



## Native Americans, Adoptions, and the Indian Child Welfare Act

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**[00:00:00] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We the People. A weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit, chartered by Congress to increase awareness and understanding of the constitution among the American people.

**[00:00:22] Jeffrey Rosen:** On November 9th the Supreme Court heard oral arguments in *Haaland v. Brackeen*. A case challenging the constitutionality of the Indian Child Welfare Act. Joining us to discuss this important case are two of America's leading scholars on the important constitutional issues that it raises.

**[00:00:40] Jeffrey Rosen:** Timothy Sandefur is Vice President for Legal Affairs at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. And holds the Duncan Chair in Constitutional Government. He submitted an amicus brief on behalf of Texas and the Brackeen family. Timothy, thank you so much for joining!

**[00:00:55] Timothy Sandefur:** Thanks for having me.

**[00:00:56] Jeffrey Rosen:** And Elizabeth Reese is an Assistant Professor of law at Stanford University. A scholar of tribal and Federal Indian Law, and a citizen of Nambé Pueblo. Elizabeth, it's an honor to have you on We the People!

**[00:01:07] Elizabeth Reese:** [foreign language 00:01:08] Thank you so much for having me.

**[00:01:10] Jeffrey Rosen:** Let's begin with the stakes of the case. Timothy, why is this case important and what are the constitutional issues that it raises?

**[00:01:17] Timothy Sandefur:** Well, it, it raises a great many constitutional issues. The reason this case is important is because this is a 45 or so year old federal law that sets a series of rules and standards that states are required to comply with in cases involving abuse, neglect, foster care or adoption for what the statute calls "Indian children" throughout the United States. That definition of Indian children is part of why this case is so controversial, 'cause it does not just apply to tribal members, but applies also to children who are eligible for membership in an Indian tribe. And so, of course one of the questions in the case is whether that crosses the line into a race-based distinction or not.

**[00:02:02] Timothy Sandefur:** But because this law restricts the ability of states to protect children how are being threatened or abused, that raises obviously very serious life and death stakes for children across the nation who qualify as Indian under the statute.

**[00:02:18] Jeffrey Rosen:** Elizabeth, how would you describe the stakes of the case and why it's important?

**[00:02:22] Elizabeth Reese:** So, this case is incredibly important for what I'd say are two reasons. First, the Indian Child Welfare act is a statute that I would describe as, you know, very crucial to Indian country and tribal sovereignty and survival. But also that's beloved by Indian country and the tribes that make that up because it has done such incredible work to combat the horrible practice of taking Native American children away from their families and placing them either in boarding schools or in non-Indian homes as a part of the federal government's legacy of encouraging the assimilation of Native people and the erasure of their governments. I've heard it described, as an anti-genocide law and I think that's really on point. That this law has done crucial work to protect Native people and tribal sovereignty over the years.

**[00:03:20] Elizabeth Reese:** But the other reason why it's so important is because some of the questions that are raised in this case actually have much broader implications for the rest of Federal Indian Law. And so, I often describe this as an attack on some of the foundational pillars of Federal Indian Law of Congress' authority in Indian affairs and tribal sovereignty itself. And so, if one of these pillars goes down it could have implications for the entire rest of the house. And there's a lot of really important things in that house that we describe as Federal Indian Law.

**[00:03:56] Jeffrey Rosen:** Well, let's explore those pillars and dive into the first big constitutional question that both of you have identified, which is whether or not the law in question is rationally related to legitimate governmental interest

and consistent with equal protection of laws. And there was vigorous discussion in oral argument about whether or not the law represents a racial classification that would trigger the highest scrutiny of equal protection or whether it's in fact a political classification that doesn't trigger that kind of Scrutiny.

**[00:04:28] Jeffrey Rosen:** Timothy, describe the arguments of the challengers who say that the law violates the Equal Protection Clause and why.

**[00:04:35] Timothy Sandefur:** Yeah, so this begins with a case called *Morton v. Mancari* which is a Supreme Court case from the 70s that said that it involved employment preferences at the Bureau of Indian Affairs for members of tribes and that was challenged as being an unconstitutional racial classification, and the Supreme Court said it wasn't. Because it said that tribal membership is a political thing. A tribe is a political entity and your citizen in a tribe is more of a political affiliation and therefore it doesn't cross the line into a, a racial classification which courts treat with a great deal of skepticism.

**[00:05:12] Timothy Sandefur:** And so, the question in the ICWA case is whether this falls within that category or if instead, it constitutes a prohibited racial classification. And the answer is that ICWA violates the Equal Protection requirement and is a race-based statute because it's triggered entirely by biological rather than political or social or cultural factors. Under ICWA a child is deemed to be Indian based on biological eligibility for tribal membership and the child also has to have a biological parent who is a tribal member.

**[00:05:48] Timothy Sandefur:** So, an example that I like to give is William Holland Thomas, who is a White man who was adopted by the Cherokee and became a chief of the Cherokee tribe in the 19th century. Under this law, he would not qualify as Indian because he lacks the biological requirements for becoming a member of the tribe.

**[00:06:07] Timothy Sandefur:** In the now classic novel, *The Round House* by Louise Erdrich, there's a character named Linda Wishkob who is a White girl who gets adopted at a very early age by a Native family and is raised as a member of the Ojibwe tribe. She would not qualify as Indian under the statute because she was legally adopted by tribal member and despite having a complete social, political, cultural affiliation with the tribe, linguistic and all these sorts of connections, none of that would factor in under ICWA. So, that is one reason why ICWA is race-based.

**[00:06:43] Timothy Sandefur:** Another kind of as one of the lawyers put it in the oral argument, "the smoking gun" here is the race-based placement

preferences that ICWA imposes. So, under ICWA a child who is deemed Indian must be adopted in accordance with certain preferences. First with members of the family, which nobody has any objection to. And then, secondly with members of the child's tribe. But then thirdly, if none of those are available, with other Indian families regardless of tribe, which means that a child who is of Inuit heritage has to be placed with a Penobscot or Seminole family rather than with a White, Black, Asian or Hispanic Family.

**[00:07:21] Timothy Sandefur:** And this is a real detriment to these children because there's such a shortage of Native adoptive or Native foster homes. For example, Los Angeles County with its population of some 10 million people, has only a single licensed Native foster mother in the entire county. So, there's a huge shortage of available homes that, that satisfy the requirements of ICWA.

**[00:07:43] Timothy Sandefur:** But, the fact that ICWA requires that children be categorized not by tribe, but as Indian versus non-Indian means that the statute is predicated on a sort of generic Indian category. And that's a racial classification, not the kind of tribal political affiliation that the Mancari case contemplated.

**[00:08:05] Jeffrey Rosen:** Elizabeth, what is the argument for why this is not in fact a racial classification, and does not trigger the highest scrutiny under the Equal Protection Clause?

**[00:08:16] Elizabeth Reese:** Yeah. So, I'm glad to hear that Mr. Sandefur agrees with the court holding of Mancari, which is that tribal members are part of a political classification and not a racial classification. I think that's absolutely key here. But there's I think sort of two like really key inaccuracies in the account that he just gave. One of them is actually the scope of Mancari's holding. So the BIA hiring preference that was being challenged under *Morton v. Mancari* had both a blood quantum requirement an Indian blood requirement that was part of that federal hiring preference. And a requirement that the person also be a member of a tribe in order to qualify for that preference. And the Supreme Court upheld that as the work that the tribal membership requirement does, is really key to understanding who is being targeted here.

**[00:09:11] Elizabeth Reese:** And I think it also acknowledged that the idea of Native people as a race, you know, that's of course a thing, of course that's a racial category, but that tribal membership is both over and under inclusive of that category. There's plenty of people who might, you know, identify racially as Indian but are not eligible for membership in any particular tribe because that

tribe has not, as a political entity, made the decision that they should be eligible for membership.

**[00:09:41] Elizabeth Reese:** And second, there are people who are enrolled members of a tribe who are not what we would call racially Indian. And I think that's sort of the second inaccuracy that I sort of wanted to flag, is that the statute defines Indian children as people who are you know, Indian tribal citizens or the biological children of tribal citizens. And tribal citizenship itself can be this broader category.

**[00:10:10] Elizabeth Reese:** I think that the example that Mr. Sandefur raised involving the Cherokee Nation is actually a great one because while that might not have been the case then in the historical example gave, right now there are plenty of members of the Cherokee Nations, full citizens of that Nation who are the descendant of Black freedmen slaves. And who don't have "Indian blood" in whatever way we're thinking of, and certainly wouldn't be racially identifiable as Indian. But they're protected by this law because they are members of the Cherokee Nation and because this law recognizes the important interest that that Nation has and preserving the next generation of its citizens.

**[00:10:49] Elizabeth Reese:** So, you know, the law has sort of two ways where folks attack it as being a racial classification instead of a political classification. One is the, you know, definition of Indian child. One thing I think that's important to understand about that is that this really just recognizes a practical necessity in drafting a law that has to do with children. And that's when people give birth [laughs], you know, they don't, you know... It's not like tribal citizens go to a hospital, give birth, and the kid just like pops out with all its paperwork done. Like no [laughs], you have to actually take the time and engage in the effort of enrolling your children in a tribe.

**[00:11:32] Elizabeth Reese:** In fact, a, a good piece of evidence about this comes from the Navajo Nation, where the enrollment numbers at that Nation actually skyrocketed by a sizable percentage during the COVID-19 pandemic because a lot of people can like kinda be behind on enrolling their kids frankly. Like no one when they're a new parent likes go through that paperwork. But when it became attached to important government provisions for services, lots of people showed up, got their paperwork done and enrolled their kids.

**[00:11:59] Elizabeth Reese:** And, you know, the ICWA definition of Indian child is written precisely to get at that reality, that, you know, just because your parents haven't filed the paperwork even though they themselves have made the

choice to be tribal citizen and to engage in that, doesn't mean that their kids should be denied that protection.

**[00:12:17] Elizabeth Reese:** And then finally, on the placement preferences it's really important to understand that if we are in this political... In this world of *Morton v. Mancari* where we are acknowledging that tribal citizens are a political classification then we are in, you know, not quite rational basis but what I call "Indian scrutiny" which is rationally related to the government's trust obligation and relationship to the Indians. And if we're in that space then the placement preferences including any other member of an Indian tribe, 'cause it's not just Indians who are at large as some racial... As a racial category. It's other families that are also themselves enrolled in Indian tribes. That's makes a lot of sense, I think that's [laughs] rational enough to me.

**[00:12:59] Elizabeth Reese:** I'm from Nambé Pueblo which is one of 19 different Pueblo Nations in New Mexico. And even though we all have separate governments it's really common for folks to marry into other Pueblos to even gain citizenship there, et cetera. We have a very intermixed culture and identity. And so, it makes perfect sense to me that if one of my children were to, you know, in some horrible circumstance end up in the system, that placing them with another Pueblo family, you know, one of the neighboring tribes, is... That speaks the same language, that's in the same geographic proximity would be a much better way of ensuring that they are able to grow up with ties to their tribal community and to their, you know, identity as citizens of our Nation, than, you know, disregarding that reality in their placement.

**[00:13:49] Jeffrey Rosen:** Tim Sandefur, your response to those important points and then tell us how the justice is split over this question of whether the law presents a racial or political classification. Justices Gorsuch and Kagan said that this involved a political classification. Justice Gorsuch said that the *Morton* case seemed to covered it. But other justices were more skeptical. And Justice Kavanaugh suggested it might be a harder case because of the third preference.

**[00:14:16] Jeffrey Rosen:** So, tell us about that debate.

**[00:14:18] Timothy Sandefur:** Let me start with talking about how ICWA treats people differently based on biological eligibility for citizenship. So, for one thing, we should probably start with some misconceptions. There's, a lot of misconceptions out there, people assume that ICWA applies on tribal lands and it doesn't. We're talking about children who live off reservation and who are citizens of the United States. You know, I think a lot of people sort of have this assumption in the backs of their minds that Indian people are kinda like foreign

people, like they're citizens of some other country. And I think that is in the back of people's minds I guess because there's reservation land and there's these separate governments and things, and so people have this habit of mind of thinking of them as foreign citizens but they're not of course. They've been citizens of the United States since the Indian Citizen Act of 1924. And that means that they're entitled to the same legal protections as citizens of all other racial and ethnic backgrounds. Protections that ICWA takes away from them.

**[00:15:15] Timothy Sandefur:** And I think we would all say it's obviously unconstitutional if Congress were to treat for example, Jewish children differently from non-Jewish children simply because their ancestry entitles them to future citizenship in Israel for example. Or who for other similar reasons are entitled to citizenship in some foreign country. Japan, for example. You wouldn't say that . . . It's constitutionally acceptable for Congress to treat children whose ancestry is Japanese differently from children whose ancestry is not, because they might be citizens of another country someday.

**[00:15:49] Timothy Sandefur:** With regard to the power of Congress the big question really centers around this funny word, plenary. Right? A lot of the debate is well Congress has plenary power with respect to legislating with respect to Indian tribes. And this question about Congress' trust obligation to the tribes to preserve the tribes as, entities, as collective entities.

**[00:16:14] Timothy Sandefur:** Now if the word plenary is a synonym is a synonym for absolute, supreme, unlimited, uncontrolled power, and it's very obvious I think that Congress does not have plenary power over anything whatsoever. We have a government of limited powers that is subject to the Constitution. And this came up during the oral argument when Deputy Solicitor General Edwin Kneedler tried valiantly to avoid answering this question and, and he's very skilled at avoiding answering the Justices' questions. And so he avoided answering what the limits are on plenary power until finally at the end Justice Barrett got him to admit that Congress' power in this respect must be limited by the Constitution including the Equal Protection Clause.

**[00:16:54] Timothy Sandefur:** And that seems obviously true. I mean, if Congress has the authority and the obligation to preserve the tribes as cultural or collective units, plan... And this power as plenary without respect to Constitutional limitations such as Equal Protection Clause, then could Congress prohibit a tribal member from surrendering tribal citizenship, or marrying outside the tribe, or leaving tribal lands, or from taking birth control, or from publishing an article in a newspaper encouraging others to leave the tribe? If Congress truly has plenary power and an obligation to preserve the tribes as

cultural units without regard to constitutional limits, then the answer to those things has to be yes. And I think it's obvious that the answer to those things is no.

**[00:17:41] Timothy Sandefur:** The, word plenary has also been used to describe Congress' power with respect to interstate commerce, or with respect to foreign commerce, or with respect to the military, or with respect to legislation for Washington D.C. and we obviously would not say that Congress therefore disregard limitations... Constitutional limitations such as the Equal Protection and Due Process Clauses, in order to, legislate in those regards. And ICWA does all those things by not only classifying people based on their biological ancestry and subjecting them to less protective rules, rules that actually make it so that states cannot protect their safety.

**[00:18:17] Timothy Sandefur:** But also violating Due Process. For example, giving tribal courts authority to adjudicate their cases in the absence of personal jurisdiction. Which it does. And of course various other parts of the argument that came up. This is a complicated case. It took four hours to argue because there are so many different constitutional flaws in question here.

**[00:18:37] Jeffrey Rosen:** Elizabeth, how did you read the Justices and their various positions about whether or not this is a racial or political classification? And if the court were to hold that it were a racial classification, would that as you suggest at the beginning, call into question much of the foundation of Native American Law?

**[00:18:55] Elizabeth Reese:** Yes. Absolutely. So, I my read of the Justices that were... That they did not seem persuaded by the, attacks on the definition of Indian child under the statute. Which, have been already discussed. That it seems, you know, clear enough that this is tribal members and folks who are eligible for tribal membership and like that's an important clause of the statue, Children have to be eligible for tribal membership and have a parent whose a tribal member, a biological parent who's a tribal member. And so, you know, again, this doesn't apply to people who have this whatsoever to a tribe or its culture. These are people who are themselves members and have made that choice to be a part of this political entity.

**[00:19:40] Elizabeth Reese:** I think similarly, you know, Mr. Sandefur just raised the idea of tribal courts and their ability to adjudicate these cases and that, that might be, you know, without personal jurisdiction because folks don't have ties to these forums, well, you know, of course they do [laughs], they have chosen to be members of these tribes. And tribal membership and what it means



to be a citizen of a tribe can operate onto various folks, not just when they're on a reservation but when they're off the reservation. You know, I send in my absentee ballot every single year to vote in tribal elections. And there's various services that also I am eligible for based on the federal government fulfilling its trust responsibility to Indian tribes because I'm a citizen of my nation. You know, I can go to Indian Health Service for example.

**[00:20:26] Elizabeth Reese:** And, that gets to I think, you know, the other question you asked about, you know, what really does it mean to remove this pillar? And I think what's so concerning to Indian country about this case is that if this case is used as a way to undermine, you know, the core holding of Mancari, which recognizes that tribal governments are just that, they're governments with citizens. And instead say, "Well you know, because all of these governments are tied to these pre-colonial governments that were, you know, that are Indian governments therefore it's just always a proxy for race". That could be used as a tool to attack and undo all of the other [laughs] things that the federal government does to support tribes and tribal sovereignty.

**[00:21:10] Elizabeth Reese:** And unfortunately, you know, some of the examples that Mr. Sandefur raised of, you know, sort of bad things that the government maybe could do in a parade of horrors under this broad plenary power of the Native people. Like, it's done a whole bunch of really [laughs] bad things already. And unfortunately justified all of that stuff under this very broad reading of plenary power.

**[00:21:34] Elizabeth Reese:** I don't think that anyone is you know, arguing precisely what he was saying which is that it's totally unchecked by the Equal Protection Clause. I think everyone agrees that the Equal Protection Clause in an application of Indian scrutiny would limit what Congress is able to do now when it's legislating with regards to tribes or tribal members.

**[00:21:53] Elizabeth Reese:** And my hope is that, you know, maybe an example like say the Federal Boarding School Program which was, you know, created during the height of assimilation to remove Indian children from their homes and "kill the Indian, save the man". To make them, you know, good citizens of the United States and erase their tribal identities and thereby the future of their tribal nations. I think unfortunately if the government were to do something, you know, that horrible today, you know, it would likewise be justified under the broad grant of Congressional plenary power that we see within the Constitution.

**[00:22:34] Elizabeth Reese:** You know, my hope though [laughs] is that if that was challenged we would look at the test of Indian scrutiny and say, "Is that rationally related to the federal government's obligation towards the Indians to, you know, support tribal sovereignty and to fulfill those treaty promises?". And we would say, "No, that's exactly the opposite. This is clearly a law intended to further eradicate them. And so, that really should not survive this unique test that we apply under the Equal Protection Clause when it involves Native Nations".

**[00:23:05] Jeffrey Rosen:** Tim Sandefur, Elizabeth Reese says that historically, traditionally, the courts applied what she calls "Indian scrutiny" to Native American Law and that's a version of rational basis scrutiny, that Congress' act has to be rationally related to legitimate governmental purpose. And she says that applying strict scrutiny and striking down all Native American Law on the basis that it's a racial rather than a political classification, would indeed call into question much of the foundation of Native American Law.

**[00:23:33] Jeffrey Rosen:** What's your response to that? And how could such a claim be reconciled with the original understanding of the Equal Protection Clause?

**[00:23:40] Timothy Sandefur:** Well, nobody really... Nobody argues for that position. Nobody is arguing that strict scrutiny should be applied across the board to all Federal Indian Law. And in fact, ICWA is really unique in Federal Indian Law in being triggered by biological eligibility and not being applied on tribal land. So a ruling that declared ICWA unconstitutional on those grounds would have no effect on the rest of Federal Indian Laws that are triggered by those sorts of things and are perfectly appropriate.

**[00:24:08] Timothy Sandefur:** I think it's... One thing I think is really interesting about this case if you listen to the oral argument, is that it's the Brackeen side of the family, it's the plaintiff's side of the case that is arguing for limited power under the Indian Commerce Clause and saying Congress does not have this unlimited plenary authority. And it's their position that the law under which the Indian boarding school situation occurred, was unconstitutional.

**[00:24:34] Timothy Sandefur:** On the other hand, Deputy Solicitor General Kneeder was asked about the same question and he said that his position, the federal government's position, is that the law is... Creating the Indian boarding school situation is constitutional because that falls within this unlimited, plenary power authority. So, it's kind of an odd thing to hear the argument that what we need is this unlimited, plenary power authority because otherwise we run the

risk of a situation like the boarding schools when in fact the roles are actually the opposite of that.

**[00:25:04] Timothy Sandefur:** And I do have to take issue with one claim that Professor Reese made when she said that ICWA does not apply to people who lack cultural connections to a tribe, that's just not true. It's just flat out not true. I mean, take the Lexi Case in 2016, which involved a six-year-old California girl whose last full-blooded Indian ancestor was her great-great-great-great-great-grandparent. Did not speak a tribal language, did not practice Native religion, had no cultural connection to the tribe, had never visited tribal lands. She qualifies as Indian under ICWA solely because of her biological ancestry.

**[00:25:37] Timothy Sandefur:** Or a child like CJ Junior, you know... Professor Reese said that I was parading out... Parade... A "parade of horrors". I'm talking about actual cases that we and others have litigated up to the highest courts of the state. In the CJ Junior case six-year-old Ohio child, born in Ohio, lived his entire life with an Ohio foster family. A tribal court in Phoenix issued an order commanding that he be taken from his foster family and sent to live with strangers on a reservation near Phoenix when he had never even visited Arizona.

**[00:26:07] Timothy Sandefur:** I'm glad to say that we fought back and the Ohio Court of Appeals declared that unconstitutional for lack of personal jurisdiction. But there's cases like the J.P. and S.P. case in Alaska where the child wasn't even a tribal member of the tribe, he was a member of a different tribe that did not have a court of its own. So that tribe asked a different tribe to adjudicate his case. And it said okay, it decided his case and ordered him sent to New Mexico and hasn't been heard from since.

**[00:26:34] Timothy Sandefur:** In case, after case, after case, children are deemed Indian under ICWA and subjected to these less protective rules. Rules that deprive them of legal protections against abuse and harm, based on their biological ancestry. Sometime frequently unfortunately, resulting in the preventable murder of Indian children. The Declan Stewart case, the Laurynn Whiteshield case, the Anthony Renova case. These are cases where children were known to be in dangerous households and the state wanted to protect them, and was prevented from doing so because ICWA imposes these special rules such as the active efforts rule. That forces states to return abused Indian children to abusive homes... Which often results in their death. Something that would not happen if the child were white, or any other race.

**[00:27:24] Timothy Sandefur:** So, ICWA takes away from a distinct class of children legal protections necessary for the security, and it does so exclusive based on their race. In fact, BIA regulations and state court decisions prohibit courts from considering whether the child has a cultural, political or social connection with a tribe when deciding whether to apply ICWA. Only biology counts. And for that reason it crosses the line and does not fall within the Mancari rule. It crosses the line and becomes a racial discrimination.

**[00:27:53] Jeffrey Rosen:** Elizabeth Reese, your response to those points including the raising of the Indian Commerce Clause argument? You have said in commentary about this case that if the court strikes down the law under Article One of the Constitution, which gives Congress ultimate governing authority, and finds that Congress overstepped the broad authority granted to it by the Indian Commerce Clause, it would open up the door for every federal law concerning Native people and nations to be challenged.

**[00:28:20] Elizabeth Reese:** So first my response, I think... I, really wanna point out that I, you know, have not suggested that cultural ties or a certain blood quantum is what should be required in order to trigger the application of ICWA. That, you know, what I'm saying, what the law says, is that this is about tribal membership which is a political designation and a political choice. And that, you know, examples like the child, like Lexi, who is, you know, as Mr. Sandefur raised like, you know, a small amount of blood. He said like just her, you know, "her last full-blooded ancestor". That's not the point. The point is that her sovereign nation decided that she is a citizen, and or eligible to be a citizen. And that her biological father made a choice to maintain his ties as a citizenship with a nation.

**[00:29:11] Elizabeth Reese:** I think if, you know, we are in a harder space if instead we are playing these games around like blood quantum and race and stuff like that, but that is not what's at issue in his case. You know, and again, that was already sort of you know... Parts involving were affirmed in Mancari. And so, you know, I think that, you know, arguments like that just sort of like undercut the again, acknowledgement that this is about political identity and what it means to be a citizen, not... And that's not something that's about skin color, and it's not something that is about your cultural ties always. It is about a political identity and if you were going to vote, if you are going to be apart of that tribe.

**[00:29:50] Elizabeth Reese:** I also think that, you know, I wanna point out a lot of these you know, critiques about the Indian Child Welfare Act, and specifically how it operates and whether it not makes sense, I think the Justices

also were really quick to point out that these aren't criticisms that have to do with whether or not his law is constitutional. These are about whether or not it's good policy. And that is sort of better directed to the U.S. Congress. You know, I would hope to, you know, for example, you know, on the scope of whether or not this definition should apply to the non-biological, the, you know...

**[00:30:24] Elizabeth Reese:** Adopted children of tribal members, I think tribes would love if that was expanded to that and if Mr. Sandefur wants to join, you know, tribal advocates in advocating for that expansion of ICWA to be more fair to tribal adopted children, I think that, you know, that would be welcome. But I think it's unfair to say that ICWA is not a protective statute. It has done, you know, incredible work to making sure that removing a child from their parents from their family, their tribal community, is really something that is only a last resort. And if it's at all possible to avoid that, then that is the best thing to do.

**[00:31:04] Elizabeth Reese:** I think it's really telling that all of the medical experts, all of the child psychology experts, all of the child welfare experts that have submitted amicus briefs in this case are all on one side and that's the side of this law. And the idea that this law is really the gold standard when it comes to treating a child like a whole person including this key identity that they have as a tribal citizen. And protecting that.

**[00:31:31] Elizabeth Reese:** The other reason why I think folks think of it as such a gold standard is precisely because of the active efforts provision that Mr. Sandefur raised. The active efforts provision often makes sure, you know, first that they the folks that were involved in placing an Indian child, take every, you know, effort to avoid taking a child away from their family if at all possible and terminating that parental right. To notify the tribe so that they can also, you know, be involved in the case if that's appropriate. But also, frankly a lot of times when kids are taken away, it's because of either, you know, really dire socioeconomic situations that are lingering in the background or, you know, something like drug addiction that might be playing a really tragic role in the life of this family.

**[00:32:19] Elizabeth Reese:** And a lot of times what that family, what that parent might need is help, instead of just taking their kid away. And the active efforts provision is precisely that. It's asking that social service agencies really try to go above and beyond to keeping children with their families before making that determination. And it's really important because, you know, I think as we saw in the era leading up to ICWA it was a very lax standard [laughs] for the termination of rights particularly of Native parents, that led to somewhere

between 25% and 35% of all Native children being taken away from their homes. And I think that's just a, you know, it's a horrifying statistic that we should still be haunted by. And that, you know, I think is really a good cause of a law like this that does this extra work protecting.

**[00:33:12] Jeffrey Rosen:** Tim Sandefur, let's squarely put on the table the Indian Commerce Clause argument, in a colloquy with Justice Barrett, Mr. McGill said, "The Article One piece, this can't be understood as within the courts' Indian Commerce Clause. Precedence and the respondents argue that nothing in Article One, including the Indian Commerce Clause, provides authority for Congress to assert authority over non-commercial areas traditionally reserved to the states like child placement proceedings. To hold otherwise they argue would be to create virtually limitless authority as long as a Native American is involved".

**[00:33:45] Jeffrey Rosen:** Tell us more about the scope of the Indian Commerce Clause arguments and how the court-

**[00:33:49] Timothy Sandefur:** Well, it, it might be best to start with a case called *United States v. Morrison* which is about 20 years old now. And in that case Congress had passed a law called the Violence Against Women Act that imposed federal penalties for violent crimes against women. And, where does it get the constitutional authority to do that? That's of course not... There's nothing in the Constitution that refers to such a subject. And Congress answered, "Well, it's a commerce clause thing. You know, the interstate commerce is affected by violence against women". Of course the problem with that argument is that interstate commerce is affected in some way or another by absolutely everything in the world. And so, you can't use that path without giving Congress just unlimited authority to do whatever it wasn't to. And so, the Supreme Court struck down the Violence Against Women Act in *Morrison*.

**[00:34:36] Timothy Sandefur:** And so the argument here is something very similar. Questions about adoption and foster care and child safety are matters of state law and traditionally have been. And there's nothing in the Constitution that gives Congress that power. And so, Congress points to the Indian Commerce Clause. Now there are some who have argued, some law professors who have argued that the Indian commerce power is different from the interstate commerce power, that it's broader. And they've sort of cobbled together this argument that sort of relies on a variety of different constitutional provisions, the war power, the treaty power, and things like this, in order to try and argue that Congress can do more things under its Indian commerce power than it can do under the interstate commerce power.

**[00:35:16] Timothy Sandefur:** That, really doesn't work very well for a number of reasons. One is that the, Commerce Clause is only one sentence long. It's not even an entire sentence. It's just a... It's a single clause. It uses the word "commerce" only one time. It says, "Commerce with foreign nations and among the several states and with the Indian tribes". So it's using the same commerce word for all those things. And commerce does not ordinarily include things like adoption and child safety matters. And as you said, that came up in the oral argument and the attorney for the state of Texas was correct when he just directly flat out said, "Adoption is not commerce", and it's not.

**[00:35:52] Timothy Sandefur:** And so the effort to try and read this really expansive interpretation of the Indian commerce power is what the defense side has to fall back on. And the problem... There's a number of problems with that. One is that even if ICWA were a treaty it would still be unconstitutional. Because even the treaty power has to comply with constitutional limits including the due process clause.

**[00:36:16] Timothy Sandefur:** There's a case called Reid v. Covert in which the Supreme Court said that even under a treaty Congress cannot force American citizens into a legal system that takes away their due process rights. In that case it was the spouses of service members serving overseas who were charged with crimes, and were put on trial in a military tribunal that lacked due process protections. And court said that's unconstitutional even under the treaty power. Well, ICWA does the same thing. Forces both children and adults out of state court and into tribal courts where the Bill of rights is not binding.

**[00:36:49] Timothy Sandefur:** So, even if ICWA were something like that, at the highest level of federal policy it still violates the Constitution. And this is important again, because what we're talking about is a statute that deprives children of crucial legal protections not just in court but in the system itself.

**[00:37:06] Timothy Sandefur:** So, for instance, Professor Reese mentioned active efforts. Now what active efforts says, here's what it actually says, "When a child is being taken away from an abusive family situation and put into foster care, the state is required to apply what's called 'reasonable efforts' to restore the family unit. To help the parents regain custody". And that's the law in every state and this is the law, federal law under the Adoption and Safe Families Act.

**[00:37:30] Timothy Sandefur:** But reasonable efforts, that means the things like making services available to help them, you know, if maybe they need alcohol treatment programs or anger management programs, whatever. That's already required. Well, that's not required in cases of aggravated circumstances

such as sexual molestation or other situations where it's obvious that sending the child back to the household will be really dangerous for the child. So there's an exception for aggravated circumstances.

**[00:37:55] Timothy Sandefur:** The rule is different for Indian children. For Indian children, it's active efforts rather than reasonable efforts. And active efforts means we don't... Exactly know what it means 'cause the statute doesn't say. But it means something more than reasonable. In fact, 10 years ago the Supreme Court said that it requires you to stimulate the birth parents' desire to be a parent". Whatever that means. And it's not excused by aggravated circumstances. And that's why as I said earlier, states are required by active efforts requirement not just to help a family but to actually send children back to homes known to be abusive, such as in the Josiah Gishie case here in Phoenix where the state knew that Josiah was at risk. But it was forced to send him back to his neglectful mother who left him alone in the apartment one day, and when she came home he was dead. Case after case like that because ICWA deprives these children of protections.

**[00:38:49] Timothy Sandefur:** I don't wanna stop before I emphasize an important distinction. I mentioned that ICWA doesn't apply on reservation land and people have this misconception. Another misconception people have is they mix up the concept of Indian child and tribal member. Those are two very different ideas. Tribal membership is a function of tribal law. And tribes have the authority to set those rules however they want. Indian child status under ICWA is a different thing. That's a function of federal law and therefore has to comply with the Constitution.

**[00:39:18] Timothy Sandefur:** And you could not pass a law that said, for example, you know, let's say there was a social club or an organization or something that you had to be a member of a certain race to join. That's perfectly constitutional. People want... If private, citizens wanna discriminate that way that's... they have the authority to do that. But Congress comes along and passes a law that says you have to be a member of that club in order to qualify for this benefit or whatever. That would be unconstitutional 'cause that would transform that private discrimination into public discrimination.

**[00:39:48] Timothy Sandefur:** Well, in this situation tribes can set whatever criteria they want, and that's, that's tribal membership. But Indian child status is different. When that comes in then constitutional limitations including the prohibition on race-based laws comes into effect.



**[00:40:02] Jeffrey Rosen:** Professor Reese, tell us about your view of the Indian Commerce Clause argument. In a brief in support of the federal party's your Stanford colleague, Professor Gregory Ablavsky, argues that the Indian Commerce Clause was only one among interrelated powers in the new federal government. But as James Madison observed to explicitly shed the qualifying language preserving state authority from the Articles of Confederation and relied on this new clause commerce plaintiffs themselves acknowledge was universally defined as intercourse.

**[00:40:33] Jeffrey Rosen:** Some of the parties in this case argue that the Interstate Commerce Clause and the Indian Commerce Clause should be viewed the same and read extremely narrowly. And I think you disagree. Tell us why.

**[00:40:46] Elizabeth Reese:** Yeah. Absolutely. So you know, as you mentioned my colleague here at Stanford Law School, Gregory Ablavsky, is really just the foremost expert in founding era history as it has to do with Indian Affairs. I am not a historian. I do not spend, spend my life squirreled away reading founding era documents, but Greg does. And Greg has done just incredible, unparalleled work in this space to really unpack what this founding era understanding is. You know, if we are in this sort of originalist vein, sort of looking, looking to that as guidance.

**[00:41:21] Elizabeth Reese:** And based on his research I think it's... and, you know, that I have, you know, read, especially [laughs] closely as his colleague, I think it's very clear that you know, this distinction between the Articles of Confederation that you raised is really important. That the Articles of Confederation gave broader authority to states, to engage in the process of making laws regarding Indian affairs, and sort of preserving their own interest in this area. And that it was a disaster.

**[00:41:50] Elizabeth Reese:** That you know, if you keep in mind, you know, during this era, the United States is at still, you know, a war with a lot of Indian tribes, it's still entering into a lot of negotiations. And that when you had states which were empowered to do things on their own. What you had was chaos. You had a bunch of different government institutions trying to make different deals, different, you know, implement different policies. And so, it was really important that as a matter of just national security [laughs] in public, you know, and, and uniformity, that the federal government be able to speak with one voice and clearly when it comes to Indian affairs.

**[00:42:25] Elizabeth Reese:** And that's why there's this change that's made. And there's a lot of contemporary historical evidence suggesting that this is

what the, the founders were thinking when they put the language around Indian commerce into the Constitution. And I think that that word commerce, you know, like read in the context in which it's also brought up concerning Indian affairs is more like intercourse. You know, intercourse with the Indians because of course it's not just deals involving commerce, there's a lot of also treaties and deals that involve sort of how to handle everything [laughs]. That will come up when two peoples are fighting over territory and also just fighting violently.

**[00:43:03] Elizabeth Reese:** You know, I think an example that Professor Ablavsky has detailed that are sort of more specifically on point was that it was really important to make rules regarding captives. And particularly lots of Indian children [laughs] who were captives and who were seen as part of the key stuff that needed to be sort of negotiated on, and sort of Congress needed to make laws sort of governing what these sort of fair rules would be.

**[00:43:25] Elizabeth Reese:** There is also this I think important idea that it's not just the Indian Commerce Clause that does this work. Mr. Sandefur said, you know, "Some folks cobbled together that there's this idea of other clauses that are doing works". Well, like the "some folks" is the Supreme Court [laughs]. You know, the Supreme Court has set precedent for over 100 years now [laughs] that it's not just the Indian Commerce Clause that supports Congress' plenary authority over Indian affairs. It's also a lot of other powers that Congress have that sort of have to do with a lot of the other things that it's required when it comes to making deals with the Indians. That territory, that's property, that's of course treaties. And that together those sort of add up to this authority.

**[00:44:11] Elizabeth Reese:** And that's been the law of the land for a really long time. I think one of the sort of frustratingly... To me at least, sort of cruel ironies about this case is that, you know, the federal government, you know, like we've said, has justified... Has used this broad authority to justify doing a lot of things. And it's sort like, only now [laughs] that you know, since the 1970s that the federal government has really reversed course and decided to actual promote tribal self determination and tribal sovereignty like that we're seeing these challenges to whether or not this authority is constitutional.

**[00:44:47] Elizabeth Reese:** And I think that that's like really telling. And it's also, you know, I think similar to a lot of the challenges to Affirmative Action that we're seeing right now that are coming from, you know, a position of sort of trying to attack these uses of, you know, I don't think this is a racial classification, but of race like classifications in order to sort of alleviate the

harms of past discrimination, or add protections against further discrimination for underrepresented minorities in this country. And not those times earlier.

**[00:45:18] Elizabeth Reese:** And I think that's, you know... that can be very frustrating. You know, I wish I had a time machine and I could go back in time and you know, give tribes far more power and sovereignty that is, you know, further respected by the Supreme Court. And, you know, put in whatever clauses of the U.S. Constitution that I think would be best support of tribal sovereignty and limiting Congress' power. But I, you know, I don't have that authority, I am bound by the same precedent as everyone else is.

**[00:45:45] Elizabeth Reese:** And this is also just sort of [laughs] revealing with how much is really at stake. That, you know, we have built an entire house of tribal sovereignty and federal law around these like foundational ideas, right? That Congress has a unique obligation and authority in Indian affairs. And that also Native Nations are Nations [laughs], with whose membership is a political classification. And to revisit that now would be just so disruptive and so harmful to everything that's been built.

**[00:46:16] Jeffrey Rosen:** I think we have time to put just one last constitutional argument on the table. And that's the anti-commandeering argument of the 10th Amendment. Justice Barrett and other justices raised questions about whether provisions of the law violate the 10th Amendment. Justice Barrett was skeptical that the provisions requiring states to maintain records about the placement of Native American children commandeers the state, she was more concerned about the requirement that states have to make active efforts to avoid breakup of Native American families. And other Justices took different positions.

**[00:46:47] Jeffrey Rosen:** Time Sandefur, tell us about whether or not you feel that ICWA violates the 10th Amendment's anti-commandeering doctrine and why.

**[00:46:55] Timothy Sandefur:** It does. And this is I think a really interesting part of this case for those of us who are really fascinated by constitutional law. Remember that the anti-commandeering rule say that Congress . . . that states are required to obey federal law but Congress can force them to implement federal law. Even when using the commerce clause. So, even if we accept that ICWA is an otherwise valid use of the Indian Commerce Clause, nevertheless the anti-commandeering rule would still apply.

**[00:47:24] Timothy Sandefur:** And so, ICWA does force states to enforce federal law. In fact, ICWA is unique in being, I believe, the only federal law on the books that is exclusively enforced by state officials. It's not enforced by... You don't see the FBI out there enforcing ICWA. It's, almost always enforced by state officials because they're required to.

**[00:47:44] Timothy Sandefur:** And they're required to in to different ways. One is the executive branches of the state are required to... Of the states, are required to enforce ICWA through things like the active efforts provision are required to engage in active efforts in... Which is to say they're required to return abused Indian children to abusive homes. And to provide the various services that, whatever those might be, that satisfy the active efforts requirements. That, pretty obviously violates the anti-commandeering rule that... As it was enunciated in cases like *Printz v. United States*.

**[00:48:16] Timothy Sandefur:** The second way is a little bit more obscure and more fascinating and that is that commander state judiciaries as well. Now no case has ever addressed whether and how the state judiciaries can be commandeered by Congress. And it was mentioned very briefly in the *Printz* case, but the reason why was because it's unique. The end of the Constitution there's a provision that says, "That state judges are bound by oath to enforce federal statutes". So, it seems self contradictory to say that it's even possible to commandeer a state court judge through, through a federal statute, right? It would seem to be nonsensical.

**[00:48:52] Timothy Sandefur:** But the reason for it, the reason why ICWA does violate the rule is because ICWA doesn't force state judges to enforce federal substantive law, it requires state court judges to enforce federal procedural and evidentiary rules when applying their one state laws.

**[00:49:10] Timothy Sandefur:** So, for example, if the child is White or any other race and he's being abused, and the state decides to terminate the parental rights of the abusive parent, it does so under the clear and convincing evidence standard. That's the standard that the Supreme Court itself required in a case called *Santosky v. Kramer* in the 1970s. That's the nationwide standard. And the court said in that case it has... You have to make it... You can't make a preponderance of the evidence 'cause then it'd be too easy to take kids away from their parents. And you can't make it beyond a reasonable doubt because that would make it too hard, and that would make it so that states couldn't protect kids.

**[00:49:43] Timothy Sandefur:** Well, ICWA imposes that very beyond a reasonable doubt standard. And on top of that it requires expert witness testimony. And that's a higher standard than even applies in criminal law where expert witness testimony is not required. And that makes it very difficult, extremely difficult to terminate the rights of an abusive parent, even if the person wanting to terminate those rights is herself Native, which very often happens.

**[00:50:05] Timothy Sandefur:** We did a case called S.S, in which a Native father wanted to terminate the rights of his abusive ex who was not a Native. But ICWA nevertheless applied because the children are Indian children, and that prohibited him from terminating the rights of his abusive ex-wife. So ICWA very often... in that situation, that's an example of how it actually violates the rights of Native parents themselves to protect their own children. But ICWA imposes this reasonable doubt standard on state courts when state courts are enforcing their own state laws about abuse or about termination of parental rights and that sort of thing.

**[00:50:42] Timothy Sandefur:** So that's why it commandeers state court judges as well. Like I said, this is an issue that the Supreme Court has never addressed. It's, brand new and ... Frankly I'd be kinda surprised if the court gets that far because there's so many other questions to turn on in this case. It's, such a complicated case. But it is a very interesting issue coming... Going forward.

**[00:51:04] Jeffrey Rosen:** Elizabeth Reese, last word in this wonderful discussion is to you. Tell us about the anti-commandeering argument and why you believe that ICWA does not violate the 10th Amendment.

**[00:51:18] Elizabeth Reese:** So, I think this is a really tricky issue because it gets at both, you know, I think, at the... As you already sort of... The difference between substantive and procedural law buy, you know, I think we recognize that federal law can be both substantive, you know, as this is. It's a federal law passed by Congress can be either both substantive and procedural. And that there's, you know, procedures that we would use to figure out which one gets applied where. For those of you who've gone to law school I think there are parts of your Brian that are ringing eerie as it absolutely should. And so, I think those are actually, you know, fairly straightforward and easy, you know, acknowledgements that this is a thing that the federal government can do. It can pass procedural laws.

**[00:51:52] Elizabeth Reese:** But the other thing that I think is tricky about this is that it gets at, you know, how unique ICWA is as a statute. You know, I... As

I've alluded to, you know, this really is... Does get at some of the pillars of Federal Indian Law and ICWA is actually not that you... Unique of a statute when it comes to things like the definition of Indian child and the idea that tribal membership should trigger the application of a statute. There are other places within federal law that would sort of immediately be called into question. Including, you know, criminal jurisdiction in Indian country, the definition of that not only uses ties with a tribe but also presumably this idea of Indian blood. You know, that would of course be called into question if the tribes lost this case.

**[00:52:36] Elizabeth Reese:** Similarly you know, the very hiring preference that was upheld in *Morton v. Mancar*, which involved Indian blood in addition to tribal membership. And so, I think if this core, you know, tribal membership statute goes down as a racial classification it'll drag everything with it.

**[00:52:51] Elizabeth Reese:** But the ways in which ICWA is unique is you know, as Mr. Sandefur said, is that it applies within the state system and within state courts. What that means tough is that, you know, one way to look at this and a huge portion of the statute is that it's just preemption, right? You know, we [laughs]... We don't say that state courts are being commandeered when they are a... Forced to comply with federal law under the supremacy clause. Like that's a very easy case that they have just been you know, preempted in the application of state law and instead have to follow federal law. And I think that's the easiest way to describe the majority of ICWA and what's going on here.

**[00:53:31] Elizabeth Reese:** The stuff that's trickier is, you know, things like the active efforts provision and whether or not that is, you know, going beyond in what it's requiring of state officials. I think that's the sort of core of the commandeering question. I think that, you know, it's, you know... On one side of the precedent that, you know, I know Mr. Sandefur thinks the others of *Printz* and sort of what the core idea of commandeering versus just complying with the law under preemption looks like.

**[00:53:54] Elizabeth Reese:** But, you know, since... Also, this active efforts has been raised several times you know, I think, you know, it's important that the federal government has also issues, you know, the Bureau of Indian Affairs has issued guidelines that are, you know. . . Regulations and guidelines that actually explain [laughs] this statute. And, what's really required. And, you know, I think a lot... You know, again, a lot of this, this is a policy [laughs] issue, this is not the core of whether or not this law is constitutional.

**[00:54:22] Elizabeth Reese:** But that, you know, the active efforts... I'm sorry, I'm reading from the guidelines [laughs] from 2016. It's that "ICWA requires the use of active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." Though it doesn't define active efforts. It reflects Congress' recognition of a particular history of treatment of Indian children and families. And sort of, acknowledges also that this idea of taking these active efforts to really protect the core of the family, like that is the gold standard. You know, the phrase "gold standard" [laughs] is in this regulation.

**[00:54:58] Elizabeth Reese:** And I think that even, you know... Even if this part of the law were to be struck down, you know, specifically these active effort provision under the anti-commandeering arguments, you know... Or even if the whole law was struck down, what you would see is a bunch of states passing their own ICWAs because it has been, you know, acknowledged that this is, you know, a law that does an incredible amount of good and it is the gold standard when it comes to protecting Indian Children.

**[00:55:26] Elizabeth Reese:** You know, I think if... You know, a lot of this rhetoric about, you know, the folks here who are being wronged are the Native children [laughs], you know, like I think that what's really telling is that if that were the case then all of these kids would... Who have been adopted out of which, you know, we know there are many 'cause we think, think of it as like a lost generation of children who were taken. You know, they would be sort of lining up to say, you know, "Oh, I'm so glad" [laughs], you know, "That I was taken away from my family and community, and raised with this other family". But that's not what they're saying.

**[00:55:58] Elizabeth Reese:** And what you see from the amicus brief submitted by Indian adoptees is that that it absolutely is a taking from them that they will never get back once they are removed from their community, removed from their tribe removed from their family. And that laws like ICWA are what keeps that from being an irreparable damage that you can do to a child.

**[00:56:21] Jeffrey Rosen:** Thank you so much, Timothy Sandefur and Elizabeth Hidalgo Reese, for a thoughtful, civil and extremely illuminating discussion of the Brackeen case. It has important implications and you've helped us understand them in all of their dimensions. Tim Sandefur, Elizabeth Reese, thank you so much for joining.

**[00:56:43] Timothy Sandefur:** Thank you.

[00:56:46] **Elizabeth Reese:** [foreign language 00:58:47]

[00:56:49] **Jeffrey Rosen:** Today's show was produced by Melanie Rao and engineered by Greg Sheckler. Research was provided by Sophia Gardell, Kel Sangdomo, Leah Kerr, Emily Campbell, Sanda Sy, and Lana Ulrick.

[00:56:59] **Jeffrey Rosen:** Please rate, review and subscribe to We the People on Apple and recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose on constitutional illumination and civil debate. And always remember the National Constitution Center is a private nonprofit, we rely on the generosity, the passion and the engagement of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate. Support the mission by becoming a member or give a donation of any amount at [constitutioncenter.org](http://constitutioncenter.org).

[00:57:26] **Jeffrey Rosen:** Dear We the People friends it's the Thanksgiving season and all of us at the NCC are so grateful to you for your engagement with our wonderful mission of lifelong education about the Constitution. Thank you for being part of it and Happy Thanksgiving. On behalf of the Constitution Center, I'm Jeffrey Rosen.