

# Equal Protection for Indian Children: Proposals to Reform the Indian Child Welfare Act



## Introduction

This country has overcome segregation, Jim Crow laws, “separate-but-equal” treatment of Black Americans, and legally sanctioned race-based discrimination. We have seen in vivid, shameful detail how separate treatment is inherently unequal.<sup>1</sup> Laws that treat individuals differently on the basis of their race are universally denounced, and rightly so.

Yet Congress still subjects one class of Americans to race-based segregation, denying them basic legal protections others take for granted. Victims of these unequal standards cannot even seek refuge through the political process because they are children, including some who have been abused and neglected by their caretakers. But because they were born with Indian ancestry, the government mandates that their safety and well-being be deliberately overlooked because of their race.<sup>2</sup>

These race-based legal standards for Indian children came out of good intentions. It was an attempt to stop Indian children from being removed from their homes unnecessarily and placed with non-Indian families or in boarding schools. But this policy became, and remains, a euphemism for unfair and unequal treatment, denying vital legal protections to vulnerable children.<sup>3</sup>

In 1978, Congress passed the Indian Child Welfare Act, which established legal standards that deliberately ignore the welfare and best interests of children with Indian ancestry. Instead, under the Act, tribal rights trump children’s. As detailed in the Goldwater Institute’s investigative report *Death on a Reservation*, some Indian children have suffered horrible abuse and even death at the hands of their caretakers when they were removed from non-Indian homes because of the Indian Child Welfare Act. Courts protect the safety, well-being and best interests of all other American children regardless of their race. But when it comes to children with Indian ancestry, courts are required by the Act to disregard the safety, well-being and best interests of children, because of their race. The Goldwater Institute’s investigative report discusses in detail the myriad ways in which the Indian Child Welfare Act promotes everything but a child’s welfare.



The Act applies to all qualifying children with Indian ancestry, not just to children born and living on an Indian reservation. The Act applies to children with slight Indian ancestry who are eligible for membership but are not and have never been members of Indian tribes. The Act applies to children whose parents don't have any connection, much less significant ties, to a tribe or an Indian culture. The Act applies to children and their extended family members who have never lived on a reservation. The Act applies even to those who have voluntarily severed all connection with the tribes.

This federal law<sup>4</sup> and accompanying guidelines issued by the Bureau of Indian Affairs,<sup>5</sup> not only create separate legal standards for children with Indian ancestry, they say these children have fewer rights than all other children. The law allows not only separate treatment, but substandard treatment.

The post-Civil War civil rights movement sought and attained freedom, long-overdue equality, and constitutional protections for Black Americans' individual rights and dignity. Sadly, the triumphs of the civil-rights movement are yet to be realized by individuals with Indian ancestry.

The United States Supreme Court's decision in *Brown v. Board of Education* was a watershed moment for the civil rights movement.<sup>6</sup> *Brown* overturned *Plessy v. Ferguson*, the case that legally sanctioned segregation.<sup>7</sup> In *Brown*, the Court observed that separate treatment on the basis of race denies people equal protection under the law because separate treatment is "inherently unequal."<sup>8</sup> Children with Indian ancestry are still living in the era of *Plessy v. Ferguson*, of legally required segregation and legally sanctioned separate, inherently unequal treatment. Federal law not only singles out children with Indian background for "separate" treatment, it explicitly affords them fewer rights and protections than non-Indian children.

## Path to Reform

Lawmakers have done little for close to four decades, perhaps in the hopes that courts will fix pervasive problems with the Act. This wait only makes matters worse for thousands of children with Indian ancestry, who, through no fault of their own, end up in out-of-home care. The United States Supreme Court has visited the problem only twice in the Act's 37-year history, and both of those decisions applied only to a narrow set of circumstances.<sup>9</sup> Recognizing the constitutional ills inherent in the Indian Child Welfare Act, in these two cases, several Justices have written passionate opinions that give us a roadmap for reform. Their written opin-



ions are not unlike the lone dissenting voice of Justice John Marshall Harlan, who, in *Plessy v. Ferguson*, laid out a roadmap upon which the civil rights movement based its strategy.

The Indian Child Welfare Act is not only unfair because it applies separate and inherently unequal treatment to children with Indian ancestry, but it also lacks the fundamental protections for the interests and rights of the children and their caretakers. Tragically, the Act mandates that from the moment a child with Indian background enters the child protection and welfare system, she has fewer rights than all other children. This is unconstitutional – and un-American.

What follows is a roadmap for reform to ensure that all children, regardless of their race or ancestry, are treated equally. All children deserve an individualized, race-neutral, child protection and custody determination. The Goldwater Institute recommends that lawmakers at the federal and state level adopt these critical reforms to protect freedom and individual rights.

These reform proposals are based on three fundamental principles embedded in the United States Constitution:

- Equal treatment under the law: Children with Indian ancestry who are abused, abandoned or neglected should have the same rights to equal protection and due process as all other children.
- Respect for individual rights: Children's, parents', and caretakers' constitutionally protected rights to individualized, race-neutral decisions that adequately protect the child's interests as well as those of the parents' and caretakers' should not be subordinated to tribal interests.
- Federalism: The federal government should not displace state family law rules that equally and uniformly protect the best interest of the child.

## Federal Reforms

1. Repeal the unconstitutional provisions of the Indian Child Welfare Act.

The United States Constitution abhors legally sanctioned, race-based segregation. As such, the Indian Child Welfare Act – and complimentary race-based guidelines issued by the Bureau of Indian Affairs – cannot stand.<sup>10</sup> The Act contains provisions that do not raise constitutional concerns, such as recordkeeping requirements and federal funding for tribal family services. The Goldwater Institute takes no position on those provisions.<sup>11</sup> We recommend that the unconstitutional race-



based provisions of the Act, 25 U.S.C. §§ 1901-1923, be repealed.

Short of an outright repeal of the Act's unconstitutional provisions, below are some reforms that can mitigate the law's substantial damage to child welfare.

2. Amend the Indian Child Welfare Act in favor of uniform, individualized, race-neutral laws that protect the best interests and welfare of all children, regardless of their race.

Perhaps the most egregious provision of the Indian Child Welfare Act is that it forces states to turn a blind eye toward children with Indian ancestry who are abused, neglected, and abandoned under its unworkable and outmoded burden of proof in foster care, termination of parental rights and adoption proceedings. The federal law forces states to apply one standard of proof for children with Indian ancestry and a different standard of proof for all other children. For example, the Act requires proof by clear and convincing evidence that serious physical or emotional damage to an Indian child has occurred. In contrast, states traditionally require proof by preponderance of evidence in taking abused, neglected or abandoned children into state protective custody. Basically, the Act requires that children with Indian ancestry must be more obviously abused before they can be given the same legal protections as other children. These different standards are based solely on the child's race and are patently unconstitutional.

State courts and legislatures have developed uniform, race-neutral laws that ensure an individualized and race-neutral assessment in every child's case. For example, state courts determine under their uniform standard of proof whether a foster care placement is necessary to ensure the safety and security of a child. This standard makes sense because if a child is abused or neglected, protection of the child's safety and security is paramount; but if the child is not, government cannot interfere with parental rights and autonomy. For adoptive placements, state courts usually prioritize the rights and best interests of the child. These factors give courts discretion to make an individualized, race-neutral assessment that puts the well-being of the child first.

By contrast, for Indian children, federal law imposes a race-based standard. The guidelines issued by the Bureau of Indian Affairs to implement the federal law go even further. The guidelines specifically require that state courts ignore the individual, best interests of the child in favor of a race-based determination.<sup>12</sup>

The Act requires race-based foster and adoptive placement preferences.<sup>13</sup> The



federal law requires that children with Indian ancestry may only be placed for adoption with an adult who has Indian ancestry. If no such adoptive home is available, the Act and guidelines require the government to keep searching for an ICWA-compliant home until one is found. If no ICWA-compliant home is found, the child can languish in foster care for years. It is extremely difficult to deviate from these placement preferences, with a virtually insurmountable burden of proof placed on the party that proposes a child's placement in a non-ICWA home be made permanent. Apart from the five- or six-figure litigation costs to meet this level of proof, the entire proceeding is explicitly geared toward not recognizing what's in the child's best interest.

States should not disregard a child's unique background in making an individualized and race-neutral foster, preadoptive or adoptive assessment, and in terminating parental rights. But the states also cannot turn a blind eye to the child's safety and security based solely on the child's race. Tribal courts can make their own individualized child custody assessments in matters that are properly before them. But if a child is not living on a reservation, the state – not the tribe – bears the burden of ensuring her safety and security. The Constitution does not allow states to treat the safety and security of children with Indian ancestry less seriously than the safety and security of all other children living within the state's borders.

Federal law should be changed to permit states to apply their uniform, race-neutral standards to all children regardless of their race. Federal law should afford state courts enough discretion to ensure an individualized assessment in every child's case. These assessments may sometimes include the unique culture and existing relationships a child has developed. But neither the federal nor the state government should be able to mandate racial or cultural conformity, or impose a race-conforming relationship on a child where none existed before, or perpetuate cultural and racial stereotypes. To the extent that federal law displaces the traditional and "virtually exclusive province of the States" in child custody matters,<sup>14</sup> federal law must be repealed or amended.

3. Amend the Indian Child Welfare Act so that state courts apply uniform, race-neutral laws in all child custody proceedings.

The Act requires states to apply a separate and substandard set of procedures to children with Indian ancestry. For example, the Act's "active-efforts provision,"<sup>15</sup> which places tribal interests over the child's safety, well-being and best interest, sometimes forces state courts to allow visitation and even unsupervised stay-overs with registered sex offenders if a child has Indian ancestry. The federal law



requires states to single out children with Indian ancestry and subjects them to greater dangers solely because of their race.<sup>16</sup> State courts should have discretion to make individualized determinations in each child's case based on what is in that child's best interests. In matters that are properly before state courts, federal law should be amended so as not to prevent the courts from applying uniform race-neutral laws in all child welfare proceedings.

4. Amend the Indian Child Welfare Act's provisions dealing with jurisdiction so that cases are not unconstitutionally transferred from one court to another based solely on the child's race.

The Indian Child Welfare Act allows Indian tribes to demand a transfer of child welfare cases from state court to tribal court if the child involved is eligible for membership, even if they have no significant ties with the tribe or tribal culture and neither of the child's biological parents nor the child live on the reservation. The Supreme Court has said that the Due Process Clause requires "minimum contacts" between a person and a court exercising jurisdiction over her.<sup>17</sup> For example, a life-long resident of Arizona who is in a car accident in Phoenix, Arizona, with another life-long resident of Arizona cannot be hauled into a Maine court in the resulting personal injury lawsuit.

Yet under the Act, the fate of a child with even slight Indian heritage living in Phoenix can be decided by a court in Maine, even if neither the child nor the parent has ever lived there.

This federally sanctioned transfer is even more egregious because the only basis for transferring the case is the race of the child. Imagine if a state court were to say that it will adjudicate all car accident cases involving White Americans, but will transfer all car accident cases involving Black Americans to some other court. Not only that, imagine if the court transferred all the car accident cases involving Black Americans to a court knowing that that court is not required to apply constitutional protections. This is precisely what federal law tells state courts to do. The federal law's race-based jurisdiction provisions<sup>18</sup> should be amended so that they do not violate the Constitution. Instead, federal law should defer to state law and Supreme Court precedent on jurisdictions, so that a child's race does not determine which court will decide her fate.

It is understandable that a tribal court would decide a child custody matter of a child living on the reservation. However, a tribe should not be able to overrule the wishes of parents, even those living on the reservation, when they choose to vol-



untarily take steps to get a child custody matter resolved before a state court.<sup>19</sup> Those children are United States citizens as well as members of the tribe, and as such, they are entitled to the same rights and legal protections as other Americans. Accordingly, federal lawmakers must amend the federal law's jurisdiction provisions.<sup>20</sup>

5. Repeal race-based BIA guidelines and prevent the BIA from issuing race-based rules.

In February 2015, the Bureau of Indian Affairs replaced its 1979 guidelines for applying and enforcing the Indian Child Welfare Act. These so-called “guidelines” are actually mandatory – they use the word “must” 101 times in requiring agencies and state courts to follow BIA’s race-based edicts. The guidelines go far beyond the statutory text of the Act and are neither necessary nor constitutional. Notably, the guidelines ignore the 2013 Supreme Court decision in the case commonly known as “Baby Veronica,” which concluded that some key provisions of the Act do not apply to voluntary adoptions of children with Indian ancestry.<sup>21</sup> A core premise of the Baby Veronica decision was that the Act cannot force a child to create a racially-conforming relationship and that a child should not be made to sever existing relationships in order to create new racially-conforming ones. One state appellate court struck down the guidelines within nine weeks after their publication. That holding is, however, not applicable outside that state.

The BIA is currently undergoing a notice-and-comment period to re-issue the guidelines as formal federal agency rules. This would make it harder for state courts to ignore or strike down the guidelines because courts usually give greater deference to federal agency rules. Congress should put a stop to BIA’s rulemaking effort and repeal the BIA guidelines altogether. If and when the currently proposed rule becomes final, Congress should expressly repeal that rule as well.<sup>22</sup>

6. Amend the federal Interethnic Placement Act so that adoptions or foster care placements are not delayed or denied based on the race, color, or national origin of the child or the adults involved.

The Interethnic Placement Act (IPA)<sup>23</sup> was enacted to remove the last remaining vestige of laws that prohibit the mixing of races, known as “anti-miscegenation laws,”<sup>24</sup> which were used to delay or deny adoptions or foster care placements based on the race, color, or national origin of the child or the foster/adoptive parents involved. There is, however, a gaping hole in the IPA: it expressly permits adoptions or foster care placements to be delayed or denied in child custody pro-



ceedings involving children with Indian ancestry.

Federal lawmakers should amend the Interethnic Placement Act to cure this lopsided treatment and singling out of children with Indian ancestry. Such an amendment would not only enable but require courts to apply uniform, race-neutral state laws to protect all children, Indian and non-Indian, in adoption and foster care placements.

## State Reforms

1. Enact a state statute or constitutional amendment protecting the fundamental right of every child to have her best interest pursued through an individualized, race-neutral child custody proceeding.

State courts and state legislatures have developed uniform, race-neutral laws that ensure an individualized assessment in every child custody proceeding. This is the cornerstone of ensuring that every child's fundamental rights and best interests are adequately protected, as well as those of all the adults involved. These uniform race-neutral laws need to be reinforced with a state law or state constitutional amendment guaranteeing every child, and every adult involved in the upbringing of that child, a fundamental right to an individualized and race-neutral child welfare decision.

2. Amend states' Interethnic Placement Acts to remove the Indian Child Welfare Act exception so that adoptions or foster care placements are not delayed or denied based on the race, color, or national origin of the child or the adults involved.

Many states have enacted their own Interethnic Placement Acts<sup>25</sup> which say that a foster or adoption placement decision cannot be delayed or denied based on the race, color, or national origin of the child or the adults involved. Unfortunately, like the federal IPA, state IPAs treat children with Indian heritage differently than other children, allowing adoptions and foster care placements to be delayed or denied based on the race, color, or national origin of the child or adults involved.

Like the federal IPA, these state IPAs need to be amended to enable and require courts to apply uniform, race-neutral state laws to protect all children, Indian and non-Indian, in their child welfare decisions.



### 3. Repeal state Indian Child Welfare laws.

Some states have enacted their own Indian Child Welfare laws. The federal Act creates a one-way-ratchet provision that encourages states to enact their own laws that are more egregious than the federal law with regards to violating the rights of children with Indian ancestry.<sup>26</sup> If a state enacts an Indian Child Welfare law, then the federal law instructs courts to apply the state law to children with Indian ancestry. This provision was used to coerce through some state legislatures particularly egregious laws that easily out-compete the federal Act in terms of their zeal for race-based discrimination against children with Indian ancestry.

States should repeal these discriminatory laws, leaving in place child-centered and rights-respecting standards uniformly applied to all children and adults regardless of race.

### 4. Amend internal procedures of state agencies involved in child custody matters so that they conform with the cornerstones of uniformity, race-neutrality, and individualized determination.

Many state attorneys general and other state departments that employ social workers and state-appointed guardians-ad-litem for children are complacent in following the Indian Child Welfare Act and the related BIA guidelines. These state officers should conform their departments' processes and take affirmative steps to update their internal rules, policies, and procedures, to prevent race-based treatment of children and adults with Indian ancestry. To start, they should instruct field workers that they do not have to follow BIA guidelines, because guidelines do not carry the force of law, and that they shall not apply nor urge the state courts to apply to children and adults with Indian ancestry different rules that undermine the child's best interest based solely on their race. State officers should also direct the department's employees to apply uniform state procedures to children without regard to the child's or the adults' race, color, or national origin, and to not delay or deny foster or adoption placements based on the child's or the adults' race, color, or national origin.

### 5. Enact state laws based on the cornerstones of uniformity, race-neutrality, and individualized determination in all child welfare proceedings.

All state constitutions include counterparts to the federal Equal Protection and Due Process Clauses, often providing greater protections to individuals than the federal constitution. State lawmakers should heed their duties to uphold the fed-



eral and state constitutions and put in place concrete reforms that prioritize the best interests of all children based on uniformity, race-neutrality, and individualized determinations.

With this in mind, states should enact statutes that will clearly and unambiguously amend or repeal their existing rules, policies, and procedures to the extent that they perpetuate race-based, unequal treatment of children and adults with Indian ancestry. States should enact statutes that will clearly and unambiguously direct the relevant state enforcement officers to disregard race-based BIA guidelines or rules.<sup>27</sup>

6. Apply and, where needed, strengthen race-neutral provisions of the Uniform Child Custody Jurisdiction and Enforcement Act as applied in all child custody proceedings.

Some states have enacted requirements that state courts must apply the federal Act's race-based standards to children and adults with Indian ancestry in child welfare proceedings.<sup>28</sup> Some states, wisely, have not.<sup>29</sup> An ICWA carve-out from state law means that those states' courts have to apply the separate procedures that the federal Act requires for children and adults with Indian ancestry in child custody proceedings. This often leads state courts to refuse to hear cases involving children or adults with Indian ancestry solely because of their race, even in situations where the state would otherwise have an obligation to hear a case.

These states should repeal their ICWA carve-outs to protect race neutrality in the state court's determination as to whether it can hear a case. There can be no law under our Constitution that prevents individuals from knocking on the courthouse door or prevents courts from hearing cases based on the amount of minority blood they have. This country committed itself to that principle when it ratified the Fourteenth Amendment, overturned *Dred Scott*, and overturned *Plessy v. Ferguson*.<sup>30</sup>

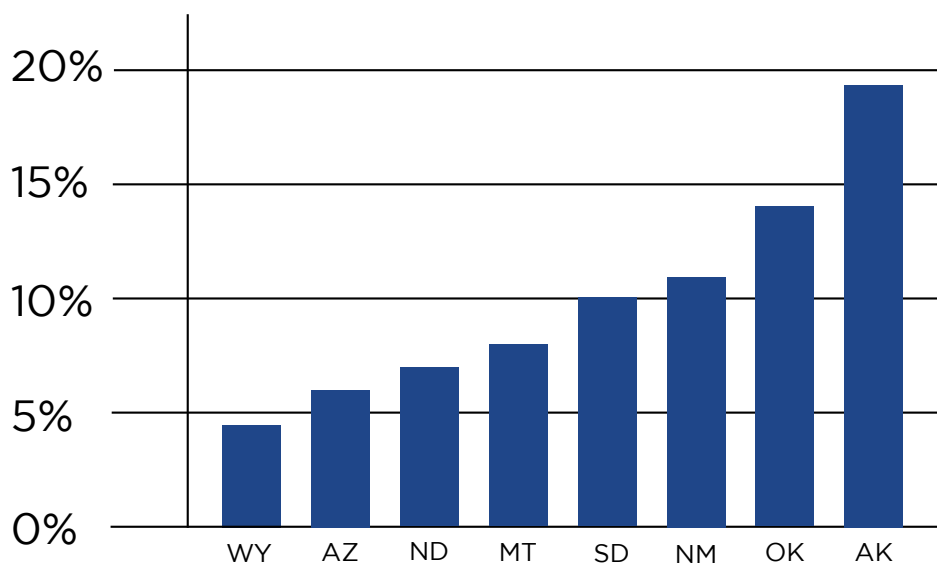
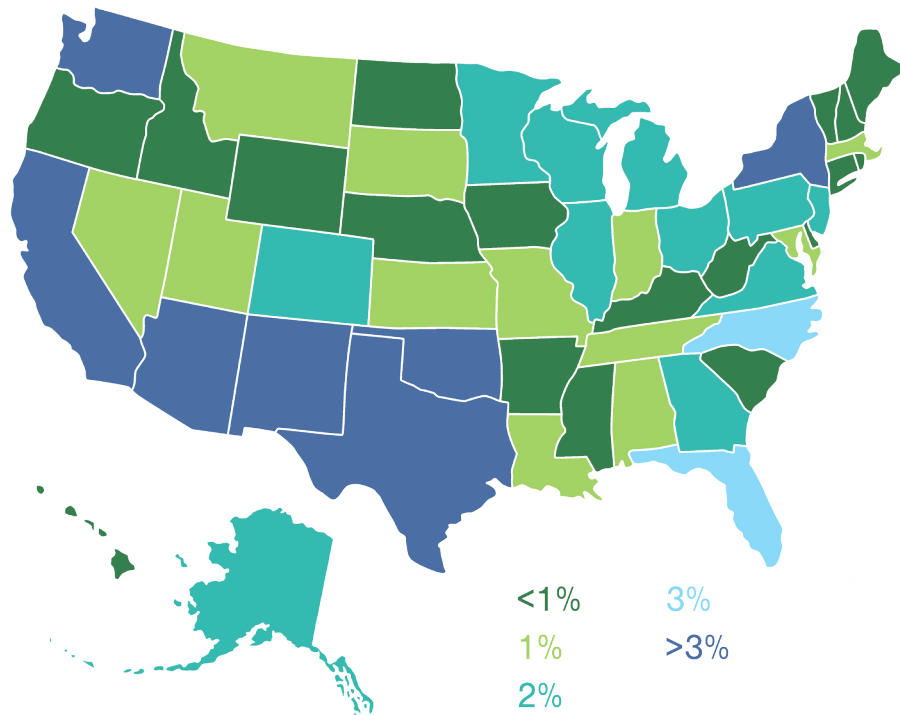


## Conclusion

This is a basic human rights issue. Do we treat children as children, or as pawns in a game of political intrigue? Do we treat individuals as individuals, or do we treat them as flies caught in the web of presumed political affiliations that they did not choose, that they cannot choose? Federal and state governments have no authority to draw a race-based line between American citizens who have Indian ancestry and all other American citizens, especially when this treatment forces government to ignore the best interests of American children with Indian ancestry. By enacting these reforms, tribes will not lose autonomy over tribal reservations and tribal citizens living on reservations. But these reforms respect the unwavering principles of our Constitution, which do not allow race-based exclusionary policies targeting minorities.

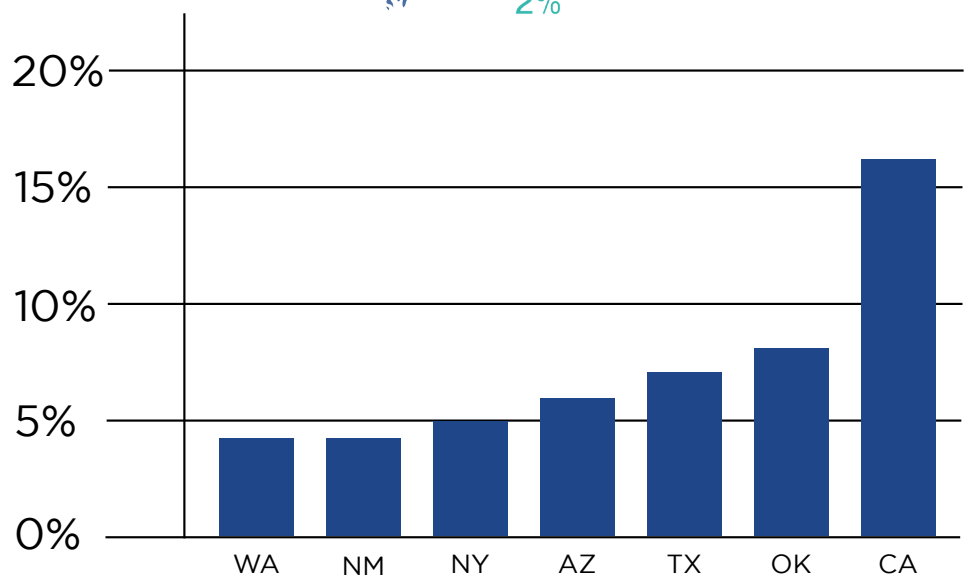
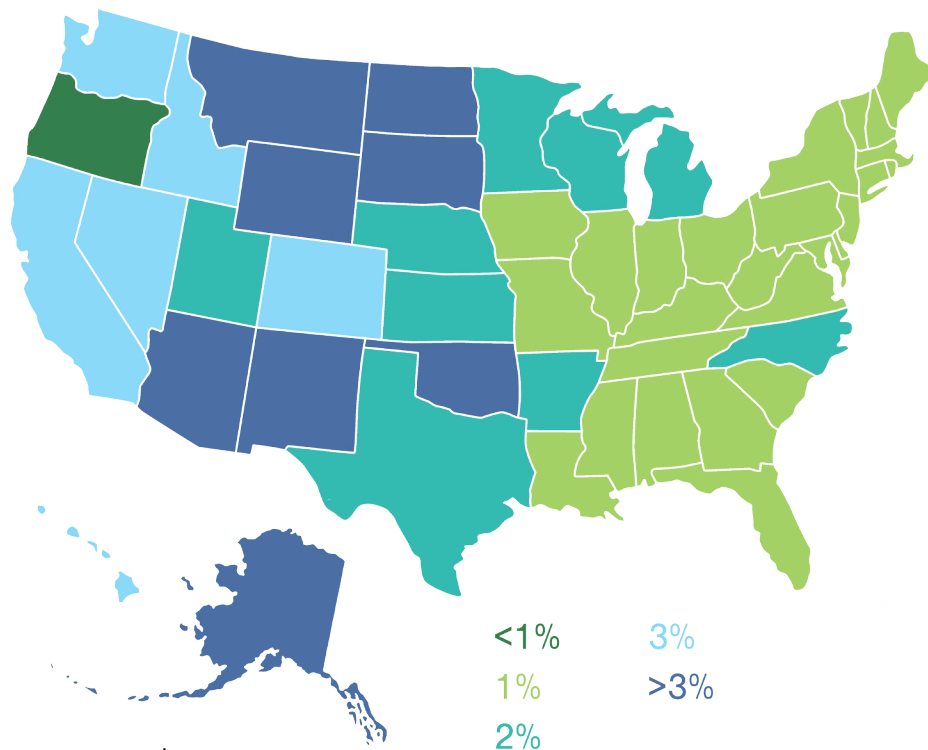
# Appendix A

## Native American Population in a State as a Percentage of Total Native American Population in that State



States with native population over 3% of total state population

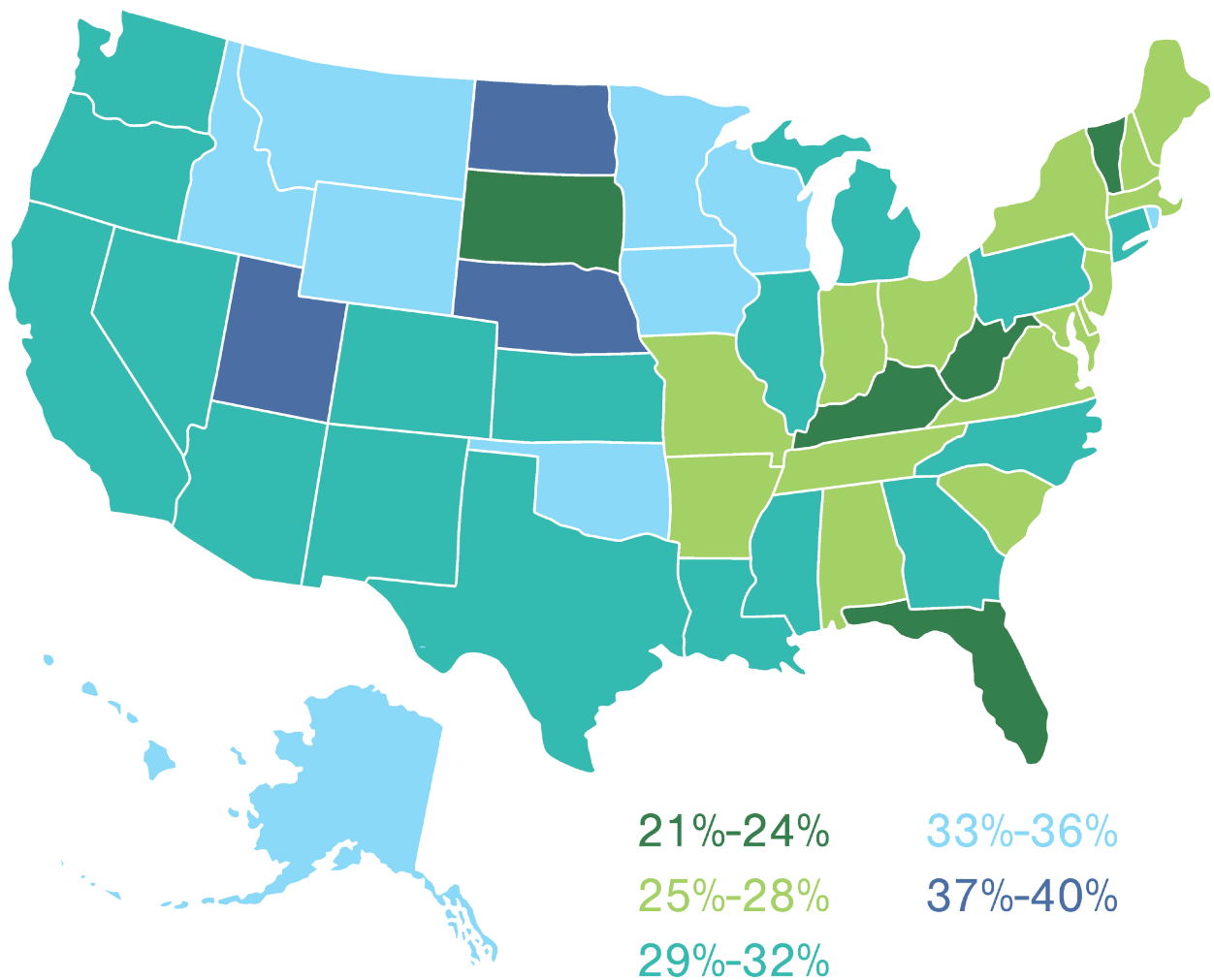
## Native American Population per State as a Percentage of Total Native American Population in the United States



States with native population over 3% of total national native population



## Under 18 Native American Population per State as a Percentage of Total Native American Population in that State



*SOURCE: All data is derived from the most current estimates, dated July 1, 2014, on the U.S. Census Bureau's FactFinder site.*

*<http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml>*

*Data on those less than 18 years old is included in state-by-state breakdowns.*

*[http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP\\_2014\\_PEPAS-R5H&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPAS-R5H&prodType=table)*


*Calculations as to percentages of populations were done by the Goldwater Institute using raw numbers from the census FactFinder.*

# References

1. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).
2. The Indian Child Welfare Act (ICWA) applies to “child custody proceedings.” “Child custody proceeding” is a term-of-art used in the Indian Child Welfare Act, and includes “foster care placement,” “termination of parental rights,” “preadoptive placement,” and “adoptive placement” but excludes, notably, a child custody matter arising out of a divorce proceeding or juvenile delinquency. 25 U.S.C. § 1903(1).
3. Comment, *The Indian Battle for Self-Determination*, 58 CAL. L. REV. 445 (1970); Cohen’s Handbook on Federal Indian Law § 1.07 (LexisNexis 2012 Edition).
4. Indian Child Welfare Act, Pub. L. 95-608, 92 Stat. 3069 (November 8, 1978), codified at 25 U.S.C. §§ 1901-1963.
5. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (November 26, 1979) (“1979 Guidelines”). In 2015, the Bureau of Indian Affairs issued new Guidelines that “supersede and replace” the 1979 Guidelines. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10147 (February 25, 2015) (“New Guidelines”). The Guidelines, in most respects, go beyond what the Act says. The Guidelines attempt to describe how the Act operates and how it is to be applied by the state courts.
6. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).
7. *Plessy v. Ferguson*, 163 U.S. 537 (1896).
8. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).
9. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *Adoptive Couple v. Baby Girl*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2552 (2013). *Holyfield* defined what it means for a child to be domiciled on the reservation, which had the unintended consequence of making it harder for birth parents and children to take affirmative steps to establish an off-reservation domicile, or, put differently, made it easier for tribes to get cases transferred to tribal court. Perhaps the most damaging aspect of *Holyfield* is its recognition of the tribal veto power over the personal decisions and choices of adults with Indian ancestry. In *Adoptive Couple*, or the *Baby Veronica* case, the Court decided that because the birth father never had physical custody of *Baby Veronica* before the *Adoptive Couple* adopted her, the Indian Child Welfare Act does not apply to her. The Court, thus, avoided ruling on the constitutionality of the race-based placement preferences by saying that, given the peculiar set of facts in the *Baby Veronica* case, the Act did not apply to her adoption by non-Indian adoptive parents.
10. The guidelines tell state agencies, state courts, and private child welfare agencies how to implement and enforce the Indian Child Welfare Act.



11. 25 U.S.C. §§ 1931-1934, 1951-1952, 1961-1963.
12. 80 Fed. Reg. at 10149.
13. 25 U.S.C. §§ 1915, 1916.
14. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).
15. 25 U.S.C. § 1912(c).
16. See, e.g., *Adoptive Couple v. Baby Girl*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2552, 2565-2571 (2013) (Thomas, J., concurring).
17. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).
18. 25 U.S.C. §§ 1911(a), 1911(b), 1918, 1919, 1920.
19. Specific jurisdiction is the norm while general jurisdiction is the exception. Specific jurisdiction requires that a litigant is sued for those things that also constitute minimum contacts between the forum and the litigant. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).
20. 25 U.S.C. §§ 1911(a), 1911(b), 1918, 1919, 1920. See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 59 & n.6, 60-61 (1989) (Stevens, J., dissenting, joined by Rehnquist, C.J., & Kennedy, J.).
21. *Adoptive Couple v. Baby Girl*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2552 (2013).
22. This has been done before. For example, entire portions of the Civil Aeronautics Board regulations were repealed by the Airline Deregulation Act, Pub. L. 95-504, 92 Stat. 1705 (1978), the Interstate Commerce Commission's regulations underwent wholesale repeal due to the deregulation measures passed in the 1970s and 1980s.
23. The Interethnic Placement Act, or IPA, was enacted as § 1808 of the Small Business Job Protection Act, Pub. L. 104-188 (1996). The provisions of IPA are codified at 42 U.S.C. §§ 671(a)(18), 674(d), 1996b(c). IPA expanded upon the Howard M. Metzenbaum Multiethnic Placement Act, or MPA, which was enacted as §§ 551-553 of the Improving America's Schools Act, Pub. L. 103-382 (1994). MPA was codified at 42 U.S.C. § 5115a; this section was repealed in its entirety by IPA. MPA allowed for the use of "cultural, ethnic, or racial background of the child" as "one of a number of factors used to determine the best interests of [the] child." Improving America's Schools Act, Pub. L. 103-382, § 553(a)(2), codified at 42 U.S.C. § 5115a(a)(2). IPA, which repeals MPA, does not permit such use.
24. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).
25. See, e.g., A.R.S. § 8-105.01
26. 25 U.S.C. § 1921.
27. This proposal for reform remains the same in states like Arizona that have Proposition 122-type constitutional or statutory provisions, as well as in states



that do not. Proposition 122, codified at ARIZ. CONST. art. II, § 3, prohibits the use of personnel and financial resources to enforce, administer or cooperate with an unconstitutional federal action or program. Perhaps the duty of state lawmakers to uphold the federal and state constitutions is more explicit under Proposition 122. But the lack of a Proposition 122-type provision does not mean lawmakers in those states have less of a duty to uphold the federal and state constitutions.

28. See, e.g., Ariz. Rev. Stat. § 25-1004; Wis. Stat. § 822.04.

29. See, e.g., Colo. Rev. Stat. § 14-13-102.

30. *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896).