

# Administrative Burden and the Reproduction of Settler Colonialism: A Case Study of the Indian Child Welfare Act



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*The Indian Child Welfare Act of 1978 (ICWA) sought to end the forced removal of Native children from their tribes. Decades later, American Indian children are still placed in foster and adoptive care at disproportionately high rates. Drawing on forty years of archival data, this study examines the role of administrative burden in reproducing these inequalities and the system of domination from which they arise: settler colonialism. Focusing on three arenas—notice, meeting and hearing involvement, and foster family certification—this article illuminates the burdens imposed on tribal governments that serve as mediating institutions in ICWA implementation. Findings suggest that burdens have particularly strong consequences for inequality when they fall on third-party organizations. They also demonstrate how administrative burden operates as a mechanism for the reproduction of settler-colonial domination.*

**Keywords:** administrative burden, settler colonialism, indigenous, American Indian, Native American, child welfare

The Indian Child Welfare Act (ICWA) of 1978 promised to reduce an entrenched inequality: the disproportionate placement of American Indian children in foster and adoptive care.<sup>1</sup> In the generations before ICWA, state and federal policies forcibly removed 25 to 35 percent of American Indian children from their communities, turning them over to white families and institutions for “assimilation” (Jacobs 2014).

Child removals were part of a broader effort by the U.S. settler state to eradicate tribes and seize indigenous resources (Bruyneel 2007). ICWA established procedures to limit the removal of American Indian children and honor the sovereign right of tribes to govern child welfare cases. Observers have lauded the bill as transformative (Wilkinson 2006). However, in many places, the number of American Indian

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1. I use the term *American Indian* because it most closely approximates the language used in ICWA. I also use terms like Native Nation, Native, tribal, and indigenous to refer to first peoples more generally. Where possible, I use tribal identifiers for individual respondents. This terminology is intended to “reflect the range of words that Indigenous Peoples in the U.S. use to refer to themselves in collective” (Linjean and Weaver 2022, 3).

children in substitute care increased after ICWA, despite a decrease for all other children (Weaver and White 1999). Four decades on, American Indian children are still placed in foster and adoptive care at disproportionately high rates (Wildeman, Edwards, and Wakefield 2019).

Research suggests that these inequalities result from limited caseworker education and weak federal enforcement (Brown 2002; Bussey and Lucero 2013; Casey Family Programs 2015; GAO 2005; Kessel and Robbins 1984). Focusing on individual street-level bureaucrats, these explanations assume that more education and strict penalties for caseworkers will reduce child removals. Shifting attention to policy design, this article illuminates the role of administrative burden in the disproportionate removal of American Indian children. Unlike traditional welfare state programs that serve individuals, ICWA's rights can be triggered only by tribal governments. Drawing on forty years of archival materials from the tribal officials and state agencies charged with ICWA implementation, I identify three arenas in which administrative burden can prevent tribal governments from intervening early to invoke ICWA: responding to notice, attending meetings and hearings, and certifying tribal foster families. In each case, burdens present learning and compliance costs for tribal officials who work with limited infrastructure and in remote areas. These onerous encounters with the state, especially those that risk or result in child removal, also create psychological costs, amplifying the collective trauma that child removals generated pre-ICWA. I further demonstrate that when burdens have limited tribal governments' ability to intervene in child welfare cases, ICWA opponents have used this burden-induced nonintervention to claim that tribes are irresponsible and unable to ensure the safety of their children. These claims have buttressed a nationwide legal effort to overturn ICWA.

These findings suggest that burdens may have particularly strong effects on inequality when they fall on organizations. When implementing organizations primarily or exclusively serve racialized minorities, organizationally targeted burdens can reinforce racial inequality

at the group and individual levels (see Ray 2019). Further, they suggest that burdens operate as a mechanism for the reproduction of settler-colonial domination, limiting the powers of sovereign entities to self-govern.

### **BURDENS, THIRD PARTIES, AND SETTLER COLONIALISM**

Administrative burden refers to "an individual's experience of policy implementation as onerous" (Burden et al. 2012, 742; Herd and Moynihan 2018). Foundational work highlights the learning, compliance, and psychological costs that people face when interacting with the state (Herd and Moynihan 2018). Burdens limit access to public benefits and services (Aiken, Ellen, and Reina 2023, this issue; Barnes 2021; Barnes, Halpern-Meekin, and Hoiting 2023, this issue; Speigman et al. 2013), but people also encounter burdens as they attempt to exercise legal rights (Edwards et al. 2023, this issue; Heinrich 2016; Herd and Moynihan 2018; Moynihan, Gerzina, and Herd 2021; Nisar 2018).

A core feature of burdens is that they are unequally targeted and experienced (Barnes 2021; Herd and Moynihan 2018; Masood and Nisar 2021; Ray, Herd, and Moynihan 2022). Populations with less power, fewer resources, and less human and social capital may be unable to overcome burdens to gain available public benefits (Christensen et al. 2020; Heinrich 2016, 2018; Herd and Moynihan 2018; Nisar 2018). Because burdens are administered by racialized organizations (Ray 2019), they also reinforce racial inequalities, denying benefits to racialized minorities while guaranteeing them to white citizens (Ray, Herd, and Moynihan 2022).

Current examinations of administrative burden are grounded in Enlightenment-era assumptions of a direct citizen-state relationship (Arendt 1979). This conceptualization clarifies the role of burdens in programs that rely on direct service provision or rights claims; policies and rights, however, are often administered and enforced via third-party organizations (Aiken, Ellen, and Reina 2023, this issue; Balough 2015; Dromi 2020; Mayrl and Quinn 2016; Yu 2023). As case studies about abortion policy and social safety net programs demonstrate (see Heinrich et al. 2022; Herd and Moynihan 2018), states may impose costs on

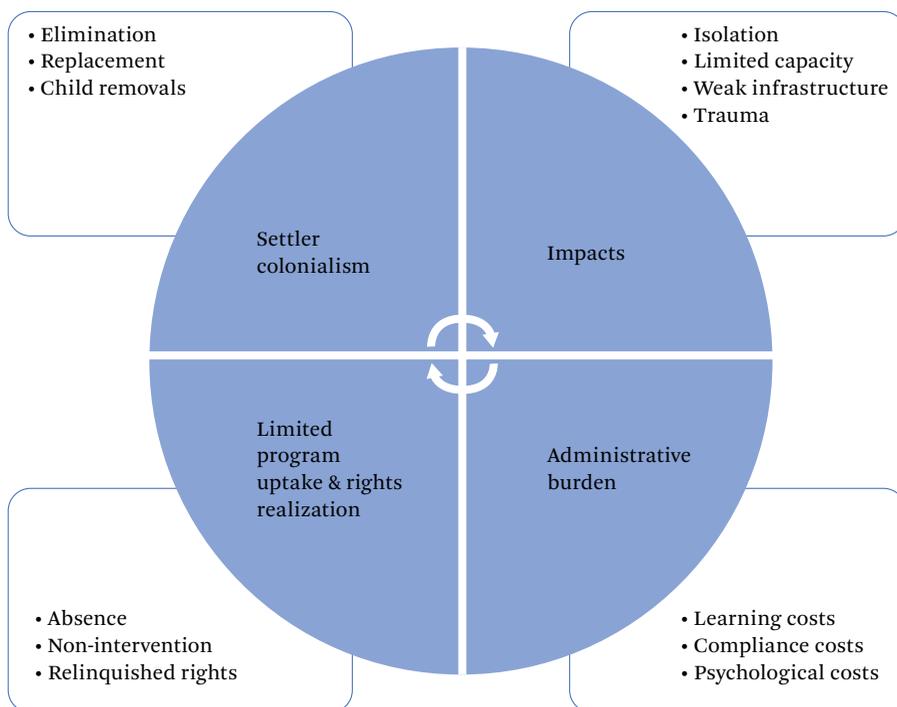
organizations that make service delivery or rights realization more onerous. Further, public policies can impose burdens on subnational government agencies, whether local election boards (Burden et al. 2012) or local safety net program offices (Heinrich et al. 2022). Because organizations and government agencies comprise individuals, burdens targeted at them are experienced by their staff and officials, and have real consequences for the individuals they serve.

Just as burdens research has typically highlighted the burdens experienced by individuals, it has understood burden-related inequalities in individual terms. This work largely treats inequality as measurable through aggregate individual outcomes and demonstrates how individual-level characteristics such as human capital structure the ability of those individuals to manage burdens. Less studied are the broader systems of domination in which burdens operate. Settler colonialism is one such understudied power structure. Settler colonialism is a specific form of colonial domination. Rather than exploit labor and extract resources from the periphery to the colonial core, settlers work to establish a new society, a task that requires the elimination of indigenous populations and their replacement by settlers and settler institutions (McKay, Vinyeta, and Norgaard 2020; Veracini 2010). Recognizing that settler colonialism is a structure rather than an event (Wolfe 2006), scholars in the field continue to ask how this system of domination is reproduced today (Glenn 2015; McKay, Vinyeta, and Norgaard 2020; Seamster and Ray 2018).

This article argues that administrative burden is a mechanism for the reproduction of settler-colonial domination. Figure 1 illustrates this process. Settler-colonial domination aims to achieve indigenous elimination and settler replacement. Historically, the U.S. settler state has met these goals in various ways, including military force, genocide, coercive treaties, the reservation system, allotment, and a host of assimilationist programs such as urban relocation and child removals (Bruyneel 2007; Fenelon 2016; Steinman 2016; Wilkins and Lomawaima 2001). Settlers justified these efforts with ideological appeals to

white superiority and indigenous inferiority (Glenn 2015; Steinman 2016). These efforts have wide-ranging and ongoing impacts on indigenous communities, including the geographic isolation of many tribal governments on remote lands and the economic marginalization of many indigenous individuals and communities (Cornell 2015; Cornell and Kalt 2000; Stewart et al 2022; Teodoro, Haider, and Switzer 2018). Tribal government infrastructures have also borne the consequences of settler-colonial domination (Cornell and Kalt 2006; Johnson and Hamilton 1995). Settler treaty violations and the allotment and assimilation policies of the early twentieth century stripped tribal governments of many inherent powers, undermining the self-governing capacity of tribes (Deloria and Lytle 1983; Johnson and Hamilton 1995). Tribal governments are diverse and resilient (Cornell 1990), but settler colonialism leaves many today with diminished institutional capacity and limited human and financial capital (Teodoro, Haider, and Switzer 2018).

This undermining of tribal authority and capacity has important consequences for the contemporary era where tribal governments work as “mediating institutions” or third parties that facilitate the relationship between the federal government and tribal members (Steinman 2022, 10). Since the 1960s and 1970s and thanks to a vibrant sovereignty movement, the U.S. government has “grudgingly accepted the principle that Indian nations should have maximum control over their own affairs” (Cornell and Kalt 2006, 13). Many of the benefits and rights afforded to tribal citizens are now administered not by state and federal governments but by tribal governments. Just as historical and contemporary racism leave many minority-serving organizations underfunded and with weak institutional capacity (Ray 2019), settler colonialism has left many tribal governments geographically isolated and under-resourced. These “durable inequalities” (Tilly 1999) mean that tribal governments may encounter learning, compliance, and psychological costs as they seek to facilitate program uptake and guarantee rights for citizens. Legal and policy efforts to dispossess and eliminate tribes have resulted in a complicated “jurisdic-

**Figure 1.** Administrative Burdens and the Reproduction of Settler Colonialism

Source: Author's tabulation.

tional maze” (Deloria and Lytle 1983) that produces learning costs for tribal officials. Compliance costs can arise where persistent poverty, geographic isolation, and reduced government capacity place intense demands on tribal governments (Cornell and Kalt 2006). Further, the trauma of settler-colonial domination produces psychological costs in interfacing with federal and state governments. As a result, tribal governments are at times unable to ensure rights realization for citizens, reaffirming settler-colonial domination and the erasure and elimination of indigenous populations. In short, for tribal officials and citizens, burdens today arise from a long history of settler colonialism but also further settler-colonial domination by limiting the ability of sovereign Native Nations to self-govern.

#### SETTLER COLONIALISM AND THE INDIAN CHILD WELFARE ACT

This article uses ICWA to illustrate these processes. Child removals have long been central

to the settler-colonial project of territorial dispossession. Before the 1800s, settler-colonial domination relied on warfare and physical extermination. In the nineteenth and early twentieth centuries, however, “assimilation became a cheaper and more productive form of annihilation” as the federal government sought to seize and privatize tribal lands for white settlers (Collins and Watson 2022, 7). Officials forcibly removed children from their communities to coerce tribes into giving up their lands. By 1900, the removal of Indian children and their permanent placement with white families and institutions became standard practice in state and federal child welfare (Casey Family Programs 2015). When the federal government adopted a policy of termination in the mid-twentieth century, attempting to eradicate Native Nations and free up tribal resources for the taking, child removals again proved central. The Child Welfare League of America and the Bureau of Indian Affairs collaborated to place Indian children with adoptive white families

(Bussey and Lucero 2013; Casey Family Programs 2015). By severing children's ties to Native Nations, child removals worked to eliminate future generations who would hold claim to tribal land and resources (Casey Family Programs 2015).

All told, between 1900 and 1978, 25 to 35 percent of American Indian children were removed from their homes (Limb, Chance, and Brown 2004). In the late 1960s, American Indian children were placed in foster care at rates sixteen times greater than the general population. In some states, they accounted for 7 percent of all children but 40 percent of the adopted population (Byler 1977).<sup>2</sup> In the 1960s and 1970s, tribal activists placed these practices under the public microscope and pressured Congress to investigate. During debates, advocates asserted that federal policy should honor tribal sovereignty and allow tribes to assume jurisdiction over child welfare cases involving their eligible members (Cornell 1990; Wilkinson 2006). ICWA faced some opposition but swiftly passed the House and Senate.

ICWA is not a benefits-granting policy. Instead, it guarantees legal rights in child welfare cases involving tribal children and sets standards for child welfare practice.<sup>3</sup> First and foremost, ICWA constitutes federal recognition of tribes' sovereign right to self-govern. Whereas pre-ICWA practices forcibly and coercively removed Indian children without consulting tribal governments, ICWA supports tribal self-determination and limits state power over Indian children (Wilkinson 2006). It acknowledges tribal jurisdiction over child welfare cases involving Indian children and affirms tribal governments as *parens patriae* with authority over foster, pre-adoptive, and adoptive placements and over the termination of parental rights for citizen children (Linjean and Weaver 2022). Like other federal Indian policies of the late twentieth century, ICWA involves a government-to-government relationship between tribes and federal authorities. Therefore, ICWA's rights can only be triggered by tribes

because the act's protections are guaranteed to tribal governments.

ICWA honors the sovereignty of Native Nations by requiring that states notify tribes when a child welfare investigation involves an Indian child and permitting tribal governments to assume jurisdiction over child welfare cases involving on-reservation children. Given that child removals long functioned as a way of eliminating Native Nations, ICWA also attempts to shift the practice of child welfare to prioritize family reunification and tribal preservation, setting higher standards and requiring additional efforts before tribal children are removed from their homes. For example, ICWA specifies an order of preference for placement should removals be required, with priority going to placement with extended family members, other members of the child's tribe or other tribes, and foster families or institutions approved by the tribe or by an Indian organization. The law requires that social workers and courts explore whether intensive in-home services would be just as, or more, effective than child removals. As the National Indian Child Welfare Association (2018) notes, "ICWA also encourages the use of culturally specific services that are more likely to successfully strengthen AI/AN families and help AI/AN children stay safely at home. ICWA helps states secure tribal assistance and ensure that experts are present in the courtroom when important decisions about the child are made." These provisions are all aimed at reducing child removals, honoring tribal sovereignty, and "return[ing] the care of Indian children to their people" (Cross, Earle, and Simmons 2000, 49).

ICWA has been hailed as "the most far-ranging [Indian rights] legislation ever enacted" and the gold standard in U.S. child welfare (Wilkinson 2006, 260–61). Four decades on, however, child removals continue apace. Today, American Indian children are placed in state foster care at a rate that is fourteen times higher than their rate in the general popula-

2. These figures come from a survey independently conducted by the Association on American Indian Affairs. No comparable data are available for other racialized groups.

3. ICWA's protections apply to every "Indian child" involved in a child welfare proceeding, and the law defines an "Indian child" as someone with membership in or eligible for membership in a federally recognized tribe.

tion, and 56 percent of kids adopted are adopted outside their families and communities (NICWA 2018). Native children are removed from their homes at two to three times the rate of white children (NICWA 2017) and are more likely than any other racialized group to experience foster care placement or termination of parental rights (Wildeman, Edwards, and Wakefield 2019). Although rates of foster care placement for black children decreased from 2000 to 2018, those for Native American children increased (Roehrkasse 2021). I illustrate how burdens limit ICWA's promise to reduce these inequalities and fuel the reproduction of the settler-colonial child removals that ICWA aims to prevent.

### DATA AND METHODS

Because ICWA's protections can only be triggered by tribes, ICWA's administrative burdens fall on tribal governments and officials. I focus on the burdens that most frequently prevent Native Nations from intervening early to invoke ICWA. Public data on tribal child removals and the processes that produce them are limited. My analysis therefore draws on forty years of archival materials, from 1978 to 2018, from a wide range of sources to identify these burdens and assess their implications for tribes' ability to invoke ICWA and for child removals generally.

First, I analyzed annual federal reports that include interviews and focus groups with tribal officials and state child welfare agencies from all fifty states. These reports cover various aspects of ICWA implementation, including tribal governments' reports on frequently encountered barriers. I also collected and analyzed fifty publicly available ICWA evaluations conducted by state agencies as well as by tribes and experts in tribal child welfare. I identified these evaluations using keyword searches of government agencies, child welfare organizations, libraries, and state archives. Each assessed the extent to which implementing agencies were abiding by the statute, how child welfare caseworkers applied it, and the challenges tribal governments faced in invoking it. My analysis includes data collected from presentations by child welfare practitioners at the 2019 National Indian Child Welfare Association

(NICWA) conference and from the University of Minnesota's Child Welfare Archive.

I draw heavily from a collection of archival materials from Maine. In 2013, the state's governor and the chiefs of the five Wabanaki tribes launched a Child Welfare Truth and Reconciliation Commission (TRC), to investigate the Wabanaki child removals. I analyzed all publicly available testimonies (119) and focus group (8) transcripts from this archive, including statements from tribal and state officials. These materials offer multiple benefits to the present study. For one, the TRC is the most comprehensive assessment on record for Indian child welfare procedures. Additionally, Maine has a troubled history of state-tribal relations, and American Indian children in the state are at disproportionate risk of family separation. Since 2000, the risk for termination of parental rights for Indian children has been higher in Maine than in all but two other states (Wildeman, Edwards, and Wakefield 2019). I analyzed these documents to identify and classify administrative burdens in ICWA implementation, but I also compare these Maine findings with reports from other states, NICWA materials, and secondary sources to trace broader patterns in tribal governments' experiences with administrative burden.

When administrative burden prevents tribes from invoking ICWA's protections, child welfare cases may be adjudicated in court; therefore, my analysis also includes materials from sixty court cases (forty-seven state court, two U.S. Supreme Court, and eleven lower federal court). For each, I compiled and analyzed oral arguments, decisions, and associated materials. These materials capture tribal officials' reports of burden and its consequences. The materials also allowed me to assess how burdens are framed by opponents seeking to undermine ICWA.

In what follows, I highlight the learning and compliance costs most faced by tribes in working ICWA. Unless otherwise noted, the burdens examined here have been largely consistent across the forty years under study. This stability not only allows for a focused examination of ICWA-related burdens, but also illustrates a central dynamic of racialized burdens. As Victor Ray, Pamela Herd, and Donald Moyni-

han (2022) note, burdens may be racialized today because they are rooted in past efforts to marginalize social groups, in this case, settler colonialism. This analysis empirically demonstrates how racialized burdens persist and structure contemporary systems of domination.

### LEARNING COSTS

ICWA governs state casework practice, state and tribal court proceedings, and other aspects of child welfare cases (see figure 2). Its provisions contain myriad subprocesses that complicate the activation of rights under ICWA and present learning costs for tribal governments. Existing work notes that ICWA presents learning costs for state officials (Bussey and Lucero 2013; Casey Family Programs 2015; GAO 2005; Kessel and Robbins 1984), but less reported on are the learning costs it has created for tribal governments.

ICWA's learning costs are particularly pronounced because of the complex jurisdictional issues involved. ICWA is a federal statute, meaning the processes outlined in figure 2 apply nationally; however, a host of other factors determine how an individual ICWA case proceeds. Because child welfare falls under state jurisdiction, the procedures for triggering ICWA's rights vary by state. Further, more than thirty states have adopted statutes specific to ICWA. These vary from state-specific ICWA statutes that guarantee even stronger protections for tribal children than federally required to statutes governing specific elements of the Indian child welfare process. Because the more than five hundred tribal governments have different formal legal and political relationships with states, the process for exercising rights under ICWA varies along tribal-state lines depending on the contours and specifics of these arrangements. In addition, more than sixty tribal governments have their own child welfare codes, and increasing numbers of tribal governments have formed state-tribal agreements around child welfare (NARF 2015; NCSL 2019;

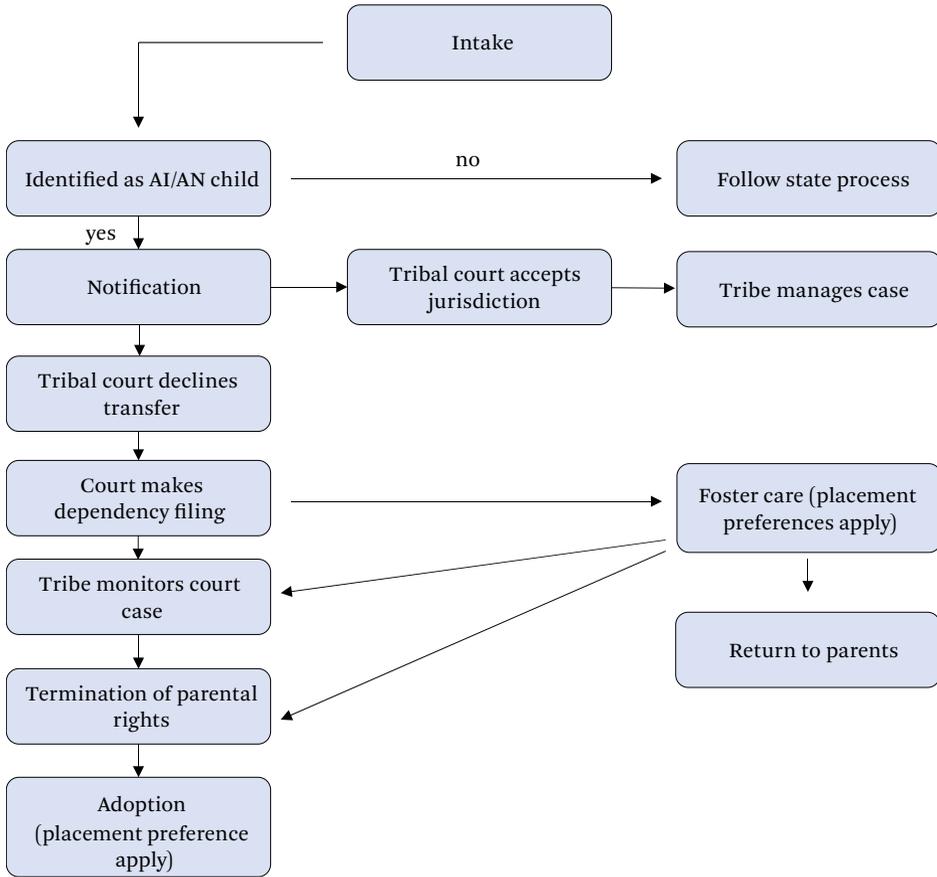
Bureau of Indian Affairs 2016). As a result, the route any two tribal governments might need to take to activate ICWA and the rights available to them can vary dramatically.<sup>4</sup> These complexities result from the settler-colonial federalist structure of the U.S. government (Dahl 2018) and reflect the institutionalization of the ongoing tug-of-war between tribal efforts to maintain sovereignty and state efforts to dispossess, undermine, and eliminate tribes (Deloria and Lytle 1983). The learning costs for tribal governments are only exacerbated by the fact that tribal governments may be working on child welfare cases involving citizen children who live in different states due to settler-colonial relocation efforts that moved of hundreds of thousands of tribal citizens from tribal lands to urban areas (Steinman 2022).

Given these realities, evaluations of ICWA have consistently stressed the learning costs associated with its application. One of the first evaluations of the law's implementation found that tribal authorities received virtually no training from the Bureau of Indian Affairs on how to exercise rights under the law (Kessel and Robbins 1984). In the 1980s and 1990s, reports indicated that tribal governments were often unaware of state ICWA requirements and that tribal authorities, especially those new to the law, were often unaware of its provisions or of the designated and often-changing bureaucratic channels for responding (Brooks 1994; Jones et al. 2000). In 2015, reflecting on a long career in the field, one tribal caseworker in Maine explained,

I don't think that there's a system for training [among most tribes]. When you look at what the ICWA workers have to go through for the bands and for the tribes versus what the State is all about. [For state workers] almost every day there's a fricking training going on and we're hanging on to coattails . . . because they probably have ten divisions with how many people in [them] to support all of that process, and there's usually one person . . . that's

4. Tribal-state agreements can affect everything from how states notify tribes in emergency removal and initial state hearings, who the point of contact is between tribes and states, who is responsible for determining whether ICWA applies to a case, who covers costs for a case, and how foster families are identified and recruited (Bureau of Indian Affairs 2016; Trope and O'Loughlin 2014; Wilkins 2008).

**Figure 2.** The Indian Child Welfare Process



Source: Author’s tabulation, adapted from Casey Family Programs 2011, Indian Child Welfare Act (Pub. L. 95-608, 92 Stat. 3069), and NARF 2007.

working part-time that’s working for the bands of the tribes trying to do it all. (Anonymous 2015)

Training opportunities increased in recent years with the establishment of organizations like NICWA and the Capacity Building Center for Tribes, but many tribal officials can still recount the moment they first learned about ICWA and the machinations they had to go through to learn how to work it. Asked to recount her experience, the director of New Mexico’s Tribal Indian Child Welfare Consortium (TICWC) Donalyn Sarracino (Pueblo of Acoma), explained that she even though she worked in

the field she knew very little about ICWA until she received a call from the state in August 2015 asking her to provide expert testimony in a termination of parental rights hearing involving a child from her Pueblo (NICWA 2019a).<sup>5</sup> Sarracino recognized that termination should not be proceeding without the involvement of the tribe. However, it took a long process of learning about ICWA for her to fully understand how her tribe should intervene given New Mexico’s specific statutes and new federal regulations. The learning process involved months of information gathering, including costly trips for NICWA trainings. Only after that expense were she and her tribe able to intervene.

5. In ICWA cases involving child removal, the law requires testimony from a “qualified expert witness” as to whether “active efforts” were made to reunify a child with their parents or custodians.

High rates of turnover among tribal workers make these learning costs particularly burdensome. As Jacqueline Yalch (Pueblo of Isleta), vice president of TICWC explained, her organization formed to limit learning costs by facilitating information sharing and coordination across New Mexico's tribes. These leaders educate themselves on ICWA but explain: "There's always turnover so we're starting from the ground up" each time caseworkers come and go. That tribal leadership changes frequently, sometimes yearly depending on the tribe, "poses a challenge as well" (NICWA 2019a). Organizations such as the TICWC have become instrumental for tribal leaders because they facilitate access to training on how to work ICWA. Many tribal governments, however, incur these learning costs on their own. These costs are further exacerbated by ongoing settler colonialism that leaves many without the resources required to manage them. As a result, ICWA's protections are often not triggered, and child welfare cases that should be governed by ICWA end up proceeding in state systems where child removals are far more likely and tribal sovereignty and rights are further eroded.

### COMPLIANCE COSTS: NOTICE

For many tribal officials, invoking ICWA's protections also involves compliance costs. Unlike learning costs, which reflect ICWA's complex structure, compliance costs often result from seemingly straightforward ICWA requirements. ICWA's notice provisions are a prime example. ICWA depends on states' early communication with tribes regarding child welfare cases that involve their children. ICWA requires that state agencies provide this notification to tribes in a timely manner and states that no foster care placement or termination of parental rights proceeding can be held until at least ten days

after receipt of notice.<sup>6</sup> Congress intended for these notice provisions to honor the sovereignty right of Native Nations to assume jurisdiction over child welfare cases involving their citizen children. The ten-day time frame prevents states from seizing tribal children without informing tribal governments.<sup>7</sup> Existing studies find that states have routinely failed to notify tribes of potential ICWA cases (Crofoot and Harris 2012; Kunesch 2007; Waszak 2010), but ongoing settler colonialism also creates compliance costs for tribes.

Since 1978, notice has been one of the most persistent barriers to ICWA implementation (Fort and Smith 2018). Indeed, since ICWA's passage, tribal leaders and child welfare experts have voiced concerns about the ability of many tribes to receive notice and to respond within ten days, noting that this nonresponse is usually due to an inadequacy of tribal resources (Casey Family Programs 2015; GAO 2005; Kunesch-Hartman 1989). Due to generations of settler-colonial efforts to decimate tribes, many are poorly resourced and have only minimal government infrastructure (Tucker, De Leon, and McCool 2020). Consequently, some tribes respond quickly to notice and others struggle to reply at all (Francis et al. 2014).

For tribal governments facing resource constraints, notice response is hampered by a lack of reliable communication technologies. The Confederate Tribe of Siltz Indians in Oregon reports repeatedly responding to notice only to find that state agencies never received their reply due to a fax machine error (Children's Bureau 2015). ICWA requires that notice be sent by registered or certified mail, but tribal staffing limitations often mean that no one is present in an office to receive certified letters. Registered mail requires the addressee to pick up

6. Tribal governments may request an additional twenty days, but this extension is not guaranteed.

7. ICWA's notice provisions were debated by the 1977 Senate Select Committee on Indian Affairs. Representatives from dozens of tribal governments and Indian organizations participated, as did representatives from the Bureau of Indian Affairs, the Department of Health, Education, and Welfare, various state governments, and the American Civil Liberties Union (ACLU). Originally, ICWA provided for a thirty-day notice period, but the National Congress of American Indians, the ACLU, and other organizations criticized the thirty-day period as too long. They argued that no state should be permitted to seize an Indian child for that long without notifying the child's tribal government and that allowing such would perpetuate existing child removal practices. Hearings on S. 1214, before the Select Committee on Indian Affairs, 95th Cong., 1st sess. (1977).

mail directly from the postal service, and the postal service will only release the letter to the addressee with photo identification. Because of federal relocation programs and the settler-colonial reservation system, many tribal governments are based in remote areas with weak transportation infrastructure and little to no access to post offices or high-speed internet (Tucker, De Leon, and McCool 2020; Wang 2018).<sup>8</sup> Given these barriers, notice may not arrive, let alone permit a response, within ten days. As one tribal ICWA official explained, “I’m readily available, but I’m not [always] able to come in and check my mail or sign for a letter . . . and if I can’t make it to the post office on a Friday or Sunday, and it’s sitting there. . . . I can’t say, ‘Well, I’m sorry I wasn’t able to make it, ’cause the mail was in the mailbox’” (Joseph 2014).

The original intent behind these notice provisions was to limit child removals by enabling tribal involvement in child welfare; however, settler-colonial domination—and limited government efforts to address it—create burdens for tribal governments. Federal ICWA allocations cover less than 25 percent of tribal needs, and funding is provided via year-to-year grants. This funding structure has meant that just as tribal governments began building sustainable child welfare infrastructure, their funding would disappear. In the 1990s, tribal governments finally received funding to hire a dedicated ICWA staffer, but 477 of the 558 eligible tribal governments received less than \$10,000 per year (Cross, Earle, and Simmons 2000). The lack of stable, consistent funding has produced instability in tribal child welfare operations that affects notice response. As an example, a Maine caseworker, who worked closely with the state and tribal governments, noted that the Penobscot Nation had “only one caseworker [so] a lot of things were getting left not being addressed . . . and somehow it came up again and they were already halfway almost through the case until we were on board, which it should have been the very beginning” (Anonymous 2014a). These resource constraints routinely leave many tribal governments unable to

receive and respond to notice, and cases that should be guided by ICWA proceed under standard state procedures.

Given these compliance costs and lack of state cooperation, notice has been the subject of more ICWA-related court cases than any other issue (Fort and Smith 2018), and state reports to the U.S. Department of Health and Human Services have consistently identified notice-related compliance costs as barriers to ICWA implementation (Children’s Bureau 2015). These compliance costs are exacerbated by state-level failures to issue notice in the first place. The rate of tribal notification has been as high as 80 percent in some states but as low as 33 percent in others (Brown 2002; Hollinger 1989; Jones et al. 2000; Plantz 1988). Ample evidence suggests that state noncompliance is sometimes deliberate. ICWA imposes administrative burdens on tribes, but also on state caseworkers who administer the policy. These burdens lead administrators to avoid ICWA to speed up bureaucratic processes, facilitate private adoptions, or simply avoid transferring jurisdiction to tribes whom they believe are racially ill-equipped to parent children (Berger 2015; Brown 2020). Absent early notification and response, tribes are unaware of cases involving their children and cannot intervene, and the child’s removal and placement in a non-Indian foster or adoptive home become more likely (Turner 2016). Further, these intentional efforts to undermine ICWA marshal settler ideologies of indigenous inferiority toward the end outcome of child removals (Brown 2020).

#### COMPLIANCE COSTS: FAMILY MEETINGS AND HEARINGS

ICWA’s promise to reduce child removals also rests on active tribal involvement in child welfare cases. Recognizing that state child removal efforts have long been grounded in biased judgments of tribal cultures and that tribally based social services are often the best hope for family and tribal preservation (Belone et al. 2002; Jacobs 2014; Wilkinson 2006), ICWA requires that states involve tribal governments in family

8. The federal government estimates that broadband access in tribal communities at less than 10 percent (Tucker, De Leon, and McCool 2020)

meetings and removal hearings, including tribal co-management of case plans. The costs associated with meeting and hearing participation, however, can present another burden for tribal officials.

For one, taking an active role in case management requires time, resources, and expertise that some tribal governments lack because of settler-colonial domination. Not the least of these barriers are geographic obstacles. Due to historical dispossession and relocation, tribal lands and governments are often hundreds of miles away from state child welfare offices. Just as isolation-related burdens prevent local government agents from obtaining services for their clients (Heinrich et al 2022), tribal officials must often expend extensive time and resources to travel these distances simply to take a legally guaranteed seat at the table in a child welfare case. The same holds for court hearings. In Minnesota, Judge Sally Tarnowski reported that tribes in her district often had to drive two to three hours each way to get to Duluth for hearings (NICWA 2019b). Unless ICWA cases are intentionally scheduled for a specific day of the week, tribes might have to come multiple days a week, often on short notice. These issues are so widespread that the U.S. Department of Health and Human Services acknowledges that “large geographic distances between state and tribal staff for in-person meetings” have long been barriers to ICWA implementation around the country (Children’s Bureau 2015, 9).

Both fiscal and time constraints limit tribal officials’ abilities to participate in these meetings. Travel expenses mount, posing a barrier to tribal participation and to ensuring children remain with their tribes (Children’s Bureau 2015). Further, many tribes have a small staff who deal with a range of administrative and legal issues. As the Maine-Wabanaki Truth and Reconciliation Commission interviewee reported, “It’s very difficult just doing [family meetings] normally, but the tribe . . . has been very responsive once they know it’s a Native, trying to come. But they’re busy and they have their schedules, so trying to get everybody . . . together can take a while” (Anonymous 2014d). Due to these other obligations and the time constraints involved in travel, “many [tribal]

stakeholders that want to attend meetings are unable to do so” (Children’s Bureau 2015). Only a few jurisdictions nationwide consolidate ICWA cases on a single day each week or allow tribes to routinely telephone in for meetings and hearings. Yet, as the National Council of Juvenile and Family Court Judges (Korthase, Gatowski, and Erickson 2021) reports, easy tribal access to child welfare meetings and hearings is crucial to ensuring the engagement of tribal families and representatives in ICWA implementation.

These barriers stem from the legacy of U.S. settler colonialism. However, they also reflect settler colonialism as ongoing structure (Wolfe 2006). ICWA set forth requirements for tribal involvement in cases, but, as noted earlier, Congress never appropriated the resources required to ensure tribal involvement (MacEachron et al. 1996). Because of urbanization and relocation programs, many children who qualify for ICWA protections do not live in the same state as their tribal government, making travel costs even more onerous for tribes. As one participant in the Maine-Wabanaki Truth and Reconciliation Commission explained, “It’s a good thing, for the most part [ICWA]. . . . The drawback to that is that there’s not a lot of money associated with helping those children for those big cases and legal fees and travel and out-of-state costs. So it has helped to some degree . . . but we need to build the capacity within the tribe to make sure that [ICWA is] carried out properly and we do justice to the children” (Maine Wabanaki REACH 2014). Absent adequate funding and decolonizing efforts, tribal governments find themselves unable to invoke ICWA’s protections, and settler-colonial child removals proceed apace.

When burdens prevent tribes from attending meetings or taking an active role in a case, the response from state agencies is rarely to adopt protocols that ease these burdens. Evidence suggests that state agencies instead use burden-induced tribal non-involvement as justification for sidestepping ICWA altogether. As Martha Proulx, the ICWA Liaison for the Office of Child and Family Services, explained of Maine’s child welfare apparatus, “Our staff sometimes forget that we have a lot of staff and Tribal Child Welfare don’t. . . . if they don’t get

back to us right away, or if they can't make the certain meetings at the certain time, people get frustrated and think that [tribes] don't want to be involved" (Proulx 2014). Hoping to move quickly through cases, state workers often wish to avoid coordinating scheduling with tribes "even if there's been some agreement going in about what the bottom lines are" (Anonymous 2014a). Thus tribal officials routinely report that "You know, meetings can happen, and we might not know about them, or we find out after the fact. And that's never good because then we're always out of the loop and till we kind of push back in" (Francis et al. 2014). In this respect, the burdens faced by tribal officials are exacerbated by the unwillingness of state agencies to ensure ICWA application.

### COMPLIANCE COSTS: CERTIFYING FAMILIES

The certification of tribal foster care families also involves compliance costs that prevent tribal governments from exercising rights under ICWA. ICWA's placement provisions identify tribal foster families as a preferred placement should a child need to be removed from their family. This provision honors tribal sovereignty and recognizes that family reunification is more likely if tribal children can remain with their tribal communities. However few tribal children are placed in out-of-home care with tribal families. In Maine, for example, half of Wabanaki children are placed in non-Native homes (Maine Wabanaki REACH 2015), and similar patterns arise elsewhere in the country. Experts attribute these patterns to a lack of certified tribal foster families (Children's Bureau 2015; GAO 2005; Plantz 1988), but this claim overlooks the burdens that prevent tribal families from becoming certified.

The logistical and resource barriers that make notice and meeting attendance problematic also pose problems for foster family certification. For example, meeting certain federal standards, such as the requirement to be fingerprinted, involves compliance costs for tribes and tribal families (McKechnie 2014; Proulx 2014). Not only that, the geographic size of some states and the geographic isolation of many tribal governments inhibits their ability

to work with states to certify foster families (Children's Bureau 2015). The burdensome certification process is further complicated by state agents' settler ideologies about "what's clean and what's decent . . . and what's safe" (Anonymous 2014c). As they did historically, state agents often continue to judge potential foster homes with a "white eye," not a "tribal eye," invoking racialized notions of worth and deservingness long used to deny tribal sovereignty (Anonymous 2014c; Brown 2020). These biases have left many states unwilling to allow Native Nations to certify their own foster families. However, as one tribal leader noted, "If we [had the ability to certify tribal foster families], then there would be more families that would qualify . . . we have some really good families that [may] have made mistakes in the past that have totally changed their life around" (Paul 2014).

These challenges arise as tribes work to meet state and federal certification requirements; however, even where tribes are legally permitted to certify foster families, administrative burden complicates the process. In Maine, legislation passed in 1999 that allows states to certify tribal families based only on the background work conducted by tribal governments. Yet tribes may lack the staff and resources to conduct these background assessments themselves. As one worker stated in a focus group, "I'm here by myself, there's only one person in the ICWA department and that's me. . . . And so if I can't make it to every little thing . . . I [get] so mad because I can't be in a hundred different places . . . at once, I'm one person I'm responsible for three grants [and] trying to do assessments, trying to license foster homes, trying to go to family team meetings, doing everything . . . in one week" (Maine Wabanaki REACH n.d.). In addition to these staffing and resource barriers, tribes must use state-generated data and standards to make their assessments, even when tribal standards for family certification differ from state ones (Maine Wabanaki REACH 2015). Often, tribal staff report, state agents refuse to accept tribes' background research and force families and tribes through the licensing process all over again (Gousse 2015, 1; Proulx 2014). Absent certified tribal families, ICWA children are placed out-

side with settler families and institutions, perpetuating the same practices ICWA sought to end.

### LEGAL CHALLENGES TO ICWA AND THE POLITICAL APPROPRIATION OF BURDENS

Political actors often create burdens to achieve policy goals (Herd and Moynihan 2018), but ongoing struggles over ICWA illustrate how political actors also use burdens as an ideological justification for removing or severing rights. Over the last fifteen years, a coordinated group of libertarian and conservative think tanks, private adoption agencies, and racially conservative organizations have launched a concerted attack on ICWA, characterizing it as an unconstitutional race-based statute. Ample evidence suggests that these ICWA opponents are not opposed to ICWA *per se*. Instead, they view overturning ICWA as an expedient way to challenge racially progressive policies such as affirmative action and to undermine federal Indian law, freeing up tribal resources—including tribal children—for private acquisition (Berger 2019). These challenges have resulted in a spate of ICWA court cases in recent years.<sup>9</sup>

These court cases demonstrate another way burdens reproduce settler colonialism. A key legal strategy for these ICWA opponents is to marshal settler-colonial ideologies of indigenous inferiority to achieve settler-colonial outcomes. Rather than recognize and rectify the burdens that inhibit tribal governments from fully invoking ICWA, ICWA opponents regularly cite tribal nonintervention in child welfare as evidence that tribes are irresponsible, uncaring, and unable to ensure the safety of their children. They have routinely argued in court that tribal nonresponse or late reply to notice is evidence of irresponsibility and ineptitude. ICWA opponents characterize these delays as tribal failure (Bakeis 1996) and accuse tribes of intentionally delaying proceedings.<sup>10</sup> They further argue that tribal governments' delayed or nonresponse to notice can "result in children

being sent back to abusive homes" and otherwise "cause harm" to vulnerable children. ICWA opponents frame tribes not as grappling with burden but as irresponsible and disinterested in protecting children's welfare (Flatten 2015). In so doing, they perpetuate the very settler-colonial ideologies and practices that led to ICWA's passage.

ICWA opponents have also used the lack of tribal foster families to justify undoing ICWA. These actors rarely, if ever, address the administrative burden involved in certification. Instead, they portray tribes as unwilling to identify families or portray tribal families as alcoholic child abusers while upholding the actions of the settler state as moral and just (Flatten 2015; Sandefur 2017a). For example, the Goldwater Institute, a key player in the ICWA constitutional challenge, notes that "Indian foster parents are scarce. Los Angeles County, with its population of 10 million people, has only one" (Sandefur 2017b, 18). Regardless of their factual basis, these inferences buttress Goldwater's claims that tribal governments are incapable of protecting children's rights. As is true of racialized organizations generally, court support of these arguments serves to "normalize and reinforce patterns of racial inequality . . . reproducing disparate treatment while obscuring" and the ongoing structure of settler colonialism that created those inequalities (Ray, Herd, and Moynihan 2022). Because the court ruling sought by ICWA opponents would not only strike down ICWA but also upend all tribal gaming, natural resources, and land rights, ICWA opponents are in essence using settler-colonial ideologies to reframe administrative burden in pursuit of settler-colonial goals.

### DISCUSSION AND CONCLUSION

This article argues that administrative burden is a mechanism for the reproduction of settler-colonial domination. ICWA aimed to destabilize a key settler-colonial project: child removals. Situated in a complex maze of intergovernmental

9. These attacks culminated in *Haaland v. Brackeen*, heard by the Supreme Court on November 9, 2022 (Docket no. 21-376).

10. Brief of Amicus Curiae in *Adoptive Couple v. Baby Girl, et al.*, U.S. Supreme Court. 398 S. C. 625, 731 S. E. 2d 550 (2013), reversed and remanded.

tal relationships, ICWA presents learning costs for tribes charged with asserting its rights. Core ICWA procedures such as notice, meeting attendance, and foster family certification present compliance costs for tribal governments that are underresourced and geographically isolated because of settler colonialism. As with other programs (Heinrich 2016; Heinrich et al 2022; Herd and Moynihan 2018), the cost of these burdens is that tribes are often unable to claim rights under ICWA and ensure its protections are applied to child welfare cases. Consequently, ICWA's protections are never triggered and child removals proceed apace. Under these circumstances, administrative burden is a mechanism by which policy efforts to challenge settler colonialism end up reinforcing it, facilitating child removals, undermining tribal sovereignty, and shoring up settler state power.

My focus in this article is on learning and compliance costs, but evidence suggests psychological costs for tribes and tribal families as well. Contemporary child removals are part of a centuries-long history of Indian child removals (Jacobs 2014). Onerous encounters with the state, especially those that risk or result in child removal, amplify the collective trauma that child removals have generated for generations. As one child welfare caseworker recounted, many tribes harbor “a fear of DHS [Department of Human Services]. Who would want to get involved with us? We were involved in taking children away” (Anonymous 2014b). This trauma only intensifies when state authorities remove tribal children from their homes and communities. One tribal caseworker summarized these collective psychological costs, saying, “It’s painful to be Indian. It’s painful to work the ICWA” (Anonymous 2015).

The origins and intentions behind ICWA's burdens are complex. Many provisions were intended to facilitate tribal intervention to prevent child removals and honor tribal sovereignty. ICWA's burdens arise because the law itself does nothing to disrupt the ongoing structure of settler colonialism. Marginalization, poverty, and rurality can make it difficult for some tribal governments to satisfy ICWA requirements. Few resources have been appropriated to tribes to facilitate implementation. Little consideration was given to building up

tribal infrastructure. Some states even have laws in place that prevent tribes from establishing infrastructure, like tribal courts, which would facilitate ICWA implementation (Paul 2014). Although some of these burdens result from malign neglect, others result from intentional, active efforts to undermine tribal sovereignty and maintain state jurisdiction over child welfare. Regardless of their origins, the outcomes of these burdens are the same. Child welfare cases that proceed in state systems are far more likely to result in child removals than are cases with active tribal involvement. When burdens prevent this involvement, they reproduce settler-colonial child removal practices and undermine tribal sovereignty. In this regard, ICWA demonstrates how racialized burdens persist across time and continue to structure racialized systems of domination in the present (Ray, Herd, and Moynihan 2022). These issues are germane beyond the field of child welfare. For example, efforts to expand voting by mail often fail to consider that tribal lands can be hundreds of miles from post offices. Absent consideration of settler colonialism, efforts to alleviate burden may create new burdens and facilitate exclusion and inequality.

ICWA's burdens have not only exacerbated child removals but also created openings for political actors to reinforce settler colonialism. ICWA opponents cite tribal nonintervention in child welfare as evidence that tribes are unable to ensure the safety of their children. They marshal these settler-colonial claims in the service of a settler-colonial project: an effort to overturn the law as part of a coordinated effort against tribal sovereignty and racially progressive policies. Similar processes may be at play in other policy arenas. For example, political opponents accuse unemployment and Earned Income Tax Credit beneficiaries of fraud, but often it is the complex rules of these programs that increase the likelihood that individuals will make mistakes in their reporting. In these cases, as with ICWA, political actors not only create burdens but also use them as justification for weakening public rights and benefits.

ICWA also demonstrates the utility of examining burdens targeted at organizations. This article shows that burdens may reinforce inequalities when they affect third-party organi-

zations that serve racialized minorities. When implementing organizations primarily or exclusively serve racialized minorities, organizationally targeted burdens can reinforce racial inequality at the group and individual levels (see Ray 2019). That said, federal Indian laws like ICWA are unique examples of the associational state because tribes are not typical third-party organizations; they are sovereign governments. Still, ICWA suggests that an eye toward organizationally targeted burdens can illuminate how burdens structure racial inequality in other policy arenas that depend on either third-party implementers or those that direct relief to individuals via formal organizations. In one example of the former, the Refugee Act of 1980, charges Voluntary Agencies with implementing refugee resettlement programs. To the extent that policymakers place undue burden on these organizations, such as during the Donald Trump administration (Siegler 2019), these burdens may affect how well these organizations can fulfill the Refugee Act's provisions. The Paycheck Protection Program (PPP) is a clear example of the latter. PPP allowed applicants access to forgivable low-interest loans to withstand costs during the COVID pandemic. However, black-owned businesses were poorly equipped to withstand the paperwork and other burdens involved in accessing loans, producing racial disparities in PPP loans and, consequently, paycheck protections for employees in those businesses (Morel, Al Elew, and Harris 2021; Derby 2021).

In 2016, after nearly four decades of research on ICWA implementation, the Bureau of Indian Affairs issued new federal ICWA regulations that are binding on state courts (Linjean and Weaver 2022). Even though this "Final Rule" clarifies standards to ensure uniform ICWA practice across the country, it largely leaves untouched the issues reported here. Implementation guidelines recommend but do not require courts to offer virtual options for participation in hearing or deliver notice in multiple forms. The ten-day notice rule remains, and the goal of these documents is to establish standard procedures, not allocate more resources.

Recent developments, however, suggest ways to counter ICWA's burdens. Dramatic re-

ductions in out-of-home placements emerge where tribal governments have the resources to support independent tribal courts and greater autonomy to support self-determination (Cross et al. 2015). The rise and proliferation of ICWA courts are one example. Six judicial districts have established separate courts that operate within but autonomously from their larger court systems. ICWA courts limit burdens by scheduling all of a tribe's cases on set schedules. ICWA court officials often journey to tribes for meetings to engage them more directly, further reducing compliance costs. In some jurisdictions, ICWA courts have even changed the standard forms used for tribal child welfare cases to ease burdens and ensure proper ICWA application (*Montana Standard* 2019). ICWA courts are far more successful than their state counterparts in ensuring proper notice, tribal attendance at meetings, and reducing child removals (Korthase, Gatowski, and Erickson 2021; Padilla 2019). In the first years of Denver's ICWA court, for example, only one ICWA case resulted in the termination of parental rights, a striking contrast to national rates (Delgado 2019). Because inequalities are embedded in organizations (Acker 2006; Ray 2019; Tilly 1999), establishing new organizational forms such as ICWA courts provides an avenue for reducing burdens and challenging the durable inequalities they reproduce.

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