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Why Try to Change Me Now? The Basis for the 2016 Indian Child Welfare Act

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Comment*

Why Try to Change Me Now?: The Basis for the 2016 Indian Child Welfare Act Regulations

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I. INTRODUCTION

I'll start with my oldest boy, John. I had a babysitter watching him and I went to get him and they wouldn't give him back to me. So, I went to my social

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worker and I asked him if he would come with me up there. . . . That was in December 1970, and I asked him . . . to meet me at the store. He didn't come. . . . I don't know if they had a court hearing or something. I didn't get any papers or nothing. . . . I didn't know anything about it, and when I did go, they had to appoint me a lawyer. . . . I went to see him and he didn't try to help me or anything. . . . He didn't do anything because I didn't know anything that happened until July of 1971. . . . They had John all that time in a foster home. . . . I didn't know where he was. I kept asking, but they wouldn't tell me where he was or anything. . . . The man said that I wasn't a very good mother and everything, and that my children were better off being in a white home where they were adopted out, or in this home, wherever they were. They could buy all this stuff that I couldn't give them, and give them all the love that I couldn't give them.¹

The tragedy of the systematic atrocities committed against Native Americans is a long, tragic, and bloody tale. Dating back to colonial times, the United States has long predicated its sovereignty on the subjugation of Native Americans.² After the conclusion of the Indian Wars in 1886, the pre-Columbian Indian population had been reduced by ninety-eight percent.³ By 1887, Native lands had been reduced to 138 million acres, which were further diminished to a mere forty-eight million acres by 1934.⁴ And in the 1970s, twenty-five to thirty-five percent of Indian children were unwarrantedly removed from their families and placed in the welfare system.⁵ The statement above by Cheryl DeCoteau is only one of many similar stories told before Congress when it considered the Indian-child-welfare crisis.⁶ Though the Indian Child Welfare Act (ICWA or the Act) sought to address the systemic issues that created such high rates of Indian child displacement, because of the inaction of the Bureau of Indian Affairs (BIA), these problems remain.⁷ Moreover, as a result of the BIA's delayed decision to promulgate binding regulations, its authority to do so may have lapsed, allowing the nationwide displacement of Indian children to continue.⁸

Section II.A of this Comment describes the intent and the passage of ICWA. Section II.B explains the BIA's decision to publish nonbinding guidelines in 1979 and the effect of that decision, which resulted in the inconsistent application of ICWA throughout the states. Section

1. *Indian Child Welfare Program: Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior & Insular Affairs*, 93d Cong. 65-66 (1974) [hereinafter 1974 ICWA Hearing] (statement of Cheryl DeCoteau).

2. See generally *Johnson v. M'Intosh*, 21 U.S. 543 (1823); see also William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 9 (2005) (arguing that Native Americans were viewed by Western invaders as inherently inferior).

3. Bradford, *supra* note 2, at 12.

4. *Id.* at 24-26.

5. H.R. REP. NO. 95-1386, at 9 (1978).

6. See 1974 ICWA Hearing, *supra* note 1.

7. See *infra* Part II.

8. See *infra* Part III.

II.C details the BIA's change from its 1979 position to its decision to issue binding regulations in June 2016. Part III of this Comment explores the challenges to the BIA's authority to promulgate regulations. Section III.A considers the constitutionality of the 2016 regulations and of ICWA itself. Section III.B examines whether the BIA should be given *Chevron* deference in interpreting ICWA. Section III.C illustrates how the Supreme Court interpretation of ICWA in *Mississippi Band of Choctaw Indians v. Holyfield* is supportive of BIA authority. Section III.D outlines the considerable hurdle of the untimeliness of the BIA's regulations. Finally, Section III.E contemplates other consequences of late action by the BIA.

II. BACKGROUND

A. Passage and Intent of the Indian Child Welfare Act

The Indian Child Welfare Act was passed by Congress in 1978 to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”⁹ The Act was passed as a response to systemic failures that resulted in Indian children being displaced from their families and communities at “significantly higher rates than non-Indian children.”¹⁰ As many as one-third of Indian children were removed from their homes and placed in the care of non-Indians prior to ICWA's passage.¹¹ Finding that “[t]he Indian child welfare crisis will continue until the standards for defining mistreatment are revised,”¹² Congress enacted ICWA to establish “minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.”¹³

The Congressional investigation lasted four years and yielded over two thousand pages of legislative testimony at hearings before the Senate and the House and their various committees.¹⁴ Congress concluded that “the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.”¹⁵ Four main factors

9. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 3, 92 Stat. 3069, 3069 (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)).

10. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,780 (June 14, 2016) [hereinafter ICWA Proceedings] (to be codified at 25 C.F.R. pt. 23).

11. Lorie M. Graham, “*The Past Never Vanishes*”: A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 2 (1998).

12. H.R. REP. NO. 95-1386, at 10 (1978).

13. Indian Child Welfare Act § 3.

14. ICWA Proceedings, *supra* note 10, at 38,780. See generally *Legislative History of the Indian Child Welfare Act of 1978*, NAT'L INDIAN L. LIBR., <http://www.narf.org/nill/documents/icwa/federal/lh.html> [https://perma.unl.edu/6A5B-LRCE].

15. H.R. REP. NO. 95-1386, at 9.

contributed to such a high rate of Indian-child removal: “a lack of culturally competent State child welfare standards for assessing the fitness of Indian families; systematic due-process violations against both Indian children and their parents during child-custody procedures; economic incentives favoring removal of Indian children from their families and communities; and social conditions in Indian country.”¹⁶ Moreover, Congress found that state actions were the cause of many of the problems surrounding the high rate of Indian-child removal.¹⁷ It was the “failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future” that ultimately created the Indian-child-welfare crisis that led to ICWA.¹⁸

To address the problem, the House Report noted:

While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.¹⁹

The resulting legislation was an attempt to push back against the Indian-child-welfare crisis by placing procedural and substantive requirements on state courts and parties to Indian-child-welfare cases before the removal of an Indian child or the termination of the parental rights of an Indian child.²⁰ Instead of continuing to rely on traditional state determinations of Indian-child-welfare cases, “ICWA emphasizes the tribe’s competency to make adoption decisions with respect to tribal children.”²¹ By placing these requirements on state courts, Congress intended to curtail the unjust application of state authority to systematically remove Indian children from their families and communities, which had been compared to another form of geno-

16. ICWA Proceedings, *supra* note 10, at 38,780; *see also* H.R. REP. NO. 95-1386, at 10–12 (explaining the failures that led to the high rate of Indian-child removal).

17. *See* Indian Child Welfare Act § 2(5) (“[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”).

18. H.R. REP. NO. 95-1386, at 19.

19. *Id.*

20. B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 395–96 (1997).

21. Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the “Existing Indian Family” Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 357 (2008).

cide committed against Native tribes.²² It was this very genocide ICWA was designed to prevent.

B. 1979 Guidelines and Their Effects

1. *The Bureau of Indian Affairs's Position Against Binding Regulations*

As part of ICWA, Congress included a mandate to the Secretary of the Interior (the Secretary): “Within one hundred and eighty days after the enactment of this Act, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act.”²³ This provision was read by the Bureau of Indian Affairs as only granting it authority to promulgate regulations where ICWA “expressly delegate[s] to the Secretary of the Interior responsibility for interpreting statutory language.”²⁴ As a result, the BIA only promulgated regulations in these specific areas and left other matters of statutory interpretation up to the states and their courts, releasing only nonbinding guidelines to aid in their interpretation.²⁵

According to the BIA, Congress had not intended the grant of rulemaking authority to allow the BIA to promulgate regulations where the Secretary was not clearly implicated.²⁶ Instead, it took the position that state and tribal courts were “fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.”²⁷ Moreover, the BIA believed that exerting any more regulatory authority with respect to ICWA than it had would be a violation of principles of federalism and contrary to Congressional intent.²⁸ The BIA instead followed the

22. *Id.* at 360; see *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior & Insular Affairs*, 93d Cong. 2 (1974) (statement of Sen. James Abourezk); *id.* at 145–48 (statement of Leon F. Cook, Department of Indian Work, Minneapolis, Minnesota); *id.* at 171 (statement of Michael Chosa, Administrative Assistant to the American Indian Child Placement and Development Program, Inc.); *id.* at 377 (statement of Ed Howes, Duluth Youth Worker).

23. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 302, 92 Stat. 3069, 3077 (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)).

24. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979) [hereinafter 1979 Guidelines].

25. See generally *id.* at 67,584 (“Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases.”); Tribal Reassumption of Jurisdiction Over Child Custody Proceedings, 44 Fed. Reg. 45,095 (July 31, 1979).

26. 1979 Guidelines, *supra* note 24, at 67,584.

27. *Id.*

28. *Id.* (“Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. . . . Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and

rulemaking process required by the Administrative Procedures Act to publish the resulting guidelines without legislative effect and to provide states with its interpretation of the Act.²⁹

2. *The Indian Child Welfare Act's Inconsistent Application Throughout the States*

As a result of the nonbinding effect of the BIA's 1979 Guidelines, state courts were left to interpret ICWA on their own.³⁰ This created inconsistent law throughout the states, with the outcome of an ICWA case often turning on where the parties were located.³¹ The unfortunate effect of this inconsistency is that many of the problems that plagued Indian-child-welfare proceedings prior to the enactment of ICWA persist.³² As of 2015, Indian children were still found in child-welfare proceedings at twice the rate of the general population.³³

One result of varying state-court interpretations is the "existing Indian family" exception.³⁴ This exception looks to the "Indian-ness" of the child and the child's parents and "precludes application of the ICWA when neither the child nor the child's parents have maintained a significant social, cultural, or political relationship with his or her tribe."³⁵ Though the majority of states have refused to adopt the ex-

separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect."). The BIA also rebuked commenters who asserted that the guidelines should be published as binding regulations and left to be challenged if it is believed that the BIA does not have the authority because "the Department has an obligation not to assert authority that it concludes it does not have." *Id.*

29. *See id.* ("Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect.")
30. *See* Cheyafina L. Jaffke, *Judicial Indifference: Why Does the "Existing Indian Family" Exception to the Indian Child Welfare Act Continue to Endure?*, 38 W. ST. U. L. REV. 127, 128 (2011) ("Courts created and used the 'existing Indian family' exception to avoid applying the ICWA to children or parents the courts did not consider Indian enough."); *see also* Jones, *supra* note 20, at 396 ("Many state courts have created exceptions to the application of ICWA and have interpreted the statute in such a manner as to render many of its provisions superfluous.")
31. *See* Jaffke, *supra* note 30, at 128–29 (discussing the adoption of the "existing Indian family" exception by the Nevada Supreme Court and the abrogation of the exception by the Kansas Supreme Court); *see also* *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 46 (1989) ("[A] statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind.")
32. *See generally* JASON R. WILLIAMS ET AL., CASEY FAMILY PROGRAMS, INDIAN CHILD WELFARE ACT: MEASURING COMPLIANCE (2015), <http://www.casey.org/media/measuring-compliance-icwa.pdf> [<https://perma.unl.edu/RU7P-PJF3>].
33. *Id.* at 6.
34. ICWA Proceedings, *supra* note 10, at 38,782.
35. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 625 (2002); *see*

isting Indian family exception, those that have reason that the purpose of ICWA is to keep Indian families together but reject any tribal interest in preventing the removal of an Indian child from the tribal community.³⁶ The effect of this exception is that “if you take away a child early enough from their tribe, they cannot develop ties to the tribe and are therefore not part of an ‘Indian family.’”³⁷

The existing Indian family exception is not an isolated example, and state courts have produced other disparate interpretations of ICWA. For example, states disagree on which standard to apply when determining whether “active efforts” have been made to avoid separating an Indian child from his or her family.³⁸ Additionally, states vary on the factors to be weighed in consideration of whether there was “good cause” for deviating from ICWA’s child-placement preferences.³⁹ These inconsistent rulings across states have continued as a result of the BIA’s nonbinding guidelines but may now be stopped by the BIA’s new binding regulations, which went into effect in mid-December 2016.⁴⁰

C. The Bureau of Indian Affairs’s Change in Position and 2016 Promulgated Regulations

In 2014, the BIA began to revisit its hands-off approach to implementing ICWA.⁴¹ Opening up to public comment, the BIA first considered whether an update to its 1979 Guidelines was necessary.⁴² At the end of its consideration, the BIA released new guidelines in early 2015.⁴³ Despite support from several commenters, however, the 2015 Guidelines were not accepted warmly by all.⁴⁴ Following the adoption of the 2015 Guidelines, the National Council for Adoption sued the Secretary of the Interior for violating the Administrative Procedures Act.⁴⁵ This claim was ultimately dismissed for lack of standing and because the 2015 Guidelines, as nonbinding on state courts, are not subject to the rulemaking process of the Administrative Procedures

also ICWA Proceedings, *supra* note 10, at 38,782 (explaining that state courts look to a child and family’s “Indian-ness” before determining if ICWA applies).

36. Painter-Thorne, *supra* note 21, at 368, 371.

37. Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21, 36 (1997).

38. *See State ex rel. C.D. v. State*, 200 P.3d 194, 205–06 (Utah Ct. App. 2008) (detailing differing standards among states for proving “active efforts”).

39. *Compare In re Adoption of F.H.*, 851 P.2d 1361, 1363–64 (Alaska 1993), with *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009).

40. *See* ICWA Proceedings, *supra* note 10, at 38,782.

41. *Id.* at 38,784.

42. *Id.*

43. *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015).

44. *Id.* at 10,147.

45. *See Nat’l Council for Adoption v. Jewell*, 156 F. Supp. 3d 727 (E.D. Va. 2015).

Act.⁴⁶ Another case, a class action lawsuit against the BIA and the Secretary of the Interior in the U.S. District Court for the District of Arizona, claimed that the 2015 Guidelines violate Equal Protection and Due Process guarantees of the Fifth and Fourteenth Amendments, that ICWA exceeds the federal government's power under the Indian Commerce Clause and the Tenth Amendment (issues discussed in further detail below), that ICWA violates the associational freedoms under the First Amendment, and that the BIA acted unlawfully by releasing its 2015 Guidelines.⁴⁷ All claims in this case were also dismissed for lack of standing, but as of the time of this writing, an appeal is pending before the Ninth Circuit.⁴⁸

Despite these claims, the BIA was motivated by the fact that many commenters to the 2015 Guidelines not only supported guideline updates but also supported that the Department "issue binding regulations addressing the requirements and standards that ICWA provides for State-court child-custody proceedings."⁴⁹ Consequently, the BIA reversed its 1979 position.⁵⁰ Firmly basing itself in the Supreme Court's *Holyfield* reasoning, discussed in further detail below, the BIA promulgated final regulations on June 14, 2016—thirty-eight years after the enactment of ICWA.⁵¹ Shortly after the final rule went into effect, the BIA again issued updated Guidelines on December 16, 2016.⁵² These updated 2016 Guidelines are designed to "explain the statute and regulations and also provide examples of best practices for the implementation of the statute."⁵³

Following the implementation of the final rule, on October 25, 2017, the State of Texas and two individuals fostering an Indian child, but unable to adopt, sued the U.S. Department of the Interior (DOI) and the BIA, as well as the Secretary of the Interior, the Director of the BIA, and the Acting Assistant Secretary for the DOI.⁵⁴ The plain-

46. *Id.* at 738.

47. *See Carter v. Washburn*, No. CV-15-01259-PHX-NVW, 2017 WL 1019685, at *3 (D. Ariz. Mar. 16, 2017).

48. *Id.*, *appeal docketed*, No. 17-15839 (9th Cir. Apr. 26, 2017).

49. ICWA Proceedings, *supra* note 10, at 38,784.

50. *See id.* at 38,782 ("The Department's current nonbinding guidelines are insufficient to fully implement Congress's goal of nationwide protections for Indian children, parents, and Tribes.").

51. *See generally id.*

52. Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96,476 (Dec. 30, 2016); *see* BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT (2016), <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf> [<https://perma.unl.edu/SK3T-AZNV>].

53. 81 Fed. Reg. at 96,477.

54. Complaint and Prayer for Declaratory and Injunctive Relief, *Brackeen v. Zinke*, No. 4:17-cv-00868 (N.D. Tex. filed Oct. 25, 2017), https://turtletalk.files.wordpress.com/2017/10/show_multidocs.pdf [<https://perma.unl.edu/C3PU-ZJY5>].

tiffs claim that the 2016 Regulations violate the Administrative Procedure Act by violating the Equal Protection Clause of the Fifth Amendment, the Tenth Amendment, and Article I of the Constitution.⁵⁵ The individuals seeking to adopt the Indian child separately allege that ICWA violates both their substantive and procedural due process rights under the Fifth Amendment, while the State of Texas separately alleges that ICWA violates separation-of-powers norms and exceeds Congress's Spending Clause power.⁵⁶ While this Comment only explores some of these arguments, it seeks to answer whether the BIA had the authority to promulgate the 2016 Regulations.

III. ANALYSIS

As discussed below, many challenges to the BIA's rulemaking authority exist. In order for the BIA to continue to have the authority to promulgate binding regulations, the BIA must satisfy three requirements. First, the BIA's regulations must not violate the Tenth Amendment of the U.S. Constitution. Second, the regulations must be given proper *Chevron* deference in state courts, and the BIA must be found to be the primary source of interpretation for ICWA. Third, and most difficult, the BIA must overcome the issue of untimeliness. Yet even if the BIA is able to clear all three of these hurdles, other consequences may exist for delaying rule promulgation.

A. Tenth Amendment and Federalism Concerns

Whether the Bureau of Indian Affairs has the authority to promulgate binding regulations under ICWA depends in part on whether the regulations violate the Tenth Amendment. Under the Tenth Amendment, any "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁵⁷ Due to the BIA's position in its 1979 Guidelines, there remains a question about the constitutionality of the BIA's new binding regulations.⁵⁸

When publishing its 1979 Guidelines, the BIA stated that "[p]romulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act . . . is not necessary to carry out the Act."⁵⁹ According to the BIA's previous

55. *Id.* at 38–50.

56. *Id.* at 52–58.

57. U.S. CONST. amend. X.

58. 1979 Guidelines, *supra* note 24, at 67,584. When releasing these guidelines, the BIA accepted rulemaking authority for specific provisions of ICWA in which the Secretary of the Interior was specifically mentioned. Otherwise, the BIA reasoned that "[p]rimary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases." *Id.*

59. *Id.*

position, to promulgate binding regulations would be akin to commanding state courts and exercising “supervisory control” over state matters.⁶⁰ That is, the child-welfare concerns raised by ICWA were originally purported to be matters of state concern that should be left to the interpretation of state courts with guidance of ICWA in cases involving Indian children.⁶¹ Therefore, the BIA took the position that it did not have the authority to interfere with that interpretive process. To help state courts with the interpretation of ICWA, however, the BIA went through the rule-promulgation process and released nonbinding guidelines meant to aid state courts rather than constrict them.⁶²

Since the passage of the 1979 Guidelines, the BIA has reversed its position on this point.⁶³ Rather than continuing to agree that the interpretation of ICWA as it applies to state courts is a matter for state courts to decide, the BIA took a new position in 2016 that the BIA itself has the authority to pass binding regulations meant to constrain the actions of state courts.⁶⁴ Reasoning that “a lack of uniformity in the interpretation of ICWA by State courts could undermine the statute’s underlying purposes,” the BIA changed its position and promulgated binding regulations.⁶⁵

Specifically, the BIA argued in the memorandum preceding the final rule published in 2016 that by “clarifying ICWA’s requirements, the Department is exercising the authority that Congress delegated to it.”⁶⁶ Originally, the BIA was granted the authority to promulgate regulations necessary to ICWA’s implementation within 180 days of its enactment.⁶⁷ The BIA’s position is founded, then, on the constitutionality of ICWA itself.⁶⁸ If Congress has the authority to enact ICWA, then Congress may also delegate rulemaking authority to the BIA.⁶⁹

60. *Id.*

61. *Id.*

62. *Id.* (“Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect.”).

63. See ICWA Proceedings, *supra* note 10, at 37,782 (“Although the Department initially hoped that binding regulations would not be ‘necessary to carry out the Act,’ a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law.” (citations omitted)).

64. *Id.* at 38,785.

65. *Id.* at 38,787; see, e.g., 25 C.F.R. § 23.120 (2016) (finding that unsuccessful active efforts to prevent the breakup of Indian families must be documented in the record).

66. ICWA Proceedings, *supra* note 10, at 38,789.

67. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 302, 92 Stat. 3069, 3077 (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)).

68. ICWA Proceedings, *supra* note 10, at 38,789.

69. *Id.*

The constitutionality of ICWA ultimately rests on the Indian Commerce Clause.⁷⁰ The U.S. Supreme Court has interpreted the Indian Commerce Clause to grant Congress plenary power over Indian affairs.⁷¹ Because child-welfare proceedings involving Indians necessarily are a matter of Indian affairs, Congress arguably has the constitutional authority to pass those provisions interfering with state court proceedings. Likewise, if Congress has the authority to implement laws interfering with state-court child-welfare proceedings involving Indians, it also has the authority to allow the BIA to promulgate regulations in line with ICWA.

However, there remains some controversy as to the absolute plenary nature of Congress's power over Indian affairs. In both *United States v. Lara* and *Adoptive Couple v. Baby Girl*, Justice Thomas, in concurring opinions, has questioned the Court's interpretation of the Indian Commerce Clause as granting Congress plenary power over Indian affairs.⁷² Moreover, Professor Ablavsky considered Thomas's position in an article for the Yale Law Journal and concluded that "[b]oth the exclusive and plenary power doctrines rest on unstable foundations."⁷³ Exploring the drafting of the Indian Commerce Clause and early arguments for Congressional plenary power over Indian affairs, Ablavsky contends that Congress has not been granted plenary power over Indian affairs under the Constitution.⁷⁴

If these positions are to be believed and Congress does not have plenary power over Indian affairs, its authority to enact ICWA would be doubtful. Nevertheless, Congress's absolute authority over Indian matters is a long-standing legal precedent.⁷⁵ Furthermore, the posi-

70. U.S. CONST. art. I, § 8, cl. 3.

71. See *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979) ("Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes."); *United States v. Wheeler*, 435 U.S. 313, 331 (1978) (remarking that the potential problem of double jeopardy when an Indian is tried by both tribal and federal prosecutions would "be solved if Congress, in the exercise of its plenary power over the tribes, chose to deprive [Indian tribes] of criminal jurisdiction altogether").

72. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2566–67 (2013) (Thomas, J., concurring) ("Although this Court has said that the 'central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs,' neither the text nor the original understanding of the Clause supports Congress' claim to such 'plenary' power." (citations omitted)); *United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) ("I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the metes and bounds of tribal sovereignty." (quotations omitted)).

73. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1015 (2015).

74. *Id.* at 1021.

75. See *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) ("From [Indian tribes'] very weakness and helplessness, so largely due to the course of dealing of the

tion that Congress lacks plenary power over Indian affairs has solely been adopted by Justice Thomas.⁷⁶ Each time Thomas has questioned Congress's plenary power, he has stood alone in his concurring opinions—even the dissents have taken the time to rebuke Thomas's notion that Congress lacks plenary power over Indian affairs.⁷⁷ Thus, while some debate remains about the constitutionality of ICWA, the debate is practically inconsequential. Through Congress's plenary powers over Indian affairs, the BIA has been granted the authority to promulgate rules necessary to implement ICWA.

B. Applicability of *Chevron* Deference

Whether the Bureau of Indian Affairs has the authority to promulgate binding regulations under the Indian Child Welfare Act also depends in part on whether the regulations should be granted deference by state courts under *Chevron U.S.A. Inc. v. NRDC, Inc.*⁷⁸ If *Chevron* deference were to be granted to the BIA's ICWA regulations, previous interpretations of ICWA by state courts would no longer be applicable in their proceedings. Rather, the regulations would dominate ICWA proceedings, in effect undoing thirty-eight years of state-court decisions. However, because the BIA took the position that these regulations are outside of the scope of its rulemaking authority, a question remains as to whether these regulations should be granted *Chevron* deference.⁷⁹

Chevron deference generally applies to all reasonable administrative interpretations of a Congressional grant of rulemaking authority.⁸⁰ That is, unless regulations promulgated by executive agencies are "arbitrary, capricious, or manifestly contrary to the statute," they are given "controlling weight."⁸¹ The rule of deference to administrative agencies by state courts is compelled in *Chevron*, which holds that:

Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."); *see also Lara*, 541 U.S. at 200 ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive." (quotations omitted)).

76. *See Adoptive Couple*, 133 S. Ct. at 2566–67; *Lara*, 541 U.S. at 215.

77. *See Adoptive Couple*, 133 S. Ct. at 2584 n.16 (Sotomayor, J., dissenting); *Lara*, 541 U.S. at 230 n.2 (Souter, J., dissenting).

78. 467 U.S. 837 (1984).

79. 1979 Guidelines, *supra* note 24, at 67,584 ("Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. . . . For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.").

80. *See* 467 U.S. at 843–44.

81. *See id.* at 844.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.⁸²

Applied to the BIA's ICWA guidelines, *Chevron* deference must be granted if Congress has specifically left gaps within ICWA for the BIA to fill.⁸³

These gaps are quite easy to find. For instance, section 108(b)(1) allows the Secretary of the Interior to consider more criteria than those listed by the Act when determining whether an Indian tribe may reassume jurisdiction over Indian-child-custody proceedings.⁸⁴ By allowing other criteria to be considered, Congress left open a gap for administrative interpretation and expertise. Another instance of leaving room for agency interpretation can be found in section 202.⁸⁵ Again, the Secretary of the Interior is given the authority to establish off-reservation Indian-child and -family-service programs, a number of which are enumerated by the Act.⁸⁶ However, authority is also granted to the Secretary to establish programs which do not meet the descriptions of the enumerated list.⁸⁷ Once more, this is a clear grant of authority to the Secretary to use his or her administrative expertise. Lastly, ICWA also explicitly grants the Secretary full rulemaking authority as is necessary to implement the Act.⁸⁸ This provision alone is enough to entitle the BIA to *Chevron* deference.

Nevertheless, this was not the position taken by the BIA in 1979 when it first passed its nonbinding guidelines.⁸⁹ Instead, the BIA reasoned that “[f]or Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.”⁹⁰ Whether the BIA can dismiss its rulemaking authority granted under ICWA seems to be an easily resolved issue. It is the intent of Congress, not the belief of the BIA, on which the Secretary of the Interior's rulemaking authority lies. The question remains, however, whether the BIA can switch its position without affecting whether it is entitled to *Chevron* deference.

82. *Id.* at 866.

83. *Id.* at 843–44.

84. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 108(b)(1), 92 Stat. 3069, 3074 (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)).

85. *Id.* at § 202.

86. *Id.*

87. *Id.*

88. *Id.* at § 302.

89. 1979 Guidelines, *supra* note 24.

90. *Id.* at 67,584.

Chevron did not address the issue of an agency changing its position on its own authority to promulgate regulations.⁹¹ Yet, the Court does address the analysis by which courts determine whether a regulation is within an agency's grant of authority.⁹² The first question a court must determine is whether the statute or act of Congress speaks directly on the issue purported to be resolved by the agency's regulation.⁹³ If the court finds that Congress has directly addressed the issue at hand, the agency has overstepped its authority.⁹⁴ If the court finds that Congress has not directly addressed the issue at hand, the agency's interpretation is given the highest priority.⁹⁵ Under these circumstances, only if the agency's interpretation is completely unfounded can it be ignored.⁹⁶

The BIA was specifically granted rulemaking authority by Congress to implement ICWA. While it is possible that certain provisions of the regulations may speak directly, specifically, and unambiguously to issues already addressed by ICWA, in the absence of such a finding, the BIA's regulations are to be given "controlling weight."⁹⁷ Under these circumstances, the BIA's regulations can only fail if they are found to be "arbitrary, capricious, or manifestly contrary to the statute."⁹⁸ Thus, the BIA's authority to pass new binding regulations does not fail on the applicability of *Chevron* deference.

C. *Mississippi Band of Choctaw Indians v. Holyfield*

While BIA authority to promulgate binding regulations is supported by both the constitutionality of ICWA and the applicability of *Chevron* deference, the BIA's 2016 regulations are further supported by the reasoning of the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*.⁹⁹ The Court's analysis illustrates that Congress intended the federal government, and not state courts, to create the rules by which Indian-child-welfare matters are to proceed.

91. See generally *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) (holding that where an agency's interpretation of a statute is a permissible construction of a statute that is silent on a direct issue, the agency's interpretation is entitled to deference).

92. *Id.* at 842 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions.").

93. *Id.*

94. See *id.* at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

95. *Id.* at 843-44.

96. *Id.* at 844 ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

97. *Id.*

98. *Id.*

99. 490 U.S. 30 (1989).

The matter at issue in *Holyfield* was the inconsistent state interpretations of the word “domicile” as it appeared in ICWA.¹⁰⁰ The Court began its analysis by considering whether Congress intended the meaning of the word *domicile* to be subject to state court interpretation.¹⁰¹ While admitting that “Congress sometimes intends that a statutory term be given content by the application of state law,” the Court observed that the default assumption of an Act of Congress is that, unless there is strong evidence to the contrary, statutory terms are not meant to be subject to State court interpretation.¹⁰²

In order to determine whether Congress intended the meaning of *domicile* to be subject to state law, the Court looked to the purpose of ICWA and to its legislative history. In doing so, the Court found that:

Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. More specifically, its purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. Indeed, the congressional findings that are part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.¹⁰³

Moreover, the Court reasoned that Congress could not have intended the inconsistent outcomes that inevitably result from differing state court interpretations of ICWA’s meaning of *domicile*.¹⁰⁴

This decision was instrumental in helping the BIA realize that its previous position on its inability to pass binding regulations was incorrect.¹⁰⁵ Reading *Holyfield* more broadly, the BIA argued that, in order to carry out the purpose of ICWA, new binding regulations are not only authorized, but they are necessary.¹⁰⁶ Using *Holyfield* as a catalyst, the BIA concluded that “it is improbable that Congress intended the broad grant of rulemaking authority . . . to issue binding

100. *Id.* at 39–40.

101. *Id.* at 43 (“The initial question we must confront is whether there is any reason to believe that Congress intended the ICWA definition of ‘domicile’ to be a matter of state law.”).

102. *Id.*

103. *Id.* at 45.

104. *Id.* at 46 (“Even if we could conceive of a federal statute under which the rules of domicile (and thus of jurisdiction) applied differently to different Indian children, a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind.”).

105. See ICWA Proceedings, *supra* note 10.

106. See *id.* at 38,788 (“[T]he Department’s conclusion is in accord with ICWA’s legislative history and the carefully reasoned decision in *Holyfield*, where the Supreme Court noted that the meaning of key ICWA terms and requirements necessarily raises Federal questions and that conflicting interpretations of the statute can lead to arbitrary outcomes that threaten the rights that ICWA was intended to protect.”).

rules that interpret only those portions of ICWA that expressly delegate responsibility to the Department.”¹⁰⁷

Nevertheless, commenters to the BIA’s newly promulgated regulations pointed again to the BIA’s own position in 1979.¹⁰⁸ While the BIA did take note of a portion of ICWA’s legislative history that showed that state courts were to be given flexibility to interpret the meaning of the term “good cause,”¹⁰⁹ according to the Supreme Court’s reading of ICWA’s legislative history, the Act was not intended to be reliant on state-court interpretations.¹¹⁰ Additionally, the BIA explained its previous position by saying that it gave “excessive weight” to the portion of the legislative history which showed that *good cause* was to have some flexibility within State courts.¹¹¹

After the Supreme Court’s decision in *Holyfield*, the BIA adopted the Court’s conclusion that it has the authority to promulgate binding regulations. Despite the fact that ICWA proceedings necessarily interfere with the exercise of state authority over child-welfare proceedings, binding regulations are not only authorized but also imperative to the purpose of ICWA.

D. Timeliness

The biggest hurdle the BIA must overcome in order to assert authority to promulgate binding regulations is to prove that the regulations are not barred by their untimeliness. The Secretary of the Interior was granted the authority to promulgate any regulations necessary for the enforcement of ICWA by section 302 of the Act.¹¹² However, this grant of rulemaking authority provided that the Secretary should exercise its rulemaking authority within 180 days of the enactment of ICWA.¹¹³ In general, regulations may be promulgated outside of the statutory deadline if there is no penalty spelled out in the stat-

107. *Id.*

108. *Id.* Using the BIA’s 1979 position against it, commenters pointed out that primary responsibility for interpreting ICWA lies with “the courts that decide Indian child custody cases.” *Id.*

109. S. REP. NO. 95-597, at 17 (1977) (“The ‘significant contact’ test coupled with the ‘good cause for refusal’ provisions of subsection (c) are designed to provide State courts with a degree of flexibility in determining the disposition of a placement proceeding involving an Indian child.”).

110. *See* *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) (“[I]t is most improbable that Congress would have intended to leave the scope of the statute’s key jurisdictional provision subject to definition by state courts as a matter of state law.”); S. REP. NO. 95-597, at 17.

111. ICWA Proceedings, *supra* note 10, at 38,788.

112. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 302, 92 Stat. 3069, 3077 (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)).

113. *See id.* (“Within one hundred and eighty days after the enactment of this Act, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act.”).

ute for failing to act within the specified time frame.¹¹⁴ However, logic and policy may restrict the BIA from acting so long after the initial grant of rulemaking authority.

1. Brock and Barnhart

As mentioned above, if no consequences are spelled out within a statute for an agency's failure to act within a specified time frame, then that agency does not lose its authority.¹¹⁵ The Supreme Court first adopted this position in *Brock v. Pierce County*, where it considered whether the Secretary of Labor lost jurisdiction over audits conducted to resolve whether a misuse of Comprehensive Employment and Training Act (CETA) funds had occurred when the Secretary's final determination was issued outside of the statutorily provided period of 120 days.¹¹⁶

In order to make this determination, the Court looked to both the statutory language and the legislative history of CETA.¹¹⁷ Looking first to the statutory language, the Court noted that the use of the word "shall" normally implies compulsory action.¹¹⁸ However, reviewing its precedent, the Court found that it had "frequently articulated the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided."¹¹⁹ Moreover, the Court noted that whether the Secretary of Labor is able to complete the task statutorily assigned to her is often subject to factors beyond the Secretary's control.¹²⁰ Additionally, the Court found it to be very persuasive that the Secretary's inaction would cause harm to public rights, as opposed to private rights.¹²¹ For all of these reasons, the Court held that the use of the word *shall* was not enough to remove the Secretary's power to act.¹²²

114. See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003); *Brock v. Pierce Cty.*, 476 U.S. 253 (1986).

115. See generally *Brock*, 476 U.S. at 260 ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.").

116. *Id.* at 254–55.

117. *Id.* at 258.

118. *Id.* at 258–59 (noting that "§ 106(b) speaks in mandatory language").

119. *Id.* at 260 (quotations omitted).

120. *Id.* at 261 ("[T]he Secretary's ability to complete [the task] within 120 days is subject to factors beyond his control.").

121. *Id.* ("In the present case, by contrast, public rights are at stake, and the Secretary's delay, under respondent's theory, would prejudice the rights of the taxpaying public.").

122. *Id.* at 262.

Looking next to CETA's legislative history, the Court noted that it "found nothing in the history of the 1978 amendments to CETA, which added the 120-day deadline, to suggest that Congress intended to impose a jurisdictional limitation on agency action."¹²³ Instead, the 120-day deadline imposed by the statute was merely intended to provoke the Secretary of Labor into speedy action.¹²⁴ Ultimately, by looking to the statute and the legislative history, the Court found no indication that the 120-day time limit imposed by CETA was meant to deprive the Secretary of Labor of her authority if she fails to act within the specified time.¹²⁵ Put more simply, if Congress intends to remove an agency's authorization to act after a statutorily specified time frame, it must say so during the proposal of the statute or in the statute itself.

This position has been supported by the Supreme Court again and again since *Brock*. For example, in *United States v. James Daniel Good Real Property*, the Court held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."¹²⁶ More recently, the Court examined whether the Commissioner of Social Security could assign each coal industry retiree eligible for benefits to a signatory operator where the assignment was untimely.¹²⁷ Looking again at the statute's language and its legislative history, the Court reasoned via the *Brock* framework that "a statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done."¹²⁸ Additionally, the Court found that no legislative history supported an assertion that Congress meant the Commissioner to lose his assigning authority after failing to act within the specified time period.¹²⁹ Thus, the Court has consistently held that in the absence of Congressional intent, mere failure to act within a statutorily defined time limit is not enough to remove an agency's authority to act.

123. *Id.* at 262–63.

124. *Id.* at 265 ("The 120-day provision was clearly intended to spur the Secretary to action, not to limit the scope of his authority.")

125. *Id.* at 266 ("There is simply no indication in the statute or its legislative history that Congress intended to remove the Secretary's enforcement powers if he fails to issue a final determination on a complaint or audit within 120 days.")

126. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993).

127. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003).

128. *Id.* at 161.

129. *Id.* at 165 ("[S]uch little legislative history as there is on the point tends to show that Congress assumed that any assignments that could be made at all (say, to an operator still in business) would be made on time.")

2. *Legislative History*

When *Brock* and *Barnhart* are applied to ICWA, it is clear to see that the mandatory language of section 302 is not enough to remove the BIA's authority to promulgate binding regulations.¹³⁰ Although section 302 states "[w]ithin one hundred and eighty days . . . the Secretary shall,"¹³¹ both *Brock* and *Barnhart* illustrate that there must be more indication from Congress that the 180-day grant of authority was meant to be jurisdictional.¹³² That is, if Congress intends its grant of authority to last only for the 180 days specified by statute, more evidence is needed of this intent than the use of the word *shall* in the statute.

Since the statutory provisions of ICWA do not remove the authority of the BIA to promulgate regulations after the 180-day period, it becomes necessary to investigate the legislative history of the Act to look for other evidence of Congress's intent to remove the BIA's authority after 180 days. However, there is nothing to support the notion that Congress intended the 180-day specification to be jurisdictional. Rather, the legislative history seems to support the fact that Congress intended to give the Secretary of the Interior a broad grant of rulemaking authority.¹³³

Specifically, original versions of ICWA included additional procedural requirements in order for the Secretary to exercise her rulemaking authority.¹³⁴ The additional procedural requirements prescribed that the Secretary must meet with Tribes and Indian organizations within six months to discuss rules necessary to implementing ICWA, present proposed rules to congressional committees within seven months, publish rules for public notice and comment within eight months, and promulgate final rules within ten months.¹³⁵ These procedural requirements were removed upon an amendment introduced on the House floor by Representative Udall that changed the bill to its current grant of rulemaking authority.¹³⁶ When introducing the amendment, Udall remarked that the "amendment would simply require the Secretary to act within 6 months of the act. However, *I think it should be clear that* it is the intent of Congress that the Secretary consult fully with Indian tribes and organizations in drafting such rules and regulations."¹³⁷ Nevertheless, no mention was made of intending the

130. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 302, 92 Stat. 3069, 3077 (codified as amended at 25 U.S.C. §§ 1901-1963 (2012)).

131. *Id.* (emphasis added).

132. See *Barnhart*, 537 U.S. at 158; *Brock v. Pierce Cty.*, 476 U.S. 253, 265 (1986).

133. See ICWA Proceedings, *supra* note 10, at 38,786.

134. See S. 1214, 95th Cong., § 205 (1977).

135. *Id.* § 205(b)(1).

136. 124 CONG. REC. H38,107 (daily ed. Oct. 14, 1978) (statement of Rep. Udall).

137. See *id.* (emphasis in original).

180-day provision to impose limitations on the Secretary's ability to act if rules were promulgated outside of the time limit. Instead, the amendment gave the Secretary broader rulemaking authority than previous versions of the bill.¹³⁸ Thus, since there is no legislative history to support restricting the Secretary's rulemaking authority to the 180-day period defined by statute, *Brock* and *Barnhart* support the BIA's position—it continues to retain its rulemaking authority.

3. *Public Policy*

The BIA clearly has the authority to promulgate binding regulations according to Congress's plenary power over Indian affairs, the language of ICWA, its legislative history, and the supportive Supreme Court case law of *Chevron*, *Brock*, and *Barnhart*. If ICWA's broad grant of rulemaking authority is to fail the BIA, it must fail, then, on equitable grounds. Thus far, when the Supreme Court has considered actions taken by administrative agencies that are untimely, the untimeliness of the actions is beyond the agency's control.¹³⁹ This is not the case with the BIA's 2016 Guidelines. Rather, the BIA could have, at the earliest, exercised its rulemaking authority by November 26, 1979—383 days after it was given its authority.¹⁴⁰ While this is clearly still outside of the 180-day range as required by statute, the question of whether rules promulgated on that date would be outside of the BIA's authority would be somewhat easily resolved, for the reasons outlined above. Instead, the BIA waited nearly thirty-eight years before promulgating regulations under ICWA.¹⁴¹ Because of this intentional, decades-long delay, the question of whether the BIA's rulemaking authority remains is a novel one.

The possibility of the BIA's lingering rulemaking authority is further complicated by the statements of the BIA itself when it first released nonbinding guidelines in 1979.¹⁴² By first taking the position that it did not have the authority to exercise rulemaking authority over state courts and refusing to promulgate binding regulations, the

138. Compare S. 1214, § 205 (requiring the Secretary to meet with tribes and Congressional committees and propose and promulgate regulations within specified timeframes), with Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 302, 92 Stat. 3069, 3077 (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)) (requiring the Secretary to promulgate regulations within 180 days).

139. See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003); *Brock v. Pierce Cty.*, 476 U.S. 253, 261 (1986) (“[T]he Secretary’s ability to complete [the task] within 120 days is subject to factors beyond his control.”).

140. See 1979 Guidelines, *supra* note 24, at 67,584. Because the BIA was able to release its 1979 Guidelines by this time, having still followed the necessary steps for rule promulgation under the Administrative Procedure Act, the BIA would have been able to fulfill its rulemaking mandate under ICWA within the same period of time. *Id.*

141. See ICWA Proceedings, *supra* note 10.

142. 1979 Guidelines, *supra* note 24, at 67,584.

BIA not only allowed but effectively *forced* state courts into creating decades' worth of precedent, interpreting ICWA as it applied in each state.¹⁴³ State courts' reliance on the BIA's 1979 statements was not only foreseeable, it was expected. The BIA predicted this reliance by remarking that "[s]tate and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department."¹⁴⁴ As a result, the delay in BIA action and the subsequent state reliance on the BIA's inaction frustrate the legitimacy of the 2016 regulations.

In general, when a party is aware of her rights and fails to assert them, causing reliance by another party for an unreasonable period of time, the doctrine of laches can be used to estop the first party from reasserting her lapsed rights.¹⁴⁵ However, the questions of whether the doctrine of laches is applicable "turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during the lapse of years."¹⁴⁶ Thus, as an equitable doctrine, whether a claim of laches can be successfully asserted against a party is a matter of weighing all of the surrounding circumstances to determine whether it would be unjust to allow the party to reassert her rights.

Though laches is typically only asserted against nonsovereign parties, when Native Tribes have failed to assert their authority for prolonged periods of time, laches has been applied to curtail the extent to which they are able to assert their sovereignty.¹⁴⁷ Laches was first asserted against a Native Tribe successfully in 2005 following decades of litigation between the Oneida Indian Nation and local governments over the proper ownership of tribal lands.¹⁴⁸ The Court found that the

143. *Id.* (noting that where "primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance").

144. *Id.*

145. *Gallagher v. Cadwell*, 145 U.S. 368, 371–72 (1892); *see also* *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922) (explaining that laches "developed and designed to protect good faith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them").

146. *Gallagher*, 145 U.S. at 371–72.

147. *See* *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005).

148. *See id.* (finding that New York State's unlawful purchase of Oneida Indian Nation's land and the State's reliance on the tribe's failure to assert its sovereignty extinguished the tribe's claim to sovereignty over the land); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (finding that New York State's unlawful purchase of Oneida Indian Nation's land made it subsequently liable to the tribe for monetary damages); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (finding that Oneida Indian Nation asserted proper subject matter jurisdiction in federal court).

Oneida Indian Nation, having failed to assert its sovereignty for nearly two hundred years, could no longer assert its authority over unlawfully purchased lands despite never having properly acquiesced its power over the land.¹⁴⁹ More recently, the Supreme Court declined to offer an opinion on whether laches could limit a tribe's power of taxation despite a century-long absence.¹⁵⁰ Thus, the fact remains that laches may be asserted to diminish a tribe's sovereignty where the tribe has previously failed to exercise its right.

It is another matter altogether, however, to consider whether the doctrine of laches could be applied to the BIA in this instance. Importantly for a laches claim, the BIA took a strong position in 1979 that promulgating rules was not necessary to enact ICWA.¹⁵¹ This created the reliance essential to a laches claim—state governments were left, in the absence of such regulations, to create their own interpretations of ICWA. State courts, Indian tribes, and Indian families became well versed in these interpretations over the course of thirty-eight years until the BIA reasserted authority it had earlier claimed it did not have. The only remaining question is whether the BIA's authority may be appropriately curtailed by the doctrine of laches.

Though a court may be willing to limit an Indian tribe's sovereignty by the use of the doctrine of laches, it seems unlikely that a court would be equally willing to limit the U.S. government's authority to act by the same doctrine in any capacity. It is important here to recognize the distinction between the BIA's authority to promulgate regulations under ICWA and Congress's authority to legislate or even to authorize the BIA to pass such regulations. While Congress properly granted the BIA the authority to act in 1978, the BIA failed its Congressional mandate and opted not to pass binding regulations.¹⁵² Thus, it is possible, although unlikely, that the doctrine of laches may estop the BIA from passing the new regulations as a matter of equity. And to be sure, if Congress were to pass an amendment re-granting regulatory authority to the Secretary of the Interior and the BIA were to pass regulations subsequent to that amendment, the BIA's authority would not be at issue. Rather, the untimeliness of the BIA's actions and state reliance on the BIA's previous position may subject it to a laches claim.¹⁵³

149. See *City of Sherrill*, 544 U.S. at 221.

150. *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016).

151. See 1979 Guidelines, *supra* note 24, at 67,584.

152. See Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 302, 92 Stat. 3069, 3077 (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)); 1979 Guidelines, *supra* note 24, at 67,584.

153. See also Patrick W. Wandres, *Indian Land Claims: Sherrill and the Impending Legacy of the Doctrine of Laches*, 31 AM. INDIAN L. REV. 131, 142 (2006) (“[T]he doctrine of laches can be applied to the United States when acting in a sovereign capacity, regardless of whether the suit is filed within an applicable statute of

E. Other Consequences of Delayed Action

While the BIA clearly continues to have the authority to pass binding regulations implementing ICWA as a matter of law and very likely retains its authority as a matter of equity, there may be other consequences for such delayed action. That is, Native American families or tribes may have a claim against the BIA for its failure to act. The Tucker Act both grants the Court of Federal Claims the jurisdiction to hear claims against the federal government founded on the Constitution, Acts of Congress, regulations, or any contract with the United States, *and* simultaneously waives sovereign immunity for those claims.¹⁵⁴ Moreover, the Supreme Court has found that the basis of a claim must only “be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be ‘lightly inferred,’ a fair inference will do.”¹⁵⁵ To determine whether such a “fair inference” exists in Indian law cases, courts look to the extent of the duties and the fiduciary relationship imposed on the federal government.¹⁵⁶

Three types of trusts can exist between Native Americans and the federal government.¹⁵⁷ The first trust, the least burdensome on the federal government, is one which acknowledges the special relationship that has historically developed between Indian tribes and the federal government.¹⁵⁸ While the federal government often acknowledges this special relationship, any such “language was not intended to create a formal trust relationship or to vest the United States with absolute power, but was designed to . . . ensur[e] stable relationships with tribes.”¹⁵⁹ The second type of trust relationship that exists between the federal government and Native tribes is a limited trust.¹⁶⁰ Under this limited-trust relationship, the applicable statute only creates a

limitations.”). *But see* *United States v. Beebe*, 127 U.S. 338, 346 (1888) (“As laches is not to be imputed to the government, the statute of limitations does not apply to the state, unless it be clear from the act that it was intended to include the state.”).

154. 28 U.S.C. § 1491(a)(1) (2012); *see also* *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“[B]y giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims.”).

155. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003) (quoting *Mitchell*, 463 U.S. at 218).

156. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.05[1][b], at 421–22 (Nell Jessup Newton ed., 2012).

157. *Id.* § 5.05[1][b], at 423.

158. *Id.*; *id.* § 5.04[3][a], at 412.

159. *Id.* § 5.04[3][a], at 412.

160. *See* *United States v. Mitchell*, 445 U.S. 535, 542 (1980) (“We conclude that the [General Allotment Act] created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources.”).

right of action for any failure by the government to fulfill its duties specified under the statute.¹⁶¹ The last type of trust relationship is a full trust relationship in which the federal government undertakes “full fiduciary responsibilities.”¹⁶² Under this kind of trust relationship, “[i]n the case of a Native American claimant, where the government has assumed pervasive control over Indian assets, the trust doctrine unavoidably overlays and infuses the legal analysis.”¹⁶³

To determine whether Native families have a claim against the BIA for failure to promulgate binding regulations, the question next turns on what kind of trust relationship was assumed by the federal government in enacting ICWA. Because Congress enacted the Indian Child Welfare Act specifically to “protect the best interests of Indian children and to promote the stability and security of Indian tribes,” the Indian Child Welfare Act was clearly meant to establish more than a minimum trust relationship between the federal government and Native families.¹⁶⁴ Rather, ICWA can be fairly read to have at least intended to create a limited trust relationship between the federal government and native families.¹⁶⁵ The scope of the limited trust relationship would be based on the interpretation of the Act, which would show that the federal government specifically undertook the duties described in section 3 of the Act, which reads:

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.¹⁶⁶

The specific duties described in this section of the Act include establishing minimum federal standards for child-welfare proceedings in-

161. *See id.* at 544 (“It is plain, then, that when Congress enacted the General Allotment Act, it intended that the United States ‘hold the land . . . in trust’ not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation.”).

162. *See id.* at 542.

163. Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 TULSA L. REV. 313, 339 (2003).

164. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 3, 92 Stat. 3069, 3069 (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)).

165. *See id.* (“The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.”).

166. *Id.*

volving Indian children that reflect the unique values of Indian cultures and providing assistance to Native tribes' child and family-service programs.¹⁶⁷ This language seems more likely to imply a full undertaking by Congress of the fiduciary duties related to Indian-child-welfare proceedings. Regardless, the Act further undertakes the duty of rule promulgation in section 302.¹⁶⁸ Whether ICWA implies a limited-trust relationship requiring the establishment of minimum federal standards for child-welfare proceedings involving Indian children and the duty of rule promulgation to establish such standards or it implies a complete trust relationship between the federal government and Native families, the trust responsibilities undertaken by Congress were breached as a result of the BIA's intentional delay in exercising its rulemaking authority. That is, ICWA very likely grants a sufficient statutory basis on which Native families are able to bring a breach-of-trust claim against the BIA.

IV. CONCLUSION

The BIA continues to have the authority to promulgate binding regulations under ICWA despite its thirty-eight-year delay in doing so. There remains a slight possibility that the equitable doctrine of laches could be applied to stop the BIA from exercising this authority, but the likelihood of succeeding on that theory is doubtful. Even if this claim were to succeed, the consequences of such an action would be clearly contrary to the result Congress intended. As the Court in *Holyfield* mentioned, ICWA's purpose was "to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct."¹⁶⁹ So while the procedure taken by the BIA to promulgate its new binding regulations was undoubtedly dubious, it results in the consistent enforcement of ICWA throughout the states as originally envisioned by Congress.

Nevertheless, the BIA may also be subject to other legal consequences due to its inaction. Upon examination of ICWA, the BIA's failure to promulgate binding regulations likely amounts to a breach of trust for which Indian families can be compensated under the Tucker Act. That is, while the BIA continues to have rulemaking authority under ICWA, the delay in exercising that authority caused serious harm to Indian tribes and families. Inconsistent state applications of ICWA ultimately led to the continued widespread displacement of In-

167. *Id.*

168. *Id.* at § 302.

169. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989).

dian children from their families and communities.¹⁷⁰ Because of the BIA's failure to follow its statutory mandate, Indian families and tribes likely will be able to recover from this breach of trust.

Thus, while the BIA is not without fault or consequences from its failure to exercise its rulemaking authority sooner, it continues to enjoy the power to promulgate regulations implementing ICWA. Most importantly, as a result of this continued authority, the consistent protection of Indian children, families, and tribes in child-welfare cases may finally begin. And when this is finally able to happen, stories like Cheryl DeCoteau's memory of the removal of her son John can at long last become a thing of the past.

170. *See generally* WILLIAMS ET AL., *supra* note 32.