TRIBES, STATES, AND SOVEREIGNS' INTEREST IN CHILDREN*

EMILY J. STOLZENBERG**

Haaland v. Brackeen*, last year's unsuccessful Supreme Court challenge to the Indian Child Welfare Act ("ICWA"), trumpeted a critique made consistently over the statute's forty-five-year history: that ICWA harms Indian children by subordinating their interests to their tribes' interests, unlike State family law, which pursues the "best interests of the child." This critique is likely to underpin future challenges to ICWA—and it is wrong in both fact and theory. Not only does ICWA generally benefit Indian children. More fundamentally, a tribe's interest in Indian children corresponds directly to an interest States regularly pursue vis-à-vis all children: the political community's interest in self-perpetuation. ICWA just does explicitly what State law does implicitly. This means that at base, challenges to ICWA are fights about which sovereign, representing which political community, gets to govern Indian children.*

This Article takes opposition to ICWA as an opportunity to scrutinize the nature and permissible scope of political communities' interests in children. Recognizing that all sovereigns pursue their political communities' interests in children—as ICWA forces us to do—requires admitting the uncomfortable truth that a community's and a child's interests may at times conflict. Acknowledging this possibility, in turn, makes clear the need to develop tools to identify and manage such conflicts when they occur.

** Associate Professor of Law and Reuschlein Emerging Scholar, Villanova University Charles Widger School of Law. For helpful discussion and comments, I am grateful to Gregory Ablavsky, Kerry Abrams, Susan Appleton, Barbara Atwood, Naomi Cahn, Michelle Dempsey, Maxine Eichner, Brenner Fissell, Matthew Fletcher, Sally Goldfarb, Meredith Harbach, Deborah Hellman, Clare Huntington, Ann Juliano, Solangel Maldonado, Michael Moreland, Teri Ravenell, Itay Ravid, Neoshia Roemer, Clare Ryan, Elizabeth Scott, Matthew Shapiro, Joseph Singer, Larry Solum, Nomi Stolzenberg, Gregg Strauss, and Sean Williams. I thank Daniel Markovits especially for encouraging this project in its infancy. This piece benefited immensely from the engagement of participants in the Family Law Scholars and Teachers Conference, New York Area Family Law Workshop, and AALS Sections on Education Law and Children and the Law Works-in-Progress Session, as well as in faculty workshops at Boston College Law School, Texas A&M University School of Law, the University of Virginia School of Law, and the Villanova University Charles Widger School of Law. PJ Brogan, Alannah Binotto, Adriana Klimkiewicz, and Josh Rothenberg provided invaluable research assistance. I thank Kate Kozain, Aidan Kelley, Kengyeh Chu, and the editors of the *North Carolina Law Review* for their excellent editorial work on and enthusiastic engagement with this piece.

This Article proposes one such means. Drawing from political theory and family law scholarship, it outlines a four-part normative framework for assessing political communities' attempts to influence their youngest members' development. It then applies the framework to defend ICWA, to assess abolitionist critiques of the child welfare system, and to narrow debates over gender-affirming healthcare for transgender youth. While I focus on just three applications for illustrative purposes, the Article's "citizen-shaping" framework offers broad purchase, yielding insights across contexts in which sovereigns seek to regulate children.

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INTRODUCTION

Last year's unsuccessful challenge to the Indian Child Welfare Act ("ICWA"),[1] *Haaland v. Brackeen*,[2] trumpeted a critique made consistently over the statute's forty-five-year history: that it harms Indian children by subordinating their interests to the interests of their tribes.[3] Enacted in 1978 to remedy the "alarmingly high" rate at which Native American children were

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

2. 599 U.S. 255 (2023) (affirming Congress's authority to enact ICWA, rejecting anticommandeering challenges, and dismissing equal protection and nondelegation challenges for lack of standing).

3. *See, e.g.*, Transcript of Oral Argument at 183, *Brackeen*, 599 U.S. 255 (No. 21-376) (Kagan, J.) ("I think some of the strong feelings about this case come from a sense of, . . . are you saying that the political community is more important than the welfare of the children?").

being removed from their homes,[4] ICWA institutes "minimum Federal standards"[5] for certain "child custody proceedings" involving "Indian children."[6] In the *Brackeen* case, seven individual petitioners and the State of Texas attacked ICWA not only for exceeding Congress's power, but also for violating equal protection by "deny[ing] Indian children the best-interests determination they would receive under state law."[7] In the petitioners' view, "ICWA deems children little more than chattel, a 'resource' to be gathered up by a tribe," in "[d]isregard[]" of the children's "well-being and best interests."[8] On this ground, they decried ICWA as aberrant, a deviation from the norm of State family law under which a "child's ultimate safety and well-being [is] the paramount concern."[9]

Although the *Brackeen* majority upheld the statute, several Justices echoed the petitioners' rhetorically powerful critique. Justice Alito condemned ICWA for "sacrific[ing] the best interests of vulnerable children to promote the interests of tribes in maintaining membership."[10] Justice Thomas characterized the statute as "dictating that state courts place Indian children with Indian caretakers even if doing so is not in the child's best interest."[11] And Justice Kavanaugh concurred to "emphasize" what he viewed as the "serious[ness]" of the "equal protection issue," which the majority did not reach.[12] Opining that under ICWA, "a child . . . may in some cases be denied a particular placement because of the child's race—even if the placement is otherwise determined to be in the child's best interests," Kavanaugh practically invited future challenges

4. 25 U.S.C. § 1901(4). In some tribes, as high as 25% to 35% of children were removed from their homes and placed in non-Indian families. H.R. REP. NO. 95-1386, at 9 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7531.

5. Among other things, ICWA grants tribes the right to intervene in State-court child welfare proceedings and to have such proceedings transferred to tribal courts, requires active efforts toward family reunification, mandates a heightened evidentiary standard for parental rights terminations, and establishes placement preferences for Indian children. 25 U.S.C. § 1911(c) (right of intervention); *id.* § 1911(b) (right of transfer); *id.* § 1912(d) (active efforts); *id.* § 1912(f) ("evidence beyond a reasonable doubt"); *id.* § 1915(a) (requiring "preference . . . in the absence of good cause to the contrary" for adoptive "placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families").

6. *Id.* §§ 1902, 1903(1); *id.* § 1903(4) ("'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."). I follow ICWA in referring to "Indian children" and "Indian tribes."

7. Brief for Individual Petitioners at 32, *Brackeen*, 599 U.S. 255 (No. 21-376) [hereinafter Brackeens' Brief]; *see also* Brief for Petitioner the State of Texas at 8, 50, 68, *Brackeen*, 599 U.S. 255 (No. 21-376) [hereinafter Texas's Brief].

8. Brackeens' Brief, *supra* note 7, at 40–43 (quoting 25 U.S.C. § 1901(3)); Texas's Brief, *supra* note 7, at 50 ("ICWA empowers Indian *tribes* at the cost of Indian *children*.").

9. Brackeens' Brief, *supra* note 7, at 2.

10. *Brackeen*, 599 U.S. at 373 (Alito, J., dissenting).

11. *Id.* at 334 (Thomas, J., dissenting).

12. *Id.* at 333 (Kavanaugh, J., concurring); *id.* at 293–96 (majority opinion).

to the statute.[13] Almost certainly forthcoming,[14] these challenges are likely to repeat the critique that by empowering Indian tribes to assert an interest in Indian children, ICWA deviates from State family law and harms Indian children.[15]

This critique is wrong in both fact and theory. Not only does ICWA instantiate child welfare best practices that serve the interests of all children.[16] More fundamentally, a tribe's interest in Indian children also corresponds directly to an interest States regularly pursue vis-à-vis all children: the political community's interest in self-perpetuation, that is, in continuing itself into the future.[17] In protecting a collective interest distinct from a child's individual interest, ICWA just does explicitly what State law does implicitly.

At base, then, challenges to ICWA are fights about which sovereign gets to govern Indian children and how.[18] For cases regarding children always involve (at least) three kinds of interested parties: the children themselves; their parents or would-be parents; and the sovereign, which acts on behalf of the

13. *Id.* at 333 (Kavanaugh, J., concurring); *see also id.* at 334 ("Courts, including ultimately this Court, will be able to address the equal protection issue when it is properly raised by a plaintiff with standing."); *cf. id.* at 264 (majority opinion) ("[ICWA] requires a state court to place an Indian child with an Indian caretaker . . . even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay there.").

14. *See, e.g.*, Leanne Gale & Kelly McClure, Note, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 YALE L. & POL'Y REV. 292, 304–11 (2020) (describing "concerted attacks" on ICWA over "the past decade").

15. *Brackeen*, 599 U.S. at 372 (Alito, J., dissenting) ("The paramount concern [in] [d]ecisions about child custody, foster care, and adoption . . . has long been the 'best interests' of the children involved. But in many cases, provisions of [ICWA] compel actions that conflict with this fundamental state policy, subordinating what family-court judges . . . determine to be in the best interest of a child to what Congress believed is in the best interest of a tribe.").

16. *See* Brief for State of California et al. as Amici Curiae in Support of the Federal and Tribal Parties at 6, *Brackeen*, 599 U.S. 255 (No. 21-376) [hereinafter California et al. Amicus Brief] ("ICWA's emphasis on family preservation aligns with the current best practices recommended by child welfare experts."); Brief for Casey Family Programs and Twenty-Six Other Child Welfare and Adoption Organizations as Amici Curiae in Support of Federal and Tribal Defendants at 7, *Brackeen*, 599 U.S. 255 (No. 21-376) [hereinafter Casey Amicus Brief] ("ICWA is a context-specific application of child welfare practices that best serve *all* children.").

17. The term "States," capitalized, refers to the fifty U.S. States, to differentiate them from the idea of "the state," which this Article generally disaggregates into the terms "political community" or "polity," "sovereign," and (sometimes) "government." *See infra* note 18 and accompanying text.

18. I use the term "political community" or "polity" to refer to the community of persons whose collective governance is organized and managed through a given set of political institutions. The "sovereign" is the set of institutions that exercises political power and authority vis-à-vis the political community. In a liberal democratic polity, for example, the political community is comprised of the citizenry and the sovereign is the state. Of course, in the nonideal world that we inhabit, not all members of the political community may enjoy equal power to influence how the sovereign exercises authority in the community's name. *Cf., e.g.*, A. John Simmons, *Ideal and Nonideal Theory*, 38 PHIL. & PUB. AFFS. 5, 6 (2010) (describing Rawls's distinction between ideal and nonideal theory as reflecting "the venerable problem of characterizing the relationship between philosophical theory and political practice"). I intend the term "political community" to reflect the descriptive reality that co-citizens are bound together through their shared political institutions, even when those institutions are imperfect.

political community.[19] In most cases, the sovereign is a State.[20] When an Indian child is involved, however, the relevant sovereigns also include an Indian tribe.[21] The *Brackeen* case is best understood not as a conflict between the interests of tribes and of Indian children, but rather as a contest over which political community—that represented by a State or by a tribe—gets to define Indian children's interests. Indeed, the *Brackeen* majority obliquely recognized this competition when it rejected the petitioners' argument that "federal power over Indians," and by extension tribal self-governance, "stops where state power over the family begins."[22]

Acknowledging political communities' interests in children, however, requires admitting that a community's and a child's interests may at times diverge. Opponents of ICWA criticize the statute precisely because its open avowal of tribal interests makes the potential for conflict with children's interests conceptually apparent. But upon closer examination, State family law is also rife with such conflicts, and non-Indian children are also governed by laws reflecting their political community's interest in them as future adult members.[23] ICWA is no aberration, but rather the clearest example of a

19. *See, e.g.*, Naomi Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory*, 53 SETON HALL L. REV. 1443, 1445 (2023) ("The parent-child-state triad is a well-established concept in American family law . . . ."). *See generally id.* (arguing that political partisanship complicates the traditional triad).

20. In the United States, most regulation of children is conducted by States, but not all. For discussions of the federal government's role in family regulation, see generally, for example, Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761 (2005); Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267 (2009); Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57 (2002); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998); Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787 (2015); Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175 (2000); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001). This Article speaks mainly in terms of States as sovereigns to reflect their predominant role in regulating children, not to exclude federal sources of family law.

21. *See infra* Section I.A. In describing Indian tribes as political communities, I do not mean to suggest that tribal communities are *solely* political. It is certainly true that federally recognized tribes are political entities under U.S. law and that tribes, whether federally recognized or not, exercise many important governance functions. But whereas the political community in a liberal democracy is constituted primarily by and through politics—the sharing of governance, *see supra* note 18 and accompanying text—Indian tribes' self-definitions tend to center around community and connectedness, *see infra* note 107 and accompanying text. Political theorists working in the Anglo-American tradition might describe Native nations as an especially thick form of political community. *See infra* note 108. Because my goal is to situate ICWA in the context of U.S. family law, my arguments rest mainly on the political status of federally recognized tribes under U.S. law, rather than theoretical analogies drawn between Native nations and large, diverse nation-states.

22. Haaland v. Brackeen, 599 U.S. 255, 276 (2023); *see also id.* at 331–32 (Gorsuch, J., concurring) ("ICWA sharply limits the ability of States to impose their own family-law policies on tribal members. But . . . state intrusions on tribal authority have been a recurring theme throughout American history.").

23. *See infra* Part II.

foundational feature of the law governing children: the potential for conflict between political communities' and children's interests.

This Article takes opposition to ICWA as an opportunity to scrutinize these potential conflicts.[24] Sovereigns will inevitably seek to shape children to perpetuate the political community they represent, and it is often good that they do so.[25] But there are normative and legal limits on how far sovereigns can go, and articulating these limits requires an account of the nature and scope of political communities' permissible interests in children.

This Article offers one such account. Drawing from the political theory literature about civic education and recent family law debates around the Restatement of Children and the Law, I propose a four-part framework for evaluating sovereigns' attempts to perpetuate their political communities. Under this "citizen-shaping" framework, legitimate sovereigns have a permissible interest in ensuring that their future adult members develop the kinds of competencies necessary for participatory polities to continue in existence.[26] That interest does not, however, permit a sovereign to act in a way that prevents children from becoming adults capable of developing their own convictions and making their own choices about their life paths.[27] Nor may a sovereign employ means that are overly intrusive or harmful to a child's physical and emotional health.[28] Because political communities' interests influence all regulation of children, this evaluative framework provides purchase on a broad range of issues. I consider just three of many applications for purposes of illustration, deploying the framework to defend ICWA from its detractors, analyze abolitionist critiques of the child welfare system, and narrow debates over gender-affirming healthcare for transgender youth.

The Article proceeds as follows. Part I assesses the critique that by protecting tribes' interests in Indian children, ICWA deviates from State family law and harms Indian children. There are two factual problems with this "aberration" critique: not only is divergence between ICWA and State family law overstated, but the statute also instantiates child welfare best practices that serve the interests of all children.[29] Indeed, forty-five years of experience with

24. Although parents are vital parties in questions concerning children, I leave consideration of how parents' interests intersect with political communities' and children's interests for future work.

25. *See infra* Part III; *cf.* LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 4 (2006) ("argu[ing] that government has an important responsibility to carry out" the "formative project" of "producing persons capable of responsible personal and democratic self-government[,] . . . but that families and other institutions of civil society are also significant sites in which this development occurs").

26. *See infra* Sections III.A–B.

27. *See infra* Section III.B.

28. *See infra* Sections III.C–D.

29. *See infra* Section I.A.

ICWA bears out Congress's judgment that it is generally in Indian children's interest to be raised by family members and in tribal communities.[30]

After dismantling the aberration critique's factual basis, Part I begins to refute it theoretically by establishing the political nature of tribes' interests in Indian children—a proposition also central to defending ICWA against the coming equal protection challenges. Like all sovereign political entities, Indian tribes have an interest in social reproduction, the "process" by which a "society prepares persons to be capable, responsible members of the community and good citizens."[31] Ensuring that Indian children can grow into future adult participants in tribal life and teachers of tribal culture and traditions is necessary to tribes' survival as political communities. ICWA protects tribes' inherently political interests in social reproduction by allowing them to retain control over the placement, and therefore the development and education, of their future adult members.

With this background in place, Part II exposes the aberration critique's deep theoretical problem: it erroneously positions State family law as an objective, impartial arbiter of children's "best interests." But State-law regulation is also unavoidably shaped by visions of the future roles that children should play in their political community. This is true even of "private" custody cases between separated and divorced parents, as longstanding scholarly criticisms of the best-interests standard and older case law denying custody to otherwise-fit LGBTQ parents illustrate. So ICWA's protection of tribal interests in social reproduction is exemplary, rather than exceptional. Because children's best interests cannot be definitively and objectively determined,[32] all sovereigns' conceptions of what serves children's interests are contestable and require defense. Liberal democratic societies therefore require normative frameworks for evaluating and circumscribing sovereigns' actions vis-à-vis children.

30. Haaland v. Brackeen, 599 U.S. 255, 307 (2023) (Gorsuch, J., concurring) ("Considerable research 'subsequent to Congress's enactment of ICWA' has 'borne out the statute's basic premise'—that 'it is generally in the best interests of Indian children to be raised in Indian homes.'" (quoting Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Federal and Tribal Parties at 10, *Brackeen*, 599 U.S. 255 (No. 21-376) (cleaned up))); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989) ("ICWA . . . 'seeks to protect the rights of the Indian child as an Indian . . . .'" (quoting H.R. REP. NO. 95-1386, at 23 (1978))).

31. MCCLAIN, *supra* note 25, at 50; *see also* AMY GUTMANN, DEMOCRATIC EDUCATION 15 (1987) (describing "social reproduction" as the process by which a society perpetuates itself by "transmit[ting]" its "values, attitudes, and modes of behavior to" the next generation of members).

32. *Cf.* David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805, 815 (1985) [hereinafter Chambers, *Legalization of the Family*] (describing as "non-neutral" the "premise[] . . . of the state . . . as a supporter of . . . a system of parental control over the children who live with them"); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 850 (1985) (describing how parental "powers are established by state regulations . . . that are hardly noticed and certainly not considered state intervention").

Part III proposes such a framework. I argue that participatory polities—both Indian tribes and liberal democracies[33]—have a permissible interest in ensuring that their future adult members develop a certain set of *sociopolitical capacities*,[34] so long as the sovereign's regulation is sufficiently related to capacity development and gives way to a child's core interest in physical and emotional safety. This argument translates into four discrete normative requirements for permissible regulation of children, which together comprise what I call the "citizen-shaping framework."

Part IV applies this framework to defend ICWA, to analyze abolitionist critiques of the child welfare system, and to assess recent State restrictions on gender-affirming medical care for transgender youth. Though factually distinct, these three examples share a common regulatory structure, for in each case the sovereign shapes children indirectly, just as it does in "private" custody cases. ICWA passes muster under the citizen-shaping framework: the statute promotes Indian children's ability to develop sociopolitical capacities necessary for participatory tribal membership and does so only insofar as is compatible with the children's physical and emotional wellbeing.[35] Abolitionist analyses of the child welfare system as aimed at regulating poor and minority families are continuous with the concerns that motivated ICWA's adoption, and abolitionists marshal compelling evidence that the system inflicts widespread, unnecessary harm. However, the most thoroughgoing abolitionist demands to dismantle the system entirely fail to grapple with the underlying insight of this project: that the political community's interest in children cannot be eliminated, only cabined. Finally, the citizen-shaping framework calls for skepticism toward total restrictions on children's access to gender-affirming medical care. Such government interventions are highly suspect because gender is unrelated to the capacities required of citizens in a liberal democratic polity. Moreover, complete prohibitions are extremely invasive and detrimental to children's health. However, it remains open for States to conduct some regulation of gender-affirming treatments in the name of children's physical and emotional safety, provided that such regulation would be equally appropriate as applied to

33. GUTMANN, *supra* note 31, at xi (describing democracy as "a political ideal . . . of a society whose adult members are, and continue to be, equipped by their education and authorized by political structures to share in ruling" (italics omitted)).

34. Because tribal communities are not solely political, *see supra* note 21, the capacities their members require are likely to be both more extensive than and different from the capacities a liberal democracy can legitimately compel its young citizens to acquire. I use the term "sociopolitical capacities" to remain linguistically agnostic about what capacities might be needed to perpetuate a given political community.

35. 25 U.S.C. § 1912(e)–(f) (permitting foster care placement and termination of parental rights when "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"); *id.* § 1922 (permitting emergency removal or placement "in order to prevent imminent physical damage or harm to the child"); *id.* § 1915(a)–(b) (permitting deviation from placement preferences for "good cause").

nonpoliticized medical care. The Article concludes with some preliminary thoughts about other contexts in which the citizen-shaping framework might apply.

I. TRIBES AND INDIAN CHILDREN

ICWA was enacted to address a family-separation crisis with grievous consequences for Indian children, their families, and their tribes alike. After conducting extensive hearings, Congress found "that an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children . . . and that an alarmingly high percentage of such children [were being] placed in non-Indian foster and adoptive homes and institutions."[36] In States with large Native American populations, as high as 25% to 35% of children were removed from their homes, and 85% to 90% of these were placed with non-Indian families.[37] Driving these unwarranted removals was "State[] . . . administrative and judicial bodies['] . . . fail[ure] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[38] ICWA responded to the "wholesale separation of Indian children from their families" by "establishing minimum Federal standards for the removal of Indian children . . . and the placement of such children in foster or adoptive homes . . . which will reflect the unique values of Indian culture."[39] In enacting these safeguards, Congress declared that it was both "protect[ing] the best interests of Indian children and promot[ing] the stability and security of Indian tribes and families."[40]

Congress's conclusion that ICWA simultaneously "protect[s]" Indian children, families, and tribes is well-founded.[41] ICWA's opponents criticize it for recognizing tribes' interests in Indian children, but their argument that the statute deviates from State family law and therefore harms Indian children is unsupportable. As Section I.A will show, not only is any divergence between ICWA and State family law overstated, but the statute's requirements also instantiate child welfare best practices that further, rather than undermine, the

36. *Id.* § 1901(4).

37. H.R. REP. NO. 95-1386, at 9 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7531; *see also ICWA History and Purpose*, MONTANA.GOV, https://dphhs.mt.gov/cfsd/icwa/icwahistory [https://perma.cc/VUM8-WGRB] ("Prior to the passage of ICWA, approximately 75–80% of Indian families living on reservations lost at least one child to the foster care system.").

38. 25 U.S.C. § 1901(5).

39. H.R. REP. NO. 95-1386, at 8–9; 25 U.S.C. § 1902. Congress also "provid[ed] for assistance to Indian tribes in the operation of child and family service programs." 25 U.S.C. § 1902.

40. 25 U.S.C. § 1902.

41. *Id.*; *see also* Haaland v. Brackeen, 599 U.S. 255, 297 (2023) (Gorsuch, J., concurring) (explaining that ICWA "safeguards the ability of tribal members to raise their children free from interference by state authorities and other outside parties").

interests of Indian children.[42] Moreover, as Section I.B will argue, the interest that ICWA protects—tribes' interest in social reproduction, or perpetuating the political communities they represent—is an interest that tribes, as sovereigns, share with States.[43] Indeed, by protecting Indian tribes' political interest in social reproduction, ICWA recognizes tribes as the "third sovereign" they are under our constitutional system.[44] Understanding that tribes are interested in Indian children as sovereigns not only establishes tribes' structural similarity to States, but will also be vital to defending ICWA against the coming equal protection challenges.[45]

A. *ICWA Compared to State Family Law*

Although ICWA's critics argue that the statute departs from State family law to the detriment of Indian children, any divergence between the two is more hypothetical than actual.[46] First, because ICWA is predominantly a procedural statute, its substantive standards apply in only a subset of cases regarding the custody of Indian children.[47] Second, many jurisdictions have adopted State ICWAs or enacted general State family law provisions that reflect ICWA's respect for tribal structures and relations.[48] Finally, and most importantly, ICWA instantiates child welfare best practices that have been proven to further the interests of all children.[49] For this reason, even in the rare instances in which ICWA might dictate different outcomes than State family law, it's unlikely that the statute's application detrimentally affects Indian children. To the contrary, ICWA most likely benefits those children whose child custody proceedings it governs.

ICWA's procedural provisions mean that its substantive elements apply in only a subset of cases regarding the custody of Indian children: those adjudicated in State courts.[50] For jurisdictional reasons, "[m]any Indian child

42. 25 U.S.C. § 1902; *see infra* Section I.A; *see also, e.g.*, Casey Amicus Brief, *supra* note 16, at 1 ("*Amici*'s perspective, based on decades of working directly with child welfare systems across the nation, is that the [ICWA] serves the best interests of children covered by the Act and their families."); Marcia Zug, *ICWA's Irony*, 45 AM. INDIAN L. REV. 1, 3 (2021) ("[M]odern child welfare policy substantially aligns with the ICWA.").

43. *See infra* Section I.B, Part II.

44. *See* Sandra Day O'Connor, Remarks, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

45. *See infra* note 75.

46. For a comprehensive account of how ICWA's requirements are not so different from State child welfare law, see Zug, *supra* note 42, at 25–27, 35–83.

47. *See infra* notes 50–57 and accompanying text.

48. *See infra* notes 58–60 and accompanying text.

49. *See infra* notes 61–74 and accompanying text.

50. Moreover, ICWA governs only a "subset of family law cases: foster care placement, termination of parental rights, preadoptive placement, and adoptive placement of Indian children."

custody cases are never heard in state court."[51] Not only are "custody cases of reservation domiciled children . . . under the exclusive jurisdiction of tribal courts,"[52] but ICWA's provisions governing "concurrent state and tribal jurisdiction" may also direct Indian child custody matters to tribal courts.[53] Under ICWA, State-court proceedings involving "an Indian child" who is "not domiciled or residing within the reservation of the Indian child's tribe . . . *shall*" be "transfer[red]" to tribal court[54]

> at the request of either the child's parent or the tribe, unless the tribal court declines jurisdiction, the parent objects to the transfer, or the [S]tate court concludes that there is good cause to retain jurisdiction.[55]

When the statute's jurisdictional elements are triggered, ICWA functions much like "uniform and federal legislation, including the UCCJEA . . . and UIFSA,"[56] governing "*who* should make the custody determination concerning [Indian] children—not what the outcome of that determination should be."[57] In this way, ICWA is similar to other procedural State family law aimed at determining which jurisdiction should hear which cases.

Moreover, ICWA *is* State law in many jurisdictions. Twelve States—California, Colorado, Michigan, Minnesota, Nebraska, New Mexico, New Jersey, Oklahoma, Oregon, Vermont, Washington, and Wisconsin—all have

Ann Laquer Estin, *Equal Protection and the Indian Child Welfare Act: States, Tribal Nations, and Family Law*, 35 J. AM. ACAD. MATRIM. L. 201, 210 (2022) [hereinafter Estin, *Equal Protection*]; *see* 25 U.S.C. § 1903(1).

51. Zug, *supra* note 42, at 25 n.106; *see* 25 U.S.C. § 1911(a).

52. Zug, *supra* note 42, at 25 n.106; *see* 25 U.S.C. § 1911(a).

53. Estin, *Equal Protection*, *supra* note 50, at 216; *see* 25 U.S.C. § 1911(b). And, "[l]ike their colleagues in state courts, tribal court judges making decisions regarding children emphasize the child's best interests." Estin, *Equal Protection*, *supra* note 50, at 210; *see also, e.g.*, 10 GRAND TRAVERSE BAND CODE § 103(a) (2023) (granting "Children's Court . . . the right to issue all orders and judgments necessary to insure the safety, well-being and best interests of children").

54. 25 U.S.C. § 1911(b) (emphasis added).

55. Estin, *Equal Protection*, *supra* note 50, at 215; *see also* 25 C.F.R. § 23.118 (2024). ICWA also grants tribes "a right to intervene at any point" in State-court child welfare proceedings. 25 U.S.C. § 1911(c).

56. Estin, *Equal Protection*, *supra* note 50, at 216. The Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"), adopted by all U.S. jurisdictions except for Massachusetts and Puerto Rico, establishes rules for determining when States may take jurisdiction over a child custody dispute. *Child Custody Jurisdiction Enforcement Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=4cc1b0be-d6c5-4bc2-b157-16b0baf2c56d [https://perma.cc/F497-ABMT]. The Uniform Interstate Family Support Act ("UIFSA"), enacted in all U.S. jurisdictions, "allows enforcement of child-support orders issued by an out-of-state court." *Interstate Family Support Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=71d40358-8ec0-49ed-a516-93fc025801fb [https://perma.cc/Z8EV-AUEN]. "In contrast to these statutes, [ICWA] is far more carefully tailored to the unique complications of family law cases that bridge state and tribal jurisdiction." Estin, *Equal Protection*, *supra* note 50, at 216.

57. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989).

laws that incorporate, and even expand upon, the federal ICWA's requirements.[58] Some jurisdictions have also narrowed any potential substantive gap between ICWA and State law by adding culturally specific content to their "best interests of the child" standards. Oregon, for instance, requires courts making a "best interests" "determination" in a "child custody proceeding involving an Indian child" to, "in consultation with the Indian child's tribe, consider . . . [t]he value to the Indian child of establishing, developing or maintaining a political, cultural, social and spiritual relationship with the Indian child's tribe and tribal community."[59] Other States have drafted their generally applicable child welfare provisions to reflect the realities of Native American extended family structures and tribal ties. For example, the Montana Code's definition of a "kinship foster home" includes "substitute care . . . provided by . . . a member of the child's or family's tribe."[60] By codifying Indian children's interests in staying connected with their tribes and defining tribal members as kin, these State laws incorporate ICWA's insights into State-level policy.

Moreover, ICWA's substantive requirements generally converge with current child welfare policy and practice.[61] Provisions attacked by the *Brackeen* plaintiffs—those requiring "active efforts" toward family reunification, establishing placement preferences for Indian children, and mandating a heightened evidentiary standard for parental rights terminations[62]—actually

58. CAL. FAM. CODE § 175(c) (Westlaw through Chapter 1 of 2023–24 Extraordinary Sess., and all laws through Chapter 890 of 2023 Reg. Sess.); COLO. REV. STAT. § 19-1-126 (2020) (LEXIS through all legislation from the 2023 Reg. and First Extraordinary Sess.); MICH. COMP. LAWS § 712B.5 (2023); MINN. STAT. § 260.752 (2023); NEB. REV. STAT. § 43-1517 (2023); N.M. STAT. ANN. § 32a-28-40 (Westlaw through July 1, 2023, of the 2023 First Reg. Sess. of the 56th Leg.); N.J. CT. R. 5:10-6; OKLA. STAT. ANN. tit. 10, § 40.1 (Westlaw through legislation of the First Reg. Sess. of the 59th Leg. and the First Extraordinary Sess. of the 59th Leg.); OR. REV. STAT. § 419B.660 (2021); VT. STAT. ANN. tit. 33, § 5120 (LEXIS through all legislation from the 2023 Reg. Sess.); WASH. REV. CODE § 13.38.010 (2022); WIS. STAT. § 48.028 (2021–22). State ICWAs have also been proposed in South Carolina and Utah. *See, e.g.*, Zug, *supra* note 42, at 3 n.1 (noting drafting of "A Bill to Enact the South Carolina Indian Child Welfare Act"); H.R. 40, 65th Leg., Gen. Sess. (Utah 2023) ("Native American Child and Family Amendments").

59. OR. REV. STAT. § 419B.612 (2021).

60. MONT. CODE ANN. § 52-2-602(4)(b) (Westlaw through chapters effective January 1, 2024, of the 2023 Sess.); *see also* Zug, *supra* note 42, at 66 ("[T]he Montana Code recognizes the similarities between members of the child's tribe and other non-relatives with whom the child shares an important relationship.").

61. Zug, *supra* note 42, at 88 (stating that ICWA's overarching "goal . . . to protect Indian children and families . . . is also the goal of non-Indian child welfare legislation"); *id.* at 3 ("[M]odern child welfare policy substantially aligns with the ICWA.").

62. 25 U.S.C. § 1912(d) (active efforts); *id.* § 1912(f) ("evidence beyond a reasonable doubt"); *id.* § 1915(a) (requiring "preference . . . in the absence of good cause to the contrary" for adoptive "placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families").

instantiate across-the-board child welfare best practices.[63] As twenty-three amici States attested, "ICWA's emphasis on family preservation," demonstrated in part through its active efforts requirement, "aligns with the current best practices recommended by child welfare experts."[64] Moreover, the "goal" of ICWA's placement preferences—"ensuring that children are placed with their relatives rather than in foster care or institutions"—"is, according to many schools of thought, the best approach for *all* children, not only American Indian children."[65] ICWA's preference for kinship care is also reflected in more recent federal statutes, including the 2008 Fostering Connections to Success and Increasing Adoptions Act and the 2018 Family First Prevention Services Act.[66] Finally, ICWA's standards for parental rights terminations work to "ensur[e]" that "Indian children are not removed from their families without justification,"[67] a safeguard necessary in light of longstanding and continuing flaws in the child welfare system[68]—flaws that include significant racial and cultural disparities.[69] In this way, not only do ICWA's substantive provisions "serve[] the best interests of" Indian children, they also serve as a model for practices that benefit all children.[70]

ICWA does not undermine the interests of Indian children; rather, it protects them. The statute "is premised on the belief that it is in the best interests of Indian children to remain connected to their families and tribes."[71]

63. Casey Amicus Brief, *supra* note 16, at 13–14 ("ICWA is a context-specific application of child welfare practices that best serve *all* children.").

64. *See* California et al. Amicus Brief, *supra* note 16, at 6.

65. Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 509 (2017) (emphasis added).

66. *See generally* Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.) (supporting relative caregiving through financial subsidies and family finding and "Kinship Navigator" programs); Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 232 (2018) (codified as amended in scattered sections of 42 U.S.C.) (permitting federal family preservation and reunification funds for relative caregivers). For more, see Zug, *supra* note 42, at 61–63.

67. Zug, *supra* note 42, at 88.

68. *See, e.g.*, Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 888 (2017) [hereinafter Fletcher & Singel, *Indian Children*] ("The child welfare system in many states is in deep disrepair, with injustices and inefficiencies beyond most people's understanding or knowledge."); *id.* at 888 n.5 (citing recent reports).

69. *See, e.g.*, Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 102 (2021) [hereinafter Dailey & Rosenbury, *The New Parental Rights*] ("[V]ague conceptions of parental 'neglect' . . . can turn on subjective and racially biased perceptions about parental fitness.").

70. Casey Amicus Brief, *supra* note 16, at 5; *id.* at 13–14 ("ICWA is a context-specific application of child welfare practices that best serve *all* children.").

71. Zug, *supra* note 42, at 70; *see also* Fletcher & Singel, *Indian Children*, *supra* note 68, at 888–89 (describing removal of both Singel's mother and her sister from their families and observing that "if ICWA had been in place before the[ir] adoptions . . . two decades apart, they may have been spared the trauma of losing their families and their connections to their tribe"); *cf.* Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 285 (2018) [hereinafter Huntington, *The*

Evidence shows that maintaining a connection to their heritages may be important for Indian children's healthy development,[72] and "[i]t is . . . well-documented that the damage to Indian families and Indian nations as a result of" generations of government-sponsored child removal "is intergenerational and continuing."[73] In light of the multifaceted harms ICWA seeks to prevent, Congress was well justified in concluding that the statute both "protect[s] the best interests of Indian children and promote[s] the stability and security of Indian tribes and families."[74] The contention that ICWA departs from State family law to the detriment of Indian children is factually unsupportable.

B. *Tribes' Sovereign Interest in Indian Children*

The aberration critique's deeper theoretical claim is that protecting tribes' interests in Indian children is exceptional, a feature of Indian law but not State family law. On this view, ICWA grants the political community an interest in children; broader U.S. law does not. To refute this claim requires two steps: (1) explaining the nature of the interest ICWA protects; and (2) locating the same interest in non-Indian law. I undertake the first step here and the second in Part II. Because the political nature of tribes' interests in Indian children is core to defending ICWA against the coming equal protection challenges,[75] I go to some lengths to establish it here.

Empirical Turn] ("ICWA embraces a broad understanding of child well-being that includes a child's ties to a tribe.").

72. Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213, 223 (2017); *see, e.g.*, RITA J. SIMON & SARAH HERNANDEZ, NATIVE AMERICAN TRANSRACIAL ADOPTEES TELL THEIR STORIES 9–10 (2008); SANDY WHITE HAWK, "A CHILD OF THE INDIAN RACE": A STORY OF RETURN 3–14 (2022); *see also* Kristen A. Carpenter & Lorie M. Graham, *Human Rights to Culture, Family, and Self-Determination: The Case of* Adoptive Couple v. Baby Girl, *in* INDIGENOUS RIGHTS IN INTERNATIONAL LAW (Stefan Kirchner & Joan Policastri eds.) (forthcoming) (manuscript at 8) ("Children . . . often suffer emotional, psychological, spiritual, and cultural harms when they are separated from their Indian families and nations.") (on file with the North Carolina Law Review).

73. Fletcher & Singel, *Indian Children*, *supra* note 68, at 938 & n.302 (citing Aaron R. Denham, *Rethinking Historical Trauma: Narratives of Resilience*, 45 TRANSCULTURAL PSYCHIATRY 391 (2008); Teresa Evans-Campbell, *Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*, 23 J. INTERPERSONAL VIOLENCE 316, 323–28 (2008); Joseph P. Gone, *A Community-Based Treatment for Native American Historical Trauma: Prospects for Evidence-Based Practice*, 1 SPIRITUALITY IN CLINICAL PRAC. (SPECIAL ISSUE) 78, 78 (2013); Maria Yellow Horse Brave Heart, *The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration*, 35 J. PSYCHOACTIVE DRUGS 7, 8–9 (2003)).

74. 25 U.S.C. § 1902.

75. Challengers are likely to argue, as the *Brackeen* petitioners did, that ICWA's "Indian" and "Indian child" classifications are racial, even though Supreme Court jurisprudence has always interpreted such classifications as political. *Compare* Haaland v. Brackeen, 599 U.S. 255, 333 (2023) (Kavanaugh, J., concurring) (describing "Indian child" classification as racial), *with* Morton v. Mancari, 417 U.S. 535, 554 (1974) (finding that Bureau of Indian Affairs ("BIA") hiring preference at issue in

In "guard[ing] against the unjustified termination of parental rights and removal of Indian children from tribal life,"[76] ICWA protects a vital tribal interest: the sovereign's interest in social reproduction, that is, in perpetuating the political community it represents. In furtherance of the United States' trust responsibility toward Indian people, the statute protects Indian tribes as sovereigns and Indian children as developing citizens of those political communities. By defending tribes' interest in self-perpetuation as an inherent aspect of their sovereignty—a sovereign interest that tribes share with States—ICWA explicitly recognizes and respects the political nature and status of tribal communities.

To see that ICWA protects tribes as sovereigns, consider first how the statute determines which children it governs. ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a *member of an Indian tribe* or (b) is *eligible for membership in an Indian tribe* and is the biological child of a member of an Indian tribe."[77] The incorporated term, "Indian tribe," refers to a particular kind of political actor in our constitutional system. As defined by ICWA, an "Indian tribe" is "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians."[78] The phrase "organized . . . community of Indians recognized . . . by the Secretary" evokes the language of the Federally Recognized Indian Tribe List Act of 1994, which requires the Secretary of the Interior to "publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[79] Thus, "Indian children" under

the case was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"), *and* Fisher v. Dist. Ct. of Sixteenth Jud. Dist., 424 U.S. 382, 390–91 (1976) (upholding exclusive tribal jurisdiction in domestic relations matter based on "quasi-sovereign status of the . . . [t]ribe"). *See also* BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 44–45, 189–91 (2010) (analyzing Supreme Court jurisprudence); Estin, *Equal Protection*, *supra* note 50, at 202 ("In the past, the Court has taken a highly deferential approach in equal protection challenges to federal legislation that includes classifications based on tribal membership."); Zug, *supra* note 42, at 32 & n.154 (analyzing precedent).

76. *Brackeen*, 599 U.S. at 305 (Gorsuch, J., concurring).

77. 25 U.S.C. § 1903(4) (emphasis added); *see also id.* § 1903(3) (defining an "Indian" as "any person who is a *member of an Indian tribe*" (emphasis added)).

78. *Id.* § 1903(8).

79. Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, § 104, 108 Stat. 4791, 4792 (codified at 25 U.S.C. § 5131(a)); 25 U.S.C. § 5131(a). For more on federal recognition of tribes as sovereign entities, see *infra* note 82.

ICWA are only those who "have a political connection to a federally recognized tribe."[80]

Under our constitutional system, such federally recognized Indian tribes are quasi-sovereign political entities.[81] "[N]either domestic states nor foreign nations," Indian tribes "are subject to the . . . authority of the federal government"[82] while also "retain[ing] an inherent sovereignty that predates the Constitution."[83] They have been historically described as "domestic, dependent nations,"[84] having "submi[tted] to the United States in their external political

80. Zug, *supra* note 42, at 32 n.155. Determination of tribal membership is itself a core attribute of tribal sovereignty. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."); ATWOOD, *supra* note 75, at 28 (stating that "the concept of tribal sovereignty means, among other things, the right to determine membership"); *Indian Child Welfare Act of 1978: Joint Hearing on S. 569 and H.R. 1082 Before the Comm. on Indian Affs. and the Comm. on Res.*, 105th Cong. 115 (1997) (statement of Ron W. Allen, President, National Congress of American Indians) ("An Indian tribe's right to freely determine its membership criteria goes to the heart of self-governance and tribal sovereignty.").

81. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 554 (1974) (referring to tribes as "quasi-sovereign . . . entities"); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (describing "Indian nations . . . as distinct, independent political communities").

82. ATWOOD, *supra* note 75, at 25. The Constitution grants Congress "exclusive authority to recognize Indian nations or tribes, to legislate with respect to tribes and their members, and to define the powers of states with respect to Indian governments and communities." Estin, *Equal Protection*, *supra* note 50, at 202–03. *See generally* U.S. CONST. art. I, § 8, cl. 3 (establishing Congress's power to "regulate Commerce with . . . the Indian Tribes"); *Worcester*, 31 U.S. at 573 (1832) ("As early as June 1775, and before the adoption of the articles of confederation, congress took into their consideration the subject of Indian affairs."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01 (Nell Jessup Newton ed., 2023) (describing sources of Congress's power to regulate Indian affairs); RESTATEMENT OF THE L. OF AM. INDIANS § 2 (AM. L. INST. 2022) (highlighting the federal government's role in recognizing an "Indian tribe"); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE. L.J. 1012, 1019 (2015) (positing sources of Federal power over Indian affairs beyond the Indian Commerce Clause, including "the broad panoply of diplomatic and military powers granted to the national government and denied to the states"); Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 520–32 (2020) (arguing that the "Constitution authorizes and requires the federal government to define who is Indian").

83. Estin, *Equal Protection*, *supra* note 50, at 203 (first citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 4 (1831); and then citing *Worcester*, 31 U.S. at 558–59); *see also Worcester*, 31 U.S. at 559 (describing "Indian nations" as "retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power" of "the first discoverer . . . of the particular region claimed"); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1621 (2000) ("The European sovereigns assumed a duty of protection toward the Indian nations, which, as Chief Justice John Marshall held in *Worcester v. Georgia*, did not imply a 'dominion over their persons,' but merely meant that the Indians were bound 'as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.'" (quoting *Worcester*, 31 U.S. at 517–18)).

84. *See, e.g.*, Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 681 n.44 (1989) (listing treatises). *But see* RESTATEMENT OF THE L. OF AM. INDIANS § 14 ("Indian tribes are domestic nations possessing the powers of a limited sovereignty subject to modification by Congress.").

affairs"[85] while "retain[ing] powers necessary to protect tribal self-government or to control internal relations . . . and exercis[ing] powers delegated, restored, or recognized by Congress."[86] Over time, the "government-to-government relationship" between the United States and Indian tribes has come to be characterized as a trust relationship,[87] under which the United States "has charged itself with . . . obligations of the highest responsibility."[88] Among these obligations is the duty to preserve and promote tribal self-government.[89]

ICWA's opening provision makes clear that the statute was enacted in furtherance of this duty.[90] Because of "the special relationship between the United States and the Indian tribes and their members,"[91] under which "Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes,"[92] "the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[93] In light of the Indian family-separation crisis—a crisis traceable to assimilationist federal policies that were formally

85. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 6 (1994).

86. RESTATEMENT OF THE L. OF AM. INDIANS § 14 cmt. b.

87. *See, e.g.*, *id.* § 4(a) ("The United States recognizes a general trust relationship between the United States and Indian tribes and their members arising from a government-to-government relationship with preexisting sovereigns."); *see also* United States v. Mitchell, 463 U.S. 206, 225 (1983) (noting "the undisputed existence of a general trust relationship between the United States and the Indian people"); Seminole Nation v. United States, 316 U.S. 286, 296 (1942) (recognizing "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people").

88. *Seminole Nation*, 316 U.S. at 297; *see also id.* at 296–97 (noting "the Government's fiduciary obligation" "[i]n carrying out its treaty obligations with the Indian tribes"); Fletcher & Singel, *Indian Children*, *supra* note 68, at 958 ("[T]he trust relationship is designed to preserve tribal lands and resources, Indian cultures and languages, and tribal governance in Indian country.").

89. *See, e.g.*, RESTATEMENT OF THE L. OF AM. INDIANS § 4 cmt. d; Fletcher & Singel, *Indian Children*, *supra* note 68, at 958 ("The trust relationship requires the United States to enable tribal governments to self-govern . . . .").

90. *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 2, 92 Stat. 3069, 3069 (codified at 25 U.S.C. § 1901); *see also* United States v. Jicarilla Apache Nation, 564 U.S. 162, 192–193 (2011) (Sotomayor, J., dissenting) ("Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government." (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4][a] (Nell Jessup Newton ed., 2005))).

91. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901.

92. *Id.* § 1901(2).

93. *Id.* § 1901(3).

renounced only with ICWA's passage[94]—Congress found "protecting" Indian children to be "vital to the continued existence and integrity of Indian tribes."[95]

Why are Indian children "vital to" a tribe's "integrity and future"?[96] Put starkly, "Native tribes . . . need . . . members in order to survive."[97] When "Indian children," defined in terms of tribal membership,[98] are removed from their families, tribes cannot continue to maintain themselves. If young members are raised without knowledge of tribal customs, tribal ways will go lost and tribes will cease to exist as current adult members age and die.[99] For tribes, Indian children are necessary for social reproduction, the process by which a society perpetuates itself by "transmit[ting]" its "values, attitudes, and modes of behavior to" the next generation of members.[100] Indeed, precisely this truth about cultural conveyance drove coercive assimilationist-era federal policies of "kidnapping and imprisoning Indian children in oppressive boarding schools" to "isolat[e] them from their families, nations, and lands," as well as efforts "to remove Indian children from their families . . . and relocate them to off-reservation, non-Indian foster and adoptive parents."[101] Analogously, the

94. *See supra* notes 36–38; Fletcher & Singel, *Indian Children*, *supra* note 68, at 890, 929–55 (describing U.S. "policy of stripping Indian children from their families and cultures," including through compulsory education at Indian boarding schools); *id.* at 954 ("In the two decades between the formal establishment of the [Indian Adoption Project] and the enactment of the Indian Child Welfare Act, state and federal bureaucrats and officials engaged in the systematic and widespread practice of removing Indian children from their Indian homes."); *see also* MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 13, 94, 115–16, 142–44, 258–63 (2014) (describing impact of Indian child removal on Indian children, their families, and their tribes).

95. 25 U.S.C. § 1901(3).

96. H.R. REP. NO. 1386, at 15 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7530, 7537 (stating that Congress "recognized that a tribe's children are vital to its integrity and future").

97. ATWOOD, *supra* note 75, at 34 (citing Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002)).

98. *See supra* notes 77–80 and accompanying text.

99. *See, e.g.*, JACOBS, *supra* note 94, at xxxiii ("The institutionalization of Indigenous children" in boarding schools "threatened the very existence of Indigenous communities. The viability of Indigenous cultures depended on rearing new generations of children who understood, were invested in, and carried on their groups' practices and knowledge. Authorities took children at the very time they would have been socialized into their clans' religious ceremonies and cultural practices, so Indigenous communities found it difficult to sustain their languages and knowledge systems.").

100. GUTMANN, *supra* note 31, at 15; *see also* MCCLAIN, *supra* note 25, at 50 (describing social reproduction as the "process" by which a "society prepares persons to be capable, responsible members of the community and good citizens").

101. Fletcher & Singel, *Indian Children*, *supra* note 68, at 891; *see id.* at 938–44 (boarding schools); *id.* at 952–55 (child removal); *infra* note 176 (more on boarding schools). *Compare* John W. Ragsdale, Jr., *The Movement To Assimilate the American Indians: A Jurisprudential Study*, 57 UMKC L. REV. 399, 409 (1989) ("The federal government correctly assumed that the young are the life blood of a culture and that the molding and transformation of the children and their values might prove an effective way of destroying Indian heritage at its roots."), *with* ATWOOD, *supra* note 75, at 30 ("From the tribal perspective, children were wrongly removed from their families and tribal communities in the past, resulting in the decimation of tribal culture; today they are seen as key to tribal survival.").

provision of the U.N. Declaration on the Rights of Indigenous Peoples categorizing "forcibly removing children of the group to another group" as an "act of genocide"[102] rests on "an international consensus about the importance of children to the survival of indigenous peoples."[103] In protecting Indian children from unwarranted removal from their families and communities, ICWA protects not only those children, families, and communities,[104] but also their tribes' ability to persist through time as "distinct, independent political communities."[105] ICWA helps to ensure tribes' futures by allowing them some control over the placement, and therefore the cultural development and education,[106] of their future adult members.

Of course, tribes' interests in Indian children are much wider, richer, and more complex than a mere realpolitikal concern for sovereign survival. Tribes are political actors under our constitutional system, but they are also communities knit together by common historical experiences and sharing extensive social, cultural, and spiritual bonds.[107] As thick communities,[108] tribes have deep and multifaceted interests in their young members' wellbeing—a set of interests that is only loosely analogous to a liberal state's *parens patriae* interest in children's health and wellbeing.[109] But it is undeniably true that

102. G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, art. 7(2) (Sept. 13, 2007) ("Indigenous peoples . . . shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.").

103. ATWOOD, *supra* note 75, at 32.

104. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989) ("[ICWA] seeks to protect the rights of the Indian child as an Indian . . . ." (quoting H.R. REP. NO. 95-1386, at 23 (1978))).

105. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

106. GUTMANN, *supra* note 31, at 14 ("Education may be more broadly defined to include every social influence that makes us who we are.").

107. *See, e.g.*, Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 439 (2002) [hereinafter Goldberg, *Members Only*] (noting the "cultural, social, economic, and political dimensions of tribal life, which vary from tribe to tribe"); *cf.* 25 C.F.R. § 83.11 (2022) (including among criteria for federal recognition showings of both "community," in § 83.11(b), and "political influence or authority," in § 83.11(c)); ATWOOD, *supra* note 75, at 18 ("To tribal members, a child's membership not only entitles the child to a future right to participate in tribal government and live on tribal lands but also denotes a shared spiritual understanding of the world.").

108. *See, e.g.*, SETH D. KAPLAN, HUMAN RIGHTS IN THICK AND THIN SOCIETIES: UNIVERSALITY WITHOUT UNIFORMITY 2 (2018) (using "thick" and "thin" to denote "different visions of how societies flourish, how human beings achieve their potential, and how human rights are conceived and realized"); *id.* at 2–3 ("'Thin societies' are based on maximizing individual freedom, while 'thick societies' are based on maximizing the robustness of relationships and institutions."); *id.* at 74 (noting that "'thick' and 'thin' are ideal types. Cultures are contested and ever changing . . . Thick societies contain thin elements and vice versa").

109. *Compare* Goldberg, *Members Only*, *supra* note 107, at 466 ("A tenet of most tribal cultures is the collective obligation to render today's decisions on behalf of future as well as present generations."), *with* Dailey & Rosenbury, *The New Parental Rights*, *supra* note 69, at 106 n.120 ("*Parens patriae* (literally 'parent of the country') authority refers to the power that a state wields when it acts to support or

tribes' interests in Indian children include a political dimension—the interest of a sovereign in perpetuating the existence of the political community it represents.

It is the tribe's sovereign interest in social reproduction that renders the "Indian child" classification inherently political. Scholars have long noted that ICWA defines "Indian children" by virtue of citizenship: these children are members in, or eligible for membership in, the political community of an "Indian tribe."[110] Under our constitutional law and ICWA, the relationship between Indian children and their tribes is one of minor citizens to their sovereigns, the political authorities that act on behalf of their political communities. A tribe's interest in social reproduction is even more political than the Bureau of Indian Affairs hiring preference so deemed in the foundational case of *Morton v. Mancari*,[111] for the "lives and activities" of a tribe cannot go on at all without citizens to participate in them.[112] Indian children's vital importance to tribes' "stability and security" makes ICWA's goal of preserving those children's familial and tribal connections intrinsically political.[113] Recognizing that ICWA protects tribes as sovereigns dependent on social reproduction not only establishes the statute's "Indian child" classification as political.[114] It also provides the conceptual basis for understanding State-law regulation of all children.

* * *

ICWA's opponents critique the statute as doctrinally and morally aberrant. The crux of their complaint is that, in protecting Indian tribes, ICWA sacrifices Indian children. As Chief Justice Roberts articulated the concern at

protect children."), *and* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1458–59 (2018) [hereinafter Dailey & Rosenbury, *The New Law of the Child*] (noting that, "by the late nineteenth century, . . . the . . . doctrine of parens patriae [had come] to justify the state's power to override parental authority in the name of children's welfare, sometimes with the goal of expanding state control over families of color, immigrant families, and other marginalized groups").

110. *See supra* notes 77–80 and accompanying text.

111. 417 U.S. 535 (1974).

112. *Id.* at 554 (noting that the challenged hiring preference was "granted to Indians . . . as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"). For more on *Morton v. Mancari*, see, for example, Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 964 (2011) ("Although the *Mancari* opinion itself leaves room for several different interpretations of the relationship between Indian race and Indian political status, it has since been invoked to stand for the idea that . . . being Indian is a matter of membership in a political group, a status that is framed as oppositional or unrelated to race. Federal Indian law—the body of federal statutes, court decisions, and regulations that recognizes the unique legal status of Indian nations and authorizes special rules or benefits for Indians because of that unique status—has been upheld against constitutional challenges based in part on this idea.").

113. 25 U.S.C. § 1902.

114. *Cf. supra* note 75 (noting and contesting arguments that "Indian child" classification is racial).

oral argument, "the best interests of the child [may] be subordinated to the interests of the tribe."[115] This part has disputed the aberration critique's more obvious factual and legal assertions, showing that any divergence between ICWA and State family law is overstated and that the statute's effects are generally salutary. But the aberration critique also incorporates more subtle assumptions. Positioning ICWA as exceptional requires taking non-Indian, State family law as an objective and disinterested measure of a child's best interests—yet another unsupportable premise. For ICWA's driving purpose, the need for sovereigns to perpetuate their political communities, also permeates State family law, including the best-interests standard. Just as ICWA recognizes and furthers tribes' interests in the raising of Indian children, so too do States have and often pursue a comparable interest in shaping their young citizens for adult life in the political community. The next part uncovers this interest at work in non-Indian, State family law.

II. STATES AND CHILDREN

A tribe's interest in Indian children under ICWA is no outlier, for every sovereign has a similar interest in its young members. In U.S. non-Indian law, the sovereign interest in shaping children for their adult roles is most apparent in contexts that explicitly touch on social reproduction. In education and truancy law, child labor law, child welfare, and the juvenile justice system, for example, concerns about young citizens' development are front and center.[116] Here, the sovereign (usually a State, but also the federal government) openly acknowledges and self-consciously pursues the political community's interest in shaping children for adulthood—making it easier for citizens to perceive and monitor child regulation undertaken in their collective name.

The political community's interest in self-perpetuation is just as present, but operates more covertly, when the sovereign claims to act in children's interests alone. Take, for example, contested custody disputes between two legal

115. Transcript of Oral Argument, *supra* note 1, at 119.

116. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's wellbeing, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." (citations omitted)); ALA. CODE § 12-15-101(b)(4) (Westlaw through the end of the 2023 First Spec., Reg., and Second Spec. Sess.) ("Purpose of the Alabama Juvenile Justice Act" includes "goal[]"of "secur[ing] for any child removed from parental custody the necessary treatment, care, guidance, and discipline to assist him or her in becoming a responsible, productive member of society."); *id.* § 12-15-101(d) ("This chapter shall be liberally construed to the end that each child coming under the jurisdiction of the juvenile court shall receive the care, guidance, and control . . . necessary for the welfare of the child and the best interests of the state."); OKLA. STAT. ANN. tit. 10A, § 1-1-102(A)(3) (Westlaw through legislation of the First Reg. Sess. of the 59th Leg. and the First Extraordinary Sess. of the 59th Leg.) ("For purposes of the Oklahoma Children's Code, the Legislature recognizes that . . . the state has an interest in its present and future citizens . . . .").

parents, which are decided by the "best interests of the child" standard.[117] Considerations of the child's future adult role in the polity lurk even in this paradigmatically "private" family law context. Some States expressly include such considerations among their enumerated best-interests factors,[118] and even when the prescribed analysis does not specifically invite such concerns, it is capacious enough to contain them. Indeed, family law scholars have long criticized how the best-interests standard permits decision-makers to incorporate their own conceptions of a child's interests.[119] Though few individual decisions are explicitly driven by States' interests in shaping children, when viewed in the aggregate, child custody case law tends to impose reigning majoritarian assumptions about the capacities, values, attitudes, and modes of behavior that children should acquire to act appropriately as adult citizens.[120]

For an illustration of this tendency, consider older case law denying custody to otherwise-fit lesbian and gay parents in contests between one gay parent and one heterosexual parent. Not every lesbian or gay parent lost their case, but as a whole, these parents tended to fare worse as compared to their

117. *See, e.g.*, DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & LINDA C. MCCLAIN, CONTEMPORARY FAMILY LAW 795 (5th ed. 2019); *see also* Susan Frelich Appleton, *Restating Childhood*, 79 BROOK. L. REV. 525, 528–29, 529 & n.33 (2014) ("This standard . . . also surfaces in other contexts, including emancipation, adoption, and placement after adjudications of abuse and neglect.").

118. *See, e.g.*, MICH. COMP. LAWS § 722.23(3)(b), (f) (2023) (listing best-interests factors that include parties' ability "to continue the education and raising of the child in his or her religion or creed, if any," and the parties' "moral fitness"); N.D. CENT. CODE § 14-09-06.2(1)(f) (LEXIS through all legislation from the 68th Legis. Assemb.) (listing factors that include "[t]he moral fitness of the parents, as that fitness impacts the child"); OKLA. STAT. ANN. tit. 10A, § 1-1-102(C)(1) ("Best interests of the child includ[e], but [are] not limited to, the development of the moral, emotional, spiritual, mental, social, educational, and physical well-being of the child."); S.D. CODIFIED LAWS § 25-4-45 (Westlaw through the 2023 Reg. Sess. and Supreme Court Rule 23-17) (providing that, in custody decisions at divorce, courts "shall be guided by consideration of what appears to be for the best interests of the child in respect to the child's temporal and mental and moral welfare").

119. *See infra* Section II.A.

120. *See infra* Section II.A. There are, of course, limits to custody law's majoritarian tendencies. Consider, for example, custody disputes over children's religious upbringing, also called "spiritual custody" cases. *See generally* Nomi Stolzenberg, *"Spiritual Custody": Religious Freedom and Coercion in the Family*, *in* 3 THE JEWISH ROLE IN AMERICAN LIFE: AN ANNUAL REVIEW 1 (Barry Glassner & Hilary Taub Lachoff eds., 2004) (exploring the values in conflict in such disputes). "[M]ost jurisdictions hold that each parent has a right to expose the child to the religious practices [the parent] observes, absent a clear showing of harm to the child." ABRAMS ET AL., *supra* note 117, at 844. This anti-assimilationist rule derives from "the basic principles of freedom of religion and conscience," which are legally protected by "the prohibition against state 'establishments' or 'entanglements' with religion, enshrined in the First Amendment." Stolzenberg, *supra*, at 5. Just as the First Amendment limits custody law's ability to incorporate majoritarian assumptions, so, too, should we understand ICWA: as a federally imposed constraint on judicial decision-making in State court cases involving Indian children. Thus, both the First Amendment and ICWA are exceptions that illustrate custody law's underlying majoritarian tendencies.

heterosexual coparents.[121] In these cases, the best-interests standard—whether as defined by appellate courts or as interpreted by individual judges—permitted decision-makers to act on concerns about lesbian and gay parents' abilities to raise children into their "proper" roles as adult citizens.[122] And because it is almost always in a child's interest to continue a relationship with a loving and capable parent,[123] these cases demonstrate how State family law, too, contains the possibility that the political community's interest may diverge from the child's, to the child's detriment.[124]

Pace ICWA's critics, the "best interests" standard is no objective arbiter of children's interests. Indeed, it is impossible to define a child's "best interests" objectively.[125] Any sovereign's articulation of those interests must inevitably incorporate the sovereign's view of those interests—and this view will, in turn, be shaped by the values and exigencies of the political community that the sovereign represents. As a result, even the most child-centered sovereign cannot avoid perceiving children's interests through the lens of the political community's interest in self-perpetuation. For this reason, a political community's interest in its young citizens cannot be excised from its law; it can only be contested, channeled, and constrained.

A. *Understanding the Best-Interests Standard*

The "best interests of the child" standard is used, among other applications, to apportion decision-making authority and parenting time in

121. *See, e.g.*, Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1281 & n.188 (2004) (noting that "lesbian and gay parents in the past were routinely denied custody or visitation on the grounds that their sexual orientation was presumed to endanger their child's moral development").

122. *See infra* Section II.B; *cf.* Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 382 (2006) ("In contested custody disputes, the fact that a parent is gay may be considered as a negative factor, based on rules adopted by state appellate courts or the views of individual trial judges.").

123. *See, e.g.*, ABRAMS ET AL., *supra* note 117, at 796 (describing concept of psychological parent); Dailey & Rosenbury, *The New Parental Rights*, *supra* note 69, at 112 ("[A]ttachment theory rooted in developmental science emphasizes that children have relational needs for close, nurturing care from parental figures who provide consistent and stable caregiving."); *see also* Emily Haney-Caron & Kirk Heilbrun, *Lesbian and Gay Parents and Determination of Child Custody: The Changing Legal Landscape and Implications for Policy and Practice*, 1 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 19, 20 (2014) ("Research findings to date have suggested that being raised by a gay or lesbian parent (or by two gay or lesbian parents) is not detrimental to children.").

124. *Cf.* Wald, *supra* note 122, at 383 ("[I]t is almost always detrimental to children if decisionmakers consider an adult's sexual orientation when making placement decisions.").

125. *See supra* note 32 and accompanying text. Though determining a child's "best interests" inevitably involves contested value judgments, there is a good deal of consensus about a narrower, "core" set of children's interests. *See infra* Section III.D.

custody disputes between two fit parents.[126] Although rhetorically appealing, the standard is inherently indeterminate. This section introduces the best-interests standard and its malleability as background for illustrating how the standard enables aggregate importation of majoritarian views regarding how children should be raised for adult life in the political community.

Although the best-interests standard applies broadly across jurisdictions to allocate physical and legal custody, its content varies by jurisdiction and by judge.[127] As a doctrinal matter, the standard requires judges to consider all evidence relevant to a child's wellbeing, including a list of considerations either enumerated by statute or set forth in case law.[128] These considerations, often referred to as "best interests" factors, frequently include "the parents' wishes, the child's wishes, the child's relationship with the people and institutions around him, and the mental and physical health of everyone involved."[129] Some States also employ presumptions, in particular presumptions favoring the primary caretaker or awards of joint custody, to help divine a child's best interests.[130] Despite these doctrinal signposts, a child's "best interests" remains in practice "an amorphous notion," a "fact-finder's best guess" as to "with whom the child will be better off in the future."[131]

126. *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 402 (UNIF. L. COMM'N 1973) ("The court shall determine custody in accordance with the best interest of the child."); *see also* Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2217 (1991) (noting that the UMDA's "child custody provisions reflected, and to an important degree continue[] to reflect, standard American law"); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS., no. 1, 2014, at 69, 69 ("The best-interests-of-the-child standard has been the prevailing legal rule for resolving child-custody disputes between parents for nearly forty years."). The *ALI Principles* takes a different approach, attempting to "approximate[]" a family's pre-dissolution caretaking patterns. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (AM. L. INST. 2002).

127. *Cf.* LINDA D. ELROD, CHILD CUSTODY PRAC. & PROC. § 4:1, Westlaw (database updated July 2023) ("The 'best interests' standard . . . grants the trial judge great latitude and broad discretion.").

128. UNIF. MARRIAGE AND DIVORCE ACT § 402 ("The court shall consider all relevant factors . . . ."); *see also* Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 694 (1976) ("[M]ost courts have adopted the view that under the best-interests-of-the-child standard, virtually any evidence concerning the child's environment is relevant.").

129. Schneider, *supra* note 126, at 2219 (glossing UMDA factors).

130. *See id.*; *see also, e.g.*, Garska v. McCoy, 278 S.E.2d 357, 358 (W. Va. 1981) (favoring "parent who, until the initiation of divorce proceedings, has been primarily responsible for the caring and nurturing of the child"); D.C. CODE § 16-914(a)(2) (LEXIS through June 30, 2023) (establishing, except in cases of intrafamily violence, child abuse or neglect, or parental kidnapping, "rebuttable presumption that joint custody is in the best interest of the child").

131. Montgomery Cnty. Dep't of Soc. Servs. v. Sanders, 381 A.2d 1154, 1163 (Md. Ct. Spec. App. 1977).

Family law scholars have criticized the standard on this ground almost since its emergence.[132] As Robert Mnookin has explained, innate limits on human predictive ability and "lack[]" of "any clear-cut consensus about" how to define "what is 'best' or 'least detrimental'" render "the determination of what is 'best' or 'least detrimental' for a particular child . . . indeterminate and speculative."[133] Although State law prescribes factors for judges to consider, "custody statutes do not themselves give content or relative weights to the pertinent values."[134] This silence is unsurprising, for "[d]eciding what is best for a child poses a question no less ultimate than the purposes and values of life itself," a question about which a pluralistic society is unlikely to reach definite agreement.[135] David Chambers similarly notes that "legislatures have failed to convey a collective social judgment about the right values" to be applied in child custody decisions, and concludes as a result that "[t]he concept of 'children's best interests' . . . has no objective content."[136]

Because a child's interests cannot be defined without recourse to values, the best-interests standard invites decision-makers to supply their own.[137] Scholarly assessments of this flaw have been scathing. Anne Dailey and Laura Rosenbury criticize the best-interests standard as "largely operat[ing] as a cover for the exercise of unprincipled judicial discretion."[138] Nan Hunter and Nancy Polikoff observe that the inquiry's open-ended nature "permits—perhaps even encourages—the biases of a judge to be given free rein."[139] Solangel Maldonado

132. *See* Scott & Emery, *supra* note 126, at 69 (referring to standard's "vagueness and indeterminacy"); *see also, e.g.*, Robert A. Burt, *Experts, Custody Disputes, & Legal Fantasies*, 14 PSYCHIATRIC HOSP. 140, 142 (1983) (referring to standard as "highly discretionary"); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1180 (1986) (referring to standard as "vague and open-ended"); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16 (1987) (referring to standard as "indeterminate"); Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 66 (1995) (referring to standard as "exceptionally vulnerable to arbitrary decisionmaking"). *But see* Schneider, *supra* note 126, at 2291 (suggesting that best-interests standards "provides as reasonable a framework for balancing the advantages of rules and discretion as we are likely to find").

133. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 229; *see also* Appleton, *supra* note 117, at 529 n.33 (describing Mnookin's as "the classic critique of [the] standard").

134. Mnookin, *supra* note 133, at 260.

135. *Id.*; *id.* at 260–61 ("[I]f the judge looks to society at large, he finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.").

136. David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481–82, 488 (1984).

137. *See* Elster, *supra* note 132, at 14 (noting that a judge applying the standard "would have to add some preferences of her own" and "engage in morally objectionable paternalism" to reach custody determination).

138. Dailey & Rosenbury, *The New Law of the Child*, *supra* note 109, at 1452.

139. Hunter & Polikoff, *supra* note 128, at 694; *see also* Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 883 (2000) ("The best-interests test is an empty vessel, to be filled by the subjective views of judges about what is good for children . . . .").

points out that these biases, whether explicit or implicit, are likely to incorporate "dominant, predominantly White middle-class norms," especially as to what childrearing practices and goals are appropriate.[140] For this reason, Annette Appell and Bruce Boyer argue that the best-interests test "raises significant concerns about 'social engineering,'" especially for "the least visible and respected population of families whose racial and economic status already place[s] them at great risk of destructive state intervention."[141] Indeed, the best-interests standard's tendency to favor adults with high socioeconomic status explains why its application is cabined to custody contests between legal parents.[142]

As these critiques suggest, the best-interests standard's capaciousness renders it a ready vehicle through which the sovereign—or decision-makers imbued with its power—may impose majoritarian norms about how to raise children for adult membership in the political community.[143] This possibility not only refutes the "myth" that the sovereign does not intervene "in children's lives";[144] it also makes clear that the potential for conflicts between a child's and the political community's interests is cooked deeply into State family law, too.

B. *States' Sovereign Interest in Children: Custody at Divorce*

For a concrete example of how the political community's interest can conflict with children's even under the best-interests standard, consider cases from the 1970s and 1980s in which courts curtailed otherwise-fit parents' custody or visitation rights because of their same-sex relationships or gay-rights activism.[145] During this time period, "individual lesbians and gay men routinely

140. Maldonado, *supra* note 72, at 214; *id.* at 224–25 (describing cultural differences in childrearing practices and goals); *id.* at 224 ("Evaluation of the best interests factors will be influenced by middle-class values and norms of the majority and will likely reflect the dominant majority's assumptions . . . .").

141. Appell & Boyer, *supra* note 132, at 66 (quoting *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992)).

142. *See, e.g.*, McDermott v. Dougherty, 869 A.2d 751, 770, 808 (Md. 2005) (observing that the "best interest of the child" standard does not govern "dispute[s] . . . between a fit parent and a private third party," because if it did, "any third party who offered a better neighborhood, better schooling, more financial capability, or more stability would consistently prevail in obtaining custody in spite of a fit natural parent's constitutional right to parent").

143. *See infra* Section II.B.

144. Dailey & Rosenbury, *The New Law of the Child*, *supra* note 109, at 1472; *cf.* Chambers, *Legalization of the Family*, *supra* note 32, at 815 (describing "the state as a supporter of . . . a system of parental control over the children who live with them"); Olsen, *supra* note 32, at 850 (noting that parental "powers are established by state regulations").

145. These cases use terms that would today be considered outdated and hurtful. *See, e.g.*, AM. PSYCH. ASS'N, INCLUSIVE LANGUAGE GUIDE (2d ed. 2023), https://www.apa.org/about/apa/equity-diversity-inclusion/language-guide.pdf [https://perma.cc/G6LM-MJWP (staff-uploaded archive)]. This piece retains opinions' original language in quotations but employs modern language in describing the opinions.

los[t] custody and instead receive[d] restricted visitation simply because they [were] lesbian or gay"[146] or "participating in gay liberation groups."[147] Some States had explicit legal rules that required judges to award custody to a heterosexual parent over a gay or lesbian one in a contest between the two,[148] but in most States, a parent's same-sex relationship could not preclude custody or visitation unless the relationship had an adverse impact on the child.[149] However, this "nexus" test could admit varying conceptions of harm, and some judges attenuated children's connections to loving and capable parents out of concern that the children would be convinced by the parent's example to become gay themselves.[150] Since disproved,[151] such "role model argument[s]" justified assigning custody to the "parent . . . better suited" to appropriately promote a "child's psychosexual development."[152] Although the envisioned "harm" was a negative impact on the child's future sexual orientation,[153] that

146. Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 625 (1996); *see also* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 533 (1999) (noting that although "in the 1970s, courts . . . ruled both for and against lesbian and gay parents," "cases in which lesbian mothers lost custody of their children were more numerous"). For more on gay and lesbian parents' custody cases, see generally Hunter & Polikoff, *supra* note 128; Kimberly D. Richman, *Judging Knowledge: The Court as Arbiter of Social Scientific Knowledge and Expertise in LGBT Custody and Adoption Cases*, 35 STUD. L. POL. & SOC'Y 3 (2005); David M. Rosenblum, Comment, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665 (1991). For a list of reported cases, 1950–2007, see Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 349–55 (2009).

147. Marie-Amélie George, *The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents*, 34 LAW & HIST. REV. 487, 494 (2016) ("[M]any judges saw this type of political activism as a basis for denying custody.").

148. *See* ABRAMS ET AL., *supra* note 117, at 829 ("For many years, in many jurisdictions, LGBT parents were considered morally unfit per se where the other parent was a heterosexual."); *see, e.g.*, Roe v. Roe, 324 S.E.2d 691, 692, 694 (Va. 1985) (finding that "father's continuous exposure of the child to his immoral and illicit relationship render[ed] him an unfit and improper custodian as a matter of law," even though he had been providing adequate care while the mother underwent cancer treatments).

149. *See* ABRAMS ET AL., *supra* note 117, at 829; *see, e.g.*, *In re* J.S. & C., 324 A.2d 90, 94–95 (N.J. Super. Ct. Ch. Div. 1974), *aff'd per curiam*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976).

150. *See* Rosky, *supra* note 146, at 270; *see also* Haney-Caron & Heilbrun, *supra* note 123, at 20 (noting that other "harms considered by courts using the Nexus Test include social stigma resulting from the parent's sexual orientation, being exposed to an 'immoral' lifestyle," and a "child's experience of anxiety . . . result[ing]" from "difficulty accepting the parent's sexual orientation" (citations omitted)).

151. *See* Haney-Caron & Heilbrun, *supra* note 123, at 21 ("[L]esbian and gay parents appear no more likely than heterosexual parents to raise children who identify as lesbian or gay.").

152. *See* Christina M. Tenuta, *Can You Really Be a Good Role Model to Your Child if You Can't Braid Her Hair? The Unconstitutionality of Factoring Gender and Sexuality into Custody Determinations*, 14 CUNY L. REV. 351, 352 (2011); *see also id.* at 353 ("Judges can be both implicit and explicit in making a role model argument.").

153. *See* Haney-Caron & Heilbrun, *supra* note 123, at 20 (noting that "harms" invoked under the nexus test "[were] derived from a belief that treats heterosexuality as 'natural,' and nonheterosexuality as unnatural or damaging").

impact also directly threatened the political community's interest in social reproduction.

In these role modeling cases, courts limited gay and lesbian parents' custody rights because they feared that exposing children to "pro-gay events and . . . media" and "providing influential models of same-sex relationships" would "encourage children to become homosexual."[154] These presumed effects reflected "[t]he major psychological explanations for homosexuality in the 1970s and 1980s," which "emphasized the importance of early age gender role development in determining sexual orientation."[155] Applying these explanations, "most" contemporaneous "mental health professionals assumed that parental homosexuality would prevent children from learning the appropriate gender roles that would lead to a heterosexual orientation,"[156] and they testified to that effect as expert witnesses in contested custody cases.[157] Understanding "homosexuality [to be] a learned trait,"[158] many courts concluded that exposure to a gay or lesbian parent was not in a child's best interests and awarded custody accordingly.[159]

In such cases, States conflated their own interest in producing a certain kind of citizen with the child's interest. All custody cases implicitly implicate the political community's interest in social reproduction,[160] but cases involving a gay or lesbian parent were seen to pose a direct threat to that interest. For an explicit articulation of the threat, consider a dissenting opinion filed in the 1978 Washington Supreme Court case, *Schuster v. Schuster*.[161] In that case, the dissenting justices relied heavily on a recently published law review article to explain precisely how gay and lesbian parents endangered the political community's interest in children.[162] Although acknowledging that "the primary or paramount" custody consideration "is the welfare of the children," the dissent

154. Rosky, *supra* note 146, at 294; *id.* at 294–95 (distinguishing between stereotypes of "recruit[ers]" and "role model[s]" but tracing both to "the same underlying concern[]—that children raised by gay and lesbian parents are more likely to . . . grow up to be gay and lesbian adults").

155. George, *supra* note 147, at 490.

156. *Id.*

157. *See* Rosky, *supra* note 146, at 344 (describing such testimony).

158. Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981).

159. *Id.* at 396; *see also, e.g.*, Pleasant v. Pleasant, 628 N.E.2d 633, 633, 639 (Ill. App. Ct. 1993) (overturning trial court's reasoning on these lines); S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980).

160. *Cf.* Smith v. Smith, 220 S.W.2d 627, 630 (Tenn. 1949) ("[A]warding . . . custody of a child" involves "a small and young life whose interests must be looked to in growing into fine manhood or womanhood.").

161. 585 P.2d 130 (Wash. 1978); *id.* at 133 (declining to modify award of custody to lesbian mothers).

162. *Id.* at 135 (Rosellini, J., joined by Wright, C.J., Hamilton, J., dissenting). The court quotes four paragraphs of the article, J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 595 (1977), and correctly notes that the arguments reproduced are endorsed by only one of the authors, Professor Wilkinson. *Schuster*, 585 P.2d at 136 (Rosellini, J., dissenting).

insisted that "[t]he State does have an interest in the matter of heterosexual acts versus homosexual acts."[163] Adopting the premise that "[y]oung people form their sexual identity partly on the basis of models they see in society," the dissent feared that "accord[ing] more legitimacy to expressions of homosexual attraction" might "hamper development of traditional heterosexual family relationships."[164] These relationships were seen to be of vital concern to the political community because "[t]he nuclear, heterosexual family is charged with several of society's most essential functions," including "educating the young" and "provid[ing] economic support and psychological comfort to family members."[165] All of the cited functions are the stuff of social reproduction, necessary to producing the next generation of citizens in body and in habit.[166] Thus, "[t]he state ought to be concerned that if allegiance to traditional family arrangements declines, society as a whole may well suffer."[167] Under this argument, the demands of perpetuating American society rendered "[p]reserving the strength" of the "nuclear, heterosexual family" "a central and legitimate end of the police power."[168] Per the *Schuster* dissent, the State's interests in private custody disputes also included ensuring that children would grow up to take on the functions on which society's continuation depends. Yet even after openly articulating the sovereign interest in children's development, the dissent still voiced its preference for the heterosexual parent in terms of "the welfare of the children" concerned.[169]

Today, we can recognize that these cases furthered the political community's interest in social reproduction at children's expense. As we have come to realize, it is almost always in a child's interest to continue a relationship with a loving and capable parent.[170] And if children themselves identify as LGBTQ, living with a gay parent could be beneficial for their wellbeing—and being separated from a parent solely because of that parent's sexual orientation would surely be detrimental. Moreover, living with a parent who is "differen[t]"

163. *Schuster*, 585 P.2d at 134, 135 (Rosellini, J., dissenting).

164. *Id.* at 136 (quoting Wilkinson & White, *supra* note 162, at 595–96).

165. *Id.* at 135 (quoting Wilkinson & White, *supra* note 162, at 595).

166. *Cf.* GUTMANN, *supra* note 31, at 15 (describing "social reproduction" as the process by which a society perpetuates itself by "transmit[ting]" its "values, attitudes, and modes of behavior to" the next generation of members); MCCLAIN, *supra* note 25, at 50 (describing social reproduction as the "process" by which a "society prepares persons to be capable, responsible members of the community and good citizens").

167. *Schuster*, 585 P.2d at 135 (Rosellini, J., dissenting) (quoting Wilkinson & White, *supra* note 162, at 595).

168. *Id.* (quoting Wilkinson & White, *supra* note 162, at 595).

169. *Id.* at 136.

170. *See, e.g.*, ABRAMS ET AL., *supra* note 117, at 796 (describing concept of psychological parent); Dailey & Rosenbury, *The New Parental Rights*, *supra* note 69, at 112 ("[A]ttachment theory rooted in developmental science emphasizes that children have relational needs for close, nurturing care from parental figures who provide consistent and stable caregiving.").

may strengthen a child's capacity for liberal democratic citizenship.[171] As one New Jersey appellate court observed, such children might grow into adults

> better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.[172]

This court and the *Schuster* dissent perceived the demands of social reproduction in wildly different ways, and yet both were working within the best-interests paradigm. The standard's accommodation of such divergent views highlights the need to scrutinize all regulation of children, even that undertaken to their ostensible benefit.

* * *

As this part has shown, State-law regulation of children is inevitably shaped by visions of the future roles they should play in the political community. This is true even of regulation undertaken in the name of children's interests, for such interests cannot be defined neutrally.[173] Admitting that State-law definitions of children's interests are not objective in turn concedes the possibility that the political community's and children's interests may diverge—a point vividly illustrated by case law denying custody to otherwise-fit lesbian and gay parents.[174] States' respective conceptions of what serves children's interests are contestable and require defense, especially in a diverse, multicultural society whose citizens hold differing views of the good life.

All of this means that a liberal democratic society requires a framework for evaluating and circumscribing the sovereign's pursuit of the political community's interest in children—whether that sovereign is a tribe or a State. Without such a framework, decision-makers lack useful guidance on how to weigh the political community's interest against children's interests; children's and parents' advocates also lack clear grounds on which to define and challenge overreach when it occurs. The alternative, refusing to recognize the political community's interest in self-perpetuation, is a nonstarter, for this interest is a practical imperative conceptually separate from and analytically prior to the law. A society's interest in social reproduction always lurks in the background, and failing to admit its existence only allows its weight to fall unevenly, as many

171. M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979).
172. *Id.* (overturning trial court order transferring custody away from a lesbian mother).
173. *See supra* Section II.A.
174. *See supra* Section II.B.

less privileged families can attest.[175] To properly channel and constrain the sovereign's interest in children, we must first acknowledge and theorize it. The next part undertakes that project.

III. POLITICAL COMMUNITIES AND CHILDREN: THE CITIZEN-SHAPING FRAMEWORK

Drawing from political theory and family law scholarship, this part proposes a framework for scrutinizing sovereigns' efforts to shape children for adult life in the political community. The political theory of "civic education"—understood broadly as "all the processes that affect people's beliefs, commitments, capabilities, and actions as members or prospective members of communities"[176]—evaluates and expounds the shape these processes may permissibly take in a liberal, pluralistic society. An outgrowth of the liberal-communitarian debate of the 1980s and 1990s,[177] this literature helps to illuminate important normative boundaries on sovereigns' efforts to influence children's development. Among family law scholars, drafting of the American Law Institute's *Restatement of Children and the Law* has provoked extensive debate about children's rights and interests under both current doctrine and reformist visions.[178] Incorporating insights from both literatures, I argue that sovereigns may pursue the political community's interest in children if such regulation satisfies four conditions.

175. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at viii (2002) [hereinafter ROBERTS, SHATTERED BONDS] (characterizing "the child welfare system" as "a state-run program that disrupts, restructures, and polices Black families"); *see also* 25 U.S.C. § 1901(4) ("[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies . . . .").

176. Jack Crittenden & Peter Levine, *Civic Education*, STAN. ENCYC. PHIL., https://plato.stanford.edu/archives/fall2018/entries/civic-education/ [https://perma.cc/7FCX-V8D6] (last updated Aug. 31, 2018). Note that "civic education" is also more narrowly used to describe concrete programs of instruction in schools and therefore may evoke the U.S. government's coercive efforts to assimilate Native Americans through forced removal of children to Indian boarding schools. *See, e.g.*, Civilization Fund Act, Pub. L. No. 15-85, ch. 85, 3 Stat. 516 (1819) (repealed) (providing "for the civilization of the Indian tribes adjoining the frontier settlements" through education); *see also* Mary Annette Pemberton, *Death by Civilization*, ATLANTIC (Mar. 8, 2019), https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/ [https://perma.cc/HG6S-26LX (staff-uploaded, dark archive)] (describing federal policies and "brutal[]" boarding school conditions). *See generally* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION (1995) (describing the experiences of Native American children in boarding schools). Despite the term's potential negative implications, I follow political theorists and philosophers in employing "civic education" to describe the many processes by which we learn to be as members of our communities. I do not intend to argue for any particular practical program of education, and certainly not to argue for cultural assimilation of Native Americans. Indeed, the historical example of Indian boarding schools would be impermissible under multiple elements of the framework developed here.

177. *See generally, e.g.*, Simon Caney, *Liberalism and Communitarianism: A Misconceived Debate*, 40 POL. STUD. 273 (1992) (classifying and evaluating communitarian critiques of liberalism).

178. *See infra* notes 212–18.

First, a sovereign that seeks to shape its minor citizens must be of the right kind. In particular, the sovereign and the political community it represents must meet certain minimum standards of justice and legitimacy, such that the polity can be considered "just enough." This first condition, which examines whether a political community, as currently constituted, may legitimately act to perpetuate itself into the future, is the requirement of *permissible ultimate ends*.[179]

Second, the characteristics sought to be inculcated must be of the right kind. A just-enough polity has a legitimate interest in ensuring that children develop what I call *sociopolitical capacities*, or capabilities that adult members of the polity need in order to function as self-directing citizens. By self-directing citizens, I mean adults who are capable not only of participating in the life of their society but also of developing their own convictions and making their own choices about their individual life paths.[180] That is, the political community's interest in self-perpetuation does not permit a sovereign to act in a way that prevents children from becoming adults capable of exercising a degree of autonomy. This second condition, which scrutinizes the substance of how children are to be shaped, is the requirement of *permissible intermediate ends*.[181]

Third, the child-regarding regulation must be of the right kind. In particular, the ways in which the sovereign furthers the political community's interest in children must be sufficiently related to the development of sociopolitical capacities and cannot be overly invasive. I refer to actions meeting these criteria as, respectively, *relevant* and *tailored*. This third condition is the requirement of *permissible means*.[182]

Finally, even if the first three requirements are satisfied, a sovereign may not pursue the political community's interest in children if doing so would impinge too greatly on a child's interests. Although what is in a child's *best* interest is contestable,[183] some interests of children—those related to satisfaction of basic human physical and emotional needs—garner considerable consensus.[184] The fourth and final condition, that a sovereign may not pursue the political community's ends to the detriment of children's physical and emotional health, is the requirement of *respect for children's core interests*.

Restating the argument in terms of these four conditions, a *just-enough polity* may encourage children's development of *sociopolitical capacities* through *relevant, tailored action*, provided that its regulation *respects children's core interests*

179. *See infra* Section III.A.

180. *See infra* notes 190, 198, 205 and accompanying text.

181. *See infra* Section III.B.

182. *See infra* Section III.C.

183. *See supra* Section II.A.

184. *See* Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1507 (2023) [hereinafter Huntington, *Pragmatic Family Law*].

in physical and emotional health. I refer to these four requirements, together, as the "citizen-shaping framework."

I explain each requirement of the citizen-shaping framework in greater depth below. As will become apparent, each condition is somewhat capacious, allowing a certain space for reasonable minds to disagree about how precisely to articulate its substantive content. This capaciousness is a feature, not a flaw. The framework's purpose is not to produce definite pronouncements, but rather to provide a conceptual structure within which diverse fellow citizens can distinguish, analyze, and debate closely related normative questions about how best to live together, both in the present and in the future.

A. *Permissible Ultimate Ends: A "Just Enough" Polity*

The requirement of *permissible ultimate ends* scrutinizes whether a political community's ultimate goal—social reproduction of the community—is acceptable. For a political community's interest in perpetuating itself to be legitimate, the community and its political institutions must be "just enough." For an unjust polity's shaping of children for future membership would be impermissible, even in the unlikely scenario in which its actions satisfied the other three requirements.

I do not attempt to define exhaustively what conditions would render a polity's self-perpetuation permissible, for doing so would far exceed the scope of this Article. The question what makes a political community "just" is enormously complicated and hotly contested in the political theory literature.[185] The proper relationship between a political community and the institutions through which it exercises sovereign power—i.e., the question of political legitimacy—is also a topic of extensive debate.[186] Moreover, political theorists disagree about the relationship between the concepts of justice and legitimacy, even to the extent of debating whether they are separate concepts at all.[187]

185. Consider, as just one example, the extensive literature responding to John Rawls's *A Theory of Justice* and its later refinements. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, A THEORY OF JUSTICE] (proposing groundbreaking theory of distributive justice); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001) (refining theory). *See also* Leif Wenar, *John Rawls*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/rawls/ [https://perma.cc/WYG6-QJTL] (last updated Apr. 12, 2021) (describing "[t]he scholarly literature on Rawls" as "vast" and suggesting "some entry points").

186. *See, e.g.*, MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 130–32 (Talcott Parsons ed., A.M. Henderson trans., 1947); RONALD DWORKIN, LAW'S EMPIRE 190–92 (1986); JOHN RAWLS, POLITICAL LIBERALISM 136–40 (1993); JOSEPH RAZ, THE MORALITY OF FREEDOM 70–105 (1986); A. JOHN SIMMONS, JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 122–57 (2001); JEREMY WALDRON, LAW AND DISAGREEMENT 188–208 (1999); Arthur Ripstein, *Authority and Coercion*, 32 PHIL. & PUB. AFFS. 2, 2–3, 26–35 (2004).

187. *See, e.g.*, JEAN HAMPTON, POLITICAL PHILOSOPHY 121–23 (1998); Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 689–94 (2002); *see also* Enzo Rossi & Matt Sleat, *Realism*

Rather than take a position on these debates, I articulate the admittedly indefinite baseline criteria that, to be "just enough," a political community must (1) act through political institutions that are minimally legitimate, even if not entirely ideal, and (2) not be so unjust that continuation of the polity as currently constituted is morally abhorrent.

Although not fully determinate, these criteria do permit a critical, even if not comprehensive, inquiry into the workings of the society that seeks to ensure its continuation by influencing children's development. At the very least, the criteria allow the citizen-shaping framework to counter some obvious objections. For example, they would rule impermissible any attempt by totalitarian regimes to acculturate young subjects to the current political order.[188] Although such attempts would likely also run afoul of the framework's other three requirements, there is value in evaluating and critiquing a political community's organizing institutions and ideologies directly, in addition to assessing particular actions undertaken in the community's name.

B. *Permissible Intermediate Ends: Sociopolitical Capacities*

The second requirement, that of *permissible intermediate ends*, scrutinizes what kind of adult citizen the political community is trying to produce. In particular, which attitudes, beliefs, values, virtues, habits, skills, and capabilities should children develop in order to ensure the political community's continuation?[189] I refer to those capacities which a political community may permissibly seek to inculcate as *sociopolitical capacities*.

From a liberal perspective, there are limits on the sociopolitical capacities a political community, acting through its sovereign, can seek to impart. For example, a liberal political community may not "standardize" or indoctrinate

in Normative Political Theory, 9 PHIL. COMPASS 689, 692–94 (2014) (distinguishing between the concepts). Among theorists who do distinguish between the two, the general consensus is that a state could be legitimate but unjust. *See, e.g.*, RAWLS, A THEORY OF JUSTICE, *supra* note 185, at 225; John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 175 (1995); PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 130 (2012).

188. *Cf.* SETH BERNSTEIN, RAISED UNDER STALIN: YOUNG COMMUNISTS AND THE DEFENSE OF SOCIALISM 5 (2017) (describing how, through the Young Communist League, or Komsomol, "Stalinist leaders . . . enacted a cultural revolution from above, an intervention in the social and political behavior of young citizens that was meant to accompany the economic transformation of socialism"); Daniel Horn, *The Hitler Youth and Educational Decline in the Third Reich*, 16 HIST. EDUC. Q. 425, 425 (1976) (describing "something of a youth rebellion conducted largely by Nazi students enrolled in the Hitler Youth and directed against the educational structures and authorities of Germany").

189. *Cf.* Crittenden & Levine, *supra* note 176 (defining "civic education" as "all the processes that affect people's beliefs, commitments, capabilities, and actions as members or prospective members of communities"); Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 424 (2023) (coining the "term *in loco reipublicae* [to] convey[] the idea that parents stand in place of the state with respect to children's development into adult democratic citizens outside of school," a position that grounds "duties on the part of parents to ensure children's opportunity to acquire the knowledge and skills of democratic citizenship").

children.[190] But what is the line between permissible education and impermissible indoctrination? The civic education literature—which justifies the liberal democratic state's interest in educating its citizens and attempts to outline the content and limits of that education—provides some guidance.[191]

As explained above, every political community has an interest in social reproduction, or perpetuating itself by "transmit[ing]" its "values, attitudes, and modes of behavior to" the next generation of members.[192] For "well-designed institutions are not enough" to ensure the survival of a political community; rather, "a well-ordered polity" also "requires citizens with the appropriate knowledge, skills, and traits of character."[193] As the Supreme Court has recognized, "[a] . . . society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[194] To this end, political communities seek to educate their young members for adult life in the polity.[195]

The substantive aims of civic education will depend on which political community undertakes it.[196] Even within a political community, citizens will disagree about the proper goals of civic education and how to achieve them. This is a matter for contestation, to be debated and determined according to the political community's institutions for mediating disagreements about how community members with differing visions of the good life should live together

190. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . . The child is not the mere creature of the state.").

191. Although civic education is "[o]ne of the oldest topics in political theory," William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 ANN. REV. POL. SCI. 217, 217 (2001) [hereinafter Galston, *Political Knowledge*], my discussion here relies on more modern theorists.

192. GUTMANN, *supra* note 31, at 15; *see supra* Section I.B, Part II.

193. Galston, *Political Knowledge*, *supra* note 191, at 217; *see also* GUTMANN, *supra* note 31, at 49 ("[D]emocratic education . . . forms the moral character of citizens, and moral character along with laws and institutions forms the basis of democratic government."); STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 3–4 (2000) ("[T]he patterns of choices that individuals make need to be shaped or constituted for the sake of sustaining a liberal democratic political order that is civically healthy.").

194. Prince v. Massachusetts, 321 U.S. 158, 168 (1944); *cf.* MACEDO, *supra* note 193, at 12 ("We have no reason to take for granted either popular allegiance to liberal democratic principles or the skills and habits needed by good citizens.").

195. *See, e.g.*, WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 242–43 (1991) [hereinafter GALSTON, LIBERAL PURPOSES] (stating civic education's "purpose is . . . the formation of individuals who can effectively conduct their lives within, and support, their political community"); Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 659 (1993) [hereinafter Stolzenberg, *He Drew a Circle*] (arguing that even "the liberal individualist commitment to 'the free mind' itself requires a certain kind of education—namely, education in the value of diversity, reason, and individual choice").

196. *Cf.* GALSTON, LIBERAL PURPOSES, *supra* note 195, at 243 (arguing that civic education "is by definition education within, and on behalf of, a particular political order," and "fails—fundamentally—if it does not support and strengthen that community").

as fellow citizens.[197] Indeed, even political theorists disagree about precisely which traits a liberal democratic polity should seek to inculcate and how.

On my account, to qualify as a permissible-to-instill *sociopolitical capacity*, the capacity in question must be sufficiently related to the roles and functions which the political community requires of its citizens *qua* citizens.[198] In any political community, qualifying capacities are likely to include a willingness to support and make some concessions for the collective good—the kind of prosocial orientation required for any type of social enterprise to go forward.[199] In liberal democratic political communities, these capacities might also include those necessary to support pluralism,[200] especially the habits of tolerance and mutual respect.[201] Another capacity, the ability "to understand and evaluate competing conceptions of the good life and the good society,"[202] promotes both moral and political virtue among a pluralistic citizenry. Lastly, we might also include a set of more obviously political capacities, ranging from the abilities to

197. *Cf.* GUTMANN, *supra* note 31, at 15 ("[T]he distinctive virtue of a democratic society" is "that it authorizes citizens to influence how their society reproduces itself.").

198. For example, one could question whether Galston's assertion that a liberal state has "a right to inculcate the expectation that all normal children will become adults capable of caring for themselves and their families" is an expectation sufficiently related to citizenship. GALSTON, LIBERAL PURPOSES, *supra* note 195, at 252.

199. *Cf. id.* at 245–46 (classifying "the willingness to fight on behalf of one's country; the settled disposition to obey the law; and loyalty—the developed capacity to understand, to accept, and to act on the core principles of one's society" as virtues common to all political communities); MACEDO, *supra* note 193, at 10 (at a bare minimum, citizens must be able "to act more or less responsibly . . . and to act for the good of the whole at least sometimes").

200. GUTMANN, *supra* note 31, at 44 ("[A] democratic state must aid children in developing the capacity to understand and to evaluate competing conceptions of the good life and the good society."); MACEDO, *supra* note 193, at 11 (noting importance of citizens' "willingness to affirm the supreme political authority of principles that we can publicly justify along with all our reasonable fellow citizens"); WILLIAM GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 37–38 (2002); WILLIAM GALSTON, THE PRACTICE OF LIBERAL PLURALISM 4 (2005) ("Because the likely result of liberal pluralist institutions and practices will be a highly diverse society, the virtue of tolerance will be a core attribute of liberal pluralist citizenship . . . . Tolerance rightly understood means the principled refusal to use coercive state power to impose one's views on others, and therefore a commitment to moral competition through recruitment and persuasion alone.").

201. *See, e.g.*, GALSTON, LIBERAL PURPOSES, *supra* note 195, at 246 (listing among virtues "specific to liberal society[] independence, tolerance, . . . respect for individual excellences and accomplishments" and "the disposition to respect the rights of others"); GUTMANN, *supra* note 31, at 47 ("The distinctive virtue of a democratic theory of education is that its principles and conclusions are compatible with our commitment to share the rights and the obligations of citizenship with people who do not share our complete conception of the good life."); *id.* at 32 (discussing the virtue of "mutual respect among citizens"); MACEDO, *supra* note 193, at 10 (identifying the virtues of "tolerance, mutual respect, and active cooperation among fellow citizens of various races, creeds, and styles of life"); Stolzenberg, *He Drew a Circle*, *supra* note 195, at 657 (identifying liberal and civic republican theories' convergence on "permit[ting] the imposition of those values, habits, and manners characteristic of a liberal society: open-mindedness, tolerance of diverse opinions, and the critical-objective mindset that underlies individual freedom of choice").

202. GUTMANN, *supra* note 31, at 44.

select and monitor one's representatives[203] to the ability to deliberate or to participate in democratic politics.[204] On the other hand, a belief, attitude, characteristic, or habit would *not* be permissible to inculcate if it kept children from becoming capable of developing their own convictions or making their own choices about their individual life paths.[205] I refer to these criteria for a proposed sociopolitical capacity as its (1) sufficient relation to the roles and functions of citizenship, and (2) not undermining children's capacity to develop and implement their own individually chosen values.

C. *Permissible Intermediate Means: Relevant, Tailored Action*

The third requirement, that of *permissible intermediate means*, works to ensure that the sovereign's intervention is of the right kind. In particular, the policies employed to further the political community's interest in children (1) must be appropriately related to development of a permissible sociopolitical capacity, and (2) cannot be overly invasive. I call these criteria the requirement for *relevant, tailored action*.

An action's *relevance* goes to its probable efficacy. How likely is the intervention to actually further the development of the desired capacity? This criterion is likely to be inversely related to the tailoring criterion, which assesses the degree of an intervention's impact. That is, "relevance" might be satisfied with less evidence of efficacy, or evidence of lower efficacy, when an

203. William Galston, *Civic Education in the Liberal State*, *in* LIBERALISM AND THE MORAL LIFE 89, 94 (Nancy L. Rosenblum ed., 1989) (characterizing American civic education as seeking to impart "the virtues and competences needed to select representatives wisely, to relate to them appropriately, and to evaluate their performance in office soberly"); *see also* GALSTON, LIBERAL PURPOSES, *supra* note 195, at 246 (describing the capacities "to evaluate the talents, character, and performance of public officials, . . . to moderate public desires in the face of public limits," and "to engage in public discourse and to test public policies against our deeper convictions").

204. GUTMANN, *supra* note 31, at 46 (arguing that the aim of "democratic education" is to help future adult citizens develop "the ability to deliberate, and hence to participate in conscious social reproduction"—that is, actively shaping the institutions of one's society); MACEDO, *supra* note 193, at 10–11 (describing abilities "to take some part in public affairs" and "to stay informed" as a bare minimum and arguing that "[f]or a liberal democracy to thrive and not only survive, many of its citizens should" also "develop," among other "political values and virtues," a "willingness to think critically about public affairs and participate actively in the democratic process and in civil society").

205. *Compare* MACEDO, *supra* note 193, at 237 ("Neither parents nor the democratic community should be allowed to confine children's options within narrow limits, or deny any child the right to pursue his or her own path in life," or "seek to indoctrinate children."), *and id.* (arguing that children "can rightfully be subjected to . . . public efforts to inculcate . . . visions of good character so long as" those visions are "reasonable," the "efforts are not repressive, and . . . the child is also presented with information about alternative ways of life"), *with* GUTMANN, *supra* note 31, at 44 (identifying as a limit on civic education the "principle of *nonrepression*," which "prevents the state, and any group within it, from using education to restrict rational deliberation of competing conceptions of the good life and the good society" (emphasis added)), *and* Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 125–26 (William Aiken & Hugh LaFollette eds., 1980) (describing a child's right "to have . . . future options kept open until he is a fully formed self-determining adult capable of deciding among them").

intervention imposes only minimal burdens, and demands a tighter causal nexus when the impact is heavier or more restrictive.

The *tailoring* criterion is conceptually similar, though not perfectly analogous, to tailoring analysis under the tiers of constitutional scrutiny.[206] Polities could analyze for overreach in a number of ways. For example, we might aim to ensure that the burdens imposed by a regulation are in proportion to the goals it seeks to achieve (a measure of means/ends fit), or we could evaluate those burdens against some predetermined absolute measure.[207] Other parts of the citizen-shaping framework do some work to simplify each of these potential modes of analysis. The requirement of a just-enough polity and the limit that a political community may inculcate only sociopolitical capacities ensures that an intervention's ultimate goals are permissible, while the prohibition on impinging a child's core interests rules some kinds of burdens per se impermissible.[208] But this does not complete the inquiry. Rather, it seems likely that a political community might wish to conduct both analyses, checking for proportionality between burdens and benefits while also articulating some fixed constraints on the sovereign's action.

D. *Protecting Children's Interests: Core vs. Contestable*

The fourth and last requirement, *respect for children's core interests*, imposes a final, substantive limit on a political community's ability to shape its minor citizens' development. When the political community's and children's interests conflict, certain core interests of children must always prevail. In particular, a political community may not pursue its interest in children to the detriment of children's physical and emotional health.

This requirement distinguishes what I call children's "core" interests from their "contestable" interests for multiple reasons. First, it would be almost impossible for a pluralistic political community to reach any detailed agreement about the entire realm of children's interests.[209] Furthermore, some interests of

206. *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1326–32 (2007) (analyzing the "narrow tailoring" prong of strict scrutiny analysis).

207. For analogs in our constitutional jurisprudence, consider the reasonableness test employed by the Supreme Court before the development of tiers of scrutiny, *see, e.g.*, *id.* at 1286–87, as well as the early twentieth-century pronouncement that property regulations that go "too far . . . will be recognized as a taking," Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *Cf.* MACEDO, *supra* note 193, at 237 (stating that "public efforts to inculcate . . . visions of good character" cannot be "repressive"); GUTMANN, *supra* note 31, at 44 (articulating "principle of *nonrepression*" (emphasis added)).

208. *See supra* Sections III.A–B; *infra* Section III.D.

209. *Cf.* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1414 (2020) (noting that "numerous and competing visions of appropriate childrearing coexist in our diverse society, and many approaches are rooted in religious beliefs and cultural, social, and political values"); Dailey & Rosenbury, *The New Law of the Child*, *supra*

children are likely to be context dependent, the product of the political community to which a child belongs, and therefore may not cross political boundaries. On the other hand, although a child's *best* interest is indefinite[210] and children's interests generally are up for debate, some interests of children—those related to satisfaction of basic human physical and emotional needs—garner considerable consensus.[211] This set of relatively noncontroversial interests, which I sketch out below, are the "core" interests that a sovereign cannot permissibly subordinate to achieving the political community's goal of social reproduction.

To illustrate the need to distinguish between children's "core" and "contestable" interests, consider the debate between family law scholars occasioned in part by the ALI's recent project, the *Restatement of Children and the Law*.[212] In a series of high-profile law review articles, project participants have championed divergent views of both the content of children's interests and how law should reflect these interests. Writing in *The Yale Law Journal*, Restatement Advisors Anne Dailey and Laura Rosenbury proposed "a new paradigm for describing, understanding, and shaping children's relationship to law," one centered around what they "identify" as children's "five fundamental interests . . . in . . . (1) parental and nonparental relationships; (2) exposure to new ideas; (3) expressions of identity; (4) personal integrity and privacy; and (5) participation in civic life."[213] Responding in the *Michigan Law Review*, Restatement Associate Reporter Clare Huntington and Reporter Elizabeth Scott eschewed broad attempts to catalog children's interests, instead focusing on the "core principle and goal" of "promoting child *wellbeing*."[214] These authors' disagreement about how wide a range of children's interests the law should consider "established" in turn reflects their differing normative goals. Dailey and Rosenbury "dream big,"[215] advancing a broad, values-rich vision of

note 109, at 1478 (observing that "any compilation of children's interests cannot be definitive or absolute"); *supra* Section II.A.

210. *See supra* Section II.A.

211. *See infra* notes 217–19 and accompanying text.

212. *Restatement of the Law, Children and the Law*, AM. L. INST., https://www.ali.org/projects/show/children-and-law/#_status [https://perma.cc/GNF6-VBR2]; *Children and the Law*, ALI ADVISOR, https://www.thealiadviser.org/children-law/ [https://perma.cc/2JKQ-FYBL] (noting project "aims to present a contemporary conception of parental rights and authority with the promotion of child welfare as a core goal, while grappling with questions about the legal personhood of children").

213. *See* Dailey & Rosenbury, *The New Law of the Child*, *supra* note 109, at 1451, 1478.

214. *See* Huntington & Scott, *supra* note 209, at 1375 (emphasis added); *see also id.* at 1378 n.31 ("[O]ur claim is that the [Child Wellbeing] framework is implicit in modern doctrine and policy and that it provides a more normatively appealing explanation for the current allocation of authority.").

215. *See* Shari Motro, *The Three-Act Argument: How To Write a Law Article That Reads Like a Good Story*, 64 J. LEGAL EDUC. 707, 709 (2015) (describing role of "legal scholars" to "pursue our wildest, most idealistic dreams for society").

children's interests that they expect and invite others to contest.[216] Adopting the goals and constraints of the Restatement format, Huntington and Scott take a narrower, pragmatic approach. Sidestepping debate about the "contested values underl[ying] many aspects of the legal regulation of children," they "rest[]" their framework on more "widely endorsed and uncontroversial" "values,"[217] building from normative grounds on which there is more social consensus.[218]

The requirement of *respect for children's core interests* similarly relies on "widely endorsed and uncontroversial" "values."[219] Only a very narrowly cabined set of children's interests, those that require little defense, can unequivocally impose limits on a political community's attempts to shape the development of its young citizens. Thus, children's "core" interests are those on which most members of a political community will agree in principle, at least at a certain level of generality.[220] Most people would agree, for example, that it is in children's interests to have adequate food, housing, medical care, and stable, loving relationships, and to not be subjected to physical or emotional harm.[221] I

216. Dailey & Rosenbury, *The New Law of the Child*, *supra* note 109, at 1478 (noting that their "compilation of children's interests" is "not meant to be exhaustive, but rather to serve as a starting point for further inquiry"); *id.* ("What we present here is a provisional account, open to debate and revision."). Dailey and Rosenbury's framework does have an empirical foundation, as it is "drawn from developmental literature, scholarship on children and law, and what [they] take to be the best of judicial decision making," *id.*, but it is predominantly normative.

217. Huntington & Scott, *supra* note 209, at 1378 n.32; *see also id.* at 1453 (noting "concern . . . that defining and promoting child wellbeing can be an uncertain and complex business, given the indeterminacy and capaciousness of the construct").

218. *Id.* at 1375, 1378 (describing their "Child Wellbeing framework" as "rely[ing] on a clear evidence base," including "psychological and biological research on child and adolescent development" and "growing evidence about the effectiveness of policy interventions"). *Compare id.* at 1453 (noting that "[t]o a considerable extent, child wellbeing is grounded in values about which there may not be consensus" and "is . . . culturally contingent"), *and id.* ("Views about what children need, beyond the basics, have shifted over time, and often there is little consensus among experts or parents."), *with id.* at 1454 ("These concerns are legitimate but exaggerate the challenge posed by the indeterminacy of legal regulation aimed at promoting child wellbeing."), and *id.* ("Regulation in the framework is built on . . . well-supported, foundational insights[]" about "child development" supported by "[s]olid and uncontested scientific research."). For more on the spirit animating this approach, see generally Huntington, *Pragmatic Family Law*, *supra* note 184. *See also id.* at 1502 (arguing that "a pragmatic method" characterizes family law "decision- and policymaking" and advocating for its "more intentional[]" use).

219. Huntington & Scott, *supra* note 209, at 1378 n.32.

220. Of course, reasonable people may disagree about the precise content of these interests once we move from questions of principle to applying principles in specific situations.

221. Huntington and Scott's conception of wellbeing incorporates the "promotion of children's physical health," Huntington & Scott, *supra* note 209, at 1378 n.32, and prevention of "serious harm," *id.* at 1418 n.261, 1419, 1422, including both "physical harm," *id.* at 1419, and emotional harm, *id.* at 1416 (noting "large body of research" showing that "the disruption and destabilization of [the parent-child] relationship threatens serious harm to the child"); *id.* at 1423 (agreeing with standard permitting court to order third-party contact over parents' objection "only if it finds by clear and convincing

capture these interests with the limitation that a sovereign cannot pursue the political community's ends if its interventions seriously harm children's physical and emotional health. All other interests of children—those that require democratic contestation to establish—are "contestable."[222] These may indeed be interests of children, but they are not so clearly established as to outweigh a political community's interest in social reproduction, presuming that the citizen-shaping framework's first three requirements are satisfied.

* * *

Both Indian tribes and liberal democracies have a permissible interest in ensuring that their young members develop the competencies necessary for the polity to continue to exist.[223] But important normative limits attend a political community's interest in social reproduction, especially because that interest may at times diverge from children's interests. I have argued that a *just-enough polity* may encourage children's development of *sociopolitical capacities* through *relevant, tailored action*, provided that that regulation *respects children's core interests* in physical and emotional health. These requirements impose important constraints regarding the nature of the political community seeking to perpetuate itself, the capacities it seeks to inculcate in its minor citizens, the means it employs to cultivate those capacities, and the effects those efforts may have on children.

The discussion here has been in relatively broad strokes for two reasons. First, the citizen-shaping framework is applicable to any political community—not just the communities represented by the United States and the several States—and each community is likely to take a different approach to social reproduction. Second, political communities are made up of individuals with different conceptions of both the good life and the appropriate relationship between the community and the individual. To reflect both kinds of diversity, the citizen-shaping framework leaves room for members of a given political community to engage in good-faith debate about precisely where a particular limit lies. To render the framework more concrete, the next part applies it to three current controversies over sovereigns' attempts to shape children's development.

evidence that denying the contact would pose a substantial risk of serious harm to the child"). Dailey and Rosenbury capture these interests as children's interests in parental and nonparental relationships and in personal integrity and privacy. Dailey & Rosenbury, *The New Law of the Child*, *supra* note 109, at 1484–85, 1500–02.

222. Dailey & Rosenbury, *The New Law of the Child*, *supra* note 109, at 1478 (expressing "hope to stimulate . . . debate" among "courts, legislatures, and scholars" about children's interests).

223. *Cf.* GUTMANN, *supra* note 31, at xi (describing democracy as "a political ideal . . . of a society whose adult members are, and continue to be, equipped by their education and authorized by political structures to share in ruling" (italics omitted)). For more on the permissibility of Indian tribes' interest in their young members, see *infra* Section IV.A.

IV. APPLICATIONS

Though the citizen-shaping framework offers analytical purchase in any context in which a political community's and children's interests may diverge, I discuss just three applications here. My main focus is to rebut challenges to ICWA, but for purposes of illustration I also show how the framework can help both to systematize critiques of the child welfare system and to structure debates about State restrictions on gender-affirming medical care for transgender youth.[224] Though substantively diverse, these examples are functionally similar. For in each context, the sovereign shapes children indirectly, through their families and general regulatory environments, as it does in private custody cases,[225] rather than directly through governmental institutions like public schools and the juvenile justice system. I discuss only briefly whether the United States, individual States, and Indian tribes are just-enough political communities[226] in order to focus my analysis on the framework's second, third, and fourth requirements: that (2) the involved capacities be appropriately linked to citizenship, and that the means selected to inculcate them be (3) relatively effective, not overly invasive, and (4) not seriously harmful to children's physical or emotional health. Analyzing ICWA under the framework reveals it to be a permissible intervention, one in which the interests of tribal communities and their youngest members are closely aligned.[227] Moreover, critics of the child welfare system are right to denounce the serious and unnecessary harm inflicted by state actors' interventions in poor and minoritized families, even if the sovereign's child-protective role cannot be entirely abolished.[228] On the other hand, restrictions on gender-affirming medical care are highly suspect as attempts to shape children's development and would be defensible only if governments adopted constrained measures to address concrete, narrowly defined harms to children's health.[229]

A. *ICWA and the* Brackeen *Case*

Although its critics position ICWA in opposition to children's "best interests,"[230] the statute passes muster under all four requirements of the citizen-shaping framework.

Critics might question whether individual Indian tribes are *just-enough political communities*, especially as measured against the standards of liberal

224. I plan to consider these contexts in greater depth in future work.
225. *See supra* Part II.
226. Fully defending this assumption is beyond the scope of this project.
227. *See infra* Section IV.A.
228. *See infra* Section IV.B.
229. *See infra* Section IV.C.
230. *See supra* notes 7–15 and accompanying text.

political theory or U.S. constitutional law.[231] For example, tribes may employ ancestry- and gender-based criteria to define their membership, in contravention of liberal egalitarian norms, and "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been . . . unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[232] Some Indian law scholars respond to such concerns by contesting the presumed disconnect between tribal governance and American democracy.[233] Others argue that the United States should tolerate illiberal decisions by tribes because doing so is necessary to protect tribal self-governance and culture.[234] For purposes of evaluating the normative permissibility of ICWA, I would answer these concerns in three ways.

First, even if one conceded that features such as "indigenous justice systems, gender-based systems of governance, and tribal theocracies" render

231. *See, e.g.*, WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 163–70 (1995) (discussing question of accommodation of nonliberal minorities); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 799–800 (2007) (noting such critiques).

232. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); *id.* at 51, 54 (noting that the challenged "tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe" "reflect[ed] traditional values of patriarchy still significant in tribal life"); *see also* Seth Davis, *Tribalism and Democracy*, 62 WM. & MARY L. REV. 431, 435 (2020) ("As pre-constitutional sovereigns, . . . Indian Tribes are not bound by the Bill of Rights.").

233. *See, e.g.*, Davis, *supra* note 232, at 436 (arguing that "[t]he politics of actual Indian Tribes are consistent with a conception of democracy as a process of arriving at collective decisions based upon mutual compromise and respect," "discourse and negotiation"); Joseph W. Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty*, 38 AM. INDIAN L. REV. 1, 13–14 (2013) ("Tribal sovereignty is not only compatible with the ideals of democracy but may even be required by it . . . . Tribes have been self-governing sovereigns for millennia."); *id.* at 15 (arguing that "the mere fact that tribes limit membership to citizens who have an ancestral connection to the nation does not, by itself, violate equality norms"); *id.* (explaining U.S. government's interest in "limiting the ability of tribes to expand their sovereignty" by increasing membership and pointing out that U.S. citizenship also passes by ancestry).

234. *See* Riley, *supra* note 231, at 802–03 (arguing that "an accurate analysis of tribes as illiberal actors must address Indian nations' sovereign status" and that "increased federal control over intra-tribal matters will likely mean the end of core aspects of tribal differentness," "risk[ing] the destruction of tribal culture"); *cf.* SARAH SONG, JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM 131, 141 (2007) (arguing that "limited self-government rights of Native tribes are justifiable as a remedy for the systemic disadvantages caused by a long history of oppression," but that "an important limit on tribal sovereignty is the protection of the basic rights and liberties of individual members," and proposing that federal intervention take the form of "measures that support democratic processes within [a] tribe").

some tribes to some degree illiberal as a matter of political theory,[235] not all tribes' practices are illiberal.[236]

Second, even tribes whose practices depart from liberal tenets are "just enough" under the citizen-shaping framework. Remember that a political community satisfies the framework's first requirement if it (1) acts through political institutions that are minimally legitimate, even if not entirely ideal, and (2) is not so unjust that continuation of the polity as currently constituted is morally abhorrent.[237] Tribes easily meet these criteria of minimal legitimacy and justice. On the question of legitimacy, consider the much-discussed case, *Santa Clara Pueblo v. Martinez*.[238] The Martinez plaintiffs challenged a tribal ordinance extending membership to the children of male, but not female, tribal members married to nonmembers as violating the Indian Civil Rights Act's guarantee of equal protection.[239] The Supreme Court held that only tribal dispute resolution forums had jurisdiction to enforce the Act. In reasoning from the availability and the superior competence of such forums,[240] the Court explicitly recognized that tribal governmental institutions meet minimum standards of legitimacy. And from the perspective of justice, tribes are not so unjust that their continuation would be morally abhorrent. Indeed, not only do

235. Riley, *supra* note 231, at 803; *id.* at 816–20 (describing reaction to *Santa Clara Pueblo* in the political theory literature); *cf.* KYMLICKA, *supra* note 231, at 94 (noting that "the liberality of a culture is a matter of degree").

236. *See, e.g.*, Matthew L.M. Fletcher, *Due Process and Equal Protection in Michigan Anishinaabe Courts*, MICH. ST. L. REV. MSLR F. (Jan. 22, 2023), https://www.michiganstatelawreview.org/vol-20222023/2023/1/22/due-process-and-equal-protection-in-michigan-anishinaabe-courts [https://perma.cc/4RM9-EGSW] ("Since the advent of the self-determination era of federal Indian law in the 1970s, Michigan Anishinaabe tribal governments have adopted constitutions that also guarantee individual rights, usually using the same or substantively similar language as federal law does. Despite the opportunity to interpret the Due Process and Equal Protection Clauses in accordance with tribal customs, tribal courts have usually applied (or modified) federal precedents to such claims."); *see also supra* note 233 and accompanying text.

237. *See supra* Section III.A.

238. 436 U.S. 49 (1978).

239. *Id.* at 52 & n.2; *see* Indian Civil Rights Act of 1968, Pub. L. 90-284, § 202(a)(8), 82 Stat. 73, 77 (codified as amended in 25 U.S.C. § 1302(a)(8)) (forbidding tribes from "deny[ing] to any person within [their] jurisdiction the equal protection of [their] laws or depriv[ing] any person of liberty or property without due process of law").

240. *Santa Clara Pueblo*, 436 U.S. at 51–52, 55–56, 65–66, 72; *id.* at 55–56 (availability and appropriateness of tribal forums); *id.* at 71, 72 & n.32 (noting that "resolution of statutory issues under" the Indian Civil Rights Act "will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts," "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar").

theorists of multiculturalism assume that tribes should continue to exist,[241] but any argument to the contrary would sound in the register of injustice.[242]

Finally, and most importantly, tribes are not the only political communities of concern for purposes of evaluating ICWA. ICWA is a federal statute that governs how States may regulate the family life of Indian children. Even if some tribes' practices are to some degree illiberal, that fact would provide no justification for a liberal polity—whether the United States or individual States—to separate Indian children from their families and tribal communities.[243] Indeed, removing Indian children in the name of liberalism, or on any basis other than protecting them from "likely . . . serious emotional or physical damage,"[244] would greatly undermine the United States' and States' claims to be just-enough polities.[245]

In satisfaction of the framework's second requirement, ICWA promotes Indian children's ability to develop *sociopolitical capacities* necessary for tribal membership.[246] Because tribes are communities bound by much more than just political institutions,[247] the competencies their adult members require are both different from and likely more extensive than the capacities a liberal democracy

241. *See, e.g.*, KYMLICKA, *supra* note 231, at 86 ("[I]n developing a theory of justice, we should treat access to one's culture as something that people can be expected to want, whatever their more particular conception of the good."); CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 136–38 (1995) (describing culture as an "irreducibly social" and "intrinsically" valuable good); Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439, 449 (1990) (arguing that membership in "groups with pervasive cultures . . . is of great importance to individual well-being"); *cf.* JOHN RAWLS, THE LAW OF PEOPLES: WITH "THE IDEA OF PUBLIC REASON REVISITED" 61 (1999) [hereinafter RAWLS, LAW OF PEOPLES] (opining that "some forms of culture and ways of life are good in themselves").

242. *Compare* RAWLS, LAW OF PEOPLES, *supra* note 241, at 59–60 ("[P]rovided a nonliberal society's basic institutions meet certain specified conditions of political right and justice and lead its people to honor a reasonable and just law for the Society of Peoples, a liberal people is to tolerate and accept that society."), *with* Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 10–11, 16 (2023) (describing how "the Constitution . . . govern[s] . . . 'Indians' . . . in spaces of liberal constitutional exception . . . on the grounds that the[se] peoples . . . require civilization before they achieve self-government" and arguing for "identifying the preservation of colonized communities as a constitutional value").

243. *Cf.* KYMLICKA, *supra* note 231, at 164–68 (distinguishing between identifying and critiquing illiberal practices of a national minority and "coercively imposing liberalism").

244. 25 U.S.C. § 1912(e)–(f) (providing that "[n]o foster care placement" or "termination of parental rights may be ordered . . . in the absence of a determination . . . that the continued custody of the child by the parent of Indian custodian is likely to result in serious emotional or physical damage to the child").

245. *See, e.g.*, G.A. Res. 61/295, annex, *supra* note 102, art. 7(2) (categorizing "forcibly removing" indigenous children as an "act of genocide"); *cf.* Blackhawk, *supra* note 242, at 15–16 ("To scholars of empire, the removal of children from a colonized nation and forced resocialization of those children in the language, norms, and customs of the colonizing nation are easily recognizable as tools of colonization. Colonized nations cease to exist when stripped of their citizens.").

246. *Cf.* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989) (noting that ICWA "seeks to protect the rights of the Indian child as an Indian").

247. *See supra* notes 107–09 and accompanying text.

can legitimately compel its young citizens to acquire. ICWA seeks to protect Indian children's connections with their families and tribes to ensure the children's ability to know their communities, languages, cultures, traditions, and religions—connections and knowledge that were denied the generations of Indian children removed to boarding schools and non-Indian adoptive homes, at great cost to the children, their families, and their tribes.[248]

Satisfying the third requirement of *relevant, tailored means*, ICWA's protections are appropriately related to capacity development and not overly invasive. When Indian children are removed from their families and placed with non-Indian foster and adoptive families, it is much more difficult for them to acquire their tribal languages, culture, and practices.[249] Thus ICWA's provisions are relevant to Indian children's ability to develop sociopolitical capacities. Moreover, ICWA's means are the opposite of invasive, for the statute is designed to ensure that Indian children are separated from their families and communities only when doing so is truly justified.[250]

Finally, ICWA does not seriously harm Indian children's physical or emotional health.[251] The statute explicitly safeguards Indian children's wellbeing by permitting foster care placement and termination of parental rights when "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[252] Although ICWA's detractors criticize its heightened evidentiary standards—"clear and convincing evidence" and "evidence beyond a reasonable doubt" for removing children from their homes and terminating parental rights, respectively[253]—these due-process protections were enacted to combat unwarranted removals resulting from the interplay of poverty, cultural bias, and

248. *See* Fletcher & Singel, *Indian Children*, *supra* note 68, at 959 ("[ICWA] is a remedial statute designed to slow down the mass exodus of Indian children from their Indian parents, their homes, their extended families, their reservations, and their culture and language."); *see also id.* at 891, 929, 938, 940; *cf.* Zug, *supra* note 42, at 55 ("The ICWA's critics object to the Act's emphasis on the transmission of Indian culture, but this may be a disagreement about whose culture gets transmitted rather than an objection to the importance of cultural connection in general.").

249. *See* Fletcher & Singel, *Indian Children*, *supra* note 68, at 959.

250. *See, e.g.*, 25 U.S.C. § 1901(4) (Congress "find[ing] . . . that . . . removal" of Indian children was "often unwarranted").

251. To the contrary, "compliance with [ICWA] is closely associated with better outcomes for Indian children." Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. REV. 1755, 1775 (2022) [hereinafter Fletcher & Singel, *Lawyering*]; *see also id.* at 1775 n.136.

252. 25 U.S.C. § 1912(e)–(f); *see also id.* § 1922 (permitting emergency removal or placement "in order to prevent imminent physical damage or harm to the child").

253. *Id.* § 1912(e)–(f). "In contrast, for child welfare cases not involving Indian children, the preponderance of the evidence standard governs temporary removals of children from their homes, and parental rights terminations are governed by the 'clear and convincing' standard as a matter of constitutional due process." ATWOOD, *supra* note 75, at 177.

vague legal standards.[254] ICWA's evidentiary standards take seriously "the very real fact that removal from a parent carries proven risks of mental, emotional, and physical harm," and that children may benefit from retaining legal relationships even with parents who do not provide day-to-day care.[255] Indeed, many family law scholars have argued for universal heightened evidentiary standards to improve outcomes for *all* children in the child welfare system.[256] Finally, ICWA is attentive to the needs of Indian children as individuals, requiring consideration of a child's "special needs, if any," and permitting deviation from the statutory placement preferences for "good cause."[257] Far

254. *See* JACOBS, *supra* note 94, at 158 ("In an effort to stop the unwarranted removal of Indian children on vague grounds, the act required the highest level of proof of neglect or abuse."); Casey Amicus Brief, *supra* note 16, at 23 ("ICWA adopted the beyond-the-reasonable-doubt standard for termination of parental rights to mitigate the particular crisis facing Indian families."). Due-process concerns also explain ICWA's requirement of "testimony of qualified expert witnesses." 25 U.S.C. § 1912(e)–(f); *see* ATWOOD, *supra* note 75, at 178 ("Congress wanted to guard against decision-making based on ignorance of cultural practices relating to Indian family life."); *see also* Fletcher & Singel, *Lawyering*, *supra* note 251, at 1773 ("Prior to the ICWA (and now, frankly), state social workers and judges applied a white, nuclear family standard to Indian families. State agencies overtly discriminated against Indian families, sometimes even adopting policies that treated any Indian child living on a reservation as automatically being in a state of neglect, justifying removal.").

255. Theo Liebmann, *What's Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLINE J. PUB. L. & POL'Y 141, 148 (2006); Casey Amicus Brief, *supra* note 16, at 21 ("ICWA's removal standard . . . reflects the well-documented damage that removal itself causes to children."); *id.* at 23 ("[T]he high priority ICWA places on parental relationships has helped foster an evolving understanding that all children can often achieve the permanency they need through the kinship guardianship process without formally severing parental ties—and be better off for it."); *see also* Zug, *supra* note 42, at 36–38 (arguing that State statutes permitting reinstatement of parental rights effectively "recogniz[e] that the clear and convincing termination standard may be inadequate to protect children from the significant harm caused by the loss of the parental relationship"); Meredith L. Schalick, *The Sky Is Not Falling: Lessons and Recommendations from Ten Years of Reinstating Parental Rights*, 51 FAM. L.Q. 219, 226–28 (2017) (discussing situations appropriate for reinstatement of parental rights).

256. *See, e.g.*, Martin Guggenheim, *The Effects of Recent Trends To Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 135 (1995) ("Termination of parental rights should only be ordered upon a specific showing that termination is necessary to promote the child's welfare."); Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109, 126 (2008) ("Similar to the Indian Child Welfare Act . . . , the burden of proof for removal of an African-American child should be . . . clear and convincing evidence" in order "to ensure that Black children and their families have been treated in a non-discriminatory manner."); Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 1023, 1052 (2003) (arguing for application of clear and convincing evidence standard to low-income parents); Stephanie Smith Ledesma, *The Vanishing of the African-American Family: "Reasonable Efforts" and Its Connection to the Disproportionality of the Child Welfare System*, 9 CHARLESTON L. REV. 29, 71 (2014) (arguing that clear and convincing evidence standard should be applied to all removal cases); *cf.* Liebmann, *supra* note 255, at 163–67 (arguing that judges should weigh risk of harm if child remains in home with risks of harm from removal).

257. 25 U.S.C. § 1915(a)–(b); 25 C.F.R. § 23.132 (2023).

from inflicting serious harm on Indian children,[258] ICWA's provisions are intended to, and do, prevent it.

If ICWA helps, rather than hurts, Indian children, how should we understand challenges to the statute? Rather than addressing a conflict between the interests of tribes and of Indian children, the *Brackeen* case is best understood as a contest over which political community, that represented by a tribe or by a State, gets to define Indian children's interests.[259] Although ostensibly about children, the *Brackeen* case is really about power—in particular, which sovereign gets to shape the future of Indian children, and who benefits from that arrangement. As Leah Litman and Matthew Fletcher have observed, *Brackeen* was both "a frontal attack on the entire corpus of federal law that governs Indian affairs today" and an attempt to "drastically reshape the law of American federalism and the relationship between states and the federal government."[260] Because ICWA protects tribal sovereignty pursuant to Congress's Article I power,[261] the *Brackeen* case presented the State petitioners a vehicle to oppose the federal government's reach.[262] Would-be adoptive parents are also likely to benefit if States get to define Indian children's "best interests."[263] The *Brackeen* individual petitioners alleged equal protection harm not only to Indian children, but also to prospective adoptive parents,[264] who would presumably compare favorably against "alternate placements supported by a tribe" when it is the State, rather than a tribe, making custody determinations.[265] Indeed, the trial court outcomes of the consolidated *Brackeen*

258. *See supra* Section I.B.

259. *See* ATWOOD, *supra* note 75, at 3 ("When sovereigns compete to determine the interests of children, fundamental questions of power and legitimacy inevitably arise."); *see also An Issue of Sovereignty*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/legislators-staff/legislators/quad-caucus/an-issue-of-sovereignty.aspx [https://perma.cc/PT4U-ZCRS (staff-uploaded archive)] (last updated Jan. 13, 2013) (describing tribes as "distinct governments" generally having "the same powers as federal and state governments to regulate their internal affairs").

260. Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167 [https://perma.cc/U7XN-H9WG (staff-uploaded, dark archive)].

261. Haaland v. Brackeen, 599 U.S. 255, 272–76 (2023).

262. 25 U.S.C. § 1901; *see, e.g.*, Texas's Brief, *supra* note 7, at 1 (raising Article I, anticommandeering, and nondelegation arguments in addition to equal protection questions).

263. *Cf.* Fletcher & Singel, *Lawyering*, *supra* note 251, at 1793 n.272 ("[I]n most private adoption cases, the demand for a 'best interests' hearing usually comes from the adoptive couple, who tend to prevail in adversarial hearings where they are pitted against underprivileged birth parents and families.").

264. Brackeens' Brief, *supra* note 7, at 41 (arguing that ICWA "discriminate[s] against non-Indian families" by denying them "an equal opportunity to adopt" Indian children "based on the same standards that apply to all other children").

265. *Id.*; *cf.* 25 C.F.R. § 23.132(d) (2023) ("A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement."); *id.* § 23.132(e) ("A placement may not depart from the preferences based solely on ordinary bonding or attachment

cases demonstrate the best-interests standard's tendency to favor parties with greater wealth and socioeconomic status,[266] dimensions on which Indian would-be adoptive families are historically disadvantaged[267]: two of the three children whose custody was contested were adopted by non-Indian families.[268]

Child welfare law is supposed to protect children and promote their wellbeing, not further States' rights arguments or supply children to would-be adoptive parents.[269] The same petitioners who criticized ICWA for treating children like property invoked children's interests to advance their own agendas[270]—with implications for both individual child welfare decisions and the long-term survival of nonmajoritarian communities.[271] As analysis under the citizen-shaping framework shows, ICWA not only protects tribes' prerogatives to ensure that their young members acquire the capacities necessary to perpetuate their unique political communities. ICWA's legal status also provides an important measure of the U.S. political community's continuing

that flowed from time spent in a non-preferred placement that was made in violation of ICWA."); Zug, *supra* note 42, at 87, 83 ("[T]he real objection to . . . ICWA's . . . preference[s] . . . may . . . be that . . . [they] thwart[] . . . the . . . desires of white adoptive families" to "adopt Indian children."). This is not true, of course, in jurisdictions that have adopted State-level ICWAs.

266. *See, e.g.*, McDermott v. Dougherty, 869 A.2d 751, 808 (Md. 2005) (observing that, if "the best interests of the child standard" became "an adding of the 'pluses' offered by one party over another," "any . . . party who offered a better neighborhood, better schooling, more financial capability, or more stability would consistently prevail in obtaining custody"); *cf.* Carolyn J. Frantz, Note, *Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes*, 99 MICH. L. REV. 216, 227–28 (2000) (arguing against consideration of wealth in custody disputes, in part because "socioeconomic biases" may "distort[] judicial decisionmaking").

267. *See, e.g.*, Adam Crepelle, *Federal Policies Trap Tribes in Poverty*, HUM. RTS. MAG., Feb. 2023, at 8, 8–9 (describing fact and causes of poverty on and off reservations).

268. A.L.M. was adopted by the Brackeens in Texas; Baby O was adopted by the Librettis in Nevada. Brackeen v. Bernhardt, 937 F.3d 406, 418–19 (5th Cir. 2019). A Minnesota court denied the Cliffords' motion to adopt Child P., who resides with her grandmother. *See id.* at 420. The Brackeens continue to seek to adopt A.L.M.'s biological sister, Y.R.J. *See* Brackeen v. Haaland, 599 U.S. 255, 268–70 (2023); *see also* Interest of Y.J., No. 02-19-00235-CV, 2019 WL 6904728, at *1 (Tex. App. Dec. 19, 2019).

269. *See* Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 362 (2015) (describing "long process of recasting adoption as a system to provide children to well-off families, while framing measures that accomplish that goal as furthering the children's interests"); Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 75 (2006) (arguing that "altruism as a primary goal in adoption has been overshadowed by supplication to parental desires").

270. *Compare* Brackeens' Brief, *supra* note 7, at 40 ("ICWA deems children little more than chattel . . . ."), *and* Texas's Brief, *supra* note 7, at 53 ("[C]hildren are not resources: they are human beings."), *with* Fletcher & Singel, *Lawyering*, *supra* note 251, at 1781 ("In the past decade, nonprofit organizations dedicated to the eradication of civil rights laws designed to protect underprivileged minorities have argued that the ICWA is unconstitutional.").

271. *See* Berger, *supra* note 269, at 362 (arguing that "framing measures" that "provide children to well-off families . . . as furthering the children's interests . . . threatens all vulnerable communities and families").

commitment to both its Indian trust responsibility and liberal democratic pluralism.[272]

B. *The Child Welfare/Family Regulation System*

The problem of improper citizen shaping is not unique to the Native American context. Indeed, recent criticisms of the child welfare system, including calls to "abolish" the system entirely, can be understood as identifying injustices similar in kind to those motivating ICWA's passage.[273] Abolitionist arguments are multistranded, and many raise concerns consonant with those of the citizen-shaping framework. Critics are right that the child welfare system's interventions are of questionable appropriateness, highly invasive, and cause serious and unnecessary harm to children. However, the most thoroughgoing abolitionist arguments fail to engage with the fundamental fact that, where children are concerned, a significant state role is ineliminable. Although abolitionist critiques are powerful, the only real option for protecting children, families, and minoritized communities is to channel and constrain how the sovereign regulates children on the political community's behalf.

Scholars and advocates have coalesced around the consensus that, as currently organized, the "child welfare" system[274] seriously harms the children, families, and communities it is meant to serve.[275] Although "[m]any Americans believe that the child welfare system consists of teams of well-meaning social

272. *Cf.* Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953) ("Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.").

273. *See infra* notes 284–94 and accompanying text.

274. *See, e.g.*, Nancy D. Polikoff & Jane M. Spinak, *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 433 (2021) (describing system as the "regime of public, private, and faith-based agencies and institutions, courts, and individuals authorized by force of law to surveil and intervene in families, remove children from their parents temporarily or permanently, terminate the parent-child relationship, and create new legal families").

275. DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 88 (2022) [hereinafter ROBERTS, TORN APART] (demonstrating that "the family-policing system targets and devastates Black communities"); *id.* at 288 ("I am certain that the child welfare system causes unconscionable harm to children and their families."); ALAN DETTLAFF, KRISTEN WEBER, MAYA PENDLETON, BILL BETTENCOURT & LEONARD BURTON, HOW WE ENDUP: A FUTURE WITHOUT FAMILY POLICING 3 (2021), https://upendmovement.org/how-we-end-up/ [https://perma.cc/L2EU-T5CL (staff-uploaded archive)] (highlighting the "urgency of ending the harms done to Black, Native, and Latinx families by the family policing system"); JANE M. SPINAK, THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES 256–57 (2023); Cynthia Godsoe, *Disputing Carceral Logic in Family Policing*, 121 MICH. L. REV. 939, 939 (2023) (reviewing ROBERTS, TORN APART, *supra*) [hereinafter Godsoe, *Disputing Carceral Logic*] (noting "[t]he tremendous harm the system inflicts on millions of families and communities—particularly low-income populations and communities of color").

workers who investigate disturbing reports of child abuse and rescue children from monstrous parents who are injuring them or from incompetent parents who are incapable of keeping them safe," Dorothy Roberts argues that, in truth, "[c]hild welfare authorities wield [their] powers to supervise, reassemble, and destroy families with stunningly little judicial constraint or public scrutiny."[276] To reflect this reality, many of those studying and resisting the system[277] refer to it as the "family regulation" or "family-policing system."[278]

Although criticisms of the system are longstanding,[279] recent critiques tend to call for abolishing the system entirely and instead providing greater social supports for meeting children's and families' needs.[280] Abolitionist critics make

276. ROBERTS, TORN APART, *supra* note 275, at 23, 34–35.

277. For brevity's sake, I will often refer to the child welfare/family regulation system simply as "the system."

278. *See, e.g.*, DETTLAFF ET AL., *supra* note 275, at 3 ("We more accurately refer to [the system] as the family policing system."); ROBERTS, TORN APART, *supra* note 275, at 35 (referring to "America's family-policing system"); Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. 1057, 1058 (2023) (calling for "unravel[ling] the family regulation system's wide net of surveillance" and "fundamentally rethink[ing] 'child welfare services'"); Godsoe, *Disputing Carceral Logic*, *supra* note 275, at 941 ("Like the criminal system, the family-policing system is driven by, and in turn perpetuates, carceral logic—an array of legal practices that operate to police, discipline, and most importantly, subordinate a given population in the name of safety or protection."); Brianna Harvey, Josh Gupta-Kagan & Christopher Church, *Reimagining Schools' Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575, 578 (2021) (defining the "family regulation system" as "the collection of public and private agencies and court systems which collectively intervene in and exercise coercive authority over largely low-income and disproportionately Black families in the name of protecting children"); S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1097 (2022) ("This Essay utilizes the term 'family regulation system' to more accurately describe the surveillance apparatus commonly known as the 'child welfare system.'"). For more on the term's origin, see Dorothy Roberts, *Feminism, Race, and Adoption Policy*, *in* ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS 234–46 (Sally Haslanger & Charlotte Witt eds., 2005); and Emma Peyton Williams, Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition (Apr. 27, 2020) (Honors thesis, Oberlin College), https://digitalcommons.oberlin.edu/cgi/viewcontent.cgi?article=1711&context=honors [https://perma.cc/M9FB-GKMH (staff-uploaded archive)] (coining term "family regulation system").

279. *See, e.g.*, ROBERTS, TORN APART, *supra* note 275, at 281–82 (describing decades of legal attempts to reform child welfare systems); Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 416 n.40 (2005) (noting that, by the time Congress was considering the Adoption and Safe Families Act of 1997, "[t]wenty-one states had [already] been forced to enter into consent decrees because they were failing to manage their child welfare systems" (citing 143 CONG. REC. S12210 (daily ed. Nov. 8, 1997) (statement of Sen. Grassley)); *What Is a Summary of Child Welfare Class-Action Litigation?*, CASEY FAM. PROGRAMS (Oct. 20, 2022), https://www.casey.org/class-action-summary/ [https://perma.cc/9K6R-KQ5N] (listing six jurisdictions operating under a consent decree, thirteen jurisdictions operating under a settlement agreement, and eleven jurisdictions with litigation pending).

280. *See, e.g.*, ROBERTS, TORN APART, *supra* note 275, at 284 (calling for "a complete end to family policing by dismantling the current child welfare system" and "reimagining the very meaning of child welfare and protection . . . by creating caring ways of supporting families and meeting children's needs"); SPINAK, *supra* note 275, at 255–93; Godsoe, *Disputing Carceral Logic*, *supra* note 275, at 943

a number of arguments in favor of this position, which can be fruitfully disaggregated using the citizen-shaping framework. I will map these arguments onto criteria 2–4 of the framework, working slightly out of order for reasons that will become clear.

Many abolitionist critiques of the family regulation system center around analyzing and theorizing its disproportionate impact on poor and minoritized families.[281] Poor, Black, American Indian, and Alaska Native children are overrepresented in the system relative to their proportion of the general population, and White children are underrepresented.[282] Although scholars debate the causes of these disparities,[283] many abolitionists have argued that the

("argu[ing] for dismantling the family-policing system and replacing it with community-based support"); Shanta Trivedi, *The Adoption and Safe Families Act Is Not Worth Saving: The Case for Repeal*, 61 FAM. CT. REV. 315, 317 (2023). The call for society to provide greater material support for families is widespread among family law scholars generally. *See, e.g.*, MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 58–62 (2010); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 263–64 (2004); JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 273 (2013); CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 193–95, 223–24 (2014); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2051–52 (2018); Emily J. Stolzenberg, *Nonconsensual Family Obligations*, 48 BYU L. REV. 625, 681 (2022).

281. *See, e.g.*, EICHNER, *supra* note 280, at 184 n.15 (noting that "[b]etween 68–71 percent of children entering foster care come from families that received either federal welfare benefits or Medicaid"); CHILD WELFARE INFO. GATEWAY, CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2–4 (2021), https://www.childwelfare.gov/resources/child-welfare-practice-address-racial-disproportionality-and-disparity/ [https://perma.cc/F48W-GG9T] (click "Download") (describing data and noting that "[r]acial disparities occur at nearly every major decision-making point along the child welfare continuum").

282. *See, e.g.*, EICHNER, *supra* note 280, at 184 n.15 ("Poor families are vastly overrepresented . . . ."); Huntington & Scott, *supra* note 209, at 1388 (system's "intervention has focused disproportionately on low-income families of color"); CHILD WELFARE INFO. GATEWAY, *supra* note 281, at 2–3.

283. One explanation offered for racial disparities is that poor children are more likely to experience abuse and neglect and that minoritized groups are more likely to experience poverty. *See, e.g.*, EMILY A. SHRIDER & JOHN CREAMER, U.S. CENSUS BUREAU, PUB. NO. P60-280, POVERTY IN THE UNITED STATES: 2022, at 4 (2023), https://www.census.gov/content/dam/Census/library/publications/2023/demo/p60-280.pdf [https://perma.cc/A6RH-FS53] (listing 2022 poverty rates as follows: for White, not Hispanic persons, 8.6%; for Black persons, 17.1%; for American Indian and Alaska Natives, 25.0%; for Hispanics of any race, 16.9%; and for persons of two of more races, 12.2%). For such an argument, see, for example, Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 899–922 (2009). *But see, e.g.*, ROBERTS, SHATTERED BONDS, *supra* note 175, at 25–74 (considering the argument that Black overrepresentation correlates with higher Black poverty levels and concluding that racism plays an independent role); *id.* at 27 ("[T]he public child welfare system equates poverty with neglect."); Dailey & Rosenbury, *The New Parental Rights*, *supra* note 69, at 102 ("[V]ague conceptions of parental 'neglect' . . . can turn on subjective and racially biased perceptions about parental fitness.").

system functions to enforce and reinscribe American hierarchies.[284] These accounts build on the system's historical origins to explain its modern disparate effects.[285] Dorothy Roberts locates "the roots of today's welfare system . . . in the forcible separation of enslaved families, the exploitation of Black children as apprentices to former white enslavers, and the exclusion of Black children from charitable aid" and early public relief programs.[286] Both abolitionist and Indian-law scholars have described family separation, whether through boarding schools or the child welfare system, as "a defining feature of the U.S. government's policy to forcibly assimilate and dismantle . . . tribal nations," with "the child-welfare system represent[ing] a[] . . . potent mechanism to reproduce the intentions of a white supremacist settler-state."[287] And historians

284. *See, e.g.*, ROBERTS, TORN APART, *supra* note 275, at 87 ("What ties together the families involved in the child welfare system is that they are disenfranchised by some aspect of political inequality—whether race, gender, class, disability, or immigration status—and typically embody an intersection of these subordinated positions."); Sarah H. Lorr, *Disabling Families*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4496603 [https://perma.cc/EQ99-EAU7 (staff-uploaded archive)] (arguing that "the family regulation system not only discriminates against disabled parents but also produces disability"); Godsoe, *Disputing Carceral Logic*, *supra* note 275, at 939–40 (arguing that the family regulation system "is central to the American project of maintaining white supremacy, as well as other hierarchies along divisions such as class and gender"); Charisa Smith, *From Empathy Gap to Reparations: An Analysis of Caregiving, Criminalization, and Family Empowerment*, 90 FORDHAM L. REV. 2621, 2634 (2022) ("Throughout U.S. history, forced separation and state intrusion upon families of color have primarily occurred for reasons linked to cultural bias, discrimination, and socioeconomic disadvantage."); S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1523 (2023) (describing "the pathologizing of impoverished and racialized groups" to "legitimize[] intrusive state intervention into marginalized families' lives and reif[y] their subjugation").

285. *See, e.g.*, Laura Savarese, Taking the Child-Savers to Court: Habeas Litigation and the Origins of Family Rights 2–3 (Dec. 4, 2023) (unpublished manuscript) ("[C]ritics of the modern family regulation system . . . . draw on history, linking present-day harms to a long pattern of state and federal authorities wrongfully separating Black families through slavery and forced apprenticeship, devastating Native communities by removing children to boarding schools and foster care, and displacing the children of poor, immigrant families through the late-nineteenth-century 'orphan train' movement.") (on file with the North Carolina Law Review).

286. ROBERTS, TORN APART, *supra* note 275, at 114–19, 283; *see* John E.B. Meyers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 452 (2008) ("[I]n the nineteenth and early twentieth centuries, child protection agencies were nongovernmental.").

287. Theresa Rocha Beardall & Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533, 533 (2021); *see* ROBERTS, TORN APART, *supra* note 275, at 102–03 ("Today's child welfare system is rooted in settler colonialism as well as slavery. Another essential part of the history of child welfare in the United States is the federal government's forcible removal of Native children from their tribes[,] . . . combining its dispossession of Native tribes with a policy to forcibly 'civilize' them by erasing their culture."); *see also* JACOBS, *supra* note 94, at xxxii ("Both outright violence and benevolent paternalism served the settler colonial goals of the United States: the complete transfer of all land from its original occupants to the new settler population."); Fletcher & Singel, *Indian Children*, *supra* note 68, at 889–91 (arguing that Indian children have been "a focus of American Indian law and policy" since before the founding, with "American policy shift[ing] . . . from using Indian children as targets of military and diplomatic strategy," to "stripping Indian children from their families and cultures" by "isolating them" "in

have long noted that the work of early nineteenth-century private child welfare agencies—forerunners of today's public system—also furthered the goal of "assimilat[ing] children of Irish, Italian, and Jewish immigrants living in urban slums to white US culture."[288] Under these critiques, the modern child welfare system's disproportionalities do more than reflect longstanding social, economic, and political inequalities. They are also evidence of how the system *perpetuates* such inequalities: both ideologically, by "blaming" individual disadvantaged parents for the systemic effects of "an unequal society," and materially, by "terroriz[ing] . . . racialized" communities to undermine their "ability . . . to resist oppression and organize politically."[289] On this view, the system works as it does because it "financially and politically" "benefit[s]" "[t]hose in power," "serv[ing] their interests in . . . reinforcing a white supremacist power structure[] and stifling calls for radical social change."[290]

Juxtaposing this abolitionist analysis with the citizen-shaping framework's second criterion, that of permissible intermediate ends, yields illuminating insights. This second requirement scrutinizes the capacities which a political community seeks to inculcate in its children and limits the permissible goals of child shaping to encouraging development of capacities sufficiently related to the roles and functions of adult citizens.[291] Abolitionists do not only theorize the child welfare system as a machine of social control. Their critiques also cast the system as a mechanism of *social reproduction*[292]—in particular, one that

oppressive boarding schools," to "abuse of the legal system to remove Indian children from their families, terminate the parental rights of their parents, and relocate them to off-reservation, non-Indian foster and adoptive parents").

288. ROBERTS, TORN APART, *supra* note 275, at 110 & n.42 (citing WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 108–15 (1999); Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 MOD. AM. 3, 3–13 (2009)); *see also* STEPHEN O'CONNOR, ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED 209–12 (2001); CHARLES LORING BRACE, THE DANGEROUS CLASSES OF NEW YORK AND TWENTY YEARS' WORK AMONG THEM, at i–ii (1872) ("[T]he cheapest and most efficacious way of dealing with the 'Dangerous Classes' of large cities, is . . . to prevent their growth; to so throw the influences of education and discipline and religion about the abandoned and destitute youth of our large towns; to so change their material circumstances, and draw them under the influence of the moral and fortunate classes, that they shall grow up as useful producers and members of society . . . .").

289. ROBERTS, TORN APART, *supra* note 275, at 283, 88; *see also id.* at 283 ("Throughout U.S. history, the government has deployed child removal as a weapon to control Black . . . Indigenous, immigrant, and poor people, and to suppress their liberation struggles."); Godsoe, *Disputing Carceral Logic*, *supra* note 275, at 944 ("[E]ffectively, because of the rhetoric of child saving, the family-policing system keeps marginalized communities down—outside the body politic and thus blocked from amassing power or challenging the status quo.").

290. ROBERTS, TORN APART, *supra* note 275, at 284.

291. *See supra* Section III.B.

292. *Cf.* DON LASH, "WHEN THE WELFARE PEOPLE COME": RACE AND CLASS IN THE US CHILD PROTECTION SYSTEM 15 (2017) (calling "the Marxist notion of social reproduction . . . essential to understanding [both] why capitalism needs to regulate poor and working-class families[] and . . . why it needs an ideological framework to justify that [regulation]").

designates and shapes some children for subordinated futures in order to preserve the privilege of others.[293] Shaping children to perpetuate social hierarchies clearly runs afoul of liberal-egalitarian commitments generally, as well as of the citizen-shaping framework's emphasis on pluralism, mutual respect, and children's prerogatives to develop and implement their own individually chosen values. Abolitionist critiques reveal the child welfare system's role in impermissibly reproducing an unequal body politic,[294] and in so doing force us to confront the pressing question how the U.S. political community should reshape its social reproduction toward more egalitarian ends.

Abolitionists buttress their equality-based critiques with cogent arguments that the child welfare system inflicts serious harm. The latter charges speak to the citizen-shaping framework's fourth requirement, which demands that political communities respect children's core interests in physical and emotional health.[295] Scholars and advocates marshal extensive evidence to show that, despite its child-protective justification, the system fails abysmally on this front. Over one in three American children will experience a child maltreatment investigation before turning eighteen,[296] and though the vast majority of allegations are unsubstantiated, the mere fact of investigation "harms . . . those surveilled"[297] by "undermining the child's attachment to their parent,"

293. *See supra* notes 289–90 and accompanying text; *see also* ROBERTS, TORN APART, *supra* note 275, at 88 ("Today's child welfare machine . . . can trace its roots directly back to . . . practices designed to uphold racial capitalism over the course of U.S. history," including "enslaved African families, emancipated Black children held captive as apprentices by their former enslavers, Indigenous children kidnapped and confined to boarding schools under a federal campaign of tribal decimation, and European immigrant children swept up from urban slums by elite charities and put to work on distant farms."); *cf.* Fletcher & Singel, *Indian Children*, *supra* note 68, at 888–89 (noting that "boarding schools attempted to strip [children] of their language, culture, and family relationships in exchange for training in menial jobs in adulthood"); Godsoe, *Disputing Carceral Logic*, *supra* note 275, at 941 n.8 (suggesting "connection between the contemporary family-policing system and" the post-Civil War "Black Codes," which "were intended primarily to reinforce a social milieu of racial subordination and to relegate newly freed Black Americans to prolonged economic exploitation"); Tina Lee, *Response to the Symposium: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 12 COLUM. J. RACE & L. 421, 424 (2022) ("Throughout U.S. history, white supremacist culture has seen little value in poor or Black and brown families. It has sought to punish or assimilate those who don't fit into white and middle-class norms of 'proper' child rearing, often through child removals.").

294. *Cf.* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067 (2017) (identifying "the real problem of policing" as the fact that "at both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic").

295. *See supra* Section III.D.

296. Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017).

297. Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOC. REV. 610, 611 (2020); *id.* at 615 ("CPS declines to substantiate allegations of maltreatment for the vast majority of children investigated (83 percent), and 95 percent remain at home following the investigation"); *id.* at 611 (stating authorities conducting child

"trauma[tizing]" the parent, and disrupting community ties.[298] When children are removed from their families of origin, even short separations inflict lasting injury on both children and parents.[299] Foster care is "known to cause devastating harms," from the negative emotional, health, and educational effects of shuffling through multiple placements, to physical and sexual abuse, to anti-LGBTQ harassment and violence, to death.[300] Multiple studies have shown that former foster youth fare worse than the general population across "measure[s] of well-being" ranging "from health to education, employment, housing, and incarceration."[301] Studies also show that foster care produces worse outcomes than children staying in their homes.[302] Termination of parental rights produces legal orphans who "face both social stigma and financial disadvantages."[303] Not only may such children never be adopted, they also lose relationships with parents that may be beneficial.[304] Abolitionists marshal damning evidence that, as currently structured, "child welfare" interventions harm, rather than promote, children's core interests in physical and emotional health.

maltreatment investigations wield vast power to "observe domestic space and probe household members' personal lives," rendering these investigations "the defining case of surveillance in a private sphere").

298. Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. 1485, 1535–36 & nn.304–07 (2023); *see also* ROBERTS, TORN APART, *supra* note 275, at 27 ("[T]he family-policing system frays social bonds.").

299. *See, e.g.*, ROBERTS, TORN APART, *supra* note 275, at 47–52 (describing evidence and effects); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527–41 (2019) (describing "numerous independent and overlapping 'harms'" caused by removal).

300. ROBERTS, TORN APART, *supra* note 275, at 24; *id.* at 227–29 (discussing negative impacts of multiple foster care placements); *id.* at 230 ("Many studies conducted since the 1980s have shown that children are much more likely to be maltreated in foster care than in their homes."); *id.* at 231–33 (describing "almost uniformly nightmarish" foster-care experiences of "gay and transgender children"); *id.* at 233–34 (describing results of 2020 *Journal of the American Medical Association Pediatrics* study, finding that "children in foster care are 42 percent more likely to die than children who aren't in foster care").

301. *See, e.g.*, ROBERTS, TORN APART, *supra* note 275, at 237–42 (describing evidence and effects).

302. *See, e.g.*, *id.* at 239–42; Huntington & Scott, *supra* note 209, at 1410 ("Substantial evidence demonstrates that state custody does not generally improve child wellbeing."); *id.* at 1388 n.86 (citing CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES, at i–iii (2015), https://www.acf.hhs.gov/sites/default/files/cb/cwo2015.pdf [https://perma.cc/T899-UA26]); Joseph J. Doyle, Jr., *Causal Effects of Foster Care: An Instrumental-Variables Approach*, 35 CHILD. & YOUTH SERVS. REV. 1143, 1149–50 (2013).

303. Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 150 & n.237 (2013) (explaining that "legal orphans are entitled to neither parental support nor inheritance from family members").

304. *Id.* at 150–51 ("The legislative history of reinstatement statutes acknowledges . . . that children do better if they 'have a significant connection to an adult,' and that states have failed to find adoptive homes for many children."); Casey Amicus Brief, *supra* note 16, at 23 ("[C]hildren can often achieve the permanency they need through the kinship guardian process without formally severing parental ties—and be better off for it."); *see also* ROBERTS, TORN APART, *supra* note 275, at 160–62 (describing costs to children of terminating parental rights); Zug, *supra* note 42, at 36–38 (noting "the significant harm caused by the loss of the parental relationship").

Thus far, abolitionist critiques have mapped closely onto the considerations of the citizen-shaping framework. Where these critiques depart from the framework, and what separates them from other critiques of the child welfare system, is the abolitionist demand to dismantle the system entirely.[305] Abolitionists reject "reformist reform[s]" that perpetuate current institutional arrangements, calling instead for "non-reformist reforms" to "build a safer and society . . . by creating caring ways of supporting families and meeting children's needs."[306] In supporting this position, abolitionists make several arguments. The citizen-shaping framework's third requirement, that of *relevant, tailored action*, which demands that child-related policies be sufficiently related to achieving appropriate goals and not be overly invasive, helps to disentangle these arguments into several distinct claims about tailoring.

As a threshold matter, abolitionists might argue that the child welfare system pursues impermissible goals: the reproduction of racial and class hierarchies.[307] In that case, the system and its interventions would be impermissible under the citizen-shaping framework's second requirement, and no further analysis would be necessary. But because the system's child-protective justification is so ideologically strong, abolitionists make relevance and tailoring arguments to show the ill fit between the system's interventions and its stated goal of keeping children safe.

A policy's relevance goes to its efficacy, and abolitionists contend convincingly that the child welfare system fails to protect children. Some arguments seem to suggest that the system yields no benefits in terms of protecting children.[308] Others emphasize how the system harms the children in

305. *See, e.g.*, ROBERTS, TORN APART, *supra* note 275, at 9 (calling for the system to be "completely replac[ed] . . . not with another reformed state system, but with a radically reimagined way of caring for families and keeping children safe").

306. *Id.* at 284. For the distinction between "reformist reforms" and "non-reformist reforms," see ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7–8 (Martin A. Nicolaus & Victoria Ortiz trans., 1967) (distinguishing between "reformist reforms" and "non-reformist reforms," with the latter "conceived not in terms of what is possible within the framework of a given system and administration, but in view of what should be made possible in terms of human needs and demands"); see also Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2507 (2023) ("Non-reformist reforms aim to undermine the prevailing political, economic, social order, construct an essentially different one, and build democratic power toward emancipatory horizons.").

307. *See supra* notes 284–94 and accompanying text.

308. *See, e.g.*, Anna Arons, *An Unintended Abolition: Family Deregulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. F. 1, 1 (2022) (demonstrating that New York City "families remained just as safe" during the pandemic, when the family regulation system retreated and families found support through mutual aid networks and new government entitlements); *see also* ROBERTS, TORN APART, *supra* note 275, at 287 ("Children fall through the cracks because agencies are devoting too many resources to investigations and child removal.").

its ambit.[309] In either case, whether inefficacious or counterproductive, the system's interventions fail to satisfy the framework's relevance criterion.

Abolitionists also argue that the child welfare system is overly invasive in a number of ways. First, they decry its weighty impacts on family privacy, family relationships, and individual psyches,[310] suggesting that the system's burdens exceed some predetermined absolute threshold. Second, some abolitionist arguments suggest that the system's interventions are insufficiently tailored. Some are reminiscent of a cost-benefit analysis, weighing the system's significant harms against its slight benefits.[311] Others suggest that less invasive policies are available to protect children—in particular, greater social provision for families' material needs.[312] On either an absolute or a relative measure of invasiveness, the child welfare system violates the framework's tailoring criterion.

Faced with such compelling evidence that the child welfare system harms children, why disaggregate abolitionist arguments into their component claims? Analyzing these critiques under the citizen-shaping framework makes clear that, while abolitionist diagnoses of the system's flaws are spot-on, their proposed remedies are only partially practicable. Abolitionists are absolutely right that the system's interventions are overly broad, highly invasive, and fail to protect children's core interests in physical and emotional health. In light of these concerns, abolitionist arguments that the system perpetuates social hierarchies raise especially pressing questions of justice. However, the most thoroughgoing abolitionist arguments call for complete dismantling of the system, which could entail the proposition that the state has no legitimate role in ensuring child protection. As this Article has shown, such a position is untenable, for it is impossible to entirely disentangle the political community from family life.[313]

309. *See, e.g.*, *supra* notes 297–304 and accompanying text.

310. *See, e.g.*, *supra* notes 297–304 and accompanying text.

311. ROBERTS, TORN APART, *supra* note 275, at 285–89 (engaging with "fear that abandoning the system is dangerous" to children); *id.* at 287 (citing study of Texas CPS that "show[ed] no relationship between a state's intervention with a family, as measured by its reporting rate, service rate, or removal rate, and its child abuse and neglect death rate").

312. *See, e.g.*, *id.* at 287–89; *see also* Huntington & Scott, *supra* note 209, at 1409 ("Population-based prevention efforts, such as Medicaid expansion, can help prevent child abuse and neglect, but the child welfare system itself continues to focus primarily on crisis management rather than preventing abuse and neglect.").

313. *See, e.g.*, James G. Dwyer, *Regulating Child Rearing in a Culturally Diverse Society*, *in* PHILOSOPHICAL FOUNDATIONS OF CHILDREN'S AND FAMILY LAW 273, 276–78 (Elizabeth Brake & Lucinda Ferguson eds., 2018) [hereinafter Dwyer, *Regulating Child Rearing*] ("The state is heavily and inevitably intervening into children's lives regardless of how much legal freedom and authority parents have . . . . Granting [parents] more privileges and powers . . . amounts simply to intervening more in children's lives by one means (delegation of power) than by another (direct exercise of power)."); Olsen, *supra* note 32, at 836; *cf.* Rachel E. Barkow, *Promise or Peril? The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 252 (2023) (offering as a "promising take on the

Acting through its sovereign, the political community has established a system that puts children largely in their parents' power.[314] Abolitionists (and family law scholars more generally) critique the community's concomitant decision to make parents overwhelmingly responsible for meeting children's needs and punishing parents who can't.[315] But even if the abolitionist project succeeds in its vital goal of ensuring that parents raise children in a more supportive society, we will still need to grapple with the implications of parental power. A just polity cannot leave children entirely at the mercy of their parents.[316] As a result, some system for ascertaining and intervening when parents are seriously harming their children will always be necessary to ensure children's equal standing in the community.[317] Adopting an abolitionist position cannot definitively resolve what kinds of state actions are permissible vis-à-vis families. However, filtering abolitionist arguments through the citizen-shaping framework yields an important set of questions to guide policymakers in structuring state power toward children's benefit, today and in the future.

rise of [prison] abolitionist rhetoric and organizing in American politics" the possibility that abolitionism "mobilizes people to fight injustices in the administration of punishment and opens the policy space for greater reforms," but expressing doubt that "it achieves its ultimate goal of ending incarceration").

314. *See* Dailey & Rosenbury, *The New Parental Rights*, *supra* note 69, at 106 ("[T]he state . . . intervenes in all families by defining who counts as a parent and then continuing the historical practice of allocating almost exclusive control over children to parents. The law's allocation of control to parents is a choice, not a natural state of affairs."); Dwyer, *Regulating Child Rearing*, *supra* note 313, at 276–78 (describing how the state structures the parent-child relationship).

315. *Compare, e.g.*, ROBERTS, TORN APART, *supra* note 275, at 284 (calling for "a complete end to family policing by dismantling the current child welfare system" and "reimagining the very meaning of child welfare and protection . . . by creating caring ways of supporting families and meeting children's needs"), *with* EICHNER, *supra* note 280, at 125 (arguing that "the primary thrust of the state's efforts to improve children's welfare should come, not through coercively removing children from their homes, but through routinely supporting families and other institutions that profoundly affect the wellbeing of children").

316. *Cf.* JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 4 (2006) ("develop[ing] a general theory of what children are morally entitled to as against the state, and correlatively what moral duties the state owes to children, when the state takes it upon itself to make authoritative decisions about the legal family relationships children will have and about which of a child's social relationships will receive legal protection").

317. *Cf.* EICHNER, *supra* note 280, at 125 ("Even with all the institutional prerequisites in place, there will still be parents who either cannot or will not adequately protect their children's welfare. In these cases, the state should breach family privacy when it has reason to believe that parents are abusing or neglecting their children or are otherwise not raising them in a manner likely to produce at least minimally competent adult citizens. [This standard] allows the state to step in on those occasions in which there is a significant risk of harm . . . ."); *id.* at 135 (arguing that parental "autonomy is limited not only by prohibitions on abuse and neglect, but also by the requirement that children must be educated for civic virtue").

C. *Gender-Affirming Healthcare Bans*

The citizen-shaping framework also provides some purchase in the current political debates over gender-affirming healthcare for transgender youth.[318] As of late January 2024, twenty-three states have enacted laws or policies limiting children's access to gender-affirming medical care, including puberty blockers, hormone therapy, and surgical intervention.[319] Parents, children, medical professionals, and clergy have challenged these laws and policies in court on numerous constitutional grounds, with unanimous success at the district-court level; Arkansas, Florida, and Indiana are currently enjoined from enforcing their policies, and judges in Alabama, Kentucky, and Tennessee issued injunctions that were reversed by the Eleventh and Sixth Circuits pending litigation.[320]

These laws, policies, and bills represent a clear attempt by States to influence their young citizens' development. They are also highly suspect under the citizen-shaping framework.

318. "Gender-affirming healthcare" or "medical care" refers to "the range of medical services that trans youth use to bring their bodies and lived experiences into alignment with their gender identities." Note, *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2164 n.8 (2021) [hereinafter *Outlawing Trans Youth*]. This care includes treatments such as counseling and therapy, puberty blockers, hormone replacement therapy, and gender confirmation surgery. *Id.* at 2166–67 (citing WORLD PRO. ASS'N FOR TRANSGENDER HEALTH [WPATH], STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE (7th ed. 2012)).

319. *See Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights?redirect=legislation-affecting-lgbtq-rights [https://perma.cc/MT2X-D6M7 (staff-uploaded archive)] (last updated Dec. 21, 2023) (listing healthcare bills enacted in Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Oklahoma, Ohio, South Dakota, Tennessee, Texas, Utah, and West Virginia); *see also* Alabama Vulnerable Child Compassion and Protection Act, Act 289, § 2, 2022 Ala. Laws (codified at ALA. CODE § 26-26-4 (2022)); Act of Mar. 30, 2022, ch. 104, § 1, 2022 Ariz. Sess. Laws. 583, 583 (codified at ARIZ. REV. STAT. § 32-3230); Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-Transgender Bills*, N.Y. TIMES, https://www.nytimes.com/2023/01/25/us/politics/transgender-laws-republicans.html [https://perma.cc/UM8W-VVMX (staff-uploaded, dark archive)] (last updated June 20, 2023).

320. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022); Doe v. Ladapo, No. 23cv114, 2023 WL 3833848, at *1 (N.D. Fla. June 6, 2023); K.C. v. Individual Members of Med. Licensing Bd. of Ind., No. 23-cv-00595, 2023 WL 4054086, at *1 (S.D. Ind. June 16, 2023). Kentucky and Tennessee district court judges granted preliminary injunctions blocking enforcement of those states' bans, but the Sixth Circuit reversed the injunctions. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 491 (6th Cir.), *rev'g* No. 23-cv-00376, 2023 WL 4232308 (M.D. Tenn. June 28, 2023), *and* Doe 1 v. Thornbury, No. 23-cv-230, 2023 WL 4230481 (W.D. Ky. June 28, 2023). Similarly, an Alabama district court granted a preliminary injunction, which the Eleventh Circuit vacated. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1151 (M.D. Ala. 2022), *vacated*, Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1231 (11th Cir. 2023). The Tennessee and Kentucky plaintiffs and the U.S. government have petitioned for certiorari in the *Skrmetti* case. *Skrmetti*, 83 F.4th 460, *petitions for cert. filed*, No. 23-466 (U.S. Nov. 1, 2023), No. 23-477 (U.S. Nov. 6, 2023), No. 23-492 (U.S. Nov. 3, 2023).

Beginning with the second requirement, the traits which prohibitions on gender-affirming healthcare seek to inculcate are not permissible sociopolitical capacities. Indeed, a person's sex and gender should be entirely unrelated to fulfilling the functions of citizenship in a liberal democratic polity. Not only does U.S. law guarantee individuals equal status as citizens regardless of their sex (and probably their gender),[321] but an individual's gender presentation is irrelevant to traits like tolerance, mutual respect, willingness to act for the collective good, and ability to participate in democratic self-governance.[322] Indeed, state-sanctioned attempts to force children to occupy certain roles based on the sex assigned to them at birth are anathema in a liberal democratic society committed to enabling individuals to choose and pursue their own conceptions of the good life.[323] Moreover, blanket bans on gender-affirming healthcare may prevent children from acting in congruence with their identities, undermining

321. *See, e.g.*, U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (holding that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender); United States v. Virginia, 518 U.S. 515, 532 (1996) ("[T]he Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."). This antidiscrimination principle probably also encompasses gender. Though the Supreme Court's equal protection jurisprudence has used the terms "sex" and "gender" somewhat interchangeably, *see, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–41 (1985) (referring to both "classifications based on gender" and "the sex characteristic"), the logic of *Bostock v. Clayton County*, 590 U.S. 644 (2020), that discrimination against transgender individuals constitutes sex discrimination under Title VII because such discrimination "necessarily entails discrimination based on sex," *id.* at 1747, holds with equal force in the Equal Protection Clause context, *see Outlawing Trans Youth*, *supra* note 318, at 2180. And many courts of appeals have found that discrimination against transgender individuals violates equal protection. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 607, 609–10 (4th Cir. 2020) ("conclud[ing] that heightened scrutiny applie[d] because transgender people constitute at least a quasi-suspect class" for purposes of equal protection analysis); Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019); Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."); Smith v. City of Salem, 378 F.3d 566, 568, 577 (6th Cir. 2004) (concluding that "[t]he facts . . . alleged to support [plaintiff's] claims of gender discrimination pursuant to Title VII easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983").

322. *See supra* notes 199–204 and accompanying text; *cf. Grimm*, 972 F.3d at 607 ("Sex is . . . a quasi-suspect class . . . . [b]ecause . . . it 'frequently bears no relation to the ability to perform or contribute to society.'" (quoting *City of Cleburne*, 473 U.S. at 440–41)).

323. *See, e.g.*, *Virginia*, 518 U.S. at 541 ("State actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982))); *cf. Glenn*, 663 F.3d at 1316 (holding that "discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause").

their capacity to develop and implement their own individually chosen values.[324]

Prohibitions on gender-affirming care also fail the framework's third requirement, that the state intervention be (1) relatively effective at encouraging development of a permissible sociopolitical capacity and (2) not overly invasive.[325] Not only is conformity with sex-based and gender-based stereotypes a trait that liberal democracies may not require of their citizens, but the enacted measures are extremely invasive. Bans on gender-affirming care work in a number of ways. Some bans subject medical professionals and parents to criminal penalties.[326] Others expose providers to professional discipline or malpractice liability,[327] or parents to investigation by the child welfare system.[328] Still others prohibit public funding and private insurance coverage for gender-affirming care.[329] These laws and policies not only severely constrain transgender children's personal and bodily autonomy, but also intrude deeply

324. *See supra* note 205 and accompanying text; *cf.* Nancy J. Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 GEO. J. GENDER & L. 615, 616 (2020) ("The history of the LGBT rights movement in the United States has been a struggle for visibility, recognition, and the type of dignity that comes from being able to live an authentic life.").

325. *See supra* Section III.C.

326. *See* Alabama Vulnerable Child Compassion and Protection Act § 2, ALA. CODE § 26-26-4(a) (Westlaw through the end of the 2023 First Spec., Reg., and Second Spec. Sess.) (stating that "no person shall engage in or cause . . . to be performed on a minor" gender-affirming care "practices," including "[p]rescribing or administering puberty blocking medication," hormonal treatments, and surgeries); *id.* § 26-26-4(c) ("A violation of this section is a Class C felony."); *id.* § 13A-5-6(a)(3) (stating that the prison term for a Class C felony "shall be . . . not more than 10 years or less than 1 year and 1 day").

327. *See* ARK. CODE ANN. § 20-9-1504(a) (LEXIS through all legislation of the 2023 Reg. Sess.) ("Any referral for or provision of gender transition procedures to an individual under eighteen (18) years of age is unprofessional conduct . . . subject to discipline by the appropriate licensing entity or disciplinary review board with competent jurisdiction in this state."), *invalidated by* Brandt v. Rutledge, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022); ARIZ. REV. STAT. ANN. § 32-3230(A) (Westlaw through all 2023 legislation) ("A physician may not provide irreversible gender reassignment surgery to any individual who is under eighteen years of age."); TENN. CODE ANN. § 68-33-103(a) (LEXIS through the 2023 First Extraordinary Sess.) ("A healthcare provider shall not knowingly perform . . . or administer . . . to a minor, a medical procedure . . . for the purpose of . . . [t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity."); UTAH CODE ANN. § 58-67-502(1)(g) (LEXIS through the 2023 Second Spec. Sess. of the 65th Leg.) ("'Unprofessional conduct' includes . . . performing, or causing to be performed, upon an individual who is less than 18 years old" either a "primary" or a "secondary sex characteristic surgical procedure."); *id.* § 78B-3-427 (creating patient right of action for provision of "transgender procedures upon a minor," including right for minor to disaffirm consent to treatment).

328. *See* Letter from Greg Abbott, Governor of Texas, to Jaime Masters, Comm'r of Texas Dep't of Fam. & Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/S6SR-MTSP]; *see also In re* Abbott, 645 S.W.3d 276, 279–80 (Tex. 2022) (denying injunctive relief to "nonparties" to suit challenging policy).

329. *See* ARK. CODE ANN. § 20-9-1503 (prohibiting "use of public funds for gender transition procedures"), *invalidated by Brandt*, 551 F. Supp. 3d at 894; *id.* § 23-79-166 (prohibiting "[i]nsurance coverage of gender transition procedures for minors").

into parent-child and physician-patient relationships—areas at the core of both our commonsensical and constitutional conceptions of privacy. Moreover, means less invasive than complete bans are available for addressing States' stated safety concerns.[330] Considered in light of both absolute intrusiveness and the availability of alternatives, blanket bans violate the framework's tailoring criterion.

The framework's fourth and final requirement is that the intervention cannot seriously harm children's physical or emotional health. Under this requirement, total bans on gender-affirming care—or regulations that function like total bans—are impermissible. The consensus of medical experts is that gender-affirming medical care is "medically necessary care"[331] for trans individuals suffering from gender dysphoria.[332] Indeed, amicus briefs filed on behalf of over twenty major medical associations—including the American Medical Association, the American Psychiatric Association, the Pediatric Endocrine Society, and the Society for Adolescent Health and Medicine—in cases challenging the Alabama and Arkansas bans attested that gender-affirming care is the standard of care for minors with gender dysphoria.[333] Such treatment helps to improve these children's mental health and reduce their risk of suicide,[334] a vital concern in light of research showing that over a third of

330. *See, e.g.*, Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1146 (M.D. Ala. 2022) ("According to . . . Defendants' own expert witness, no state or country in the entire world has enacted a blanket ban of these medications other than Alabama."), *vacated*, Eknes-Tucker v. Governor of Ala., 80 F.4th 1205 (11th Cir. 2023); *id.* ("Defendants themselves offer several less restrictive ways to achieve their proffered purposes."); *see also* K.C. v. Individual Members of Med. Licensing Bd. of Ind., No. 23-cv-00595, 2023 WL 4054086, at *11 (S.D. Ind. June 16, 2023) ("Defendants don't explain . . . why uncertainty about a gender-dysphoria diagnosis or about how long gender dysphoria may persist leaves the State without more tailored alternatives."); *id.* ("[N]o European country that has conducted a systematic review responded with a ban on the use of puberty blockers and cross-sex hormone therapy.").

331. *See* Katherine L. Kraschel, Alexander Chen, Jack L. Turban & I. Glenn Cohen, *Legislation Restricting Gender-Affirming Care for Transgender Youth: Politics Eclipse Healthcare*, CELL REPS. MED., Aug. 16, 2022, at 1, 1.

332. Criteria for a diagnosis of gender dysphoria include "marked incongruence between one's experienced/expressed gender and assigned gender, of at least six months' duration," that is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 453 (5th ed. 2013).

333. *See Eknes-Tucker*, 603 F. Supp. 3d at 1139 ("[Twenty-two] major medical associations endorse [the WPATH] guidelines as evidence-based methods for treating gender dysphoria in minors."); *id.* at 1141 n.13 (listing amici); *Brandt*, 551 F. Supp. 3d at 890 & n.2 (describing WPATH Standards of Care as "widely accepted medical protocols for treatment of adolescent gender dysphoria"); *id.* at 890 n.3 (listing amici); *see also* Kraschel et al., *supra* note 331, at 1, 3 (summarizing protocols for treating gender dysphoria).

334. *See* Kraschel et al., *supra* note 331, at 4 ("Over a dozen studies have collectively linked such care to improvements in depression, anxiety, and suicidality."); *see also Eknes-Tucker*, 603 F. Supp. 3d at 1150 ("The record shows that, without transitioning medications, Minor Plaintiffs will suffer severe

transgender adolescents have attempted suicide.[335] Given the importance of gender-affirming care to some children's physical and emotional health, complete prohibitions on such treatment would violate the requirement that state invention not infringe these children's core interests.

Note that ban proponents reach the opposite conclusion, arguing that restrictions on gender-affirming care are necessary to *promote* children's health.[336] As Chief Judge Sutton of the Sixth Circuit put it, "Both sides have the same fear, just in opposite directions—one saying the procedures create health risks that cannot be undone, the other saying the absence of such procedures creates risks that cannot be undone."[337] The fact that ban proponents and opponents disagree about what furthers children's health demonstrates that the precise content of even children's core interests can generate debate.[338] When disagreements about children's core interests arise, liberal democratic polities should adopt approaches that reflect the best available empirical evidence[339]—especially medical, psychological, public health, and sociological evidence. And when the evidence of serious harm to children is less than clearcut, the community should hesitate to collectively impose blanket bans that completely displace individual parents' and children's weighing of the risks in light of their particular situations.[340]

Applying these principles suggests that liberal governments may have a limited role to play in protecting children's health in this sphere. Like all medical care, gender-affirming care is not without risks. These include concerns

medical harm, including anxiety, depression, eating disorders, substance abuse, self-harm, and suicidality . . . . Additionally, the evidence shows that Minor Plaintiffs will suffer significant deterioration in their familial relationships and educational performance.") (citations omitted)); *Brandt*, 47 F.4th at 671 ("[S]everal studies have shown statistically significant positive effects of hormone treatment on the mental health, suicidality, and quality of life of adolescents with gender dysphoria. None have shown negative side effects.").

335. *See* Jack L. Turban, Katherine L. Kraschel & I. Glenn Cohen, *Legislation To Criminalize Gender-Affirming Medical Care for Transgender Youth*, 325 JAMA 2251, 2251 (2021) ("According to a 2017 study from the Centers for Disease Control and Prevention, . . . approximately 35% of transgender adolescents reported having attempted suicide, highlighting the importance of the mental health concerns affecting this population.").

336. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 491 (6th Cir. 2023) ("Tennessee and Kentucky's interests in applying [gender-affirming care bans] . . . to protect their children from health risks weighs heavily in favor of the States at this juncture.").

337. *Id.*

338. *See supra* note 220 and accompanying text; *cf.* Huntington & Scott, *supra* note 209, at 1453 (noting "concern . . . that defining and promoting child wellbeing can be an uncertain and complex business, given the indeterminacy and capaciousness of the construct").

339. *See* Huntington, *The Empirical Turn*, *supra* note 71, at 229 (defining empirical evidence "broadly as research and data gathered through both quantitative and qualitative methods").

340. *Cf. id.* at 234 ("Decisionmakers should generally rely on empirical evidence when seeking to achieve a particular, agreed-upon outcome, such as reducing family violence, when the valence of the choice is relatively uncontested and when there is a general agreement about how to balance competing values. . . . [D]ecisionmakers should not use it to avoid a debate about contested values and norms.").

that puberty blockers may undermine bone density growth and therefore lifelong bone health, especially when administered to very young children;[341] may impact brain development;[342] and may commit youth to a treatment path prematurely.[343] Although the weighing of these risks against the benefits of treatment appropriately belongs to patients and their parents in consultation with medical providers,[344] governments could take steps to ensure that these decisions are well-informed—ideally by supporting scientific research.[345] If further research then reveals or confirms the potential for serious harm, the state should hesitate to legislate based on such risks unless it would do the same for nonpoliticized areas of medicine.[346] Otherwise, concern for children's health may serve as a mere pretext for expressing normative judgments about transgender individuals.[347]

341. *See* Megan Twohey & Christina Jewett, *They Paused Puberty, but Is There a Cost?*, N.Y. TIMES (Nov. 14, 2022), https://www.nytimes.com/2022/11/14/health/puberty-blockers-transgender.html [https://perma.cc/AN99-W4YV (staff-uploaded, dark archive)] (noting that "[m]any physicians in the United States and elsewhere are prescribing blockers to patients at the first stage of puberty—as early as age 8—and allowing them to progress to sex hormones as soon as 12 or 13"); *cf.* E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH, at S1, S65 (2022) ("[T]he only existing longitudinal studies . . . are based on a specific . . . approach" under which "pubertal suppression was considered at age 12 [and gender-affirming hormone therapy] at age 16 . . . ."); *id.* (noting "concerns delaying exposure to sex hormones (endogenous or exogenous) at a time of peak bone mineralization may lead to decreased bone mineral density" and calling for "continued study").

342. Diane Chen, John F. Strang, Victoria D. Kolbuck, Stephen M. Rosenthal, Kim Wallen, Deborah P. Waber, Laurence Steinberg, Cheryl L. Sisk, Judith Ross, Tomas Paus, Sven C. Mueller, Margaret M. McCarthy, Paul E. Micevych, Carol L. Martin, Baudewijntje P.C. Kreukels, Lauren Kenworthy, Megan M. Herting, Agneta Herlitz, Ira R.J. Hebold Haraldsen, Ronald Dahl, Eveline A. Crone, Gordon J. Chelune, Sarah M. Burke, Sheri A. Berenbaum, Adriene M. Beltz, Julie Bakker, Lise Eliot, Eric Vilain, Gregory L. Wallace, Eric E. Nelson & Robert Garofalo, *Consensus Parameter: Research Methodologies To Evaluate Neurodevelopmental Effects of Pubertal Suppression in Transgender Youth*, 5 TRANSGENDER HEALTH 246, 248 (2020) ("[T]he existing knowledge about puberty and the brain raises the possibility that suppressing sex hormone production during this period could alter neurodevelopment in complex ways—not all of which may be beneficial.").

343. Twohey & Jewett, *supra* note 341.

344. *See* Parham v. J.R., 442 U.S. 584, 603 (1979) ("Simply because the [medical] decision of a parent . . . involves risks does not automatically transfer the power to make that decision . . . to some agency or officer of the state."); Kraschel et al., *supra* note 331, at 4 ("It is problematic for the state to interpose itself and prevent the provision of care that is evidence-based, meets clinical guidelines, and takes place in circumstances where parents, adolescents, and healthcare providers are all aligned and supportive of what they view as the best medical treatment for a given adolescent.").

345. Such support may be especially important in cases where nongovernmental entities are unlikely to conduct studies. *See, e.g.*, Twohey & Jewett, *supra* note 341 (reporting decision of manufacturers of puberty blockers not "to seek FDA approval for the drugs' use among trans adolescents," noting that the process would require "drugmakers . . . to fund research for a patient population that [makes] up just a small part of their market").

346. *Cf.* Kraschel et al., *supra* note 331, at 4 ("[G]ender-affirming care is being singled out in a way one would not countenance for other areas of medicine.").

347. *Cf.* Huntington, *The Empirical Turn*, *supra* note 71, at 292 (noting that recourse to "[e]mpirical evidence" may be intended to "obfuscate[] the normative and political nature of" legal "judgments").

Complete bans on gender-affirming medical care are impermissible under the citizen-shaping framework. Not only are sex and gender entirely irrelevant to fulfilling the roles of citizenship in a liberal democratic polity, but blanket prohibitions are overly invasive and may cause serious harm to transgender children's physical and emotional health. While it remains open for liberal democratic governments to act to protect children's health,[348] they must define the harm they seek to prevent narrowly, lest they betray the tenets of pluralism and stray into the territory of standardizing children.

CONCLUSION

Children's interests are not the only interests at stake in child custody disputes. As ICWA makes clear, all political communities share a sovereign interest in shaping the development of their young citizens. That sovereign interest in social reproduction, even if only implicit, permeates all State-law regulation of children. But there are also limits to how a liberal democratic polity may pursue its interest in self-perpetuation—limits which this Article has attempted to illuminate. The framework developed here offers analytical purchase whenever a political community's interest may diverge from that of its young citizens. And because such divergence may occur at any time a government regulates children, the potential application of the citizen-shaping framework is wide indeed. It speaks not only to laws affecting Indian children, but also to, for example, debates about the child welfare system, transgender youth, juvenile justice, education, and private custody adjudication. For as ICWA and opposition to that statute remind us, a sovereign empowered against *some* children is likewise empowered against *all* children.

348. *Cf.* Huntington & Scott, *supra* note 209, at 1377 (articulating "a contemporary rationale for state action under its *parens patriae* and police power authority").