culminated in a state ICW law—passed after the article was published).

117. As the decision from the Supreme Court in *Brackeen* solidified ICWA's place in America's justice system, South Dakota has the opportunity to strengthen ICWA's role and improve the Act as it continues to protect tribal families, children, and culture. Haaland v. Brackeen, 143 S. Ct. 1609 (2023). Wyoming, Colorado, Montana, and North Dakota very recently did just what this comment proposes South Dakota should do by passing their own state ICW laws in the latter half of 2023. *See* Joshi, *supra* note 18 (providing a map that shows the states that have passed their own ICW law).

States that have adopted their own ICW laws presumably did so to enhance the federal Act and to assist state courts in following the law.[118] Still, like their federal counterpart, state ICW laws have been subjected to litigation.[119] Opposition is to be expected and should not discourage states from passing their own ICW laws.[120] Significantly, ICWA explicitly declares that where a "State or Federal law applicable to a child custody proceeding . . . provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under [ICWA], the State or Federal court shall apply the State or Federal standard."[121] Irrespective of whether a state has enacted its own ICW statute, the federal ICWA provides a baseline of protections afforded to Indian parents and children.[122] But if the state ICW law provides a higher standard of protection for Indian parents and children, the state law should be applied.[123] At least one state court has even construed this provision as extending a higher standard of protection to tribes, as well.[124] Regardless, state ICW laws are valuable because they can empower state courts and actors to understand and apply the law.[125]

The sections below provide a general overview of certain state ICW laws and how those laws further the goals of the federal ICWA.[126] Their purpose is to suggest a framework for South Dakota to ambitiously (and optimistically) pass its own ICW statute, rather than leave its circuit courts to interpret ICWA inconsistently or not to apply the Act at all when the law demands they should.[127] Although ICWA offers much more protection to Indian families and

118. *See* Fort, *Waves of Education*, *supra* note 6, at 548.

119. *See In re* Santos Y., 112 Cal. Rptr. 2d 692 (Cal. Ct. App. 2001) (reversing the lower court decision that held ICWA unconstitutional as applied); Cherokee Nation v. Nomura, 160 P.3d 967 (Okla. 2007) (upholding the lower court decision that held ICWA applied to voluntary and involuntary adoptions of Indian children in Oklahoma); Oregon Off. for Servs. to Child. & Fam. v. Klamath Tribe, 11 P.3d 701 (2000) (affirming the lower court decision that held a state statute authorizing agreements between the state and tribes did not permit expanding the definition of "Indian children" under ICWA).

120. *See generally* Fort, *Waves of Education*, *supra* note 6, at 548 (explaining that "appellate litigation based on state versions of ICWA in other states is not entirely positive" and should be "anticipated").

121. 25 U.S.C. § 1921 (2023).

122. *Id.*

123. *Id.* For example, the Michigan Indian Family and Preservation Act (MIFPA) provides greater protections for parents of Indian children when withdrawing consent to the termination of parental rights than the federal Act. *See In re* Williams, 915 N.W.2d 328, 329 (2018) ("Sometimes the protections afforded under MIFPA are greater than those provided under ICWA, as with the issue we consider today: when may the parent of an Indian child withdraw consent to the termination of parental rights.").

124. *E.g.*, Cherokee Nation v. Nomura, 160 P.3d 967, 976 (Okla. 2007) (holding that "[s]ince *Holyfield* instructs that [ICWA] was intended to protect the Indian child, the parents and the Tribe, we find the 'higher standard of protection' under § 1921 extends to the Tribe as well").

125. *See generally The Indian Child Welfare Act: A Primer for Child Welfare Professionals*, CHILD WELFARE INFORMATION GATEWAY at 1 (Apr. 2021), https://perma.cc/L3SA-JDVV ("[N]ot all child welfare caseworkers are aware of how to apply ICWA or the troubling history that prompted the law to be enacted.").

126. *Infra* Sections A, B, C (providing a general overview of certain states with ICW laws).

127. *See* Fort, *Waves of Education*, *supra* note 6, at 551 (noting that "some state court judges have been reluctant to enforce the law, likely seen as an encroachment on areas 'traditionally reserved' to state courts"); *see also* Kathleena Kruck, *The Indian Child Welfare Act's Waning Power After Adoptive Couple v. Baby Girl*, 109 NW. U. L. REV. 445, 473 (2015) (explaining that even with ICWA, "Indian

communities than they received before its passage, the statute is not comprehensive.[128] Because ICWA still contains gaps,[129] South Dakota has the opportunity to adopt its own ICW law in order to clarify any ambiguities in the Act.[130] This can provide consistency for state court application, fidelity to ICWA, and demonstrate South Dakota's commitment to Indian child welfare.[131] After all, South Dakota's own Senator led the movement to pass ICWA, and South Dakotans should honor that legacy by supporting even stronger welfare laws for Indian children.[132] The overviews below—highlighting certain state ICW law provisions—are intended to guide South Dakota and other states in determining the substance of their own ICW law.[133] Michigan, New Mexico, and Oklahoma are profiled primarily because they have a sizeable Native American population and the states represent various positions on the political spectrum.[134] Finally, this Part concludes with a section detailing the importance of tribal-state relations and how improved relations can facilitate the enactment of a state ICW law.[135]

A. MICHIGAN

The Michigan Indian Family and Preservation Act ("MIFPA") came into effect in 2013,[136] aiming to "protect the best interest of Indian children and to promote the stability and security of Indian tribes and families."[137] MIFPA consists of the baseline protections of ICWA, and also affords greater protections to Indian parents and children by: (1) defining "active efforts";[138] (2) clarifying what constitutes "good cause to the contrary" if a state court refuses to transfer a case to tribal court;[139] (3) broadening the definition of an "Indian

children continue to be removed from their homes at alarming rates[,]" partly because "of state resistance to the ICWA and the complete bypass of its provisions").

128. *See* Fletcher & Singel, *Lawyering ICWA*, *supra* note 99, at 1775.

129. As outlined below, some of these gaps consist of defining "good cause to the contrary" when a state court refuses to transfer a case to tribal court and providing a definition of "active efforts." *See infra* Section III.A (describing Michigan's attempt to fill these gaps).

130. *Infra* Part IV (suggesting an ICW law for South Dakota).

131. *See* Fort, *Waves of Education*, *supra* note 6, at 539 (asserting that although "ICWA is a federal law and the states are required to follow it, state judges often render inconsistent decisions").

132. *See generally* Taino, *supra* note 49 (illustrating how South Dakota Senator Jim Abourezk was the primary sponsor for ICWA in 1978).

133. *Infra* Sections A, B, C (providing an overview of other states that have enacted a version of ICWA and proposing an ICW law for South Dakota).

134. *See Native American Population by State 2023*, WORLD POPULATION REVIEW, https://perma.cc/PDX7-78ZD, (last visited July 10, 2023) (depicting New Mexico and Oklahoma within the top two of three largest Native populations in the United States); *Swing States 2023*, WORLD POPULATION REVIEW, https://perma.cc/LG7R-FH4V, (last visited July 10, 2023) (listing Michigan as a "perennial" swing state).

135. *Infra* Section D (detailing the importance of tribal-state relations).

136. 2012 Mich. Legis. Serv. 565 (West).

137. MICH. COMP. LAWS ANN. § 712B.5 (West 2023).

138. ICWA is silent on what constitutes "active efforts" but MIFPA provides a definition. *Id.* § 712B.3(a).

139. MIFPA contains clear standards for what constitutes "good cause to the contrary" when a state court is determining whether to transfer the case to tribal court—unlike the federal ICWA. *Id.* § 7.12B.7(5).

child";[140] and (4) instructing on what may constitute "reason to know" a child is an Indian child for notice purposes.[141]

Additionally, MIFPA specifically requires the Michigan Department of Health and Human Services to employ practices designed to keep Indian families intact.[142] When that goal is not practicable, the Department is to place the child in a household reflecting the unique values of the child's tribe, thereby maintaining a "political, cultural, and social relationship with the Indian child's tribe and tribal community."[143] Michigan courts have "consistently decided cases concerning parents' rights based on the higher standards afforded under MIFPA"—proving the statute's ability to afford greater protections than ICWA.[144] Notably, in drafting MIFPA, the drafting committee was highly cognizant of judicial action in other states that passed their own ICW laws—particularly in Iowa—where the Iowa Supreme Court ultimately struck down certain provisions of their state's ICW law.[145] This assisted Michigan in tailoring MIFPA into a more constitutionally sound piece of legislation, potentially designating MIFPA to serve as a reliable model for other states interested in adopting their own ICW laws.[146]

B. NEW MEXICO

New Mexico passed the Indian Family Protection Act ("IFPA") in March of 2022, with some considering it to encompass the strongest protections in the country for Indian families and communities.[147] IFPA goes well beyond ICWA in safeguarding the rights of Indian children and families, and further holds the State to a high standard in effectuating the law.[148] For instance, IFPA requires the State: (1) to notify tribes within twenty-four hours of filing an emergency petition investigating abuse or neglect;[149] (2) to employ culturally appropriate

140. MIFPA's definition of "Indian child" is broader (and thus applies to more children) than that of the federal ICWA in that MIFPA includes Indian children that are "eligible for membership" in a tribe without needing to know whether the parent is a tribal member. *Compare* 25 U.S.C. § 1903(4) (defining an "Indian child" as one who is enrolled or is "eligible for membership in an Indian tribe *and is the biological child of a member of an Indian tribe*") (emphasis added), *with* MICH. COMP. LAWS ANN. § 712B.3(k)(ii) (West 2023) (defining an "Indian child" as on who is enrolled or is "[e]ligible for membership in an Indian tribe as determined by that Indian tribe").

141. The Michigan legislature was purposeful and explicit in providing a nonexclusive list of situations that trigger the notification mandate in MIFPA. MICH. COMP. LAWS ANN. § 712B.9(4) (West 2023). Whereas in the federal ICWA, "reason to know" is undefined. *See* 25 U.S.C. § 1912(a) (2023).

142. MICH. COMP. LAWS ANN. § 712B.5(b) (West 2023).

143. *Id.*

144. Norika L. Kida Bettia & Cameron Ann Fraser, *Michigan Indian Family Preservation Act at Seven Years*, 98 MICH. B.J. 32, 33 (2019).

145. *See* Fort, *Waves of Education*, *supra* note 6, at 541 ("[T]he committee was also aware of the recent Iowa Supreme Court decision finding that the Iowa ICWA's broad definition of Indian child was unconstitutional.").

146. *See generally infra* Part IV (providing a potential pathway for South Dakota to adopt its own ICW law).

147. *The Indian Family Protection Act Signed into Law*, COALITION TO STOP VIOLENCE AGAINST NATIVE WOMEN (Mar. 4, 2022), https://perma.cc/A2KT-5SE2.

148. *See id.*

149. H.B. 135 § 12(A), 2022 Leg., Reg. Sess. (N.M. 2022).

family preservation strategies and resources intended to thwart the breakup of Indian families;[150] (3) to be diligent when conducting searches of relative caregivers by defining "active efforts";[151] and (4) to "develop and deliver" annual mandatory responsiveness training for judges, court-appointed attorneys, guardians ad litem, and non-tribe member foster parents about the Act.[152] Taken together, these provisions further safeguard Indian culture and identity.[153]

Moreover, IFPA provides that infants younger than three months old cannot be placed outside the placement preferences in the Act;[154] that courts will consider alternatives to termination of parental rights, including permanent guardianship of the child;[155] and that if the household into which an Indian child is placed for adoption or guardianship does not include a parent who is a member of the Indian child's tribe, the court should inquire about whether the child's tribe desires to enter into a cultural compact with the parents concerning how the child will maintain her cultural identity.[156] These cultural compacts require tangible strategies that demonstrate active participation by foster and adoptive families to support Indian children in preserving their Native identity.[157] Finally, New Mexico has instituted a specialized court system to adjudicate ICWA cases that allows for a more consistent application of the law.[158]

Although New Mexico's passage of IFPA occurred during the *Brackeen* proceedings, there had been significant efforts to pass a New Mexico version of ICWA since 2015.[159] IFPA was a historic piece of state legislation that added significant protections to Indian children and families, allowing New Mexico to serve as a vanguard for other states enacting their own ICW laws in an attempt to secure the highest level of protections for Indian children, families, and tribes.[160]

C. OKLAHOMA

Oklahoma enacted the Oklahoma Indian Child Welfare Act ("OICWA") in 1982, just four years after the passage of ICWA, to clarify "state policies and

150. *See id.* § 4(C)(4); § 12(B); § 21(C)(3)(j).

151. *Id.* § 21(C)(3).

152. *Id.* § 22(A).

153. *See The Indian Family Protection Act (IFPA) Has Passed the 2022 Legislative Session, and Has Been Signed Into Law*, INDIAN FAMILY PROTECTION ACT, https://perma.cc/L2F9-D3UJ (last visited Sept. 13, 2023) (discussing how IFPA "provide[s] care, protection[,] and promotion of cultural wellbeing for the Indian Tribal and Pueblo children and families").

154. H.B. 135 § 21(B), 2022 Leg., Reg. Sess. (N.M. 2022).

155. *Id.* § 19(G).

156. *Id.* § 23.

157. *Id.*

158. See ICWA Courts, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, https://perma.cc/JMN6-X6HW (last visited Mar. 5, 2023). Several other states have also incorporated ICWA courts to assist in Indian child welfare cases. *Id.*

159. *The Indian Family Protection Act Signed into Law*, COALITION TO STOP VIOLENCE AGAINST NATIVE WOMEN (Mar. 4, 2022), https://perma.cc/A2KT-5SE2.

160. *See generally id.* (emphasizing how IFPA was a historic piece of legislation that affords the highest protections in the country for Indian children and families).

procedures regarding the implementation by the State of Oklahoma of the federal [ICWA]."[161] OICWA establishes a state policy to fully cooperate with the 39 Indian tribes in Oklahoma in enforcing ICWA and recognizes that "Indian tribes and nations have a valid governmental interest in Indian children regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated."[162]

Although OICWA does not provide clarifying definitions for traditionally ambiguous terms—such as "active efforts"[163] and "good cause" to transfer the case to tribal court—it does provide heightened protections for Indian parents and children concerning emergency removal,[164] placement preferences,[165] and payment assistance under certain circumstances.[166] Also, in 2021, the Oklahoma Legislature authorized the State Director of the Department of Human Services and the Executive Director of the Office of Juvenile Affairs "to enter into agreements on behalf of the State with Indian Tribes in Oklahoma regarding the care and custody of Indian children and jurisdiction over child custody proceedings" under section 1919 of the federal Act.[167] This delegation of authority from the State Legislature to the Executive branch is further evidence of Oklahoma's heightened attempts to collaborate with tribes to advance the goals of both OICWA and ICWA.[168]

Moreover, after the Oklahoma Supreme Court recognized the existing Indian families exception,[169] the State's Legislature was able to counteract the

161. OKLA. STAT. tit. 10 § 40.1. (2023); *Oklahoma Indian Child Welfare Act Keeps Cultural Identity*, OKLA. HUM. SERV. (Nov. 14, 2000), https://perma.cc/7DZH-YTL6.

162. OKLA. STAT. tit. 10 § 40.1. (2023); Molly Young, *News Report Captures Economic Impact of Tribal Nations in Oklahoma*, THE OKLAHOMAN (Mar. 24, 2022), https://perma.cc/2FJF-ZN46.

163. Although OICWA does not define "active efforts," courts there have interpreted § 1912(d) of the federal IWCA to require more than just "reasonable efforts"—the standard applied in child custody proceedings not involving ICWA. *See In re* J.S., 177 P.3d 590, 592-93 (Okla. Civ. App. 2008). This interpretation, which is subject to alteration within Oklahoma's state courts, demonstrates the efficacy of defining "active efforts" in state ICW laws—for example, like in Michigan and New Mexico. *Supra* Sections III.A, III.B (describing Michigan and New Mexico's definition of "active efforts").

164. 10 OKLA. STAT. tit. § 40.5 (2023). In the event of an emergency removal, OICWA dictates that the court order authorizing the removal be accompanied by an affidavit containing explicit details with regard to the child, parents, circumstances leading up to removal, and next steps to reunify the family. *Id.*

165. *Id.* § 40.6. OICWA adds preadjudicatory placements to the list of placement preferences under § 1915 of the federal Act, as well as a proviso that mandates the maximum utilization of tribal services "in securing placement consistent with the provisions of [OICWA]." *Id.*

166. *Id.* § 40.8. This section provides that if the tribe and State have entered into an agreement, the State will cover the costs of the tribal foster care to the same extent it covers the costs of state-sponsored foster homes. *Id.*

167. *Id.* § 40.7 (2023).

168. *See generally Separation of Powers: State-Tribal Relations and Interstate Compacts*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://perma.cc/8MUW-FDQ2 (last visited Sept. 13, 2023) (discussing how state and tribal agency coordination is essential to promoting state-tribal policy issues like ICWA).

169. *See In re* Adoption of D.M.J., 741 P.2d 1386, 1389 (Okla. 1985). The existing Indian families doctrine is a judicially crafted rule that allows courts to sidestep ICWA if the case does not involve "the 'removal' of an Indian child from an 'existing Indian family or home.'" Lorrie M. Graham, "*The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 35 (1998). A few state courts have adopted this doctrine, reasoning that "Congress never intended

judicial exception more easily because there was an existing state ICW law on the books.[170] The Legislature merely added an extra clause to a provision of OICWA, whereafter the Oklahoma Supreme Court affirmed the new legislation and overruled its precedent applying the existing Indian families exception.[171] It is clear now that the Oklahoma Legislature did not desire or intend for the existing Indian families exception to take hold in the State; and without OICWA in place, it would have been more difficult for the Legislature to cure the Oklahoma Supreme Court's adoption of that exception.[172] Thus, the ability to mitigate issues surrounding the law merely because of the law's existence further buttresses the importance of state ICW laws.[173] The fact that Oklahoma has enacted its own ICW statute also signifies that Indian child welfare is a priority for the State and reinforces tribal-state collaboration.[174] This notion is also supported by Oklahoma's adoption of an ICWA court exclusively operating in matters with respect to Indian child welfare.[175]

D. TRIBAL-STATE COLLABORATION

Although the main thrust of this comment is to provide a pragmatic roadmap for South Dakota to implement a state ICW statute, tribal-state collaboration can help further the welfare of Indian children in the absence of legislation; moreover, such collaboration may lay the foundation for a future ICW statute.[176] Generally, states cannot make any decisions that would affect Indian tribes—such as decisions affecting their property or citizens on the reservation—without the tribes' participation and consent.[177] One method for both sovereigns to collaboratively make decisions and problem solve is through

ICWA to apply to American Indian children who had not lived in an Indian cultural environment or bonded with an Indian parent, or whose parent has no apparent connection with his or her community." *Id.*

170. *See* OKLA. STAT. tit. 10 § 40.3. (2023).

171. *Id.* ("Except as provided for in subsection A of this section, the Oklahoma Indian Child Welfare Act applies to all state voluntary and involuntary child custody court proceedings involving Indian children, *regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated*.") (emphasis added); *see In re* Baby Boy L., 103 P.3d 1099, 1106 (2004) ("The change in the statute is an explicit repudiation of the 'existing Indian family exception.'").

172. This difficulty would stem from the political capital necessary to enact a bill surrounding tribal and state relations in general. *See* Fort, *Waves of Education*, *supra* note 6, at 534 (describing the "difficulty of passing legislation related to tribes without the legislature bogging it down in other issues related to tribal and state relations").

173. *Contra id.* (explaining the difficulty in passing any tribal relations bill in a state legislature).

174. *See generally Separation of Powers*, *supra* note 168 ("The health and well-being of tribal citizens and tribal communities enhance the overall health of a state.").

175. See ICWA Courts, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, https://perma.cc/JMN6-X6HW (last visited Mar. 5, 2023).

176. *See* Fort, *Waves of Education*, *supra* note 6 at 551 (concluding that some states have entered into tribal-state agreements in furthering ICWA).

177. *See What Does Tribal Sovereignty Mean to American Indians and Alaska Natives*?, U.S. DEP'T OF THE INTERIOR, https://perma.cc/327Z-CZPC (last visited Mar. 18, 2023).

tribal-state agreements.[178] Tribal-state agreements are authorized under ICWA and can support ICWA's twin aims of "protect[ing] the best interests of Indian children" while also "promot[ing] the stability and security of Indian tribes and families. . . ."[179] Section 1919 of ICWA permits tribes and states to collaborate "respecting care and custody of Indian children and jurisdiction over child custody proceedings. . . ."[180] Because ICWA provides minimum federal standards for child custody proceedings, and because ICWA consists of certain ambiguous provisions, tribes and states can address several topics of concern surrounding Indian child welfare proceedings without states necessarily passing their own versions of ICWA or any laws at all.[181]

ICWA specifically provides for tribal-state agreements surrounding care and custody matters, jurisdictional issues over child custody proceedings, and tribal-state concurrent jurisdiction.[182] These agreements can clarify ambiguities in ICWA, including notification of emergency removal from the state, placement preference arrangements, who pays for placements, and foster home recruitment.[183] Like state ICW statutes, tribal-state agreements must follow the minimum standards set forth in ICWA—some jurisdictions allow expanding protections from the minimum standards, while others do not.[184] These agreements are subject to a 180-day written revocation notice by either party, but the revocations do not affect any proceeding where a court has already assumed jurisdiction.[185]

The latest data, from 2017, explains that ten states have entered into agreements with thirty-seven tribes under Section 1919 of ICWA.[186] To date, South Dakota does not have any tribal-state agreements in place with regard to Indian child welfare.[187] Perhaps for South Dakota, the tribal-state agreements

178. *See generally State/Tribal Relations*, *supra* note 5 (discussing how "it is important that both tribes and states recognize the benefits of understanding intergovernmental processes and potential avenues for collaboration").

179. 25 U.S.C. § 1902 (2023).

180. *Id.* § 1919.

181. *See, e.g.,* Brief for the States of California et al., *supra* note 116, at 8 ("For example, court systems in Arizona, California, and Michigan have established units or adopted guidance focused on enhancing coordination with Tribes in custody proceedings."). Importantly, as Part V, *infra*, details, a state ICW law would be a better long-term solution than tribal-state agreements.

182. 25 U.S.C. § 1919 (2023).

183. *See Topic 10.*, *supra* note 113.

184. *See id.*

185. 25 U.S.C. § 1919(b) (2023).

186. *A Survey and Analysis of Tribal-State Indian Child Welfare Act Agreements*, ASS'N ON AM. INDIAN AFF. 2 (June 2017), https://perma.cc/9QE3-WREV.

187. Notably, South Dakota did have state-tribal ICWA memoranda of understanding (MOU's) in place with five tribes within the State, but these agreements expired in May of 2021. *See Resources: Indian Child Welfare Act*, SO. DAK. DEP'T OF TRIBAL REL., https://perma.cc/D4X8-K2FX (last visited Aug. 1, 2023); *see also Indian Child Welfare Act*, SO. DAK. DEP'T OF SOC. SERV., https://perma.cc/MLA6-SK6V (last visited Aug. 1, 2023) (depicting then-current tribal-State Title IV-E agreements—but the webpage has not been updated since 2020). Currently, however, there are tribal-state agreements that exist in South Dakota that prove these sovereigns can indeed work together. *See Resources: State Tribal Agreements*, SO. DAK. DEP'T OF TRIBAL REL., https://perma.cc/Q7ZB-3KRA (last visited Aug. 1, 2023) [hereinafter *Resources: State Tribal Agreements*].

currently in place can act as a catalyst to facilitate an agreement under section 1919 or a more ambitious goal like a state ICW law.[188] For example, in Michigan, the State and tribes were "leaders in tribal-state agreements" before their negotiations culminated into a legislative proposal (and eventual codification) in favor of a state ICW law (now MIFPA).[189] The South Dakota Supreme Court did organize a successful tribal-state judicial forum to resolve jurisdictional disputes, but that was over thirty years ago.[190] Conceivably, the South Dakota Supreme Court could host another tribal-state judicial forum to encourage cooperation between the State and Tribal justice systems within South Dakota.[191] Collaboration has to begin somewhere, and a judicial forum is an appropriate starting point to advance relations in furtherance of more robust tribal-state agreements.[192]

IV. A STATE ICW LAW FOR SOUTH DAKOTA

A state ICW law may seem redundant because ICWA applies to all fifty states and was recently upheld as constitutional by the Supreme Court.[193] However, state ICW laws help clear up ambiguities in the federal Act and can further align it with state law—even without expanding the rights conferred by the federal ICWA.[194] Noticeably, there has been a revived interest in state ICW laws due to the proceedings and the Court's ultimate decision to uphold ICWA in *Brackeen*.[195] Although ICWA survives, many areas of improvement within the Act still remain, providing states the opportunity to tailor solutions for their specific needs.[196] Enacting ICW laws empowers states to participate in the legislative and implementation process while also flexing their own autonomy.[197] Since it is highly unlikely Congress will act to improve ICWA,[198]

188. South Dakota currently has taxation agreements with seven of the nine tribes within the state; gaming compacts with all nine tribes; game, fish, and parks agreements with five tribes; public safety agreements with three tribes; transportation agreements with three tribes; and a UCC agreement with two tribes in the State. *Resources: State Tribal Agreements supra* note 187.

189. *See* Fort, *Waves of Education*, *supra* note 6, at 532-33.

190. Pommersheim, *supra* note 2, at 275.

191. *See* Fort, *Waves of Education*, *supra* note 6, at 533 (explaining how the Michigan Supreme Court held a judicial forum to advance cooperation between the tribes and the State).

192. *See generally* Pommersheim, *supra* note 2, at 275 ("[T]hese landmark tribal-state judicial cooperative efforts may develop the most promising model for mutual tribal-state problem solving.").

193. 25 U.S.C. §§ 1901-1963 (2023); Haaland v. Brackeen, 143 S. Ct. 1609 (2023).

194. *See generally* Fort, *Waves of Education*, *supra* note 6, at 541 (stating that a state ICW law can fix "some of the ambiguities in the federal ICWA" and "bring[] some of it in line with individual state laws").

195. Wyoming, Montana, New Mexico, North Dakota, Nevada, and Maine have all passed their own ICW law within the last year. *See* TURTLE TALK, *supra* note 18. Arizona, Utah, and South Dakota have all introduced a proposal for a state ICW law, a further inquiry into a state ICW law, or a state-ICWA task force. *Id.*

196. *See supra* Part III (describing three different states that have adopted their own ICW law).

197. *See* Martin, *supra* note 98 (discussing the benefits of state ICW laws).

198. *See* Scanlon, *supra* note 69, at 636 (expressing that "despite several attempts to amend the ICWA, Congress has yet to alter any aspect of the original law").

state ICW laws are now the most viable option to further protect Indian families and communities within their borders.[199]

The less obvious answer as to why state ICW laws are necessary is that many state courts and actors are unenthusiastic and reluctant to abide by the Act.[200] In South Dakota, almost twenty years have passed since any comprehensive analysis has taken place on the State's compliance with ICWA.[201] That report—the South Dakota ICWA Commission Report of 2004—revealed multiple procedural deficiencies in the State's compliance with ICWA.[202] Because of these deficiencies, the South Dakota Legislature responded in 2005 and 2006, enacting piecemeal legislation regarding notice and placement preferences.[203] In an attempt to review the outcomes of the legislation responding to the 2004 Report, a bill was introduced in February of 2023 in the South Dakota Senate to establish a task force addressing Indian child welfare in the State.[204] That bill made it through the Senate (Y-22, N-12), but ultimately failed in the House of Representatives (Y-26, N-42).[205] Other bills related to Indian child welfare died even earlier in the legislative process.[206] Unfortunately, the current level of South Dakota's compliance with ICWA is uncertain, and the Legislature appears indifferent in determining why.[207] Speculation remains as to whether South Dakota circuit courts and actors are complying with the law—and given South Dakota's history of non-compliance, the State is likely still non-compliant.[208]

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199. Colorado, Montana, North Dakota, and Wyoming most recently passed their own ICWA to insulate themselves from the then-pending *Brackeen* decision. *See* Joshi, *supra* note 18 (providing a map that shows the states that have passed their own ICW law).

200. *See About ICWA*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, https://perma.cc/5K5Z-96CP (last visited Mar. 17, 2023) ("compliance with [ICWA] has been uneven at best."); Kelsey Vujnich, *A Brief Overview of the Indian Child Welfare Act, State Court Responses, and Actions Taken in the Past Decade to Improve Implementation Outcomes*, 26 J. AM. ACAD. MATRIM. LAW. 183, 207 (2013) (asserting that states struggle to meet the goals of ICWA); *see also* Fletcher & Singel, *Lawyering ICWA*, *supra* note 99, at 1785 (maintaining that state actors openly discriminating against Indian families "is still a serious problem because states like South Dakota do not contact Indian foster families, preferring to place children with non-Indian families").

201. *See* Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247, 267 (2007).

202. *Id.*

203. *See Indian Child Welfare Act*, *supra* note 187. However, twenty of the twenty-one recommendations provided by the Commission in 2004 to the South Dakota Department of Social Services were implemented by the Department. Annie Todd & Makenzie Huber, *South Dakota Inspired ICWA But Still Has a High Rate of Native Children in Foster Care*, ARGUS LEADER (Nov. 6, 2023), https://perma.cc/RP6G-X5FJ [hereinafter Todd & Huber ICWA Article].

204. S.B. 191, 2023 Leg., 1st Sess. (S.D. 2023).

205. *Id.*

206. H.B. 1229, 2023 Leg., 1st Sess. (S.D. 2023); H.B. 1168, 2023 Leg., 1st Sess. (S.D. 2023).

207. *See* S.B. 191, 2023 Leg., 1st Sess. (S.D. 2023); *see also* Todd & Huber ICWA Article, *supra* note 203 (describing the bill to create a task force and how it could have shed light on South Dakota's compliance with ICWA).

208. *See* Stephanie Woodard, *South Dakota Tribes Charge State With ICWA Violations*, INDIAN COUNTRY TIMES (Sept. 13, 2018), https://perma.cc/4R2E-9243 (examining "plausible allegations" from a "2011 National Public Radio story claiming that a goldmine in federal dollars flow into South Dakota, thanks to the high proportion of Lakota and Dakota children from the state's nine Sioux reservations in the foster-care system").

However, it was noted on the House floor in February 2023 that these bills failed in South Dakota because of the federal Act's potential unconstitutionality.[209] Because the Act was "in flux," the South Dakota Legislature did not want to pass a law that was ultimately unconstitutional.[210] Although the Supreme Court left the Equal Protection issue for another day, ICWA was upheld in *Brackeen*, and the South Dakota Legislature can and should seriously consider a state ICW law as soon as possible.[211] Indeed, Representative Tamara St. John has declared her intent to introduce a state ICW bill during the 2024 legislative session.[212]

But before South Dakota adopts its own version of ICWA, tribal-state relations may need to improve.[213] Presumably to further relations, a Tribal-State Relations Committee meeting was assembled in Agency Village, South Dakota, in late June 2023, to examine the implications of the newly-decided *Brackeen* decision upholding ICWA.[214] In the wake of ICWA's constitutionality, the Committee members discussed the importance of adopting South Dakota's own ICW law because the federal Act is not without gaps.[215] It is uncertain how receptive the representatives on behalf of the State were to the renewed calls for a South Dakota version of the Act.[216] But continuing the conversation and collaboration is crucial for garnering support for a South Dakota ICW statute.[217]

Additionally, as mentioned above, perhaps hosting another judicial forum can provide a critical spark, fostering much-needed collaboration between the tribes and the State.[218] During this time, there can be expanded educational opportunities for both sides to better understand each other, bolstering cultural competency and respect.[219] The next step could then involve discussions and negotiations that increase the breadth of tribal-state agreements, with a focus on

209. *See* Victoria Wicks, *Two ICWA Bills Fail in the House*, SDPB RADIO (Feb. 7, 2023), https://perma.cc/7ERE-KLTQ (quoting House Rep. Tony Venhuizen: "[s]o as important as this issue is, at a time when the law is in flux before the Supreme Court, I would submit that this is not the time to make this change," he said. "We should wait and see what happens and consider a law like this next year.").

210. *Id.*

211. Haaland v. Brackeen, 143 S. Ct. 1609 (2023).

212. Todd & Huber ICWA Article, *supra* note 203. By the time of this article's submission for publication, Rep. St. John's proposed ICW law has neither been introduced nor have its contents been made public.

213. *See generally* Fort, *Waves of Education*, *supra* note 6, at 535 (explaining how improved tribal-state relations culminated into "a legislative proposal to incorporate ICWA into state law" in Michigan).

214. Caleb Barber, *South Dakota Needs Specific Child Welfare Laws for Native Americans, Officials Say*, THE DAILY REPUBLIC (June 27, 2023), https://perma.cc/59W8-RHAH.

215. *See generally id.* (explaining that "lawmakers should not expect the federal upholding of ICWA to automatically protect South Dakota Native children from being removed from their families [because] challenges to [tribal] sovereignty are still coming").

216. *Id.*

217. *See supra* Section III.D (relaying the importance of tribal-state collaboration).

218. *See generally* Pommersheim, *supra* note 2, at 275 (noting how "the South Dakota Supreme Court organized a successful Tribal-State Judicial Conference" in the early 1990's).

219. *See generally* Fort, *Waves of Education*, *supra* note 6, at 533 (illustrating the effectiveness of a tribal-state judicial forum).

agreements concerning Indian child welfare.[220] In theory, all of this would culminate into better relations between the sovereigns that could optimistically lead to the State codifying its own ICW law "to protect the best interests of Indian children" while also "promot[ing] the stability and security of Indian tribes and families . . . ."[221] The stability and security of Indian children are, in many ways, equivalent to the stability and security of South Dakota.[222] By passing its own law on Indian child welfare—arguably the most important issue to Indian people[223]—South Dakota would be demonstrating its commitment to Indian tribes, communities, and children, and the value it places on their health and well-being. Even something as simple as hiring an administrator dedicated to tribal-state relations within the State judiciary could serve to further tribal-state relations and ultimately advance ICWA compliance among the judges and state actors across South Dakota.[224] Indeed, strong tribes contribute to strong states.[225]

Significantly, South Dakota clearly asserted its position in support of ICWA as it united with the twenty-five other amici states in *Brackeen* by describing ICWA as "a critical tool for protecting Indian children and fostering state-tribal collaboration."[226] This is a crucial affirmation for Native American tribes and communities within South Dakota and a step in the right direction for tribal-state relations. Because South Dakota supported ICWA at the Supreme Court, there is a real chance the State would be amenable to adopting an ICW law that—at the very least—models the bills that ultimately failed in the 2023 legislative session, which were designed to strengthen placement preferences, define "active efforts," and create a task force to address Indian child welfare in the State.[227] Still, South Dakota should go further and enact an ICW law that incentivizes tribal-state collaboration and affords greater protections for Indian parents and children—much like Oklahoma's ICW law.[228]

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220. *Id.* at 534 ("Aside from ICWA, the forum may collect and evaluate other intergovernmental agreements, draft agreements to prevent litigation, and otherwise work together cooperatively").

221. 25 U.S.C. § 1902 (2023).

222. *See generally* Kunesh, *supra* note 201, at 285 ("The most valuable resource of a society is its children, who will one day become adults and assume responsibilities both as members in the social community and as citizens of the political community.").

223. *See generally* Danelle J. Daugherty, *Children are Sacred: Looking Beyond Best Interests of the Child to Establish Effective Tribal-State Cooperative Child Support Advocacy Agreements in South Dakota*, 47 S.D. L. REV. 282, 293 (2002) (describing how Indian children are the center of Indian society and that "[t]he children of the tribe represent[] the continued existence of the tribe").

224. *See* Fort, *Observing Change*, *supra* note 21, at 8 (describing how ICWA compliance has been furthered in Michigan with the help of the State Court Administrative Office staff person dedicated to tribal-state court relations).

225. *Separation of Powers*, *supra* note 168.

226. *See* Brief for the States of California et al., *supra* note 116, at 4. It was the Acting Attorney General, Mark Vargo, that signed the brief on behalf of South Dakota in support of ICWA submitted on August 19, 2022. *See generally* Eric Mayer, *Gov. Noem Appoints Vargo as New AG*, KELOLAND (June 28, 2022), https://perma.cc/N3VN-CJ2Y (stating that Mark Vargo was appointed South Dakota's Acting Attorney General on June 28, 2022).

227. *See supra* notes 24-26, 202-10 and accompanying text.

228. *See supra* Section III.C (detailing Oklahoma's ICW law).

South Dakota's adoption of an ICW law similar to Oklahoma's is politically pragmatic—its adoption would be seen as less radical compared to the adoption of a relatively comprehensive state ICW law like that of New Mexico.[229] Most importantly, an ICW law similar to Oklahoma's would ameliorate many practical issues surrounding the application of ICWA that South Dakota circuit courts have had difficulty addressing.[230] Specifically, this is an opportunity to clarify any ambiguities the courts have dealt with when effectuating the Act—terms such as "active efforts," "qualified expert witness," and "licensing."[231] Clarifying ambiguities in the federal Act further empowers South Dakota courts to follow the Act when necessary and incentivizes tribal-state agreements.[232] For example, OICWA provides that if a tribe and state have entered into an agreement, the state will pay the costs of the tribal foster care to the same extent it pays the costs of state-licensed foster homes.[233] Tribal-state agreements may then snowball into additional discussions surrounding other potential solutions to the problems underlying ICWA, such as the establishment of a South Dakota ICWA court[234]—further bolstering the utility of a tribal-state judicial forum.[235]

Adopting a state ICW law similar to Oklahoma's would also signify that Indian children are a priority for South Dakota and would establish tribal-state cooperation as a state policy—further generating relationship-building opportunities.[236] Specific provisions could target deficiencies and continually improve the system through the collection of local and statewide data.[237] Further, the law could include language mandating the State to honor tribal licensing of foster homes.[238] This would encourage tribal-state cooperation and help the State locate suitable foster care placements for Native American children.[239] Finally, in passing an ICW law like Oklahoma's, South Dakota

229. *See supra* Section III.B (explaining how New Mexico's ICW law likely provides the highest protections for Indian families and children of any state ICW law in the country).

230. *See supra* Section III.C (describing how OICWA provides supplemented placement preferences and clarifies emergency removal procedures).

231. *See* Barber, *supra* note 214 (pointing to "Minnesota's Indian Family Preservation Act, which clarifies and defines language used in the ICWA, such as 'qualified expert witness' or 'licensing,' which . . . helps Department of Social Services work with tribes to better connect Native children to qualified Native foster homes and family members.") (citing B.J. Jones, the Executive Director of University of North Dakota's Tribal Judicial Institute and a tribal court judge for more than 20 years).

232. *See id.* (describing how these clarifications promote tribal-state collaboration).

233. 10 OKLA. STAT. tit. § 40.8.

234. The creation of a South Dakota ICWA court will also increase the expertise of judges, attorneys, and social workers with regard to ICWA. See ICWA Courts, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, https://perma.cc/JMN6-X6HW (last visited Mar. 19, 2023) (expressing that "[t]he community of ICWA participants have more focused education and skill-development of the relevant laws").

235. *See* Pommersheim, *supra* note 2, at 273 (illustrating the importance of formal and informal forums for positive tribal-state relations).

236. *See* discussion *supra* Sections III.C, III.D (arguing Oklahoma's ICW statute prioritized Indian child welfare and thus furthered cooperation between the tribes and State).

237. *See* Martin, *supra* note 98 (interviewing, among others, Sarah Kastelic, Executive Director of the National Indian Child Welfare Association).

238. *Id.*

239. *See* Barber, *supra* note 214. (explaining that "[c]urrently, there is a lack of clarification from the state whether it will honor tribal licensing of foster homes").

would be affirming the validity of Indian tribes' inherent right to be the primary decision-makers in issues concerning their children—especially off the reservation—which is a major step towards tribal empowerment and a step away from state paternalism.[240]

V. CONCLUSION

The advancement of tribal-state relations in South Dakota relies upon, in large part, cultural understanding.[241] Tribal nations have generally been required to understand American culture through forced assimilation, but states have not been forced to understand tribal culture.[242] If tribal-state relations are to improve, South Dakotans should educate themselves on tribal customs and familial norms of the tribes within the State.[243] Cultural development and understanding between the Tribes and State can certainly help foster negotiations with regard to Indian child welfare.[244] That process can ignite healing, potentially eradicating the "ignorance that has taken root in the arid historical and political soil that permeates much of the region."[245]

Tribal-state agreements are potentially one way to bridge the cultural gap and protect Indian children.[246] Tribal-state agreements may indeed be easier to accomplish than legislation because legislation requires far more political capital

240. *See, e.g.*, MINN. SESS. LAW SERV. §260.754(d) (2023) ("The state of Minnesota recognizes all federally recognized Indian Tribes as having the inherent authority to determine their own jurisdiction for any and all Indian child custody or child placement proceedings regardless of whether the Tribe's members are on or off the reservation and regardless of the procedural posture of the proceeding."); *see generally* Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1278 (1995) (discussing the federal government's historically paternalistic policies in Indian affairs and how the policy of tribal self-determination has worked towards empowering Indian tribes).

241. *See generally* Pommersheim, *supra* note 2, at 271-73 (expressing that "state and local governments simply do not educate their citizens about such things as reservations, treaties, and tribal governments"). I submit that this educational reform should also encompass cultural understanding—that is, learning about the Dakota and Lakota way of life and how family (especially children) is placed at the center of this way of life. *See* Daugherty, *supra* note 223 (explaining how culturally important family is to the Tribes in South Dakota and how the Dakota word for "children"—wakanyeja—translates as "sacred beings").

242. *See generally* Andrea A. Curico, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L. J. 45, 51-76 (2006) (analyzing certain federal policies and their effects over time with regard to American Indians).

243. *See generally* Pommersheim, *supra* note 2, at 272-73 (asserting how South Dakota must increase educational efforts surrounding "historical and contemporary tribal and reservation realit[ies]" if tribal-state relations are to improve). South Dakota has struggled in its attempt to inform its citizenry of the history and culture of the Native American tribes in South Dakota. *See, e.g.*, C.J. Keene, *Social Studies Standards Accepted Despite Opposition*, SDPB RADIO (Apr. 17, 2023), https://perma.cc/6SNR-KJE3 (stating how the new standards "lack . . . emphasis on Native American history"); C.J. Keene, *South Dakota Tribes Voice Opposition to Social Studies Standards*, SDPB RADIO (Apr. 9, 2023), https://perma.cc/EP5H-WGE4 (illuminating tribal dissatisfaction with the new South Dakota social studies standards).

244. *See* Pommersheim, *supra* note 2, at 272 (discussing cultural education and how "[i]t reflects the inability in South Dakota and much of the West to identify what it is that is unique to the region that needs to be preserved, in order to enhance and to mold a meaningful future").

245. *Id.* at 271.

246. *See generally* Section III.D (explaining the benefits of tribal-state agreements).

than sovereign-to-sovereign cooperative agreements.[247] However, South Dakota's enactment of its own ICW law would be superior to a tribal-state agreement because state law would reach all nine Tribes in South Dakota, whereas a separate tribal-state agreement for each of the nine Tribes would be necessary to obtain the same effect as a state ICW law.[248] Further, a state ICW law would be better for the long term.[249] The federal ICWA provides crucial minimum standards for the protection, well-being, and preservation of Indian tribes and families.[250] But state ICW laws can advance these overarching goals, augment the federal Act, and formally establish as a state policy that states are prioritizing Indian nations and their people.[251]

ICWA has drastically cut down the disparities between non-Indian and Indian removal from their families; however, similar problems still persist, underpinning the continuing necessity for the Act's protections.[252] Many times, state resistance to ICWA leads to the complete bypass of its provisions.[253] By enacting its own ICW law, South Dakota can facilitate fidelity to the federal Act.[254] Ultimately, South Dakota, and all states, should critically consider enacting a state version of ICWA, thereby furthering the protection and preservation of Indian tribes, families, and children, and creating a more meaningful future for everyone in South Dakota.[255]

247. *See* Fort, *Waves of Education*, *supra* note 6, at 534 (describing how tribal-state court agreements may be easier to accomplish than legislation because of the amount of political capital it takes in passing legislation).

248. *See* Harvard Law Review, *Intergovernmental Compacts in Native American Law: Models For Expanded Usage*, 112 HARV. L. REV. 922, 923 (1999) (mentioning that "legislation [can] offer certain advantages over compacting").

249. *See* 25 U.S.C. § 1919(b) (2023) (allowing for revocation of the agreement with 180-day notice to the other party).

250. *See* Section II.B (providing an overview of ICWA).

251. *See* Part III (explaining how state ICW laws can help to clarify ambiguities in effectuating ICWA).

252. *See About ICWA*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, https://perma.cc/5K5Z-96CP (last visited Mar. 17, 2023) ("Native families are four times more likely to have their children removed and placed in foster care than their White counterparts.").

253. Kruck, *supra* note 127.

254. *See* Fort, *Waves of Education*, *supra* note 6, at 539 (asserting that although "ICWA is a federal law and the states are required to follow it, state judges often render inconsistent decisions").

255. *See supra* Part IV (explaining why South Dakota—and all states—should pass their own ICW law in furtherance of the federal Act).