

TIME

## The Fight Over Native American Adoptions Is About More Than Just the Children

By Abigail Abrams | July 2, 2019



Each time Elisia Manuel sees her daughter Precious rehearsing traditional basket dancing and humming tribal songs around their home in Casa Grande, Arizona, she's overwhelmed with emotion. "It's beautiful to witness," the mother of three says. "She's part of the community."

This wasn't always guaranteed. Elisia and her husband Tecumseh, who is a member of the Gila River Indian Community, became foster parents in 2012 after learning about the great need for Native American foster families in Arizona. They couldn't have biological children of their own and felt a deep calling to help other families, Elisia says.

Within two years, the couple had taken in two foster children and adopted three more. Their two adopted sons are biological brothers, and each came to the Manuels when they were just days old.

Their daughter, Precious, also needed to leave her home as a baby but was going to be placed with a non-Native family at first. "She wouldn't have received any education about her culture," Elisia says. She knows what that would be like. Elisia's family is Hispanic and has Apache roots, but, her grandmother was adopted and raised away from her biological family, so Elisia did not grow up learning about Apache culture and is not an enrolled tribal member.

“I don’t know exactly who I am as an Apache woman. I’m learning that as an adult,” she says. “Now that I have my kids, I know that I can’t keep them out of it.” So when the case worker called the Manuels and explained about the baby girl, the couple sprang into action and petitioned to adopt her under a federal law called the **Indian Child Welfare Act**.

Passed in 1978, the law sets requirements for what states must do when an American Indian kid comes into contact with the child welfare system. It says that Native American children should be placed with Native foster and adoptive families whenever possible, and before that, states need to make “active efforts” to keep Native children with their biological parents in the first place. Created to protect Native American families and preserve their heritage following centuries of policies aimed at forcibly assimilating Indian children into white culture, the law has become increasingly controversial as special interest groups have argued that it actually prioritizes the tribes over the best interests of the children it is meant to help.

Now the law is facing its most serious challenge yet. In a case that has implications far beyond the adoptions of American Indian children, three non-Native families and three Republican state attorneys general have sued the federal government saying that the ICWA relies on racial classifications that violate the equal protection clause of the U.S. Constitution.

In October, a federal judge in Texas agreed, **striking down the Indian Child Welfare Act for the first time in its 41-year history**. The government, joined by five tribes and supported by many more, **appealed the case to the Fifth Circuit Court of Appeals**, but advocates of the law are worried that if the court upholds the earlier decision, it could call into question all other federal Indian laws.

The battle is at once profoundly personal for each family involved and simultaneously so broad that many believe it could reshape U.S.-Indian relations for generations to come. It is about reckoning with the nation’s brutal past and protecting the possibility of its future. And ultimately the questions remain the same as they often have throughout U.S. history: Who will the government prioritize, and will American Indians once again be forced to give something up, as the country seeks to advance the law of the land?



The Manuel family lives near the Gila River Indian Community in Arizona and spends time with relatives there. *Courtesy of the Manuel family*

**When Congress passed** the Indian Child Welfare Act in 1978, lawmakers from both parties were responding to more than two centuries of efforts by various governmental, religious and social welfare agencies to impose American values onto tribal communities. “There’s this continuity of this idea that Indian children don’t really belong with their families and they would be better off with white families,” says Margaret Jacobs, a historian at University of Nebraska-Lincoln who studies the treatment of Indian children in the U.S.

The most well-known of these policies started in the late 19th century, when the government took many Indian children from their parents and put them in boarding schools to “civilize” them. Children had their hair cut, were required to speak English and were taught Christianity. More than 75% of Indian children in school at the turn of the 20th century were brought up in these boarding schools, Jacobs says.

Federal policy changed in the 1930s when the government realized boarding schools were expensive and were not achieving the goal of assimilation. But they had to find a place for all these children, so they turned to the child welfare system. One infamous federal program called the Indian Adoption Project resulted in hundreds of Indian children in Western states being removed from their parents and given to white families, often several states away. This and other programs like it lasted for about 20 years starting the 1950s. Parents were often pressured to give up children, while others had children taken away because everything from poverty to single motherhood was called “abuse.”

The government’s goal was assimilation, Jacobs says, though individual social workers likely had good intentions. “But they are embedded in a society where the overriding belief is that Indian families can’t take care of their children,” she said.

By the time the Indian Child Welfare Act was passed in 1978, between 25 and 35% of all Native children had been removed from their parents, according to research done by the [Association on American Indian Affairs](#). And 85 to 95% of those children, Jacobs says, were living in non-Native homes.

“The laws that have been put in place and are active today are recovery from that early federal Indian policy that shouted ‘we have to kill the Indian and save the man,’” says Shannon Keller O’Laughlin, executive director of the Association on American Indian Affairs.

But as with many federal laws, ICWA doesn’t always work perfectly.

Like the Manuels, Chad and Jennifer Brackeen felt a calling to help children. They already had two kids, but knew lots of children in Texas needed homes, so they signed up to become foster parents. The second child placed with them was a nine-month-old baby, known in court documents as “A.L.M.” The Brackeens were told he would only be with them for a few months

because he was Native American. The couple was happy to give the baby a safe place to stay, but after A.L.M. had been with them for a year and his birth parents had their parental rights terminated, the Brackeens began to wonder what would happen to him.

“He thinks we’re his family and we think we’re his family,” Jennifer Brackeen remembers thinking. “Surely we can adopt him.”

What seemed like a simple decision turned out to be much more complicated. Despite the support of A.L.M.’s birth parents, a state family court denied the Brackeens’ petition to adopt him. Under ICWA, state agencies must notify Native American tribes when children who are tribal members or eligible for membership enter the system, and the state must prioritize placing Native children with their families, their tribe or another Native community. If none of these is in the child’s best interest, anyone involved can argue there is “good cause” to deviate from ICWA’s placement preferences.

In the Brackeens’ case, the Navajo tribe (to which A.L.M.’s mother belongs) wanted to place him with an unrelated Navajo couple in New Mexico, and the judge ruled the Brackeens did not prove there was “good cause” to adopt A.L.M. into a non-Native home instead. The Brackeens didn’t know anything about ICWA or its history, but they knew they wanted to keep A.L.M. So they decided to fight the decision.

Jennifer read through the full 1978 law while Chad reached out to a lawyer specializing in ICWA who the couple heard about through a podcast. That lawyer connected them with a high-powered D.C. legal team that suggested they not only appeal the family court decision, but also sue the federal government to overturn ICWA at the national level. In early 2018, the Brackeens finalized their adoption of A.L.M. But they still spent months “terrified” they’d lose him and paid thousands of dollars in legal fees, they say. They remain committed — along with the two other white families who joined their federal suit — to blocking the law so other parents and children don’t have the same experience they had.



Rebecca Black and her mother, Karen Myrtle Black, in 1984, the year they reunited. *Courtesy of Rebecca Black*

followed properly.

**Over the last 40 years**, critics have challenged ICWA by highlighting a small number of high-profile cases that have had difficult conclusions. There have been instances, for example, when a Native child is placed with non-Native foster parents and lives there for years as a dispute plays out in court, but ultimately has to leave that family to return to unfamiliar people in their tribal community. ICWA’s defenders say that while these stories are painful, they typically happen when the law is not

“The trouble with the anecdote is that you’re always going to be able to tell a story on either side that is compelling because you’re dealing with kids’ lives,” says Keith Harper, an attorney representing the tribes in the Brackeen case. “But the problem is that their anecdotes don’t reflect what is the reality out there.” If there’s an issue with ICWA, Harper and other tribal experts say, it’s not the law itself but the uneven implementation.

In fact, ICWA has near-universal backing among child welfare experts. After the law was passed with bipartisan support, it helped lead to more child welfare legislation, and its principles of providing culturally appropriate services to families and prioritizing placement with relatives are now considered best practices for all children. It is so prized that a group of 31 child welfare organizations filed a friend-of-the-court brief supporting the law in the Brackeen case.

There is very limited data on ICWA outcomes, as state and local governments often don’t track the necessary information, but research has shown that involvement in traditional Native American cultural activities can be linked to better mental health. And conversely, a [2017 study](#) from the Centers for American Indian and Alaska Native Health at the Colorado School of Public Health found that Native children adopted away from their families were more likely than their white counterparts to struggle with drug abuse, alcohol addiction, suicide, self-harm and other mental health issues.

In an ideal world, every state would have social workers who understand ICWA, social welfare agencies and tribal governments would have enough staff to give every case personal attention and there would be culturally appropriate support services available for families around the country. But the reality looks very different, says Melanie Sage, an assistant professor of social work at the University of Buffalo, who is conducting a five-year study with a team in North Dakota aimed at finding ways to increase ICWA compliance. Both state and tribe child welfare systems are underfunded, caseloads are frequently larger than recommended, and with high turnover among child welfare workers, many never learn how to deal with ICWA before leaving their roles.

“This is a system issue, it can’t be solved in the courts by itself,” Sage said. “We need all these people to work together to strengthen the way the law is applied.”

Even when ICWA is followed, the way it’s applied varies widely based on location. Under the law, social service workers are required to make “active efforts” to keep Indian children with their families, a higher standard than the “reasonable efforts” made in most other child protection cases. This could mean arranging a ride to drug treatment for a parent rather than simply handing out a referral, or helping them sign up for positive parenting classes before removing a child. But there’s no real penalty for not doing so. A [2015 report](#) from child welfare organization Casey Family Programs noted that “without federal oversight, state legislatures, public child welfare authorities and courts are left to interpret ICWA provisions.”

Many American Indians say that even if ICWA does not always work as intended, they see it as crucial to protecting their children from what life was like before the law existed. For Rebecca Black, the history of painful adoptions goes back generations. Her grandmother's parental rights were terminated while she was sick in a hospital in the 1940s, Black says. A judge called her "morally unfit" and Black's mother, a child at the time, was taken away from her Quileute tribal community and adopted by a white family in a matter of days.

"The folks that adopted her made her feel that she should always be grateful that they saved her from this poor existence. They knew nothing about her culture," Black says. When Black's mother became pregnant with her as a teenager, her mother's adoptive parents sent her away to a school that "forced her to sign voluntary adoption papers." Black ran away from her own adoptive family as a teen, and only found her birth mother decades later after years of research.

Now as an adult, Black is a member of the Quinault Indian nation and lives at the Swinomish Indian Tribal Community in La Conner, Washington. After being involved in grassroots advocacy around ICWA for years, she became a state licensed foster home to see how the law worked in her area. But after she never received a call from the state, she began fostering children through the many tribes near her in Washington. Black now cares for two American Indian boys who came to her after an emergency situation in their sixth non-Native foster home.

"They're a part of our community and attached to their own tribal community," Black says. "Because I'm tribal I know how to do that. They are connected to all of those people. And they are secure in who they are as indigenous boys."

As Black notes, the history of removing Indian children from their families often doesn't feel very far in the past. Even today, 56% of Native children who are adopted still go to live with families outside their communities, according to the National Indian Child Welfare Association. Part of this is due to a severe shortage of American Indian foster homes. But Indian children are also represented in foster care at a rate of **nearly three times** the general population, and that disproportionality, which is more than 10 times the population in some states, has increased sharply in recent years.

ICWA's critics point to this imbalance and say the law prioritizes tribal interests over those of children who need homes right now. But tribal experts say this is the wrong way to look at it. Nancy Lucero, a social work research associate professor at University of Denver and a member of the Mississippi Choctaw nation who has worked on more than 1,000 ICWA cases, says keeping Indian children in their communities can have both immediate and lasting effects. She often hears judges say children can just reconnect with their culture later if they're raised in non-Native homes. "But the cultural association is a developmental process," she says.

“When you’re surrounded by people who are different from you, it’s something that you are constantly aware of. I’ve seen lots of young people who have a really hard time because they have been disconnected and struggle with who they are.” Harper, the tribal attorney, argues this is exactly what tribes want to avoid: “The best interests of the kids and the best interests of the tribes are aligned here,” he says.



Rebecca Black and her mother, Karen Myrtle Black, in 2012. Courtesy of Rebecca Black

**The even bigger concern for ICWA proponents**, though, is the challengers’ argument that ICWA is unconstitutional because it is based on racial discrimination.

One of the strongest champions of this idea is the Goldwater Institute, a libertarian think tank in Arizona that has been involved in at least a dozen legal challenges to ICWA since 2015. Along with other conservative think tanks and a group representing private adoption attorneys, the institute filed a friend-of-the-court brief supporting the Brackeen case. Timothy Sandefur, the group’s vice president of litigation, says he agrees with the goal of keeping families together, but believes ICWA is harming Indian children by requiring them to stay with families chosen by tribes, even when that situation is not the best one.

“It imposes heavier evidentiary requirements that means the state has to send abused and neglected Indian children back to the families that have abused and neglected them for longer,” Sandefur says. “And it does so simply because their ancestry falls into a certain genetic class.”

When the Goldwater Institute is not working on ICWA cases, its focuses on traditional conservative priorities: cutting taxes, championing charter schools and defending free speech. It

got involved in ICWA after a few staffers, including its former president, learned about the law as they were becoming foster parents, Sandefur says. When asked if the group had any Native American staffers working on its project devoted to challenging ICWA, Sandefur said no.

As it turned out, U.S. District Judge Reed O'Connor in Fort Worth agreed with Sandefur. In October, O'Connor ruled that ICWA is a race-based law, citing similar reasoning to the Goldwater Institute to say that it violates the Fifth Amendment's equal protection clause. (He also wrote that it violated states' rights by forcing them to follow a federal law and yield to tribes.) The decision landed like a bombshell for child welfare and tribal advocates alike. Tribal law experts say it goes against decades of legal precedent and has the potential to rewrite the way all Native Americans relate to the United States. Nearly every part of American Indian law is grounded in the idea that tribes are sovereign political organizations within the larger country, or "domestic dependent nations," in the words of the Supreme Court. This has meant that tribes have their own governments, courts and social service systems, but they receive certain funding from the United States. It also means they, like the U.S. or any other nation, choose their own membership criteria.

Part of the controversy is that many tribes include "blood quantum," a measure of Indian blood, in their membership criteria. Sandefur says this is proof that ICWA is based on racial categories. But not all tribes use blood quantum, and each tribe has different rules about how the system is considered along with other factors. Jacobs, the historian, notes that Native Americans never wanted to define membership this way until the U.S. government forced them to do so to shrink tribal rolls.

"The system of so-called 'blood quantum' that the U.S. government introduced and imposed on tribes about creating their own definition of membership is now being used against the tribes to say that they're being racist," she says. Beyond this, ICWA's defenders argue, the law does not apply to just anyone with a certain blood quantum or ethnicity. Rather, it applies to children only if they are either enrolled members of a tribe or if they are both eligible for membership in a tribe and have a parent who is an enrolled member of a tribe.

But as devastating as the district court ruling was for Native communities, it wasn't exactly surprising. O'Connor, who also struck down large portions of the Affordable Care Act last fall, works in a part of Texas with a very small American Indian population and relatively few ICWA cases.

"I think it was strategic trying to get this case in front of this judge to get this outcome. It's the only court in 40 years that has ever found that ICWA is unconstitutional because it's based on race," says Chrissi Nimmo, deputy attorney general for the Cherokee Nation, one of the tribes involved in the Brackeen case. "If you keep filing the same suit over and over, eventually you're going to get a judge to agree with you."

The federal government, joined by the tribes, appealed the case and the Fifth Circuit Court of Appeals heard arguments in Louisiana in March. Now everyone awaits the outcome. Whichever side loses this next ruling, they each expect to ask the Supreme Court to hear their case.

Nimmo and other tribal advocates say they believe the ICWA challenge is intended to have larger implications for tribal sovereignty. “If the Indian Child Welfare Act is found to be unconstitutional because it’s race-based, then most other federal laws are subject to the same type of challenge,” Nimmo says.

Mark Fiddler, one of the attorneys helping the Brackeens, says that’s not the goal. He is a member of the Turtle Mountain Band of Chippewa Indians and says tribes will still have independence without ICWA. But, he argues, American Indian children would be better off. “I would like to see them treated just like any other case,” Fiddler says. “ICWA gets in the way of that, so I won’t shed any tears when it’s gone.”

**As much as the case looms large** for the future of both sides, it could also have intimate and even immediate implications for many of those involved.

The Brackeens are thrilled to have A.L.M. as part of their family. But as they settled into life with their three children over the last year, they found out his baby half-sister was also in foster care. The Navajo tribe identified a Native relative in Arizona for her to be placed with, but the Brackeens believed the baby would be better off with her sibling, so they petitioned for her to be placed with them. This spring, a Texas family court judge awarded the Brackeens primary custody of the baby, but said they have to share her with her Navajo family. The Navajo Nation has appealed this ruling.

Chad and Jennifer say they understand they won’t be able to provide the same environment as an American Indian family would, but they don’t believe that means theirs is a bad home. “We’re proud of his heritage and we’re committed to teach him as best we can about his heritage,” Chad says of his adopted son. “As he grows up and becomes more curious, he can reach out on his own and explore that. And we’ll support that.” They hope to do the same for A.L.M.’s baby sister too.

Elisia Manuel says she has nothing against non-Native families adopting Native children into a loving home as long as they follow through on keeping the kids connected to their roots. After adopting her children, she started an organization called Three Precious Miracles to provide supplies to Native American adoptive parents and help teach non-Native adoptive parents about their children’s cultures. “There’s so many children that need a forever home,” she says, but adds: “It’s important for any child to at least know who they are and where they come from. They deserve that.”

And for Rebecca Black, she has seen the way this connection has helped her foster children learn about who they are. She fears what would happen to other children, and to tribes, if ICWA goes away and kids in the child welfare system don't have the chance to know adults who understand their identities. Now 11 and 13, her boys have transformed from acting out and carrying trauma when they arrived at her home, she says, to being recognized by tribal elders for their positive work in the community.

"I watch them pull in at a canoe landing and hear them sing our songs," she says. "There's just this beauty in their self-actualization of who they are and who they were meant to be."