EDITORIALIZING ICWA:
40 Years of Colonial Commentary

"Sacrificing Indian Children's Rights"
"Paleface Paternalism"
"Justice Massacred"
"Ethnic Errancy"
"Rose Parade Indian-givers"
"Slaves to the tribe"
"Tribal bigotry"
"Kids pay the price for tribes"

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I. Introduction

The phrases listed above are published titles of newspaper editorials and op-ed essays challenging the legitimacy of the federal Indian Child Welfare Act ("ICWA") in the last 40 years. ICWA is a federal law originally passed in 1978 to address the high rate of removal (and subsequent adoption) of Indian[1] children by state authorities.[2] In passing the law, Congress found "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[3] While there was no significant controversy about the law when it was drafted and passed with unanimous consent in 1978, the application of the law over the past 40 years, the law has come under sustained attack from scholars, attorneys, legislators, think tanks, adoption agencies, and judges. Moreover, while most child custody cases impacted by ICWA are so conventional that they don't warrant any particular attention, almost all national news coverage of ICWA emanates from a few specific high-profile cases in which mainstream news outlets usually characterize ICWA as cultivating unfair battles between Tribal Nations and prospective adoptive parents. Editorials, though, often go further than that, using words like "sacrificing", "massacre", and "slaves" to describe both tribal citizens and tribal nations. This article focuses on how these high-profile cases are characterized in newspaper editorials and op-eds; namely, how these authors explicate their colonial views about ICWA, Indian identity, tribal sovereignty, and the virtues of adoption.

Historian Richard Drinnon makes a compelling case that removing Indian children from their families predates the creation of the United States.[4] Indian boarding schools operated throughout the 19th and 20th centuries to separate Indian children from their parents and cultures,

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[1] Terminology used to describe indigenous people in the United States is fraught and there is no clear consensus as to the appropriate terms. In this article, we use "Indian" and "Native" interchangeably. *See generally* Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, 23 Am. Indian Q. 1 (1999).

[2] 25 U.S. § 1901.

[3] *Id.*

[4] Richard Drinnon, Facing West: The Metaphysics of Indian-Hating & Empire-Building 47 (1980).

violently enforcing assimilation as part of a genocidal U.S. strategy.[5] In 1978, ICWA represented a crucial shift in the nation's consciousness, reflecting a new understanding of how Tribal Nations were being destroyed from the inside through a legacy of involuntary boarding school education and widespread removal of children from homes by state social workers. Up to that point, the official 20th century federal policy toward Indian children can be characterized as re-education (brainwashing) and adoption (permanent removal from the Tribal Nation).

It is difficult to overstate the despair and desperation that Tribal Nations experience when their children are removed from their communities without their consent. Before ICWA, there was an assumption (often explicit) in mainstream culture that Native children would be better off if they were raised by a non-Native family.[6] Congressional hearings throughout the 1970s established that between 25–35% of all Indian children were removed from their families of origin - and another study concluded that 85% of removed Indian children were placed with a non-Native family.[7] In 1974, one expert testified before Congress that some state social workers viewed entire reservations as categorically unacceptable places to raise children and removed children without basic due process.[8]

The federal government itself was complicit in these efforts, funding the "Indian Adoption Project" ("IAP") starting in the late 1950s. The IAP was facilitated by the Child Welfare League of America with the stated goal of systematically removing Native children in the western states and having them adopted by white families in eastern states.[9] This Project was marketed to potential white adoptive families as an "act of liberal enlightenment."[10] At the same time, the IAP was "reinforcing im-

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[5] *See generally* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928 (2nd ed. 2020); Marian Bussey & Nancy M. Lucero, *Re-examining child welfare's response to ICWA: Collaborating with community-based agencies to reduce disparities for American Indian/Alaska Native children*, 35 CHILD. YOUTH SERVS. REV. 394, 395 (2013).

[6] MATTHEW L.M. FLETCHER, THE GHOST ROAD: ANISHINAABE RESPONSES TO INDIAN HATING 163 (2020).

[7] STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 291 (4th ed. 2012).

[8] MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 422 (2016) (citing *Indian Child Welfare Program: Hearing Before the S. Sub. Comm. on Indian Affs.*, 93rd Cong., 2d Sess., 19–20 (1974)).

[9] ANGELIQUE EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW at 96 (2013). It is also worth noting that child removal practice violates international law as well. According to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, genocide includes the act of "forcibly transferring children of the group to another group." G.A. Res. 260 A (III) (Dec. 9, 1948). Article VII of the Declaration on the Rights of Indigenous Peoples also reads "Indigenous peoples . . . shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group." G.A. Res. 61/295 (Sep. 13, 2007).

[10] Margaret D. Jacobs, *The Habit of Elimination: Indigenous Child Removal in Settler Colonial Nations in the Twentieth Century*, *in* COLONIAL GENOCIDE IN INDIGENOUS

ages of unwed Indian mothers, deviant extended families, and hopelessly impoverished and alcoholic parents."[11] Many states implemented similar adoption projects—leading to a crisis period in the 1970s when "as many as 35 percent of all Indian children [. . .] were being taken from their families and placed in foster care or adoptive homes of almost exclusively non-Indian families."[12]

Tribal leaders and citizens had tried for years to address this problem at the local, state, and national level. After several high-profile Congressional hearings throughout the mid-1970s,[13] Congress agreed that a remedy for this crisis was warranted and passed ICWA in 1978.[14] In short, ICWA is a federal law that limits the power of a *state* court to remove Native children from biological parents and limits the power of state courts to place Native children with non-Native families. As EagleWoman and Rice explain, "ICWA . . . was intended as a congressional fix for what it perceived as abusive state practice and procedure with respect to Indian children, and to provide federal standards that would determine whether Indian children could be subjected to foster care or adoptive placement under state law."[15] ICWA requires that state courts apply strict standards when dealing with a Native child in need of out-of-home placement and to ensure that Tribal Nations are informed of the removal and have the right to intervene or transfer the case to tribal court. If the custody issue arises on a reservation, then the Tribal Nation has the exclusive right to adjudicate the proceedings. In cases arising off-reservation, ICWA requires state courts to follow specific procedures involving Native children to ensure that they remain in connection with their tribal communities.[16]

Despite studies concluding ICWA has been a successful law to curb the crisis of child removal in Indian country when implemented correctly,[17] a significant number of attorneys, think tanks, and politicians argue

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North Am. 189–207, 199 (Andrew Woolford, Jeff Benvenuto, & Alexander Laban Hinton eds., 2014).

[11] Margaret D Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 Am. Indian Q. 136, 144 (2013).

[12] Alyosha Goldstein, *The Jurisprudence of Domestic Dependence: Colonial Possession and Adoptive Couple v. Baby Girl*, 14 darkmatter: in the Ruins of Imperial Culture (2016), http://www.darkmatter101.org/site/2016/05/16/the-jurisprudence-of-domestic-dependence.

[13] Pevar, *supra* note 7; Fletcher, *supra* note 8.

[14] A full review of the myriad technical aspects of ICWA and its corresponding rules from the Bureau of Indian Affairs ("BIA") is beyond the scope of this paper. Instead, we provide a basic overview of the main conceptual aspects of the federal law.

[15] Angelique EagleWoman & G. William Rice, *American Indian Children and U.S. Indian Policy*, 16 Tribal L.J. (2016).

[16] *See* Elizabeth Low, *Keeping Cultural Bias out of the Courtroom: How ICWA "Qualified Expert Witnesses" Make a Difference*, 44 Am. Indian L. Rev. 43 (2019).

[17] *See, e.g.* Bussey & Lucero, *supra* note 5; Gordon E. Limb, Toni Chance & Eddie F. Brown, *An empirical examination of the Indian Child Welfare Act and its impact on cultural and familial preservation for American Indian children*, 28 Child Abuse & Neglect 1279 (2004).

that ICWA actually harms Native children and should be repealed. Others argue that ICWA has served its purpose and is no longer necessary. This article considers how newspaper editorials perpetuate misinformation about ICWA, its history and its purpose. Moreover, we explore how anti-ICWA authors employ "words of colonialism"—in particular, the use of derogatory words and phrases to portray Native people as bad parents and Tribal Nations as dysfunctional. Providing inaccurate and racist characterizations of ICWA is one of the primary tactics used by editorials to delegitimize ICWA. Emotionally triggering and wholly inaccurate language is often employed as a sensationalist method to grab the reader's attention by presenting the law in terms of clear-cut morality.

In Part II, we explore the relationship between newspapers and public perception. In addition to considering how journalists have historically denigrated Native people, we consider how the contemporary uses of an authoritative voice in the form of editorials and op-eds continue to frame Native people as subhuman and unworthy of legal protection. Our methodology is described in Part III, where we also explain our theoretical approach to this subject matter. In Part IV, we turn to the word choices made by anti-ICWA writers with regard to blood quantum and race, a problem that fundamentally misrepresents the purposes and goals of ICWA. This is followed by Part V, which focuses on language and word choices that writers use to describe Native biological parents and white adoptive parents, and explores how writers often make sweeping, inaccurate generalizations about reservations, tribal courts, and Native families. In Part VI, we review common claims which inaccurately assert that Tribal Nations invoke ICWA for nefarious reasons like "tyranny" or "turf". Part VII provides examples of pro-ICWA editorials to demonstrate the stark contrast in terms of words, images, and themes. In our conclusion we consider how pro-ICWA editorials have the capacity to be a corrective remedy to the efforts by anti-ICWA organizations to control the "story" of ICWA.

II. Newspapers and Native People

American newspapers have long functioned as sites for the production and reinforcement of colonial narratives by juxtaposing Native peoples and Indianness in general with American values and goals—such as progress, expansion, and individual rights.[18] Since the time of *Publick Occurrences, Both Foreign and Domestick* (widely considered the first newspaper of the English colonies), newspaper writers have deployed overt and covert anti-Indian sentiment in newspapers across the country.[19]

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[18] *See generally* JOHN M. COWARD, THE NEWSPAPER INDIAN: NATIVE AMERICAN IDENTITY IN THE PRESS 1820–90 (1999); MARY ANN WESTON, NATIVE AMERICANS IN THE NEWS: IMAGES OF INDIANS IN THE TWENTIETH CENTURY PRESS (1996).

[19] *See generally* Meta G. Carstarphen & John P. Sanchez, *The Binary of Meaning Native/American Indian Media in the 21st Century*, 21 HOWARD J. COMMC'NS. 319 (2010); WESTON, *supra* note 18.

The image of Native peoples depicted by newspapers (the "newspaper Indian," to borrow Media Studies scholar John M. Coward's phrase) was cultivated as newspapers "aligned with both government and business interests" and viewed Native peoples as "obstacles to economic growth and national expansion."[20] Newspapers, consisting primarily of non-Native authors writing for non-native audiences, "reflected white, American, or Euro-centric ideologies popular at the time."[21] For example, in newspaper accounts of Buffalo Bill's Wild West shows in the 19th century, articles often "signaled to the public the successful civilizing of Native peoples."[22] In fact, it was common for newspapers to actively justify Westward expansion and thus characterize the seizure of tribal lands as "progress."[23]

These narratives often went so far as to advocate for the extermination of Native peoples in the name of progress and safety. L. Frank Baum, the late 19th early 20th century Plains writer and newspaper editor best known for writing the children's book *The Wonderful Wizard of Oz* is a quintessential example. In two now infamous editorials, Baum called for killing off the remaining Native people in North Dakota and South Dakota after statehood in 1889. In late December 1890, he advocated for the "total annihilation of the few remaining Indians" for the sake of the "best safety of the frontier settlements."[24] Less than a month later, he wrote, "our only safety depends upon the total extermination of the Indians" and issued a call to action, arguing that the federal government should "wipe these untamed and untamable creatures from the face of the earth."[25]

Colonial narratives and bias toward Native peoples are perhaps less explicit in newspapers today, but anti-Indian sentiments still manifest through biased framing and implicit stereotypes in journalistic practices.[26] Although most journalism centers on the present moment, journalist practices have deep connections to the past, often implicitly reinforcing old stereotypes of dominant American popular culture instead of challenging them.[27] Newspaper discourse continues to frame Native subjects as degraded, exotic, and culturally static, and relies upon

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[20] Coward, *supra* note 18, at 39.

[21] Linda S. McNenly, *Foe, Friend, or Critic: Native Performers with Buffalo Bill's Wild West Show and Discourses of Conquest and Friendship in Newspaper Reports*, 38 Am. Indian Q. 143, 146 (2014).

[22] *Id.* at 147–148.

[23] Coward, *supra* note 18, at 19, 37.

[24] L. Frank Baum, *Sitting Bull Editorial*, Saturday Pioneer, Dec. 20, 1890.

[25] L. Frank Baum, *The Wounded Knee Editorial*, Saturday Pioneer, Jan. 3, 1891.

[26] See, e.g. First Nations Development Institute, Changing the Narrative About Native Americans: A Guide for Allies (2018), https://www.firstnations.org/publications/changing-the-narrative-about-native-americans-a-guide-for-allies; Autumn Miller & Susan Dente Ross, *They Are Not Us: Framing of American Indians by the Boston Globe*, 15 Howard J. Commc'ns. 245 (2004); Carolyn Casey, *Distorted Images: News Coverage of Indian Country is Slowly Improving. But the Fourth Estate Still Doesn't Understand the Fourth World*, VI Tribal Coll.: J. Am. Indian High. Educ. (1994).

[27] *See generally* Weston, *supra* note 18; Carstarphen & Sanchez, *supra* note 19.

non-native "experts" to explain Native issues, subsequently silencing and erasing the voices of Native peoples themselves.[28] A framing analysis of news, features, and editorials in the *Boston Globe* from 1999–2001 found that "editorials . . . were equally likely to frame American Indians as generic outsider, degraded, or historic relic Indians."[29]

The First Nations Development Institute (a Native non-profit organization) released a guidebook in 2018 which argues that the average American is exposed to Native issues through "a largely false and deficit-based narrative, meaning it focuses on challenges and weaknesses -- real, assumed, or exaggerated—rather than being based on strengths and opportunities."[30] The handbook asserts that "[t]hese narratives are almost always created by non-Native people, often with the intention to oppress Native nations, peoples and cultures."[31] This biased representation of Native peoples in newspapers has dangerous consequences. The all-too-common frame of Native peoples as "degraded outsiders" in the news "may inhibit the ability of American Indians to act effectively or be taken seriously by readers in contexts related to significant issues, such as tribal sovereignty and culture."[32] Mvskoke scholar Dwanna Robertson notes that Native people are living "under the prevalence of Native misrepresentations in the media, archaic notions of Indianness, and the federal government's appropriation of "Indian" names and words as code for military purposes."[33]

Because newspaper coverage of ICWA has "implications for public attitudes regarding tribal rights, adoption and foster care policies and practices, and the future of ICWA,"[34] we find our analysis to be of utmost importance for the law and the Native peoples directly and indirectly impacted by it. Existing scholarship has explored the skewed presentation of ICWA in mainstream media. In 2018, Harman Bual published a study exploring how newspaper and other media outlet coverage of ICWA has "received unfavorable reviews within the current mainstream media coverage" due to a general lack of understanding of the procedures and historical context of the law.[35] Bual's study seeks to dispel popular myths about ICWA by discussing its background, how state courts and adoption agencies try to find ways around ICWA, and ICWA's flawed coverage

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[28] Miller & Ross, *supra* note 26, at 255; Akim D. Reinhardt, *Defining the Native: Local Print Media Coverage of the NMAI*, 29 AM. INDIAN Q. 450, 451 (2005).

[29] Miller & Ross, *supra* note 26, at 252.

[30] FIRST NATIONS DEVELOPMENT INSTITUTE, *supra* note 26.

[31] *Id.*

[32] MILLER & ROSS, *supra* note 29, at 255.

[33] Dwanna L. Robertson, *Invisibility in the Color-Blind Era: Examining Legitimized Racism against Indigenous Peoples*, 39 AM. INDIAN Q. 113, 114 (2015).

[34] Kathryn A. Sweeney & Rachel L. Pollack, *Colorblind Individualism, Color Consciousness, and the Indian Child Welfare Act: Representations of Adoptee Best Interest in Newspaper Coverage of the Baby Veronica Case*, 58 SOCIO. Q. 701 (2017).

[35] Harman Bual, *Native American Rights & Adoption by Non-Indian Families: The Manipulation and Distortion of Public Opinion to Overthrow ICWA*, 6 AM. INDIAN L.J. 270, 272 (2018).

in the media.[36] Mikhelle Lynn Toss-Mulkey's 2015 doctoral dissertation studied high profile media coverage (and subsequent public perception) of the 2013 Supreme Court decision in *Adoptive Couple v. Baby Girl* (which became known in the press as the "Baby Veronica" case).[37] She examined mainstream media coverage of the case by analyzing different frames common throughout newspaper articles, TV coverage, radio, and more.[38] Although the flawed portrayal of the ICWA in the media has been previously explored, the unique role of media opinion, namely newspaper editorials and op-eds, remains uncharted territory. In this study, we hope to highlight the prevalent misunderstandings of the law and its content by adding to existing literature an analysis of the destructive ways editorials and op-eds frame ICWA.

Problematic depictions of Native peoples extend beyond newspapers' "objective" journalism. In order to fully understand the scope of bias in newspapers, we must also consider editorials and op-eds because they are often written in an attempt to sway public opinion. By the 20th century, in order to cultivate evolving journalistic standards, newspapers began to strictly divide news from opinion by offering the newspaper's own views in the form of unsigned editorials.[39] Historically, a typical editorial is "considered the sacrosanct domain of the publisher . . . reserved for the official expression of the paper's institutional opinion on topics of broad public interest."[40] Some editorial boards regularly endorse specific political candidates, for example. These types of articles can also cover a hot-button issue in a local community, offering a biased perspective as a companion to the "objective" articles published on the topic.

Unlike editorials, which are often unsigned, op-eds have a specific author who is usually someone with knowledge or expertise on the topic. In the 1970s, *The New York Times* sought to diversify their opinion page by including essays dubbed "opposition the Editorial Page," now known as "op-eds".[41] These op-eds have become increasingly common, "with nearly every major print and online newspaper publishing two to three op-eds per day."[42] Opinion sections of newspapers today continue to function as prime platforms for editors, pundits, politicians, professors,

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[36] *Id.*

[37] 570 U.S. 637 (2013).

[38] Mikhelle Lynn Ross-Mulkey, "Baby Veronica" & The Indian Child Welfare Act (ICWA): A Public's Perception (April 17, 2015) (Ph.D. dissertation, University of Arizona) (on file with the University of Arizona library system).

[39] Josh Rivera, *Why do newspapers still have editorials?*, USA Today, February 5, 2018, https://www.usatoday.com/story/opinion/2018/02/05/why-do-newspapers-still-have-editorials/1063917001.

[40] Andrew Ciofalo & Kim Traverso, *Does the Op-Ed Page Have a Chance to Become a Public Forum?*, 15 Newsp. Rsch. J. 51, 51–52 (1994).

[41] Guy J. Golan, *Editorials, Op-ed Columns Frame Medical Marijuana Debate*, 31 Newsp. Rsch. J. 50, 52 (2010); Alexander Coppock, Emily Ekins & David Kirby, *The Long-lasting Effects of Newspaper Op-Eds on Public Opinion*, 13 Quart. J. Polit. Sci. 59–87 (2018).

[42] *Id.* at 60.

activists and others to express their own opinions and attempt to persuade the public.[43] In recent years, however, the conflation of opinion and journalism has seen a revival in openly partisan news media.[44] This complicated history highlights the importance of further studying editorials and op-eds, as it is apparent that media opinion has important effects on the production and consumption of media as a whole.

Scholarship on the persuasiveness of editorials and op-eds on public opinion is mixed. Some studies suggest that media opinion can influence the formation of readers' opinions and thus impacts voting and policy.[45] One study concludes that op-eds even have the ability to create lasting influence on the opinion of elites and ideological opponents.[46] Others have highlighted the role that op-eds play in influencing politics at every level of government.[47] At the very least, many scholars agree that op-eds and editorials play important roles as agenda setters and in framing the presentation of an issue.[48] By their very nature, editorials act as agenda setters due to the way they call specific attention to issues the author deems important. Additionally, editorials exemplify issue "framing", editorials exemplify issue "framing" by using a specific "combination of words and phrases that convey a message and influence perceptions of audiences."[49]

When editorials focus on important social and political issues such as race, gender, and identity politics, agenda setting and framing have the potential to significantly impact a reader's perception of the issue. The study of editorials and op-eds is useful for uncovering how specific arguments are commonly used and understood as persuasive, as well as whether public discourse about social issues addresses their systemic causes or individual behavior.[50] Communications scholar John D.

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[43] CIOFALO & TRAVERSO, *supra* note 40; Philip D. Habel, *Following the Opinion Leaders? The Dynamics of Influence Among Media Opinion, the Public, and Politicians*, 29 POLI. COMMC'NS. 257, 271 (2012).

[44] RIVERA, *supra* note 39.

[45] *See, e.g.* COPPOCK, EKINS & KIRBY, *supra* note 42, at 84; Kim Fridkin Kahn & Patrick J. Kenney, *The slant of the news: How editorial endorsements influence campaign coverage and citizens' views of candidates*, 96 AM. POLI. SCI. REV. 381–394 (2002); Golan, *supra* note 41, at 50–62.

[46] COPPOCK, EKINS & KIRBY, *supra* note 42, at 84.

[47] Bob Sommer & John R. Maycroft, *Influencing Public Policy: An Analysis of Published Op-Eds by Academics*, 36 POLI. POL'Y 586 (2008); *But see* Habel, *supra* note 43, at 271 (suggesting that the persuasiveness of newspaper opinion is negligible, and that media opinion does not necessarily influence policy and policymakers); COPPOCK, EKINS & KIRBY, *supra* note 42, at 84 (arguing that the effectiveness of editorial and op-eds is further put into question by the small scope of their readership).

[48] Sommer & Maycroft, *supra* note 47, at 607; Verica Rupar, *Newspapers' production of common sense: The "greenie madness" or why should we read editorials?*, 8 JOURNALISM 591 (2007).

[49] Sarah Akram, *The New York Times Editorials*, 35 STRATEGY STUD. 87, 90 (2015).

[50] Melina R. Singh & Heather E. Bullock, *An intersectional analysis of newspaper portrayals of the 2013 reauthorization of the Violence Against Women Act*, TRANSLATIONAL ISSUES PSYCH. SCI. (2020).

Richardson, argues that in editorials, "frames can activate distinct social identities within the minds of readers," suggesting that they "can affect whether receivers' racial or ethnic perceptions are activated in a politically meaningful way."[51] Recent studies have suggested that "opinion editors tend to provide limited perspectives in the framing of salient public issues"[52] and that editorial coverage of these issues suffers a limited range of authorship.[53] The framing of editorials and op-eds thus can function in both positive and negative ways for significant social issues.

Editorial framing has been studied in detail within the context of several different social and political issues, such as affirmative action, medical marijuana, and the Violence Against Women Act.[54] However, we are not aware of any comprehensive study of editorials regarding ICWA. Filling this gap is necessary for understanding what pro- and anti-ICWA groups believe is persuasive to a mainstream audience, what racial framings are circulating in U.S. culture regarding Native people, and how the issue of tribal sovereignty is (mis)understood. The average American will never read a federal law or a Supreme Court case (much less a law review article), so their knowledge about ICWA can be easily swayed by a well-crafted one-sided essay that oversimplifies a particularly complicated issue. While there are important distinctions between the editorials and op-eds, for purposes of word economy, we use the term "editorial" broadly to include op-eds.

III. Theoretical Foundation and Methodology

A. *Settler Colonialism*

Recognizing the powerful effects of framing in newspaper editorials, we explore the word choices and phrasing of anti-ICWA editorials. Just as standard newspaper coverage often implicitly suggests Native peoples are degraded, historic outsiders, editorials written in opposition to ICWA often incorporate similar language and thus reinforce colonial assumptions. As a threshold issue, it is useful to note that most of the anti-ICWA editorials we analyze in this article can be characterized as espousing a "settler colonial" ethic. Settler colonialism refers to "a historically created system of power that aims to expropriate Indigenous territories and eliminate modes of production in order to replace Indigenous peoples with settlers who are discursively constituted as superior and thus more deserving over these contested lands and resources."[55]

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[51] John D. Richardson, *Switching social identities: The influence of editorial framing on reader attitudes toward affirmative action and African Americans*, 32 Commc'n Rsch. 503, 521 (2005).

[52] Golan, *supra* note 41, at 58.

[53] Guy J. Golan, *The gates of op-ed diplomacy: Newspaper framing the 2011 Egyptian revolution*, 75 Int'l Commc'n Gazette 359–373 (2013).

[54] *See generally* Richardson, *supra* note 51, at 521; Golan, *supra* note 41, at 58; Singh & Bullock, *supra* note 50.

[55] Dean Itsuji Saranillio, *Settler Colonialism*, *in* Native Studies Keywords 284–300,

In the case of Indigenous children, settler colonialism has encouraged the eventual erasure of Native political entities through the removal of children from their political and familial communities. Today, as many anti-ICWA editorials deploy racist stereotypes of Native people and Tribal Nations, they play a significant role in furthering the settler colonial agenda. However, settler colonialism as a theoretical foundation for examining media coverage of Indians "has been little studied in the American field of communications."[56]

B. *Methodology*

For this study, we gathered, reviewed and coded editorials (both print and internet) published about ICWA since the law passed in 1978. The earliest editorial about ICWA we found is from 1985.[57] To adequately analyze salient themes throughout our collection of op-eds, we consulted the methodology of a significant study by Sweeney and Pollack that examined the media coverage of the *Adoptive Couple* case.[58] Centering their focus to 262 newspaper articles (*excluding* editorials and op-eds) between six mainstream and three Native newspapers, their study identified salient themes within each article and marked different appropriate segments based on one or multiple "codes," which "took into account factors such as mention of the adoptive couple, birth family, courts, Cherokee Nation, culture, and Baby Veronica."[59] This method of coding allowed the researchers to understand the percentage of articles that incorporated specific themes within newspaper reports on the "Baby Veronica" case. We use a similar method of coding to analyze editorials and op-eds that discuss ICWA.

Our study analyzes 125 newspaper editorials and op-eds published between the years of 1985 and 2020 that pertain to ICWA. These editorials were found and selected through keyword searches in a variety of databases such as ProQuest, NewsBank, and Newspapers.com. Searches predominately incorporated the keywords "ICWA" or "the Indian Child Welfare Act," narrowing results to only include newspaper editorials and op-eds. The final collection of 125 columns included 49 editorials and 76 op-eds from 70 different newspapers of a variety of types. In order to understand the scope of ICWA debate, newspapers were categorized by the range of their audience and tagged as either a local, regional, or national newspaper. Examples of each category include the *Green-Bay Press Gazette*, *The Daily Oklahoman*, and *The Washington Post*, respectively.

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284 (Stephanie Nohelani Teves, Andrea Smith, & Michelle H. Raoheja eds., 2015).

[56] Kay Marie Beckerman, *Newspapers As a Form of Settler Colonialism: an Examination of the Dakota Access Pipeline Protest and American Indian Representation in Indigenous, State, and National News* (June 2020) (unpublished Ph.D. dissertation, North Dakota State University).

[57] The Editorial Board, *Adopting Indian children and the law*, INDIAN COUNTRY TODAY 4–6 (Nov. 27, 1985).

[58] Sweeney & Pollack, *supra* note 34.

[59] *Id.* at 701, 708.

72 articles from our sample come from local newspapers, 21 from regional, and 32 from national newspapers. Finally, nine of our articles came from tribal/Native newspapers, including *Indian Country Today* and *The Seminole Tribune*.

The editorials we analyzed represented four different categories of support for the ICWA. 53 were in support of ICWA, 58 were against, 11 presented a muddled or unclear view of ICWA that did not have a cogent position but rather discussed a specific case involving ICWA instead of taking a position on law generally, and three proposed a compromise of some sort. "Compromise" articles discussed both flaws and strengths of the law and usually called for improvements to the law.

The majority of editorials in our sample coincided with high-profile ICWA court cases.[60] From 1985–1990, we found 19 editorials (often pertaining to the 1989 Supreme Court decision in *Mississippi Band of Choctaw Indians* which found that ICWA was constitutional).[61] From 1991–2000, we located 39 editorials which largely focused on local or regional cases that did not involve a Supreme Court decision. Interestingly, from 2001–2010, we only located 10 editorials. There was a significant jump in the number of editorials published between 2011 and 2020: we located a total of 57. A bulk of these editorials were published before, during, and after the Supreme Court decision in the 2013 *Adoptive Couple* case.[62] There has been another surge of editorials in the last three years that has arisen out of a recent challenge to the constitutionality of ICWA in the 5th Circuit—in the case of *Brackeen v. Bernhardt*, which was finally decided in April 2021.[63] Thus, we can conclude that a significant number of editorials about ICWA are focused on a particularly high-profile, outlier cases. Journalists rarely cover of the thousands of successful placements in ICWA cases.[64] Most matters involving child custody changes (not just ICWA) can be painful to all parties involved. Newspapers rarely cover these kinds of routine family law cases outside of ICWA cases. Indeed, most of the child removal cases in the state system are not made public in order to protect the children at the heart of a case.[65] We

[60] This dynamic is consistent with observations of local news articles about ICWA. *See* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 587, fn4 (2002).

[61] Mississippi Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[62] Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).

[63] Brackeen v. Haaland, No. 18–11479, slip op at 3 (5th Cir. April 6, 2021). Our data collection was complete before the release of the Brackeen decision in April 2021.

[64] Atwood, *supra* note 60, at 623 (explaining that "[t]he Act [ICWA], although imperfect, appears to work smoothly when a child's Indian identity is uncontested and is made known early on in the proceedings, tribes receive timely notice that involuntary or voluntary proceedings are pending involving a member or a member's eligible child, and tribal representatives act promptly in invoking their statutory remedies." (internal citations omitted).

[65] *See, e.g.* John C. Mayoue & Renee Neary, *Re-Examination of the Protection of Children's Best Interests in Public Custody Proceedings*, 20 Georg. Bar J. 12 (2015).

found that anti-ICWA editorials are often a reaction to a particularly provocative case that has received some attention by local journalists.

For this article, we focus primarily on the 58 anti-ICWA editorials. We developed categories for editorials and areas of focused analysis collaboratively, using an iterative process. We generated categories of codes to help us understand the context of editorials; for example, those about particularly high profile cases, whether an editorial was from a local, national, or tribal publication, or those in magazines versus newspapers. Additionally, our codes addressed themes and patterns, including racist assumptions about Native people, language denigrating Native parents while valorizing white parents, and inaccurate descriptions of the mechanics of ICWA. The process of analyzing written content using coding and other tools allowed us to access narratives that actors wielding power in the public policy process (including litigants, state governors, and legislators) have deliberately projected. We drew inferences regarding how specific geographic or audience contexts influence language used by various stakeholders in the ICWA debate and traced the development of that language both over time and in response to particular current events.

We used qualitative content analysis as our method of scholarly inquiry into the language used by editorial writers. Qualitative content analysis has been described as "a research method for the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns."[66] It is a technique used across a variety of scholarly fields, from history to political science, to extrapolate meaning from written or otherwise observable materials. Content analysis can exist as one method of many in a larger research project, or on its own as a means of studying an issue to which other access is impossible. We used a type of content analysis known as "conventional content analysis," meaning that we did not pre-assign categories of themes or patterns in editorials, but rather developed our organizational schema following (and informed by) our reading of the materials.[67] This tactic allowed us to have the richest possible set of codes identifying the ideological orientation and thematic nuances of editorials. The codes we used ranged from simple to complex and informed the organization of this article as well as our recommendations for future action by pro-ICWA and Native rights advocates. This article focuses on the two most common themes in anti-ICWA editorials: questions about tribal identity and descriptions of worthy parents.

IV. Framing ICWA: Race, Citizenship, and Culture

Most opposition to ICWA rests largely upon the flawed assumption that Native people are strictly a racial category and not citizens of independent sovereign governments. This premise leads to questions about

[66] Hsiu Fang Hsieh & Sarah E. Shannon, *Three approaches to qualitative content analysis*, 15 QUALITATIVE HEALTH RSCH. 1277, 1278 (2005).
[67] *Id.* at 1277–79.

the protections Native people receive from being citizens of Tribal Nations.[68] Objections to Indian identity like the conflation of citizenship with ethnicity (or Indian "blood") were some of the most common anti-ICWA tropes found in our data. This type of rhetoric is also reflected in the majority opinion in Adoptive Couple. Justice Alito's opening sentence is "This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."[69]

Many of the anti-ICWA editorials characterize Native people as a "race" without polity or governments. These editorials presuppose a conclusion about what it "means" to be Native and, subsequently, raise questions about the nature of tribal sovereignty. In this section we will focus on two general modes of rhetoric found in anti-ICWA editorials that delegitimize the Act itself based on common (mis)understandings of race and equality. First, we explore the rhetoric and language used to claim that Native Americans are a racial category rather than a political category. Second, we will analyze the labels used to deem the entire ICWA as a "racist" or "perverse" law and the implications such suggestions may have on a general readership as well as legislators and judges. Throughout this section, we will attempt to make clear the connections of these two components of anti-ICWA rhetoric and the racist or anti-Indian assumptions they often obscure. While a coalition of 18 national child advocacy organizations has labeled ICWA the "gold standard" in child welfare practice,[70] anti-ICWA forces continue to demonize Native peoples, Native nations, and the Act itself, describing it as a "historical anachronism"[71] designed to protect "racial integrity."[72] Using racially inflammatory language to compare ICWA to ideologies of racial purity is meant to have a detrimental impact on the perceptions of uniformed readers and could, by extension, influence voters, policy-makers, and judges. As Bethany Berger argues, "questions of race continue to haunt Indian policy."[73] Not only is it alarming that such language is based upon an incomplete understanding of Native identity and an incorrect interpretation of the law, but it is ironic (yet not entirely surprising) that cries of "racism" are so often racist themselves. Observed through a historical

[68] Allison Krause Elder, *"Indian" as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act*, 13 Northwestern J. Law & Soc. Pol'y 417, 417 (2018); Matthew L.M. Fletcher & Wenona T. Singel, *Indian Experience and Randall Kennedy's Mythology* in Facing the Future: The Indian Child Welfare Act at 30, xiii, xiii (Matthew L.M. Fletcher, Wenona T. Singel & Kathryn E. Fort, eds., 2008); Atwood, *supra* note 60, at 609–10.

[69] Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).

[70] National Indian Child Welfare Association, Setting the Record Straight: The Indian Child Welfare Act (2015) http://www.nicwa.org/government/documents/Setting-Record-Straight-About-ICWA_Sep2015.pdf.

[71] Clint Bolick, *The wrongs we are doing Native American children*, Newsweek, Nov. 2, 2015,

[72] Editorial, *Whose child is it?*, The Orange County Register (Dec. 8, 1997).

[73] Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. Rev. 591, 592 (2009).

lens, this is a direct continuation of centuries-long pattern of anti-Indian racism which denies Native peoples their separate political status.[74]

A. *Tribal Citizenship and Blood Quantum*

Tribal Nations are generally understood as having exclusive authority over determining who can be a citizen of the Tribe.[75] ICWA is a law that is centered on Indian children. ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[76] There is no mention of racial identity, blood quantum fractions, or other tribal identity percentages found anywhere in the law. It defines "Indian" in a political sense—as a member of an Indian tribe. Anti-ICWA editorials and op-eds rarely acknowledge this definition, but instead assume that Indians are a "race" of people, opening up arguments that involve equal protection and moral objections to what is perceived as racial discrimination against non-Indian adoptive parents. Indian identity has a complicated history and the concepts of race and citizenship have been conflated in many contexts.[77] To be sure, racism has been used as a tool of oppression against Native people, who have long been discriminated based on their physical appearance.[78] But ICWA itself is clearly based on political identity, not race. The Supreme Court rejected the argument that Native people are a racial group in *Morton v. Mancari* (1974).[79]

Contemporary political and legal discussions of ICWA (and Indigenous identity altogether) often revolve around a concept of "blood quantum"– a controversial (and colonial) method of measuring one's percentage of Native "blood." Blood quantum is often determined by exploring the lineage of a Native person's ancestors who were listed on a Tribal Nation's enrollment list or census from the late 19th or early 20th century.[80] For example, if someone has one Native grandparent who was listed as "full blood" (4/4), then that person's blood quantum would be 1/4.

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[74] *Id.* at 655 (2009) ("Understanding that the most devastating manifestations of racism for American Indians were denial of the governmental status of the Indian tribe and limitation of tribal status to that of a racially inferior group provides a new lens to understand why protection of tribal governments is in fact a necessary means to undermine racism toward American Indians.").

[75] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 (1978). *See also* Apodaca v. Silvas, 19 F.3d 1015, 1016 (5th Cir. 1994); Smith v. Babbitt, 875 F.Supp. 1353, 1360 (D. Minn. 1995).

[76] 25 U.S.C. 1903(4).

[77] *See generally* Berger, *supra* note 73.

[78] *See generally* BARBARA PERRY, SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS (2008).

[79] 417 U.S. 535, 554 (1974).

[80] Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 UNIV. KANSAS L. REV. 437, 457–458 (2002).

For some Native people, the allotment of tribal lands in the late 19th and early 20th century marked the first time the federal government applied blood quantum to Native Americans as a collective group.[81] Since then, however, legal applications of blood quantum have evolved to reflect inherent contradictions within Indian legal identity as well as federal Indian Law as a whole.[82] Today, blood quantum remains a contentious subject,[83] but while many Tribal Nations continue to determine tribal citizenship based on blood quantum minimums, others use lineal descendancy from someone on the tribe's base roll. There are a variety of other ways that Tribal Nations determine citizenship eligibility. Some Tribal Nations have political mechanisms to enroll people with no biological Native ancestors. For example, after a protracted legal struggle between the Cherokee Nation and the descendants of Black people who were enslaved by the Cherokee Nation in the 19th century (known as "Freedmen"), the Cherokee Nation now recognizes these descendants as citizens of the Cherokee Nation despite the fact that they do not possess Indian "blood."[84] Rhetoric in mainstream media and politics, however, suggests that blood quantum relates to a Native person's *race* rather than political identity. As mentioned previously, blood quantum was a tool used for centuries to determine if one was legally white or Black in early American history. For contemporary Native peoples, blood quantum is grounded in political status rather than race.[85] In the context of ICWA, this misunderstanding can prove detrimental to the law's perceived integrity, as it misconstrues ICWA to ground the separate treatment of Native families and children based on race rather than separate political citizenship. When this misinformation spreads to large audiences, such as through newspaper editorials, the implications could have adverse effects on public support for ICWA. The majority opinion of the 2013 Supreme Court case *Adoptive Parents* is evidence of the extent to which blood quantum remains an enigma both legally and in ordinary understandings of Native identity.[86]

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[81] Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S. D. L. Rev. 1, 48 (2006).

[82] *Id.*

[83] Gregory Campbell, *Blood Quantum*, Encyclopedia of Race, Ethnicity, and Society 184 (2008) ("For some individuals, blood quantum is a eugenics policy designed to "statistically exterminate" the remaining Native American people. For others, it is a mechanism to legitimately define who may claim to be Native American.").

[84] Michael Dekker, *Cherokees Begin Processing Freedmen Descendants for Tribal Citizenship*, Tulsa World (Sept. 8, 2017) https://tulsaworld.com/news/state-and-regional/cherokees-begin-processing-freedmen-descendants-for-tribal-citizenship/article_555b6279–79fe-5571-b2a2-c88bb2005f2d.html.

[85] Campbell, *supra* note 83.

[86] During the oral arguments in the *Adoptive Couple* case, Chief Justice John Roberts posed the question, "Is it one drop of blood that triggers all these extraordinary rights?" *See* Carl Cannon, *Bad facts make bad law*, Orange County Register (June 30, 2013).

Many anti-ICWA editorials use blood quantum as a tactic to depict race as the only component of Native identity and through this claim, attack the moral legitimacy of the law. Highlighting the "miniscule" amount of "pure-blooded" Native ancestry in the Native children and parents at the center of high-profile cases questions the authenticity of their identity as Native people and subsequently delegitimizes the goals of ICWA. We found that anti-ICWA authors are often fixated on fractions and percentages, disparaging the idea that a child with a "small" amount of Indian blood could *truly* be characterized as an Indian child. Authors often deploy specific fractions or percentages in their critique or refer to a "drop" of blood. For example, a 2016 editorial in the *Daily News of Los Angeles* reads, "The little girl has a tiny bit of Choctaw ancestry—just 1.5 percent—and under federal law the Choctaw Nation can decide her fate."[87] This trope about minimal heritage and fractions is a consistent theme in anti-ICWA editorials that use phrases like "only a *smidgeon* of Native American blood."[88] Many editorials characterize an Indian child or a parent to be "part Indian." Professor Barbara Atwood reminds us that "[t]he nomenclature of 'part Indian' is both problematic and revealing."[89] As a member of a body politic, citizens of Tribal Nations are not "partial" anything. No one is "part American" or "1/16th American."

Paradoxically, many editorials not only hold small amounts of blood quantum as evidence of unsubstantiated claims of indigeneity, but also sow doubt into all claims of Native ancestry. A 1996 editorial from *The Washington Post* says, "The Rosts claim the children are only 1/32nd Indian, while Richard and Cindy now claim to be part Indian."[90] Similar words and phrases are frequently used to subvert the respectability of these families' claims to Native identity and citizenship, such as "claimed," "apparently,"[91] "turn out,"[92] and "flimsy argument."[93]

Native peoples are thus held to an impossible double standard: one is not "Indian enough" without an "appropriate" amount of Native blood, but whatever Native blood one has is not believed to be legitimate.[94] The

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87 Susan Shelley, *How the law failed part-Choctaw girl, Santa Clarita family*, THE DAILY NEWS OF L.A. 6 (Mar. 23, 2016).

88 Bolick, *supra* note 71.

89 Atwood, *supra* note 60, at 646.

90 Susan Estrich, *Kids first*, WASH. POST, C7 (July 28, 1996).

91 Mona Charen, *Too much importance on racial lineage*, THE BURLINGTON FREE PRESS 32 (June 4, 1995) ("But one of the twins' great-great-great-grandparents was an Indian. That makes the twins one thirty-second Indian, and that, apparently, is enough to trigger the federal law.").

92 Editorial, *Adoption Fiasco: Laws, courts working wrong way*, THE PADUCAH SUN 4 (Oct. 17, 1995) ("Two year old twins, who have been with their adoptive parents since birth, turn out to have a small amount of Native American blood").

93 Editorial, *This is Justice? Judge Wrong to Wrest Twins from Rosts*, COLUMBUS DISPATCH (June 18, 1995) [hereinafter *This is Justice?*] ("And it all rests on the flimsy argument that the toddlers are 1/32 American Indian").

94 This exclusionary practice is characteristic of historical trends of settler colonialism.

contradictory usage of blood quantum is therefore a fundamental characteristic of the attack on ICWA and a prime example of the complete racialization of Native Americans in popular discourse. Understanding the prevalence of such language helps frame this issue in the context of editorials and ICWA as a whole. In our study, we found that 14 out of the 58 editorials designated as "anti-ICWA" specifically deployed blood quantum as an argumentative tool. Although this may not seem to be a large proportion, the potential impact of such language is significant since several editorials were written by nationally syndicated pundits such as George Will.[95] Additionally, we found that 43 out of the same 58 editorials in some way characterize Native identity as being wholly racial or ethnic, a significant demonstration of the problematic foundation of most arguments against ICWA. To understand this more fully, we will now explore the additional rhetoric and language used in anti-ICWA editorials to establish Native people as "just another" race.

Many editorials are explicit about this assumption. Ken Paxton, Attorney General of Texas, who is leading an effort to overturn ICWA in federal court, published an anti-ICWA opinion piece in *The Washington Post* in 2019. Paxton's opinion piece exemplifies many of the editorials analyzed in our study when he says, "ICWA compels states to [. . .] treat Native American foster children differently based on nothing more than their race."[96] However, less obviously, assumptions about Native people and race are also embedded within a variety of specific rhetoric and word choices that evoke explicitly racist language.

B. *Comparison With Racial Categories*

Directly comparing Native peoples to other ethnic, racial, or religious minorities is another way which anti-ICWA editorials seek to control the interpretation of Native identity. Hypotheticals are the typical rhetorical device to do so. One 2017 editorial claims, "If Andy [the child at the center of a court case concerning ICWA] were white, black, Asian, or Hispanic, that adoption would have been approved without delay . . . except [for] one race."[97] Another editorial from 1989 argues, "If the same restrictions that Ms. Argleben faces were imposed, say, on Jewish mothers . . . it would be a triumph for bigotry."[98] These hypotheticals explicitly and incorrectly assume that ethnic or racial minorities

Settler populations in the United States not only created the "Native American," been have since sought to control who is considered Native, altogether while encouraging Native peoples to assimilate into American society in order to gain access to tribal resources such as land. *See* Berger, *supra* note 73, at 654; Coward, *supra* note 18, at 30.

[95] George F. Will, *Kids pay the price for tribes*, Wash. Post, Sept. 3, 2015, at A23.

[96] Ken Paxton, *A federal law is hurting Native American children. It must be struck down.*, Wash. Post, Jan. 31, 2019, https://www.washingtonpost.com/opinions/a-federal-law-is-hurting-native-american-children-it-must-be-struck-down/2019/01/31/f00f9570–24a9–11e9–90cd-dedb0c92dc17_story.html.

[97] Timothy Sandefur, *Native American children deserve equal protection under the law*, Austin American-Statesman A7 (Nov. 14, 2017).

[98] The Editorial Board, *Tribal Bigotry*, Telegraph-Forum 4 (Oct. 9, 1989).

automatically occupy the same legal status as someone who is Native. Pro-ICWA lawyer Mary Kathryn Nagle (Cherokee) explains how being a tribal citizen is mutually exclusive from race, explaining "[j]ust as citizens of the United States can belong to any race, citizens of tribal nations are of many different races. Lumping all tribal citizens together as 'one race' is itself racist and undermines the sovereignty of tribal nations."[99] We found that anti-ICWA editorials comparing Native peoples to racial or ethnic groups foster unseemly comparisons to other ethnic groups. Local columnist Debra Saunders exemplifies this when she proclaims, "other ethnic groups have adapted to modern times."[100] The reinforcement of racist tropes, such as the idea that Native peoples are "archaic" or "stuck in the past," is an inseparable consequence of rhetoric that categorizes all tribal citizens as one race.

The fixation on blood quantum and Native peoples as a racial group promotes unsubstantiated opposition towards a law which protects the welfare of Native children. As a consequence, such language lays a foundation for authors to be able to delegitimize ICWA on terms of "racism." If editorials took into account the separate legal status Native peoples receive from being enrolled citizens of a Tribal Nation, this argument would lose its legitimacy. However, by limiting the purpose of ICWA to "preserving the culture" of an ethnic and racial minority, editorials can label the law using provocative words such as "bigoted," "racist," and "segregationist."

Anti-ICWA tactics often gloss over the distinct political identity of Native peoples through talk of generic "culture" or "heritage." Editorials often purport to consider "both sides of the story." What they describe "the other side" to want, however, is often a reflection of the author's own preconceived beliefs, and ultimately reinforces problematic assumptions about Native peoples as a whole. One particularly condescending editorial reads, "It's understandable—perhaps even laudable—that the Cherokee Nation and other tribes want to preserve their heritage."[101] The apparent innocence of this language legitimizes the problematic assumptions it conveys. The appearance of attempting to weigh both sides of the argument in order to come to a thoughtful conclusion allows columnists to implicitly define the purpose of ICWA to be to only preserve racial culture or heritage and not the existence of a body politic.

Culture and heritage are certainly components of ICWA's purpose, but it is impossible to separate them from its larger goals—protecting Indian children while supporting tribal sovereignty.

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[99] Mary Kathryn Nagle, *Fact check: the Goldwater Institute's statements about the Indian Child Welfare Act*, High Country News (Dec. 20, 2018), https://www.hcn.org/articles/tribal-affairs-fact-check-the-goldwater-institutes-statements-about-the-indian-child-welfare-act.

[100] Debra J. Saunders, *Identity, tradition and the good mother*, Santa Fe New Mexican, Feb. 9, 1990, at N21.

[101] Editorial, *High court got it right in case of adopted baby*, Daily Oklahoman, Jun. 27, 2013, at 6.

These assumptions simply miss the mark when it comes to ICWA. For example, in her op-ed "Baby not tribe's cultural property," Joanne Jacobs writes, "I can understand why an impoverished and isolated group deeply resents the adoption of 'their' children by relatively wealthy white couples."[102] All supposedly in an attempt to understand the "the other side," Jacobs implies that all Native peoples are "impoverished and isolated," sows doubt into Native parents' claims to their own children by using quotation marks around "their," and infers that white adoptive couples are saviors. Nevertheless, as Jacobs makes clear, considering Native peoples' perspectives is simply another argumentative tactic. Although this line comes from just one editorial, its assumptions are representative of deep-seated racist stereotypes in popular American consciousness.

C. *Framing ICWA as a racist law*

Within the last decade, many anti-ICWA editorials have focused their attacks on the law itself rather than the families it serves. As these arguments continue to propagate false information about ICWA, it is necessary to combat some of the more notable misconceptions. Timothy Sandefur, a top official of the *Goldwater Institute* and prominent opponent of ICWA, claims in one of his 21st century editorials opposed to the law that ICWA "is not limited to members of tribes" and "applies to children who are "eligible" for tribal membership."[103] Thus, he claims that ICWA is "based exclusively on genetics."[104] Although Sandefur is correct that a child does not need to be an enrolled citizen of a tribe to qualify for ICWA but can rather be *eligible* for enrollment, he is wrong to say that eligibility is based strictly on genetics. In a *High Country News* fact check of op-eds written by Sandefur, Mary Kathryn Nagle refutes a similar claim by reasserting that an Indian child is eligible for tribal enrollment only if a parent is a citizen. She writes, "If a child and his/her parents are not citizens of a sovereign nation, ICWA will have no application to that child's foster placement, adoptive placement, or the possible termination of the parents' rights."[105] In short, race is not determinative of tribal eligibility.

Texas Attorney General Ken Paxton expresses a similar claim to that of Sandefur in his 2019 editorial "A federal law is hurting Native American children. It must be struck down." Writing in *The Washington Post*, Paxton says, "The idea that the ICWA relies on a political designation rather than a racial one is further undermined by the fact that if no family from the child's tribe volunteers to adopt, any Native American from any tribe, anywhere, takes automatic precedence over a non-Native

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[102] Joanne Jacobs, *Baby not tribe's cultural property*, Edmonton J., May 4, 1988, at 6.

[103] Timothy Sandefur, Opinion, *Native American Children Are Suffering Thanks To Racist Federal Law*, Daily Caller (Washington, D.C.), Feb. 13, 2019, https://dailycaller.com/2019/02/13/sandefur-native-children.

[104] Sandefur, *Native American children deserve equal protection under the law*, *supra* note 97.

[105] Nagle, *supra* note 99.

American couple."[106] Similarly, in 2018, Naomi Schaefer Riley (resident fellow at the American Enterprise Institute) poses the same question in the *Los Angeles Times*: "if each tribe is a single political entity, and that entity should have precedence over adoptive parents from other groups, why does the ICWA allow Indian kids to be adopted by any native family, from any tribe?"[107] ICWA's primary purpose is to grant tribal governments jurisdiction over the child welfare and adoption cases of their own citizens. Professors Addie Rolnick and Kim Pearson remind us that "ICWA's intervention in structural, not substantive."[108]

ICWA does not control where tribal courts decide to place a child; ICWA only limits the actions of state courts. It is perfectly legal for a tribal court to choose a non-Native family to adopt one of their children rather than a Native family, as some tribal courts have done, while ensuring that the adopted child will still be in contact with their Native kinship circles.[109] In some cases where a non-Native foster family has special training in caring for disabled children, for example—a tribal court could prioritize that particular foster family over placement with a Native family. However, a Native family, even if not from the same nation, may be more equipped to keep a child in touch with their Native heritage than a white family, and are hence prioritized in the adoption or foster care process. Although these modern arguments have shifted the focus of their attack away from Native peoples and towards the law, their implications continue to jeopardize tribal sovereignty and the wellbeing of Native children across the country.

The most impactful and common label used to describe ICWA is "racist." After establishing Native peoples as equivalent to racial or ethnic minorities, editorials often conclude with an accusation that ICWA conflicts with the Constitution's equal protection clause.[110] These claims often are put forth in dramatic fashion. An editorial from the *Telegraph-Forum* says, "If Washington decreed that white people couldn't adopt black children [. . .] only bigots would applaud."[111] Another from the *Columbus Dispatch* calls ICWA "a flawed and racist law known ironically as the

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[106] Paxton, *supra* note 96.

[107] Naomi Schaefer Riley, *Does the Indian Child Welfare Act protect tribal interests at the expense of children?*, L.A. TIMES, Oct. 12, 2018, at A11.

[108] Addie Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. STATE L. REV. 727, 744 (2017).

[109] *See* Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 50 (1998) (describing how the Mississippi Band of Choctaw tribal court and the Navajo Nation tribal courts did not remove the children at question from their white adoptive parents—instead they ensured continued contact with their extended Native family).

[110] Charen, *supra* note 91, at 32 (concluding that "the law is racist").

[111] The Editorial Board, *Slaves to the tribe*, TEL.-FORUM, Aug. 18, 1989, at 4.

Indian Child Welfare Act."[112] Most recently, Paxton's 2019 *Washington Post* op-ed describes the law as "racist and reductionist."[113]

In 12 editorials, accusations of racism went even further to compare ICWA to the era of legal segregation in the United States. Playing off a now infamous legal phrase, many describe ICWA as creating a "separate and unequal" child welfare system.[114] Others include direct mentions of Adolph Plessy or the corresponding Supreme Court case, *Plessy v. Ferguson*, to serve as historical parallels.[115] It is important to note that this language is not limited to editorials in small town conservative newspapers. To conclude his nationally circulated article "Kids pay the price for tribes," *Washington Post* columnist George Will paints a picture of the history leading up to ICWA saying, "It has been a protracted, serpentine path from *Plessy v. Ferguson* (1896) and 'separate but equal' to today's racial preferences."[116] By establishing Native people as members of a "race" rather than citizens of Tribal Nations, writers claim that ICWA is unconstitutional under the 14th Amendment equal protection clause.[117]

Outrageous comparisons to popularly disgraced periods of U.S. and world history do not end there. Notably, albeit less frequently, many editorials tie ICWA to movements of "cultural and racial purity."[118] Columnist Mona Charen makes three references to such movements when she asks, "isn't [ICWA] uncomfortably close to the tainted-blood view of miscegenation from the Jim Crow era—to say nothing of the racial schemes of the old South Africa or Nazi Germany?"[119] An editorial from the *Orange County Register* asks if ICWA is "a Ku Klux Klan plot to prevent race-mixing,"[120] and another from the *Telegraph-Forum* proclaims, "If you thought slavery was dead, you haven't heard of the Indian Child Welfare Act."[121] Although it may be easy to dismiss such claims as the irrational opinions of people from fringe political ideologies, these claims reveal the problematic conclusions that labeling ICWA as "racist" can lead to.

Editorials also frequently describe ICWA as existing in the realm of the inconceivable. A 2013 op-ed characterizes ICWA as an "Alice

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[112] *This is Justice?*, *supra* note 93.
[113] Paxton, *supra* note 96.
[114] See, e.g., Naomi Schaefer Riley, *The Indian Child Welfare Act: A Law that paved the way for a 5-year-old's death*, USA Today, Jan. 29, 2020, https://www.usatoday.com/story/opinion/2020/01/29/indian-child-welfare-act-law-paved-death-column/4519511002; Bolick, *supra* note 71.
[115] *Id.*
[116] Will, *supra* note 95.
[117] U.S. Const. amend. XIV.
[118] Stevie Lacy-Pendleton, *Once Again, Children are Chattel in Adoption Fight*, Staten Island Advance, Aug. 31, 1994; Editorial, *Paleface paternalism*, Orange Cnty Reg., May 20, 1991; *Tribal Bigotry*, *supra* note 98.
[119] Charen, *supra* note 91, at 32.
[120] Editorial, *Ethnic Errancy*, Orange Cnty. Reg., Nov. 20, 1994, at J04.
[121] *Slaves to the tribe*, *supra* note 111, at 4.

in Wonderland legal situation."[122] Labels such as "bizarre,"[123] "balderdash,"[124] and "puzzling"[125] attempt to erode the law's integrity by subtly yet purposefully ignoring the meticulous bipartisan thought and planning put into its creation and passage. Nevertheless, "puzzling" over the complexities of ICWA is rarely based in genuine curiosity, but rather functions as a stepping-stone to reach more substantial accusations. "Perverse"[126] is a favorite word used by pundits to describe ICWA, oftentimes accompanied by more colorful language, such as "a travesty in the making,"[127] a "bonehead federal law"[128], "a modern tragedy"[129], and, bluntly, "just plain stupid."[130]

D. *Racist language in anti-ICWA editorials*

A few editorials dip into a historical supply of racist rhetoric that can be used to mock or belittle Tribal Nations. For example, one anti-ICWA editorial is entitled "Paleface Paternalism"[131]—an insulting reference to how mid-20th century Hollywood characterized the broken English of Native people. Several editorials refer to the law as "barbaric,"[132] a word inextricably linked to colonial ideas of Native "savagery." Although outliers in the context of our study, these examples show how labeling ICWA with the incorrect understanding of Native identity can easily lead to alarming anti-Indian rhetoric.

In addition to "barbaric", another common anti-Indian trope is deployed: "massacred."[133] "Massacre" is coded language harkening back to the 19th century "captivity narratives" in which Native warriors were portrayed as vengeful and prone to excessive, gory violence. Several editorials deployed this word to describe how ICWA has purportedly

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[122] Thomas Sowell, *1978 Indian child act is harmful*, MESSENGER INQUIRER, Jan. 30, 2013, at A5.

[123] Bolick, *supra* note 71; Editorial, *"Baby K" airport pickup a kidnap to most*, ARIZ. DAILY SUN, April 18, 1988, at 6.

[124] Elizabeth Sharon Morris, *Indian Child Welfare Act puts children's interests last*, GRAND FORKS HERALD, July 21, 2013, https://www.grandforksherald.com/news/2196409-elizabeth-sharon-morris-indian-child-welfare-act-puts-childrens.

[125] *See, e.g.* Editorial, *Two cultures? - Mix usually works well*, TULSA WORLD, June 23, 1998, at 10.

[126] "For now at least, a perverse federal law called the ICWA has triumphed . . . " *Tribal Bigotry*, *supra* note 98, at 4.

[127] *Adoption Fiasco: Laws, courts working wrong way*, *supra* note 92, at 4.

[128] *Ethnic Errancy*, *supra* note 120.

[129] The Editorial Board, *A Tribal Question; Native American Children Should Not be Harmed by a law intended to preserve Indian Families*, WASH. POST, Oct. 9, 2007, at A16, [hereinafter *A Tribal Question*].

[130] Editorial, *Indian adoption law formula for injustice*, PADUCAH SUN, July 9, 1995, at 4.

[131] *Paleface paternalism*, *supra* note 118.

[132] Editorial, *Law is Unjust*, PADUCAH SUN, Nov. 29, 1996, at 4.

[133] *Ethnic Errancy*, *supra* note 120.

destroyed families. Indian reservations are also described using disparaging anti-Indian rhetoric such as "poverty pits"[134] and "dysfunctional."[135]

In our study, perhaps the most outrageous characterization of ICWA is found in a 2016 op-ed published by the *Daily News of Los Angeles*, where local columnist Susan Shelley wastes no time in comparing ICWA with child sacrifice, opening her editorial with the line "Five hundred years ago, the Incas *sacrificed children*."[136] Placing children with their Native relatives is, argues Shelly, "not human sacrifice, but it is closely related. It is collectivism, the opposite of individual rights."[137] While this turn of phrase is quite offensive, we found other editorials also deploy references to "sacrificing children".[138] Even worse, one editorial states unambiguously that "preserving independent tribes" would be an act of "foolishness,"[139] an explicitly anti-Indian idea which hearkens back to the termination period of federal Indian law in the mid-20th century. In a 1990 editorial, Debra Saunders writes that if a tribe's children are removed and they "can't keep enough people to carry on their village life, then maybe it's time the village simply folded."[140] Underlying claims that ICWA legitimizes abuse are facially coded assumptions about the fitness of white parents and the unfitness of Native parents.

V. Commentary on worthy and unworthy parents

In this section, we explore how anti-ICWA editorials draw a stark contrast between biological Native parents and prospective or actual foster or adoptive parents, buttressing the argument that Native children are victims of ICWA because they are denied access to worthier parents. Native biological parents are often depicted as unfit and neglectful in an oversimplified bid to discredit ICWA, despite the reality that the law seeks to maintain tribal political sovereignty over child placement rather than mandate that all Native children remain with their biological parents in perpetuity. Editorials often conflate the byproducts of poverty, a couple's marital status, or the behavior of a non-parenting partner with rare instances of grotesque violence. By contrast, white foster or adoptive parents are described in glowing terms as financially stable, affectionate, and generous in their willingness to adopt a Native child. Attacks on non-white mothers to justify denying the right to parent are as old as settler colonialism; white American women in particular have "generated powerful images that pathologized indigenous families and helped to justify child removal policies" since the beginning of the

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134 *Paleface paternalism*, *supra* note 118.
135 *A Tribal Question*, *supra* note 129.
136 Shelly, *supra* note 87, at A6 (emphasis added).
137 *Id.*
138 Editorial, *Sacrificing Indian Children's Rights*, State J.-Reg., June 10, 1988, at 11.
139 William Allen, *Decision Robs Indians of Constitutional Rights*, Palm Beach Post, May 4, 1989, at 62.
140 Saunders, *supra* note 100.

twentieth century.[141] Roughly one-third of the 90 editorials we analyzed named Native abuse and neglect as a justification for child removal; about half of those contrasted Native parents with seemingly virtuous white, heteronormative couples.

A. *Unworthy Native Biological Parents*

Many editorials defame biological Native parents as unfit for parenting, often through insinuations and stereotyping. Mothers and other female caregivers are particularly subject to these allegations when editorialists employ the language of social morality. For example, one editorial passes judgment on the relatively young age of a Native grandmother (42), a fact wholly irrelevant to the case itself.[142] Many editorials are quick to point out when Native parents are not married to each other. Nine editorials analyzed for this project comment on how the Native parents are unmarried; in one 2013 editorial, Mona Charen reminds the reader that the mother was "not married to the father," and goes on to repeat that the "biological father [. . .] was not in the picture."[143] A potential Native adoptive mother described as a "single woman" is pilloried in a *New York Times* editorial for wanting to put her prospective adopted son in daycare, a reminder of how frequently editorials treat poverty as a personal failing disconnected from broader social structures.[144] Dusten Brown, the Cherokee biological father in the Baby Veronica case, is characterized in a *Daily Oklahoman* editorial as a "deadbeat dad;" the editorial concludes that "Veronica has already paid a too-high price for her the sins of her father."[145] Another 1990 editorial opines that ICWA "sentences children whose parents want better for them to lives of poverty."[146] Native parents' living conditions are described in the *Daily News of Los Angeles* with the racist adjective "primitive," as well as the less specific "unsanitary [and] unwholesome."[147] A mother's former cocaine addiction is invoked as an automatic as a strike against her parenting abilities.[148] Editorials often seize on facts about Native parents who are struggling with substance abuse or are neglectful to reinforce stereotypes about Native people. These stereotypes are then used to justify the abolition of ICWA itself.

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[141] MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE : SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940, xxxi (2011); BARBARA GURR, REPRODUCTIVE JUSTICE: THE POLITICS OF HEALTH CARE FOR NATIVE AMERICAN WOMEN 8 (2015).

[142] Charen, *supra* note 91, at 32.

[143] The Editorial Board, *A Wrenching Adoption Case*, N.Y. TIMES, April 16, 2013, https://www.nytimes.com/2013/04/16/opinion/a-wrenching-adoption-under-the-indian-child-welfare-act.html.

[144] Sowell, *supra* note 122, at 16.

[145] *High court got it right in case of adopted baby*, *supra* note 101, at 6.

[146] *Slaves to the tribe, supra* note 111, at 4.

[147] Saunders, *supra* note 100.

[148] Thomas Sowell, *Another child traumatized by 'good intentions'*, PRESS SUN-BULL., Nov. 4, 2001, at 16.

Advocating for the abolition of ICWA because of isolated instances of violence and neglect characterizes the majority of editorials denigrating Native parents. Some editorials focus on neglect only; one tells the story of how a child was "abandoned" by her mother, "left in the care of pre-teens," and had no diapers.[149] The *Orange County Register* describes two children who were "abandoned by parents."[150] Alcoholism is another common stereotypical thread in anti-Native parent, anti-ICWA editorials. Debra Saunders of the *Daily News of Los Angeles* declares that tribal members are "chronic alcoholics."[151] Another, regarding a high-profile case, says "alcohol was the natural mother's priority."[152] Drug use is an even more common theme invoked to discredit ICWA than alcoholism. *The Indianapolis News* borrows from an anti-Black trope to characterize Indian children as "crack babies, products of teen-age pregnancies."[153] *The L.A. Times* also discusses a baby "born with drugs in his system and removed from his parents because of neglect."[154] A 2015 George Will editorial in *The Washington Post* bemoans that a child of a Native home with "poverty, substance abuse" cannot be adopted, naming a "mother who was a drug addict and a father who was in prison."[155] Another editorial echoes Will's language regarding a different case, describing "a mother suffering from substance abuse and a father with a criminal history."[156] A *Washington Post* editorial describes parents with drug and alcohol problems, critiquing the notion that social workers must provide "active efforts" to rehabilitate "drug-addled or psychologically impaired Indian parents."[157]

Anti-ICWA, anti-Native parent editorials focus on violence against Native children more often than alcohol or drug use, particularly focusing on tragic instances of Native children dying because of abuse. With some high profile exceptions, descriptions of abuse are largely detached from the specific cases from which they emerge; writers invoke children who "die at the hands" of Indian parents who win custody battles and are "abused and uncared for by biological parents."[158] An editorial by Elizabeth Sharon Morris at the *Grand Forks Herald* decries "abusive homes,

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[149] The Editorial Board, *Welfare act not in child's best interest*, Bismarck Trib., Feb. 24, 1994, at 4.

[150] *Ethnic Errancy, supra* note 120, at J04.

[151] Debra Saunders, *When an Old Federal Law Allows Tribes to go too far*, Daily News of L.A., 1990, at N21.

[152] The Editorial Board, *It's only right Kayla has say in her future*, The Bismark Trib., 1995, at 02C.

[153] The Editorial Board, *Adoption discrimination*, Indianapolis News, Oct. 18, 1996, at 8.

[154] Riley, *supra* note 107, at A11.

[155] George Will, *The blood-stained Indian Child Welfare Act*, Wash. Post, Sept. 2, 2015, at A23.

[156] The Editorial Board, *Lessons for adults in Lexi custody case*, Daily News of L.A., 2016, at A16.

[157] *A Tribal Question*, *supra* note 129, at A16.

[158] Lacy-Pendleton, *supra* note 118, at A19.

many headed by known sex offenders," as well as "homes where parents were addicted to drugs and/or where they had been credibly accused of abuse or neglect."[159] An editorial written for the Hoover Institution invokes the case of a Native girl whose mother "had been arrested half a dozen times for abuse, neglect, endangerment and abandonment of her own children" to make the case that a policy preference for Native families guaranteed "adverse treatment" of children.[160]

A few editorials include graphic descriptions of isolated tragic violence and death of Native children at the hands of their parents or other relatives, often characterizing violence as the product of ICWA itself. Some claim that violence is endemic to Native communities. Indeed, this conclusion that extinction or assimilation into whiteness is preferable to living as Native people is consistent with the glowing descriptions of white parents that exist in the same editorials denigrating Native parents. The truth is, no child protection system is perfect. Unfortunately, in the United States each year, there are children of all backgrounds who experience a violent death at the hands of their caregivers, not just ICWA cases. But these isolated examples are used to suggest that ICWA as a whole subjects Indian children to more violence.

B. *Angelic Adoptive Parents*

White parents in anti-ICWA editorials are commonly described as nearly angelic, generous of spirit for adopting Native children, loving, stable, and financially successful. Fourteen editorials characterize foster parents as "loving," while the word "love" is rarely used in the context of Native biological parents. Anti-ICWA editorials almost exclusively describe white adoptive parents who are in a monogamous, heterosexual marriage. In the *Los Angeles Times*, white foster parents' professions - a physician mother and a stay-at-home father - are described as ideal for giving an Indian child "a solid second chance."[161] An adoptive couple is described as "honest" in the *Columbus Dispatch*, capable of providing an "affectionate and nurturing home"[162] Removal of children from tribes and placement with white families is described as creating "stability"[163] and safety.[164] A 1993 *New York Times* column by Timothy Egan recounts a white adoptive couple who conflates religion and profession with nationality, arguing that they, like Indians, "have their own cultural traditions, that of the Mormon farmers who first settled in southern Idaho nearly 150 years ago."[165] An op-ed authored by Baby Veronica's birth mother, Christy Maldonado, was published in *The Washington Post*

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[159] Morris, *supra* note 124.
[160] Bolick, *supra* note 71.
[161] Riley, *supra* note 107, at A11.
[162] *This is Justice?*, *supra* note 93, at 02B.
[163] *Adoption discrimination*, *supra* note 153, at 8.
[164] *A Tribal Question*, *supra* note 129, at A16.
[165] Timothy Egan, *Indian Heritage vs. Adoptive Parents*, THE N.Y. TIMES, October 12, 1993, at A16.

in 2013. She describes how she selected the white adoptive parents (the Capobiancos)—emphasizing that they are "people of strong faith."[166]

Anti-ICWA columns also tend to frame white adoptive parents in a very sympathetic light, often describing the difficulty the couple has had in conceiving their own biological child. Christy Maldonado notes that the Capobiancos "had tried for years to have children."[167] While white parents are described ubiquitously in anti-ICWA editorials as ideal parents because of economic privilege and abundant affection, they are less frequently but still notably characterized as saviors because of their willingness to adopt non-white children.[168] An editorial in the *Staten Island Advance* which equates indigeneity with race describes the U.S. adoption landscape as one in which "children of color [. . .] are the ones no one seems to want."[169] Adoptive parents of Native children in Texas are affectionately described in *Newsweek* as creating a family resembling "a mini-United Nations."[170] Anti-ICWA editorials fundamentally characterize Native jurisdiction over Native children as selfish and white adoption of Native children as selfless. That purported selfishness is particularly evident when it is attributed to hunger for power—over children, adoptive parents, and settler institutions.

VI. Tribes as Power-Hungry and Violent Imagery

Tribal governments themselves are often portrayed by anti-ICWA authors as power-hungry entities seeking to control the lives of Native children for no justifiable reason.[171] For example, a syndicated columnist argued that ICWA cases "show that tribal leaders may be more concerned about tribal ego than children."[172] In 2013, a local editorial suggested that enforcement of ICWA was "to protect the tribe's turf."[173] After the Supreme Court decision in the 1989 *Holyfield* case, the then-Chairman for the United States Commission on Civil Rights, William B. Allen, penned a syndicated column in which he characterized ICWA as giving the Mississippi Choctaw Nation "veto power" over adoption proceedings.[174] In

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[166] Christy Maldonado, *Baby Veronica's birth mother: Girl belongs with adoptive parents*, Wash. Post, July 12, 2013, https://www.washingtonpost.com/opinions/baby-veronicas-birth-mother-girl-belongs-with-adoptive-parents/2013/07/12/40d38a12-e995–11e2-a301-ea5a8116d211_story.html.

[167] *Id.*

[168] *See, e.g.* Goldstein, *supra* note 12 (noting that "white adoptive families epitomise post-racial liberal tolerance for their willingness to take children of colour into their homes, while those who might challenge such practices as inattentive to the significance of racial and colonial difference are portrayed as racists or otherwise regressive.").

[169] Lacy-Pendleton, *supra* note 118, at A19.

[170] Bolick, *supra* note 71.

[171] Atwood, *supra* note 60, at 591.

[172] Jack Anderson, *Mini-Editorial*, Daily World, June 10, 1988, at 7.

[173] Sowell, *supra* note 122, at A5.

[174] Allen, *supra* note 139.

other editorials, Tribal Nations are described as coercive,[175] "dangerous,"[176] and "selfish".[177] Anti-ICWA authors also often suggest that Tribal Nations are driven by a sense of property ownership over Native children.[178] One column claims that ICWA "makes Indian babies the property of tribal bureaucrats."[179] George Will suggests that ICWA is used by Tribal Nations for establishing "little trophies" for tribal power.[180] Writing about the *Adoptive Couple* case, Susan Estrich admonishes ICWA supporters for treating children like "chattels."[181]

Anti-ICWA editorials often seize on the image of children being transferred to another family. To be sure, transfer of child custody from one family to another can be a painful experience for all involved regardless of the context. But many anti-ICWA editorials use words and phrases that evoke violent, physical harm when ICWA requires the transfer of custody from one family to another. Multiple editorials describe the change in custody in violent terms, such as words as "tearing", "ripping", "wrenching", "uprooting" and "forcibly dragged away." In a 1995 editorial in *The Bismarck Tribune*, the metaphor grew even darker in a column which claimed that a particular Native child was "being strangled by the Indian Child Welfare Act."[182] Here, a legal statute, ICWA, is framed a sentient, evil being that has the capacity to extinguish the lives of Native children.

VII. Pro-ICWA editorials

Our research uncovered 53 editorials from 1985–2020 that are decidedly pro-ICWA and almost all of these editorials provide historical context for the law (far more often than anti-ICWA editorials). A significant number of pro-ICWA editorials are written by Native people themselves, as well as prominent politicians from both sides of the aisle. These editorials are also more likely to be published during periods of high-profile cases. In addition, almost all pro-ICWA editorials provide historical context for the law. Tribal newspapers, like *Indian Country Today* and *Tahlequah Daily Press* almost exclusively publish editorials that support ICWA.

Pro-ICWA op-eds are often written by the beneficiaries of ICWA. Autumn Adams, a member of the Confederated Tribes and Bands of the Yakama Nation and a former foster child herself, published an op-ed in a

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[175] Editorial, *A Blow to Personal Freedom for the Indians*, STATE JOURNAL-REGISTER, April 9, 1989, at 11.
[176] *Sacrificing Indian Children's Rights*, *supra* note 138.
[177] *Id.*
[178] *Paleface paternalism*, *supra* note 118.
[179] *Ethnic Errancy*, *supra* note 120, at J04.
[180] Will, *supra* note 155, at A23.
[181] Susan Estrich, *Baby Veronica went home for good*, THE STAR-DEMOCRAT, September 26, 2013, at 4.
[182] Editorial, *It's Only right Kayla has a say in her future*, BISMARCK TRIB., November 12, 1995, at 02C.

2019 issue of *The Seattle Times*. She describes how ICWA made a change in her life by placing her with relatives who were able to teach her tribal traditions and culture. In describing the ICWA. Adams uses words and phrases like "connection" and "family integrity and stability" and asserts, "[l]osing our culture is not an option for us."[183]

Scholars are another category of pro-ICWA writers. UCLA Professor Randall Akee published an essay for *The Seminole Tribune* in 2018 expressing his conclusion that "[k]eeping children in the community has meant reduced trauma and harm for [Indian] children."[184] During the *Adoptive Couple* phase, Historian Margaret D. Jacobs (University of Nebraska-Lincoln) also wrote a local column explaining the historical context of ICWA.[185]

Tribal leaders themselves have also written editorials to support ICWA. After the *Adoptive Couple* decision in 2013, then-President of the Navajo Nation, Ben Shelly, penned a poignant essay for *The Washington Post*, recalling being punished as a child for speaking Navajo.[186] He reminds the reader, "[t]he chance to teach our children the ways of our ancestors is a sacred honor and duty."[187] In 2016, the Principal Chief of the Cherokee Nation, Bill John Baker, penned a syndicated column intending to support ICWA in the *Brackeen* case. He warns that if ICWA is overturned by the federal courts, "this would strip Indian children of the law's valuable protections. A [federal] court would have to decide that it knows the best interests of tribal children better than their tribes do," adding that repealing ICWA would "breathtakingly arrogant and ignore the repeated failures of the United States to protect tribal children."[188] In 2019, Fawn Sharp (President of the Quinault Indian Nation) teamed up with Washington Attorney General Bob Ferguson to write a pro-ICWA op-ed, demonstrating that state-tribal ICWA collaborations benefit the entire child protection system.[189]

Both Democrats and Republicans have authored editorials that praise ICWA as critical law for the future of Tribal Nations. In 2015, Representatives Tom Cole (R-Okla.) and Betty McCollum (D-Minn.) co-authored an editorial for *The Hill*, a widely read publication in Washington, D.C. They criticized recent news coverage of ICWA as "sensationalized" saying it fails to adequately explain the historical purposes

[183] Autumn Adams, *I am living proof that it's best to keep Native children with their tribal communities*, Seattle Times, March 1, 2019, https://www.seattletimes.com/opinion/i-am-living-proof-that-its-best-to-keep-native-children-with-their-tribal-communities.

[184] Randall Akee, *Don't repeat the failed policy of separating Indian children from their families*, Seminole Trib., October 31, 2018, at 2–4.

[185] Margaret D. Jacobs, *Local View: Baby Veronica: Another side to the story*, Lincoln J. Star, July 20, 2013.

[186] Ben Shelly, *Baby Veronica's Place in History*, Wash. Post, July 7, 2013, at A19.

[187] *Id.*

[188] Bill John Baker, *It takes a tribe to keep Indian children safe*, Laurel Outlook, Jan. 7, 2016, at A4.

[189] Bob Ferguson & Fawn Sharp, *Native children benefit from knowing their heritage. Why attack a system that helps them?*, Wash. Post, March 20, 2019, at 18–20.

of ICWA. Their editorial ends with the admonition that "We should be very careful about the language we use and the laws we put forward, and ultimately . . . we should reflect on what is best for Native American children."[190]

After one of George Will's anti-ICWA op-eds appeared in *The Washington Post* in 2015, former Senator Byron L. Dorgan published a rebuttal (also in *The Washington Post*), correcting several of Will's claims.[191] Dorgan also speaks to the content of Will's op-ed—asserting that "Mr. Will cherry-picked cases . . . " In 2019, Judge Darlene Byrne, a state court judge in Texas, published an editorial in *San Antonio Express-News* describing her experience working with ICWA cases. She writes, "ICWA only creates delays or legal conflicts when the law has essentially been ignored and courts or child welfare agencies made no effort to comply until late in the process or after the child has been adopted outside the tribe."[192]

VIII. Conclusion

Patrick Wolfe writes that "settler colonialism destroys to replace."[193] In this article, we have demonstrated how anti-ICWA editorials use a settler colonial ethic in an attempt to "destroy" ICWA and "replace" Native parents with white couples. In Professor Bethany Berger's decisive article critiquing the *Adoptive Couple v. Baby Girl* decision, she emphasizes how these myriad themes culminated in a decision by the United States Supreme Court writing "the decision in fact rested on racialization and colonialism of Indian people, condemnation of poor single mothers, economic interests of private adoption facilitators, and the class divides in modern paths to parenthood."[194]

Most of the editorials in our sample used anti-Native bias to sway public opinion about ICWA.[195] There is a clear agenda and public relations campaign presented in our research of anti-ICWA columns, particularly those from the 21st century. There are many powerful organizations, legislators, and attorneys who wish to see ICWA ruled as unconstitutional

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[190] Tom Cole & Betty McCollum, *Taking care of Native children*, HILL, Nov. 25, 2015, https://thehill.com/blogs/congress-blog/civil-rights/261207-taking-care-of-native-children.

[191] Byron L. Dorgan, *Improving treatment of Native American Children*, WASH. POST, Sept. 6, 2015, at 1–2.

[192] Darlene Byrne, *Another view; Indian Child Welfare Act Worth Preserving*, SAN ANTONIO EXPRESS-NEWS, May 6, 2019, at 5–7.

[193] Patrick Wolfe, *Settler colonialism and the elimination of the native*, 8 J. GENOCIDE RES. 387, 388 (2006).

[194] Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 295 (2015).

[195] *This is Justice?*, *supra* note 93; Estrich, *supra* note 181, at 4; Bill Lawrence, *Tribal politics an inherent part of ICWA, tribal social services: American Indian children abused and killed as a result*, OJIBWE NEWS, Nov. 12, 1999, at 1–3, Saunders, *supra* note 151.

or repealed altogether. Several columns end with a concerted call for Congress to modify or rescind ICWA.[196]

While this article was being finalized, the 5th Circuit Court of Appeals released its 325-page decision in the *Brackeen* case.[197] Both parties have filed cert petitions to have the case decided at the Supreme Court. Based on our study, it is likely that the volume of newspaper editorials about ICWA will continue its upward trajectory. We can anticipate more pernicious portrayals of ICWA, more tainted descriptions of the facts, and frankly, an unrelenting racist argument that Native children need white saviors. Should the plaintiffs lose at the Supreme Court, we can anticipate new national efforts to legislatively overturn ICWA. The truth is that ICWA is in danger.

The words of colonialism may be the only ICWA story the average citizen will read about this case. These narratives should be countered by Native writers and ICWA experts who can provide the appropriate context for ICWA. This is a call for resistance, a call for action, and a call for "words"—the words of indigeneity and the words of family, connections, and belonging.

[196] Editorial, *Whose child is it?*, *supra* note 72, at B06; Editorial, *A Blow to Personal Freedom for the Indians*, *supra* note 176, at 11; Editorial, *Whose child is this?*, Wash. Post, April 16, 2013, at A16; Editorial, *Law is Unjust*, *supra* note 132, at 4.

[197] Brackeen v. Haaland, No. 18–11479, slip op at 4 (5th Cir. April 6, 2021). The Brackeen Court did not overturn ICWA as unconstitutional, but did rule that state governments do not have to provide all of the remedies within the law, such as "active efforts" to reunify the family.