Protecting Tribal Nations by Developing a 21st Century Workforce

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THREE TAKEAWAYS TO REMEMBER

- 1. **WHERE DID INDIAN LAW COME FROM?**
  - A. **Indian Law Predates The United States.** *Federal Indian Law* Came Later.
  - B. The Federal Indian Policy, Statutes, And The Case Law That Grew From Them Make Up "Federal Indian Law."
- 2. **WHY SEPARATE FEDERAL LAWS WERE DEVELOPED FOR INDIANS AND INDIAN NATIONS.**
  - A. From The Beginning Of The United States, **the U.S. Constitution Dealt Separately With Indian Tribes.**
  - B. The **Marshall Trilogy** Formed the Basis of Federal Indian Case Law

- 3. **HOW TO PROTECT TRIBAL NATIONS FROM COURTS WHO CONSIDER FEDERAL INDIAN LAWS TO BE RACE BASED**
  - A. Suggestions for Tribal Laws & Policies That May Need Review
  - B. Problems With Separate Laws For Non-Indians
  - C. Challenges Yet to Come

The History Of Federal Indian Policy

Post Contact & Pre-Constitution
1492-1789

- Since Tribal governments (and tribal sovereignty) predate the United States and the United States Constitution, **tribes were sovereign nations under international law.**
- Tribes were brought into the United States through a colonial process that was partly **negotiated** and partly **imposed**.
- Federal Indian law is the primary mechanism that the resulting intergovernmental relationships among the Indian nations, the United States and the states of the Union were mediated.
  - Example: In **International Law,** mediation is the friendly interference of one state in controversies between nations. It is recognized as a proper action to promote peace among nations. Like the United States trying to bring peace to Russia and Ukraine, sort of…

Federal Indian Policy: The Formative Years 1789-1871

- Why is 1789 important in Federal Indian Law?
  - That is when the U.S. Constitution was first implemented.
- Why is 1871 important in Federal Indian Law?
  - That is when Treatymaking with the Indian nations ended.
- So this policy period is marked by Congress dealing with Indian nations through **Treaties and statutes.**
- In treaty negotiations, Indian nations moved from a position of relative **equality** to a position of **less strength**.
  - Treatymaking also gave birth to the **Canons of Construction for interpreting Treaties:**
    - Treaties have to be interpreted the way (a) the Tribes would have understood them (b) at the time they were made and (c) ambiguities have to be interpreted in favor of the Indians.

The Formative Years 1789-1871 (cont'd)

- **Indian Removal** Treaties and Legislation also took place between 1815 and 1846
  - On the **Trail of Tears** upwards of 4,000 Cherokee lost their lives
- How many treaties were negotiated between the United States and Indian tribes?
  - 374
- How many Indian specific statutes have been enacted by the U.S. Congress?
  - The Library of Congress lists **700 unique titles and 350,000 pages of American Indian Law** in its collection. *See attached Sampling Of Sources Of Federal Indian Law*.
- 1865 saw the end of the Civil War and a determination to expand the Union westward, **mostly at the expense of Indian nations.**

ALLOTMENT AND ASSIMILATION 1871-1928

- Why is 1871 important in Federal Indian Law again?
  - It marks the end of Treatymaking in U.S. Indian policy
- The General Allotment Act was passed in1887
  - Henry Dawes was a Quaker who felt that they only way to keep Indian lands under Indian ownership was to break them up into individual ownership, **but no one ever talked to an Indian about this idea**. Under the General Allotment Act, **Indian land holdings were reduced from 138 million acres to 48 million acres** only 50 years later.
- In 1889, the Commissioner of Indian Affairs wrote **the goal of assimilation was "The American Indian is to become the Indian American."** Richard Henry Pratt, the founder of Carlisle School stated the goal of Indian education was to "Kill the Indian and Save the Man."
- Indians were made citizens of the United States in 1924, **whether they wanted to be or not.**

Indian Reorganization Policy Era 1928-1942

- The Merriam Report was published in 1928. **It showed that the Allotment and Assimilation policies had been failures.**
- **It REDEFINED the goal of Indian policy** as "the development of all that is good in Indian culture rather than to crush out all that is Indian."
- Assimilation proved to be harder than the U.S. Government envisioned, as many Indians viewed it as a "fight to the death" as much as was Custer's Last Stand.
- Beginning in the 1920s, 1930s and 1940s Indian policy shifted away from assimilation to tolerance and even respect for Indian cultural practices
- Nonetheless, bureaucratic conflicts, the fighting of World War II, the Great Depression and underfunding of BIA program requests **prevented effective implementation of the New Deal Indian policy.**

Indian Reorganization Policy Era 1928-1942 (cont'd)

- The **Indian Reorganization Act** was passed in 1934
  - Some Tribes had written Constitutions even **BEFORE** the IRA
  - The IRA **encouraged Tribes to adopt constitutions**, but supervision by the federal bureaucracy seriously limited the reemergence of Tribal self government.
- Indian reorganization policy to stop land loss **was remarkably successful**
- The **Johnson-O'Malley Act** was passed in 1934 and continues to fund Indian Education today.
- The coming of World War II saw Indian Country facing many of the same problems they faced at the end of the Civil War and World War I.
- This situation left federal policymakers wondering **how to solve "the Indian Problem" permanently**. This would prove to be even more disastrous.

TERMINATION POLICY ERA 1943-1961

- Although Termination of tribal governments did not become official federal policy until 1953, attacks on the Indian Reorganization Act began in the late 1930s.
- In 1943 **a study was released by the U. S. Senate** entitled "*Survey of Conditions Among the Indians of the United States.*" Its recommendations were **OPPOSITE to the IRA**, especially regarding Indian lands and other tribal resources.
- In 1944 the **House Committee on Indian Affairs also released the Mundt Report,** which also recommended encouraging and expediting further assimilation.
- **By 1945 Indian Commissioner John Collier had resigned** due to strained relations with the Congress. They were clearly headed in opposite directions on Indian policy.
- Congress and the Bureau of Indian Affairs then began to work together **to END the special status of Indian Tribes with the U.S. Government.**
- The new Commissioner of Indian Affairs was no other than **Dillon S. Myer**, who came from the War Relocation Authority which had operated the detention camps for Japanese Americans. **Native Americans were seen as "a people of the past in a land of the future."**

TERMINATION POLICY ERA 1943-1961 (cont'd)

- The Termination policy drove the nation beginning with the attack on Pearl Harbor (the beginning of WW II) to the election of John F. Kennedy – **two decades.**
- During this time **Indian policy was turned back** to that of the Allotment and Assimilation period **with a vengeance.**
- Supporting Indian culture was seen as anti-Christian.
- U.S. business interests didn't want to lose the use of Indian lands and resources. They viewed tribal ownership as "Communist."
- Budgets of Indian Bureaus and Indian programs were drastically cut.
- Those tribes that were not directly terminated were subjected to a series of laws that took decisionmaking from the Bureau of Indian Affairs and spread it to other federal agencies and to the states.
- Vast acreages of Indian land passed out of Indian hands, as **Indians were encouraged to find employment off the reservation.**
- The Bureau of Indian Affairs later admitted that 1/3 to 1/4 of those who were relocated **returned to the reservation**. Independent sources reported that 60% to 90% returned to some reservations.

TERMINATION POLICY ERA 1943-1961 (cont'd)

- **The Indian Claims Commission** was established in 1946 to hear Indian claims but its jurisdiction was limited to the payment of money. **IT COULD NOT RETURN LAND TO THE TRIBES!**
- Criminal legislation enacted in 1948 broadened, codified and revised criminal law and procedure pertaining to Indians.
- **18 U.S.C. 1151 (the criminal statute defining "Indian Country") was broadened.**
- Congress began passing statutes terminating Indian tribes **BEFORE THE DATA TO SUPPORT THE TERMINATION POLICY WAS EVEN GATHERED.**
- **House Concurrent Resolution 108** declared it the policy of Congress to make Indians subject to the same laws as other citizens, **to free Indians** from federal supervision and control, and to remove all disabilities and limitations applicable to Indians.
- **Within one year (1954), 70 Indian tribes had been terminated. 100 tribes were terminated in all.**
- Most terminated tribes ultimately relinquished or lost their land.
- Although Tribal governments were not expressly extinguished, **most were unable to exercise their governmental powers** after the loss of their land base.
- During World War II, over **500,000 acres of Indian land were taken for military use.**
- The Klamath and Menominee tribes, among others, later succeeded in being restored.

SELF-DETERMINATION & SELF-GOVERNANCE POLICY ERA 1961-Present

- This new era of government policy has evolved in response to the **demands of Indian people and with the support of every President since 1960.**
- The Indian Civil Rights Act was passed in 1978, with a mixed reception by the tribes.
- ****The Indian Self-Determination and Education Assistance Act was passed in 1975.** This law allowed tribes to contract to run health, education, economic development and social programs themselves, not the BIA.
- **Other tribal specific laws such as the Indian Child Welfare Act in 1978, the Indian Gaming Regulatory Act in 1988, the Tribally Controlled Schools Act, the Indian Arts and Crafts Act and others protect and extend tribal culture and life.
- ****The Tribal Self-Governance Act was passed in 1994**. The number of self-governance tribes has grown over time and finally provided a chance for tribal governments to govern themselves.
- Remember those documents that make up Federal Indian Law – policy statements, statutes, and case law? **Most of them are products of the self-determination policy era.**

WHY SEPARATE FEDERAL LAWS WERE DEVELOPED FOR INDIANS AND INDIAN NATIONS

The U.S. Constitution

- **Article 1, Section 8:**
  - Section 8: Powers of Congress

  …
    - **To regulate Commerce** with foreign Nations, and among the several States, and **with the Indian Tribes**;
- **Article 1, Section 8, Clause 18:**
  - **To make all Laws** which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
- **14th Amendment**
  - Section 2:
- Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, **excluding Indians not taxed**.
- **Article 1, Section 2, Clause 2:**

  …
- He shall have Power, by and with the Advice and Consent of the Senate, **to make Treaties**, provided two thirds of the Senators present concur;
-

WHY SEPARATE FEDERAL LAWS WERE DEVELOPED FOR INDIANS AND INDIAN NATIONS

The Marshall Trilogy

- **Johnson v. McIntosh 21 U.S. 543 (1823)**
  - In Johnson v. McIntosh, the Supreme Court under Chief Justice John Marshall upholds the McIntosh family's ownership of land purchased from the federal government. It reasons that since the federal government now controls the land, **the Indians have only a "right of occupancy" and hold no title to the land**. "The Court is decidedly of opinion, that the **plaintiffs do not exhibit a title which can be sustained in the Courts of the United States…**"

- **Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)**
  - The case was significant because the Supreme Court ruled (by Chief Justice Marshall) that "Upon the whole, **I am of opinion, that the Cherokees compose a foreign state within the sense and meaning of the constitution,** and constitute a competent party to maintain a suit against the state of Georgia. Therefore the Court did not have jurisdiction to hear the case.

- **Worcester v. Georgia, 31 U.S. 515 (1832)**
  - The Court said "Our existing Constitution… confers on congress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, among the several states, and with the Indian tribes. **These powers comprehend all that is required for the regulation of our intercourse with Indians."**

Now that we understand the history of Indian policy and why separate laws exist for Indians and Indian tribes, we will FAST FORWARD TO THE BRACKEEN CASE.

HOW TO PROECT TRIBAL NATIONS FROM COURTS WHO CONSIDER FEDERAL INDIAN LAWS TO BE RACE BASED

Brackeen v. Haaland – The Facts of the Case

- A Texas couple wishing to adopt an Indian child, and the State of Texas, filed suit against the United States and several of its agencies and officers in federal district court **claiming that the Indian Child Welfare Act (ICWA) was unconstitutional.**
- They were joined by additional individual plaintiffs and the States of Louisiana and Indiana.
- Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (collectively the Four Tribes) intervened as defendants, and Navajo Nation intervened at the appellate stage.
- Louisiana and Indiana are no longer parties to the Supreme Court case.

HOW TO PROECT TRIBAL NATIONS FROM COURTS WHO CONSIDER FEDERAL INDIAN LAWS TO BE RACE BASED

Brackeen v. Haaland – Questions Presented

- **Texas asserts** that Congress acted beyond its Indian Commerce Clause power in enacting ICWA and that **ICWA creates a race-based child custody system** in violation of the Equal Protection clause.
- **Texas also claims** that **ICWA violates the anti-commandeering principle and** that its implementing regulations violate **the non-delegation doctrine** by allowing individual tribes to alter the placement preferences enacted by Congress.
- **The ICWA law establishes** minimum standards for the removal of Native American children from their families and establishes a **placement preference** that when Native American children are taken from their homes, they be placed with extended family members or with other Native families. **The Plaintiffs assert that giving preference for placing Native children with other Indian families (even if the families are not relatives) discriminates against non-Indian placements based on RACE.**
- Opponents of the law say **it exceeds Congress' power, violates states' rights, and imposes unconstitutional race-based classifications.**

HOW TO PROECT TRIBAL NATIONS FROM COURTS WHO CONSIDER FEDERAL INDIAN LAWS TO BE RACE BASED

Brackeen v. Haaland – Questions Presented (cont'd)

- **The seven individual Plaintiffs assert:**
- ICWA "**flouts the promise of equal justice under the law**" by treating Native American children differently.
- **ICWA falls outside Congress' power to regulate Native American affairs,** arguing that Congress does not have the "power to regulate Indians everywhere, wherever they might be in the jurisdiction of the United States."

Why Are These Issues Important To Tribes?

- **REMEMBER THOSE treaties, statutes, executive orders, administrative decisions, and court cases we just covered? They define and exemplify:**
  - **the unique legal and political status of the 574 federally recognized American Indian and Alaska Native tribes;**
  - **the relationship of tribes with the federal government; and**
  - **the role of tribes and states in our federalism?**

Why Are These Issues Important To Tribes? (cont'd)

- **If the U.S. Supreme Court continues to question whether the hundreds of statutes enacted specifically for Native Americans and/or Indian Tribes,** and considers them to be IMPERMISSIBLY **RACE-BASED STATUTES, the entire body of what we are now calling "Federal Indian Law" could be overturned, INCLUDING TITLE 25 OF THE U.S. CODE.**
- **That may include treaties (although treaties are part of international law), and WILL include statutes, executive orders, administrative decisions, and court cases.**
- **All of Indian Country criminal jurisdiction will be kaput!**

Why Are These Issues Important To TERO?

- The BEST argument against federal Indian laws being race-based is that **Tribes are political entities,** not race-based entities.
- **But what happens to that argument when Tribes are the ones doing the discriminating?**
- **Will "Indian Preference" be seen by the current Court as race-based discrimination and Morton v. Mancari overturned?**
- **Now let's take a look at the Court that will be deciding the Brackeen case.**

The Makeup of the U.S. Supreme Court

- **Chief Justice John Roberts – 67 yrs old - George W. Bush nominee - most seniority**
- **Justice Clarence Thomas – 75 yrs old – George W. Bush nominee – 2nd in seniority**
- **Justice Samuel Alito, Jr. – 73 yrs old - George W. Bush nominee – 3rd in seniority**
- **Justice Sonya Sotomayor – 69 yrs old – Barack Obama Nominee – 4th in seniority**
- **Justice Elena Kagan – 63 yrs old – Barack Obama nominee**
- **Justice Neil Gorsuch – 56 yrs old – Trump nominee -** arguably the court's strongest champion of Native American sovereignty
- **Justice Brett Kavanaugh – 58 yrs old – Trump nominee**
- **Justice Amy Coney Barrett – 51 yrs old – Trump nominee**
- **Justice Ketanji Brown Jackson – 53 yrs old – Biden nominee**
- **HOW DO WE PROTECT TRIBES AGAINST THIS KIND OF COURT?**

HOW TO PROTECT TRIBAL NATIONS FROM COURTS WHO CONSIDER FEDERAL INDIAN LAWS TO BE RACE BASED

Employment Protections Available to Indian Employees Working for Tribes

- **Indian employees** working for Indian Tribes are protected by:
- coverage under the Indian Civil Rights Act
- Tribal Constitutions
- access to Grievance Hearings under Tribal Human Resource policies,
- Access to Tribal Administrative Procedure Acts
- Access to Tribal Courts,
- their relatives who vote (not the best option…)

HOW TO PROTECT TRIBAL NATIONS FROM COURTS WHO CONSIDER FEDERAL INDIAN LAWS TO BE RACE BASED

Tribal Laws & Policies That May Need Review to Ensure Coverage for Non-Indian Employees

- **Non-Indian employees** working for Indian Tribes **MAY NOT BE** protected by:
- coverage under the Indian Civil Rights Act
  - it only covers **Indians** being oppressed by **Indian** Tribes
- Tribal Constitutions
  - they may only list the **powers of Indian tribes over tribal members**
  - They may **not give** the Tribe or the Tribal Court **jurisdiction over non-Indians**
- access to Grievance Hearings under Tribal Human Resource policies,
  - Some Tribal Human Resource policies **do not cover non-Indian employees**
- Access to Tribal Administrative Procedure Acts
  - If the Tribal Court does not have jurisdiction over non-Indians, the non-Indians will still have no legal recourse/appeal rights EVEN IF THEY DO EXHAUSE THEIR ADMINISTRATIVE REMEDIES under the APA.

HOW TO PROTECT TRIBAL NATIONS FROM COURTS WHO CONSIDER FEDERAL INDIAN LAWS TO BE RACE BASED

Tribal Laws & Policies That May Need Review to Ensure Coverage for Non-Indian Employees (cont'd)

- Access to Tribal Courts,
  - When the Tribal Constitution created the Tribal Court **it may not have given the Court jurisdiction over non-Indians**
  - This may require **Constitutional revision** to correct the problem

- **Non-Indian Employees WILL be covered by LAWS OF GENERAL APPLICABILITY** (NLRB, OSHA, EEOC, Discrimination, Due Process, Equal Protection, etc.) if they sue a Tribe for discrimination, etc.

- **THESE LAWS SHOULD BE REVIEWED TO ENSURE COVERAGE OF NON-INDIAN EMPLOYEES WORKING FOR TRIBES.**

HOW TO PROTECT TRIBAL NATIONS FROM COURTS WHO CONSIDER FEDERAL INDIAN LAWS TO BE RACE BASED

Potential Problems With Separate Laws For Non-Indians Workforce Protection Acts

- While a separate **Workforce Protection Act** may provide some employment protections for non-Indians working for Indian tribes, it may also run afoul of the "separate but equal" doctrine, which the U.S. Supreme Court has already addressed.
- When you have a Supreme Court that is already prone to looking at cases with a **race-based lens**, they may also consider a separate law for non-Indians to be discriminatory.
- Two famous civil rights cases illustrate this point.
  - The first case is **Plessy vs. Ferguson**, 163 U.S. 537 (1896), was a landmark U.S. Supreme Court decision in which the Court **ruled that racial segregation laws did not violate the U.S. Constitution** as long as the facilities for each race were equal in quality, a doctrine that came to be known as "separate but equal".
  - The second case is **Brown v. Board of Education**, 347 U.S.483, the Court overturned Plessy v. Ferguson, and declared that **racial segregation in public schools violated the Equal Protection clause of the 14th Amendment**.

- Similarly, **if tribes consider passing a separate employment law** providing "separate but equal coverage for its non-Indian employees, it too would run the risk of being held unconstitutional by the U.S. Supreme Court.

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Supreme Court Decision in BRACKEEN V. HAALAND CASE

- QUESTIONS PRESENTED:
  - 1. Did Congress have the authority to enact ICWA?
  - 2. Did ICWA violate the Tenth Amendment's anti-commandeering principles?
  - 3. Did ICWA unconstitutionally violate equal protection?

  Answer to Question 1:
  - ICWA WAS UPHELD BY THE U.S. SUPREME COURT
    - Congress' power to legislate Indian Affairs is well-established and broad, MAYBE PLENARY, therefore ICWA is consistent with Congress' powers under Article I of the Constitution.

Answer to Question 2:

The Court found that provisions of ICWA, like active efforts and notice to tribes, did NOT impermissibly require state officers to administer or enforce federal programs because the requirements applied to private individuals and agencies, as well as government entities,

Supreme Court Decision in BRACKEEN CASE (cont'd)

- Answer to question 3:
  - The Court found that the petitioners' claims of equal protection and non-delegation lacked standing under Article Three of the constitution. **So, these claims can be brought in future cases.**

▶SO TRIBES MIIGHT HAVE WON THIS BATTLE… BUT THE WAR AGAINST TRIBAL SOVEREIGNTY IS NOT OVER!

FRACTURED OPINIONS IN BRACKEEN CASE

- The decision was 7-2 in favor of the Tribes, **but It was a FRACTURED opinion:**
  - BARRETT, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SOTOMAYOR, KAGAN, GORSUCH, KAVANAUGH, and JACKSON, JJ., joined.
  - GORSUCH, J., filed a concurring opinion, in which SOTOMAYOR and JACKSON, JJ., joined as to Parts I and III.
  - KAVANAUGH, J., filed a concurring opinion.
  - THOMAS, J., and ALITO, J., filed dissenting opinions.

OPINION OF THE COURT

- Held: 1. The Court declines to disturb the Fifth Circuit's conclusion that ICWA is consistent with Congress's Article I authority. Pp. 10– 17.
  - (a) The Court has characterized Congress's power to legislate with respect to the Indian tribes as "plenary and exclusive," *United States v. Lara, 541 U. S. 193,* 200, superseding both tribal and state authority, *Santa Clara Pueblo v. Martinez, 436 U. S. 49, 56.* In sum, Congress's power to legislate with respect to Indians is well established and broad, but it is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders. Pp. 10–14.
  - (b) Petitioners contend that ICWA impermissibly treads on the States' traditional authority over family law. But when Congress validly legislates pursuant to its Article I powers, the Court "has not hesitated" to find conflicting state family law preempted, "[n]otwithstanding the limited application of federal law in the field of domestic relations generally." *Ridgway v. Ridgway, 454 U. S. 46, 54.* And the Court has recognized Congress's power to displace the jurisdiction of state courts in adoption proceedings involving Indian children. *Fisher v. District Court of Sixteenth Judicial Dist. of Mont., 424 U. S. 382, 390* (per curiam). Pp. 14–15.

OPINION OF THE COURT (cont'd)

- (c) Petitioners contend that no source of congressional authority authorizes Congress to regulate custody proceedings for Indian children. But this Court's holding more than a century ago that "commerce with the Indian tribes, means commerce with the individuals composing those tribes," United States v. Holliday, 3 Wall. 407, 417, renders that argument a dead end.

OPINION OF THE COURT (cont'd)

- 2. Petitioners' anticommandeering challenges [under the Tenth Amendment], which address three categories of ICWA provisions, are rejected. Pp. 18–29.
  - Petitioners contend this subsection directs state and local agencies to provide extensive services to the parents of Indian children, even though it is well established that the Tenth Amendment bars Congress from "command[ing] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." Printz v. United States, 521 U. S. 898, 935. To succeed, petitioners must show that §1912(d) harnesses a State's legislative or executive authority. But the provision applies to "any party" who initiates an involuntary proceeding, thus sweeping in private individuals and agencies as well as government entities

OPINION OF THE COURT (cont'd)

- Legislation that applies "evenhandedly" to state and private actors does not typically implicate the Tenth Amendment. *Murphy v. National Collegiate Athletic Assn., 584 U. S. at* _____.
- Finally, petitioners turn to criticizing this Court's precedent as inconsistent with the Constitution's original meaning, but they neither ask the Court to overrule the precedent they criticize nor try to reconcile their approach with it. If there are arguments that ICWA exceeds Congress's authority as precedent stands today, petitioners do not make them here. Pp. 15–17.

OPINION OF THE COURT (cont'd)

- 3. The Court does not reach the merits of petitioners' two additional claims—**an equal protection challenge to ICWA's placement preferences and a nondelegation challenge to §1915(c),** the provision allowing tribes to alter the placement preferences—because no party before the Court has standing to raise them. Pp. 29–34. (Emphasis added.)
- THIS MEANS THESE ARGUMENTS CAN BE BROUGHT IN THE FUTURE BY ANY PARTY THAT HAS STANDING TO BRING THEM BEFORE THE COURT!
- 994 F. 3d 249, affirmed in part, reversed in part, vacated and remanded in part.
- **SO TRIBES MIIGHT HAVE WON THIS BATTLE… BUT THE WAR AGAINST TRIBAL SOVEREIGNTY GOES ON!**
- NOW LET'S LOOK AT THE CONCURRNG OPINIONS.

CONCURRING OPINIONS

- **GORSUCH, J., filed a concurring opinion, in which SOTOMAYOR and JACKSON, JJ., joined as to Parts I and III.**
  - In affirming the constitutionality of the Indian Child Welfare Act (ICWA), the Court safeguards the ability of tribal members to raise their children free from interference by state authorities and other outside parties. In the process, the Court also goes a long way toward restoring the original balance between federal, state, and tribal powers the Constitution envisioned. I am pleased to join the Court's opinion in full. I write separately to add some historical context. To appreciate fully the significance of today's decision requires an understanding of the long line of policies that drove Congress to adopt ICWA. And to appreciate why that law surely comports with the Constitution requires a bird's-eye view of how our founding document mediates between competing federal, state, and tribal claims of sovereignty.

CONCURRING OPINIONS (cont'd)

- **JUSTICE KAVANAUGH**, concurring. I join the Court's opinion in full. I write separately to emphasize that **the Court today does not address or decide the equal protection issue** that can arise when the Indian Child Welfare Act is applied in individual foster care or adoption proceedings. See ante, at 29, 32, n. 10. So the equal protection issue remains undecided.
- In my view, **the equal protection issue is serious.**
- Courts, including ultimately this Court, will be able to address the equal protection issue **when it is properly raised by a plaintiff with standing**—for, **example** by a prospective foster or adoptive parent or child in a case arising out of a state-court foster care or adoption proceeding. See ante, at 29, 32, n. 10.

DISSENTING OPINIONS

- **JUSTICE THOMAS**, dissenting [**39 pages!**]. These cases concern the Federal Government's attempt to regulate child-welfare proceedings in state courts. That should raise alarm bells. Our Federal "[G]overnment is acknowledged by all to be one of enumerated powers," having only those powers that the Constitution confers expressly or by necessary implication. *McCulloch v. Maryland, 4 Wheat. 316, 405 (1819)*. All other powers (like family or criminal law) generally remain with the States. **The Federal Government thus lacks a general police power to regulate state family law.**
- In the normal course, we would say that the Federal Government has no authority to enact any of this. Yet **the majority declines to hold that ICWA is unconstitutional…**
- But, given ICWA's patent intrusion into the normal domain of state government and clear departure from the Federal Government's enumerated powers, **I would hold that Congress lacked any authority to enact ICWA.**

DISSENTING OPINIONS (cont'd)

- **JUSTICE ALITO**, dissenting [11 pages]. The first line in the Court's opinion identifies what is most important about these cases: they are "about children who are among the most vulnerable." Ante, at 1. But **after that opening nod, the Court loses sight of this overriding concern and decides one question after another in a way that disserves the rights and interests of these children and their parents, as well as our Constitution's division of federal and state authority.**
- **Decisions about child custody, foster care, and adoption are core state functions**.

DISSENTING OPINIONS (cont'd)

- **The paramount concern in these cases has long been the "best interests" of the children** involved. See, e.g., 3 T. Zeller, Family Law and Practice §§32.06, 32.08 (2022); 6 id., §64.06. But in many cases, **provisions of the Indian Child Welfare Act (ICWA) compel actions that conflict with this fundamental state policy, subordinating what family-court judges—and often biological parents—determine to be in the best interest of a child to what Congress believed is in the best interest of a tribe.**

OTHER THREATS TO TRIBAL SOVEREIGNTY

- **LAWS OF GENERAL APPLICABILITY** are by definition laws that DO NOT mention Indian Tribes
  - The Circuits used to be split regarding whether these laws apply to Indian Tribes
- Now several federal agencies are taking jurisdiction over and deciding cases involving Indian Tribes
- Tribes involved DO NOT appear to be **contesting the jurisdiction** of these agencies over them, even though their enabling statutes DO NOT mention Indian Tribes

National Labor Relations Act EXAMPLE

- [Title 29, Chapter 7, Subchapter II, United States Code]
- DEFINITIONS
- Sec. 2. [§152.] When used in this Act [subchapter]--
- (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code [under title 11], or receivers.
- (2) The term **"employer"** includes any person acting as an agent of an employer, directly or indirectly, but **shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof,** or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
- Every other governmental entity is exempted EXCEPT TRIBES, who are not mentioned at all, yet the NLRB is hearing cases involving Indian Tribes.

OTHER THREATS TO TRIBAL SOVEREIGNTY
Laws of General Applicability

- Links to National Labor Relations Board Cases Involving Indian Tribes
  - file:///C:/Users/Bernice/Downloads/JDD.21_CA_166290.ALJAzalone.docx%20(3).pdf
  - file:///C:/Users/Bernice/Downloads/Administrative%20Law%20Judges%20Decision%20(2).pdf (pending Board decision)
  - file:///C:/Users/Bernice/Downloads/Administrative%20Law%20Judges%20Decision%20(2).pdf *Arguing Treaty precluded jurisdiction
  - file:///C:/Users/Bernice/Downloads/JD_NY_09_08.doc%20(2).pdf
  - https://www.nlrb.gov/case/19-CA-293678

Why Are These Issues Important To Tribes?

- **Treaties, statutes, executive orders, administrative decisions, and court cases define and exemplify:**
  - **the unique legal and political status of the 574 federally recognized American Indian and Alaska Native tribes;**
  - **the relationship of tribes with the federal government; and**
  - **the role of tribes and states in our federalism?**

Why Are These Issues Important To Tribes? (cont'd)

- **If the U.S. Supreme Court continues to question whether the hundreds of statutes enacted specifically for Native Americans and/or Indian Tribes,** and considers them to be IMPERMISSIBLY **RACE-BASED STATUTES, the entire body of what we are now calling "Federal Indian Law" could be overturned, INCLUDING TITLE 25 OF THE U.S. CODE.**
- **That may not include treaties (treaties are part of international law), and WILL include statutes, executive orders, administrative decisions, and court cases.**
- **All of Indian Country criminal jurisdiction will be kaput!**

Why Are These Issues Important To TERO?

- The BEST argument against federal Indian laws being race-based is that **Tribes are political entities,** not race-based entities.
- **But what happens to that argument when Tribes are the ones doing the discriminating?**
- **Will "Indian Preference" be seen by the current Court as race-based discrimination and Morton v. Mancari overturned?**
- **At the Moment, Tribes have dodged the bullet in the Brackeen case, but we have to stay vigilant. THE WAR AGAINST TRIBAL SOVEREIGNTY IS NOT OVER.**

QUESTIONS?

"Dude! I am so not prepared for this!"