After *Brackeen*: Funding Tribal Systems

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Introduction

The purpose of the Indian Child Welfare Act[1] was to allow tribes to make decisions for their own families, rather than state courts and agencies. Again and again, tribal leaders stated that they knew what to do for their tribes. Lost in our current fights over ICWA in the Supreme Court is the history of tribal leaders trying to secure funding for *tribal* systems of child welfare.[2] There are pages of testimony often overlooked today where tribal leaders

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1. 25 U.S.C. §§ 1901–63.

2. *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affs.*, 95th Cong. 163–65 (1977) [hereinafter *1977 Hearings*] (statement of Ramona Bennett, Chairwoman, Puyallup Tribe).

and tribal child welfare workers tried to pin down the section of law that would fund their systems and ensure the purpose of ICWA wasn't lost.[3]

The ability for tribal governments to fund their own tribal child welfare systems is a critical component of promoting tribal sovereignty, as well as ensuring Native children and families receive culturally appropriate services. The issue is not whether tribes want to provide these services to their communities; it is often whether they have the necessary resources and access to implement these services. Under the current U.S. child protection funding model, tribes are faced with challenges and barriers that prevent them from accessing the necessary funding needed.[4] Given that only 3 percent, or 18 out of 574 federally recognized tribes, have successfully completed the requirements to the federal government's satisfaction to access the primary source of federal child protection funding, a new approach is desperately needed.[5]

The current state child welfare system in the United States is broken. Tribes have a unique opportunity and ability to use and create systems that work for their communities. They are not currently bound to follow the system created for states. But today tribes must follow that system to

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3. *Problems That American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearing Before the Subcomm. on Indian Affs. of the S. Comm. on Interior & Insular Affs.*, 93d Cong. 7, 9, (1974) [hereinafter *1974 Hearings*] (statement of William Byler, Exec. Dir., Ass'n on Am. Indian Affs.); *id.* at 35–36 (statement of Bertram Hirsch, Staff Att'y, Ass'n of Am. Indian Affs.); *id.* at 104 (statement of Dr. James H. Shore, Psychiatry Training Program, Portland, Or.); *id.* at 157 (statement of Richard Lone Dog, Rosebud Detention Ctr., Rosebud, S.D.); *id.* at 168–70 (statement of Betty Jack, Chairman, Bd. of Dirs., Am. Indian Child Dev. Program, Milwaukee, Wis.); *id.* at 219 (statement of Dr. Carl Hammerschlag, Phoenix, Ariz.); *id.* at 371 (statement of Thomas Peacock, Dir., Indian Youth Program, Duluth, Minn.); *1977 Hearings*, *supra* note 2, at 290 (letter from Goldie M. Denney, Dir., Soc. Servs., Quinault Indian Nation); *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the H. Subcomm. on Indian Affairs and Public Lands* 78 (1978) [hereinafter *1978 Hearings*] (statement of Faye LaPointe, Coordinator of Social Serv, for Child Welfare, Puyallup Tribe of Wash.); *id.* at 99 (statement of Donald Reeves, Legis. Sec'y, Friends Comm. on Nat'l Legis.); *id.* at 109 (statement of Elizabeth Cagey, Admin. Assistant, Tacoma Urban Indian Ctr.); *id.* at 114–15 (statement of Mike Ranco, Exec. Dir., Health & Soc. Serv., Cent. Me. Indian Ass'n).

4. *See infra* Part III.

5. As of January 2022, the U.S. government recognized 574 Indian tribes. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022). As of July 2021, 17 tribes had approved Title IV-E plans. *Tribes with Approved Title IV-E Plans*, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs. (current as of July 1, 2021), https://www.acf.hhs.gov/cb/grant-funding/tribes-approved-title-iv-e-plans. The author is aware of one more that is not yet on the list, Kenaitze Indian Tribe, making it 18 total.

access significant funding.[6] *That* system incentivizes breaking up families and placing children in care. *Tribal* systems disrupt that understanding of care and use non-adversarial healing to wellness models to better serve their families.[7] They should receive the funding to do so.

Haaland v. Brackeen,[8] a challenge to ICWA that is currently pending before the U.S. Supreme Court, is a direct result of a state system privileging removal and placement with stranger foster care, as opposed to kinship or relative care. Indeed, the challenges to ICWA are often a result of this system. This article explains the challenges and then identifies the limitations and hurdles tribal governments face when attempting to secure funding for their own tribal child welfare systems through the current child protection framework. Additionally, this article proposes possible funding solutions for expansion in future articles. Part I of this article will discuss ICWA and the current *Brackeen* case. Part II will describe how the child protection system is funded in the United States, while Part III describes how tribal governments currently fund tribal child welfare systems in Native communities. Part IV will succinctly propose potential solutions for how tribal child welfare systems could be funded under either ICWA's provisions or a self-governance model.

I. ICWA and *Brackeen v. Haaland*

In 2013, Indian Country was rocked by the Supreme Court decision in *Adoptive Couple v. Baby Girl*.[9] Holding that certain ICWA protections did not apply to the biological daughter of a citizen of the Cherokee Nation, the U.S. Supreme Court overturned the South Carolina Supreme Court's holding that ICWA provided protections to her father.[10] After a few months of back and forth at the state and tribal court levels, the father voluntarily and tearfully gave up his child to the adoptive couple demanding her.[11] That

6. *See infra* Part III.

7. *See* Tribal Law & Pol'y Inst., Tribal Healing to Wellness Courts: The Key Components (2d ed. 2014) (Typically called "drug courts" in state systems, healing to wellness courts incorporate current addiction science, a team model, and significant training to address the issues that brought the individuals to the court in the first place. This is diametrically in opposition to traditional adversarial proceedings.).

8. 994 F.3d 249 (5th Cir. 2021), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022).

9. 570 U.S. 637 (2013).

10. *Id.*

11. Heide Brandes, *Biological Father, Tribe Give Up the Fight over Baby Veronica*, Reuters (Oct. 10, 2013), https://www.reuters.com/article/us-usa-adoption-southcarolina/biological-father-tribe-give-up-the-fight-over-baby-veronica-idUKBRE99911B20131010.

case kicked off a decade of fighting at the state and federal levels over the constitutionality of the law, including the *Brackeen* litigation.[12]

A. The Indian Child Welfare Act

Congress passed ICWA[13] in 1978 in response to organizing by Native families, tribal leaders, and nonprofit organizations. After years of testimony,[14] the law passed with a voice vote and was accompanied by a House report presaging arguments made by anti-ICWA forces more than four decades later.[15]

ICWA provides certain protections to families involved in child custody proceedings if the child involved is an Indian child. Both the type of the proceedings[16] and "Indian child"[17] are defined in the law. ICWA covers a broad swath of cases but is primarily used in foster care proceedings and termination of parental rights proceedings initiated by state agencies. In some instances, the federal law preempts state law, but most of the time it requires courts to make parallel holdings for both state and federal requirements.[18]

When a court knows or has reason to know there is an Indian child involved in an involuntary child custody proceeding, the court or agency must send notice of the proceeding to the Indian child's tribe, parents, and

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12. *See* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022); *see also* Stipulation of Voluntary Dismissal, C.E.S. v. Nelson, No. 15-cv-982 (W.D. Mich. Jan. 27, 2016); Nat'l Council of Adoption v. Jewell, No. 16-1110, 2017 WL 9440666 (4th Cir. Jan. 30, 2017); Order, Doe v. Hembree, No. 15-cv-471 (N.D. Okla. Mar. 3, 2017); Doe v. Piper, No. 15-2639, 2017 WL 3381820 (D. Minn. Aug. 4, 2017); Carter v. Tahsuda, 743 F. App'x 823 (9th Cir. 2018); Watso v. Jacobson, 929 F.3d 1024 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1265 (2020); Order Dismissing Case, Fisher v. Cook, No. 19-cv-2034 (W.D. Ark. May 28, 2019); Voluntary Dismissal, Americans for Tribal Court Equality v. Piper, No. 17-cv-4597 (D. Minn. Sept. 6, 2019); Notice of Dismissal, Whitney v. Bernhardt, No. 19-cv-299 (D. Me. Aug. 23, 2019); *In re* Alexandria P., 204 Cal. Rptr. 3d 617 (Ct. App. 2016), *cert. denied sub nom.* R.P. v. Los Angeles Cnty. Dep't of Child. & Fam. Servs., 137 S. Ct. 713 (2017); S.S. v. Stephanie H., 388 P.3d 569 (Ariz. Ct. App. 2017), *cert. denied sub nom.* S.S. v. Colo. River Indian Tribes, 138 S. Ct. 380 (2017); Renteria v. Superior Ct., *cert. denied*, 138 S. Ct. 986 (2018); *In re* Adoption of B.B., 417 P.3d 1 (Utah 2017), *cert. denied sub nom.* R.K.B. v. E.T., 138 S. Ct. 1326 (2018).

13. 25 U.S.C. §§ 1901–63.

14. *See 1974 Hearings*, *supra* note 3; *1977 Hearings*, *supra* note 2; *1978 Hearings*, *supra* note 3.

15. H.R. Rep. No. 95-1386 (1978).

16. 25 U.S.C. § 1903(1).

17. *Id.* § 1903(4).

18. Kathryn Fort, American Indian Children and the Law: Cases and Materials 143 (2019); *In re* England, 887 N.W.2d 10 (Mich. Ct. App. 2016); *In re* Brandon M., 63 Cal. Rptr. 2d 671 (Ct. App. 1997).

Indian custodian.[19] If the state court properly has jurisdiction, the tribe has an opportunity to intervene in the proceedings[20] and request that the case be transferred to tribal court.[21] If the case is not transferred, usually due to the objection of a parent or a good cause determination to the contrary,[22] the case proceeds under ICWA's protections in state court.

For a state court to place the child in foster care, the state agency must demonstrate by clear and convincing evidence the child will likely suffer from serious physical or emotional damage if they are returned to their parents.[23] In addition, the agency must provide active efforts to reunify and rehabilitate the Indian family.[24] The state must also find a qualified expert witness who can testify about the cultural parenting practices of the Indian child's tribe and support the foster care proceeding.[25]

When a child is placed in foster care, ICWA provides for certain placement preferences to ensure the child is kept close to their family and community.[26] The preferences include a member of the Indian child's family; a foster home licensed, specified, or designated by the Indian child's tribe; an Indian foster home licensed by the state; or a group home run by the child's tribe.[27] If none of these are available after a diligent search, the court may find there is good cause to deviate from the placement preference.[28]

If reunification fails, ICWA also provides standards for a termination of parental rights proceeding.[29] To terminate parental rights, courts must find beyond a reasonable doubt that returning the child to the parents is likely to result in serious emotional or physical harm to the child.[30] That finding

19. 25 U.S.C. § 1912(a).
20. *Id.* § 1911(c).
21. *Id.* § 1911(b).
22. *See id*.
23. 25 U.S.C. § 1912(e). Emergency removals prior to judicial proceedings are permitted on a limited basis. *Id.* § 1922 ("Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. . . ."); *see In re* J.M.W., 514 P.3d 186 (Wash. 2022).
24. 25 U.S.C. § 1912(d).
25. *Id.* § 1912(e).
26. *Id.* § 1915.
27. *Id.* § 1915(b).
28. *Id.*; 25 C.F.R. § 23.132(c)(5) (2016).
29. 25 U.S.C. § 1912(f).
30. *Id.*

must be supported by the qualified expert witness,[31] and the court must find there were active efforts provided to avoid the termination.[32]

Once an Indian child is a legal orphan, there are placement preferences in place for their adoption as well.[33] These include placing the child with a member of the Indian child's family, the child's tribe, or members of other federally recognized tribes.[34]

Finally, and perhaps most importantly, ICWA contains jurisdictional provisions that ensure state courts send Native children to tribal courts.[35] Specifically, section 1911 discusses tribal jurisdiction over Indian child custody proceedings.[36] Subsection (a) includes information about exclusive jurisdiction and identifies that tribes "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."[37] This section also gives tribes exclusive jurisdiction over cases where an Indian child is a ward of a tribal court, regardless of the child's domicile or residence.[38]

ICWA has most of the procedural mechanisms and substantive rights in place necessary for tribal sovereignty, self-governance, and autonomy. Particularly, subchapter II, Indian Child and Family Programs, houses the grants that would provide the support necessary for states and tribes to implement the supports families need.[39] However, ICWA is not self-funding, and these grants have been unfunded or underfunded since Congress passed the law.[40] Without proper funding, most tribes are not able to successfully implement the tribal child welfare systems that are the essence of ICWA preferences.

While ICWA does not address all the challenges that tribal communities face, it is a significant step in the right direction toward further protecting Native children and families and promoting tribal self-governance. This is one of the reasons why ICWA has been considered the gold standard for

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31. *Id.*
32. *Id.* § 1912(d).
33. *Id.* § 1915(a).
34. *Id.*
35. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
36. 25 U.S.C. § 1911.
37. *Id.* § 1911(a).
38. *Id.*
39. *Id.* §§ 1931–34.
40. Nat'l Cong. of Am. Indians, Fiscal Year 2021 Indian Country Budget Request: Advancing Sovereignty Through Certainty & Security 70, https://www.ncai.org/resources/ncai-publications/indian-country-budget-request/NCAI_FY_2021_FULL_BUDGET.pdf.

child welfare practices for over 40 years.[41] Even so, those looking to get rid of the law for various reasons have periodically attacked it under various constitutional arguments.[42]

B. Adoptive Couple v. Baby Girl

When the Supreme Court heard *Adoptive Couple*, it was only the second time an ICWA case made it up to the Court, and both cases involved voluntary adoptions.[43] Because of this, the Court's view of the law has focused on arguments involving ICWA's "intrusion" into placement decisions by fit parents to put their child up for adoption.[44] In the case of *Adoptive Couple*, the child's mother decided to put the child up for a-doption without a release or consent from the father.[45] ICWA has limited protections for parents involved in adoptions, specifically that they must wait 10 days after the birth of the child to consent to an adoption, and they must do it in the presence of a judge.[46]

In *Adoptive Couple*, by the time the child was born, the father was in pre-deployment to Iraq.[47] The pre-adoptive couple filed their adoption in South Carolina but did not notify the father for four months—days before he was set to deploy to Iraq.[48] He immediately contacted a lawyer, and the case was stayed under the Servicemember's Civil Relief Act.[49] After the case went through the South Carolina court system, the state supreme court found that the proceeding was involuntary as to the father.[50] The ICWA protections detailed above protected the father, and his child was returned to him after the court's decision.

Almost immediately, the prospective adoptive couple filed a certiorari petition with the Supreme Court, and the Court accepted review.[51] Justice

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41. *See* Brief of Casey Family Programs et al. as Amici Curiae in Support of Respondent Birth Father, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1279468.

42. *See* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002); *In re* Santos Y., 112 Cal. Rptr. 2d 692 (Ct. App. 2001).

43. Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989).

44. Brief for Petitioners at 2–3, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399); Brief of Amica Curiae Birth Mother in Support of Petitioners and Baby Girl at 24–28, 30–31, *Adoptive Couple*, 570 U.S. 637 (No. 12-339).

45. Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 630 (S.C. 2012), *rev'd*, 570 U.S. 637 (2013).

46. 25 U.S.C. § 1913(a).

47. *See Adoptive Couple*, 731 S.E.2d at 555.

48. *Id.*

49. *Id.*; *see* 50 U.S.C. §§ 3901–4043.

50. *Adoptive Couple*, 731 S.E.2d at 561.

51. Adoptive Couple v. Baby Girl, 568 U.S. 1081 (2013).

Alito's decision in *Adoptive Couple* was ultimately a narrow one, and subsequently quite limited in practice.[52] But his reasoning and language, which specifically referred to the child's blood quantum rather than her eligibility for tribal citizenship[53]—and noted that in certain cases there might be equal protection concerns under ICWA[54]—both worried Indian Country and emboldened ICWA opponents. Perhaps even more importantly for ICWA opponents, Justice Thomas's concurrence questioned the very ability of Congress to pass ICWA in the first place and provided an ahistorical reading of the Indian Commerce Clause to make his argument.[55] Ultimately, the reasoning in this decision prompted the actions that have led to the current case in front of the Court, *Haaland v. Brackeen*.

After the *Adoptive Couple* decision came down, the Obama administration sent out a Dear Tribal Leader letter asking for comments on how the administration could better support tribes and a robust ICWA enforcement. The Environment and Natural Resources division of the Department of Justice, the division responsible for most Indian law issues, started filing pro-ICWA amicus briefs in state courts.[56] The administration released the first updated set of federal guidelines since 1979, and not long after began a long and somewhat contentious regulation process.[57]

Almost as soon as the 2015 ICWA guidelines were released, the National Council for Adoption filed a federal lawsuit in the eastern district of Virginia,

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52. Perhaps the case has been most used in Montana against fathers; *see, e.g.*, *In re* J.S., 321 P.3d 103, 110–13 (Mont. 2014).

53. Adoptive Couple v. Baby Girl, 570 U.S. 637, 641, 642 n.1, 646 (2013).

54. *Id.* at 656.

55. *Id.* at 665–66, (Thomas, J., concurring); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1015–17 (2015).

56. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Appellant, Native Vill. of Tununak v. State of Alaska, Dep't of Health & Soc. Servs., 334 P.3d 165 (Alaska 2014) (No. S-14670); Application of the United States for Leave to File Amicus Curiae Brief and [Proposed] Brief in Support of Petitioner and Appellant Ashlee R., *In re* Isaiah W., 373 P.3d 444 (Cal. 2016) (No. S221263).

57. *See* Mem. from Barbara Atwood, et al. to Assistant Sec'y Washburn, Comments on BIA Guidelines (April 30, 2014); Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38784 (June 14, 2016); Bureau of Indian Affairs, Indian Child Welfare Act (ICWA) Proceedings, Rulemaking Docket, https://www.regulations.gov/docket/BIA-2015-0001/document. The notice and comment period included more than 2,000 written comments for and against the regulations as well as six public meetings. Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38784; Kathryn Fort, *Additional Comments on Proposed ICWA Regulations*, TURTLE TALK (June 11, 2015), https://turtletalk.blog/2015/06/11/additional-comments-on-proposed-icwa-regulations/. The author attended the Portland, Oregon, hearing where at least one commentator yelled at the audience. Public Meeting Transcript, Proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings "ICWA Proposed Rule"—25 CFR 23, at 37–45 (Portland, Or., Apr. 22, 2015).

claiming the guidelines and parts of the law were unconstitutional.[58] In a string of cases after that, various parties and organizations filed federal lawsuits across the country, all taking swipes at ICWA's constitutionality, primarily on equal protection grounds.[59] All of the attempts failed, except one that was filed in the fall of 2017.[60]

C. Haaland v. Brackeen

During the same week as the annual Tribal In-House Counsel Association conference in October of 2017, Texas and a foster family filed a complaint in the U.S. District Court for the Northern District of Texas, arguing that ICWA was unconstitutional under a myriad of claims.[61] This complaint was immediately different than the others in that it was the first time a state brought the argument that it shouldn't have to follow ICWA. The complaint was also different because it was filed in a federal district notoriously favorable to Texas's increasingly outlandish lawsuits[62] and was also the first time ICWA was challenged during the Trump administration.

The plaintiffs eventually filed amended complaints, bringing in two additional foster families and suing the entire federal government.[63] Realizing this case would be the biggest fight against ICWA and that its posture meant no tribal voices would be parties to the case, four tribes across the country agreed to intervene and defend ICWA alongside the

58. Nat'l Council for Adoption v. Jewell, No. 1:15-cv-675-GBL-MSN, 2015 WL 12765872 (E.D. Va. Dec. 9, 2015), *vacated*, No. 16-1110, 2017 WL 9440666 (4th Cir. Jan. 30, 2017).

59. *See* cases cited *supra* note 12.

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

61. Complaint & Prayer for Declaratory & Injunctive Relief, *Brackeen*, 338 F. Supp. 3d 514 (No. 17-cv-00868). The author organized the conference, and was in attendance. The conference was October 26 and 27, 2017. *2017 ILPC/TICA Law Conference*, Turtle Talk, https://turtletalk.blog/indigenous-law-program/indigenous-law-program-events/2017-indigenous-law-conference/. The complaint was filed on October 25, 2017. Complaint & Prayer for Declaratory and Injunctive Relief, *Brackeen*, *supra*.

62. Steve Vladeck, *Texas Judge's Covid Mandate Exposes Federal Judge-Shopping Problem*, MSNBC (Jan. 11, 2022), https://www.msnbc.com/opinion/texas-judge-s-covid-mandate-ruling-exposes-federal-judge-shopping-n1287324.

63. Second Amended Complaint & Prayer for Declaratory & Injunctive Relief, *Brackeen*, 338 F. Supp. 3d 514 (No. 17-cv-00868) [hereinafter Second Amended Complaint].

federal government.[64] The Navajo Nation later intervened for the purpose of a Rule 19 motion, and then fully intervened on appeal.[65]

The three foster families, the Brackeens, the Cliffords, and the Librettis, all claimed that ICWA interfered with their ability to adopt Native children out of the foster care system.[66] The child in the *Brackeen* case was eligible for membership at both Cherokee Nation and Navajo Nation, and after reunification with the parents failed, the Navajo Nation provided a permanent placement on the reservation.[67] Both Nations and the state agency agreed this was an appropriate change of placement and the state court ordered the change.[68] The Brackeens immediately appealed in state court[69] and filed their challenge in federal court. Relatively quickly, the Navajo placement became uncomfortable due to the appeals and arguments from the Brackeens and ultimately they withdrew,[70] making it possible for the Brackeens to adopt the child.

The Cliffords wanted to adopt an older child in Minnesota who was eligible for membership in the White Earth Nation.[71] She had often lived with her grandma growing up, and when she was removed from her parents and placed in a stranger's foster home, Robyn Bradshaw quickly moved to become a kin placement for her granddaughter.[72] The Cliffords fought the change, but the state agency, the Tribe, and the court agreed the change in placement was in the child's best interest.[73] Not long after this change, Bradshaw adopted her granddaughter.[74]

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64. Motion of Cherokee Nation, Oneida Nation, Quinault Indian Nation & Morongo Band of Mission Indians to Intervene as Defendants, *Brackeen*, 338 F. Supp. 3d 514 (No. 17-cv-00868). These tribes are represented by the author at the Michigan State University Indian Law Clinic as well as attorneys at Jenner & Block LLP and Kilpatrick Townsend & Stockton LLP.

65. Brief in Support of the Navajo Nation's Motion to Intervene as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19, *Brackeen*, 338 F. Supp. 3d 514 (No. 17-cv-00868); En Banc Brief of Intervenor Navajo Nation, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (No. 18-11479), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022).

66. Second Amended Complaint, *supra* note 63, ¶¶ 12–13, 15.

67. Brief in Support of the Navajo Nation's Motion to Intervene as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19, *supra* note 65, at 1–2.

68. *Id.* at 2.

69. *Id.* at 3.

70. *Id.*

71. Second Amended Complaint, *supra* note 63, ¶¶ 6–7, 171–774.

72. Brief for Robyn Bradshaw, Grandmother & Adoptive Parent of P.S. ("Child P.") as Amicus Curiae in Support of Tribal & Federal Defendants, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 11, 2022).

73. *Id*.

74. *Id*.

The Librettis wanted to adopt a newborn child who was in the hospital as a result of a "safe haven" drop off.[75] The child was eligible for membership in the Ysleta del Sur Pueblo tribe, which had a potential placement for the child, but soon agreed to the placement with the Librettis.[76] They were able to adopt the child during the pendency of the trial court proceedings.[77]

In all, all three foster families had their state proceedings completed during or immediately after the decision from the district court in Texas, though the courts have nonetheless permitted their federal challenge to ICWA to proceed.[78]

After some unorthodox motion practice in the district court, including combining the briefing for a motion to dismiss and a motion for summary judgment,[79] Judge Reed O'Connor found ICWA to be unconstitutional on virtually all of the grounds the plaintiffs argued.[80] In a stunning paragraph with one citation, he found that Congress's Article I power could not overcome a commandeering argument, creating a completely new legal precedent with no citation to any relevant legal authority.[81]

The intervening tribes and the federal government sought and received a stay from the Fifth Circuit pending an appeal of the decision.[82] A three-judge panel found that ICWA was constitutional and overturned the lower court's decision.[83] Texas and the foster parents asked for an en banc review, which they received. The 15 judges of the Fifth Circuit issued a highly

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75. Second Amended Complaint, *supra* note 63, ¶ 4; Rebecca Nagle, *The Story of Baby O—and the Case That Could Gut Native Sovereignty*, NATION (Nov. 9, 2022), https://www.thenation.com/article/society/icwa-supreme-court-libretti-custody-case/.

76. Second Amended Complaint, *supra* note 63, ¶¶ 5, 164, 166.

77. Brief for Tribal Defendants at 49, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. Aug. 12, 2022).

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

79. Order, Brackeen v. Zinke, No. 17-cv-868 (N.D. Tex. Apr. 25, 2018).

80. *Brackeen*, 338 F. Supp. 3d at 546.

81. *Id.*

82. Brackeen v. Cherokee Nation, No. 18-11479 (5th Cir. Dec. 3, 2018).

83. Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019), *on reh'g en banc sub nom. Brackeen*, 994 F.3d 249.

fractured, long decision that had virtually no impact on ICWA practice[84] but did attract the attention of the Supreme Court.[85]

The en banc decision consists of a brief per curiam opinion summarizing the outcome of the case; and essentially two full opinions by the left and right sides of the court, portions of which represent the opinion of the court on certain issues.[86] Judge Dennis wrote that while the parties had standing to bring the case, ICWA is constitutional and does not have either equal protection or commandeering concerns.[87] Judge Duncan wrote that ICWA is broadly unconstitutional in that it is beyond Congress's power to pass, and violates equal protection with the definition of Indian children and Indian families.[88] The rest of the judges joined in some or all of the decision while writing their own dissents and concurrences.[89]

Ultimately, the only clear holdings from the case were that the active efforts and qualified expert witness requirements violate the commandeering doctrine by forcing state agencies to follow a federal law not properly based on preemption grounds, that the rest of ICWA was within congressional power and constitutional on preemption grounds, and that a provision of the 2016 federal regulations governing ICWA cases was beyond the scope of the law and violated the Administrative Procedure Act.[90] A majority rejected the equal protection challenge to the "Indian child" classification but other equal protection arguments garnered no majority.[91] Otherwise,

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84. According to the Westlaw citing references, as of the time of a search conducted by the author in December 2022, since its release in 2021, only 38 cases cited to this decision, and only 11 of those involved ICWA. This tracks the author's experience that very few advocates contacted her regarding the use of this opinion in trial or appellate ICWA cases.

85. *Brackeen*, 994 F.3d 249.

86. *Id*. at 267 (per curiam opinion), 269 (opinion of Dennis, J.), 362 (opinion of Duncan, J.).

87. *Id*. at 361 (opinion of Dennis, J.).

88. *Id*. at 362–63 (opinion of Duncan, J.)

89. *See* West opinion synopsis, *id*. at 249 ("Dennis, Circuit Judge, filed opinion concurring in part and dissenting in part, in which Stewart and Graves, Circuit Judges, joined, and Wiener, Higginson, Southwick, and Costa, Circuit Judges, joined in part, and Owen, Chief Judge, joined in part. Duncan, Circuit Judge, filed opinion concurring in part and dissenting in part, in which Smith, Elrod, Willett, Engelhardt, and Oldham, Circuit Judges, joined, and Jones, Southwick, Haynes, Circuit Judges, joined in part, and Owen, Chief Judge, joined in part. Haynes, Circuit Judge, filed opinion concurring in part. Owen, Chief Judge, filed opinion concurring in part and dissenting in part. Wiener, Circuit Judge, filed opinion dissenting in part. Costa, Circuit Judge, filed opinion concurring in part and dissenting in part, in which Owen, Chief Judge, and Wiener, Higgenson, and Southwick, Circuit Judges, joined in part.").

90. *See* Brackeen *Judicial Breakdown Chart*, TURTLE TALK, https://turtletalk.files.wordpress.com/2022/09/screen-shot-2022-09-26-at-2.35.37-pm.png (last visited Oct. 24, 2022).

91. *Brackeen*, 994 F.3d at 267–68 (per curiam opinion). The court split equally on the equal protection challenge to the third preference for both adoption and foster placements, allowing children to be placed with Indian families from tribes other than that for which the child is a member or eligible for membership. *Id.*

as Judge Costa wrote, the decision "has no more legal force than a law review article."[92]

Almost all of the parties submitted petitions of certiorari to the Supreme Court, the federal government and tribal intervenors with the hope of limiting the questions presented,[93] and Texas and the foster families with the hope of having the constitutional questions broadly considered.[94] The Court granted all of the petitions, leaving multiple questions presented and the constitutional issues around ICWA open for Court review.[95] There has been a tremendous amount of ink spilled on these questions, including principal briefs that contain more than 20,000 words, plus over 20 amicus briefs in support of ICWA and eight opposing it.[96] While a full analysis of the arguments for the case are beyond the scope of this article, a short description of the three primary issues the Court will consider is below.

1. Equal Protection

In many ways, the most shocking argument Texas and the foster parents bring is the claim that ICWA violates the Equal Protection Clause.[97] Their argument is twofold. The first is that tribal citizenship is based on descendancy, which means it is inextricably tied to race.[98] Their second is that two provisions of the law that have to do with the placement preferences are not tied directly to the Indian child's tribe and, as such, insert a racial preference rather than a political one.[99]

Since at least 1974, the Supreme Court has held that the classification of Indians for the purpose of legislation is not a race-based determination, but rather a political one.[100] In the first instance, the inclusion of Indians as a

92. *Id* at 446 (Costa, J., concurring in part and dissenting in part).

93. Petition for a Writ of Certiorari, Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (No. 21-377); Petition for a Writ of Certiorari, Haaland v. Brackeen, 142 S. Ct. 1205 (No. 21-376).

94. Petition for a Writ of Certiorari at i, Texas v. Haaland, 142 S. Ct. 1205 (No. 21-378); Petition for a Writ of Certiorari at i, Brackeen v. Haaland, 142 S. Ct. 1205 (No. 21-380). Indiana and Louisiana, which had joined Texas in the litigation, did not file a petition for certiorari.

95. Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), *cert. granted sub nom.* Cherokee Nation v. Brackeen, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.* Texas v. Haaland, 142 S. Ct. 1205 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022).

96. *See* Haaland v. Brackeen *(No. 21-376) Supreme Court Documents*, Turtle Talk, https://turtletalk.blog/texas-v-zinke-documents-and-additional-materials/texas-v-haaland-supreme-court-documents/ (last visited Oct. 24, 2022).

97. Brief for Petitioner the State of Texas at 37–57, Texas v. Haaland, 142 S. Ct. 1205 (2022) (No. 21-378), 2022 WL 1785628.

98. *Id.* at 42.

99. *Id.* at 47–48.

100. Morton v. Mancari, 417 U.S. 535, 554 (1974).

political class is illustrated in the Constitution in both the Indian Commerce Clause and the Indians Not Taxed provisions.[101] Both require Congress to determine who is an "Indian" for the purposes of lawmaking, an inherently political determination.[102]

In the second, treaties between the United States and tribes, combined with the language in the Constitution and Supreme Court case law, make clear that the United States has a trust relationship with, and plenary authority to pass laws affecting, Indian tribes and people.[103] If these laws are subject to a strict scrutiny analysis as race-based laws, to quote the Court, all of Title 25 would be unconstitutional.[104]

Finally, tribes alone hold the power to determine their own citizenship.[105] This often means that Native people who may be racially American Indian or Alaska Native may not meet the requirements of a tribe's citizenship laws. There is perhaps nothing more political for a tribe than the determination of its citizenry.[106]

2. Congressional Power to Enact ICWA

Related to the argument about the nature of tribal citizenship and race, Texas and the foster parents argue that Congress simply does not have the power to intrude in state domestic matters to protect Native families.[107] Congress's power in Indian affairs has been described as exclusive and plenary by the Supreme Court.[108] Based on the trust responsibility, the Indian Commerce Clause, and treaties, Congress has significant power to pass laws on behalf of both tribes and individual Indians.[109] This had not been questioned significantly by the Court until Justice Thomas wrote in

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101. U.S. Const. art. I, §§ 2, cl. 3 & 8, cl. 3.

102. *See* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 Calif. L. Rev. 495, 551 (2020).

103. Matthew L.M. Fletcher, Federal Indian Law 43–44 (2016).

104. *Morton,* 417 U.S. at 552 ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.").

105. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).

106. *See, e.g.*, Gerald Vizenor & Jill Doerfler, The White Earth Nation Ratification of a Native Democratic Constitution (2012); *Martinez*, 436 U.S. at 55–56; Gloria Valencia-Weber, Santa Clara Pueblo v. Martinez*: Twenty-Five Years of Disparate Cultural Visions*, 14 Kan. J.L. & Pub. Pol'y 49 (2004–05).

107. Brief for Petitioner the State of Texas, *supra* note 97, at 20–34.

108. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

109. Fletcher, *supra* note 103, at 44.

Adoptive Couple and in *Lara*.[110] Justice Thomas's concurrences questioned the source of congressional power in Indian affairs given the perceived limitations of the Indian Commerce Clause.[111] His argument was essentially that Congress only has power to address literal issues of commerce, rather than broad policy enactments that fulfill treaty promises and the trust responsibility.[112] Therefore, Justice Thomas believes ICWA to be beyond the scope of congressional power.[113]

Justice Thomas's reasoning may have a destructive but appealing clarity that is belied by the actual history of the Clause and the history of the United States.[114] ICWA's preamble makes clear it is tied directly to the trust responsibility of Congress to protect tribes and Native people.[115] Without their children, the very existence of tribal communities and nations is threatened. By allowing the continued removal of Native children and their subsequent placement in non-Native families, the federal government would be encouraging the end of tribal nations and the destruction of Native families.

3. Commandeering[116]

In recent years, the Supreme Court has expanded the judicially created doctrine of anti-commandeering.[117] Arguably based on interpretations of the 10th Amendment,[118] Congress does not have the power to pass laws that would "commandeer" state agencies to enact a "federal regulatory program."[119] However, Congress can, and does, use incentives through the Spending Clause to "encourage" state action.[120]

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110. Adoptive Couple v. Baby Girl, 570 U.S. 637, 659 (2013) (Thomas, J., concurring); United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring).

111. *See Lara*, 541 U.S. at 224 (Thomas, J., concurring).

112. *Adoptive Couple*, 570 U.S. at 658–64 (Thomas, J., concurring).

113. *Id.* at 666.

114. *See* Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship and Original Constitutionalism*, 70 Stan. L. Rev. 1025, 1047–48 (2018) ("Justice Thomas has made a separate point with respect to enumerated powers, arguing that the Constitution's grant of congressional power to regulate commerce 'with the Indian *tribes*' does not provide congressional authority to regulate individual Indians, as ICWA does. This distinction finds no support in constitutional history, regardless whether Native communities are described as nations or as tribes.").

115. 25 U.S.C. § 1901.

116. *See* Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 Yale L. & Pol'y Rev. 292 (2020) (delving into commandeering in great detail).

117. Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. Rev. 7, 15–16 (2006).

118. Josh Blackman, *Improper Commandeering*, 21 U. Pa. J. Const. L. 959, 963 (2019).

119. New York v. United States, 505 U.S. 144, 161 (1992).

120. *Id*. at 166–67. This is particularly important for the discussion in Part II *infra*, as Congress uses its Spending Clause power to direct state child protection requirements.

Texas argues that ICWA's provisions requiring the state courts and agencies to follow the burdens of proof required to either place an Indian child in foster care or terminate the parental rights of their parents constitute a commandeering violation.[121] Their arguments intersect in that if Congress does not have the power to pass the law under Article I, discussed above, then the law must necessarily be commandeering the states.[122]

Congress addressed a version of this argument in its House Report accompanying the bill, discussing the Supremacy Clause in the context of ICWA.[123] Stating that the law does not "oust the State" from the legitimate police powers in domestic relations, Congress stated, "it is clear that Congress has full power to enact laws to protect and preserve the future and integrity of Indian tribes. . . ."[124] The Report explains how Congress may impose "certain procedural burdens to protect the substantive rights of Indian children, Indian parents, and Indian tribes in State court proceedings. . . ."[125]

D. An Uncertain Future

Though the Court may not issue a decision until June of 2023, the question that arises time and again is how to preemptively fix what the Court might do to ICWA and federal Indian law. If the Court accepts virtually any of Texas's arguments, the legal landscape of federal Indian law may be fundamentally changed. At a minimum, it is likely ICWA practice will change at least in some respects. The Court's ultimate decision, however, does not mean tribes will suddenly stop fighting to protect their children and families. In addition, advocates will continue to fight for just solutions to the massive issues created by the current child welfare system.[126]

In order for tribes to continue that fight, there must be a solution to the funding structure in place now for tribal child welfare and justice systems. The *Brackeen* litigation has laid bare the importance of tribal governments administering their own child protection and justice systems separate and apart from the states. Tribal governments must have the ability to successfully secure sources of funding for tribal child welfare systems. Without significant changes to the amount of funding and the funding

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121. Brief for Petitioner the State of Texas, *supra* note 97, at 60–62.

122. *Id.* at 66.

123. H.R. Rep. No. 95-1386, at 12–19 (1978).

124. *Id*. at 17.

125. *Id*. at 18.

126. *See* Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World 10 (2022). Professor Roberts has been writing path-marking scholarship in this area for more than 20 years, and while her frustration shines through in the prologue, she also has very obviously not stopped doing the work.

structure, tribes will continue to be at a massive disadvantage, and will be unable to serve their member children and families.

Tribal justice systems and social service agencies vary as widely as over 500 separate sovereigns can.[127] Some tribes have a system that is relatively similar to a state system.[128] Other tribes have very traditional justice systems, with elders acting as judges or counselors, and very limited or no agency.[129] Some use pieces of both.[130] Some tribes have a culture of involving many in the community in a family's problems, and others are the opposite. Even given that variety, there is often an understanding that family problems aren't best solved in an adversarial process, parents need services and support, children should stay with extended family, and state systems don't serve Native families.[131] Tribes develop systems based on their knowledge and tradition that do not look like state systems[132] and are disrupted when children are taken into state systems.[133] Tribal systems are built on, and intended to create, resiliency.[134]

Because the ultimate goal of ICWA was not only to ensure states followed federal minimum standards to protect Indian families in their courts,[135] but also to ensure tribes had the opportunity to make decisions regarding their own children,[136] strengthening tribal child protection systems must be at the heart of any post-*Brackeen* advocacy. One of the many effects of the federal

127. There are 574 federally recognized tribes in the United States. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636 (Jan. 28, 2022); *Tribal Leaders Directory*, U.S. Dep't of the Interior, Indian Affs., https://www.bia.gov/service/tribal-leaders-directory (reporting number of federally recognized tribes as of Jan. 28, 2022). *See 1977 Hearings*, *supra* note 2, at 79 (statement of Goldie Denny, Dir. of Soc. Servs., Quinault Nation, & Nat'l Cong. of Am. Indians) ("These are some of the advantages of a tribe operating its own social services delivery system. You can be innovative. You do not have to be restricted by the old ways of doing things that the non-Indian people have taught you to do.").

128. *See, e.g.*, Tulalip Tribal Codes, Juvenile and Family Code, tit. 4, ch. 4.05, https://www.codepublishing.com/WA/Tulalip/#!/Tulalip04/Tulalip0405.html#4.05; Cherokee Nation Tribal Code, tit. 10, ch. 1 (2019).

129. *See Kongiganak Tribal Court*, Native Vill. of Kongiganak, https://sites.google.com/alaska.edu/nativevillageofkongiganak/kong-tribal-court?authuser=0.

130. *See* Aullarripta Qaunagisaqługich Miqłiqtuvut Pitqurrianich Native Vill. of Barrow's Children's Code (2020).

131. Carrie Garrow, *Changing Family Courts to Help Heal and Build Resilient Families*, 2018 B.Y.U. L. Rev. 1277 (2018).

132. Joseph Flies Away & Carrie Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence +*, 2013 Mich. St. L. Rev. 403 (2013).

133. *See, e.g.*, *In re* Payne/Pumphrey/Fortson, 874 N.W.2d 205, 208 (Mich. Ct. App. 2015) (qualified expert witness opposed termination of the mother's parental rights as "it was generally against the tribe's practice to support termination").

134. Michalyn Steele, *Indigenous Resilience*, 62 Ariz. L. Rev. 305 (2020).

135. 25 U.S.C. § 1902.

136. *Id.* § 1911(a).

funding of state child welfare systems has been to force Native families to stay in state court to ensure their children have access to funding and services. When that happens, ICWA is vulnerable to challenges that arise from the fundamental structure of state systems—breaking up families, placing children in stranger foster care, providing children with poor representation, and, most importantly, showing a fundamental disrespect of tribal culture and systems.[137]

Tribal leaders advocated for funding of tribal systems.[138] Testimony after testimony of tribal child welfare agency directors and tribal leaders raised concerns about funding tribal child welfare systems.[139] ICWA's protections are all well and good, the testimony implies, but mean very little without significant support and funding for tribal systems.[140]

As such, subchapter II of the law, which is mostly ignored by advocates today, includes provisions for funding systems and services.[141] The law gives the Secretary of the Interior discretion to make grants to tribes and organizations for their child welfare programs, including for licensing foster homes, maintaining counseling facilities, and providing family assistance, home improvement, training and education of tribal court judges and staff, adoption subsidies, and legal representation for Indian families involved in proceedings.[142] The money provided can also be used as a "non-federal" match for Social Security Act funding.[143]

The law includes a section specifically authorizing the Secretary to fund *off*-reservation services including foster homes, facilities and services, family assistance, and legal representation to Indian families involved in the child welfare system.[144] The Secretary is also authorized to enter into agreements with the Secretary of Health and Human Services (HHS) to appropriate HHS funds as needed for the services listed.[145] Some of these grants have never been appropriated by Congress, while others are so underfunded they make very little difference for families.[146] The on-reservation program, which in

137. *See In re* Nicole B., 927 A.2d 1194, 1201–04 (Md. Ct. App. 2007) (where a trial judge, among other things, compared tribal membership with being a member of the Boy Scouts), *rev'd*, 976 A.2d 1039 (Md. 2009).

138. *See* congressional hearing testimony cited *supra* note 3.

139. *See id.*

140. *See id*.

141. 25 U.S.C. §§ 1931–1934.

142. *Id.* § 1931(a).

143. *Id.* § 1931(b); see Part II *infra* explaining that Social Security Act funding for child welfare is done on a matching, reimbursable basis, making it difficult for tribes to access the funds.

144. 25 U.S.C. § 1932.

145. *Id.* § 1933(a).

146. Nat'l Cong. of Am. Indians, *supra* note 40, at 66.

1978 Congress assumed would require $26 million to $62 million to fund, was funded in 2020 at $14.431 million for *all* of Indian Country.[147] In today's dollars, the 1978 assumptions would require $200 to $500 million for full funding.[148] Congress could, and should, fully fund these grants. The off-reservation program has been and remains at $0.[149]

Tribes have access to other threads of funding that may be used to fund their social service and tribal justice systems, including the Bureau of Indian Affairs (BIA) Tiwahe program, the Indian Child Welfare Act program, and the off-reservation ICWA program. All three of these were funded at approximately $15 million total for all 576 tribes in 2020.[150] The BIA social services program received $51.4 million in 2020.[151] One program addresses child abuse prevention, though that amount is approximately half a million dollars for tribes and is shared with migrant populations.[152] None of these lines of funding begin to approach the amount of money available to states to run their systems through the Social Security Act.[153] However, even if tribes could fully access that funding, the attendant requirements force them to run systems that look like state systems.

II. Child Welfare Funding

In 1977, the then-Deputy Assistant Secretary of Health, Education, and Welfare (HEW)[154] had an exchange with Chairman Abourezk during hearings on S. 1214, a bill that would become the Indian Child Welfare Act. Nancy Amidei, the HEW official, told the Senate committee of a new bill HEW was moving—S. 1928.[155] S. 1928 would create standards for state systems and, finally, fully invest in a child welfare system—or, as Amidei described it, "an adequately financed, official backed, ongoing system that would

147. *Id.* at 70.
148. *Id*.
149. *Id.*
150. *Id.*
151. *Id.* at 71.
152. *Id.* at 74.
153. *See* EMILIE STOLTZFUS, CONG. RSCH. SERV., R47080, CHILD WELFARE IN THE PRESIDENT'S FY2023 BUDGET (Apr. 26, 2022), https://crsreports.congress.gov/product/pdf/R/R47080#:~:text=The%20President's%20FY2023%20budget%20requests,Victims%20of%20Child%20Abuse%20Act (reporting that in fiscal year 2022, over $11 billion were provided to fund Title IV-B and IV-E and almost $200 million under the Child Abuse Prevention and Treatment Act grants).
154. The department that is now the Department of Health and Human Services (HHS) and a separate Department of Education.
155. *1977 Hearings*, *supra* note 2, at 53 (statement of Nancy Amidei, Deputy Assistant Sec'y for Legislation/Welfare, Dep't of Health, Educ. & Welfare).

address the needs of children and support the rights of their families."[156] Amidei stated the fact they were invited to give testimony on S. 1214 had them revisit their own bill and note there were "some gaps" that could be addressed by bringing some of S. 1214's provisions into S. 1928.[157]

The chairman and the official went back and forth, with Amidei trying to explain to the chairman how this new funding source would work, and how it would address many of the provisions in S. 1214.[158] At the end of the testimony, HEW agreed that it could create programs for Indian people that do not have a racial or ethnic basis, and Amidei explained they could incorporate portions of S. 1214 into S. 1928, such as involving tribal governments and tribal courts, and keeping children in their homes. The benefit would be to "insure that the moneys available generally would also be available on behalf of Indian children in ways that they are not now."[159]

That afternoon, the influential lawyer Bert Hirsch testified that merging S. 1214 with S. 1928 would be an awful idea.[160] Others submitted testimony to the same.[161] The suspicion—rightfully based on years of dealing with the federal government—appeared to be that none of the provisions of the nascent ICWA would actually make it into the broader federal law.[162] ICWA passed in 1978, and two years later, S. 1928 passed as a different law, one we now know as the Adoption Assistance and Child Welfare Act of 1980 (CWA).[163] CWA included all of the protections that Amidei discussed with the chairman, while also creating the single largest source of child welfare funding in the country.[164] What the law didn't include were any provisions to protect Native children or recognize tribal courts or agencies. Forty-five years later, tribes are still struggling with unfunded and underfunded ICWA grants, while states receive millions of dollars from the IV-E system.

Indeed, the primary source of funding for all child protection systems in the United States is the Social Security Act—specifically Titles IV-B and

156. *Id.* at 54.

157. *Id.* at 55.

158. *Id.* at 71–75.

159. *Id.* at 75.

160. *Id.* at 150 (statement of Bertram Hirsch, Ass'n on Am. Indian Affs.).

161. *1978 Hearings*, *supra* note 3, at 66 (statement of Goldie Denny, Dir. of Soc. Servs., Quinault Nation, representing Nat'l Cong. of Am. Indians).

162. *Id.* ("General child welfare legislation, no matter how well meaning, does not address the unique legal, cultural status of Indian people"); *1977 Hearings*, *supra* note 2, at 150 (statement of Bertram Hirsch, Ass'n on Am. Indian Affs.).

163. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

164. *See Introduction to Child Welfare Funding*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/management/funding/intro/ (last visited Dec. 28, 2022).

IV-E.[165] Since those hearings in 1977, those acts have grown in size and complexity as Congress used its Spending Clause power to direct state child protection policies.[166] Prior to 1961, child welfare costs fell entirely on the states, to the extent they offered any services at all.[167] The years 1961 to 1980 marked a transitional period in which the federal government and states shared child welfare costs.[168] Beginning in 1980, significant funds were authorized under Title IV-E of the Social Security Act.[169] In 1997 Congress passed the Adoption and Safe Families Act.[170] On October 7, 2008, the Fostering Connections Act was passed.[171] Most recently, in 2018, the Families First Prevention Services Act (FFPSA) passed in Congress and is the biggest rewrite of Title IV-E in 21 years.[172]

As many have pointed out, these policies swing wildly between supporting parents and limiting the removal of children and punishing parents and encouraging the use of foster care.[173] Twenty years ago, Professor Dorothy Roberts wrote *Shattered Bonds*, an influential book detailing a depressing trek through problems all too familiar to the system today.[174] Roberts' points have proved to be just as valid and emphatic today, despite considerable studies and sizable amounts of money devoted to the cause. Just this past year she revisited the system in *Torn Apart*. The subtitle speaks volumes: "how the child welfare system destroys Black families—and how abolition can build a better world."[175] For years, child protection professionals and

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165. *Id*.

166. Roberts, *supra* note 126, at 141–45.

167. Laura Radel, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs., Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field 3 (Off. of the Assistant Sec'y for Plan. & Evaluation et al. eds., ASPE Issue Brief. 2005), https://aspe.hhs.gov/reports/federal-foster-care-financing-how-why-current-funding-structure-fails-meet-needs-child-welfare-field-0.

168. *Id*.

169. *Id*.

170. *Id*.

171. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949–81; Jack F. Trope & Shannon Keller O'Loughlin, A Survey and Analysis of Select Title IV-E Tribal-State Agreements Including Template of Promising Practices (Ass'n on Am. Indian Aff. & Casey Fam. Programs 2014), https://www.indian-affairs.org/uploads/5/4/7/6/54761515/fulltitleiv-ereport.pdf.

172. Family First Prevention Services Act of 2018, Pub. L. No. 115-123, 132 Stat. 64, 170, 232; Roberts, *supra* note 126, at 144.

173. Roberts, *supra* note 126, at 144; Dorothy Roberts & Jill Lepore, *Baby Doe: A Political History of Tragedy*, New Yorker (Jan. 24, 2016); Child Welfare Info. Gateway, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs., How Federal Legislation Impacts Child Welfare Service Delivery (Mar. 2022), https://www.childwelfare.gov/pubPDFs/impacts.pdf.

174. Dorothy Roberts, Shattered Bonds: the Color of Child Welfare (2002).

175. Roberts, *supra* note 126.

academics have warned that having state social workers as first responders in a child protection context rarely has a beneficial outcome for families.[176] That is, in many ways, due to the nature of child welfare funding.

A. Title IV-B

Title IV-B of the Social Security Act is the smaller of the two pots of money states (and tribes) access for their child welfare systems. Title IV-B offers funding to child welfare systems to facilitate child and family services. It has two subparts: (1) the Stephanie Tubbs Jones Child Welfare Services Program, which is a discretionary grant program; and (2) the Promoting Safe and Stable Families Program, which can be used for family preservation and support.[177] The purpose of the first subpart of Title IV-B "is to promote State flexibility in the development and expansion of a coordinated child and family services program that utilizes community-based agencies and ensures all children are raised in safe, loving families."[178] In fiscal year 2016, 179 tribes, tribal organizations, or tribal consortia received a total of $6,437,417 under the first subpart.[179]

The Promoting Safe and Stable Families Program (subpart 2) only allows tribes of a certain size to access the funding, and in fiscal year 2016, 130 tribes, tribal organizations, and tribal consortia received $10,320,750.[180] The grants ranged from approximately $10,225 to $1,546,523.[181] The

176. *See* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 526 (2019); Virginia Sawyer Radding, *Intention v. Implementation: Are Many Children, Removed from Their Biological Families, Being Protected or Deprived?*, 6 U.C. Davis J. Juv. L. & Pol'y 29, 32, 37, 45, 48 (2001); Marsha B. Freeman, *Lions Among Us: How Our Child Protective Agencies Harm the Children and Destroy the Families They Aim to Help*, 8 J. L. & Fam. Stud. 39, 43, 49–50, 64 (2006); Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 Wm. & Mary J. Women & L. 414, 417–18, 450 (2003).

177. John Sciamanna, *What Are the IV-B Programs?*, Child Welfare League of Am., https://www.cwla.org/what-are-the-iv-b-programs/; *Promoting Safe and Stable Families: Title IV-B, Subpart 2, of the Social Security Act*, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs. (May 17, 2021), https://www.acf.hhs.gov/cb/grant-funding/promoting-safe-and-stable-families-title-iv-b-subpart-2-social-security-act.

178. 42 U.S.C. § 621.

179. Capacity Building Center for Tribes, Title IV-B Funding Overview (July 2018), https://capacity.childwelfare.gov/tribes/resources/title-iv-b-funding-overview; *see also Promoting Safe and Stable Families: Title IV-B, Subpart 2, of the Social Security Act*, *supra* note 177.

180. *Promoting Safe and Stable Families: Title IV-B, Subpart 2, of the Social Security Act*, *supra* note 177.

181. *Id.*

minimum grant for subpart 2 is $10,000[182] and funding is restricted to four areas: family preservation, family support, family reunification, and adoption promotion and support services.[183] Previously, subpart 2 funding was restricted to time-limited family reunification in addition to the other three areas. However, FFPSA changed this requirement as part of an effort to undo the limits of when a family may receive services.[184]

B. Title IV-E

The purpose of Title IV-E is to encourage "each State to provide, in appropriate cases, foster care and transitional independent living programs for children who otherwise would have been eligible for assistance under the State's plan approved under part A, adoption assistance for children with special needs, kinship guardianship assistance, and prevention services programs specified in section 471(e)(1)."[185] The Act and its accompanying regulations are tremendously complex, and this article will only give a basic overview of the funding mechanism.

Title IV-E is an uncapped entitlement and uses a reimbursement system that is means tested.[186] Only certain families qualify for the funding, and states only receive a percentage of funds from the government.[187] States must use other funding to cover both the matching costs and the remaining costs of child protection systems. Regardless, the amount received from the federal government drives huge policy changes.

Overall, there are three primary funding streams associated with major categories of child welfare costs: the costs of keeping the child in foster care, the associated administrative costs, and related training costs.[188] In

182. *Id.* There has been at least one legislative attempt to allow all tribes to receive the minimum $10,000. Tribal Family Fairness Act, H.R. 4348, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/4348/text?q=%7B%22search%22%3A%5B%22To+remove+administrative+barriers+to+participation+of+Indian+tribes+in+Federal+child+welfare+programs%2C+and+increase+Federal+funding+for+tribal+child+welfare+programs%2C+and+for+other+purposes.%22%5D%7D&r=1&s=2.

183. Admin. for Child. & Fams., U.S. Dep't of Health & Human Services, Program Instruction ACYF-CB-PI-19-04, at 9 (Mar. 18, 2019) [hereinafter ACYF-CB-PI-19-04].

184. *Id.*

185. 42 U.S.C. § 670.

186. Cong. Rsch. Serv., Child Welfare: An Overview of Federal Programs and Their Current Funding 14–15 (2018), https://crsreports.congress.gov/product/pdf/R/R43458.

187. *Id*. at 15.

188. Nat'l Council of Juv. & Fam. Ct. Judges, Child Welfare Finance Reform Policy Statement (2011), https://www.ncjfcj.org/wp-content/uploads/2019/08/child-welfare-finance-reform-policy-statement.pdf.

other words, the funding stream is separated into foster care maintenance payments, administrative costs, and training costs.

There are a wide range of services under Title IV-E. The following are the available services and programs for which Title IV-E funding is available:

- Title IV-E Foster Care—Assistance with costs of foster care for eligible children and associated administrative and training costs.
- Title IV-E Adoption Assistance—Financial and medical assistance for the adoption of children with special needs and associated administrative and training costs.
- Title IV-E Guardianship Assistance—Financial and medical assistance for guardianship of eligible children and associated administrative and training costs.
- John H. Chafee Foster Care Independence Program—Funds to help older youth in foster care and former foster care youth acquire training and independent living skills so they can become self-sufficient.[189]

These categories of services overlap with the aforementioned funding streams. For example, the funding stream that covers administrative costs could be used to fund administrative activities in the provision of foster care, adoption assistance, and guardianship assistance.

The Title IV-E Foster Care and Adoption Assistance program provides federal funds for foster care, adoption assistance, and relative guardianship payments for children who meet Title IV-E eligibility requirements.[190] These requirements are: "(1) the child's family has an income below the level set by the Title IV-E statute, and (2) certain legal findings have been made by a court of competent jurisdiction, or in the case of a voluntary placement, there is an agreement between the parent(s) and the agency administering the Title IV-E program."[191]

A Title IV-E plan has 37 unique elements that must be met, and many of those elements have subparts.[192] If a state or tribe satisfies these requirements, "[t]he Secretary shall approve any plan which complies."[193] The 37 requirements for plan approval are relatively general and straightforward,

189. *Title IV-E Program Funding*, Nat'l Child Welfare Res. Ctr. for Tribes, http://nrc4tribes.org/Direct-Tribal-Title-IV-E-Funding.cfm (last visited Dec. 12, 2022).

190. Cong. Rsch. Serv., Child Welfare, *supra* note 186, at 15.

191. Jack F. Trope, Title IV-E: Helping Tribes Meet the Legal Requirement (Mar. 2010), https://narf.org/nill/resources/title-iv-e/2010_iv-e_legal_requirements.pdf.

192. 42 U.S.C. § 671(a).

193. *Id.* § 671(b).

comprising approximately 12 pages of text.[194] Additionally, more specific requirements for the provision of foster care maintenance payments and adoption assistance are outlined in further detail in 42 U.S.C. §§ 672 and 673, respectively. However, in practice, to access funding, states must do significantly more than simply meet the 37 basic requirements set out in Title IV-E:

> To be in compliance with the title IV-E plan requirements and to be eligible to receive Federal financial participation (FFP) in the costs of foster care maintenance payments and adoption assistance under this part, a title IV-E agency must have a plan approved by the Secretary that meets the requirements of this part, part 1355, section 471(a) of the Act and for Tribal title IV-E agencies, section 479B(c) [42 U.S.C. § 679c] of the Act. The title IV-E plan must be submitted to the appropriate Regional Office, ACYF, in a form determined by the title IV-E agency.[195]

The implementing regulations are found in 45 C.F.R. §§ 1355 and 1356. The implementing regulations elaborate on parts of the statutory requirements, such as 45 C.F.R. § 1356.21, which details the foster care maintenance payments program implementation requirements.[196]

In the submitted plan, HHS generally requires that compliance with each of the Title IV-E statutory criteria be proven by reference to written official records based on the tribe's lawful exercise of sovereign authority.[197]

III. Barriers for Tribal Systems

Since ICWA was first considered, the conversation about which agency would be responsible for funding tribal child welfare systems has been in question. At the time, the BIA opposed section II of the law, stating that:

> As regards title II of the bill, we believe that it also needs to be rewritten. The Secretary of the Interior already possesses many of

194. *Id.* § 671(a) (includes elements such as coordination of local programs; personnel requirements; reporting and monitoring; standards for foster family homes and institutions; reasonable efforts guidance for reunification of families and placements; development of case plans; preference to relative caregivers; procedures for criminal records checks; health insurance for children; training of foster parents; home study timelines; timelines for notifying relatives after removal; educational placements; placement with siblings; and licensing standards and reporting).

195. 45 C.F.R. § 1356.20(a).

196. *Id.* § 1356.21.

197. TROPE, *supra* note 191, at 11.

> the authorities contained in title II. Our principal concern with the title, however, is that the Secretary of the Interior would be granted certain authorities that are now vested in the Secretary of Health, Education, and Welfare. We are unclear which Department would be required to provide what services; and we would be hesitant, without an increase in manpower and money, to assume responsibilities for providing services which are now being provided by the Department of Health, Education, and Welfare.[198]

Since then, the question of both funding and the trust responsibility in the area of Indian child welfare has been the topic of dispute between the BIA and HHS, with very few positive results for tribes.[199] At the time of ICWA's passage, most tribal testimony stated it didn't matter much which agency assisted with funding, so long as one did.[200]

Today, the problems with current federal policy funding for all children are notorious, and even those who work or have worked within the Children's Bureau know this.[201] The system is currently designed to promote the termination of parental rights—the legal relationship between a parent and their child—rather than provide the kind of services and create the kinds of systems that keep families together. And while Title IV-E is a massive pot of funds (Congress appropriates over $10 billion annually),[202] it does not match the needs of state systems.[203]

Even though everyone who works in the system seems to agree there is at least one thing wrong,[204] if not the whole process, there is little room

198. *1978 Hearings*, *supra* note 3, at 55 (statement of Rick Lavis, Deputy Assistant Sec'y for Indian Affs., U.S. Dep't of the Interior).

199. *See, e.g.*, Calif. Tribal Fams. Coal. v. Azar, No. 4:20-CV-06018 (N.D. Cal. 2020) (a still-unresolved lawsuit attempting to hold HHS responsible for collecting data on American Indian and Alaska Native children, as well as LGBTQIA+ children, as part of their federal data collection process).

200. 1978 Hearings, *supra* note 3, at 117.

201. Jerry Milner & David Kelly, *The Need for Justice in Child Welfare*, 99 CHILD WELFARE J. (2020), *reprinted online at* https://www.cwla.org/the-need-for-justice-in-child-welfare/.

202. *See* STOLTZFUS, *supra* note 153.

203. *See Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field*, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION (July 31, 2005), https://aspe.hhs.gov/reports/federal-foster-care-financing-how-why-current-funding-structure-fails-meet-needs-child-welfare-field-0; Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 219–21 (2013).

204. Jerry Milner & David Kelly, *The Need to Replace Harm with Support Starts with the Adoption and Safe Families Act*, 1 FAM. INTEGRITY & JUST. Q. 6, 7 (Winter 2022). https://publications.pubknow.com/view/752322160/6/; Ashley Albert et al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861 (2021).

for pilot projects or variances from the Social Security Act requirements.[205] And because of this, tribal governments are stuck with no real way to access the most significant source of funds set aside for child protection in the United States.

Under the current system, tribes can more easily access Title IV-B funds than Title IV-E funds. And after years of advocacy, there are now two ways that a tribe can access Title IV-E funds: (1) tribal-state Title IV-E agreements or (2) direct funding.[206] That access comes at a cost, however. The damaging assumption that tribes do not know how to care for their children has continued, following centuries of forced assimilation, forced removal, and disparagement of Indigenous family structures.[207] Current federal funding policies still start from a place of doubt regarding tribal systems.[208] Forcing tribes to adapt to the Social Security requirements—especially Title IV-E—not only forces them to adapt to broken systems, but to systems that may contribute to the destruction of Native families.[209]

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205. *See* ELLIOTT GRAHAM, TITLE IV-E WAIVER DEMONSTRATIONS: HISTORY, FINDINGS, AND IMPLICATIONS FOR CHILD WELFARE POLICY AND PRACTICE (Child.'s Bureau, U.S. Dep't of Health & Hum. Servs., Mar. 2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/2020-waiver-summary-508.pdf (From 1995 to 2019, states were allowed to apply for certain waivers to the usual funding mechanisms. Most states created subsidized guardianship programs.). In 2008, the Fostering Connections to Success and Increasing Adoptions Act included kinship guardianship payments in Title IV-E. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949; *see* CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., KINSHIP GUARDIANSHIP AS A PERMANENCY OPTION 5 & n.12 (July 2018), https://www.childwelfare.gov/pubPDFs/kinshipguardianship.pdf.

206. CAPACITY BLDG. CTR. FOR TRIBES, TITLE IV-E GUIDE FOR TRIBAL GOVERNMENTS AND LEADERS, CONSIDERATIONS AND LESSONS LEARNED 3–4 (2020), https://tribalinformationexchange.org/files/products/titleiveguide.pdf.

207. *See* FORT, *supra* note 18, at 6–28.

208. The clearest example of this is the Children's Bureau's requirement for termination of parental rights petitions, an anathema to many tribes. *See Child Welfare Policy Manual* § 8.3C.2e, Question 5, CHILDREN'S BUREAU, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=61 (last visited Dec. 29, 2022) ("While we recognize that termination of parental rights and adoption may not be a part of an Indian tribe's traditional belief system or legal code, there is no statutory authority to provide a general exemption for Indian tribal children from the requirement to file a petition for TPR. If an Indian tribe that receives title IV-B or IV-E funds has placement and care responsibility for an Indian child, the Indian tribe must file a petition for TPR or, if appropriate, document the reason for an exception to the requirement in the case plan, on a case-by-case basis.").

209. Josh Gupta Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1 (2015) (discussing the failure of Fostering Connections to promote guardianships rather than termination of parental rights and adoption; the article discusses the considerable power of state and local agencies, and the way the federal law still privileges termination and adoption).

However, before discussing this issue in more detail, here is an example of the problem.[210] The example is a small Native village in Alaska. The total population is between two and three hundred people. The only way to get to the village is by a small plane from a hub town. The village received enough funding from the BIA to underpay an Indian Child Welfare worker to track its child welfare cases. It may now also receive some funding from Tribal Justice Support at the BIA for its tribal justice system. The village has between two and five children in state care in any given year. There is no question that having the children placed in the village with their relatives, and being able to go to a local tribal court rather than fly to a hub for state court, is the preferable outcome. However, if the village does that, the kinship placement receives absolutely no Title IV-E maintenance funding to help take care of the child. The tribal ICW worker is not paid by Title IV-E administrative funding and does not receive education that IV-E training funding would pay for.

In order to access that funding, the village would have to enter into an agreement with Alaska to access it indirectly. Alaska is notorious for its unwillingness to enter into Title IV-E agreements, only adding two pilots for maintenance funding in the past 10 years.[211] The village does have the opportunity to receive the funding directly from the federal government, if it can complete a complex 200-page application called a "pre-print" that has to be approved by a regional HHS officer. That application is the same for the state of California as it is for this village. The village would also have to put up all of the initial funding, since IV-E money is a reimbursement program.[212] This would all be to make sure a grandmother can receive a small amount of funding to help care for her grandchild in the village. The system makes no sense, and the numbers bear that out.

Since tribes were first allowed to access Title IV-E funding directly, of over 500 tribes, only 42 have requested the federal grant to start the

210. This example arises from the author's discussions and experience in participating in nearly 100 tribal court assessments in Alaska for The Whitener Group on behalf of Tribal Justice Services, Bureau of Indian Affairs, from 2016 to the present.

211. TROPE & O'LOUGHLIN, *supra* note 171, at 11.

212. *See supra* note 186 & accompanying text.

process,[213] and of those, only 17 tribes have an approved Title IV-E plan to operate foster care, adoptive assistance, guardianship assistance, or a tribal option.[214] What's far more difficult to ascertain is how many tribes are actually running the program. Based on the author's inquiries with tribal attorneys and social workers, not even half of the 17 tribes with approved plans have decided to move forward and implement them.

A. Title IV-B

Many tribes qualify for direct Title IV-B funding. While the requirements are technically subpart-specific, there is significant overlap and tribes can satisfy them through the same process. Under subpart 1, a tribe is eligible for direct payments if the tribe is within a state with an approved child welfare services plan under the subpart.[215] The Secretary of Health and Human Services must make a determination for when direct funding is appropriate.[216]

Under subpart 2, a tribe generally must comply with the same requirements as the states to access direct funding.[217] A tribe may be exempt from the requirement under subpart 2 that not more than 10 percent of funding for any fiscal year go to administrative costs and "significant portions" of expenditures go to each of the four areas if the Secretary determines the requirements are "inappropriate."[218]

Formulas for both subparts are based on the population of a tribe under the age of 21.[219] Tribal funding under subpart 1 is diverted from the grants

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213. For reasons that aren't clear, the Children's Bureau has restricted access to who can see the awarded Development grants, https://www.acf.hhs.gov/cb/grant-funding/childrens-bureau-discretionary-grant-awards, though they have maintained their annual discretionary award site, *FY 2022 Children's Bureau Discretionary Grant Awards*, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs. (Sept. 30, 2022), https://www.acf.hhs.gov/cb/grant-funding/fy-2022-discretionary-grant-awards. Prior to this development, the author created a spreadsheet with the list of tribes that have received grants and have approvable plans from 2009 through 2022, including their ACF region. She is personally aware that no tribes received the award in 2021.

214. *Tribes with Approved Title IV-E Plans*, *supra* note 5.

215. 42 U.S.C. § 628.

216. *Id*.

217. *Id.* § 629b.

218. ACYF-CB-PI-19-04, *supra* note 183, at 5 n.4; 42 U.S.C. § 629b(b)(2)(A) ("The Secretary may exempt a plan submitted by an Indian tribe or tribal consortium from the requirements of subsection (a)(4) of this section to the extent that the Secretary determines those requirements would be inappropriate to apply to the Indian tribe or tribal consortium, taking into account the resources, needs, and other circumstances of the Indian tribe or tribal consortium.").

219. ACYF-CB-PI-19-04, *supra* note 183, at 19; Div. of Program Implementation, Child.'s Bureau, Overview of the Children's Bureau and Tribal Child Welfare Programs 5 (Dec. 9, 2016), http://www.tribal-institute.org/2016/F1PP2.pdf.

otherwise proportioned out to the state in which a tribe is located.[220] Subpart 2 includes a 3 percent set-aside for Indian tribes or tribal consortia.[221]

The tribe or tribal organization must submit a five-year Child and Family Services Plan (CFSP) developed jointly with HHS and an Annual Progress and Services Report (APSR) to access grants.[222] A tribe's plan must meet the mandated regulations, which include certain requirements for state plans.[223] The CFSP serves a primary purpose of "facilitat[ing] tribes' integration of the programs that serve children and families," and consolidates plans for four programs: the Chafee Foster Care Program for Successful Transition to Adulthood, the Education Training Voucher Program, and both subparts under Title IV-B.[224]

Additionally, a tribe must send in an APSR for each intermittent year between CFSPs, with the purpose of reviewing annual progress on the goals outlined in a tribe's CFSP.[225] At the end of the five-year cycle, a tribe submits a Final Report, which is substantively similar to the APSR but looks back over the entire five-year period.[226]

In general, a tribe must provide information on the administrating agency, goals, objectives, measures of progress, consultation and service coordination, service descriptions, program supports, and the population under 21.[227] The required forms have both a narrative and budgetary component to effectively incorporate all this information.[228] Consultation between states and tribes is also a statutory requirement.[229] A state must consult with tribes in regard to ICWA compliance, but tribes must explain how states in which the tribe is located have consulted with the tribe and provide any concerns.[230] Tribes must also explain their own welfare system and the arrangements made with the state for all tribal children under state or tribal jurisdiction.[231]

Under subpart 1, a tribe is also required to address the manner in which it will satisfy the requirements of three additional targeted plans: the Foster and Adoptive Parent Diligent Recruitment Plan, the Health Care Oversight

220. 42 U.S.C. § 628.
221. *Id.* § 629g(b)(3); DIV. OF PROGRAM IMPLEMENTATION, *supra* note 219, at 5.
222. ACYF-CB-PI-19-04, *supra* note 183, at 4–5, 10–12.
223. *Id*. at 4.
224. *Id*.
225. *Id.* at 5.
226. *Id*.
227. *Id.* at 6–19. For detailed requirements, see 45 C.F.R. § 1357.15.
228. ACYF-CB-PI-19-04, *supra* note 183, at attachment H.
229. *Id.* at 14, 16.
230. *Id*.
231. *Id.* at 12–20.

and Coordination Plan, and the Disaster Plan.[232] Special rules also apply to tribes that formerly received funding as a tribal consortium and now are seeking funding independently.[233] Finally, tribes must match Title IV-B subpart 1 and 2 grants at 25 percent of the total program funding.[234]

Title IV-B is more accessible to tribes as compared to Title IV-E, yet it mandates annual reporting to access funds directly, so it nevertheless presents major administrative costs for tribes and tribal organizations.

B. Title IV-E

Title IV-E presents significant obstacles for tribal governments' abilities to secure funding for tribal child welfare systems. Prior to 2008, tribes could not access Title IV-E funding at all and "the federal government had no statutory mechanism to directly fund tribal foster care programs through Title IV-E."[235] Also during that time, states were under no legal obligation to enter into agreements with tribes or provide them with Title IV-E funding for eligible children under the jurisdiction of the tribe.[236] During an amendment process to Title IV-E, Congress added a section that required states to negotiate with tribes for pass-through agreements. So called because the money "passes through" the state from the Feds on its way to the tribes, these agreements can vary dramatically in length and requirements.[237] These agreements are also dependent on the state's willingness to negotiate with tribes, and while some states have long had straightforward and relatively simple Title IV-E agreements with tribes, others have stubbornly refused to enter into them, or require extreme concessions from tribes.

1. Tribal Access—Indirect or Pass-Through

A 2014 report titled *A Survey and Analysis of Select Title IV-E Tribal-State Agreements* analyzed 98 agreements between tribes and 16 states.[238] The results indicated that there is substantial variation among tribal-state agreements. Many of the practices address issues of self-determination and the practical realities faced by tribes seeking to implement child welfare services and exercise more autonomy in the process. This is especially notable because Title IV-E does not address issues of relationships between tribes and states, nor how the federal government's trust responsibility to

232. *Id*. at 17–19.
233. *Id*. at 19–20.
234. *Id.* at 4, 33.
235. Trope & O'Loughlin, *supra* note 171, at 18.
236. *Id.*
237. *Id*. at 18–71.
238. *Id.*

tribes is to be realized through Title IV-E. In several tribal-state agreements, states have recognized their government-to-government relationship to tribes and "included language supporting Indian Nation sovereignty, self-determination, and federal law and policy regarding Indian children."[239]

Under a tribal-state agreement, there are a wide variety of provisions that are funded by funds passed through the state—from a simple notification program to comprehensive child welfare system operation. The individual agreements vary from tribe to tribe and specify which services will be funded through the agreement. For example, in Alaska, most tribal-state agreements include "reimbursement for administrative and training costs, but . . . not . . . maintenance funding for tribally licensed foster care."[240] But in California, a tribal-state agreement with the Karuk and Yurok tribes provides administration and maintenance costs.[241] Tribal-state agreements describe how ICWA will be implemented and address services provided to American Indian/Alaska Native children in non-kinship out-of-home care. They also specify procedures, roles, and responsibilities for tribal notification when the state receives a referral for an Indian child; when and how state or tribal law enforcement is involved; the roles of the BIA and state and tribal courts; guidance dealing with transfers of jurisdiction to tribes that have their own child protection programs and courts; and procedures for establishing eligibility for Title IV-E payments.[242]

There are several types of tribal-state agreements. The first "allows tribes to access Title IV-E funding for children under the placement and responsibility of the Tribal Court."[243] This funding includes maintenance payments, guardianship assistance payments for eligible children, adoption assistance payments, administrative reimbursement for staffing and training, and training of foster parents.[244]

The second major type of agreement allows for additional funding for the tribe to "assume the full provision of child protection services from intake of reports, in-home services, placement services, [and] services to achieve a child's permanent plan and licensing of placement resources."[245]

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239. *Id*. at 18.

240. *Id*. at 5.

241. *Id*. at 6–7. However, the author is aware that this agreement has never been operationalized due to reluctance by California. This further points to the issue that pass-through agreements are overly controlled by state partners.

242. *Title IV-E Program Funding*, Nat'l Child Welfare Res. Ctr. for Tribes, http://nrc4tribes.org/Direct-Tribal-Title-IV-E-Funding.cfm (last visited Jan. 28, 2023).

243. Capacity Bldg. Ctr. for Tribes, Pathways to Tribal Title IV-E 3 (2017), https://capacity.childwelfare.gov/sites/default/files/media_pdf/tribal-title-ive-cp-00168.pdf.

244. *Id*.

245. *Id*. at 4.

When a full agreement of this type is enacted, the tribe no longer relies on the state to provide the services directly; rather, the state provides technical assistance and oversight of Title IV-E requirements.[246]

Tribal-state agreements are overseen in part by the Administration for Children and Families, specifically by its regional offices. There are 10 regional offices, each with Regional Directors, and all overseen by the Office of Regional Operations (ORO), which is in turn led by a Director.[247] The ORO is tasked with advising the Assistant Secretary for ACF on "regional-state relations."[248] Regional offices also have a role to assist in resolving disagreements between states and tribes.[249] However, many report difficulties in the administration of the regional offices. In 1996, one of the most commented on issues with the Children's Bureau was "[v]ariations across and sometimes within regions on interpreting the regulations and policies. . . ."[250] These issues exist in the oversight and execution of tribal-state agreements, which end up further burdening a tribe by including sometimes superfluous requirements. This regional structure is also a massive issue when it comes to tribes attempting to get their direct plan approved, which is discussed below.

Two examples show the limitations that are built into a pass-through agreement by both a layer of state involvement and federal agency involvement. First, the Bay Mills Indian Community agreement with Michigan is a total of five pages long and includes procedures on ICWA compliance and the administration of Title IV-E programs.[251] The agreement

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246. *Id*.

247. *What We Do*, Off. of Reg'l Operations, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs., https://www.acf.hhs.gov/oro/about/what-we-do (last visited Dec. 8, 2022).

248. *Leadership*, Off. of Reg'l Operations, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Serv, https://www.acf.hhs.gov/oro/about/leadership- (last visited Dec. 8, 2022).

249. *Children's Bureau Response to Tribal Comments*, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs. (Dec. 5, 2005; current as of July 1, 2022), https://www.acf.hhs.gov/cb/resource/childrens-bureau-response-to-tribal-comments?page=all.

250. Soc. Work Pol'y Inst., Educating Social Workers for Child Welfare Practice: The Status of Using Title IV-E Funding to Support BSW & MSW Education 1 (Sept. 2012) https://www.socialworkers.org/LinkClick.aspx?fileticket=1m8kTUtr9sQ%3D&portalid=0. This is particularly acute where tribes are negotiating direct agreements, discussed *infra.* These regional differences are notorious among those who work in the area, where "everyone" knows that if a tribe is in one region, it will be very difficult to get an approvable plan. *See* U.S. Gov't Accountability Off., GAO-15-273, Foster Care: HHS Needs to Improve the Consistency and Timeliness of Assistance to Tribes, 26–30 (2015), https://www.gao.gov/assets/gao-15-273.pdf [hereinafter GAO Report].

251. Bay Mills Indian Community Title IV-E Agreement, Bay Mills Indian Cmty.-Mich. Fam. Indep. Agency, July 21, 1999, *in* Michigan Dep't of Health & Hum. Services, Tribal Agreements Policy Manuals, NAB 2013-001 (Apr. 1, 2013), http://dhhs.michigan.gov/OLMWeb/ex/NA/Mobile/TAM/TAM%20Mobile.pdf.

is short, simple, and straightforward. This does not mean the tribe and state don't sometimes disagree on reimbursement, but the agreement itself is a relatively simple document.

On the other hand, the Central Council of Tlingit and Haida Indian Tribes of Alaska (CCTHITA) also has an agreement. Its agreement with Alaska is 161 pages long. While the agreement is technically nine pages, there are extraordinarily long "attachments" that do everything from make substantive procedural requirements and demands on the tribe to require the tribe to waive its sovereign immunity for civil actions or proceedings brought by the State of Alaska relating to the agreement.[252] Because they cannot acquire this funding directly from the federal government, Alaskan Native communities are essentially placed in the position to either agree to Alaska's conditions, including waiver of sovereign immunity, or be foreclosed from access to this large funding stream.

As demonstrated with these agreements, significant differences exist among the various Title IV-E agreements between states and tribes, and even tribes within the same state may have agreements with substantively different provisions.

2. Tribal Access—Direct

While the 2008 Fostering Connections Act provided a new opportunity for tribes to access federal child welfare funding for the care of their children, the act also required tribes to meet Title IV-E's complex program requirements, which were originally designed for states.[253] Due to "existing tribal resource constraints, many tribes have faced challenges in developing approvable Title IV-E plans. These challenges have been further complicated by inconsistent guidance from HHS."[254] Fostering Connections allowed tribes to access Title IV-E funds directly from the federal government, rather than developing tribal-state agreements, in order to administer their own foster care programs, as well as the option of administering kinship guardianship assistance and adoption assistance programs.[255]

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252. Tribal Title IV-E Maintenance Program, An Agreement Between: The State of Alaska & Central Council Tlingit and Haida Indian Tribes of Alaska, attach. 13 (2016), https://firstalaskans.org/wp-content/uploads/2018/08/Title-IV-E-Agreement-CCTHITA-2016.pdf. Alaska and Montana are the only two states that require such a waiver. In addition, Alaska is the only state that does not allow for a *mutual* waiver, meaning that while the state can sue the tribe, the tribe cannot sue the state. Trope & O'Loughlin, *supra* note 171, at 30–31.

253. GAO Report, *supra* note 250.

254. *Id*. at 30.

255. *Id*. at 5–7.

To get approval for direct funding, tribes must provide local matching funds, be operating a Title IV-B (subpart 1 or 2) program,[256] and submit an approvable Title IV-E plan.[257] The plan must be developed using the pre-print from ACF.[258] The pre-print was designed by the Children's Bureau and is part of the application process for tribes seeking direct funding through Title IV-E. While it was presumably intended to provide additional guidance and assist tribes in navigating the process of satisfying the statutory requirements of Title IV-E for the purposes of direct funding, in practice the pre-print is an overly complicated bureaucratic morass for tribes.

In addition, the plan must be approved by the regional bureaucrat. Differences between administrative regions create burdens on tribes because of the significant variation. Depending on a tribe's administrator, they may face additional challenges that effectively prevent them from pursuing Title IV-E funding directly. This decentralized approach not only creates a system that is challenging to understand because of the different regional requirements, but also further entrenches the outdated idea that a tribe needs federal oversight in creating a child welfare system.

To create an "approvable plan," the tribe will usually need to make extensive modifications to the tribal code, court rules, and/or administrative regulations or policies.[259] In addition to the 42 U.S.C. § 671 requirements, tribes must also comply with additional obligations: tribal-specific statutory obligations under 42 U.S.C. § 679, the implementing regulations, and the pre-print. Just a sample of the legal issues that tribes must address include legal standards related to determination that a child is in need of care, removal of a child, placement preferences, termination of parental rights, guardianships, adoptions, and voluntary placements.[260] Issues related to judicial/administrative proceedings include developing systems and procedures for case review, permanency hearings, and appeals of denial of benefits. Further, there are required administrative procedures for licensing of foster homes, background checks, case plans, employment practices, home studies, payments, provision of services, training, eligibility determinations, and reports and evaluation. Tribes must also address a variety of jurisdictional issues such as territorial definition and tribal court structure. And, finally, tribes must address third-party rights/obligations for

256. Capacity Bldg. Ctr. for Tribes, *supra* note 243, at 5.

257. *Id*. at 6.

258. *PI-18-09, State Requirements for Electing Title IV-E Prevention and Family Services and Programs*, Child.'s Bureau, Admin. for Child. & Fams., U.S. Dep't of Health & Hum. Servs., https://www.acf.hhs.gov/cb/policy-guidance/pi-18-09 (last visited Dec. 8, 2022).

259. Trope, *supra* note 191, at 11–12.

260. *Id*. at 11–20.

foster parents, relatives, families receiving benefits, reporting child abuse, Medicaid, and privacy concerns.[261]

The pre-print is complicated and divergent from the requirements of the statute and allows for very little variation from a state style program. The relationship between the statute, the implementing regulations, and the pre-print makes clear that even when the Children's Bureau attempted to facilitate the application process, the result is subjectively ineffective and frustrating for tribes. This process is a classic example of the incompatibility of federal bureaucratic management with effective tribal self-determination. Moreover, the requirements and the Children's Bureau's divergent regional implementation reflect a particular image of what they think child welfare should be, which is a limited conception that excludes the realities and needs of tribes.

Because of these barriers, this process continues to be widely unavailable to most tribes. In fiscal year 2018, zero tribes applied for Title IV-E direct planning grants; in fiscal year 2019, three applied; and in fiscal year 2020, only two applied. There is no evidence any tribe applied in fiscal year 2021.[262] And even the tribes that have successfully navigated the planning process sometimes still don't receive funding. Moreover, the ability of a tribe to successfully secure funding depends in large part on the region in which the tribe is located, due to the discretionary nature of the application process and the differences in ACF leadership across regions.[263] In other words, some tribes can access funding when others can't, simply because of their geographic location. This arbitrary and capricious disparity further demonstrates why self-governance is necessary for tribal child welfare systems.

IV. Proposed Solutions

As this article illustrates, there is an urgent need to find better ways to fund tribal child welfare systems. One easy solution would be for Congress to fully fund the ICWA grants. This money is already authorized by statute, the funding comes through the BIA, and the funds are covered in far less red tape than Social Security funding is. The National Congress of American Indians regularly asks Congress for more funding in this area in its budget proposal. Tribal governments must push to get real and significant congressional appropriation for child welfare programs.

261. *Id*. at 20–31.

262. Research on file with author. *See supra* note 213.

263. GAO Report, *supra* note 250.

However, the likelihood that those grants would ever reach the level of funding that should be available to tribes under the Social Security Act is slim. Social Security funds are due to the children and families in child welfare systems, whether they be tribal or state. That's one reason both tribes and the federal government should be considering changes for this funding. Initial pilot projects or variances for tribes like those that existed for states prior to 2019 could lead to changes such as a full self-governance model.

This article cannot describe the full complexities of this solution but provides the initial idea here: utilize a self-governance model to fund tribal child welfare systems. Tribes have already successfully implemented this self-governance model in other areas of tribal governance no less complicated than child protection.[264] Additionally, the tribal self-governance model for tribal child welfare systems has proven to be a feasible expansion of the self-governance structure already in place within HHS.[265]

Therefore, both Title IV-B and Title IV-E are ready for a transition to self-governance implementation by tribal governments. While there are other potential solutions available for achieving self-governance in this area, the self-governance model is the likely place to start due to its pre-established infrastructure. Self-governance is not a perfect solution. Tribes would still be subject to some of the requirements in federal law. But it might open doors to flexibility and pilot projects that are desperately needed in this area.

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA).[266] The purpose of this Act was to promote tribal self-governance by allowing tribes to operate programs that were previously provided by the BIA.[267] Under the ISDEAA, a tribe can contract with the federal government in one of two ways—self-determination contracts or self-governance compacts.[268] This has been primarily limited to programs

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264. *See* Stephen D. Osborne, *Tribal Self-Governance Extended to U.S. Department of Transportation*, Advocate, Oct. 2016, at 29 (2016); Geoffrey D. Strommer et al., *Tribal Sovereign Authority and Self-Regulation of Health Care Services: The Legal Framework and the Swinomish Tribe's Dental Health Program*, 21 J. Health Care L. & Pol'y 115, 129–30 (2018).

265. Ken Lucero et al., Self-Governance Tribal Federal Workgroup, Final Report 15–16 (U.S. Dep't of Health & Hum. Servs. 2013).

266. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450–450n, 455–458e, 458aa–458hh, 458aaa–458aaa-18 (2012)).

267. *See Contracts Under Indian Self-Determination and Education Assistance Act, Generally*, 19 Fed. Proc. § 46:339 (Lawyers ed.).

268. David H. Greches et al., Cases and Materials on Federal Indian Law 463 (7th ed. 2016).

administered by the BIA, except for one large exception—the Indian Health Service, a massive program run under HHS.[269]

In the past, tribal leaders and representatives have pushed for self-governance of other HHS programs, including tribal child welfare.[270] A workgroup study determined it was feasible and provided recommendations to HHS and proposed legislation.[271] Unfortunately, HHS did not support the legislation or negotiate with tribal leaders in good faith. This early failed attempt has made this conversation even more difficult. The federal government's reasons for denying self-governance in tribal child welfare are based on the decisions made by the federal government in structuring the child welfare bureaucracy and funding systems. These decisions have had the cumulative effect of cutting most tribes out of meaningful access to child welfare funding. A solution will require rethinking and reconsideration of these past decisions, while keeping in mind the goal of tribal self-governance. This is not a question of authorization; it is about administration and implementation.[272]

Fortunately, there is already a foundation for responsive federal action with respect to child welfare and tribes. ICWA itself stands for the principle that tribal child welfare requires special considerations and processes. Congress has already designed a tribal set-aside through direct funding agreements. However, this process isn't working. Instead, the time has come for HHS to accept that it, too, is subject to the trust responsibility and to expand self-governance to tribal child welfare, under the authority of ISDEAA.

While the current system allows the Children's Bureau to treat tribes as though they lack the requisite capacity for sovereign control of their child welfare systems (see, e.g., the pre-print and regional approval by bureaucrats not familiar with tribal governance), self-governance could provide tribes the resources and freedom to use this capacity as they determine it should

269. *Office of Tribal Self-Governance*, Indian Health Serv., https://www.ihs.gov/selfgovernance/ (last visited Dec. 29, 2022).

270. Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 Am. Indian L. Rev. 1, 63–67 (2015).

271. Lucero et al., *supra* note 265.

272. *See, e.g.*, Osborne, *supra* note 264, at 29.

be used.[273] Tribes are already operating quasi-self-governance systems within child welfare under existing funding agreements and have already demonstrated the capacity to run their own child welfare systems.[274]

Another significant aspect of Title IV-E is the structure of three separate streams of funding. This compartmentalized funding structure means that tribes could strategically select a level of funding that is appropriate for their resources and capacity for self-governance. For example, a tribe could focus on self-governance in the culturally relevant training of foster parents but might continue a tribal-state agreement for the operation of the rest of its child welfare services. This flexibility means tribes don't need to reinvent the wheel; they will be able to use existing structures to provide services in ways that are appropriate for their unique situations. Further, tribes already can and do form consortiums when applying for Title IV-E funding. This benefits under-resourced tribes as tribes can pool resources, much like health consortiums have done under the Indian Health Service.

Because of the administrative burdens and complexity of the pre-print and the direct funding process, many tribes lack the resources to navigate the process to get this funding. Thus, if tribes want to operate a child welfare system, they are often forced to go through a tribal-state agreement. This places tribes in the unpalatable situation of negotiating with states—which often have no desire or incentive to work cooperatively with tribes—in order to develop agreements. Not only does this create an unwanted burden for tribes *and* states, but it also represents a dereliction of federal duties to work with tribes.

Finally, the statutory requirements of Title IV-E could feasibly be translated into requirements for a self-governance model. The failure of the Children's Bureau to translate these requirements into a form that works for tribes underscores that even the best attempts of the federal government are still lacking and indicates the need for more tribal control in the process. Adopting a self-governance model for child welfare that recognizes the statutory requirements of Title IV-E is a promising way forward.

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273. *See generally* Patrice H. Kunesh, *The Significance of Belonging for Indigenous Peoples: The Power of Place and People—Creating a Vision for Community in Indian Country Through Self-Governance and Self-Determination*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 23 (2021); Strommer & Osborne, *supra* note 270; Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-management on Federal Public Lands*, 44 PUB. LAND & RES. L. REV. 49 (2021).

274. TROPE, *supra* note 191.

Conclusion

The long-running litigation attack on ICWA only further illustrates the need for tribes to fully run their own systems for their families. Regardless of what happens after the Court decides *Brackeen*, tribes will still need to operate social services and justice systems. And it is unnecessarily difficult for tribes to successfully access significant funding from the largest pot of federal foster care funding. While the option to access the funding is available to tribal governments, the path is so difficult and unnecessarily complicated that it makes it nearly impossible for a vast majority of tribes to navigate it. This has led to the increased need for tribal governments to rethink the way they access federal child protection funding.

There is no one-size-fits-all approach to this problem. However, the solution may be found in a funding system that already exists under a tribal self-governance model. This model has proven to be successful in other areas of tribal self-governance. Additionally, studies have shown that applying a self-governance model to the tribal child welfare system is indeed feasible. This is not an easy solution, but we are long past easy solutions to difficult problems. The benefits and problems with a tribal self-governance approach to funding tribal child welfare systems will be further explored and discussed in subsequent articles, but at this point, all options must be on the table.