A University expert, cited by the Supreme Court, explains the recent ruling on the Indian Child Welfare Act

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In a landmark 7-2 decision, the U.S. Supreme Court upheld the Indian Child Welfare Act, which helps keep Native American adoptees with their families and tribes.

The case, Haaland v. Brackeen, was the latest challenge to the 1978 law, which gives preference to a child's family, tribe and other Native Americans in adopting Native American children. The Brackeens are the Texas couple who filed the initial lawsuit in a federal district court in Texas while trying to adopt a boy who was Navajo and Cherokee. The couple succeeded in adopting the child while the case was pending and then tried to adopt the boy's sister. Two other couples similarly trying to adopt Native children joined the lawsuit. Deb Haaland is the U.S. Secretary of the Interior.

As an expert on the Indian Child Welfare Act, Barbara Atwood had kept a close eye on the case – and a 2002 article Atwood wrote about the law was cited in Justice Neil Gorsuch's concurring opinion in the decision, which was delivered on June 15. In that article, titled "Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance," Atwood examined state courts' longstanding opposition and how some courts may have followed the law too stringently in placing Native children with adopting families.

Atwood is the Mary Anne Richey Professor Emerita of Law and co-director of the James E. Rogers College of Law Family and Juvenile Law Certificate Program. Her research focuses on family law, particularly voice and representation for marginalized groups. After earning her J.D. from the James E. Rogers College of Law in 1976, Atwood returned to the college as a visiting associate professor in 1980, then taught at the University of Houston for five years. She returned to the University in 1986 and was designated professor emerita in 2011.

In this Q&A, Atwood explains the history and goals of the Indian Child Welfare Act, the arguments central to the Supreme Court case and what it was like to have the court cite one of her articles.

What was the historical backdrop in the U.S. in 1978, when Congress passed the Indian Child Welfare Act that made the law necessary and possible?

The law was enacted in response to a concerted effort on the part of the federal government to essentially terminate tribes by forcing an assimilationist policy on tribal members, separating Native children from their families and sending them to boarding schools in an effort to basically break their ties with their Native cultures. There was gross insensitivity to the impact on the children themselves, the impact on families and the impact on tribes.

The terrible boarding school history is one part of the backdrop to the Indian Child Welfare Act. The other is the child welfare abuses that were carried out by state child welfare systems in removing children, often for reasons that, we think now, were very biased in their failure to recognize different cultural standards of parenting, labeling certain practices as neglect or abandonment that were traditional practices of collective parenting among many tribes.

In the late 1960s, the American Association of Indian Affairs began conducting surveys among Native communities and lobbying Congress for change. And that continued basically for a decade. A lot of evidence was amassed, and the end result was the Indian Child Welfare Act.

What does the Indian Child Welfare Act do?

It challenged these earlier practices in really three aspects. One was to reaffirm tribal jurisdiction and tribal power as exclusive power to determine the child welfare placements for children who were members of the tribe and were living within the tribe's reservation. This jurisdiction was something that had emerged and had been recognized in case law already.

Another important part of the act involved making sure that basic due process protections are afforded to Native parents when they're the subject of both voluntary and involuntary proceedings – making sure they're voluntarily relinquishing a child for adoption or for voluntary foster care and that they know what they're doing and are informed of the consequences. For involuntary proceedings, one of the more profound and controversial aspects of the Indian Child Welfare Act is to elevate the burden of proof that the state or any other party must meet. So, a state agency, for example, must prove by clear and convincing evidence that the child is going to suffer harm if returned to the custody of the parent. To terminate parental rights, the burden of proof is beyond a reasonable doubt. These are higher standards of proof than a state would ordinarily need to show for removal or termination.

The substantive aspects of ICWA are the placement preferences for adoption and foster care. The child's family is always going to be the first preference, then members of the child's tribe, then other Native families. There are also somewhat
Each aspect of the Indian Child Welfare Act was Congress’s effort to remedy and make every effort to stop the practices that were causing such destruction among tribes and families.

What were the central facts and arguments in the Brackeen case?

The couple for whom the case is known, the Brackeens, started the litigation when they were trying to adopt a Native boy. He had both Navajo and Cherokee heritage. The Navajo Nation and the Cherokee Nation got together and decided the Navajo membership would be controlling membership for this proceeding. After some litigation, the Navajo Nation had identified a potential placement that would have been preferred over the Brackeens. But that placement withdrew during the litigation and there was no alternative placement brought forward, so the Brackeens were permitted to finalize their adoption of this child. During the litigation, the child's sister was born, and they wanted to adopt that girl, too. That girl has been living with them since infancy – she is now 5 years old. But the adoption proceedings have been on hold pending this litigation.

The preferences for adoption themselves ended up being one of the important targets of the Brackeen litigation. The procedural burdens placed on states or other parties whose goal is to separate children from their families were also a piece of the Brackeen litigation. What it did not involve was the question of tribal jurisdiction.

The states of Texas, Louisiana and Indiana joined in to make the argument that this act intrudes on states' traditional realm of authority in family law and adoption, and they strongly argued that the federal government had no power in the Constitution to enact the Indian Child Welfare Act in the first place. This was the first time the states themselves had been pressing that argument in litigation and it caught a lot of people's attention.

The court dismissed the plaintiffs' claims that tribal affiliations are racial classifications rather than political ones. But can you explain that distinction?

The reason the plaintiffs made that argument is that racial classifications are subject to heightened scrutiny in constitutional law in our system.

But since the 1970s, the Supreme Court has treated classification based on tribal membership as a political classification based on citizenship in a tribal nation, not race. Classifications based on political affiliation are subject to a lesser degree of scrutiny. It's much easier constitutionally, in other words, to defend a political classification than a racial classification. So, by saying this was racial and not political classification, the plaintiffs wanted to trigger this heightened scrutiny on the part of the Supreme Court. In that sense, the plaintiffs wanted to align their case with the other cases on the court's docket challenging racial preferences.

From the perspective of people who want the federal government to continue to pass laws that benefit tribes and tribal members, the case gave rise to widespread concerns that it might dismantle a large swath of federal Indian law.

Justice Neil Gorsuch, in his concurring opinion, cited your 2002 article that examined state courts' longstanding opposition to ICWA. More than 20 years later, some state courts still seem very opposed to the act. Why is that?

That's a good question, and one answer might be that state court judges have an established tradition of deciding cases in the best interest of children and resisted, for a long time, this external force coming in and saying, "Well, when there's a case involving removal and placement of Native children, you put a strong thumb on the scale favoring these preferences." And I think some state court judges were reluctant to follow those preferences. Outright bias in favoring white middle-class homes over Native homes has played a role throughout ICWA's history.

While the situation is much better now, there's been a shortage of Native foster homes over time and sometimes state requirements for those homes to get licensed didn't take into account economic disparities and that sort of thing. So, there might be a shortage of places that would be qualified as preferred placements under the act. When I wrote that article, I was mainly concerned about cases where the child is placed in a non-preferred placement because of the absence of preferred placements. And the child stays in that placement for some period of time – maybe several years – and then the tribe identifies a preferred placement. That's going to take a toll on the child. That article proposed that there continue to be a firm thumb on the scale favoring the preferences, but that they can be overcome on a showing of clear and convincing evidence. That now happens to be the approach in federal regulations that became effective in 2016.

What's it like to have the Supreme Court cite one of your articles?

It's a nice thing to have happen. In that article, I recognized that sometimes children, in extreme circumstances, have been the subjects of questionable decisions under the Indian Child Welfare Act. I discussed a couple of cases where I thought the courts were almost too stringent in their application of the preferences, and that's why I made the argument that ICWA should not be viewed as an absolute. So, it was ironic that Justice Gorsuch cited the article for his proposition that the act has helped decrease unwarranted removals. I think that's true, but it's truer now than it was 20 years ago.

But this is the third time I've been cited by the Supreme Court (the court twice cited, in 1992 and 2006, a 1984 article by Atwood that examines federal courts' jurisdiction of domestic relations cases), and in the law professor world, that's always a treat. I've been cited quite a few times by lower courts, particularly in the world of ICWA and on topics related to tribal-state jurisdictional conflicts. And I've been cited by some tribal courts, which is gratifying, too. You never know if anybody
ever reads anything you write.