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Supreme Court Considers Native American Preferences and Classifications

Publications

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This month, the US Supreme Court heard oral argument in *Brackeen v. Haaland*, a case concerning the constitutionality of the federal Indian Child Welfare Act (ICWA). The challengers—individuals who sought to adopt Indian children and the state of Texas—present a broad array of objections to ICWA, including that it violates the Equal Protection component of the Fifth Amendment. The Supreme Court has long recognized that federal regulation of Indian affairs is based on permissible political classifications rather than impermissible racial ones. Nevertheless, the challengers seek to impose broad limits on the circumstances in which a federal law can permissibly single out Indians. If the Court were to adopt such limits, it would have drastic consequences for Congress's ability to fulfill its trust obligations to Indian tribes, and it likely would also have ramifications for universities, employers, and other entities that provide preferences or benefits to Native Americans or operate diversity programs that include Native Americans.

The Legal and Factual Backdrop

ICWA was enacted in 1978 in response to rising concern over abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.[1] In the years leading up to ICWA, 25 to 35 percent of all Indian children were separated from their families and placed in adoptive families, foster care, or institutions.[2] Approximately 90% of the placements were in non-Indian homes.[3] ICWA addressed these problems by, among other things, establishing adoptive placement preferences for Indian children. Absent good cause to the contrary, preference under ICWA is given to a placement with (1) members of the child's extended family, (2) members of the child's tribe, or (3) members of other federally recognized tribes.

The Supreme Court will now decide ICWA's constitutionality against a backdrop of more than 230 years of federal regulation of Indian affairs and nearly 50 years of precedent—starting with *Morton v. Mancari*—expressly rejecting Equal Protection challenges to federal Indian statutes.[4]

Mancari established that classifications based on tribal affiliation are political rather than racial classifications and thus subject only to rational-basis review in lieu of strict scrutiny.[5]

Mancari reached that conclusion for three key reasons. First, the text of the Constitution identifies Indians as a proper subject for separate legislation.[6] Second, since the Founding the United States has assumed a trust obligation to legislate on behalf of federally recognized Indian tribes, and if laws singling out Indians were deemed invidious racial discrimination, the United States' solemn commitment to Indian tribes would be jeopardized.[7] Third, classifications tied to tribal status are not racial in nature because they exclude many individuals who are racially "Indian" but who lack tribal ties.[8]

The Brackeen Lawsuit

The argument at the Supreme Court represented the culmination of nearly five years of litigation between the parties. The challengers present a federal facial challenge to the bulk of ICWA's provisions. On the Equal Protection front, they seek to limit in various and significant ways *Mancari's* holding that tribal affiliations are political rather than racial classifications.[9]

Oral argument yielded three key takeaways:

The Scope of Mancari. The challengers maintain that "Native American" preferences—including preferences for members of federally recognized tribes—are generally racial in nature, and that *Mancari* is a limited exception to that general rule.[10] Justice Kagan questioned this argument's consistency with precedent. She asked counsel for the individual challengers what he would do with the "long line of cases which has consistently said, when you regulate the tribes, you're regulating political entities," and she queried whether those cases "really knock the legs out from this argument."

Tribal Fungibility. The challengers also advance the narrower argument that ICWA's third adoptive placement preference is irrational because it treats all tribes as "fungible."[11] Several Justices pondered this subject and asked about the rationality of treating all tribes (other than a child's own tribe) as equally preferred placements for an Indian child.

College Admissions. At least one Justice appears to have on his mind the intersection between *Brackeen* and the *Students for Fair Admissions (SFFA)* cases concerning the consideration of race in college admissions. Justice Kavanaugh asked counsel for both the individual challengers and the United States whether *Mancari* permits Congress to mandate that states give a preference in college admissions to American Indians. Counsel for the individual challengers answered no. Counsel for the United States said that such a preference would be much more difficult to defend because the tribal relationship is more attenuated and bumps up against interests that other people might have. These colloquies illustrate the complex interplay between *Brackeen* and the *SFFA* cases and indicate that Brackeen's consequences will extend far beyond the child welfare context.

What's Next?

Timing. It is likely that the Court's decision will come out no earlier than the late spring and possibly as late as June. The case presents a wide-ranging set of issues. Indeed, the en banc Fifth Circuit below issued 325 pages of opinions. Working through the issues presented will take the Court time.

Possible Broad Consequences for Federal Indian Law. Tribes will undoubtedly hold their collective breath as they wait for the Court to issue its opinion. If the Court were to endorse the challengers' broadest theories, huge swaths of the existing federal statutes pertaining to Indians would become highly vulnerable to challenge, and Congress's ability to fulfill its trust obligation to Indian tribes would be called into serious doubt. Moreover, even a narrow ruling could create future problems for tribes. For instance, a ruling about tribal "fungibility" could generate future litigation over when Congress may adopt laws that apply uniformly to all Indian tribes—a common feature of federal Indian statutes.

Diversity, Equity, and Inclusion (DEI). Justice Kavanaugh's questions about college admissions suggest that *Brackeen* will also have consequences for universities that provide Native American or tribal member preferences or benefits, and for businesses' DEI efforts similarly directed toward such groups. Such programs have become increasingly common in recent years, with multiple prominent universities, for example, covering full tuition for qualifying Native American students. Even under the current status quo, some courts have questioned whether entities other than the federal government can invoke *Mancari* and treat these classifications as political rather than racial.[12] And the Supreme Court has previously applied strict scrutiny to a federal government contracting preference for all "Native Americans" alongside "Black Americans, Hispanic Americans, ... Asian Pacific Americans, and other minorities."[13] Thus, before the *Brackeen* decision is issued, organizations across industries should proactively examine their existing DEI efforts focused on Native Americans and evaluate whether those programs employ permissible political classifications. Programs will be less susceptible to challenge if they are tied to tribal status, whereas programs that benefit anyone who identifies as "American Indian" or "Native American" are more likely to be condemned as employing impermissible racial classifications.

Footnotes

[1] *Miss. Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 32 (1989).

[2] *Id.*

[3] *Id.* at 33.

[4] *Morton v. Mancari,* 417 U.S. 535 (1974).

[5] *Id.* at 555.

[6] *Id.* at 552.

[7] *Id.*

[8] *Id.* at 553 n.24.

[9] *See generally* Brief for Individual Petitioners at 20, *Haaland v. Brackeen,* No. 21-376 (U.S. May 26, 2022), 2022 WL 1786984.

[10] *Id.* at 21-23.

[11] *Id.* at 39, 43.

[12] *See, e.g., KG Urban Enters., LLC v. Patrick,* 693 F.3d 1, 19 (1st Cir. 2012).

[13] *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 205, 207-08, 213 (1995) (plurality op.).

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