American students "must know and love the laws, this knowledge should be diffused by means of schools and newspapers, and an attachment to the laws may be formed by early impressions on the mind."

Author Photo and Bio:

Zavdi is a 9th-grade student at The Blake School who is interested in finance and the legal system. In the future, Zavdi looks forward to learning more about the legal system, and possibly becoming a lawyer.

A Historical Note: Placing the **Brackeen** *Cases in Context*

By Zavdi Fischer

Since the arrival of European settlers on the shores of what is now the United States, federal and state governments have sought to conquer Native American lands through the forced separation and assimilation of Native Americans. These Native American children were taken away by the government and sent to boarding schools, which aimed to destroy their spirit both culturally and religiously.

Looking at Richard Pratt:

Army officer Richard Henry Pratt developed the first off-reservation Indian boarding school, the Carlisle Indian School, out of his experience educating Native American prisoners of war after opening the school in 1879. The school aimed to "civilize" and "Americanize" the Indian."[1] Officer Pratt delivered a speech to the National Conference of Charities and Correction in 1892, where he remarked what is now an infamous quote: "Kill the Indian in him, and save the Man."[2]

Enter ICWA:

Throughout the 1800s and even until the early 1900s these Native American children were robbed of their identity and families. To make up for this, the Indian Child Welfare Act (ICWA) of 1978 was drafted to address concerns that many Native American children indoctrinated into the child welfare system would leave the tribe. These concerns were conveyed to the 95th Congress through various statistics including, notably, that "[a]pproximately 75-80% of Indian families living on reservations lost at least one child to the foster care system."[3]

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[1]"'Kill the Indian in Him, and Save the Man': R. H. Pratt on the Education of Native Americans | Carlisle Indian School Digital Resource Center." n.d. Welcome | Carlisle Indian School Digital Resource Center. Accessed March 20, 2023.

[2]Davy, Jack. 2022. *We, the Oppressors*. Quercus.

[3]Indian Child Welfare Act of 1978

The Act aimed to protect the best interests of Native American children and to preserve their cultural identity by prioritizing placement with extended family, members of their tribe, or other Native American families. Although each tribe legally acts as its own nation, the treaties the tribes signed make them in conjunction with the U.S. child welfare system, as the Act acknowledges "that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources."[3] Signed into law by President Jimmy Carter, the ICWA was enacted as a response to the high rates of Native American children being removed from their families and placed in non-Native foster care and adoptive homes. The law established minimum federal standards for the removal of Native American children from their families and placement in foster care or adoptive homes. These minimum standards include the notification of the tribes, placement preferences (going to extended family members), and active efforts to reunite the families.

After ICWA was passed, legal controversy began. Recently, the constitutionality of ICWA has been challenged in several court cases, with some arguing that it is racially discriminatory and violates the Equal Protection Clause of the 14th Amendment. Others claim the ICWA's vagueness of the use of "Indian child." Eventually, in November 2022, the Supreme Court, after granting cert several months before, heard oral argument. The justices are likely to reach a verdict by June 2023.

Outlining ICWA's Support:

Supporters of the legality of ICWA's assert one argument that rests on Congress' authority over Native American affairs, which empowers Congress to make laws specific to Native American tribes and their members. The law that gives congress power to create laws is the Indian Commerce Clause, "Article 1, Section 8, permits Congress to make all laws pertaining to Indian trade."[4] This provision has been interpreted to give Congress legislative power over many areas of Indian affairs.[5] Another argument for ICWA's constitutionality rests on the law's

[4]Article 1, Section 8, Clause 3 of the U.S. Constitution

[5]Ablavsky, Gregory. n.d. "Yale Law Journal - Beyond the Indian Commerce Clause." The Yale Law Journal - Home. Accessed March 22, 2023.

purpose of protecting the best interests of Native American children. ICWA advocates argue that the law recognizes the unique political and cultural status of Native American tribes and their role in protecting the welfare of their members, including children.

ICWA provides a framework to prevent Native American children from being separated from their families and communities or placed in non-Native American homes by preferring Native Americans in their community over non-native Americans. To fight the claims that being "Indian" is based on race, ICWA's supporters argue that tribal membership is determined by the tribes themselves and is a political designation or racial, established in *Morton v. Mancari*.[6] ICWA also provides that tribes should inherently receive sovereignty over affairs occurring in the tribe through its protection of the culture and welfare of Native American children, which inherently serves to protect the future of the tribe.

The Contra-ICWA Position:

The argument against ICWA includes three main arguments: (1) Whether or not the ICWA unconstitutionally discriminates on the basis of race; (2) ICWA assumes or exceeds the powers of Congress; (3) ICWA violates the principle of non-recruitment. *Haaland v. Brackeen* was a case initially brought to the U.S. Fifth Circuit Court of Appeals in 2019. Brackeen v. Haaland was a case filed that challenged the constitutionality of the ICWA claiming that certain provisions, such as the tenth amendment were unconstitutional. The plaintiffs include several couples who wished to adopt or foster Native children, a woman who wished for her Native biological child to be adopted by non-Natives, and the states of Texas, Louisiana, and Indiana. While the defendants are the federal government and several Native American tribes. The Tenth Amendment was invoked by the non-Indian families who challenged the constitutionality of the as it imposes obligations on states under federal law. Several individuals and states have filed lawsuits challenging the law, claiming that it violates the Tenth Amendment principle of non-recruitment. This argument rests on a statement from Supreme Court precedent that reads, "The powers not granted to the United States by the Constitution or prohibited by the States are reserved to the States or to the people."[7]

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[6]"Three-Minute Legal Talks: Brackeen v. Haaland | UW School of Law." n.d. UW School of Law. Accessed March 20, 2023.

[7]*Press-Enterprise Co. v. Superior Ct*., 464 U.S. 501 (1984)

Opponents argue that ICWA exceeded the authority of Congress by forcing states to apply federal standards for custody decisions and placement preferences based on a child's Native American heritage. Despite this, the court rejected the argument. The Fifth Circuit rejected that ICWA's provisions for placement preferences and active efforts to reunite Native American families violated the Equal Protection Clause of the Fifth Amendment, which "bars the government from passing laws or taking official actions that treat similarly-situated people or groups of people differently"[8] The Fifth Circuit ruled that the ICWA's provisions were based on the unique political and cultural status of Native American tribes, which protected Native American children and families from historical injustice and systemic discrimination in the child welfare system. In this case, strict scrutiny is not applied as the ICWA is not based on race, but on the unique status of a Native American. Additionally, the plaintiffs disputed that the ICWA's definition of an "Indian child" is unconstitutionally vague as it relies on the child's biological ancestry to decide the child's status. This argument was made in the U.S. District Court for the Northern District of Texas, where the court ruled that the definition was unconstitutionally vague and therefore violated the Due Process Clause of the Fifth Amendment.

With the upcoming verdict from the Supreme Court, some fear the Supreme Court will overturn the ICWA. The argument that ICWA is based on race is not valid as ICWA is based on the unique status of Native Americans as sovereign nations with distinct political and cultural heritage. Moreover, Congress did not exceed its powers in enacting the ICWA. This law constitutes a valid exercise of the authority to regulate the trade of Native American tribes. Finally, ICWA has not violated the non-recruitment principle. Because the ICWA seeks to ensure that Native American children are placed with their families or within their tribes whenever possible. Despite these legal and constitutional justifications, the Supreme Court may choose to overturn the ICWA on allegations of racial discrimination. However, the importance of recognizing the historical injustices and systematic discrimination that Native American tribes and families have faced within the child welfare system is important to recognize. As well as ensuring that their unique political and cultural status is protected. ICWA represents an important step in addressing these issues and promoting the well-being of Native American children and families.

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[8] *See generally,* Connecticut Supreme Court Historical Society, https://www.jud.ct.gov/HistoricalSociety/Rights.pdf.